Immigration
Birthright Citizenship

Total Pages: 18

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Monday, June 23, 1997

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: James J. Jukes (for) Assistant Director for Legislative Reference
J. Schroeder for Jukes
OMB CONTACT: Ingrid M. Schroeder
PHONE: (202)395-3883 FAX: (202)395-3109

SUBJECT: **JUSTICE Testimony on HR7 Citizenship Reform Act of 1997**

DEADLINE: **5pm Monday, June 23, 1997**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

COMMENTS: The H. Judiciary Subcommittee hearing is scheduled for June 25th. Please note that Justice testimony asserts that H.R. 7 is unconstitutional and as a result the Dept. can not support the legislation.

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LRM ID: IMS98SUBJECT: JUSTICE Testimony on HR7 Citizenship Reform Act of 1997

**RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM**

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

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Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: ______________________ (Date)

______________________ (Name)

______________________ (Agency)

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The following is the reponse of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _________

_____ Other: ______________________

_____ FAX RETURN of ____ pages, attached to this reponse sheet

HR 7

Draft

Testimony Before the Subcommittee
on Immigration and Claims
of the United States House of Representatives Judiciary Committee
on

Proposed Legislation to Deny Citizenship
at Birth to Certain Children Born in the United States

Dawn E. Johnsen
Acting Assistant Attorney General
Office of Legal Counsel
United States Department of Justice

Chairman Smith, Members of the Committee:[*]

Throughout this country's history, the fundamental legal principle governing citizenship has been that birth within the territorial limits of the United States confers United States citizenship. The Constitution itself rests on this principle of the common law.[1] As Justice Noah Swayne wrote in one of the first judicial decisions interpreting the Civil Rights Act of 1866 ("1866 Act"):[2] "'Citizens' under our constitution and laws means free inhabitants born within the United States or naturalized under the laws of congress. We find no warrant for the opinion that this great principle of the common law has ever been changed

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[*] ~~In December 1995, Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, provided substantially identical testimony concerning proposed legislation to deny citizenship at birth to certain children born in the United States to this Committee and the Subcommittee on the Constitution of the United States House of Representatives Committee on the Judiciary.~~

[1] Indeed, the common law's inclusive rule of citizenship by birth defined "the People" who created the Constitution. "The Constitution itself does not make the citizens; it is, in fact, made by them. It only . . . recognizes such of them as are natural -- home born." Citizenship, 10 Op. Att'y Gen. 382, 389 (1862).

[2] Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

in the United States."[3] When Justice Swayne wrote these words, the nation was only beginning to recover from a great civil war sparked in no small part by the Supreme Court's tragically misguided decision in the Dred Scott case.[4] That decision sought to modify the founders' rule of citizenship by denying American citizenship to a class of persons born within the United States. In response to Dred Scott and to the Civil War, Congress enacted the 1866 Act, and Congress and the States adopted the Fourteenth Amendment in order to place the right to citizenship based on birth within the jurisdiction of the United States beyond question. As a result, any proposed provision of law, such as the "Citizenship Reform Act of 1997" (H.R. 7), that purports to deny citizenship by birth to persons born within the jurisdiction of this country would be unconstitutional on its face.

I.

The stated purpose of H.R. 7 is "to deny automatic citizenship at birth to children born in the United States to parents who are not citizens or permanent resident aliens." Section 3(a) of the bill would amend section 301(a) of the Immigration and Nationality Act, which grants U.S. citizenship "at birth" to all persons "born in the United States, and subject to the jurisdiction thereof." Specifically, section 3(a) proposes to define the phrase "subject to the jurisdiction thereof" to include only children born to U.S. citizens or permanent resident aliens.

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[3] United States v. Rhodes, 27 F. Cas. 785, 789 (C.C.D. Ky. 1866) (No. 16,151) (Swayne, J., on circuit) (internal quotation marks and citations omitted).

[4] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

My office grapples with many difficult and close issues of constitutional law. The lawfulness of this bill is not among them. This proposed legislation is unquestionably unconstitutional. The Fourteenth Amendment declares that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The unmistakable purpose of this provision was to constitutionalize the existing Anglo-American common law rule of jus soli or citizenship by place of birth and especially to extend it to persons of African descent and their descendants.[5] The phrase "subject to the jurisdiction thereof" was meant to reflect the existing common law exception for discrete sets of persons who were deemed subject to a foreign sovereign and immune from U.S. laws, principally children born in the United States of foreign diplomats, with the single additional exception of children of members of Indian tribes. Apart from these extremely limited exceptions, there can be no question that children born in the United States of aliens are subject to the full jurisdiction of the United States. And, as consistently recognized by courts and Attorneys General for over a century, most notably by the Supreme Court in United States v. Wong Kim Ark,[6] there is no question that they possess constitutional citizenship under the Fourteenth Amendment. Affirming the citizenship of African Americans that Dred Scott had denied, in 1862 President Lincoln's Attorney General wrote an opinion for the Secretary of the Treasury asserting "[a]s far as I

[5] The principal alternative system, jus sanguinis, used in most civil law European countries, grants citizenship by descent or blood -- that is, according to the citizenship of one's parents. This system obviously could not have operated in the United States at its inception, where, except for American Indians, the inhabitants were citizens of other countries.

[6] 169 U.S. 649 (1898).

know . . . you and I have no better title to the citizenship which we enjoy than the 'accident of birth' -- the fact that we happened to be born in the United States."[7]

A.

While the Constitution recognized citizenship of the United States in prescribing the qualifications for President, Senators, and Representatives, it contained no definition of citizenship until the adoption of the Fourteenth Amendment in 1868. Prior to that time, citizenship by birth was regulated by the common law, which conferred citizenship upon all persons[8] born within the territory of the United States, whether children of citizens or aliens.[9] The only common law exceptions to this generally applicable rule of jus soli were

[7] Citizenship, 10 Op. Att'y Gen. at 394.

[8] Slaves, shamefully, not being considered persons at all for many legal purposes, were ignored by the common law analysis.

[9] E.g., Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 119 (1804) (presuming that all persons born in the United States were citizens thereof); McCreery v. Somerville, 22 U.S. (9 Wheat.) 354 (1824) (in determining title to land in Maryland, Court assumed that children born in the state of an alien were native-born citizens of the United States); Lynch v. Clarke, 1 Sand. Ch. 583 (N.Y. 1844) (in holding that child born in New York during temporary stay by alien parents was a citizen of United States, Court, after thorough examination of law, concluded that it entertained no doubt that every person born within the dominions and allegiance of the United States, whatever the situation of his parents, was a natural-born citizen); Letter from Mr. Marcy, Secretary of State to Mr. Mason, United States Minister to France (June 6, 1854) in 2 Francis Wharton, Digest of the International Law of the United States 394 (2d ed. 1887) ("In reply to the inquiry which is made by you . . . whether 'the children of foreign parents born in the United States, but brought to the country of which the father is a subject, and continuing to reside within the jurisdiction of their father's country, are entitled to protection as citizens of the United States,' I have to observe that it is presumed that, according to the common law, any person born in the United States, unless he be born in one of the foreign legations therein, may be considered a citizen thereof until he formally renounces his citizenship."); Citizenship of Children Born Abroad of Naturalized Parents, 10 Op. Att'y Gen. 328 (1862) (child born in the United States of alien parents who have never been naturalized is, by fact of birth, a native-born citizen of the United States); Citizenship, 10 Op. Att'y Gen. 382

of children born under three circumstances -- to foreign diplomats, on foreign ships, and to hostile occupying forces -- which, under principles of international law, were deemed not to be within the sovereignty of the territory.[10]

B.

As the legislative history of the Civil Rights Act of 1866 and the Fourteenth Amendment makes clear, the definitions of citizenship contained in both were intended to codify the common law and overrule Dred Scott's denial of citizenship to persons of African descent. Thus, with the three limited common law exceptions already noted, and the additional exception of tribal Indians, the Fourteenth Amendment guaranteed citizenship to all persons born in the United States, including children born to aliens.

The Civil Rights Act of 1866 provides: "[A]ll persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." During the debates on the 1866 Act, the Chair of the House Judiciary Committee stated that the provision defining citizenship is "merely declaratory of what the law now is," and he cited, among other authorities, a quotation from William

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(1862) (reaffirming general principle of citizenship by birth in the United States and rejecting the existence under law of a class of persons intermediate between citizens and aliens); Frederick Van Dyne, Citizenship of the United States 6-7 (1904) ("It is beyond doubt that, before the enactment of the civil rights act of 1866 . . . or the adoption of the constitutional amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States." (citations omitted)).

[10] United States v. Wong Kim Ark, 169 U.S. 649 (1898); 4 Charles Gordon et al., Immigration Law and Procedure § 92.03[3] (rev. ed. 1997). See footnote 13 for a discussion of the status of tribal Indians.

Rawle, whose constitutional law treatise was one of the most widely respected antebellum works: "Every person born within the United States, its Territories or districts, whether the parents are citizens or aliens, is a natural-born citizen in the sense of the Constitution, and entitled to all the rights and privileges appertaining to that capacity."[11]

The Fourteenth Amendment as initially drafted contained no definition of citizenship. In proposing to insert the definition that became the opening sentence of the Fourteenth Amendment, Senator Howard of Michigan noted:

> This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States.

He explained that this was not meant to include those discrete classes of persons excluded by the common law, "but will include every other class of persons."[12]

The framers intended the amendment to resolve not only the status of African Americans and their descendants, but that of members of other alien groups as well. This is reflected in the exchange between Senators Trumbull and Conness, supporters of the Fourteenth Amendment and the Civil Rights Act of 1866, and Senator Cowan, a strong opponent of both. Senator Cowan expressed his reluctance to amend the Constitution in such a way as would "tie the[] hands" of the Pacific states "so as to prevent them from [later] dealing with [the Chinese] as in their wisdom they see fit." The supporters of the citizenship clause responded by confirming their intent to constitutionalize the U.S. citizenship of

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[11] Cong. Globe, 39th Cong., 1st Sess. 1115 (1866); id. at 1117 (quoting William Rawle, A View of the Constitution of the United States of America 86 (2d ed. 1829)).

[12] Cong. Globe, 39th Cong., 1st Sess. 2890 (1866).

children born in the United States to alien parents:

> Senator Cowan . . . . I am really desirous to have a legal definition of 'citizenship of the United States.' What does it mean? . . . Is the child of the Chinese immigrant in California a citizen? Is the child of a gypsy born in Pennsylvania a citizen?
>
> Senator Conness . . . . The proposition before us . . . relates . . . to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. We have declared that by law; now it is proposed to incorporate the same provision in the fundamental instrument of the nation. I am in favor of doing so.[13]

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[13] See Cong. Globe, 39th Cong., 1st Sess. 2890-91 (1866).

A great deal of attention was spent on how (not whether) to exclude unassimilated or tribal Indians. Ultimately, any reference to "excluding Indians not taxed" -- the phrase used in the Civil Rights Act of 1866 was omitted as unnecessary, as they were not deemed to be "subject to the jurisdiction" of the United States because of the unique status of Indian tribes within the United States. In Elk v. Wilkins, 112 U.S. 94, 99 (1884), the Court construed the "subject to the jurisdiction" clause in a case brought by an Indian claiming citizenship who was born a member of a tribe, but who had later taken up residence among the non-Indian citizens of the state. The Court held he was not a United States citizen, because he was not "subject to the jurisdiction" of the United States at the time of his birth. In construing the phrase "subject to the jurisdiction" the Court noted that the Indian tribes, although not, strictly speaking, foreign nations, were alien nations with distinct political communities with which the United States entered into treaties:

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.

Id. at 102. See also David C. Williams, The Borders of the Equal Protection Clause: Indians as Peoples, 38 UCLA L. Rev. 759, 832-41 (1991) (reviewing the legislative history of the citizenship clause to conclude that "subject to the jurisdiction" was intended to exclude tribal Indians with separate laws and governments of their own, and thus were, "in modern international law parlance, a separate people"). Wilkins cannot be interpreted to mean that children born in the United States of aliens are not "subject to the jurisdiction" of the United

C.

The constitutional guarantee of citizenship to children born in the United States to alien parents has consistently been recognized by courts, including the Supreme Court, and Attorneys General for over a century. Most notably, in United States v. Wong Kim Ark,[14] the Supreme Court held that a child born in San Francisco of Chinese parents (who, under the Chinese Exclusion laws then in effect, could never themselves become U.S. citizens) became at the time of his birth in the United States a citizen of the United States, by virtue of the Fourteenth Amendment.

The Court, in a detailed review of the Anglo-American common law of citizenship and the legislative history of the Fourteenth Amendment, established several propositions. First, the language of the Constitution, as it relates to citizenship, must be interpreted in light of the common law. Under the common law of England, which was adopted by the United States, every child born within the territory of alien parents was a natural-born subject, with the exception of children born of foreign ambassadors, of alien enemies during hostile occupation, and of aliens on a foreign vessel.

