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Last Updated: 2/13/2024

THE WHITE HOUSE

WASHINGTON

August 4, 1981

MEMORANDUM FOR FRANK HODSOLL

FROM: KATE MOORE *K/M*

SUBJECT: Meeting with Coast Guard on Interdiction

Interdiction should commence about August 15 after the following has occurred:

- o Written requests from U.S. to Haiti to confirm understanding that the two governments will cooperate to interdict Haitian boats. Specific confirmation of permission to board Haitian boats is needed (cable to be sent August 4 or 5).
- o Haitians confirm agreement in writing.
- o Presidential Proclamation issued, authorizing Coast Guard to interdict.
- o Coast Guard redirects resources and specific interdiction plan is laid out.
- o Congressional delegation (Dixon of Black Caucus) departs Haiti.

Issues and actions discussed at our meeting this afternoon are noted below.

Legal

- o Presidential Proclamation needs drafting. DOJ to take lead, working with Coastguard. Purpose of proclamation is to direct Coastguard to take action which is not currently within Coast Guard statutory authority but which the President can mandate.
- o Agreement was reached that one individual from the Immigration and Naturalization Service, should be on board for the purpose of making any amnesty determinations required. State's view was that either an INS or State Department official could be on board but both were not required. Admiral Hayes noted that the Presidential proclamation might include reference to this aspect of the interdiction.

- o DOJ will investigate possibilities of confiscating vessels intercepted outside of U.S. waters.

Logistics

- o The Coast Guard proposes to dedicate one "ship day" for the purpose of interdicting Haitians. This would require 3 to 4 Coast Guard ships and occasionally an "embarked" helicopter, (i.e., one that leaves from the ship). The cost associated with this allocation is that interdiction of drugs will diminish.
- o The Coast Guard favors a having on board a naval officer of the Haitian navy. Such an individual could provide insights into a Haitian boat situation, and could serve as a liaison with the Haitian navy. It would be necessary to make clear that the Coast Guard crew was responsible for protecting the Haitians, not the naval officer who would have no authority on the ship. Interrogation of Haitians should occur separate from the Haitian officer.
- o State Department will provide a Creole interpreter on the Coast Guard ship.
- o Efforts would be targeted at traffickers who run motorboats versus sailboats.
- o Upon verifying a boat was attempting to transport illegal aliens into the U.S., the Coast Guard cutter would accompany the Haitian boat back into a Haitian harbor. Use of the Coast Guard cutter to accompany the boat would help make a firm impression that the U.S. is committed to preventing illegal flows.
- o The Coast Guard proposes to establish a liaison at the U.S. embassy in Haiti, with ship to embassy communications to allow the U.S. embassy to contact the Haitians. However, once Haitian naval vessels are operational in this joint effort, there would need to be direct operational communications between the U.S. Coast Guard and the Haitian navy.
- o The Coast Guard often has media representatives on its cutters. A policy decision is required as to whether media should be allowed on Coastguard cutters in this effort to interdict ships.
- o Coast Guard policy in regard to intercepting "small leaking Haitian boats" will be to return them to Haiti.
- o The Coast Guard stressed that if a show of force is necessary they will prosecute it. Admiral Hayes stressed that death can occur, although the Coast Guard is highly cautious. Use of a weapon must be approved by Admiral Hayes. Warning shots must be approved by the District Commander. In the eight years that the Coast Guard has been involved in intercepting drug traffic it has fired into a total of four vessels.

- o State Department and Coastguard will develop a paper by early next week that lays out the international treaty aspects, resources, timing, logistics and media guidance.

Outstanding Issues

- o Given that we are interdicting ships in Haitian waters, what should be our posture with regard to Haitian vessels off U.S. shores? (e.g., beyond 3-mile limit?)
- o How do we assess results of efforts?

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E.O. 12065: GDS 2/3/87 (PREG, ERNEST HA.) OR-M
TAGS: SREF, HA
SUBJECT: IMPLEMENTATION OF HIGH SEAS INTERDICTION BY USCG OF
HAITIAN ILLEGAL MIGRANTS
REF: STATE 203316

1. C-ENTIRE TEXT.

2. SUAMMARY: I RAISED THE POINTS CONTAINED IN REFTTEL WITH FOREIGN MINISTER AND INTERIOR MINISTER. REACTIONS WERE GENERALLY POSITIVE, BUT THE GOH WOULD LIKE A WRITTEN REQUEST, PARTICULARLY CONCERNING PERMISSION TO BOARD HAITIAN VESSELS. AS WE PROCEED WE NEED TO STRESS AS MUCH AS POSSIBLE THAT THIS IS A JOINT EFFORT AND NOT SIMPLY A UNILATERAL US INTERDICTION OF HAITIAN BOAT PEOPLE. WE ALSO NEED TO PLAN CAREFULLY THE INITIAL SEIZURES SO AS TO AVOID CONFUSION AND INCIDENTS WHEN THE BOAT PEOPLE ARE RETURNED. END SUMMARY.

3. UPON RECEIPT REFTTEL, I OBTAINED AN APPOINTMENT WITH FONMIN FRANCISQUE THE MORNING OF AUGUST 3 AND EXPLAINED OUR INTENTIONS ALONG THE LINES OF PARA 6 OF REFLTE. I SOUGHT ASSURANCES AS CONTAINED IN PARA 7 AND MADE AN ORAL REQUEST FOR GOH PERMISSION FOR THEUS COAST GUARD TO BOARD HAITIAN FLAG VESSELS WHICH WE HAVE REASONT O BELIEVE ARE TRANSPORTING ILLEGAL MIGRANTS. THE FONMIN PROMISED FULL SUPPORT IN OUR MUTUAL EFFORTS TO INTERDICT ILLEGAL MIGRATION AND HOPED THAT THIS COPERATION WOULD LATER EXTEND TO DRUG TRAFFICKING AND CONTRABAND MERNANDISE AS WELL. HE CONFIRMD FROM AN ERALIER DISCUSSION THAT RADIO HAITI WOULD MAKE BROADCASTS IN CREOLE CONCERNING INTERDICTION EFFORTS AND THE INENDED PROSECUTION OF TRAFFICERS. AS FOR THE POINTS CONTAINED IN PARA 7, HE RESPONDED THAT HAITI WOULD RECEIVE BACK THE ILLGAL ALIENS

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Approved by *[Signature]*
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BY *MM* NARA DATE *1/19/24*

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INTERDICTION BY THE COAST GUARD, THAT SUCH ILLEGAL ALIENS WOULD NOT BE PROSECUTED UPON RETURN, AND THAT TRAFFICKERS WOULD BE PROSECUTED AND THEIR BOATS CONFISCATED. HIS ONLY QUALIFICATION WAS THAT WE ALSO PROSECUTE AMERICAN TRAFFICKERS AND CONFISCATE BOATS WITH AMERICAN REGISTRY.

4. AS FOR OUR REQUEST FOR PERMISSION TO BOARD HAITIAN VESSELS, THE FONMIN MINI WAS IN GENERAL AGREEMENT, BUT ASKED FOR A NOTE REQUESTING SUCH PERMISSION. HE SUGGESTED THAT THE NOTE BE DRAFTED IN TERMS OF A JOINT UNDERTAKING OF US AND HAITIAN UNITS AS PART OF OUR COOPERATION TO HELP HAITI SOLVE ITS PROBLEM OF ILLEGAL IMMIGRATION. HE ALSO SUGGESTED THAT WE INVITE HAITIAN OFFICIALS TO BE PRESENT ABOARD US COAST GUARD VESSELS DURING INTERDICTION OPERATIONS SO AS TO AVOID ANY LATER MISUNDERSTANDINGS AND TO DEMONSTRATE FURTHER THAT THIS IS A JOINT UNDERTAKING.

5. I HAD A SEPARATE MEETING WITH INTERIOR MINISTER BERROUET WHO WILL HAVE THE MOST DIRECT OPERATIONAL RESPONSIBILITY FOR HAITIAN INTERDICTION EFFORTS. AFTER EXPLAINING THE CURRENT SITUATION, INCLUDING OUR REQUEST FOR PERMISSION TO BOARD HAITIAN VESSELS, BERROUET RESPONDED THAT THE GOH HAS NEVER TOLERATED THIS ILLEGAL TRAFFIC, BUT THAT IT HAD INSUFFICIENT RESOURCES TO CONTROL IT AND WAS PLEASED TO COLLABORATE WITH THE UNITED STATES IN THE INTERDICTION EFFORT. HE NOTED THAT THE MOST EFFECTIVE THE INTERDICTION SHOULD TAKE PLACE AS CLOSE TO HAITI AS POSSIBLE. HE THEN WENT ON TO SPEAK AT LENGTH ABOUT THE NEED TO CREATE JOBS IN HAITI AND PROMOTE DEVELOPMENT IN GENERAL IF THIS PROBLEM IS TO BE FULLY RESOLVED. AS FOR THE ASSURANCES AND REQUEST CONTAINED IN PARAS 7 AND 8 OF THE REFTEL, BERROUET SAID THAT IT SEEMED ALL RIGHT IN PRINCIPLE, BUT THAT HE WOULD LIKE TO SEE OUR REQUEST IN WRITING.

