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Project SAVE: Can It Work?

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PROJECT SAVE: CAN IT WORK?

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I. INTRODUCTION

Ten million refugees around the world seek to emigrate from their homelands, many of them hoping to settle in industrial nations, including the United States.¹ During 1985, almost 70,000 refugees were admitted legally to the United States, another 6,500 people obtained asylum after demonstrating that they had suffered persecution in their home country, and nearly 600,000 immigrants arrived through legal channels. These numbers do not account for

1. This immigration heritage has been enriched by over 50 million people who have adopted the United States as their homeland. Nelson, *U.S. Refugee Policies Must Be Fair, But Firm*, The Miami Herald, Oct. 25, 1986, at 21, col. 1.

people who entered the country illegally.² The sheer force of the numbers is causing concern, particularly among officials of the Immigration and Naturalization Service (INS), who are wary of the potential for widespread abuse of U.S. immigration laws by aliens entering the country. A consequence of such a flood of immigration is the overburdening of entitlement programs, as many illegal aliens, in addition to legal aliens and citizens who legitimately qualify for such programs, resort to government aid to meet their basic economic needs.

Preventing illegal immigration is a difficult task for the INS, and one which is complicated even more by the agency's internal administrative limitations. This comment discusses the agency's efforts to discourage illegal immigration through implementation of Project SAVE (Systematic Alien Verification Enforcement), by focusing on the program's goals, on the concerns of the states as to their roles in its use, on the problems of identifying which aliens are legally disqualified from receiving entitlement benefits, and most importantly, on the potential for violating civil rights when the INS uses the program as an enforcement mechanism, rather than solely as a tool to deter illegal immigration.

On April 25, 1986, a group of seven Haitians and two local Miami Haitian rights groups filed a federal law suit in Miami on behalf of themselves and others in their class (i.e. all individuals whose work authorizations had been revoked by INS without prior notice of intent to revoke during the period from August 1, 1982 to the date of suit) against FDLES and INS officials.³ The focus of the complaint alleged:

(1) illegal revocation of employment authorization which rendered them unavailable for work and thus ineligible for unemployment compensation;⁴

(2) violations of the Civil Rights Act based on national origin and race discrimination;⁵

2. *Id.*

3. *Augustin v. Harrison*, No. 86-0882 (S.D. Fla. Sept. 29, 1986).

4. This claim alleged violation of INS regulations for failure to grant notice under 8 C.F.R. § 109.2(b) (1986), the Administrative Procedure Act since the policy really amounted to a new administrative rule which had been initiated without complying with 5 U.S.C. § 553 (1982), requiring a general notice of proposed rulemaking to be published in the Federal Register.

5. 28 U.S.C. §§ 1331, 1337, 1343(3), (4) (1982) (regarding claims brought to secure relief under acts of Congress which protect civil rights).

(3) violations under the Administrative Procedures Act by denying work authorization;⁶

(4) due process and equal protection violations under the Fifth and Fourteenth Amendments.⁷

The complaint also charged that the state defendants conspired with the federal defendants to deny unlawfully the alien plaintiffs' unemployment compensation and disaster unemployment assistance to which they were entitled under the Federal Unemployment Tax Act and Social Security Acts.⁸ Plaintiffs sought injunctive and mandatory relief requiring the defendants to restore work authorizations for the period of improper revocation. *Augustin v. Harrison*, No. 86-0882 (S.D.Fla. Sept. 29, 1986).

II. PROJECT SAVE

The goal of Project SAVE is to discourage undocumented immigration by preventing illegal aliens from subsisting on federally funded entitlement programs such as food stamps, welfare, aid for families with dependent children (AFDC), unemployment compensation, and Medicaid.⁹ The theory is that if people, who anticipate immigrating to the United States, understand that they will be barred from any governmental economic assistance, then they will decide not to immigrate.¹⁰ The INS states that SAVE's goal is not necessarily to detect illegal aliens who apply for entitlement benefits in order to deport them.¹¹ Identification is made through use of

6. Under § 89(b), Administrative Procedure Act, 5 U.S.C. § 558(b) (1982): "A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." The plaintiffs claimed that since INS's policy of revoking their work authorizations was not authorized by law, the agency's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1982).

7. Plaintiffs alleged that the defendants' policy of revoking the Haitians' work authorizations was not directed at any other group and was undertaken to discriminate against the plaintiffs and cause their involuntary departure from the U.S.

8. 26 U.S.C. § 3304 (1982), 42 U.S.C. subch. 3 and 4, 42 U.S.C. § 501 (1982).

9. INS So. Region - Investigations Program, *SAVE Seminar* (Oct. 1984) [hereinafter *Seminar*]. The INS proposes that SAVE "will reduce the 'pull' factors which encourage illegal immigration." *Id.* at 3.

10. It is debatable whether illegal aliens come here specifically to live on government entitlement programs. The reasons for coming here are diverse, but include greater economic opportunities, freedom from persecution, and the fact that the United States is located near their homeland.

11. *Seminar*, *supra* note 9, at 12. INS has no statistics as to whether any illegal aliens have decided to return to their homelands after they have been denied entitlement benefits. It is more likely that they remain in the country as a burden on the state and local social

a computer-record matching system aimed at people who apply for benefits, whereby states have automatic access to the INS's Alien Status Verification System. A secondary goal is to provide substantial tax savings for federal and state entitlement programs,¹² as illegal aliens avoid applying for benefits.

According to the INS, SAVE is an excellent way to stem the illegal alien problem.¹³ In fact, the Immigration Reform and Control Act of 1986 makes state use of Project SAVE mandatory for certain federally funded public assistance programs.¹⁴ There are provisions for waiver of the system's use where a state agency can prove the program is not cost effective or is redundant.¹⁵

The INS claims that Project SAVE offers states direct access to INS alien records with appropriate safeguards. At the same time, states retain full control over their programs and resources and the INS does not review state agencies' benefits decisions. Finally, the INS asserts that it, and not the states, assumes full responsibility for enforcing immigration laws.

A. *How Project SAVE Works*

Implementing Project SAVE requires each state agency distributing entitlement programs to install a computer terminal which has access to the INS computer containing the immigration status of each benefits applicant.¹⁶ Local eligibility workers throughout the states then contact the terminal operator to find out the applicant's immigration status and thereby determine whether the applicant has a legal claim for benefits. This is done by matching a person's alien registration number to his INS file.

When a person applies for benefits at a local agency office, he must declare in writing whether or not he is a citizen or national of

service systems.

12. *Id.* at 15.

13. *Id.*

14. Immigration Reform & Control Act, 42 U.S.C. § 121(c)(1) (1986).

15. *Id.* § 121(c)(4)(B).