Further, "[a]s appears upon the face of the [Fourteenth] Amendment, as well as from the history of the times, [the amendment] was not intended to impose any new restrictions

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States because their parents may owe some allegiance to their own country of birth. Indeed, were the contrary to be true, dual nationality would be prohibited. Legal and illegal aliens alike simply enjoy no jurisdictional immunities from any laws of the United States as long as they are not part of the diplomatic personnel of a foreign country, and neither do their children.

The denial of citizenship to tribal Indians was later corrected by statute. 8 U.S.C. § 1401(b) (1994).

[14] 169 U.S. 649 (1898).

upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect." Id. at 676. Specifically, the Court explained:

> The real object . . . in qualifying the words '[a]ll persons born in the United States,' by the addition, 'and subject to the jurisdiction thereof,' would appear to have been to exclude, by the fewest and fittest words, (besides children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law,) the two classes of cases -- children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State -- both of which . . . by the law of England, and by our own law, . . . had been recognized exceptions to the fundamental rule of citizenship by birth within the country." Id. at 682.

In concluding its review of the relevant law, the Court summarized:

> The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. Id. at 693.

The Court then turned to the status of Chinese persons in the United States under the Constitution and the Chinese Exclusion Acts, which provided for exclusion and expulsion of Chinese persons. After considering the effects of both sources of law, the Court held that Wong Kim Ark had become a citizen at birth by virtue of the Fourteenth Amendment, reaffirming the constitutional principle that "[t]he Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship." Id. at 703.

II.

The principles set forth in Wong Kim Ark cannot be dismissed as having been overtaken by contemporary judicial interpretation or current events. Both the courts and commentators have consistently cited and followed the principles of Wong Kim Ark.[15]

I am aware of only one statement of the contrary view that birthright citizenship may be modified by a simple act of legislation. In their 1985 book, Professors Peter Schuck and

[15] See Rogers v. Bellei, 401 U.S. 815, 829-30 (1971) (citizenship clause is "'declaratory of existing rights, and affirmative of existing law,' so far as the qualifications of being born in the United States, being naturalized in the United States, and being subject to its jurisdiction are concerned"); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159 n.10 (1963) (confirming that the citizenship clause "is to be interpreted in light of pre-existing common-law principles governing citizenship"); Plyler v. Doe, 457 U.S. 202, 211 n.10 (1982) (relying on Wong Kim Ark's predominantly geographic interpretation of the "jurisdiction" clause of the Fourteenth Amendment); INS v. Rios-Pineda, 471 U.S. 444, 446 (1985) (in habeas proceeding brought by deportable aliens, Court noted that respondent had given birth to a child, "who, born in the United States, was a citizen of this country"); Morrison v. California, 291 U.S. 82, 85 (1933) (noting that although persons of Japanese descent were not eligible to become citizens through naturalization, a person of Japanese descent is a citizen of the United States if he was born within the United States, citing Wong Kim Ark); 4 Charles Gordon et al., Immigration Law and Procedure § 92.03[2][e] (rev. ed. 1997) (noting that any uncertainty regarding the applicability of the jus soli rule to children born in this country was "finally resolved by the Fourteenth Amendment and the Supreme Court's decision in U.S. v. Wong Kim Ark. There is now no doubt that the constitutional rule of universal citizenship for all persons born in the United States is unaffected by the status of their parents, except in minimal situations. Thus American citizenship is acquired by children born in the United States, even though their parents were always aliens, and even if the parents were themselves ineligible to become citizens of the United States. Nor has the acquisition of citizenship been affected by the circumstance that the child's alien parents were in the United States temporarily or even illegally at the time the child was born." (footnotes omitted)).

Rogers Smith argue for a novel "reinterpretation" of the citizenship clause.[16] Briefly, the authors recommend replacing the "ascriptive" approach to citizenship -- which determines citizenship by an objective circumstance, such as place of birth or citizenship of parents -- with a "consensual" approach -- which makes political membership a product of mutual consent by the polity and the individual. The authors argue that the Fourteenth Amendment may be reinterpreted to allow Congress to deny citizenship to children of illegal aliens by legislation (as opposed to constitutional amendment). As support, the authors attempt to show that the framers of the Fourteenth Amendment intended the reference to "subject to the jurisdiction" of the United States to replace the existing ascriptive common law principle with one of express mutual consent.

Schuck and Smith are proposing a change in the law, not a plausible reinterpretation of the Constitution.[17] Their theory would require repudiation of the language of the Constitution itself, the clear statements of the Framers' intent, and the universal understanding of 19th and 20th century courts. Indeed, the authors themselves concede that there is no judicial precedent in support of their theory.

In short, the text and legislative history of the citizenship clause as well as consistent

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16 Peter H. Schuck & Rogers M. Smith, Citizenship Without Consent: Illegal Aliens in the American Polity (1985).

17 For critiques of Schuck and Smith's work, see, e.g., Christopher L. Eisgruber, Birthright Citizenship and the Constitution, 72 N.Y.U. L. Rev. 54 (1997); Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law 165-87 (1996); Gerald L. Neuman, Back to Dred Scott?, 24 San Diego L. Rev. 485 (1987) (book review); David Howarth, Citizenship Without Consent, 46 Cambridge L.J. 169, 170 (1987) (book review); Arthur C. Helton, Citizenship Without Consent, 19 N.Y.U. J. Int'l L. & Pol. 221, 226 (1986) (book review); David A. Martin, Membership and Consent: Abstract or Organic?, 11 Yale J. of Int'l Law 278 (1985) (book review).

judicial interpretation make clear that the amendment's purpose was to remove the right of citizenship by birth from transitory political pressures. As the Supreme Court noted in Wong Kim Ark,[18] "[t]he same Congress, shortly afterwards, evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent Congress, framed the Fourteenth Amendment of the Constitution." More recently, the Supreme Court noted in Afroyim v. Rusk[19] that the framers of the Fourteenth Amendment "wanted to put citizenship beyond the power of any governmental unit to destroy." See also Rogers v. Bellei, 401 U.S. at 835 (recognizing that "Congress has no 'power, express or implied, to take away an American citizen's citizenship without his assent,'" where that citizenship is attained by birth). By excluding certain categories of native-born persons from U.S. citizenship, the proposed legislation impermissibly rescinds citizenship rights that are guaranteed to those persons by the citizenship clause of the Fourteenth Amendment. Such a rescission of constitutionally protected rights is beyond Congress's authority.

III.

The constitutional principle of birthright citizenship flows from some of the deepest wellsprings of American history. From the earliest days of our nation, with the tragic exception of slaves and tribal Indians, all those who were born on its soil and subject to the full power of the United States became its citizens. The simple fact of birth here in America

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[18] 169 U.S. at 675.

[19] 387 U.S. 253, 263 (1967).

was what mattered.

Then came the Supreme Court's monumentally erroneous decision in Dred Scott that no persons of African descent, including free persons of African descent, could ever be citizens of the United States regardless of their birth in America, and our country subsequently plunged into a savage and brutal civil war. In rebuilding our nation after that war, we pledged that we should never again trust to judges or politicians the power to deprive from a class born on our soil the right of citizenship. We rejected the possibility of a permanent caste of aliens, generation after generation born in America but never to be among its citizens. All who have the fortune to be born in this land inherit the right, save by their own renunciation of it, to its freedoms and protections.

Today, in 1997, we cannot and should not try to solve the difficult problems illegal immigration poses by denying citizenship to persons whose claim to be recognized as Americans rests on the Constitution and over two hundred years of history. H.R. 7 is unquestionably unconstitutional, and we cannot support it. The Department of Justice stands ready to continue to work with you on legislation and oversight to address the problems of illegal immigration in ways that are consistent with the Constitution.

I

105TH CONGRESS
1ST SESSION

H. R. 7

To amend the Immigration and Nationality Act to deny citizenship at birth to children born in the United States of parents who are not citizens or permanent resident aliens.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 7, 1997

Mr. BILBRAY (for himself, Mr. ARCHER, Mr. BALLENGER, Mr. BEREUTER, Mr. BRYANT, Mr. CUNNINGHAM, Mr. DOOLITTLE, Mr. GOODLATTE, Mr. HERGER, Mr. HORN, Mr. HUNTER, Mr. INGLIS of South Carolina, Mr. JONES, Mr. McCOLLUM, Mr. McINTOSH, Mr. McKEON, Mr. PACKARD, Mr. RADANOVICH, Mr. RIGGS, Mr. ROHRABACHER, Mr. ROYCE, Mr. SKEEN, Mr. TRAFICANT, Mr. WAMP, Mr. WELDON of Florida, and Mr. WELLER) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the Immigration and Nationality Act to deny citizenship at birth to children born in the United States of parents who are not citizens or permanent resident aliens.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Citizenship Reform Act of 1997".

SEC. 2. PURPOSE.

It is the purpose of this Act to deny automatic citizenship at birth to children born in the United States to parents who are not citizens or permanent resident aliens.

SEC. 3. CITIZENSHIP AT BIRTH FOR CHILDREN OF NON-CITIZEN, NON-PERMANENT RESIDENT ALIENS.

(a) IN GENERAL.—Section 101 of the Immigration and Nationality Act (8 U.S.C. 1101) is amended by inserting after subsection (c) the following new subsection:

"(d) For purposes of section 301(a), a person born in the United States shall be considered as 'subject to the jurisdiction of the United States' if—

"(1) the child was born in wedlock in the United States to a parent either of whom is (A) a citizen or national of the United States, or (B) an alien who is lawfully admitted for permanent residence and maintains his or her residence (as defined in subsection (a)(33)) in the United States; or

"(2) the child was born out of wedlock in the United States to a mother who is (A) a citizen or national of the United States, or (B) an alien who is lawfully admitted for permanent residence and maintains her residence in the United States.

For purposes of this subsection, a child is considered to be 'born in wedlock' only if both parents are married to each other and parents are not considered to be married if such marriage is only a common law marriage.".

(b) CONFORMING AMENDMENT.—Section 301 of such Act (8 U.S.C. 1401) is amended by inserting "(as defined in section 101(d))" after "subject to the jurisdiction thereof".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to aliens born on or after the date of the enactment of this Act.

○

Food Stamps
INS

Immigration — "public charge"

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

Route Slip

TO: JACK SMALLIGAN	Take necessary action	
NIKKI HIGHSMITH	Approval or signature	
JEFF FARKAS	Comment	
DEBRA BOND	Prepare reply	
JOE PIPAN	Discuss with me	
INGRID SCHROEDER	For your information	
	See remarks below	
From: Steve Mertens	Date: January 20, 1998	

Remarks:

Attached is a copy of INS' draft policy guidance on "public charge" for your review and edit. This is the second piece of the INS commitment made to OMB last December and is supposed to reflect the INS/Food Stamp compromise.

INS has also shared this draft with Food Stamps and HHS and will be briefing immigration interest groups (including Bob Greenstein's group this afternoon -- but not sharing this internal draft).

INS has asked for any edits/revisions/comments OMB may have by **Friday, January 23 COB.** Please feel free to forward comments to me (54935) or directly to Barbara Strack at INS (514-3242). Any questions, please let me know. Thanks

Attachment

c: Julie Fernandez

DRAFT
1/16/98

Public Charge: INA Sections 212(a)(4) and 237(a)(5)

96 Act ***
HQ *******

All Regional Directors
All District Directors (Including Foreign)
All OICs (Including Foreign)
All Port Directors
All Service Center Directors
All Training Academies (Glynco and Artesia)
All Regional Counsels
All Asylum Directors

Office of Programs

This memorandum provides interim guidance concerning the Public Charge inadmissibility ground of section 212(a)(4) of the INA, the related deportable charge under section 237(a)(5) of the INA, and the impact on these subsections of the new enforceable Affidavit of Support prescribed by the new section 213A of the INA established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). While these new laws do not change the substance of public charge determinations, the renewed focus on aliens receiving public benefits makes it expedient to restate and clarify Service policy on this subject. The standards applied to public charge adjudications in deportation and admission/adjustment are significantly different and are addressed separately in this memorandum.

1. General

All arriving aliens remain inadmissible, and therefore subject to removal under the provisions of section 212(a)(4), if they are likely at any time to become public charges. IIRIRA amended section 212(a)(4) to require the Service to consider the alien's age, health, family status, assets, resources, and financial status, and education and skills when making a public charge inadmissibility determination. However, except for the creation of a new affidavit of support requirement, IIRIRA has not altered the standards the Service has traditionally used to determine the likelihood of an alien's becoming a public charge. Officers must, nevertheless, specifically consider each of these factors in making public charge determinations and specifically articulate consideration of them in every denial order.

In particular, the new law does not create any requirement that aliens repay benefits received in the past in order to avoid being found inadmissible or deportable on public charge grounds, nor has such a requirement existed in the past.