6. COMMENT: IT IS IMPORTANT THAT WE PRESENT THE INTERDICTION EFFORT AS A JOINT UNDERTAKING AND NOT SIMPLY AS A UNILATERAL US ACTION TO STOP HAITIAN BOAT PEOPLE. OTHERWISE THE GOH WOULD BE ESPECIALLY VULNERABLE TO THE CHARGE OF KNUCKLING UNDER TO US PRESSURE IN ALLOWING US TO CONTROL ITS WATERS. FRANCISQUES SUGGESTION TO INVITE HAITIAN OFFICIALS ABOARD OUR US COAST GUARD CUTTERS SEEMS A SENSIBLE STEP IN THAT DIRECTION. ALSO A FOLLOWUP SPECIFIC PROPOSAL TO THE WALTERS/ DUVALIER LETTER TO LEND TECHNICAL AND MATERIAL SUPPORT TO BOLSTER HAITIAN INTERDICTION EFFORTS WOULD BE VERY HELPFUL TO SHOW A BALANCED EFFORT. PUBLIC STATEMENTS, OF COURSE, SHOULD ALSO FOLLOW THIS LINE.

7. WE ARE DRAFTING A NOTE CONTAINING THE ASSURANCES AND

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8. ADDITIONAL QUESTIONS OR POINTS WE WOULD LIKE TO RAISE AT THIS POINT WITH RESPECT TO INTERDICTION EFFORTS ARE:

(A) DO WE INTEND INTERDICTION EFFORTS WITHIN 12 MILE LIMIT AS WELL AS BEYOND, AND WOULD THIS REQUIRE ADDITIONAL PERMISSION TO SEIZE VESSELS OTHER THAN UNDER HAITIAN FLAG?

(B) BASED ON RECENT VISIT BY US TECHNICAL TEAM, DOES US COAST GUARD FEEL CONFIDENT OF FACILITIES IN PORT DE PAIX FOR LANDING INTERDICTION HAITIANS? WILL TRY COAST GUARD PERSONNEL BE NEEDED SHORSIDE DURING THE INITIAL INTERDICTION OPERATION?

(C) HAVE WE MOVED AHEAD WITH AN ARRANGEMENT WITH THE ICM TO HAVE THEIR PERSONNEL IN HAITI BY THE TIME THE BOAT PEOPLE ARE RETURNED TO HAITI? IT IS EXTREMELY IMPORTANT THAT THE FIRST GROUPS OF HAITIANS TO BE RETURNED RECEIVE ORDERLY AND GOOD TREATMENT. IN VIEW OF THE SPARSE FACILITIES IN PORT DE PAIX AND ITS DISTANCE FROM PORT AU PRINCE THIS RECEPTION WOULD NEED TO BE CAREFULLY PLANNED TO INCLUDE THE GOH, THE HAITIAN RED CROSS, THE ICM IF POSSIBLE, AND OURSELVES. (E) WHAT ARRANGEMENTS ARE ANTICIPATED FOR COMMUNICATIONS BETWEEN US COAST GUARD VESSELS AND HAITIAN OFFICIALS ON THE NORTH COAST? AGAIN, THE OBSERVATIONS OF THE TECHNICAL TEAM SHOULD BE USEFUL IN ASSESSING THE CURRENT HAITIAN CAPACITY.

9. A FINAL SEPL EVIDENT COMMENT IS THAT THE INITIAL INTERDICTION EFFORT WILL BE CLOSELY SCRUTINIZED BY THE PRESS AND OTHER OBSERVERS AND WE NEED TO MAKE SURE THE FIRST SEIZURES ARE DONE AS SMOOTHLY AND INCIDENT FREE AS POSSIBLE, EVEN IF THIS ENTAILS SOME DELAY IN THE OPERATIONS. WE ALSO NOTE THAT CODEL DIXON WILL BE IN HAITI FROM AUGUST 11-15, AND MAY STAY A FEW DAYS LONGER ON VACATION. WE SHOULD WAIT UNTIL AFTER HIS DEPARTURE TO BEGIN INTERDICTION ACTIONS. PREFG
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~~C O N F I D E N T I A L~~ STATE 203316

E.O. 12065: GDS 7/31/87 (ENDERS, T.)

TAGS: HA, SREF, PEPR, PORS, MMOL, MOPS, MPOL

SUBJECT: PROBABLE IMMINENT IMPLEMENTATION OF HIGH SEAS INTERDICTION BY USCG OF HAITIAN ILLEGAL MIGRANTS

REF: STATE 196315

1. CONFIDENTIAL - ENTIRE TEXT.

2. ON THURSDAY JULY 30 ATTORNEY GENERAL SMITH INFORMED A JOINT HEARING OF SENATE AND HOUSE IMMIGRATION SUBCOMMITTEE ABOUT THE ADMINISTRATION'S PROPOSAL FOR NEW IMMIGRATION POLICY PACKAGE INCLUDING: STRINGENT ENFORCEMENT PROCEEDINGS INCLUDING THE INTERDICTION AT SEA AND INDEFINITE DETENTION OF MASS ARRIVALS OF ALIENS INCLUDING CUBANS AND HAITIANS NOT OTHERWISE ADMISSABLE.

3. ATTORNEY GENERAL SMITH SAID THE COAST GUARD WOULD REPEAT WOULD BEGIN SELECTIVE INTERDICTION OF INCOMING BOATS FROM HAITI AS SOON AS POSSIBLE, PROBABLY IN THE NEXT SEVERAL DAYS (OR WEEKS).

4. A NUMBER OF ISSUES WILL HAVE TO BE DECIDED AND

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FOR: FONTAINE, KIMMITT, GURIN
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GDS 7/31/87
ENDERS, T.

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Authority: DOS WAWR

BY LM NARA DATE 1/19/29

AGREED UPON IN SHORT ORDER. A NUMBER OF THESE ARE THE PARTICULAR CONCERN AND RESPONSIBILITY OF THE DEPARTMENT OF STATE, ESPECIALLY THOSE CONCERNING THE EFFECT OF THE IMPLEMENTATION OF SELECTIVE INTERDICTION ON OUR BILATERAL RELATIONS WITH HAITI. SPECIFICALLY (BUT NOT NECESSARILY EXHAUSTIVELY) THESE ARE:

A) THE NECESSITY TO INFORM THE GOH OF THIS DECISION.

B) THE NECESSITY TO SECURE GOH AGREEMENT TO RECEIVE BACK INTERDICTIONED VESSELS CARRYING ILLEGAL MIGRANTS.

C) THE NECESSITY TO REQUEST PERMISSION OF THE GOH TO BOARD AND INSPECT HAITIAN VESSELS ON THE HIGH SEAS DEPARTING HAITI WITH MIGRANTS. WE WOULD PREFER A BLANKET PERMISSION BUT WILL BE WILLING (RELUCTANTLY) TO SETTLE FOR PERMISSION ON A CASE BY CASE BASIS.

D) THE NEED TO DETERMINE WHAT CONDITIONS IF ANY, THE GOH MAY INSIST UPON TO ALLOW THE SUCCESSFUL IMPLEMENTATION OF A SELECTIVE INTERDICTION PROGRAM.

E) THE NEED TO PROVIDE DEPARTMENT OF STATE INPUT INTO THE DEVELOPMENT OF THE ACTUAL IMPLEMENTATION PLANS FOR SELECTIVE INTERDICTION SO THAT THEY WILL TAKE ACCOUNT OF GOH REACTIONS AND BILATERAL POLITICAL CONCERNS. IN PARTICULAR WE WOULD WANT TO AVOID BEGINNING A MASSIVE, COSTLY PROGRAM THAT COULD ALIENATE THE GOH AT THE OUTSET.

F) THE NECESSITY FOR CREATING A MECHANISM TO MEET OUR INTERNATIONAL TREATY OBLIGATIONS AGAINST REFOULMENT, I.E. RETURNING REFUGEES TO COUNTRIES OF PERSECUTION.

G) THE NEED TO DEVELOP PRESS GUIDANCE, TALKING POINTS AND CONTINGENCY PLANS TO DEAL WITH THE SPECIFIC CONCERNS ABOUT A SELECTIVE-INTERDICTION PROGRAM WHICH WILL RAPIDLY DEVELOP, E.G. WHETHER FORCE WOULD BE EMPLOYED TO ENSURE COMPLIANCE.

H) THE NEED TO DEVELOP A PUBLIC AWARENESS THAT MUCH OF MIGRATION AT THIS TIME IS IN THE HANDS OF UNSCRUPULOUS TRAFFICKERS AND IS NOT THE SYMPATHY INSPIRING SMALL LEAKY WOODEN BOAT LADEN WITH DEFENSELESS WOMEN AND CHILDREN.

I) THE DEPARTMENT DOES NOT YET HAVE DEFINITIVE ANSWERS TO THE FOREGOING. HOWEVER, WE ARE FACED WITH THE

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IMMEDIATE NEED TO OFFICIALLY INFORM THE GOH OF THE IMMINENT IMPLEMENTATION OF A SELECTIVE INTERDICTION PROGRAM. DURING AMBASSADOR LEGER'S RECENT VISIT TO THE DEPARTMENT HE WAS INFORMED ABOUT THE PRESIDENT'S IMPENDING ANNOUNCEMENT OF THE CONCLUSION OF THE TASK FORCE ON REFUGEES AND IMMIGRATION AND THOSE POINTS OF THIS POLICY THAT WOULD HAVE IMMEDIATE IMPACT ON HAITI (PARA 4 REFTTEL). DEPARTMENT RECOMMENDS THAT POST IMMEDIATELY CALL UPON THE APPROPRIATE OFFICIALS OF THE GOH TO INFORM THEM OF THE IMPENDING IMPLEMENTATION OF THE NEW IMMIGRATION POLICY AND HOW IT WILL AFFECT HAITI USING THE POINTS MADE IN PARA 4 REFTTEL. IN THE RECENT CONVERSATION WITH AMBASSADOR LEGER HE WAS INFORMED OF THE ADMINISTRATION'S DESIRE TO PROMPTLY SEEK ADDITIONAL LEGISLATION TO FACILITATE THE COAST GUARD TO INTERDICT ILLEGAL MIGRANTS AND RETURN THEM TO THEIR COUNTRY OF ORIGIN. WE ARE INFORMED BY DOJ THAT THE AUTHORITY TO BEGIN SELECTIVE INTERDICTION ALREADY EXISTS.