16. INS projects the SAVE program could be implemented in a state within six months after initial contact with the state's chief executive. First year start up costs (for computer installation and upkeep, personnel, security clearance and access to the communication line) are estimated by INS to be \$22,400 - \$29,500. *Seminar, supra* note 9, at 23. However, Colorado officials have stated their start up costs were approximately \$50,000. Letter from Emily Yaung, National Governors' Association, to Barry Van Lare, Assistant to Florida's Governor Bob Graham (Dec. 3, 1984) (discussing results of a survey of states participating in Project SAVE) [hereinafter Yaung Memo].

the United States.¹⁷ If he answers no, and cannot produce a green card to show he is a permanent resident, he must produce an alien registration number in order to verify his status. The computer operator contacts the INS, and the INS informs the operator whether the person's name and alien number matches the INS alien status in the verification computer records. If the record does not match, then the person is assumed to be "illegal" and thus ineligible for assistance. If the claimant believes he was wrongfully denied benefits, he may have to report to the INS to correct the information provided, or produce additional documentation to prove legal status.

B. Implementing the Program

The INS implemented SAVE on a trial basis in eight states, representing approximately 41 percent of the unemployed population in the United States.¹⁸ Currently, California, Illinois, Colorado and Florida have implemented versions of the program. California has operated a program similar to SAVE for food stamps, AFDC, and MediCal since the mid-1970's. Since 1982, Illinois has used SAVE in its unemployment compensation program. Colorado began operating the SAVE program for unemployment compensation in January 1984 and Florida began its pilot program in 1985. Originally, INS had planned to phase in the use of SAVE in various programs.¹⁹ Phase One was directed at unemployment compensation.²⁰ Phase Two, to be started after successful implementation of Phase One, focused on food stamps, AFDC and Medicaid. Phase Three covered all remaining federal and state benefits programs (such as student loans). Now, with passage of the Immigration Reform & Control Act of 1986,²¹ the INS is required to make the system available to the states by October 1, 1987. States have until October 1, 1988 to begin complying with program requirements.

17. If a person misrepresents himself as a citizen, he is subject to the penalty of perjury. Immigration Reform & Control Act, 42 U.S.C. § 121(d)(1)(A)(1986). The degree to which such a penalty deters dishonesty is questionable.

18. These states were California, Illinois, Colorado, Florida, Texas, New Jersey, New York, and Washington. *Seminar, supra* note 9, at 20.

19. *Id.*

20. Unemployment compensation programs were SAVE's first target because "unemployment compensation represents a comparatively uncontroversial entitlement program. The employed public will likely react favorably to targeting illegal aliens who are recipients of the benefit of unemployment compensation." *Id.* at 23.

21. 42 U.S.C. § 121(c)(1)(1986).

C. *The Pros and Cons of Project SAVE*

INS expects that federal and state agencies will reduce costs by using Project SAVE. Once the program is operating fully in all fifty states, INS estimates savings of almost \$11 billion per year. These savings are based on the Service's assumption of a current annual cost nationally for entitlement programs exceeding \$450 billion annually.²²

However, opponents of Project SAVE contend that the Service bases the savings on several invalid assumptions.²³ The INS assumes that illegal aliens apply for benefits at a rate similar to the general population;²⁴ it also estimates that there are six million undocumented aliens out of a total population of 240 million. In other words, 2.5% of the U.S. population is undocumented.²⁵ However, in 1980, the U.S. Census Bureau estimated the illegal population to be between two and four million.²⁶ In addition to the discrepancy in the size of the illegal population, there is no proof that all illegal aliens apply for public benefits as the INS assumes.²⁷

Second, the INS bases its cost savings on the assumption that aliens receive the maximum amount of benefits allowed under three basic entitlement programs: food stamps, AFDC, and Medicaid.²⁸ Opponents argue that there are no studies supporting this assumption. They cite, instead, a lower utilization rate by immigrants than by the general population.²⁹

Finally, the INS assumes that aliens are illegal if they fail to

22. INS projects Phase I savings to amount to \$109 million; Phase II, \$420 million. *Seminar*, *supra* note 9, at 25.

23. Wong, *Project SAVE: An Assessment from the Civil Rights' Perspective*, 14 IMMIGR. NEWSL. 1 (July - Aug. 1985)[hereinafter NEWSLETTER].

24. *Seminar*, *supra* note 9 at 22.

25. NEWSLETTER, *supra* note 23, at 11.

26. *Id.*

27. Illegal aliens may be less likely to apply for benefits than the general population because of the fear of being caught in the country illegally, and consequently being jailed, deported or at best jeopardizing future efforts to gain legal status.

28. *Seminar*, *supra* note 9, at 14. The average payment per applicant per year is estimated at \$3,000 to \$6,000.

29. NEWSLETTER, *supra* note 23, at 11. A common reason for low usage of benefits by illegal aliens is that they tend to be young, single, working-age males who have no use for the family oriented benefits of Food Stamps and AFDC. Also, since they tend to have few health needs or to ignore them because of their young age, they rarely apply for Medicaid benefits.

Curiously, numerous studies conducted in California and Texas indicate illegal aliens' tax payments "far exceed costs they incur from using public services." *Id.* at 11.

appear at INS interviews after being denied benefits, in order to present records or clarify their status. Opponents of SAVE claim, however, that the lack of records regarding a claimant's alien status does not mean these people are in the U.S. illegally; it may be that the Service simply has no record of those in question.³⁰ In fact, the INS's inability to provide an accurate, up-to-date computer file of aliens' status may well prove to be the "Achilles heel" of Project SAVE.³¹ This is so because the INS takes about a year to enter data into its system. Moreover, manual record-keeping, used before implementation of the computerized system five years ago, meant files could be misplaced or lost. Thus, thousands of aliens are not identified in the INS's computer system.³² As a result, aliens who were issued "A" numbers before 1980 or after 1985 may not appear in the INS computer files.³³ Such an outdated record system has been detrimental to aliens who urgently need economic assistance. For example, unemployment compensation is designed to provide immediate aid to workers. Its improper denial, even temporarily, can have disastrous repercussions.

The case of *Roman-Ramirez v. Bernardi*³⁴ illustrates the consequences of out-of-date computer files on eligible aliens applying for benefits. In that case, aliens (a number of whom were in the country legally) were denied employment compensation benefits when an Illinois Department of Labor computer check of INS files failed to turn up their records. The claimants were denied desperately needed benefits while INS verified their status. In some cases, the claimants had to obtain outside verification on their own, and even after obtaining proof, were still denied benefits. The federal district court consequently ordered the state to grant unemployment compensation until the INS provided written confirmation that a claimant was undocumented. The court also enjoined the state agency and the INS from forcing the applicant to verify his status. The burden was instead on the agency and the INS to show that the alien was ineligible for benefits.³⁵

30. *Id.* at 11-12. The author cites a 1979 study by the General Accounting Office which reviewed the effectiveness of the California program to prevent illegal aliens from receiving public assistance benefits. The results were that 37% of those denied benefits should have been able to receive them. More importantly, the study found that large numbers of aliens simply had no record with the agency even though they were not in the country illegally. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Roman-Ramirez v. Bernardi*, No. 82C2539 (N.D. Ill. June 9, 1982).