2. Public charge determinations - deportation

Section 237(a)(5) of the INA states that "[a]ny alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable." This section requires a two-step determination. First, the Service must determine whether the alien has become a public charge within five years after the date of entry. Second, if the alien has become a public charge, then the Service must determine whether the alien has demonstrated that the circumstances that caused the alien to become a public charge arose after the alien's entry into the United States. An alien who can make such a showing is not deportable as a public charge. With respect to whether an alien has become a public charge, the Board of Immigration Appeals (Board) has determined that the mere receipt of a public benefit by an alien does not make an alien a public charge for purposes of deportation under section 237(a)(5). Rather, in Matter of B, 3 I&N Dec. 323 (BIA 1948),[1] the Board established a strict three-part test to determine if an alien has become a public charge. In order for an alien to become a public charge under section 237(a)(5), the Service must conclude that:

1.) The State or other governing body which provides the benefit must, by law, impose a charge or fee for the services rendered to the alien. In other words, the State must have a cause of action in contract against either the person taking advantage of the State services or other designated relatives or friends. **If there is no charge made, and if the State does not have a cause of action, the alien cannot be said to be a public charge.**

2.) **The authorities must make demand for payment of the charges** upon the persons made liable under State law.

3.) **There must be a failure to pay the charges.** If there is a failure to pay either because of a lack of demand or because the State authorities do not perform their duty to collect the charges, the alien cannot be considered a public charge.

The amendments to the INA in IIRIRA may over time effect the number of aliens who are deportable as public charges. Under the new INA section 213A, all immediate relative and family-based immigrants, and some employment based immigrants, are required to have a sponsor who signs an affidavit of support. Sponsors may be required to repay the government for any means-tested public benefits received by the immigrants they sponsor. If an immigrant receives means-tested public benefits and the sponsor fails to repay them, then the immigrant can become deportable as a public charge if this occurs within five years of entry. However, even in this case, the alien must be given an opportunity to prove that he or she became a public charge for causes that arose after entry. If the alien can make such a showing, he or she will not be deportable as a public charge.

3. Public charge determination - admission and adjustment of status

Under INA section 212(a)(4), an alien seeking admission to the United States or seeking to adjust status to that of an alien lawfully admitted for permanent residence is inadmissible if the alien, "at the time of admission or adjustment of status, is likely at any time to become a public charge." The determination of whether an alien is likely to become a public charge under section

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[1] While this decision concerned the public charge provision of the 1917 Act, the standard set forth continues to be valid under current law, which is substantially the same as the 1917 law. See Matter of L, 6 I&N Dec. 349 (BIA 1954), and Matter of Harutunian, 14 I&N Dec. 583 (R.C. 1974).

212(a)(4) is quite different from the determination of whether an alien has become a public charge under section 237(a)(5). An alien receiving a benefit becomes a public charge if the program from which he or she receives assistance is specifically designed to support individuals unable to provide for themselves. Most significantly,[2] an alien may be likely to become a public charge even if the there is no charge for the service or benefit the alien is likely to receive and if reimbursement is not permitted.

The standard for adjudicating inadmissibility under section 212(a)(4) has been developed in several BIA decisions and an Attorney General decision and has been codified in the Service regulations implementing the legalization provisions of the Immigration Reform and Control Act of 1986 (IRCA). These decisions and regulations, and section 212(a)(4) itself, create a "totality of the circumstances" test.

In determining whether an alien is likely to become a public charge, Service officers should assess the financial responsibility of the alien by examining the "totality of the alien's circumstances *at the time of his or her application*. . . . The existence or absence of a particular factor *should never be the sole criterion* for determining if an alien is likely to become a public charge. The determination of financial responsibility *should be a prospective evaluation*" based on the alien's age, health, family status, assets, resources and financial status, among other factors.[3] In assessing the totality of the circumstances in a case, it should be noted that the changes in the laws relating to the eligibility of aliens for public benefits have reduced the likelihood that any particular alien will become a public charge because most aliens are now statutorily ineligible for many of the public benefits that could make them a public charge.

In addition, the Attorney General has ruled that "[s]ome specific circumstances, such as mental or physical disability, advanced age, or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public, must be present. A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of an emergency."[4]

Current receipt of benefits

If at the time of application for admission or adjustment an alien is receiving a public benefit that gives rise to public charge inadmissibility, as discussed below, then the alien is inadmissible. Such an alien may reapply for admission or adjustment after he or she stops receiving public benefits, and at that time should be treated as an alien who has received public benefits in the past.

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2 Service ruling in Matter of Harutunian, pursuant to the standard in section 212(a)(4) --then 212(a)(15).

3 8 C.F.R. § 245a.4(b)(11)(iv)(B), and see INA § 212(a)(4)(B). The Federal Courts have also endorsed this "totality of the circumstances" test. See, e.g., Zambrano v. INS, 972 F.2d 1122 (9th Cir. 1992), *judgment vacated on other grounds*, *509 U.S. 918 (1993)*.

4 Matter of Martinez-Lopez, 10 I&N 409, 421-422 (AG, Jan. 6, 1964).

Past receipt of public benefits

Past receipt of public benefits will not automatically make an alien inadmissible as likely to become a public charge. Rather it is one factor of many to be considered in applying the totality of the circumstances test and it will not, by itself, render an alien inadmissible. In the case of an alien who has received public benefits in the past, a Service officer determining admissibility should **assess the totality of the alien's circumstances at the time of the application** for admission or adjustment and **make a forward-looking determination** regarding the likelihood that the alien will become a public charge after admission or adjustment. The "length of time an applicant has received public cash assistance is a significant factor."[5] The longer an alien has been receiving benefits, the stronger the implication that the alien is likely to become a public charge. The negative implication of past receipt of benefits, however, may be overcome by positive factors in the alien's case demonstrating an ability to be self-supporting. For instance, a work-authorized alien who has current full-time employment or has a job offer in the United and/or an Affidavit of Support should be found admissible despite past receipt of public benefits, unless there are other adverse factors in the case.

Repayment of public benefits

As a general rule, **an alien is not required to repay public benefits received in the past in order to avoid being found inadmissible as likely to become a public charge. The Service does not have the authority to demand that aliens repay public benefits.** Inspectors and adjudicators should not request repayment or indicate that repayment is required in order to be found admissible the United States.

Repayment is relevant to the public charge inadmissibility determination only in very limited circumstances. If at the time of application for admission or adjustment of status the alien has an outstanding public debt that would render the alien deportable on public charge grounds under section 237(a)(5) of the INA, then the alien is inadmissible as an alien likely to become a public charge because the alien is, in effect, a public charge and will continue to be so after admission. **Only a debt which satisfies the three-part test under section 237(a)(5) set forth above will render an alien a public charge upon admission.** If the debt is paid, then the alien will no longer be inadmissible based on the debt. However, the past receipt of public benefits and the failure to pay the debt until after the alien sought admission will still be factors in determining admissibility. While the Service may not demand that an alien repay a public debt which meets the three-part test, it may inform an alien that if the alien does not repay the debt, he or she will continue to be inadmissible to the United States. Adjudicators should make sure also to inform aliens that even if they pay the debt, they may still be determined to be inadmissible as an alien likely to become a public charge.

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5 8 C.F.R. § 245a.2(k)(4).

4. Receipt of benefits by U.S. citizen children

The rule on receipt of benefits by U.S. citizen children was specifically addressed by the Service in a number of memoranda on the issue of public charge for aliens applying for legalization under section 245A of the INA. The Service's approach to the receipt of benefits by family members in the legalization context has been upheld in Federal Court and should govern the question for general public charge determinations as well.[6] The rule is well summarized in an April 21, 1988, memorandum from the Associate Commissioner for Examinations to the Regional Commissioners:

> [a]s a general rule, the receipt of . . . benefits by a member of the legalization applicant's family is not attributed to the applicant for purposes of determining the likelihood that the applicant will become a public charge. . . . If, however, the family is reliant on the . . . benefits as its sole means of support, the legalization applicant may be considered to have received public cash assistance. This determination is to be made on a case-by-case basis and upon consideration of the totality of the applicant's circumstances.

This memorandum addressed the receipt of cash assistance under the Aid to Families with Dependent Children (AFDC) program, but the rule is applicable to any general cash assistance program, or receipt of Food Stamps or medical benefits by the U.S. citizen child of an alien.

5. Benefits that may and may not give rise to public charge determinations of inadmissibility or deportability.

The new laws have not changed the types of benefits that would cause an alien to be considered a public charge. Nevertheless, because of the complexity of the public benefits system, this issue requires some clarification. **The mere fact that an alien has been, is, or may become the recipient of services or benefits paid for in whole or in part from public funds does not necessarily establish that the alien is or may become a public charge within the meaning of INA § 212(a)(4).** The nature of the public program must be considered. An alien receiving a benefit becomes a public charge if the program from which he or she receives assistance is specifically designed to support individuals unable to provide for themselves.

By contrast, receipt of benefits under a program essentially directed at the general welfare of the public as a whole does not make an alien a public charge. What follows are examples of benefits that may and may not give rise to public charge inadmissibility. These lists should be used as guidance, since many benefits aliens might receive are not included. When an alien receives a benefit under a program not listed below, officers must make a determination as to whether or not it is the type of benefit that would render the alien a public charge.

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6 See Perales v. Reno, 48 F3d 1305 (2nd Cir. 1995).

Benefits that may give rise to a public charge determination

As indicated above, only benefits received under Federal, State, or local government programs designed to support individuals unable to provide for themselves may render an alien a public charge. Under recent legislation, Federally-funded programs listed below are not available to most aliens, and, States and local jurisdictions may also limit access to their programs of this type. Therefore, **a finding of public charge inadmissibility will be rare because of use of one of the following programs.** It is not possible to list all such programs here, but the following are examples of such programs.

1.) "Public cash assistance"[7] This includes such programs as:

- Supplemental Security Income under Title XVI of Social Security Act;
- Temporary Assistance for Needy Families (TANF) under part A of Title IV of the Social Security Act; and
- Federal, State, and local cash assistance programs of a similar nature.

2.) Certain non-cash benefits under programs in which eligibility for benefits, or the amount of such benefits, are determined on the basis of income, resources or financial need of the individual, household or family. This includes such programs as:

- Non-emergency medical care under Medicaid pursuant to Title XIX of the Social Security Act;
- The Food Stamp Program as defined in section 3(h) of the Food Stamp Act of 1977 (See special note on Food Stamps in section 5 below.); and
- Federal, State, and local non-cash assistance programs of a similar nature.

Benefits that do __not__ give rise to a public charge determination

There are also many types of benefits and services paid for with public funds that an alien can receive without becoming a public charge. For instance, attending public schools, taking advantage of school lunch or other supplemental nutrition programs, receiving emergency medical care, or earned social security payments would not make an alien inadmissible as a public charge, despite the use of public funds.

Again, it is not possible to list all the benefits an alien may receive that will **not** render him or her a public charge. Sections 422(b) and 423(d) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform), list many of the principal benefits that the Service has determined are in this category. Benefits that do **not** give rise to public charge inadmissibility include:

1.) Emergency medical assistance;
2.) Short term, non-cash, in-kind emergency disaster relief;

[7] As defined in Service regulations at 8 C.F.R. §§ 210.1(n), 245a.1(i), and 245.4(a)(10).

3.) Assistance or benefits under the National School Lunch Act and similar state and local programs;
4.) Assistance or benefits under the Child Nutrition Act of 1966 and similar state and local programs, including the Supplemental Nutrition Program for Women, Infants and Children (WIC) program;
5.) Public assistance for immunizations and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease;
6.) Payment for foster care and adoption assistance;
7.) Programs, services, or assistance specified by the Attorney General (such as soup kitchens, crisis counseling and intervention, and short-term shelter). (See attached Order of the Attorney General);
8.) Programs for student assistance under Titles IV, V, IX, and X of the Higher Education Assistance Act of 1965, and titles II, VII, and VIII of the Public Health Service Act;
9.) Benefits under the Head Start Act;
10.) Means-tested programs under the Elementary and Secondary Education Act of 1965; and
11.) Benefits under the Job Training Partnership Act.

An alien may receive these and similar benefits without risking a negative public charge determination. **Specifically, an alien currently receiving any of these benefits (including WIC) is eligible for admission and adjustment of status. Further, an alien need not withdraw from the program in order to be admissible or eligible for adjustment of status.** Past or current receipt of these benefits should not be considered in any way in determining whether an alien is likely to become a public charge or has become a public charge.

6. Food Stamps

The treatment of the receipt of Food Stamps requires special consideration because of past State Department policy and the unique nature of the Food Stamps program. Since Congress has greatly restricted the eligibility of aliens for Food Stamps in recent welfare and immigration legislation, the Service has concluded that, with three important qualifications, receipt of Food Stamps should be considered when determining issues of public charge.