6. ~~SINCE THE ASPECT OF THIS POLICY TO BE MOST IMMEDIATELY IMPLEMENTED IS THE SELECTIVE INTERDICTION PROGRAM AND SINCE THE GOH MUST BE CONSULTED BEFORE ANY SUCH PROGRAM CAN BE IMPLEMENTED; DEPARTMENT REQUESTS THAT POST USE THE FOLLOWING TALKING POINTS IN INFORMING THE GOH ABOUT THE IMPENDING SELECTIVE INTERDICTION PROGRAM:~~

A) THE USG HAS DECIDED TO BEGIN SELECTIVE INTERDICTION OF ILLEGAL MIGRANTS. THIS WILL TAKE PLACE VERY SHORTLY, POSSIBLY WITHIN DAYS. THIS IS SOMEWHAT EARLIER THAN HERETOFOR ANTICIPATED BUT THE URGENCY OF THE PROBLEM REQUIRES A PROMPT AND DIRECT RESPONSE. IN VIEW OF OUR COMMITMENT TO CONSULT WITH THE GOH IN IMPLEMENTING THIS PROGRAM WE WISH TO CLARIFY THE FOLLOWING POINTS AND SEEK RECONFIRMATION OF GOH COOPERATION.

B) SELECTIVE INTERDICTION WILL NOT IN ANY SENSE BE A QUOTE BLOCKADE UNQUOTE OF HAITI.

C) IN SO FAR AS POSSIBLE, IT WILL BE DIRECTED AT TRAFFICKERS OF ILLEGAL MIGRANTS.

D) EMPHASIZE THE QUOTE SELECTIVE UNQUOTE NATURE OF THIS INTERDICTION EFFORT AND POINT OUT THAT INITIALLY ONLY A SMALL NUMBER OF COAST GUARD VESSELS WILL BE EMPLOYED IN THIS EFFORT.

E) (IF ASKED) ONLY THE MINIMUM, NONLETHAL FORCE NECESSARY

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ENSURE COMPLIANCE WILL BE EMPLOYED BY THE COAST GUARD,
CH IS VERY EXPERIENCED AT THIS TYPE OF OPERATION.

THE GOH WILL BE INFORMED WITH AS MUCH ADVANCE NOTICE
POSSIBLE OF THE RETURN TO HAITI OF ANY VESSELS INTER-
CEPTED. (AS PER THE CONCERN EXPRESSED BY AMBASSADOR
MORIER AND THE ASSURANCES GIVEN TO HIM IN PARA 6 REFTEL).

REQUEST THAT POST, AT THE SAME TIME AS IT INFORMS
THE GOH, AS PER THE FOREGOING, SEEK GOH ASSURANCES THAT
IT WILL RECEIVE BACK TO HAITI ANY ILLEGAL ALIENS INTER-
CEPTED BY THE COAST GUARD, THAT SUCH ILLEGAL ALIENS
WILL NOT BE SUBJECT TO PERSECUTION UPON THEIR RETURN,
AND THAT THEY WILL PROSECUTE TRAFFICKERS AND CONFISCATE
VESSELS USED FOR THE TRANSPORTATION OF ILLEGAL MIGRANTS
RETURNED TO HAITI BY THE COAST GUARD MAKING THEM UN-
AVAILABLE FOR CONTINUED USE IN ILLEGAL MIGRANT TRAFFICKING.

8. ALSO, IN ORDER TO ASSIST HAITI IN THE CONTROL OF
ILLEGAL MIGRATION AND TO PROTECT THE UNITED STATES FROM
MUCH ILLEGAL MIGRATION REQUEST THAT POST SEEK BLANKET
GOH PERMISSION TO BOARD HAITIAN FLAG VESSELS WHICH WE
HAVE REASON TO BELIEVE ARE TRANSPORTING ILLEGAL MIGRANTS.

9. DEPARTMENT WILL KEEP POST INFORMED OF DEVELOPMENTS
AS THEY OCCUR AND WILL PROVIDE TO POST FURTHER INFORMATION
WITH REGARD TO THE DETAILS AND SCHEDULE OF IMPLEMENTATION
OF THE SELECTIVE INTERDICTION PROGRAM AS SOON AS THEY
ARE AVAILABLE. DEPARTMENT WILL APPRECIATE POST'S COMMENTS
AND POST'S REPORT OF GOH REACTION AND RESPONSE TO SPECIFIC
REQUESTS. STOESEL

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Assign

MEMORANDUM

THE WHITE HOUSE
WASHINGTON

12 AUG 1981

August 12, 1981

FOR: FRED FIELDING *FF*
FROM: KATE MOORE
SUBJECT: Coast Guard Interdiction

Attached is an opinion from the DOJ's Office of Legal Counsel regarding Presidential authority to initiate interdiction of Haitian vessels attempting to bring illegally aliens to the United States.

According to this opinion, the President has authority to enter into an agreement with Haiti to interdict boats suspected of breaking United States/Haitian migration laws. A Presidential proclamation may be a requirement to initiate this activity. Therefore, I would appreciate your reviewing the attached.

This opinion is also being reviewed by the Legal Adviser's Office (State), the Coast Guard's legal office, and by NSC counsel.

If you have any problems with the attached, please let me know by close of business tomorrow, Thursday, August 13.

Many thanks.

*① OLC opinion
② procedure for interdiction*

Attachment

X 2174

*① Friday 1:00 pm
② Sullivan
③*

*View on OLC opinion
Agreement w/ Haiti
Doq - draft the proclamation*

(wk - 10 days)



U.S. Department of Justice

Office of Legal Counsel

RECEIVED
OFFICE OF THE
ATTORNEY GENERAL

AUG 11 1981

Office of the
Assistant Attorney General

Washington, D.C. 20530

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MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Proposed interdiction of Haitian
flag vessels

This responds to your inquiry of August 7, 1981 concerning the implementation of the proposed interdiction of Haitian flag vessels. As presently formulated, the Government of Haiti and the United States will enter into an agreement (the Agreement) permitting the United States Coast Guard (Coast Guard) to stop Haitian flag vessels, board them and ascertain whether any of the Haitians aboard have left Haiti in violation of its travel laws and whether they intend to travel to the United States in violation of United States immigration laws. Individuals who are determined to have left Haiti illegally will be returned to Haiti pursuant to the President's authority in the field of foreign relations in order to assist Haiti in the enforcement of its emigration laws. Those who have left Haiti, whether legally or illegally, in an attempt to enter the United States illegally will be returned to Haiti pursuant to the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a)(1) to enforce United States immigration laws, to protect our sovereignty, and as an exercise of his power in the field of foreign relations. 1/

The Coast Guard plans to intercept the Haitian vessels in the Windward Passage, on the high seas but relatively close to Haiti. 2/ At that point, Haitians will be headed toward either the United States or the Bahamas. Although experience suggests that two-thirds of the vessels are headed toward the United States, it is probable that, as the interdiction continues, an ever-increasing number will claim they are going to the Bahamas. Unless the Haitians admit they are coming to the United States, establishing their intended destination may become more difficult.

1/ We note that the Agreement does not cover United States vessels, either while they are in Haitian waters or while they are on the high seas. Therefore, the Agreement does not contemplate the return of the Haitians on board such vessels to Haiti.

2/ Placing the Coast Guard vessels closer to the United States is apparently not possible because of the increased difficulties and costs of detecting and interdicting vessels from Haiti once they have traveled far from Haiti and the practical problems of caring for the Haitians during the four day voyage back to Haiti.

1. Effect of the Immigration and Naturalization Act (INA): The interdiction will not be affected by the provisions of the INA. Aliens are entitled to exclusion proceedings only when they arrive "by water or by air at any port within the United States." 8 U.S.C. § 1221. They are entitled to deportation proceedings only if they are "within the United States." 8 U.S.C. § 1251. Asylum claims may only be filed by those "physically present in the United States or at a land border or port of entry." 8 U.S.C. § 1158(a). Since the interdiction will be taking place on the high seas, which is not part of the United States, 8 U.S.C. § 1101(a)(38), none of these provisions will apply.