35. *Id.* When the records of those denied benefits were reviewed, 62 out of 500 aliens

D. State's Concerns with Project SAVE

The states implementing Project SAVE have raised concerns about the costs of the program and its potential to reduce state expenditures. For example, a pilot SAVE program started by the Washington State Employment Security Department showed a maximum savings of only \$7,270 during its first four months of operation, because only 0.6% of the aliens who applied were found ineligible.³⁶ Yet, in order to screen ineligible aliens, the agency expended \$3,927 in staff salaries alone.³⁷ New York and Colorado have had similar results, which call into question the cost effectiveness of SAVE.³⁸ It should be pointed out, however, that the INS bases its savings potential not only on the number of illegal aliens who apply for benefits and are denied, but also on the ineligible aliens who are deterred from applying for benefits because they know the program exists.³⁹ Opponents claim that the deterrence factor is impossible to verify. Passage of the 1986 Immigration Reform and Control Act should calm states' cost concerns since the law provides for one hundred percent reimbursement to state governments of the total SAVE program costs.⁴⁰

Another of the states' concerns involving the identification of illegal alien applicants and subsequent denial of benefits, is that while the federal government is spared the costs of providing fed-

who had been denied benefits and who had failed to appeal their denials were found to have been improperly classified as undocumented. *NEWSLETTER*, *supra* note 23, at 3. The recently passed Immigration Reform Act specifically states that an alien claimant cannot be denied benefits pending INS verification of his status. Immigration Reform & Control Act, 42 U.S.C. § 121(a)(4)(B)(ii)(1986).

36. Letter from Isiah Turner, Commissioner, State of Washington Employment Security Department, to Rep. Rod Chandler (Feb. 24, 1986)(discussing the state's concerns with Project SAVE).

37. *Id.* The Washington Employment Commissioner further stated that "[b]y the time we add the staff and automation expenses of setting up the overpayments and the collection costs involved, we will have spent more money than was paid out originally." *Id.*

38. New York found that of over \$1 billion paid out annually in unemployment benefits, only \$52,000 was overpaid during a three-month period to aliens who were later found to be ineligible. Colorado saved \$3,046 in benefits during fiscal year 1985, but its program costs were \$10,500, excluding staff time. Out of a total 174,000 applications in three social service programs, only seventeen were found ineligible. Letter from Thomas L. Joseph, Legislative Representative for the National Association of Counties, to House Judiciary Committee Members (May 1, 1986).

39. *Seminar*, *supra* note 9, at 14. INS claims such low percentages of illegal alien participation in a program, once it is established, "demonstrates the long range needs for and value of the program. . . . [I]f illegal aliens perceive that the program is no longer active their participation will grow and soon reach the previous high levels."

40. Immigration Reform & Control Act, 42 U.S.C. § 121(b)(1)-(7) (1986).

erally-funded benefits to ineligible aliens, in most cases these people will turn to local governments for assistance. If they are denied local government assistance, then they will be forced to rely on local charitable organizations. Thus, states are concerned that SAVE will only shift the financial burden from federal resources to state and local governments.

States also point out that their agencies which determine eligibility and distribute entitlement benefits have anti-fraud mechanisms.⁴¹ Consequently, they question the real purpose behind Project SAVE, as well as the costs of installing and implementing the INS computer system.⁴² The states are particularly concerned about:

(1) the cost of agency personnel required to implement project SAVE;

(2) that any money saved reverts to the federal trust fund;

(3) that the U.S. Department of Labor refuses to commit money to the INS to implement SAVE;

(4) that the whole INS system can be evaded by an applicant's claiming to be a citizen; and

(5) that the INS computer data is limited to registered aliens who enter through the visa system, or in some situations, those aliens whom the INS chooses to include in the system.⁴³

As one state official concluded:

An argument could be made that INS has devised Project SAVE for the sole purpose of relieving itself from the financial burden of a costly computer system that provides a limited function. Thus, if states could be induced to use the system, they would mitigate the financial burden to INS.⁴⁴

41. "Since state and local governments pay a large portion of the benefit and administrative costs of federal assistance programs, and have possible federal sanctions imposed for errors in AFDC and food stamps, they already have a deep financial interest in combating waste, fraud, and abuse." Letter from the National Association of Counties representative, *supra* note 38, at 2.

42. Memorandum from Henry Solares, Special Counsel and Governmental Assistant to the Florida Governor, to Steve Sauls, Director of the State of Florida Washington D.C. Office (Feb. 4, 1985)[hereinafter *Memorandum, Feb. 4, 1985*].

43. See *infra* note 99 and accompanying text where the INS targeted Haitians entrants for secondary verification while exempting Cubans.

44. Memorandum, Feb. 4, 1985, *supra* note 42.

E. Privacy Issues

The possible invasion of privacy rights is a third area of concern. The INS has stated that it does not intend for local claims officials to question the citizenship status of people claiming to be U.S. citizens.⁴⁵ A computer cross-check would be made only through an alien's "A" number. However, in limited circumstances, aliens may be required to provide their date and place of birth, and possibly their port of entry. This raises the issue of an alien's right of privacy, which might be violated by the link-up of state and INS computer systems. Problems of discrimination and invasion of privacy could also arise if a local official questioned a person's claim of citizenship due to the applicant's foreign appearance, accent, or skin color. An additional privacy concern is raised if a state has a privacy statute which prevents it from sharing information with the INS.⁴⁶

Finally, the state agency's primary function to provide services may be compromised if the INS uses state information regarding aliens for law enforcement purposes.⁴⁷ In addition, an alien's mere knowledge that the INS is involved in the benefits application process may well discourage qualified applicants from applying due to a fear of the INS. Should a qualified alien be wrongly denied aid by a state based on erroneous information supplied to it by the INS, litigation costs are borne by the state.

Because of the foregoing concerns, states have been reluctant to support mandatory, nationwide implementation of SAVE,⁴⁸ until the questions of accuracy and timeliness, as well as actual program savings and civil rights protections, are resolved. However, provisions of the recently passed Immigration Reform and Control Act are designed to reduce unfair denials and state liability by requiring the state to provide a hearing for those aliens who are denied assistance because of unresolved immigration status.⁴⁹ In ad-

45. Memorandum from Henry Solares to Wallace Orr, Secretary of the Florida Department of Labor and Employment Security (Apr. 2, 1985)(discussing implementation of Project SAVE).

46. For example, in order to uphold an Illinois statute which prohibits the state from sharing with INS any applicant information other than name and social security number, the state places its employees in the INS Chicago office to check INS files. See *Yaung* Memo, *supra* note 16, at 3.

47. *Id.* at 12.

48. Letter from National Association of Counties Representative, *supra* note 38, at 1.

49. Immigration Reform & Control Act, § 121(a)(5)(B)(1986).

dition, a state "may not delay, deny, reduce, or terminate the individual's eligibility for benefits under the program," during the pending verification of an alien's immigration status.⁵⁰

F. Undocumented Aliens: The "Permanently Residing Under Color of Law" Standard

A key stumbling block for the SAVE program is the fact that the INS computer does not list undocumented aliens who are permanently residing under color of law (PRUCOL) in this country.⁵¹ This is because such persons have no "A" registration number. However, federal statutory standards of at least four federal benefits programs indicate that such aliens are eligible for assistance.⁵² As a result, a state may deny benefits to an applicant on the basis of INS information that the person is in the country illegally, but if the alien is in the United States PRUCOL, it may have to defend a suit for wrongful denial.