The first qualification results from the fact that the Service does not have any prior published policy on use of Food Stamps and the public charge determination while the State Department Foreign Affairs Manual (FAM) has long stated that receipt (or potential receipt) of Food Stamps does not make a person inadmissible as likely to become a public charge.[8] While the Service is not legally bound by the statements in the FAM, because it is the only written guidance available on Food Stamps and public charge, the Service will, as a matter of prosecutorial discretion, apply the policy stated in this memorandum prospectively. **Therefore, Service officers shall not consider any receipt of Food Stamps prior to the date of issue of this memorandum when determining whether an alien is or is likely to become a public charge.** An alien cannot be

[8] 9 FAM 40.41, n. 9.1.

considered a public charge or likely to become a public charge based on receipt of Food Stamps prior to the date of this memorandum.

The second qualification results from the unique nature of the Food Stamps program. While Food Stamps is a public benefit granted based on family or individual income and need, it differs from other welfare programs in two ways. First, Food Stamps is essentially supplemental in nature; total benefits cannot exceed 30 percent of the Federal poverty line. Second, the Food Stamp program, unlike many welfare programs, allows a person who is fully employed and essentially self-supporting to receive Food Stamps as a food and nutrition supplement. As a result, an alien who has a full-time job and is basically self-supporting may be receiving a small amount of Food Stamp benefits as a supplement. Under the totality of the circumstances test applied to determine whether an alien is likely to become a public charge, such an alien should **not** be determined likely to become a public charge, unless there are additional negative factors present. As a general rule the positive fact that the alien has full-time employment that provides the majority of his or her financial support outweighs the negative public charge implications of the receipt of a small amount of Food Stamps. **Therefore, an alien who is currently employed in a job that provides the majority of his or her income *is* eligible for admission and adjustment of status even if he or she is receiving a small amount of assistance from Food Stamps at the time of application.**

The final qualification relates to the receipt of Food Stamps by the U.S. citizen children of an alien. As discussed above, as a general rule, receipt of benefits by an alien's U.S. citizen children will not be automatically attributed to an alien parent and will not be considered when determining whether an alien is or is likely to become a public charge. Because Food Stamps benefits are by statute only supplemental, it is, as a matter of fact, nearly impossible for an alien and his or her family to rely on Food Stamps as their sole means of support. Therefore, receipt of Food Stamps by the U.S. citizen children of an alien shall not be considered when determining whether or not an alien is or is likely to become a public charge, unless the alien and his or her family are receiving other benefits and are subsisting solely on those public benefits. **An alien shall not be denied admission or adjustment of status even if his or her U.S. citizen child or children are receiving Food Stamps at the time of application.**

7. Affidavit of Support.

The most significant change to section 212(a)(4) of the INA is the creation of a new Affidavit of Support which imposes on the sponsor a legally enforceable support obligation. The Affidavit of Support requirement applies to all immediate relatives (including orphans), family-based immigrants and those employment-based immigrants who will work for a relative or for a firm in which a relative holds a 5 percent or more ownership interest. Immigrants seeking admission or adjustment of status in these categories are inadmissible under subparagraphs (C) and (D) of the modified section 212(a)(4), respectively, unless the appropriate sponsor has completed and filed a new Affidavit of Support if the application for an immigrant visa or adjustment of status was submitted to the Government on or after December 19, 1997. **Note that this requirement applies to these aliens even if, under the factors codified in section 212(a)(4)(B), the examiner would ordinarily find that the alien is not likely to become a public charge.** There are exceptions from this requirement for qualified battered spouses and children and for qualified widow(er)s of citizens, *if* these aliens have filed visa petitions on their own behalf.

The new Affidavit of Support form, Form I-864, and regulations have been published and became effective on December 19, 1997. Separate specific guidance has been issued on adjudicating applications including an Affidavit of Support.

6. Continued Use of Form I-134.

The use of the ***new*** **Affidavit of Support is mandatory for those categories of immigrants listed in section 212(a)(4)(C) and (D), and a Service officer may not accept a Form I-134 in place of the new Affidavit of Support for these immigrants if the application was filed on or after December 19, 1997**. In those cases not governed by sections 212(a)(4)(C) and (D) and 213A (*e.g.*, parolees, nonimmigrants), in which the Service has traditionally accepted Form I-134, Service officers may continue to do so. Use of Form I-361 will continue in cases involving Amerasians under P.L. 97-361.

7. Public Charge Bonds.

Section 213 of the INA, Admission of Certain Aliens on Giving Bond, was only amended by IIRIRA by including a parenthetical reference to the new Affidavit of Support prescribed in section 213A. Where appropriate, the public charge bond of section 213 should continue to be administered as has been done in the past. Regulations on the bond pilot which under section 564 of IIRIRA must be implemented in five INS districts are forthcoming.

If there are any additional questions, contact Miriam Hetfield, Headquarters Office of Adjudications, at (202) 514-5014.

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Programs

United States General Accounting Office

GAO

Report to Congressional Committees

Julie Fernandez from Diana

November 1997

ILLEGAL ALIENS

Extent of Welfare Benefits Received on Behalf of U.S. Citizen Children

GAO/HEHS-98-30

GAO

United States
General Accounting Office
Washington, D.C. 20548

B-275806

November 19, 1997

The Honorable Orrin G. Hatch
Chairman
The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate

The Honorable Henry J. Hyde
Chairman
The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
House of Representatives

In recent years, public concern about illegal immigration has often focused on the costs associated with illegal aliens' use of public benefits and the extent to which these benefits serve as an incentive for immigration.[1] In 1996, the Congress took steps to address these concerns through welfare and immigration reform legislation. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193) further restricted the limited access of illegal aliens to federal public benefits and limited their access to state and local public benefits. In addition, the legislation established requirements for states and selected federal agencies to report information to the Immigration and Naturalization Service (INS) on any individual they know is unlawfully in the United States. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208), the Congress addressed several enforcement issues, including the need for improved border control and better ways of deterring the use of fraudulent documents.

The act also requires us to report on the extent to which means-tested public benefits are provided to illegal aliens for the use of eligible individuals. This is most likely to occur when an illegal alien parent not eligible for aid receives benefits on behalf of his or her U.S. citizen child. A child born in the United States to an illegal alien obtains U.S. citizenship at birth regardless of the parent's immigration status and, as any other citizen in need, may receive welfare and other benefits. When such a child receives assistance, the aid also helps support the child's family, raising

[1]An illegal alien is a person who is in the United States in violation of U.S. immigration laws. Such a person may have entered illegally—that is, without Immigration and Naturalization Service inspection (undocumented) or using fraudulent documentation—or legally under a nonimmigrant visa or other temporary condition and subsequently violated the terms of the visa or other terms of entry.

concerns about the use of public assistance by those illegally in the United States. This report responds to the mandate for information on the extent to which this occurs and, as agreed with your offices, discusses (1) to what extent and in what locations selected federal means-tested benefits are being provided to illegal aliens for the use of their U.S. citizen children and (2) the nature and extent of fraud or misrepresentation detected in connection with these benefits.

Of the many federal means-tested programs, we focused on the four largest programs—Aid to Families With Dependent Children (AFDC),[2] the Food Stamp program, Supplemental Security Income (SSI), and Department of Housing and Urban Development (HUD) rental housing assistance[3]—likely to provide benefits to U.S. citizen children through an ineligible parent rather than providing benefits or services directly to a recipient—as is the case with Medicaid. We conducted fieldwork in California, New York, and Texas, which our preliminary work showed were the principal locations where these benefits were being provided. In addition, we used the most recent AFDC and Food Stamp administrative data available to develop national estimates of the number of households with an illegal alien parent receiving benefits for U.S. citizen children.[4] We also identified some cases of illegal aliens receiving SSI benefits for their U.S. citizen children using data from the Social Security Administration (SSA). To determine the extent of fraud or misrepresentation detected, we spoke with officials at the national level for each program and in the three states and reviewed available studies.[5] Appendix I provides more details on our methodology.

[2]Welfare reform legislation ended the AFDC program for all states as of July 1997 and instead provides states with funds through Temporary Assistance for Needy Families (TANF) block grants.

[3]HUD housing programs generally do not provide payments directly to recipients but do subsidize the rent a household pays.

[4]To identify all households that potentially include an illegal alien parent of a U.S. citizen child, our estimate includes households headed by (1) one illegal alien parent, (2) an illegal alien parent with an illegal alien spouse, or (3) a parent who is not an illegal alien but who has an illegal alien spouse.

[5]For the purposes of this study, we use the phrase "misrepresentation or fraud" to discuss fraud as described in three studies of the AFDC caseload conducted in three California counties. These studies consider fraud to exist when previously unreported information that should have been used to evaluate eligibility is discovered during the investigation. More specifically, fraud is said to occur when an individual willfully misrepresents information even though there is no immediate impact on the benefit amount. Further, a finding of fraud occurs when a recipient's willful misrepresentation results in an overpayment of aid or total ineligibility. Last, fraud is found to exist if a household voluntarily withdraws from aid or aid is terminated due to failure to cooperate with the study and it is believed reasonable to conclude that fraud existed. We recognize, however, as do the California studies, that the legal definition of fraud requires an offender to be successfully prosecuted and convicted. Only a small number of cases are prosecuted, in part because it is a time-consuming and labor-intensive process.

Results in Brief

In fiscal year 1995, about $1.1 billion in AFDC and Food Stamp benefits were provided to households with an illegal alien parent for the use of his or her citizen child. This amount accounted for about 3 percent of AFDC and 2 percent of Food Stamp benefit costs. A vast majority of the households receiving these benefits resided in a few states—85 percent of the AFDC households were in California, New York, Texas, and Arizona; 81 percent of Food Stamp households were in California, Texas, and Arizona. California households alone accounted for $720 million of the combined AFDC and Food Stamp benefit costs, with such households representing about 10 percent of the state's AFDC and Food Stamp caseloads. Although illegal aliens also received SSI and HUD housing assistance for their citizen children, data to develop estimates for these two programs were not available.

Comprehensive national statistics on any misrepresentation or fraud perpetrated by illegal aliens receiving benefits on behalf of their citizen children are not available. However, a few California counties' studies of AFDC households indicate that the rates and types of potential misrepresentation or fraud are similar both for households headed by illegal aliens and for the general welfare population. In these studies, one of the most commonly cited types of misrepresentation or fraud was the underreporting of income. Income is a key factor in determining program eligibility and benefit amounts and, when underreported, can result in overpayment of benefits. The states we visited had procedures in place to verify income; however, officials said that verifying individuals' income from earnings obtained through the underground economy was very difficult—for both illegal aliens and citizens—in part because these earnings are not documented or reported to state or federal databases used to verify employment and earnings.

Background

An estimated 5 million illegal aliens resided in the United States in 1996, according to INS. Official estimates, however, are not available on the number of children born to illegal aliens in the United States.[6] Illegal alien parents may apply on behalf of their children for those federal welfare benefits to which their children are entitled as citizens. A household composed of an illegal alien parent and a citizen child gains access to federal welfare benefits by virtue of the child's eligibility. The AFDC, Food Stamp, and SSI programs generally do not provide direct payment of

[6]We recently reported that in 1995, undocumented alien mothers received Medicaid benefits for 78,386 births in California and 24,549 births in Texas. These births represented 14 and 8 percent, respectively, of all births in these states in that year. See Undocumented Aliens: Medicaid-Funded Births in California and Texas (GAO/HEHS-97-124R, May 30, 1997).

benefits to minors—children under 18—requiring that their benefits be paid through an authorized representative payee, typically the custodial parent. In such cases, the citizenship status of the parent is not a consideration in deciding who the payee should be. The rationale is that the parent of an eligible child is in the best position to make decisions on how benefits should be spent on behalf of his or her child. For housing assistance, HUD provides funds to a public housing authority or owner of a housing unit to subsidize the rent for an eligible household. Under HUD rental programs, a household composed of an illegal alien and a citizen would be eligible for assistance if the citizen met eligibility criteria and assistance was available.[7]

Although illegal alien parents are not eligible for assistance, their income and assets are taken into account when determining the eligibility of and benefit amounts for their citizen children. Table 1 shows the average monthly benefit amounts under the various programs. Recipients often receive assistance from more than one program. In 1995, about 87 percent of AFDC households also received Food Stamp benefits and 31 percent received housing assistance.[8] No individual may receive both AFDC and SSI benefits.

[7]Housing benefits are limited by budgetary constraints to about one-fourth of those who are eligible.

[8]Almost all AFDC recipients—97 percent—also received Medicaid. In fiscal year 1994, the average annual Medicaid expenditure for a child on AFDC was $1,039. Under welfare reform legislation, individuals who meet the eligibility requirements that existed as of July 16, 1996, of their states' now terminated AFDC programs will remain eligible for Medicaid.