2. Coast Guard authority to enforce United States laws: The Coast Guard is authorized to stop ships upon the high seas in order to detect violations of American laws. 14 U.S.C. § 89(a). 3/ The interdiction at sea of a foreign flag vessel requires the

3/ This section states:

The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas . . . for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both shall be seized.

permission of the flag state, which the contemplated Agreement expressly grants. 4/ The authority for returning the Haitians who are attempting to enter the United States illegally may be found in both statutory authority and implied Constitutional authority under Article II. The two statutes are 8 U.S.C. §§ 1182(f) & 1185(a)(1). The first, 8 U.S.C. § 1182(f), states:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. 5/

The second, 8 U.S.C.A. § 1185(a)(1), provides:

(a) Unless otherwise ordered by the President, it shall be unlawful --

(1) for any alien to . . . attempt to . . . enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

Under § 1182(f), the President would make a finding that the entry of all Haitians without proper documentation is detrimental to the interests of the United States and issue a proclamation suspending their entry. It could be argued that the entry of illegal aliens, Haitians or otherwise, is already "suspended" since it is already illegal for them to come, and that the section is directed against those who are otherwise eligible. The section, however, is not limited by its terms to documented aliens, and the legislative history is silent on this point. Since the section delegates to the President the authority to exclude entirely certain classes of aliens, we believe that a return of the Haitians can be based on the Coast

4/ The continuing jurisdiction of a country over vessels flying its flag on the high seas is a basic principle of international law. 1 Oppenheim, International Law § 264 (8th ed. 1955). This principle has been codified in the Convention on the High Seas, art. 6. 13 U.S.T. 2313, T.I.A.S. No. 5200. Ships flying no flag may also be stopped to determine if they are stateless.

5/ Neither this Office nor INS is aware of any time when the power granted by this section, added in 1952, has been used.

Guard's power to enforce federal laws. 14 U.S.C. § 89(a).

Likewise, § 1185(a)(1) makes it unlawful for any alien to enter the country unless in compliance with the rules and limitations set by the President. All of the undocumented Haitians who are attempting to enter the country are therefore doing so in violation of this section. See also 8 U.S.C. § 1103 (Attorney General's duty to control and guard the borders); Ex parte Siebold, 100 U.S. 371, 396 (1879). 6/

Implied constitutional power is less clear. Where Congress has acted, the regulation of immigration is an area in which Congress exercises plenary power. Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (power to exclude aliens prevails over First Amendment interests of citizens). There has been recognition, however, that the sovereignty of the nation, which is the basis of our ability to exclude all aliens, is lodged in both political branches of the Government. See Ekiu v. United States, 142 U.S. 651, 659 (1892). An explicit discussion is found in United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950). Rejecting a claim that it should review regulations which excluded a German war bride, the Court stated:

Petitioner contends that the 1941 Act and the regulations thereunder are void to the extent that they contain unconstitutional delegations of legislative power. But there is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. United States v. Curtiss-Wright Export Corp., 299 U.S. 304; Fong Yue Ting v. United States, 149 U.S. 698, 713. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

6/ Given the desperate physical condition of many of the Haitians found on the high seas, the Coast Guard may, in particular situations, also be acting pursuant to its duty to render aid to distressed persons and vessels. 14 U.S.C. §§ 2, 88.

338 U.S. at 542-43 (citations omitted) (emphasis added). See also Savelis v. Vlachos, 137 F. Supp. 389, 395 (E.D. Va. 1955) aff'd, 248 F.2d 729 (4th Cir. 1957) (dictum).

The President, in the exercise of this inherent authority, would be acting to protect the United States from massive illegal immigration. His power to protect the Nation or American citizens or property that are threatened, even where there is no express statute for him to execute, was recognized in In re Neagle, 135 U.S. 1, 63-67 (1890). See also In re Debs, 158 U.S. 564, 581 (1895); United States ex rel. Martinez-Angosta v. Mason, 344 F.2d 673, 688 (2d Cir. 1965) (Friendly, J. concurring); 50 U.S.C. § 1541 (War Powers Resolution). 7/ A recent Supreme Court decision points out that, in the absence of legislation, it was a common perception that the President could control the issuance of passports to citizens, citing the the foreign relations power. Haig v. Agee, No. 80-83 (S.Ct. June 29, 1981), slip op. at 12.

The President may also act to return the boats with the flag state's permission as an exercise of his power in the field of foreign relations, a field in which "with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). See also Narenji v. Civiletti, 617 F.2d 745, 747-48 (D.C. Cir. 1979), cert. denied, 100 S.Ct. 2978 (1980) (regulation of Iranian students); Chicago & Southern Air Lines, Inc. v. Waterman S.S. Co., 333 U.S. 95 (1948) (regulation of foreign airlines). The President's power is strongest where he has well recognized constitutional powers (foreign affairs) to which Congress has added statutory delegation (8 U.S.C §§ 1182(f), 1185).

3. Coast Guard authority to enforce Haitian law pursuant to an Agreement entered into by the Executive: The Coast Guard has submitted a draft Agreement that would permit the Coast Guard to board Haitian vessels in order to determine whether any alien is committing an offense against Haitian emigration laws. The issue which arises is whether the Executive can enter into an agreement under which the United States agrees to detain Haitians who are emigrating in violation of Haitian law in order to return

7/ This Office has relied upon such inherent authority in an opinion, stating that the President could act to prevent airplane highjackings by placing marshals on board, even in the absence of express authority to take such preventive measures. Memorandum to Wayne B. Colburn, Director, United States Marshals from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, September 30, 1970, at 2-3.

them to Haiti. The President's authority to enter into executive agreements with foreign nations may be exercised either under Congressional authorization or the President's inherent authority. 8/ The President's power to enter into such agreements on his own authority can arise from "that control of foreign relations which the Constitution vests in the President as a part of the Executive function," 39 Op. Att'y Gen. 484, 486-7 (1941). 9/ The limits on Presidential power to enter into these agreements are not settled and have aroused controversy from the earliest days of our Republic. 10/

We believe that authority to enter into the Agreement is provided by two sources -- the power delegated by Congress to the President, through the Attorney General 11 to guard the borders, 8 U.S.C. § 1103(a) 12 and the President's authority in the field of foreign relations. The arrest of Haitian citizens as an aid to Haiti's enforcement of its emigration laws will enable the President to curtail the flow of Haitians in the furtherance of his "power and duty to control and guard the borders against the illegal entry of aliens." Id. 13 The breadth of the President's authority in the field of foreign relations is extremely broad, as illustrated by the numerous executive agreements that have been negotiated and upheld by the courts. 11/ See United States v. Pink, 315 U.S. 203 (1942) (Litvinov Agreement); United States v. Belmont, 301 U.S. 324 (1937) (same); Tucker v. Alexandroff, 183 U.S. 424, 435 (1901) (Mexican/United States agreement to permit both countries to cross the border in pursuit of marauding Indians) 12/; Dole v. Carter, 444 F. Supp. 1065, 1068-69 (D.Kansas), motion denied, 569 F.2d 1109 (10th Cir. 1977) (return of the Crown of St. Stephen).

8/ E. Corwin, The President's Control of Foreign Relations 116-17 (1917) (Corwin).

9/ Agreements executed by various Presidents for the settlement of claims of United States citizens against foreign governments are examples. See Dames & Moore v. Regan, 49 U.S.L.W. 4969 (July 2, 1981).

10/ E. Corwin, The President, 216-233 (3d ed. 1948) (debate between Hamilton and Madison over the constitutionality of Washington's Proclamation of Neutrality); L. Henkin, Foreign Affairs and the Constitution 177 (1972) (Henkin).

11/ Henkin, supra, at 179.

12/ 2 W. Malloy, Treaties, Conventions, International Acts, Protocols and Agreements 1144 (1910) (Malloy).

An agreement to aid the enforcement of the laws of another country is not without precedent. In 1891, the United States and Great Britain entered into an executive agreement prohibiting for one year the killing of seals in the Bering Sea. Modus Vivendi Respecting the Fur-Seal Fisheries in Behring Sea, 1 W. Malloy, Treaties, Conventions, International Acts, Protocols and Agreements 743 (1910) (Malloy). This agreement permitted the seizure of offending vessels and persons if "outside the ordinary territorial limits of the United States," by the naval authorities of either country. Id., Art.III. "They shall be handed over as soon as practicable to the authorities of the nation to which they respectively belong. . ." Id. As there was no statutory authority for this agreement, the President acted pursuant to his inherent authority in the field of foreign affairs.

Between 1905 and 1911, Presidents Roosevelt and Taft entered into a series of executive agreements that permitted the United States to operate the customs administration of both Santa Domingo (now the Dominican Republic) and Liberia. 13/

[This first agreement] provided, in brief, for (1) a receiver of 'the revenues of all the customs houses,' to be designated by the President of the United States and satisfactory to the Dominican President; (2) the deposit in a New York bank for the benefit of creditors of all receipts above 45 percent, which was to be turned over to the Dominican Republic for the expenses of government administration and the necessary expenses of collection; and (3) the eventual distribution of the funds in the payment of Dominican debts.

W. McClure, International Executive Agreements 94 (1941). A customs administration in Haiti was established by treaty in 1915 but an elaborate series of executive agreements were signed "both extending and terminating various phases of American intervention and assistance in the financial, medical and military affairs of Haiti." 14/

Many authorities have noted that a President's exercise of his authority in this area is "a problem of practical statesmanship rather than of Constitutional Law." E. Corwin, The President's

13/ 1 Malloy, supra, at 418. See also M. McDougal & A. Lans, Treaties and Congressional-Executive or Presidential Agreements, 54 Yale L.J. 181, 279 (1945); N. Small, Some Presidential Interpretations of the Presidency 78-79 (1970). The arrangement was based on a fear that these countries' debts would be used by European countries as a grounds for military intervention.

14/ McDougal, supra, at 279. The final one was signed in 1934.

Control of Foreign Relations 120-21 (1917). 15/ The Supreme Court has upheld a variety of executive agreements based upon a number of theories and it is difficult to delineate with certainty the limits of the President's authority when he enters into such agreements based solely on his inherent executive authority. But see Reid v. Covert, 354 U.S. 1, 16-19 (1957) (agreement cannot deny civilian his right to a trial by jury). Because this Agreement will be based both on delegated and inherent authority, we believe that it is constitutional.