In *Holley v. Lavine*,⁵³ the United States Court of Appeals first defined the phrase PRUCOL:

The phrase obviously includes actions not covered by specific authorizations of law. It embraces not only situations within the body of law, but also others enfolded by colorable imitation. "Under color of law" means that which an official does by virtue of power, as well as what he does by virtue of right. The phrase encircles the law, its shadows, and its penumbra. When an administrative agency or a legislative body uses the phrase "under

50. *Id.* at § 121(a)(4)(B)(ii).

51. An alien is PRUCOL if he meets the provisions of: § 1157 of tit. 8 Immigration and Nationality Act, § 207(c) (1982) (relating to aliens admitted by the Attorney General as refugees after Mar. 31, 1981); § 1153(a)(7) of tit. 8 (Immigration and Nationality Act, § 203(a)(7)(1982) (relating to aliens granted status as conditional entrant refugees prior to Apr. 1, 1980); § 1158 of tit. 8 (1982) (relating to aliens granted asylum by the Attorney General); § 1182(d)(5) of tit. 8 (1982) (relating to aliens granted temporary parole by the Attorney General).

52. Congress has used the operative language of 42 U.S.C. § 602(a)(33) (1982) as a test for PRUCOL eligibility under a variety of federal programs. These include establishing entitlement to Supplemental Security Income benefits, 42 U.S.C. § 1382c(a)(1)(B) (1982), and to employment compensation 26 U.S.C. § 3304(A)(14)(a) (1982). The same test was used in administering the Food Stamp program, 7 C.F.R. § 271.1(e) (1976) until Congress tightened the requirements for eligibility in 1977, 7 U.S.C. § 2015(f) (1982).

53. *Holley v. Lavine*, 553 F.2d 845 (2d Cir. 1977), *cert. denied sub nom. Shang v. Holley*, 435 U.S. 947 (1978). In that case, an alien sought AFDC benefits for herself and her six dependent children, who were U.S. citizens. Although she resided in the U.S. illegally, the alien possessed an official letter from the INS stating that, for humanitarian reasons, the agency did not contemplate enforcing her departure at that time.

color of law," it deliberately sanctions the inclusion of cases that are, in strict terms, outside the law but are near the border.⁵⁴

In other words, if the INS has knowledge of an alien's illegal presence and has taken no action to remove or enforce his departure from the United States, the Service thereby acquiesces to the person's presence and he is thus embraced within the PRUCOL category.⁵⁵

Although the exact number of PRUCOL categories will vary depending on the particular federal agency and state regulations, the Social Security Administration, in response to the settlement in *Berger v. Schweiker*,⁵⁶ issued a policy directive defining sixteen categories to be considered PRUCOL.⁵⁷ In these situations, their status can only be verified by asking for documentation, because the INS does not have access to their records in its computer files.⁵⁸ In sum, neither illegal entry into the country, nor non-legal status at the time of applying for benefits, is determinative of eligibility to receive assistance.

Various cases in both state and federal courts illustrate the legal aspects of the SAVE Program and the eligibility issues. In the area of unemployment compensation, *Antillon v. Department of Employment*⁵⁹ is noteworthy. The court rejected arguments that Mr. Antillon was ineligible for benefits because he had entered the country illegally or because he never had work authorization from the INS. Rather, the court ruled him eligible on the ground that he

54. *Id.* at 849.

55. The *Holley* court also considered the term "permanently residing in the U.S." as stated in 8 U.S.C. § 1101(a)(31) (1982): "The term 'permanent' means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship is permanent even though it is one that may be dissolved eventually at the instance either of the United States or the individual, in accordance with law." *Holley*, at 850.

56. *Berger v. Schweiker*, No. CV 76 1420 (E.D.N.Y. July 26, 1984).

57. The categories are: conditional entrant, parolee, alien under order of supervision, alien with an indefinite stay of deportation, alien whose visa petition has been approved, alien who has filed for an adjustment of status, alien with a stay of deportation, asylee, refugee, alien under voluntary departure, alien with a deferred action status, alien with a suspension of deportation, alien with a deportation that has been withheld, alien granted Cuban/Haitian entrant status. See note 53 for statutory sources.

58. Documents which these aliens would possess may include I-94, I-220B, I-181, I-210, I-551, or I-151, an order from an immigration judge, a letter from an INS office, a passport, or a combination of these.

59. *Antillon v. Dept. of Employment*, 688 P.2d 455 (Utah 1984). In that case, Mr. Antillon entered the U.S. illegally in 1971, working off and on until he was laid off in 1981 and again in 1982. He filed for permanent residence in 1982 and was told by INS he would be deported, yet no hearing date to show cause why he was not deportable was ever scheduled nor was a hearing made on his application for permanent residence.

was residing under "color of law" when he applied for benefits. Mr. Antillon's residence was determined to be such because the INS knew of it and thus acquiesced to it by exercising its discretion not to deport him. An Oregon court of appeals used the same results as the Antillon court in its handling of *Rubio v. Employment Division*.⁶⁰ In an appeal of a denial of unemployment compensation, the court held, "His residence was under 'color of law,' because INS knew of it and, by its routine extensions of his voluntary departure, had acquiesced in it. At the least, INS exercised its discretion not to enforce the law."⁶¹ The court concluded that the test for alien eligibility in unemployment compensation cases was not whether the claimant was legally entitled to work, but whether he was PRUCOL in this country.⁶²

As previously stated, the requirements for eligibility to entitlement benefits and the extent of PRUCOL language may vary depending on the state and federal agency and regulations involved. For example, various cases are still pending, or have been decided recently, in the areas of Medicaid and AFDC. A class action suit is pending in the United States District Court for the Eastern District of New York (*Lewis v. Krauskopf*),⁶³ which addresses the issue of whether aliens who have had petitions filed in their behalf with the INS are PRUCOL and are therefore eligible for medical assistance under the federal Medicaid program. Meanwhile, a California state appellate court in *Zurmati v. McMahon*,⁶⁴ recently denied AFDC benefits to a woman and her children who had illegally overstayed their visitors' visas. The woman had applied for, but had not received, political asylum and had been told by the INS that she could remain and work in the country until a final decision was made. The court determined that Congress never intended to extend welfare benefits to aliens whose presence in the United States is unlawful and whose sole claim to entitlement rests

60. *Rubio v. Employment Division*, 66 Or. App. 525, 674 P.2d 1201 (1984). Mr. Rubio was in the U.S. illegally when he began working in 1979, using false identification to get the job. He did not receive employment authorization until July 20, 1981. The Employment Division referee found that, because he was not legally authorized to work in the U.S. until July 20, 1981, his earnings prior to that date could not be considered in determining his benefits. The Appeals board upheld the determination but the Oregon Court of Appeals reversed.

61. *Id.* at 527.

62. *Id.*

63. 79 Civ. 1740 (E.D.N.J. filed).