Table 1: Major Federal Welfare Programs With Benefit Amounts for One Person or Household

Program	Benefit	National average monthly benefit amount
AFDC	Cash assistance to needy families with dependent children who meet state eligibility criteria	$290 for households with one recipient child[a]
Food Stamp	Food assistance for needy individuals who meet federal eligibility criteria	$71 per person[a]
SSI	Cash assistance to needy blind, disabled, or aged individuals who meet federal eligibility criteria	$453 per disabled child[b]
HUD rental housing assistance	Public housing, tenant-based certificates or vouchers, or project-based rental subsidies for private-market housing	$385 per household[c]

[a]AFDC and Food Stamp data were obtained from the National Integrated Quality Control System for fiscal year 1995.

[b]The benefit amount was for September 1995, as reported in SSA administrative data, and includes both federal and state assistance and may include retroactive payments.

[c]The HUD average benefit is for tenant-based housing, not public housing, and covers the 30-month period ending June 1997. See A Picture of Subsidized Households in 1997: Description of a Data File (Washington, D.C.: HUD, Oct. 1997). The amount of assistance for a household comprising an illegal alien parent with an eligible child would be prorated on the basis of the number of eligible people in the household. In this case, the household would receive one-half as much rental assistance as it would if both parent and child were eligible.

The 1996 welfare reform legislation made sweeping changes to welfare programs for needy families, but it did not directly affect the eligibility of illegal aliens' citizen children. Although TANF block grants, which replaced AFDC, will allow states more flexibility in structuring their programs, federal and state officials stated that U.S. citizen children of illegal aliens will remain eligible for assistance. The provision in the welfare reform law that requires reporting of illegal aliens to INS, however, may have an impact in the longer term. Prior to the legislation, AFDC, SSI, and housing assistance programs generally were not required to report illegal aliens to INS.[9] The new provision requires that states operating TANF programs, the Commissioner of SSA, and the Secretary of HUD periodically provide information to INS on any individual they know is unlawfully in the United States. Federal officials stated that an interagency workgroup is presently determining what level of evidence will be required to establish that someone is known to be unlawfully present in the United States, as well as reporting procedures. No time frame, however, was available for when

[9]Food Stamp program regulations regarding reporting requirements have not changed. They require that illegal aliens be reported to INS. In the states we visited, this reporting focused on illegal aliens issued a final order of deportation by INS.

agencies and states are to begin reporting known illegal aliens to INS. If the final regulations for this reporting affect illegal aliens acting as payees for their U.S. citizen children, some illegal aliens could be discouraged from seeking benefits for their eligible children. Also, the Congress is considering legislation that would deny citizenship to children born in the United States to a parent who is not a citizen or lawful permanent resident.

An Estimated $1.1 Billion Provided in AFDC and Food Stamp Benefits

In fiscal year 1995, an estimated $1.13 billion—$700 million under the AFDC program and $430 million in Food Stamp benefits—was provided to households in which either the head of household or his or her spouse was an illegal alien.[10] These benefits were provided to illegal alien parents for the well-being of their U.S. citizen children. The payments represent about 3 percent of total AFDC benefit costs and about 2 percent of total Food Stamp benefit costs.[11] Approximately 153,000 AFDC households—with 300,000 citizen children—and 224,000 Food Stamp households—with 428,000 citizen children—had an illegal alien as the head of household or spouse of the head of household. In many cases, these estimates reflect the same households and citizen children, since 94 percent of the AFDC households with an illegal alien parent also received Food Stamp benefits and 65 percent of the Food Stamp households with an illegal alien parent also received AFDC. A summary of estimated benefits provided to these households in fiscal year 1995, by program, is shown in table 2.

[10]We previously reported that for fiscal year 1992 about $479 million annually—or 2 percent of federal, state, and local AFDC benefits—was provided to the citizen children of illegal aliens. See Benefits for Illegal Aliens: Some Program Costs Increasing, But Total Costs Unknown (GAO/T-HRD-93-33, Sept. 29, 1993).

[11]AFDC benefit costs were shared between the federal government and the states, with the federal share being about 55 percent nationally. Food Stamp benefit costs are fully federally funded.

Table 2: Estimated Number of AFDC and Food Stamp Households Headed by Illegal Aliens and Benefits Provided to Citizen Children, Fiscal Year 1995

Program	Total households nationwide (millions)	Estimated households headed by illegal aliens[a]	Percentage of total households	Total estimated benefits provided to households headed by illegal aliens[a] (millions)	Percentage of total benefits
AFDC	4.9	153,000[b]	3	$700	3
Food Stamp	10.9	224,000[b]	2	$430	2

[a]See appendix I for the sampling errors associated with these estimates.

[b]Since households are likely to participate in both programs, the estimated number of households should not be totaled.

Source: GAO estimate based on data obtained from the National Integrated Quality Control System.

About 77 percent of AFDC and 78 percent of Food Stamp households with an illegal alien parent had one or two citizen children; the remaining households had three or more citizen children receiving benefits. In addition, while most of the illegal alien parent households had only citizen children in the households, a significant portion—23 percent of AFDC and 29 percent of Food Stamp recipients—had both eligible citizen children and noneligible illegal alien children.

Data Not Available to Accurately Estimate SSI Benefits or HUD Rental Housing Assistance

SSA does not have any comprehensive data on the number of U.S. citizen children of illegal aliens receiving SSI benefits. Based on the limited data available, we estimated that as of December 1996, at least 3,450 disabled U.S. citizen children of illegal aliens received benefits at an annualized federal benefit cost of about $17.6 million. SSA officials explained that readily available data cannot be used to accurately estimate the total number of cases in which an illegal alien parent received benefits on behalf of citizen children because the citizenship status of payees is not uniformly identified in SSA's automated systems.

Similarly, HUD does not have any data that would allow for an estimate of the number of households in which illegal aliens are receiving rental housing assistance for the benefit of U.S. citizen children. Before June 1995, citizenship status was not considered when determining the eligibility of individuals for HUD's various rental assistance programs and such information was not collected or maintained on participants. However, recently implemented regulations and provisions included in the immigration reform legislation prohibit HUD from providing rental assistance to persons other than U.S. citizens and certain qualified noncitizens.[12] HUD has begun redesigning its automated databases and data collection instruments to capture information on participants' citizenship and alien status. However, this process is ongoing and the agency is not yet able to report the level of assistance being provided to households composed of both illegal aliens and eligible U.S. citizen children.

Majority of Cases Located in a Few States

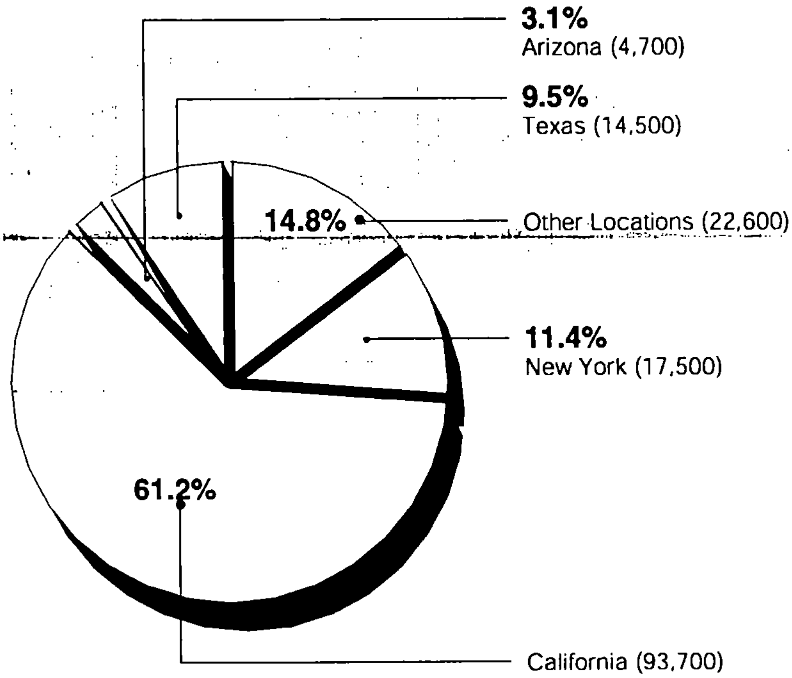
Most illegal aliens receiving AFDC or Food Stamp benefits on behalf of U.S. citizen children are located in only a few states. Over 85 percent of the households with children of an illegal alien parent receiving AFDC are located in California, Texas, New York, and Arizona.[13] (See fig. 1.) The distribution of Food Stamp households with an illegal alien parent is only slightly different, with 54 percent of the cases in California, 23 percent in Texas, and 4 percent in Arizona.[14] In addition, the majority of SSI cases of illegal alien payees for citizen children that records allowed us to identify were located in California and Texas.

[12]Under the law, a public housing authority has the option, but is not required, to verify the citizenship information provided by program participants.

[13]INS has estimated that most illegal aliens reside in a few states, including California, Texas, New York, Florida, and Illinois. For some of these states, although they have a large number of illegal immigrants, the sample data on which we based our estimates did not contain enough households with an illegal alien parent for us to develop an estimate.

[14]We were unable to estimate the number of households or benefits being provided under the Food Stamp program in New York because we did not have a large enough number of these households in the sample.

Figure 1: AFDC Households With an Illegal Alien Parent Receiving Benefits on Behalf of U.S. Citizen Children, by State, Fiscal Year 1995



Note: See appendix I for sampling errors.

Source: GAO estimate based on data obtained from the National Integrated Quality Control System.

In California, households composed of an illegal alien parent and citizen children represented about 10 percent of the state's AFDC and Food Stamp caseloads in 1995 and accounted for $720 million in AFDC and Food Stamp benefits combined. Other studies from the California counties of Los Angeles and Orange estimated that these households have constituted up to 20 percent of each county's AFDC caseload in recent years. In the other states for which we developed estimates, illegal alien payee cases ranged from 4 to 7 percent of each state's AFDC and Food Stamp caseloads. (See app. I for more details on the estimated number of households and benefits provided by state and the associated sampling errors.)

Detected Misrepresentation or Fraud Similar for Households Headed by Illegal Aliens and Other Households

Although procedures are in place to prevent and detect fraud, comprehensive national statistics on fraud perpetrated by illegal aliens serving as payees on behalf of their citizen children are not available. However, studies of AFDC households in a few California counties with large populations of illegal aliens serving as payees indicate that there is little difference in the rate and type of misrepresentation or fraud detected for them and other households receiving benefits.

Various Methods Used to Prevent and Detect Fraud

To prevent and detect misrepresentation or fraud, federal, state, and local agencies use various approaches in processing applications for benefits, ensuring the continued eligibility of recipients, and maintaining payment accuracy for the AFDC, Food Stamp, and SSI programs.[15] While each of these programs has different goals, all require individuals or families to meet certain eligibility criteria. To establish program eligibility, proof of citizenship and a social security number typically must be presented for all applicants, including U.S. citizen children of illegal aliens.[16] In addition, since these are means-tested programs, the income and resources of an applicant's household cannot exceed specific limits set by each program. Benefits, based on total household income, are then computed for the eligible family members.

The amount of household income and other resources are verified at the time of application and, for successful applicants, periodically thereafter to ensure continued eligibility and payment accuracy. Applicants must provide proof of income and resources such as pay stubs, vehicle registration forms, and rental agreements. For the AFDC, Food Stamp, and SSI programs, officials access the Income and Eligibility Verification System or use computer matching with other databases to corroborate information provided by applicants.[17]

[15]HUD's rental housing assistance programs require all applicants to self-certify their status as either citizens or eligible noncitizens to establish eligibility for assistance. However, current regulations do not require verification of an applicant's citizenship status for all of HUD's rental housing assistance programs.

[16]Under the Food Stamp program, for an individual reporting to be a U.S. citizen, proof of citizenship is required to the extent that it is questionable. The determination of questionable citizenship is left to the discretion of the state agency.

[17]Federal law has supported using computerized systems to validate social security numbers and identify household information, such as earnings, assets, and receipt of other forms of aid by applicants and recipients. Such matches are required in TANF and were required under the Food Stamp program until made optional in the 1996 welfare reform legislation.

In addition to the verification procedures used during the application process and periodic reviews, some states take further steps to aid in detecting and preventing misrepresentation or fraud. For instance, all AFDC applicants in New York City are required to participate in office interviews and home visits by investigative staff to validate application information. As a result of these investigations, approximately 35 percent of new applicants never received benefits, according to city officials. In California and Texas, cases are referred to investigators for additional reviews, including home visits, if fraud is suspected. Although the officials we spoke with generally agreed that intensive screening is effective, it is also resource intensive and costly.

Under the AFDC and Food Stamp programs, all states have been required by federal regulations to conduct quality control reviews of a sample number of cases to ensure that benefit amounts are correct. These reviews include verification of eligibility and income data; if fraud is suspected, a referral for investigation is made. Although the quality control program is not a requirement under TANF, states may continue the program at their option.