4. Obligations Under the Convention Relating to the Status of Refugees (Convention), 19 U.S.T. 6223, T.I.A.S. No. 2545: Article 33 of the Convention, to which the United States is a party, provides that "No Contracting State shall . . . return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Individuals who claim that they will be persecuted for one of these reasons must be given an opportunity to substantiate their claims. The Convention does not, however, mandate any particular kind of procedure. We have reviewed the plan outlined in the draft Memorandum for Acting Commissioner Meissner from Associate Commissioner Carmichael (undated) and believe that it comports with the Convention.

5. Effect of the Foreign Assistance Act, 22 U.S.C. § 2151 et seq.: We know of no provision of the Act that would prohibit the interdiction, since no foreign aid funds are being used.

6. Formal implementation of the interdiction: There are three formal steps still to be taken before the interdiction can begin. The first is clearance of the Agreement by the Department of State. The second is the signing of the Agreement by the


15/ Commitment of financial resources overseas "depend[s] directly and immediately on appropriations from Congress While the issue of Presidential power to make executive agreements or commitments has no legal solution, political forces have mitigated its theoretical rigors. The President has to get along with Congress and with the Senate in particular, and he will not lightly risk antagonizing it by disregarding what it believes are its constitutional prerogatives." Henkin, supra, at 183-84. See also K. Holloway, Modern Trends in Treaty Law 216-17 (1967); McClure, supra, at 330; Restatement (Second) of the Foreign Relations Law of the United States §121 (1965).

United States and the Government of Haiti. 16/ The third is the issuance of a Proclamation by the President pursuant to 8 U.S.C. § 1182(f). The Proclamation would contain a finding that the entry of Haitian nationals who do not possess proper documentation for entry into the United States is detrimental to the interests of the United States. The Proclamation would then suspend the entry of all such Haitian nationals. If a decision is made not to rely upon 8 U.S.C. § 1182(f), no Proclamation is necessary. However, the validity of the President's action will certainly be strengthened by relying on both statutory provisions which provide support for the contemplated action.

that are implications of not relying on USC 51182(f)?

The Coast Guard is presently under the authority of the Department of Transportation. 14 U.S.C. § 1. The Attorney General is in charge of enforcing the immigration laws. 8 U.S.C. § 1103. The Coast Guard will be enforcing both the immigration laws and the laws of Haiti pursuant to the Agreement. While a Memorandum of Understanding signed by the Coast Guard, INS, and the Department of State would facilitate operations, 14 U.S.C. § 141, a Presidential order to the Secretary of Transportation to have the Coast Guard act to enforce both parts of the Agreement will avoid any question about the Coast Guard's authority to act.

7. Coast Guard's authority to operate in Haitian waters: Under the Agreement Haiti will grant the Coast Guard permission to enter its waters to return Haitian nationals. The Coast Guard's authority to enter the waters will be pursuant to the Agreement. 17/ By permitting the Coast Guard to enter its waters, Haiti is granting free passage to our ships and crews. Sovereign nations often grant permission for the passage of foreign forces. Tucker v. Alexandroff, 183 U.S. 424, 435 (1901); Schooner Exchange v. M'Faddon, 11 U.S. 116, 139-40 (1812); 2 J. Moore, A Digest of International Law § 213 (1906). We suggest a modification to the Agreement to make it clear that Haiti will not exercise jurisdiction over the Coast Guard ships or her crews while they are in Haitian waters. Schooner Exchange, supra, at 140, 143.


Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

16/ The Agreement should be transmitted to Congress within sixty days. 1 U.S.C. § 112b(a) (Supp. III 1979).

17/ It will not be pursuant to 14 U.S.C. §89(a) because the waters of Haiti are not within the jurisdiction of the United States. United States v. Conroy, 589 F.2d 1258, 1265 (5th Cir. 1979). Section 89(a), however, does not limit the authority of the Coast Guard to act pursuant to another provision of law -- in this case, the Agreement. 14 U.S.C. § 89(c).

Memorandum



Subject	Date
Interdiction at sea: INS procedures onboard U.S. Coast Guard vessels.	AUG 13 1981
	CO 1433

To	From
Rudolph W. Giuliani Associate Attorney General Department of Justice	Doris M. Meissner Acting Commissioner Immigration and Naturalization Service

The attached memorandum to me from Andrew Carmichael, Associate Commissioner for Examinations, sets forth the present plans for meeting the provisions of the Convention and Protocol Relating to the Status of Refugees in conjunction with the interdiction at sea program called for in the Administration's immigration program.

The Convention does not mandate specific procedures (see attached OLC memorandum). It does require that countries not return a person to a country "where his life or freedom would be threatened on account of his race, religion, nationality"

I do not believe that the Attorney General can be satisfied that the procedures, as presently envisioned by the Coast Guard and the Department of State, are adequate to meet the "non-refoulement" obligation under the Convention.

The following procedures contain certain important modifications to the present procedures and represent INS' recommendation for this element of the interdiction program.

INS Personnel

INS will assign two immigration officers and two interpreters for each trip. The officers we have identified are experienced in processing refugee claims, and the interpreters are fully competent in the Creole language. One team will be rotated approximately every three weeks, always keeping an experienced team on duty.

INS officers will be briefed by INS headquarters personnel and

State Department officers from the Bureau of Human Rights and Humanitarian Affairs (BHRHA). Both INS teams will be further briefed by United States Coast Guard regarding maritime procedures.

Advance Publicity in Port-au-Prince

INS should not be involved in the press conference/media event at Port-au-Prince now planned upon the United States Coast Guard's arrival prior to the start of the interdiction effort.

Initial Encounter: Halting and Boarding of Haitian and Flag Vessels within Haitian Waters by U. S. Coast Guard

The Coast Guard, in accordance with its mandate and the procedures in the agreements with the Government of Haiti, will interdict and board Haitian flag vessels. INS officers should not be involved in the actual interdiction but will board the Haitian vessel with Coast Guard officers. The Haitian Naval officer, acting as U.S. Coast Guard liaison, will remain behind on the Coast Guard cutter.

All initial questioning dealing with exit documents, and other documents in possession of aliens will be handled by the Coast Guard through a Creole interpreter. However, experienced INS officers will be present to answer questions regarding the validity of immigration documents and to monitor U.S. Coast Guard questioning of aliens for chance remarks which give subtle rise to possible claims of asylum based on persecution.

INS Officer Direct Involvement

When an alien alleges a documentary or other claim of entitlement to enter the United States (e.g., passport, visa, or claim to United States citizenship) and in the event of an extempore, unsolicited claim to asylum, INS officers will examine the documents or claims in the same manner as an immigration inspector at a pre-inspection station abroad. Should the documents or claims (to United States citizenship) appear valid or based on reasonable facts, the alien or aliens will be cleared by INS officers for onward passage aboard the Coast Guard vessel.

In a voluntary, unsolicited asylum claim, the procedures below will be followed.

INS Pre-screening (1st Stage)

When advised of a voluntary, unsolicited alien claim for asylum, INS officers will:

1. Collect biographic data (name, date, and place of birth, place of residence and nationality.)
2. Ask three foundation questions:
 - a. Why did you leave (Haiti)?
 - b. Why do you wish to go to the (United States)?
 - c. Do you fear return to (Haiti)?

INS Interview (2nd Stage)

If responses to any of the three questions give rise to a possible claim to asylum in the United States, the interview will be expanded and an affidavit taken. A convincing claim would lead to onward passage to the United States where a formal application for asylum would be filed (i.e., the applicant establishes the main elements of refugee character owing to a well-founded fear of being persecuted).

An unconvincing claim would be rejected (i.e., although the applicant's reasons for leaving Haiti are compelling and understandable, the elements to recognize him as a refugee under law do not exist).

A marginal claim would be brought to the attention of the Department of State, Bureau of Human Rights and Humanitarian Affairs (BHRHA) for views leading to INS resolution.

Interpreters

Qualified and experienced INS interpreters will be used during the prescreening and interview stages. Under no circumstances will the INS officer and the qualified interpreter be the same person.

Where will Asylum Claims be Heard?

The Coast Guard identifies the type of vessels targeted for interdiction as coastal freighters ranging from 75 to 110 feet in length and carrying 50 or more passengers. The pre-screening of

even a frivolous asylum case through an interpreter will take 15 or 20 minutes. The processing of a case in depth could take from 45 minutes to one hour. Applying this time formula to 50 or 75 asylum claims could expand the processing for one vessel from several hours to an extended period of time. The United States Coast Guard has indicated that holding a boat full of people adrift in the open sea for such periods is not practical or feasible. INS recommends that the interview or hearing be held on board a U. S. Coast Guard vessel separate and apart from the alien vessel.

Ship to Shore Communications

Department of State, BHRHA, officials will be accessible, by radio communication, to INS officers at all times for consultation on individual claims. The INS 24-hour communication center (633-4110) will provide access to INS Central Office personnel familiar with interdiction procedures during other than regular working hours.

State Department Asylum Officer

INS regulations call for INS to solicit the views of Department of State, BHRHA officials in case-by-case adjudication of asylum claims. For that reason, INS recommends the assignment on board of a Department of State asylum officer.

International Observer

INS strongly urges that an international observer with expertise in refugee-asylum matters (International Red Cross, UNHCR, Amnesty International, etc.) be present at all phases of the interdiction program. Coast Guard officials have indicated no objection to such an assignment but State has not supported this view.