64. *Zurmati v. McMahon*, 180 Cal. App. 3d 164, 225 Cal. Rptr. 374 (1986).

on their filing applications for asylum with the INS.⁶⁵

However, the project SAVE computer system, like all computer systems, is only as good as the information programmed into it. Thus, if INS fails to include PRUCOL in the SAVE program, there is a clear possibility that eligible aliens will be denied assistance and that the system will be used to enforce immigration laws and apprehend aliens—a use which is clearly illegitimate.⁶⁶

Because of the complexity of the various immigration categories, the immigration law itself, the various state and federal agency regulations involved, and INS's failure to program PRUCOL aliens into the system, it is clear that the effects of the PRUCOL standard can be quite crippling to the efficient use of SAVE since the state would have to await written confirmation of the applicant's status from the INS. If the state is statutorily confined to making its ineligibility decision within strict time limits, incomplete information from the INS could subject the state to legal action.⁶⁷ Clearly, people living in the United States cannot be divided simply into "legal" and "illegal" categories. In fact, even if an alien is illegal, he is not always automatically ineligible for entitlement benefits.

G. *Project SAVE in Florida*

Florida's disproportionate alien population, as compared to other states, made it a likely place to implement INS's SAVE program. A pilot SAVE program was initiated in Dade County, Florida in 1984, in conjunction with the state unemployment insurance's system.⁶⁸ One year later, on June 18, 1985, the Florida

65. *Id.* at 381. See also *Sudomir v. McMahon*, 767 F.2d 1456 (9th Cir. 1985). In *Sudomir*, the Ninth Circuit distinguished between aliens such as conditional entrants and temporary parolees who had been granted entry and were thus PRUCOL from illegal aliens who, once having entered the country would contend that their own affirmative acts of applying for asylum entitle them to all the benefits and privileges of those invited to stay. *Sudomir*, at 1459.

66. Immigration Reform & Control Act, § 121(c)(1) (1986).

67. States may not be subjected to federal penalties for any errors made in their determination of an individual's eligibility for benefits based on citizenship or immigration status. Immigration Reform & Control Act, § 121(a)(5)(e) (1986).

68. Memorandum from Thurman D. Burnett, Director of Florida Unemployment Compensation to Wallace E. Orr (Jan. 30, 1986)[hereinafter Memorandum, Jan. 30, 1986]. Before initiation of the pilot program, unemployment compensation claims offices in Dade County were issuing a substantial number of denials of benefits to aliens either because they could not prove eligibility during their base period or because they had no proof of work authorization when they filed their claims.

Department of Labor and Employment Security (FDLES) and the INS signed a memorandum of understanding to implement the program state-wide on a one-year trial basis. The program commenced on October 7, 1985.⁶⁹ The decision to broaden the pilot program was made only after Florida officials had considered the program's drawbacks. The two principal concerns were 1) the fear that the unemployment insurance program would become involved in police action, and 2) the need for adequate funding to carry out the project.⁷⁰ The INS's unreliable computer system⁷¹ and the situation of PRUCOL claimants⁷² raised additional problems. Finally,

At the end of fiscal year 1985, Dade County showed the following savings:		
<u>Program Cost Avoidance</u>		<u>No. of Ineligible Aliens</u>
Unemployment Insurance	\$368,372	224
Supplemental Security Income	542,364	131
Food Stamps	45,148	54
Student Loans	71,450	16
Pell Grants	138,270	35
Secondary Education Loans	1,200	2
Work Study Programs	1,225	1
TOTALS	1,176,039	480

Memorandum from R.M. Kisor, Associate Commissioner for INS Enforcement, to Clarence Coster, Executive Assistant to the INS Commissioner (May 21, 1985).

69. Memorandum from Henry Solares to Congressmen Bill McCollum, Clay Shaw, and Larry Smith (May 30, 1986)[hereinafter Memorandum, May 30, 1986]. Florida officials based their decision to expand SAVE's use on several factors. They included:

[A] desire to determine whether the computer data would further assist claims examiners in identifying ineligible alien claimants, whether the computer verification would speed compensation delivery to eligible alien claimants, the extent to which ineligible alien claimants may be applying for compensation and the costs and benefits for administrative purposes of computer verification as compared to current verification procedures set forth by the U.S. Department of Labor. *Id.*

70. Memorandum from Talmadge Harrison, chief of Florida Bureau of Unemployment Compensation, to Thurman D. Burnett, Director of FDLES, (August 17, 1984).

71. FDLES officials stated that many times alien claimants who had no documentation of legal status were referred to INS for verification but such "informal contacts produced mixed results due to a lack of an established procedure for requiring and providing information." *Id.* at 2. Consequently, claimants who were initially denied benefits based on informal inquiry to INS were later determined to have authentic work authorization stamps. However, "INS felt that their employees had granted some authorizations incorrectly." *Id.* In an attempt to resolve this, "[I]n October 1984, Division (FDLES) officials met with Miami INS representatives to discuss these problems. The representatives agreed that INS would provide a formal written redetermination revoking authorization to work where it felt that the authorization had been improperly granted." *Id.*

72. Legal counsel for the FDLES suggested that because the technical "legal" status of aliens in PRUCOL categories does not necessarily make them ineligible for benefits under Fla. Stat. ch. 433 (unemployment compensation), "the proposed agreement with INS must, for our protection, clearly state that, regardless of an alien's official INS immigration status, we will, in all such cases, make an independent determination of whether the alien is resid-

the possibility of civil rights conflicts arising from a regular program of checking the alien status of claimants in migrant farming areas was recognized as a practice that "would generate a substantial outcry and class action suits."⁷³ Nevertheless, the FDLES chiefs realized that refusing to expand the program beyond South Florida would subject the agency to criticism for improperly paying benefits to illegal aliens.⁷⁴ After weighing the choices, FDLES Chief, T.D. Harrison, recommended expanding the program to comply with the existing law prohibiting benefits to illegal aliens.⁷⁵ As a result, Florida embarked on its Project SAVE Odyssey.

The odyssey begins with the incompatible methods of gaining work status under the INS and state unemployment insurance systems. An alien's eligibility for unemployment insurance is determined by compliance with section 3304(a)(14)(A) of the Federal Unemployment Tax Act.⁷⁶ To qualify for benefits, a Florida claimant must have been working legally during his base period, which is statutorily prescribed. In contrast, the INS computer grants alien work-status authorization only as of the day the application for benefits is made.⁷⁷ If the INS questions the computer verification, then the agency must submit a secondary verification request, along with a photocopy of the document⁷⁸ presented to the claims examiner. The INS must then manually check the immigration status of the claimant. The secondary verification only concerns

ing in the U.S. under color of law." Memorandum from Dan F. Turnbull, Junior Assistant General Counsel for FDLES, to Henry Solares (May 3, 1985).

73. Memorandum from T.D. Harrison, Michael Switzer, J.K. Lowhorn, FDLES officials, to Thurman D. Burnett (Feb. 2, 1985).

74. *Id.*

75. The FDLES director concluded, "We [must] proceed as soon as possible with respect to a verification system. If we try to develop a perfect agreement with INS, the verification system could be delayed indefinitely." Memorandum from Thurman Burnett to Wallace E. Orr (April 19, 1985)(discussing the INS/FDLES Memorandum of Understanding re SAVE).

76. "The Federal Unemployment Tax Act (FUTA), provides that unemployment compensation shall not be payable to an alien unless the alien is lawfully admitted for employment purposes or is present in the U.S. under color of law." 26 U.S.C. § 3304(a)(14)(A) (1982).

77. The three primary responses from the INS computer are: employment authorized, institute secondary verification, or no record for the A-number. These responses do not provide any information concerning a claimant's status during his or her base period.