In addition to the application and review procedures, some federal agencies, states, and localities train staff to identify fraudulent documents and provide updates on the latest counterfeit documents. For example, SSA staff use black light equipment to determine whether documents submitted in support of SSI benefit claims are authentic. Staff are also trained to use interview techniques to better identify misrepresentation by applicants.

Incidence and Types of Misrepresentation or Fraud Detected Similar for Illegal Alien Payees and the General AFDC Population

National studies on the nature and extent of misrepresentation or fraud by illegal aliens obtaining benefits for their citizen children are not available. However, three California counties—Fresno, Los Angeles, and Orange—have experienced rapid growth in their AFDC child-only cases (those without an adult recipient)[18] and, in recent years, began conducting studies to investigate fraud among child-only and other cases. Although these studies used a much broader definition of fraud and a different methodology than generally used in AFDC and Food Stamp quality control reviews, they provide some evidence that the types and frequency of misrepresentation or fraud in cases where illegal aliens receive AFDC benefits for their U.S. citizen children are similar to that of the general

[18]A child-only case is an AFDC case in which the parent or caretaker is excluded from receiving benefits due to (1) receipt of SSI benefits; (2) undocumented alien immigration status; (3) failure to cooperate with program requirements, such as work or child support enforcement; or (4) lack of need.

AFDC population.[19] Based on a random sample of 450 AFDC cases, a 1997 Orange County study identified potential misrepresentation or fraud in 38 percent of the illegal alien payee cases and over 46 percent of all other cases.[20] These findings of potential fraud were associated with overpaid benefit amounts totaling 9 percent of combined AFDC and Food Stamp benefits paid in a typical month to the 450 cases. Two additional studies based on random samples and conducted in Los Angeles County and Fresno County identified potential misrepresentation or fraud in 42 to 45 percent of the AFDC cases involving illegal alien payees.[21] In these two studies, about one-half of the cases in which misrepresentation or fraud was identified resulted in an overpayment of benefits. In the other cases, the incorrectly reported information did not have an impact on benefit amount.

The most commonly cited types of misrepresentation or fraud identified in all three of the California studies were misreported or unreported income and misrepresented household composition, such as unreported members living in a household.[22] The types found in cases involving illegal alien payees did not differ from those of the general AFDC population. Officials in New York and Texas also identified misreporting of income and household composition as the most common types of misreporting among AFDC child-only cases and the general AFDC population.

According to one of the California studies, 81 percent of the misreported income cases involved cash obtained by applicants from sources that made verification virtually impossible because there are no records of the financial transactions.[23] This study uses the term "underground economy"

[19]The studies' definition of fraud and objectives, scope, and methodology differed from those used in AFDC and Food Stamp quality control reviews. The county studies defined misrepresentation or fraud as any case in which investigators discovered unreported information that should have been reported and used to evaluate eligibility, even if no overpayment of benefits resulted. Their methods also differed. For example, investigators in the Orange County study made unannounced home visits and considered the entire assistance period. AFDC and Food Stamp quality control reviewers generally announced their visits to households and examined data for the one month's sample.

[20]County of Orange Fraud Incidence Study: A Joint Effort of the California Department of Social Services and Orange County Social Services Agency and District Attorney (Orange County, Calif.: Apr. 1997). Food Stamp program fraud was also included in this study. The 450 cases were selected between August 1994 and October 1995.

[21]Fresno County Child-Only Study: A Joint Effort Between the County of Fresno Department of Social Services, the Office of the District Attorney, and the California Department of Social Services (Fresno County, Calif.: Jan. 1995) and Department of Public Social Services, Welfare Fraud and Prevention Investigations Section, Child-Only Study: Final Report (Los Angeles County, Department of Public Social Services, Calif.: Jan. 1996).

[22]Misrepresenting household composition includes situations in which not all members of the household are reported, an absent parent is actually living in the home, or a child is not living in the reported residence.

[23]County of Orange Fraud Incidence Study, Apr. 1997.

~~to refer to a source of income from~~ which individuals are paid in cash and their earnings are not reported to the Internal Revenue Service or the state. In addition, officials in California, Texas, and New York cited the difficulties of verifying income that individuals—both illegal aliens and citizens—derived from the underground economy. Moreover, because illegal aliens may not legally obtain social security numbers—which serve as the basis for reporting through the Income and Eligibility Verification System—verification of income for this population is difficult. California officials also noted that it is more difficult to obtain evidence of fraud without a social security number.

Agency Comments and Our Evaluation

We received comments from the Department of Health and Human Services (HHS) and the Department of Agriculture (USDA). Their comments are included in appendixes II and III, respectively, and technical comments were incorporated as appropriate. HHS stated that our report identifies the difficult and complicated policy issue of providing food and cash assistance to families containing both citizens and illegal immigrants. Yet it also stated that we had not sufficiently emphasized that citizen children of illegal alien parents are legally eligible for benefits on the same basis as any other citizen in need. We believe our report clearly states that these citizen children are eligible for assistance and, while we acknowledge the difficult policy issues involved, this report focuses on describing the extent to which such children receive assistance.

USDA commented that the report provides valuable information and emphasized that illegal aliens receive no benefits for themselves and that their income and resources are considered in determining the eligibility of any citizen children. In addition, USDA was concerned that the misrepresentation and fraud rates identified by the California counties' studies may inadvertently be misinterpreted. It noted that the studies' definition of misrepresentation and fraud is much broader than that used in Food Stamp quality control studies, which generally focus on the percentage of benefit dollars overpaid as a result of intentional misrepresentation. To address this concern, we have more clearly emphasized the amount of benefit overpayments identified in the studies. We also recognize that the studies use a much broader definition of misrepresentation and fraud than used in quality control reviews and clarified this in the report.

We also provided a copy of the report to SSA, which did not have comments. In addition, we considered and incorporated, where appropriate, technical comments from the State of California and Orange County, California. HUD, Los Angeles County, New York, and Texas did not have technical comments.

As required by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, we are sending copies of this report to the Inspector General of the Department of Justice. We are also sending copies to the Secretaries of USDA, HHS, and HUD and the Commissioners of SSA and INS. We will also make copies available to others upon request.

Please contact me at (202) 512-7215 if you have any questions concerning this report or need additional information. Major contributors to this report are listed in appendix IV.

Sincerely yours,

Mark V. Nadel

Mark V. Nadel
Associate Director,
Income Security Issues

Contents

Abbreviations

AFDC	Aid to Families With Dependent Children
HHS	Department of Health and Human Services
HUD	Department of Housing and Urban Development
INS	Immigration and Naturalization Service
SSA	Social Security Administration
SSI	Supplemental Security Income
TANF	Temporary Assistance for Needy Families
USDA	Department of Agriculture

Methodology

To estimate the locations, number of households involved, and amount of AFDC and Food Stamp benefits provided to illegal aliens for the use of their U.S. citizen children, we used administrative databases composed of statistically valid samples of households nationwide receiving benefits under each of these programs. The source data were AFDC and Food Stamp households selected for quality control reviews from October 1994 through September 1995—the 1995 federal fiscal year. HHS' Administration for Children and Families for AFDC and USDA's Food and Consumer Service for Food Stamps use sample data that are maintained in the National Integrated Quality Control System to estimate state error rates related to eligibility and payment amount and for studies of populations receiving benefits.

As part of the quality control reviews done for both the AFDC and Food Stamp programs, the citizenship or immigration status of household members, such as a parent of a U.S. citizen child receiving benefits, is obtained by program officials. To develop our estimates of households in which an illegal alien received benefits on behalf of citizen children under these programs, we selected only sample households identified as having (1) a person acting as the head of household whose citizenship status was listed as illegal alien due to expired visa or illegal entry into the country or (2) a head of household whose spouse had a citizenship status listed as illegal alien due to expired visa or illegal entry into the country.[24] For some individuals, the data did not precisely capture their exact immigration status. For example, citizenship status was listed as "not a U.S. citizen, but exact alien/immigrant status unknown" or "unknown." As a result, there may be additional households with an illegal alien parent that we were unable to identify and are not included in our estimate. Heads of households or their spouses whose citizenship status was listed as being accorded refugee status, granted a stay of deportation by the INS, or permanently residing in the U.S. under color of law were not included in our estimate.

For each of the selected households headed by or whose spouse was an illegal alien, we obtained from the sample case file information on the dollar amount of benefits received by the recipient household for the sample month, projected the yearly dollar amount of such benefits received by the household, and confirmed that the benefits were received

[24]In 89 and 84 percent of the AFDC and Food Stamp cases, respectively, the head of household was specifically identified as an illegal (undocumented) alien. In the remaining 11 and 16 percent of the cases, the spouse of the head of household was the illegal alien. The head of household in these instances was often identified as an immigrant accorded permanent resident status, a lawful permanent resident under provisions of the Immigration Reform and Control Act, or a U.S. citizen.

on behalf of U.S. citizen children in the household.[25] We applied sample weights to develop our estimate for the nation or a specific state. For those states that had a large enough number of households headed by illegal aliens in the sample, we were able to develop an estimate for that state. For AFDC, we were able to estimate the number of such households and benefits received in Arizona, California, New York, and Texas. Under the Food Stamp program, these states were Arizona, California, and Texas. Although other states, such as Florida and Illinois, also have large illegal alien populations, not enough households with an illegal alien parent or spouse were identified in these states' samples to allow us to develop estimates. This also occurred for New York in the case of the Food Stamp program.

Because our estimates are based on samples, they are subject to sampling error. Table I.1 shows each of our estimates and indicates the extent of each estimate's sampling error by showing the 95-percent confidence interval around that estimate. There is a 95-percent chance that the actual total falls within that interval.

Table I.1: Estimated AFDC and Food Stamp Households Headed by an Illegal Alien and Benefits Received (With Confidence Intervals), Fiscal Year 1995

	Households headed by illegal alien		Benefits received (thousands)	
	AFDC	Food Stamp	AFDC	Food Stamp
Arizona	4,700 (+/-1,000)	9,200 (+/-2,300)	$12,340 (+/-$2,700)	$16,000 (+/-$4,700)
California	93,700 (+/-15,500)	120,700 (+/-23,000)	$512,000 (+/-$93,100)	$208,000 (+/-$44,600)
New York	17,500 (+/-5,000)	NA[a]	$82,000 (+/-$24,700)	NA[a]
Texas	14,500 (+/-3,500)	52,600 (+/-12,200)	$16,000 (+/-$4,100)	$122,500 (+/-$36,200)
National	153,000 (+/-17,000)	224,000 (+/-27,000)	$700,000 (+/-$100,000)	$430,000 (+/-$60,000)

[a]New York did not have a large enough number of Food Stamp households headed by an illegal alien to provide an estimate.

Source: GAO estimate based on data obtained from the National Integrated Quality Control System.

We discussed and obtained concurrence from personnel of the Administration for Children and Families for AFDC and the contractor for

[25]The head of household was identified as the parent of a citizen child; data on the parental status of the spouse were not available.

the Food and Consumer Service for Food Stamps regarding our estimating procedures.

Because of variances in how SSI cases composed of disabled children with illegal alien payees are identified in SSA's automated systems, we could not develop an accurate estimate of the number of these cases. However, we statistically sampled available recipient caseload data to estimate a minimum number of disabled child cases in which one or both parents were illegal aliens as of December 1996. Our sample included a sufficient number of cases from California and Texas to allow us to provide estimates for those states. Based on the benefits being provided to the children in our sample, we also estimated the dollar amount of benefits paid to the children in December 1996.

Because our figures are based on samples, they are subject to sampling error. Table I.2 shows each of our estimates and indicates the extent of each estimate's sampling error by showing the 95-percent confidence interval around that estimate. There is a 95-percent chance that the actual total falls within that interval.

Table I.2: Estimated SSI Cases With an Illegal Alien Payee and Benefits Received (With Confidence Intervals), December 1996

	Cases with an illegal alien payee	Benefits received
California	2,178 (+/-63)	$947,759 (+/-$54,536)
Texas	755 (+/-57)	$314,482 (+/-$35,207)
National	3,450 (+/-101)	$1,466,601[a] (+/-$74,392)

[a]Estimated to be an annualized federal benefit cost of about $17.6 million.

Source: GAO estimate based on administrative data obtained from SSA.

Since AFDC and Food Stamp quality control data are reviewed by the Administration for Children and Families, the Food and Consumer Service, and the states, and SSI data are reviewed by SSA, we did not independently examine the computer controls or verify the accuracy of these data. Except for this limitation, we conducted our review in accordance with generally accepted government auditing standards between December 1996 and July 1997.

Comments From the Department of Health and Human Services

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Inspector General

Washington, D.C. 20201

SEP 19 1997

Mr. Mark V. Nadel
Associate Director,
Income Security Issues
United States General
Accounting Office
Washington, D.C. 20548

Dear Mr. Nadel:

Enclosed are the Department's comments on your draft report, "Illegal Aliens: Extent of Welfare Benefits Received on Behalf of U.S.-Citizen Children." The comments represent the tentative position of the Department and are subject to reevaluation when the final version of this report is received.