Transportation Onward to the United States

The transportation of persons selected to proceed to the United States can be furnished by United States Coast Guard helicopter or vessel to Guantanamo Navy Base. However, INS raises the possibility that Premier Castro might use this for propoganda purposes. Onward transportation to the United States can be furnished by United States Coast Guard flights between Guantanamo and United States

Coast Guard air station, Saint Petersburg, Florida.

Return of Aliens to Port-au-Prince

INS will not be involved in the press conference/media event planned upon return of the U.S. Coast Guard cutter and the Haitian vessel to Port-au-Prince. U. S. Coast Guard officials, acting with Haitian officials, will escort the aliens ashore.

U.S. Obligations Under International Agreements and INS Authority for Asylum Processing on the High Seas

* Section 208, Immigration and Nationality Act requires that an asylum claim (in a formal way) may be filed only in the United States or at a port of entry thereof. The interdiction effort, being performed in foreign waters or on the high seas, is neither.

On the other hand, Section 207 of the Immigration and Nationality Act contemplates refugee processing abroad in accordance with executive/legislative consultation in advance of the appropriate fiscal year. While Section 207 considerations are viable, those for FY 1981 and thereafter would need consultation with the Congress since there are no Haitian "numbers". Successful applicants would have to be included among unused Latin American allocations.

Another alternative exists. While the Act prohibits parole of refugees, it does not preclude humanitarian parole in an individual case for emergent and/or national interest reasons (Section 212(d)(5) of the Act). INS recommends the use of parole as the legal basis for admitting interdiction asylum claimants to the U.S.

Conclusion

The United States Coast Guard mission of interdiction and INS determination of refugee status must stand apart from each other in order for the Attorney General to demonstrate a procedurally fair process to meet the United States' responsibility under the "refoulement provision" (Article 33) of the Convention.

Also critical to the program's success and to demonstrate fair processing are these elements described above:

- Creole interpreters to be used by USCG and on board the Haitian vessel;
- INS assistance and physical presence on the Haitian vessel; interviews and hearings to be held on the U.S. Coast Guard vessel with INS assistance from State Department (BHRHA) representatives;
- International observer accompanying the mission.

We believe the procedures outlined here will best meet the needs of the program and equally safeguard the opportunity for those who claim to be refugees to substantiate their claim.

Attachments

CC: David Hiller

CC: Carol Williams, OLC

CC: Renee Szybala



Subject

Interdiction at Sea; Procedures to be Followed
by I&NS officers on board United States Coast
Guard Vessels

Date August 7, 1981

To

Doris M. Meissner
Acting Commissioner

From

Andrew J. Carmichael, Jr.
Associate Commissioner
Examinations

The procedures outlined below are based almost entirely on plans and documents announced and discussed at a meeting hosted on August 6, 1981 by Coast Guard officials and attended by several Immigration and Naturalization Service (I&NS) representatives and one officer from the Department of State (Kevin McIntyre, Caribbean Desk). I represented I&NS along with Sandra Stevens of your office, John Rebsamen and Richard Spurlock (Refugee and Parole) and Paul Schmidt and Molly Clark from the Office of General Counsel.

From the outset it was clear that the roles of the various agencies had already been determined even though I am not aware of any previous I&NS input. I must add that there was no representation from Department of State, Bureau of Human Rights and Humanitarian Affairs (BHRHA), in spite of the fact that BHRHA plays a vital role in the asylum process. Nevertheless, on the afternoon of August 6, 1981, members of my staff and I reviewed the entire process with Larry Arthur of Department of State, BHRHA.

The basis of the proposition is that through Presidential Proclamation, Executive Order and Agreement between the United States and the Government of Haiti, GOH, United States officials will enforce the laws of Haiti (exit permits, smuggling, etc.) with due attention being given those (Haitians) who allege a documentary or other claim to admissibility to the United States or who claim (with no solicitation or prompting whatever) flight from Haiti or fear of returning there because of persecution.

Initial Encounter, Halting and Boarding of Haitian and United States Flag
Vessels within Haitian Waters.

All such occurrences will be carried out solely by the Coast Guard in accordance with its mandate and procedures set forth in its rules of engagement and agreements with the GOH. I&NS will have no involvement at this stage. All initial questioning dealing with exit documents, and other documents in possession of aliens will be handled by the Coast Guard. No mention will be made of asylum or of matters related to reasons for flight or fear of return. I&NS officers or interpreters will not participate but will remain on stand-by.

I&NS Officer Involvement

I&NS officers will be called upon when an alien alleges a documentary or other claim of entitlement to entry into the United States (e.g., passport and visa or claim to United States citizenship). Additionally, I&NS officers will be called upon in the event of an extempore unsolicited claim to asylum. In the former instance, I&NS officers will examine documents or claims in the same manner as an immigration inspector at a pre-inspection station abroad. Should the documents or claims (to United States citizenship) appear valid or based on reasonable fact, the alien or aliens will be cleared by I&NS officers for onward passage aboard the Coast Guard vessel. In the latter instance, that is, a voluntary, unsolicited, asylum claim, other procedures will be followed.

Where an Asylum Claim is Raised

It has yet to be determined whether such claims would be heard on the encountered boat or on board the Coast Guard vessel. I&NS strongly favors an interview (hearing), separate and apart from other aliens, on board the Coast Guard ship.

The Refugee Act of 1980

Section 208, Immigration and Nationality Act requires that an asylum claim (in a formal way) may be filed only in the United States or at a port of entry thereof. This interdiction effort, being performed in foreign waters or on the high seas, is neither. On the other hand, Section 207 of the Act contemplates refugees processing abroad in accordance with executive/legislative consultations in advance of the appropriate Fiscal Year. While Section 207 considerations are viable, these for FY 1981 would need consultation with the Congress since there are no Haitian "numbers". Successful applicants would have to be included among unused Latin American allocations. But there is another alternative. While the Act prohibits parole as a refugee it does not preclude humanitarian parole in an individual case for emergent and/or national interest reasons (Section 212(d)(5) Act). I&NS recommends the alternative (parole) approach.

Interviews at Sea (by I&NS):

When advised of a voluntary, unsolicited alien claim for asylum, I&NS officers would act as follows:

1. Biographic data would be collected. These would include name, date and place of birth, place of residence and nationality.
2. Three foundation questions would be asked:
 - a. Why did you leave (Haiti)?
 - b. Why do you wish to go to the (United States)?
 - c. Do you fear return to (Haiti)?

If responses to any of the three questions give rise to a possible claim to asylum in the United States, the interview would be expanded seeking elaboration on any or all of those questions. A full affidavit would be taken. A convincing claim would lead to onward passage to the United States where a formal claim to asylum would be filed (i.e., the applicant establishes the main elements of refugee character owing to a well-founded fear of being persecuted). An unconvincing claim would be rejected (i.e., although the applicants' reason for leaving Haiti are compelling and understandable, the elements to recognize him as a refugee under law do not exist). A marginal claim would be brought to the attention of Department of State, BHRHA for views leading to I&NS resolution.

Convincing claims and those marginal ones receiving favorable Department of State, BHRHA views would trigger onward passage to the United States. Under parole, formal asylum claims under Section 208, Immigration and Nationality Act, could be filed.

Interpreters

Qualified interpreters will be used. Under no circumstances will the I&NS officer and the qualified interpreter be the same person.

Ship to Shore Communications

Department of State, BHRHA, officials will be accessible, by radio communication, to I&NS officers at all times for consultation on individual claims presented.

Other Asylum Oriented Officials on Board

I&NS has traditionally relied on the views of Department of State, BHRHA officials in case-by-case adjudication of asylum claims. For that reason, I&NS strongly favors the assignment on board of a Department of State asylum officer.

I&NS has no objection whatever to, and would indeed welcome the presence on board of an international observer with expertise in refugee-asylum matters. Coast Guard officials have indicated no objection to such an assignment.

Transportation Onward to the United States

The transportation of persons selected to proceed to the United States will be furnished by United States Coast Guard helicopter or vessel to Guantanamo Navy Base. Arrangements are being made for onward transportation to the United States.

Resources

I&NS will assign two immigration officers and two interpreters for each trip. The officers are experienced in processing refugee claims, and the interpreters are fully competent in the Creole language. One team will be rotated approximately every three weeks, always keeping an experienced team on duty.

Briefings

I&NS officers will be briefed by Central Office personnel and State Department officers at Bureau of Human Rights and Humanitarian Affairs. Both I&NS teams will be further briefed by United States Coast Guard in respect to their mission and maritime procedures.

Access to Central Office

The I&NS 24 hour communication center (633-4110) will provide access to I&NS Central Office personnel familiar with the interdiction program during other than regular working hours.

Summary

I&NS officers will not be involved in this exercise unless and until an alien raises a documentary and/or asylum claim. I&NS officers will have authority to make final decisions on asylum claims with or without consultation with Department of State, BHRHA. If a BHRHA officer is on board, routine consultation will take place in each case.

It must be understood that these procedures are subject to review and modification before and during the operation. I shall be pleased to discuss them in detail at anytime.



Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

5 AUG 1981

MEMORANDUM FOR THE ASSOCIATE ATTORNEY GENERAL

Re: Processing of Haitians during interdiction

This responds to an inquiry from your Office on whether we are obliged to provide any kind of hearing for those interdicted on the high seas and returned to the country from whence they came. Because the provisions of the Immigration and Nationality Act dealing with exclusion and deportation are inapplicable, */ the issue is governed by the Convention and Protocol Relating to the Status of Refugees (Convention). 19 U.S.T. 6223, T.I.A.S. No. 2545.