78. A common problem with the INS data base is that neither a computer check nor secondary verification can be done if the claimant has lost his documentation and cannot provide an A-number. The claimant must obtain a replacement document from INS; this may take weeks or months. INS acknowledges this problem along with admitting that the data base is often incomplete and inaccurate. Memorandum, Jan. 30, 1986, *supra* note 68 at 3.

the alien's current authorization to work. In Florida, 47% of the cases have required the labor intensive secondary verification.⁷⁹ As a result, the state's costs in time, money and headaches for participating in the SAVE program have been substantial.⁸⁰

1. The Effect of Project SAVE on Haitians

While costs to the State of Florida have been high, the price Haitian immigrants have paid as a result of the SAVE system is immeasurable. The majority of the thousands of Haitians who have entered the United States in the past ten years were destitute when they arrived. Because of their impoverished condition, it was imperative that the Haitians be able to obtain employment. For example, Haitians abandoning their country in 1980 left by boat and were often intercepted by immigration authorities as soon as they arrived in Miami. Each Haitian was given an I-94 card bearing a registration number beginning with the letter "A", and was admitted into the country as a Haitian-Cuban entrant and thus was not restricted from working. Many of these parolees found work as migrant farm workers in the rural areas of the state. Eligibility for unemployment benefits became available after working the required number of weeks in covered employment.

Because the Haitian aliens' legal status varied, they were divided into four distinct classes.⁸¹ Those classified as Haitian en-

79. From October 1985 through April 1986, there were 207,530 total claimants in Florida. Alien claimants represented 2.9 percent (or 5,951) of that total. The number of disqualified alien claimants was 0.19 percent (401) of the total number of claimants. During that seven month period, the total amount of compensation payable on average to all claimants was \$279,851,170. Qualified aliens would have accounted for \$7,451,042 of that amount. Disqualified aliens would have averaged a total payable amount of \$539,825 or 0.19 percent of the total benefits payable to all claimants. "It is probable that most of the disqualified aliens were Haitian and they may have had valid claims." Memorandum, May 30, 1986, *supra* note 69 at 2.

80. Florida's costs for participating in the SAVE Program have been quite substantial. In its first year of operation, \$119,000 in state funds were budgeted. More than 75 percent of this amount went to cover labor costs: salaries, benefits, and indirect personnel costs. A proportionate percentage was budgeted to cover second year costs. Memorandum, Jan. 30, 1986, *supra* note 68 at 3.

81. Before passage of the Immigration Reform and Control Act of 1986 (which now allows illegal aliens living in the United States since before January 1, 1982, to begin applying for legal status starting in May, 1987), there were four classes of Haitians for immigration purposes.

(1) *Haitian entrants*: INS estimates that there were approximately 20,000 in Florida with I-94 documents versus a total of about 30,000 in the United States. The I-94 documents were issued in six-month periods with the final documents issued on Oct. 10, 1980. These people

trants and Spellman-class Haitians were considered to have valid parole status; their I-94 documents were marked "work authorized."⁸² Consequently, they did not appear as "hits" on the INS computer verification files.⁸³ Humanitarian parolees also received work authorization,⁸⁴ but the INS attempted to hold deportation/exclusion proceedings for those who failed to pursue asylum claims. These particular Haitians were difficult to find, so INS decided to use Project SAVE to locate those who became unemployed and applied for unemployment compensation. As a result, they appeared as "hits" in INS computer verification files, despite the fact that this third class of Haitians qualified for entitlement benefits because of their PRUCOL status and despite INS's proclaimed intent that Project SAVE was to deter aliens from staying in the United States, rather than to take action against certain identified aliens.

2. Haitians' Work Authorizations Revoked: Enforcement Versus Deterrence

For the Haitians, INS work authorization was essential. Unfortunately, the Miami INS district director began to exercise his right to revoke work authorizations,⁸⁵ in a move which Haitian ad-

were considered indefinite parolees.

(2) *Spellman-class Haitians*: These Haitians were those who were in detention as of June 29, 1982 when they were issued I-94 documents. There were approximately 1,800 under the jurisdiction of the Spellman decision which required them to report to INS on a regular basis for recurring interviews. See *Jean v. Nelson*, *aff'd in part, rev'd in part* 711 F.2d 1455 (1983), *on reh'g* 727 F.2d 957 (1984), *reh'g denied* 733 F.2d 908 (1984), *aff'd as to remand* *Jean v. Nelson*, 472 U.S. 846 (1985).

(3) *Humanitarian Parolees*: These Haitians entered the United States after Oct. 10, 1980 and before June 29, 1982. INS estimates there were approximately 12,000 people in this class. They were issued I-94 cards with work authorization. Their documents were also stamped "entered without inspection."

(4) *Undocumented Haitians*: They were those who entered the United States after June 29, 1982. Their status remains illegal. There were approximately 20,000 people in this class. Memorandum from Henry M. Solares to Steve Sauls (July 9, 1985) (discussing INS meeting of June 27 on Project SAVE).

82. *Id.*

83. *Id.*

84. INS district offices can grant work authorization to any alien who has filed a non-frivolous application for asylum for the period of time necessary to decide the case and to any alien paroled in the United States temporarily for emergent reasons or for reasons deemed strictly in the public interest provided that the alien established an economic need to work. 8 C.F.R. § 109.1 (1986).

85. 8 C.F.R. § 109.2(b) (1986) authorizes a district director to revoke employment authorization after serving the alien with notice of the reasons. The alien then has fifteen days

vocacy groups saw as a form of coercion implemented to cause the aliens to leave the country.⁸⁶ INS officials justified their actions on the grounds that during the 1980 boatlift, approximately 37,000 Haitians and 120,000 Cubans inundated the South Florida INS caseload resulting in work-authorizations being granted "literally at the discretion of desk clerks," according to an INS Miami assistant district director.⁸⁷ The INS further claimed that in a move to tighten its policies, it was revoking many previously granted authorizations. The INS official went on to say that "because it does not have the resources to check all aliens, INS has decided that it is more cost effective to focus attention on aliens who file claims for a variety of benefits."⁸⁸ As a result of having their work authorizations revoked upon applying for unemployment compensation, Haitians in the "humanitarian parolee" class were in a "catch-22" position: they could be eligible for unemployment compensation because of their status as PRUCOL, but because their work authorizations had been revoked, they did not meet the "available for work" requirements of Florida's unemployment insurance law.⁸⁹ Consequently, they were denied benefits.⁹⁰

A crisis was waiting to happen due to the INS's policies in its use of Project SAVE and to the impoverished condition of the Haitian workers. It came in the form of a severe freeze on January 20 and 21, 1985. Numerous Florida counties, including Dade and Broward, were declared disaster areas and special disaster unemployment assistance benefits were made available to agricultural workers. Many Haitians were among those affected.⁹¹ The claims for these benefits were processed like regular unemployment compensation claims, with lists of claimants provided to the INS for

to submit evidence as to why the authorization should not be revoked. The decision revoking authorization is not appealable, nor can an alien challenge the INS ruling's validity, such as in a hearing before the state when unemployment compensation is denied.