The Department appreciates the opportunity to comment on this draft report before its publication.

Sincerely,

June G Brown

June Gibbs Brown
Inspector General

Enclosure

The Office of Inspector General (OIG) is transmitting the Department's response to this draft report in our capacity as the Department's designated focal point and coordinator for General Accounting Office reports. The OIG has not conducted an independent assessment of these comments and therefore expresses no opinion on them.

Comments of the Department of Health and Human Services on the GAO final report entitled "Illegal Aliens: Extent of Welfare Benefits Received on Behalf of U.S.-Citizen Children"

General Comments

The General Accounting Office (GAO) report identifies a very difficult and complicated policy issue related to the provision of cash and food assistance to families that contain both citizens and illegal immigrants. These "mixed status" families also usually include legal immigrants, and the recent changes in eligibility for legal immigrants is likely to further complicate this issue. What makes it a particularly difficult issue is that it highlights the competing Federal policy goals of deterring illegal immigration and denying benefits to illegal immigrants on the one hand, and providing assistance and opportunity to all citizens--particularly children--on the other hand.

The Department of Health and Human Services (HHS) clearly supports all Federal efforts to deter illegal immigration, and we are vigorous in denying major cash and medical assistance (other than emergency services) to illegal immigrants. However, our mission also requires us to improve the health and economic self-sufficiency of all citizens (and to some degree most qualified aliens), including the citizen children of immigrant parents, both legal and illegal.

With respect to these policy goals, we do not believe the GAO report gives enough weight to the importance of providing assistance and support to the citizen children who are members of these "mixed status" families. The report in several places characterizes Aid to Families with Dependent Children and Food Stamp assistance as supporting the child's *family*, with no mention of how such assistance also supports the *child*. While such assistance undoubtedly benefits other members of the child's family, it is also true that the citizen child is likely to derive benefits, and we do not believe this crucial fact is made clear enough in the report. It is important to note that citizen children are legally eligible for benefits on the same basis as other citizens, even if they have an illegal parent(s). We believe it is important to evaluate the impact on citizen children when addressing these complicated policy issues related to "mixed status" families.

We note that this report defines the term "means-tested public benefit" in its broadest sense. The Department has interpreted the term "Federal means-tested public benefit," as used in sections 403 and 421 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, more narrowly to include only mandatory spending programs of the Federal Government in which eligibility for the programs' benefits, or the amount of such benefits, or both, are determined on the basis of income or resources of the eligibility unit seeking the benefit. See 62 Fed. Reg. 45256 (August 26, 1997). Given the statutory context, it is not clear that the definitions of the two terms should be the same. Nonetheless, although we cannot speak to programs of other departments, all the HHS programs included in the analysis of this report fall within the Department's definition of Federal means-tested public benefits.

Comments From the Department of Agriculture

USDA

United States
Department of
Agriculture

Food and
Consumer
Service

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22302-1500

SEP 1 5 1997

Mr. Mark V. Nadel
Associate Director
Income Security Issues
Health, Education, and Human Services Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Nadel:

This letter provides Food and Consumer Service comments on the draft report entitled, Illegal Aliens: Extent of Welfare Benefits Received on Behalf of U.S. - Citizen Children. We appreciate the opportunity to review the draft and for the full discussion of the audit at the exit conference the General Accounting Office (GAO) held with the Agency on August 6, 1997. This report provides valuable information on the extent to which means-tested public benefit programs affect families containing both citizens and illegal aliens. In commenting, we would simply like to offer two observations that may aid the public in interpreting the report.

The first part of the report presents information on the extent to which mixed households containing citizens and illegal aliens receive public benefits. An implied concern is that there is leakage of benefits to the illegal alien members even though benefits are not issued on their behalf. While this may happen, we would like to point out that the flow of income also goes from non-citizens to citizens since the income and resources of an ineligible alien are considered in determining eligibility of any citizen children. Illegal aliens and, since passage of the 1996 welfare reform legislation, most legal aliens, receive no benefits for themselves.

Our more serious concern is that the presentation showing that fraud rates are no higher among the mixed households of interest and other assistance households may have the inadvertent effect of suggesting much higher fraud rates than the data actually show. Although the data are for the Aid to Families with Dependent Children (AFDC) Program, casual readers may reach the wrong conclusion not only for AFDC but also for the Food Stamp Program (FSP).

Of necessity, the GAO had to draw on existing studies. The California studies cited define fraud much differently than the common understanding. GAO notes this but is forced to use the only data available as a proxy for fraud to compare the two

Mr. Mark V. Nadel 2

types of households. Although the studies established the value of the associated benefit loss among the whole population studied, this much lower figure was apparently not available for each group separately. The casual reader may assume that the much higher figures used to compare groups represent fraud as we generally understand it, i.e., benefit dollars overpaid as the result of intentional misrepresentation.

Agency data from a national sample of cases also support a finding of much lower overpayment and fraud rates. Although the FSP quality control system does not measure fraud per se, we do measure total overpayments of which fraud is a small portion. The FY 1996 error rates published June 30, 1997, indicate the lowest overpayment rate ever. Although overpayments of 6.92 percent are still higher than desirable, they indicate continuing improvement in the careful management of public dollars in the service of nutrition assistance to low income Americans.

We have enclosed additional comments on the report for your consideration. Thank you again for giving us an opportunity to comment on this draft report. If we can assist you further with the final report, please let us know.

Sincerely,

Yvette S. Jackson
Administrator

Enclosure

Comments on GAO Draft Report "Illegal Aliens: Extent of Welfare Benefits Received on Behalf of U.S. Citizen Children," GAO/HEHS-97-182

General Comments

Include more information on the methodology for computing the FSP figures. Specifically, include the data source, describe how illegal aliens were identified, present the sample size for the national estimates and the State-specific estimates, and explain the criteria for determining States for which an estimate was made for number of households receiving benefits and the dollar value. This information is essential because a reader who is knowledgeable about immigration issues in general will wonder why statistics are presented for Arizona but not for New York, Florida, and Illinois, all of which have larger immigrant populations than Arizona.

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CENTER ON BUDGET AND POLICY PRIORITIES

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REGARDING:	Forced Disenrollment of Legal Immigrants from Medicaid
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Comments:

The enclosed memo needs your immediate attention; it concerns the matter of legal immigrants being asked to repay the value of Medicaid benefits that they or their children (including citizen children) have *legally* received. INS also is compelling some legal immigrants who legally are eligible for Medicaid to disenroll themselves and their children.

These practices, being carried out in some areas by INS and State Department consular offices who mistakenly believe they are properly enforcing the "public charge" provisions of immigration law, is most commonly applied when a legal immigrant seeks to re-enter the United States after visiting his or her native land. When the immigrant seeks to re-enter, the INS — which has established cooperative relationships for this purpose with state Medicaid agencies in California and a number of other states — determines if the immigrant or any member of his or her family has received Medicaid. If so, the immigrant may be required to repay the cash value of benefits legally received and to disenroll all family members as a condition of being allowed to re-enter the United States.

This practice is illegal; it violates Title XIX of the Social Security Act. With the Christmas holidays coming up, many immigrant will visit relatives in their native land and face this harassment upon seeking to re-enter. In some areas, immigrant service organizations are advising all immigrants to forego holiday visits to relatives in their native lands. A major class action suit has been filed against these INS practices in California, and immigration attorneys and advocates have been clamoring for action.

The Administration needs to act immediately to direct INS and State to cease these practices and to undertake an investigation of a series of related problems. At a minimum, a moratorium needs to be placed on these practices right away while the Administration examines this situation in more detail.

Time for action is short. With the holidays looming, some immigration groups are considering using media strategies to go after the Administration on this. At best, media coverage will cast the Administration as effectively imposing a travel ban on legal immigrants with modest incomes. At worst, the Administration may be pictured as anti-immigrant and as quietly undermining the benefit restorations it speaks about in immigrant communities.

This problem is not limited to those leaving and then seeking to re-enter the country. It appears these illegal practices also are being employed in some cases when a legal immigrant seeks to adjust his or her immigration status en route to eventual application for citizenship.

As a result of these practices, we are hearing a number of reports from immigrant advocates at the local level that poor legal immigrants are declining in substantial numbers to enroll their children in Medicaid and other programs — including their citizen children — due to fear the INS may use this against them in the future. Some poor legal immigrant parents already receiving Medicaid are reportedly disenrolling their children and themselves for the same reason.

These practices are undermining the very policies the Administration fought for and won in this summer's budget battles. This year's victories will be somewhat hollow if immigrants feel compelled to disenroll from Medicaid and other programs because they fear reprisals from the INS. INS' actions are contributing to an atmosphere of fear among legal immigrants and jeopardizing health coverage for children of legal immigrant parents.

The enclosed memo provides more information. We urge you to have your staff look into this immediately. We're available to discuss these issues at any time.

CENTER ON BUDGET AND POLICY PRIORITIES

November 24, 1997

DEMANDS FOR MEDICAID REPAYMENT FROM LEGAL IMMIGRANTS AND THEIR CITIZEN CHILDREN WHO HAVE LAWFULLY RECEIVED BENEFITS IS CAUSING SERIOUS PROBLEMS

The INS and some State Department consular offices, in conjunction with certain states, are demanding repayment of Medicaid benefits *legally* received by legal immigrants and/or their immigrant or citizen children. In addition, some legal immigrants are being told they must disenroll themselves and their children, including citizen children, from Medicaid despite the fact they are eligible for Medicaid. These practices are occurring in a variety of circumstances, such as when legal immigrants who have temporarily left the United States seek to re-enter the country and when some immigrants residing in the country with temporary status — such as spouses of citizens — seek to adjust their status to permanent resident. In those jurisdictions where these administrative practices are being applied, the Medicaid entitlement has effectively been turned into a two-tiered system— one for citizens in citizen-only families and one for legal immigrants or citizens in families that include legal immigrant members.

Although INS enforcement officials and State Department consular officers may believe their actions are warranted or even encouraged by the Immigration and Naturalization Act, demanding repayment of and disenrollment from Medicaid is in clear violation of the Medicaid statute, Medicaid regulations, and supporting case law. The INS and State Department should be directed to terminate these practices immediately. We also believe the Administration should establish an interagency review of current and proposed immigration enforcement mechanisms to ensure they are consistent with federal benefits law and Administration policy.

Examples of How this Practice is Being Applied

Two specific examples from the local level best describe how, and under what type of circumstances, individuals and their families are being forced to disenroll from the Medicaid program or to repay the value of Medicaid benefits they have received. Based on reports from local level immigration lawyers, a class action lawsuit filed against the INS in California and California state budget documents, the following cases do not appear to be isolated incidents.

- Recently, a legal immigrant from Mexico re-entering the country was detained by the INS and told that if she did not go to the state Medicaid office the next day and repay Medicaid benefits legally received by herself and her citizen children *and* disenroll the family from Medicaid, the INS would confiscate her residency card permanently. She disenrolled herself and her children, and the family is now uninsured even though they are eligible for Medicaid.

- A Guatemalan woman who temporarily returned to Guatemala to complete the final step in processing her visa petition, which she had initiated several years earlier with her naturalized citizen husband, was kept out of the United States for *seven months* by the U.S. Consulate office until she could obtain a letter stating she did not owe back any Medicaid benefits. As a condition of providing the letter, the state Medicaid office required that the father repay the value of the Medicaid benefits already received by the family and terminate Medicaid benefits for all five of their citizen children. The father terminated Medicaid for four of his children, but refused to do so for one young daughter, a U.S. citizen who has cystic fibrosis. Only after intervention by a lawyer and a member of Congress was the visa petition granted and the mother allowed to re-enter the United States.

In both of these cases, the INS and State Department were working in cooperation with a state Medicaid office. At the request of the INS and the individual consular office, the state Medicaid program provided information regarding Medicaid enrollment by legal immigrants and family members who were entitled to and legally receiving Medicaid. The INS and consular offices then used that information as an immigration enforcement mechanism to preclude individuals from re-entering the country unless the individuals stopped receiving Medicaid and paid back the value of what they had received.