Article 33 of the Convention, to which the United States is a party, provides that "No Contracting State shall . . . return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Those who claim to be refugees must be given a chance to substantiate their claims. The Convention does not mandate any particular kind of procedure and countries have adopted a variety of techniques, both formal and informal, for determining an alien's status. Whether any particular plan would meet our obligations under the Convention is a matter of judgment. Although the Department of State and the INS should be consulted in the first instance, we will be glad to review any plan that is considered.


Larry D. Simms

Deputy Assistant Attorney General
Office of Legal Counsel

*/ Aliens who arrive "by water or by air at any port within the United States" are subject to 8 U.S.C. § 1221 (exclusion). Deportable aliens are those "within the United States" who fall into one of the classes listed in 8 U.S.C. § 1251. The United States does not include the high seas. 8 U.S.C. § 1101 (a)(38).

Kevin-John H. U. Galtore

632-8451

Office of Caribbean Affairs
Department of State.

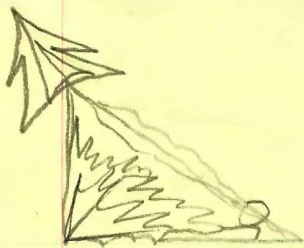
77 = seek legis. to authorize

AG - public that U.S. had auth
to proceed w/o legislation (but w/o
Oce opinion.)



no State memor
No NSC memor

1 Oct



We may need a W.H
push to resolve
this expeditiously.

Frank Hodel has all the
info. or Mike Glinin
NSC.

1007

NO VRC
NO VRC



NO VRC
NO VRC

* ① Stat. Auth. wasn't intended to apply to these situations. (stretching it.)

∴ executive authority.

② No concrete authority cited
features
mail prohibits

③ no discussion of pros and cons.

* ④ What are Haitian laws that U.S. would be enforcing.
Would it offend U.S. substantive principles.

⑤ War Powers Act.
Congressional consent

⑥ Liability of U.S. for boarding
injuries
death.
destruction of property.

How far can

Enforcement of U.S. laws extend / outside
U.S. waters
high seas.

∴ this regarding the border?
How far to border extend.

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H2
FBI
FBI
FBI

CABINET ADMINISTRATION STAFFING MEMORANDUM

DATE: April 18, 1981 NUMBER: 018507CA DUE BY: --
 SUBJECT: Immigration Task Force: 4/10 Report

	ACTION	FYI		ACTION	FYI
ALL CABINET MEMBERS	<input type="checkbox"/>	<input type="checkbox"/>	Baker	<input type="checkbox"/>	<input type="checkbox"/>
Vice President	<input type="checkbox"/>	<input type="checkbox"/>	Deaver	<input type="checkbox"/>	<input type="checkbox"/>
State	<input type="checkbox"/>	<input type="checkbox"/>	Allen	<input type="checkbox"/>	<input type="checkbox"/>
Treasury	<input type="checkbox"/>	<input type="checkbox"/>	Anderson	<input type="checkbox"/>	<input type="checkbox"/>
Defense	<input type="checkbox"/>	<input type="checkbox"/>	Garrick	<input type="checkbox"/>	<input type="checkbox"/>
Attorney General	<input type="checkbox"/>	<input type="checkbox"/>	Darman (For WH Staffing)	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Interior	<input type="checkbox"/>	<input type="checkbox"/>	Gray	<input type="checkbox"/>	<input type="checkbox"/>
Agriculture	<input type="checkbox"/>	<input type="checkbox"/>	Beal	<input type="checkbox"/>	<input type="checkbox"/>
Commerce	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
Labor	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
HHS	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
HUD	<input type="checkbox"/>	<input type="checkbox"/>			
Transportation	<input type="checkbox"/>	<input type="checkbox"/>			
Energy	<input type="checkbox"/>	<input type="checkbox"/>			
Education	<input type="checkbox"/>	<input type="checkbox"/>			
Counsellor	<input type="checkbox"/>	<input type="checkbox"/>			
OMB	<input type="checkbox"/>	<input type="checkbox"/>			
CIA	<input type="checkbox"/>	<input type="checkbox"/>			
UN	<input type="checkbox"/>	<input type="checkbox"/>			
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Remarks: For your review and information.

RETURN TO: Craig L. Fuller
 Deputy Assistant to the President
 Director,
 Office of Cabinet Administration
 456-2823

Memorandum



Subject Immigration Task Force -- Cuban and
Haitian Materials

Date
April 10, 1981

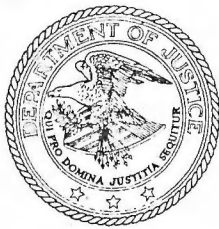
To Task Force Members

From David Hiller, Special Assistant
to the Attorney General

There are enclosed the background materials sent today to the Cabinet.

The Policy Group of the Task Force will meet on Monday, at 4:00 p.m., in Conference Room A of the Department of Justice, to give final consideration to these materials.

The Cabinet will meet on Wednesday, April 15, at 4:00 p.m., at the Roosevelt Room of the White House to consider these issues.



Office of the Attorney General

Washington, D. C. 20530

April 10, 1981

MEMORANDUM FOR THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE SECRETARY OF EDUCATION
THE SECRETARY OF LABOR
THE SECRETARY OF HEALTH AND HUMAN SERVICES
THE SECRETARY OF TRANSPORTATION
THE SECRETARY OF THE TREASURY
THE DIRECTOR OF THE OFFICE OF MANAGEMENT
AND BUDGET
THE DIRECTOR OF THE FEDERAL EMERGENCY
MANAGEMENT AGENCY
THE DEPUTY ASSISTANT TO THE PRESIDENT

FROM: THE ATTORNEY GENERAL

As your offices already have been advised, a meeting of the President's Task Force on Immigration and Refugee Policy is scheduled for Wednesday, April 15, 1981, at 4:00 p.m. at the Roosevelt Room in the White House.

The purpose of that meeting is to address four categories of issues with respect to Cuban and Haitian migration to the United States.

Please find enclosed three documents: (1) the agenda for Wednesday's meeting; (2) a briefing paper on Cuban-Haitian issues; and (3) a set of papers containing additional background information for your further reference.

I look forward to seeing you on Wednesday.

Enclosures



United States Department of Justice
Washington, D.C. 20530

ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Authority to return undocumented Haitian
aliens to Haiti after interdiction of
Haitian vessels on the high seas

This responds to Mr. Hiller's request of March 19, 1981 for our opinion on a proposed interdiction of Haitian-owned or stateless vessels carrying undocumented Haitian aliens towards the United States. We have been unable to find any precedent for such an operation. Nor have we found any example of the President's using inherent executive authority to regulate immigration in the years before Congress first enacted extensive immigration legislation. We believe, however, that the proposal is adequately supported by certain broad statutory provisions coupled with the President's implied powers under Article II of the Constitution.

I. Background

The interdiction would occur in the strait between Haiti and the Bahamas, some distance from the southern coast of Florida. 1/ The ships would be stopped and searched for evidence of intent to violate our immigration laws. 2/ If evidence were discovered, the Haitians would, if their ships were sturdy enough, be towed back to a port in Haiti. Refugee claims would be adjudicated on board the Coast Guard vessel by a team from the State Department or the Immigration and Naturalization Service

1/ We agree with, and therefore do not repeat, the Criminal Division's analysis of the Coast Guard's authority to stop and board such vessels if permission is given by the Haitian government. Memorandum from Mark Richard, Deputy Assistant Attorney General, Criminal Division to Paul R. Michel, Associate Deputy Attorney General, January 22, 1981. The only question which this memorandum addresses is the authority, if any, to return the Haitians to Haiti.

2/ There may be difficult questions of proof involved at that point.

(INS), a Creole interpreter and, possibly, a representative of the United Nations High Commissioner for Refugees. Refugee Act of 1980, § 201(b), Pub. L. No. 96-212, 94 Stat. 102.

The Criminal Division's Memorandum bottoms its analysis of the Government's authority in this area on an argument that the return of the aliens to Haiti is authorized because it fulfills the legislative purpose of 8 U.S.C. § 1323 (punishment of those who unlawfully bring aliens into the United States) and is "necessary" to the section's proper administration. Memorandum, p. 31-2. We disagree. Congress' enactment of 8 U.S.C. § 1323 is its clearest statement of how it wished to punish smugglers -- by a fine of \$1000 per illegal alien. 8 U.S.C. § 1323(b). Further, since the primary purpose of § 1323 is to punish the smugglers, not the aliens, the forcible return of the aliens to Haiti would not appear to fulfill the section's purpose. Certainly the section is meant to discourage illegal immigration. This argument, though, applies to all the penalty provisions -- indeed, to most of the Immigration and Nationality Act (INA). Where Congress has explicitly prescribed the method of dealing with smugglers -- arrest 3/, fines 4/ and felony prosecutions 5/ -- we do not believe that the Executive may create a new method of dealing with the problem. See United States ex rel. Martinez-Angusto v. Mason, 344 F.2d 673 (2d Cir. 1965); C. Gordon, E. Gordon, and H. Rosenfield, Immigration Law & Procedure, §§ 1.5b, 2.2, 4.4 (1980) and cases cited therein (Gordon & Rosenfield).