86. Memorandum from Talmadge Harrison to Thurman Burnett (Aug. 17, 1984).

87. Memorandum from Michael M. Switzer, Talmadge Harrison and Larry Lowhorn, FDLES officials, to Thurman D. Burnett (Mar. 4, 1985) [hereinafter Memorandum, Mar. 4, 1985], (discussing meeting with INS officials on unemployment compensation claims by aliens and quoting Richard Smith, Assistant District Director for Miami INS office).

88. *Id.* Florida officials believed that INS planned to use Project SAVE to readjudicate Haitians' status even though Washington INS officials claimed no knowledge of the issue. Memorandum from Henry Solares to Wallace Orr (Apr. 2, 1985) (discussing implementation of Project SAVE).

89. FLA. STAT. § 443.091(1)(c) (1985).

90. See *Alfred v. Fla. Dept. of Labor and Employ. Sec.*, 487 So.2d 355 (Fla. Dist. Ct. App. 1986).

91. Plaintiff's Complaint at 15, *Augustin v. Harrison*, *supra* note 3.

screening. The seed was sown for a battle by the Haitians and their advocates against the state and federal governments to uphold the immigrants' rights, as exemplified in the case of *Augustin v. Harrison*.⁹²

The case of Jacques Augustin is a typical example of those Haitians who applied for disaster unemployment assistance during the 1985 winter emergency. Mr. Augustin filed for benefits with his local unemployment insurance office on March 25, 1985, showing a facially valid I-94 card with employment authorization. He was not questioned about his alien status, yet INS was notified and his work authorization was summarily revoked on April 3, 1985 by the Miami district director.⁹³ Even though the director has the discretion to revoke work authorizations "when it appears the conditions upon which it was granted no longer exist, or for good cause shown,"⁹⁴ he is still required to serve notice of the reasons and the intention to revoke on the applicant and allow that person fifteen days from the date of service to submit evidence why authorization should not be revoked.⁹⁵ Yet, during the winter of 1985, 600 Haitian aliens had their work authorizations cancelled without prior notice of intent to revoke.⁹⁶ In Mr. Augustin's case, he was not informed of the April 3 revocation until April 15 when he was held by the state to be ineligible for any type of unemployment compensation.⁹⁷

In addition to the INS's failure to follow its own notice requirement prior to revocation of the work authorizations, it also came to light that Cuban nationals were immune to secondary verification procedures which the Haitians, holding facially legitimate work authorizations, were required to undergo.⁹⁸

92. See *supra* note 81.

93. *Id.* at 16.

94. 8 C.F.R. § 109.2(a) (1986). The cause here for revocation was the Haitians' failure to follow through on asylum claims.

95. 8 C.F.R. § 109.2(b)(1986).

96. Miami INS District Director Perry Rivkind's Response to Interrogatories, *Augustin v. Harrison* (July 22, 1986).

97. *Augustin*, *supra* note 3, at 16.

98. Secondary, or manual verification is performed by INS for those claimants not in the Alien Status Verification Index or if the computer instructs the claims office to undertake such additional verification. In contrast to INS' automatic secondary verification of Haitians holding facially legitimate work documents, Cuban-born aliens were not referred for such secondary verification. The INS has two reasons for this difference:

(1) Cuban nationals were presumed not to present fraudulent documents (while Haitians were apparently not so trusted);

(2) Cubans were subject to Pub. L. 89-732 (Nov. 2, 1966) and thus eligible to become

The deterrent effect of SAVE was having an impact in Florida. Haitian claimants with legal status, in addition to illegal aliens, were deterred when they learned through community sources that application for unemployment benefits, to which they were legitimately entitled, might result in revocation of their work authorizations and put them on the path toward deportation.⁹⁹ These people, who were already living on the periphery of American society,¹⁰⁰ were pushed closer to their economic and emotional breaking point, as they confronted their inability to support themselves and their families, as appeals through the state unemployment compensation system and state courts were denied,¹⁰¹ and as the possibility of complex and drawn-out deportation proceedings, which could take a year or more, loomed near after work authorizations were revoked.

In response to the *Augustin v. Harrison* class action, INS reviewed its files and indicated that they may have improperly revoked the work authorizations of the seven plaintiffs plus over 2300 other aliens.¹⁰² This news caused Wallace E. Orr, the FDLES Secretary, to discontinue secondary verification until the INS's problems with the procedure could be resolved.¹⁰³ Secretary Orr

permanent residents in the United States two years after arrival here; thus, the INS said verification of their status by unemployment insurance offices was administratively inconvenient. Letter from Paul W. Virtue, Associate General Counsel of Washington, D.C. INS office, to Michael M. Switzer, FDLES official (May 9, 1986). See also letter from John F. Shaw, INS Assistant Commissioner for Investigations, to Talmadge Harrison, FDLES Chief of Unemployment Compensation Claims and Benefits (Oct. 11, 1985).

However, INS issued new instructions to Harrison on June 19, 1986 to process Cuban-born applicants for secondary verification due to the rising controversy with the Haitian claimants. Letter from R.M. Kisor, INS Associate Commissioner of enforcement, to Talmadge Harrison (June 19, 1986).

99. Memorandum Jan. 30, 1986, *supra* note 68.

100. Since a number of Haitian aliens have American citizen children, welfare was a possibility. The remainder of their needs had to be met by local community charitable groups.

101. Those with a building sense of outrage included Peter W. Rodino, Jr., Chairman House Judiciary Committee who, in a letter to Edwin Meese, Attorney General, wrote: "The Haitians now deprived of work opportunity had legal authorization to work in this country. Their legal status is the same as the Cubans who entered as part of the Mariel boatlift. Yet these decent hardworking people continue to be treated inequitably and unjustly solely because they are Haitian." (May 8, 1986). See *Alfred*, *supra* note 90, where Haitian claimants were held to be PRUCOL but still ineligible for unemployment compensation benefits because, due to revocation of their work authorizations, they were not able and available to work as required by Florida Statute.

102. Memorandum, May 30, 1986, *supra* note 69, at 3.

103. Letter from FDLES officials to Alan Nelson, INS Commissioner (May 6, 1986). In that letter, Secretary Orr reiterated the understanding Florida had when it entered the program.

also raised additional state concerns about the possibility of selective verification and work authorization revocation of Haitians but not Cubans.¹⁰⁴

The Haitians maintained their position and on September 29, 1986 a settlement was reached.¹⁰⁵ First, all aliens whose work authorizations had been illegally revoked through referrals to Project SAVE would be retroactively reinstated.¹⁰⁶ Second, INS agreed to comply with the notice requirements providing for prior notice of intent to revoke work authorizations. Third, FDLES agreed to implement project SAVE's provisions for verification of status without regard to sex, color, race, religion, or national origin of the individual involved. Fourth, the INS vowed to utilize SAVE in a non-discriminatory manner and agreed to comply with the rule-making procedures of the APA, should it decide to change its policy. Fifth, the INS would be required to respond to state inquiries for secondary verification within ten working days, to avoid unnecessary delays in determining a claimant's qualifications for benefits. If no response within the ten-day period, FDLES must determine eligibility based on the information currently available to them. Finally, the INS was required to reprogram its computer to show all Cuban/Haitian entrants and Spellman-class members as

We were told that the Alien Status Verification Index (ASVI) data base was as accurate as possible and that it was intended to show current status of listed aliens. We were also told that the SAVE program would not be used by INS for enforcement purposes. We were further assured that the immigration laws were being applied in a nondiscriminatory manner in Florida. With these assurances, we entered into the agreement in the face of opposition by certain advocacy groups, confident that our participation was legally proper and would withstand judicial scrutiny. *Id.*

Yet there is evidence that FDLES officials knew as far back as Mar. 1985 that INS was using information provided by the state to improperly revoke work authorizations. INS and the FDLES Claims Division agreed the method then used was "easier than being required to maintain files in suspense." Even though INS was apparently willing to change procedures, the Florida officials decided to continue it until "the legal propriety of the procedure has been reviewed by the Unemployment Compensations Appeal Commissioners." Memorandum Mar. 4, 1985, *supra* note 87.