Demanding Repayment and Disenrollment Is Not Consistent with Federal Medicaid Law and Federal Health Policy

Issues raised by the intersection of immigration and benefits policy often give rise to complicated, thorny questions that require a careful review to achieve an outcome that best balances federal needs in both policy arenas. The issues of forced repayment and disenrollment for individuals who have lawfully received Medicaid, however, are not difficult to resolve. The Immigration and Naturalization Act charges the INS and the State Department with the responsibility of excluding individuals from admission into country who are unlikely to be self-reliant and grants these agencies broad discretion to make such decisions. But any administrative procedures that the

INS and State Department adopt must, at a minimum, comply with other federal laws and regulations and should also be consistent with other Administration policy. *The Medicaid statute, regulations and supporting case law indicate that the INS and State Department may not legally require any immigrant or citizen to disenroll from or to repay Medicaid benefits legally received.*

- Under federal law, payment by the Medicaid program for health services does not create a debt owed by the recipient of services, and state Medicaid agencies are prohibited from requiring repayment of Medicaid benefits as long as the benefits were *lawfully* obtained.[1] State agencies can only seek to recover Medicaid benefits that were *fraudulently or otherwise incorrectly* obtained.[2]

- Medicaid regulations explicitly note that the state "must continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible."[3] By working with the INS and State Department to assist those agencies in efforts to disenroll eligible immigrants from the Medicaid program, the states are *de facto* disenrolling these individuals, in violation of federal law. Moreover, this disenrollment comes with none of the notices or fair hearing procedures required by law.[4]

- A state Medicaid agency is not permitted to disclose information about its Medicaid applicants and beneficiaries for purposes unrelated to carrying out the state Medicaid program.[5] The INS' and State Department's use of this information to enforce immigration policy, rather than to carry out the Medicaid program, is in violation of federal Medicaid law. States may share information with the INS or other agencies to determine an individual's eligibility for the program. These uses would include

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[1] § 1917(b)(1) of the Social Security Act.

[2] State agencies are required to seek repayment from the estates of individuals who received nursing home or long term care. That authority, however, would not apply in this circumstance.

[3] 42 CFR 435.930 (b)

[4] Section 1902(a)4 of the Social Security Act. 42 CFR 435.919 and 45 CFR 431 Subpart E.

[5] § 1902(a)(7) of the Social Security Act.

verifying an individual's income or immigration status.[6] Information regarding an individual's or families use of benefits, however, may not be disclosed to the INS or State Department for the purposes of excluding immigrants from re-entering the United States.

INS and State Department Practice

INS and State Department officials, particularly at the local level, are likely to be unaware of the protections granted to Medicaid applicants and beneficiaries by the Social Security Act and supporting regulations. Instead, they may believe they are appropriately carrying out their duty to determine whether immigrants entering the country are likely to be a "public charge."

Public charge is the term the INS and the State Department use to describe immigrants who have or will become a cost to society. A public charge allegation can be made in two circumstances — when immigrants are re-entering the United States after having left temporarily or when immigrants are seeking to change their immigration status from temporary to permanent. If the INS determines an immigrant to be a public charge, the individual can be barred from staying in or re-entering the United States.

In the past, a public charge determination was virtually never used as a basis for barring re-entry or deporting immigrants. It is only recently that some immigrants are being told by the INS or consular offices that they must repay Medicaid benefits and disenroll from Medicaid to avoid being considered a public charge and be allowed to re-enter or stay in the United States.

- *INS policy and practice:* The INS has a "Border Lookout System" pilot project, in which it asks incoming immigrants if they or their children — citizen or immigrant — have ever received Medicaid. Although the lookout system is said to be designed to stop only undocumented immigrants or other immigrants who received Medicaid benefits fraudulently, in at least some areas the program does not appear to be distinguishing between lawfully and fraudulently obtained benefits. Even if the immigrant or any of his or her children has received Medicaid lawfully, they reportedly are told they must repay the Medicaid benefits before being re-admitted into the United States. A class action lawsuit

[6] § 1137 of the Social Security Act.

was filed recently against the INS and the California Department of Health Services alleging that 2,000 individuals have been subjected to unlawful detentions at California airports and told they must repay Medicaid benefits *lawfully* received and discontinue Medicaid enrollment for themselves and their children, including both immigrant and citizen children.

- *State Department policy and practice:* Some embassies have initiated a Public Charge Lookout System (PCLS) under which they enter into cooperative agreements with states to check the public assistance records — including Medicaid records — of persons requesting visas or adjustment of immigration status, and at times, the Medicaid records of their family members. A telex describing the PCLS that the State Department sent to consular offices states that "demand for payment can only be made after an investigation has established the *unlawful* [emphasis added] receipt of benefits."[7] The practice of some U.S. Consulate offices, however, apparently includes demanding repayment of Medicaid lawfully received. For example, the U.S. Consulate office in Haiti is reported to require payment of Medicaid benefits for citizen children before their siblings are considered for entry into the United States. (See attached *Boston Globe* article.)

Implications of the "Lookout Systems"

The practice of demanding repayment of Medicaid benefits and disenrollment undercuts the Administration's efforts in the area of health coverage. Essentially, legal immigrants and their citizen children no longer have the same entitlement to Medicaid as others, even though the Administration fought hard last year to maintain Medicaid eligibility for immigrants present in the country before August 22, 1996. (This entitlement for these legal immigrants is a state option, but all states except one have opted to maintain the entitlement.) Although they remain eligible for Medicaid,

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[7] Memo to all Diplomatic and Consular Posts from U.S. Department of State regarding PCLS – Behind the Scenes, May 1997. Also in a letter to an immigration attorney earlier this year, the Chief of the Advisory Opinions Division of the Directorate for Visa Services acknowledged that the Embassy in question "agrees that your client's mother, as a legal permanent resident, is under no legal obligation to repay the welfare [Medicaid] benefits she received and that even if she were, her failure to repay the benefits would not, in and of itself, be a ground for refusing your client's immigrant visa application." Letter to Mr. Neumeister from H. Edward Odom, Chief, Advisory Opinions Division, Directorate for Visa Services, Department of State, February 25, 1997.

affected immigrants are no longer truly entitled to Medicaid because of the INS practices. Moreover, for citizen children of legal immigrants, the effect is that they are not eligible for Medicaid because their parents are immigrants, a violation of the U.S. Constitution. In short, persons who are legal immigrants or citizens related to legal immigrants are essentially no longer entitled to Medicaid, even though federal and state law says otherwise.

The INS and State Department practices are effectively undermining the Administration's success in last year's immigration bill and this year's Balanced Budget Act to maintain Medicaid coverage for legal immigrants. In addition, the INS and State Department are efforts are also eroding with also are eroding the Administration's hard-fought victory on expansion of *child* health coverage. There is widespread fear in immigrant communities that immigrants will have to pay back Medicaid lawfully received, and that if they are unable to do so or if they even *enroll* their children — citizen or immigrant — in Medicaid, this either may be used against them when they re-enter the United States after visits to their native countries or may result in unfavorable rulings in the future on their immigration status. As a result, many immigrants now will not enroll their children in Medicaid or other child health programs. The potential public health ramifications of this effect are well known.

Action Needed

Current INS and State Department operations with regard to Medicaid repayment appear to disregard statutory protections guaranteed to Medicaid recipients and are inconsistent with the Administration's longstanding position of encouraging populations eligible for Medicaid, especially children, to avail themselves of this health coverage. All operations relating to Medicaid repayment and disenrollment in cases where Medicaid benefits were lawfully received should cease immediately. This includes explicit as well as implicit actions. No specific request or even suggestion should be made by the INS or State Department to legal immigrants that these agencies would look more favorably upon immigrants who disenroll from or repay Medicaid benefits. In addition, White House officials should conduct a thorough review of current INS and State Department procedures that require information about an individual's use of public assistance to ensure a proper balance between immigration and benefits policy.

Several steps are needed to terminate the repayment and disenrollment operations.

- The INS and State Department should issue guidance immediately prohibiting field agents and consulates from demanding or suggesting repayment from immigrants who have lawfully received Medicaid benefits either for themselves or for members of their family. Similarly, no one who is eligible for Medicaid should be asked to disenroll.

- HHS should issue guidance immediately to all states that clarifies no state may disclose information regarding individuals who lawfully receive Medicaid benefits to any agency, including the INS or the State Department.

- Finally, both the INS and the State Department should suspend operation of their Border Lookout System and Public Charge Lookout System until they can provide some guarantees that these programs are targeted only at those individuals who have fraudulently obtained Medicaid benefits.

Immigrants are told to pay back aid
Advocates call actions by judges in Miami a form of extortion

The Boston Globe, October 19, 1997

Teresa Mears, Globe Correspondent

MIAMI - When Frantz Michel Bien-Aime asked the US Embassy in Haiti to allow his five children to join him in the United States, he received a surprising request. First, said the embassy, Bien-Aime, who is a naturalized US citizen, had to repay any welfare benefits he had received, including benefits for a child who was born in the United States.

When Scott Aguiar, also a US citizen, petitioned for his Nicaraguan wife's permanent residency in immigration court, he received a similar request. Medicaid had paid for Zoila Aguiar's prenatal care and the birth of their son two years ago. According to an immigration judge, the Aguiars owed the state $3,000.

Bien-Aime and the Aguiars are among hundreds of Miami residents who have been asked to repay government benefits as part of immigration proceedings, even though there is no law requiring them to do so.

Immigrant advocates say the government is improperly extorting money from vulnerable people

"People are desperate to get their residency," said Cheryl Little, executive director of the Florida Immigrant Advocacy Center in Miami. "If it means paying the government money they don't owe, they'll do it."

She and others complain that the practice is also discriminatory. Florida routinely checks the welfare records of only those immigrants from Haiti, though Mark Schlakman, special counsel to Florida Governor Lawton Chiles, said the program may be extended to other Caribbean countries.

State and federal officials say they are not requiring anyone to repay benefits, but merely giving immigrants and their families the "opportunity to take mitigating actions to absolve their application of negative factors such as previous use of Medicaid or other social service benefits," as Chief Immigration Judge Michael Creppy wrote in response to Little's complaints about immigration judges in Miami.

Florida and Massachusetts are two of 10 states participating in a pilot State Department program in which states provide information on welfare benefits an immigrant or his family has received.

visas for his children, saying he doesn't make enough money to support them.

"We do not require past public assistance users to repay state or federal aid," Joan V. Smith, the US consul general in Haiti, wrote to the center. "However, their ability to do so may rebut the presumption that the beneficiary is likely to become a public charge."

After Dec. 19, family members bringing in relatives must have an income of 125 percent of the poverty level and sign binding "affidavits of support" to ensure that their relatives won't rely on public assistance.

For an immigration judge, who is an employee of the Justice Department, to suggest repayment of benefits is unusual, said Elissa McGovern, a senior policy analyst for the American Immigration Lawyers Association.

In Miami, several judges have not only suggested "voluntary" repayment, but have criticized immigrants for accepting services such as Medicaid, immigration lawyers say.

Zoila and Scott Aguiar were not yet married and neither had medical insurance when she became pregnant three years ago. She took Medicaid for prenatal care and the childbirth. Since then, their financial picture has improved, and Scott's job provides medical insurance. Zoila has two jobs.

At Zoila's hearing, immigration Judge Lillian Torreh-Bayouth chastised the couple for accepting Medicaid. When they refused to repay it, she delayed ruling on Zoila's residency.

"If you knew that you were in a bad financial situation, why did you take the risk of having a child?" she asked.

Told that the baby wasn't planned, she responded, "Well, there's protection you can take for that. So why should the taxpayers of this community pay for your mistakes?"

Massachusetts seeks repayment of benefits that were received fraudulently but, unlike Florida, officials said Massachusetts has not been approached by significant numbers of people seeking to repay benefits they received legally.

The State Department's goal is not to seek repayment, but to give visa officers additional information for determining whether someone is likely to become a "public charge," or a drain on state resources and therefore ineligible for an immigrant visa, said Maria Rudensky, a spokeswoman for the State Department.

"If there are any people who are instructed by a consular office to pay back a specific debt, that's erroneous," she said. "They are saying that, if you pay back, we will reconsider your case."

Paying back welfare benefits won't guarantee a visa, because the issue is whether the immigrant or the sponsor can demonstrate future financial stability.

In Dade County, more than 560 families have repaid $2 million in benefits in the last year, and so many more people are seeking to repay benefits that no appointments are available until December, said Gilda Ferradez of the local office of the Florida Department of Children and Families.

Congress and state legislatures have adopted clear guidelines on which benefits immigrants may receive. But some immigrants and even US citizen relatives are discovering that accepting those benefits is being held against them, and many are now refusing benefits even for children born in the United States, advocates say. That is jeopardizing a local effort to enroll uninsured children in Medicaid. It could also threaten a $24 billion federal initiative to extend health coverage to children who don't have insurance, but make too much money to qualify for Medicaid, advocates say.

"It's contradictory public policy," said Daniella Levine, executive director of the Human Services Coalition of Dade County. "If you create a disincentive to enroll eligible children in Medicaid, we're undermining the health of the whole community."

Bien-Aime was informed by letter that he had to repay the benefits his family received before his children, who had remained in Haiti after he left for the United States, could receive visas to come to Miami. He agreed to pay $100 a month until the debt was satisfied.

After the Florida Immigrant Advocacy Center complained, embassy officials in Haiti said he wasn't required to repay. However, they have not approved