II. Arguments in Favor of Power to Interdict

Arguments supporting the proposed interdiction are either that Congress has provided sufficient flexibility in the INA itself to authorize the interdiction or that control of aliens on the high seas is an area in which Congress has not legislated to the exclusion of President's implied constitutional authority to act. We believe that the former argument provides a more substantial basis on which to proceed.

3/ See 8 U.S.C. §§ 1324(b), 1357(a).

4/ See 8 U.S.C. § 1323(b).

5/ See 8 U.S.C. § 1324(a).

A. Statutory Power

There are two statutes which could be read to authorize the operation. The first, 8 U.S.C. § 1182(f), states:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. 6/

The second, 8 U.S.C.A. § 1185(a)(1), provides:

(a) Unless otherwise ordered by the President, it shall be unlawful --

(1) for any alien to . . . attempt to . . . enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

Using § 1182(f), the President could make a finding that the entry of all Haitians without proper documentation is detrimental to our interests and issue a proclamation suspending their entry. It could be argued that the entry of illegal aliens, Haitian or otherwise, is already "suspended" since it is already illegal for them to come, and that the section is directed against those who are otherwise eligible. The section, however, is not limited by its terms to documented aliens and the legislative history is silent on this point. Since the section delegates to the President the authority to exclude entirely certain classes of aliens, we believe that a return of the Haitians could be based on the Coast Guard's power to enforce federal laws. 14 U.S.C. § 89(a). Likewise, § 1185(a)(1) makes it unlawful for any alien to enter the country unless in compliance with the rules and limitations set by the President. All of the undocumented Haitians who are attempting to enter the country are therefore doing so in violation of this

6/ Neither this Office nor INS is aware of any time when the power granted by this section, added in 1952, has been used.

section. See also 8 U.S.C. § 1103 (Attorney General's duty to control and guard the borders); Ex parte Siebold, 100 U.S. 371, 396 (1879).

B. Implied Constitutional Power

The argument for implied constitutional power is less clear. The regulation of immigration is one in which Congress exercises plenary power. Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (power to exclude aliens prevails over First Amendment interests of citizens). There has been some recognition, however, of the fact that the sovereignty of the nation, which is the basis of our ability to exclude all aliens, is lodged in both political branches of the Government. See Ekiu v. United States, 142 U.S. 651, 659 (1892). An explicit discussion of the wide discretionary scope this gives the President is found in United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950). Rejecting a claim that it should review regulations which excluded a German war bride, the Court stated:

Petitioner contends that the 1941 Act and the regulations thereunder are void to the extent that they contain unconstitutional delegations of legislative power. But there is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. United States v. Curtiss-Wright Export Corp., 299 U.S. 304; Fong Yue Ting v. United States, 149 U.S. 698, 713. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

338 U.S. at 542-43 (citations omitted) (emphasis added). See also Savelis v. Vlachos, 137 F. Supp. 389, 395 (E.D. Va. 1955) aff'd, 248 F.2d 729 (4th Cir. 1957) (dictum).

We would argue that the President, in the exercise of this inherent authority, is acting to protect the United States from massive illegal immigration. The President's power to

act to protect the Nation or American citizens or property that are threatened, even where there is no express statute for him to execute, was recognized in In re Neagle, 135 U.S. 1, 63-67 (1890). See also In re Debs, 158 U.S. 564, 581 (1895); United States ex rel. Martinez-Angosto v. Mason, 344 F.2d 673, 688 (2d Cir. 1965) (Friendly, J. concurring); 50 U.S.C. § 1541 (War Powers Resolution). 7/ But see United States v. Western Union Telegraph Co., 272 F. 311 (S.D. N.Y.) (A. Hand, J.), aff'd, 272 F. 893 (2d Cir. 1921), rev'd per stip., 260 U.S. 754 (1922) (President's inability to prohibit landing of submarine cables). This argument would be joined with an argument that the President may act to return the boats with Haiti's permission as an exercise of his power in the field of foreign relations, a field in which "with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). See also Narenji v. Civiletti, 617 F.2d 745, 747-8 (D.C. Cir. 1980) (regulation of Iranian students); Chicago & Southern Air Lines, Inc. v. Waterman SS. Co., 333 U.S. 95 (1948) (regulation of foreign airlines). The President's power is strongest where he has well recognized constitutional powers (foreign affairs) to which Congress has added statutory delegation (8 U.S.C. §§ 1182(f), 1185). 8/ Immigration is not an area,

7/ This Office invoked inherent authority in a recent opinion, stating that the President could act to prevent airplane high-jackings by placing marshals on board, even in the absence of express authority to take such preventive measures. Memorandum to Wayne B. Colburn, Director, United States Marshals from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, dated September 30, 1970, at 2-3.

8/ Without the statutory delegation, we could argue that immigration is an area in which the President has concurrent authority and may act without statutory authority in exigent circumstances. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). A likely response to this would be that there is nothing exigent about a situation that has existed for several years. Further, the Justices did not agree among themselves whether even threats such as imminent invasion were sufficient to provide such power. Compare 343 U.S. at 661-62, 687-700, with id. at 587, 613, 632, 652, 659.

however, in which the President's independent power is well-established. ^{9/}

III. Arguments Against Power to Interdict

It must be recognized that Congress has put in place an extensive statutory scheme dealing with immigration -- a scheme that applies both within and without the United States. An alien anywhere in the world, if he is on some country's soil, is subject to Congressional legislation regarding his rights to admission to the United States. Congress has mandated procedures for those who do arrive illegally --- some of which are quite summary in nature. See 8 U.S.C. §§ 1282(b), 1323(d). While we would argue that the President is acting pursuant to Congressional authority, a strong counter-argument could be made that in fact the President is acting in the area of his smallest power -- contrary to the express or implied will of Congress as stated in the INA. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638-9 (1952) (Jackson, J., concurring). Not only does the INA represent the Congress' studied judgment of how it wants to treat smugglers and illegal aliens, but it is clear that Congress is willing to treat certain groups of illegal aliens favorably. See 2 Gordon & Rosenfield, § 7.8 (refugee legislation). As recently as last October, some of the Haitians were granted a status that entitled them to certain social welfare benefits. Refugee Education Assistance Act, Pub. L. No. 96-422, 94 Stat. 1799. This ratification process, repeated as it has been for many groups, would support an argument that Congress prefers to deal with such problems on an ad hoc basis, rather than equipping the President with more forceful exclusionary methods.

The courts have been reluctant, in analogous situations, to find implied power to return aliens to their countries. The Second Circuit has held that, in the absence of express authority, the INS could not arrest a Spanish crewman who deserted his ship without violating the crewman's rights under the Fifth Amendment. United States ex rel. Martinez-Angosta v. Mason, 344 F.2d 673 (2d Cir. 1965). The Court found that the INS only had authority to arrest an illegal alien in order to begin deportation proceedings, id. at 680, not to arrest to enforce the desertion provisions of a Spanish-American treaty. This was so even

^{9/} "The doctrine of implied power does not apply to the actions of executive officers [in immigration]. The authority of such officers to act is limited to the zone charted by Congress. If such officers depart from the channels of authority fixed by statute they act illegally." 1 Gordon & Rosenfield, § 1.5b.

though the crewman admitted that he was in the country illegally. See also United States ex rel. Valentine v. Neidecker, 299 U.S. 5 (1936) (President lacked authority to extradite in the absence of a treaty). Opponents of the return procedure would no doubt argue that the Coast Guard lacks any statutory authority to arrest aliens except as the first step in processing them under the INA. We would note, however, that Judge Friendly concurred in Martinez-Angosta only because he believed that the President did have the inherent power to designate the INS as the proper arresting authority and could exercise that power at once to fill the procedural void. Id. at 688. In our case, the Coast Guard would have received its directions from the President.

IV. Conclusion

We believe that the President's authority in the field of foreign affairs, coupled with the delegations from Congress expressed in 8 U.S.C. §§ 1182(f) & 1185, authorize a program in which Haitian vessels are, with the permission of the Haitian government, stopped on the high seas while en route to the United States and forcibly returned to a port in Haiti. The President's power in this area, however, could clearly be clarified and strengthened by appropriate legislation, and the outcome of a legal challenge to such a program of interdiction without additional legislation is uncertain.^{10/}

^{10/} There is some doubt whether anyone would be able to challenge the plan. It is possible, as recognized by the Criminal Division, that the district court in Florida might be sympathetic to suits filed by third parties challenging the plan. Although the aliens returned to Haiti would probably lack standing to sue, see Kleindienst v. Mandel, 408 U.S. 753, 762 (1972); Johnson v. Eisentrager, 339 U.S. 763 (1950); Berlin Democratic Club v. Rumsfield, 410 F. Supp. 144, 152 (D.D.C. 1976), there is a statute which permits aliens to sue for torts committed in violation of the law of nations. 28 U.S.C. § 1350. A Second Circuit decision has interpreted this provision as incorporating a broad body of international human rights law. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). Filartiga was recently followed by a district court in Kansas. Fernandez v. Wilkinson, No. 80-3183 (D. Kan. Dec. 31, 1980). Fernandez held that the international norm prohibiting arbitrary detention protected Cubans who were being detained in

(continued)

We do not address the policy of this operation.

Larry L. Simms
Acting Assistant Attorney General
Office of Legal Counsel

/ (continued)

American prisons as inadmissible aliens. The Criminal Division has decided not to appeal this case. Cf. Nguyen da Yen v. Kissinger, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975); De Pass v. United States, 479 F. Supp. 373 (D. Md. 1979).