104. Memorandum, May 30, 1986, *supra* note 69, at 2.

105. INS agreed to notify qualified aliens by means of search and review of FDLES files, placement for sixty-days of advertisements in Spanish and Creole newspapers, and radio broadcasts in those languages. In addition, INS agreed to designate specific persons in the Miami office to deal with questions about and reinstatement of work authorizations.

106. Richard Smith, Director of Investigations for Miami INS, was quoted as saying that even if the work authorizations of the Haitians were reinstated, "We will revoke them again if the aliens don't contact INS. But this time we will give them due process and notice." He said INS had the right to review names sent by the state because the aliens had had time to pursue asylum claims. Fort Myers News Press, July 21, 1986, at 7, col. 2.

employment authorized.

3. Remedial Measures by INS

The INS proceeded to defend itself from further litigation and to correct past misuse of the SAVE program. Beginning in May 1986, the Service began identifying aliens who had received "a defective letter revoking their employment authorization" and "retroactively reinstated the authorization of several hundred aliens."¹⁰⁷ The Service stated that as of May 1986, it had not sent any aliens such a defective letter.¹⁰⁸ The INS also stopped revoking employment authorization for aliens referred through the SAVE program and promised it would no longer use SAVE as a basis for re-adjudicating work authorizations or immigration status.¹⁰⁹ Finally, the INS claimed that as a consequence of a new memorandum of understanding with FDLES, no alien would have employment-authorization revoked based on an FDLES request for information regarding an alien's status.¹¹⁰ In sum, the INS opposed class certification because it said there was no reasonable expectation that the wrong would be repeated due to the Service's voluntary corrective actions.¹¹¹ For its part, the state claimed there should be no class certification because the coordinated SAVE/FDLES unemployment compensation program was not inequitably granting benefits due to the INS's changes in its use of the program. Moreover, any claim the plaintiffs had against the FDLES was subordinate to those of the federal defendants, because the state had no choice but to deny a claimant compensation after work authorization was revoked.¹¹²

107. Federal Defendants' Memorandum Opposing Class Certification at 12, *Augustin*.

108. *Id.*

109. *Id.*

110. *Id.* The plaintiffs' response to this INS defense was:

First, the Memorandum, by its terms, expires on June 30, 1987. Second, its provisions may be amended by agreement of both parties. Finally, the Memorandum may be rescinded by either party or terminated by one party upon written notice to the other. It may even be unilaterally revoked by INS with no notice at all in certain circumstances.

Plaintiffs' Reply to Federal Defendants' Memorandum Opposing Motion for Class Certification, *Augustin*, *supra* note 3, at 15.

111. Memorandum, May 30, 1986, *supra* note 69.

112. Federal Defendants' Memorandum Opposing Class Certification, at 12.

III. PROBLEMS THAT REMAIN

On the surface, Project SAVE would appear to be a valuable program to aid states in removing ineligible aliens from entitlement programs. Nevertheless, upon close scrutiny and in light of the dubious pilot programs in Florida, the potential for misuse and overreaching by the INS and other government officials through manipulation of SAVE is enormous. Lawsuits filed by those unjustly denied benefits, court decisions as to which aliens are entitled to benefits, the provocative data on the number of illegal aliens who in fact use benefits, the true costs and savings to states, as well as other issues and concerns, indicate that SAVE may remain controversial.

States have pointed out that if the purpose and intent behind the program is to save money by weeding out ineligible claimants, then state verification systems already exist which meet this task. They question whether use of the INS's computer program is simply a way to have the states undertake the administrative burden of an incomplete, and often inaccurate computer system of limited use. There is also the continuing fear that the benefits and savings of using the system do not sufficiently outweigh the costs and administrative burdens.

Questions also remain regarding the reliability of the SAVE computer program. The data base, which is the foundation of the verification system, is incomplete for two reasons. First, there are thousands of otherwise eligible aliens who will never appear in the computer due to the loss of their records by the INS. Second, aliens in PRUCOL categories do not appear in the files, resulting in eligible non-citizens being denied assistance, and the system being used to apprehend aliens rather than to deter immigration. While benefits are delayed, immigrant families suffer the hardship brought on by their wrongful denial of assistance. When benefits are illegally denied, states suffer the consequences in time spent on appeals, claims for back benefits and staff time. While the *Augustin* case provides a partial solution to this problem by requiring that INS respond to state requests within ten days, such a requirement might impair a state's savings if a claimant is subsequently found to be ineligible, since the state must attempt to recover the benefits paid. This situation again illustrates the problem of transforming a federal responsibility into a local burden and liability.

A final area of concern involves the civil rights of claimants.

State officials may discriminate as to whom they submit to the secondary verification process; incomplete INS computer files make it impossible to accurately determine who is eligible; and the whole SAVE process is based on whether the claimant is a citizen. While illegal aliens may have a motive to lie about their citizenship, legitimate aliens do not. Thus, the latter may be treated unjustly and subjected to undue hardship and often debilitating distress if INS records are inaccurate. Additionally, the claimant's family often consists of both documented and undocumented members. By denying benefits to the member who cannot prove eligibility, documented members of the family are discriminated against because the mother or father is denied assistance. In fact, such a situation will simply result in the family attaining assistance through another benefit program for which a documented member is eligible.

Finally, the privacy concerns which arise as a result of Project SAVE cannot be ignored. The linking of federal and state data bases may be viewed as another step in the government's ability to act as "big brother." The centralization of data greatly facilitates enforcement activities, but may open the door to abuses which are difficult to curtail.

IV. CONCLUSION

The states and the INS must operate Project SAVE in a neutral, non-discriminatory manner, and under the supervision of the courts where necessary, if they are to have a viable program. A complete federal and state review of pilot programs must be completed in order to judge SAVE's ultimate effectiveness.¹¹³ If every precaution is taken to ensure that the claims of aliens are not unnecessarily delayed due to SAVE, if the program can be shown to be utilized without resort to its use for re-adjudication of immigrant status or work authorization, and if claimants are provided with a fair opportunity to contest decisions made as a result of SAVE, the project will have proven its potential.

MADELYN S. LOZANO

113. The Immigration Reform and Control Act provides for the Comptroller General to make such a report to Congress and the INS Commissioner no later than Oct. 1, 1987 (§ 121(D)(1) & (2) (1986)).