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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. memo	H P Goldfield to Fred Fielding re: Status of Immigration Policy Legislative Proposals. 3p.	10/20/81	~~P5~~
2. memo	Mike Horowitz to Ed Harper, Glenn Schleede and Annelise Anderson re: Haitian refugees 3p.	9/16/81	~~P5~~
3. memo	Bob Carlstorm to Annelise Anderson, Frank Hodsoll, Mike Uhlmann et al re: Immigration Policy Legislative Proposals-Remaining Issues. 8p.	10/15/81	~~P5~~ KB 10/24/00

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]
- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]
- F-1 National security classified information [(b)(1) of the FOIA].
- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-3 Release would violate a Federal statue [(b)(3) of the FOIA].
- F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
- F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

held inadmissible for purposes of impeachment and it would mean elimination of the requirement that no person other than the one whose privacy rights were infringed has standing to ask for the invocation of the rule. Yet the Court has refused to apply the rule in the case of evidence used for impeachment, Walder v. United States, 347 U.S. 62 (1954), and the recent standing cases such as Rakas v. Illinois, 349 U.S. 128 (1978), and United States v. Payner, 447 U.S. 727 (1980), reemphasize that only a person aggrieved by an allegedly unlawful search or seizure can invoke the rule.

Moreover, in Payner the Court stated significantly that its "cases have consistenly recognized that unbending application of the exclusionary sanction to enforce ideals of government rectitude would impede unacceptably the truth-finding functions of the judge and jury." 447 U.S. 727. Modern cases turn on a balancing of deterrence against the harm done to the truth-finding process when the rule is applied. For example, in Stone v. Powell, 428 U.S. 465 (1976), the issue was whether to apply the rule to cases in which state prisoners who had previously been given the opportunity to seek application of the rule in state courts could again seeks its invocation when they collaterally attacked their convictions on federal habeas corpus. In

holding that such search and seizure claims were not available on collateral attack, the Court in Stone alluded to the well known costs of applying the rule, noting that it "deflects the truth-finding process and frees the guilty." 428 U.S. 465, 490. The question whether the rule should be applied in a particular context, such as collateral relief from Fourth Amendment violations, is answered "by weighing the utility of the exclusionary rule against the costs of extending it." 428 U.S. 465, 489.

In addition, there is substantial doubt about whether the rule actually deters and the complexity and volume of appellate cases making up the "law" of search and seizure suggest that it does not. The Supreme Court seems to be moving toward applying the rule only when the conduct of the police is capable of being deterred and refusing to apply it, e.g., in cases of an arrest pursuant to a good faith reliance on a statute or rule later declared invalid. Michigan v. DeFillippo, 443 U.S. 31, United States v. Peltier, 422 U.S. 531. Moreover to the minor degree that "judicial integrity" may still be a factor supporting the exclusionary rule generally, it is significant that the Court stated in Peltier that "judicial integrity is not offended if law enforcement officials reasonably believed in good faith that their conduct

was in accordance with the law." Id. at 538. Thus our proposal to exempt reasonable, good faith searches and seizures from the operation of the rule is consistent with both the deterrence and judicial integrity principles that underlie the rule today.

In these circumstances, the social costs of applying the rule in terms of the exclusion of reliable evidence from criminal proceedings and the consequent acquittals of guilty defendants are balanced by no legitimate policy interest. The case for the proposal to enact a reasonable, good faith limitation on the application of the Fourth Amendment exclusionary rule is thus overwhelming, and we will submit a legislative proposal implementing this approach on which we urge prompt and favorable action by the Congress.

7. Guns

One of the most significant recommendations of the Task Force on Violent Crime was that there should be a mandatory sentence of imprisonment for the use of a firearm in the commission of a federal felony. At least five bills presently before the Senate Judiciary Committee would seek to accomplish this, and S. 1630 provides in section 1823 for the mandatory sentencing to imprisonment for the use, display, or possession of a firearm during a federal crime of violence.

The idea of mandatory sentencing for the use or possession of a firearm during a federal crime is not new, and in fact seems to have been the intention of the Congress in enacting the legislation that became the present section 924(c) of Title 18 in 1968. The sentence provided for under section 924(c) is in addition to that for the underlying felony and is from one to ten years for a first conviction and from two to twenty five years for a subsequent conviction. However, section 924(c) is drafted in such a way that a person may still be given a suspended sentence or be placed on probation for his first violation of this section and it is ambiguous as to whether the sentence for a first violation may be made to run concurrently with that for the underlying offense. Some courts have held that a concurrent sentence may be given. See United States v. Sudduth, 457 F.2d 1198 (9th Cir. 1972), and United States v. Gaines, 594 F.2d 541 (6th Cir. 1979). In addition, even if a person is sentenced to imprisonment under section 924(c), the normal parole eligibility rules apply.

The pending Senate bills, S. 903, S. 909, S. 972, S. 494 and S. 1185, all attempt in various ways to overcome the problems with the language of section 924(c). However, all have one or more problems such as the failure to negate the possibility

of parole, or the inclusion of matters unrelated to mandatory sentencing.

Consequently, ~~the Department~~ we will strongly support mandatory minimum sentences for the use, display, or possession of a firearm during and in relation to the commission of a federal crime of violence as part of the Criminal Code Reform bill. Such a sentence will be required to run consecutively to any other term of imprisonment and the defendant will not be eligible for probation. Parole will be eliminated as it is for all offenses under the new code.

Meanwhile, in an additional effort to disarm the criminals of this country I am instructing the United States Attorneys to enforce vigorously the existing federal firearms laws. We will be working with the various law enforcement agencies in other departments as necessary to ensure that we are supported in this effort.

8. Habeas Corpus Reform

Equally in need of reform are the federal laws governing habeas corpus, the process by which federal and state prisoners are permitted -- for years after their appeals have ended and long after one would expect the case to be closed -- to continue to flood the courts with petitions objecting to their convictions. In 1980, the federal courts had to deal

with some 8,000 of these petitions from state and federal prisoners. All but a handful of these petitions were denied. Even so, the endless process of relitigation exacts a tremendous toll in terms of time spent by federal judges and court personnel, strained relations between federal and state judiciaries, and prolonged uncertainty regarding the outcome of criminal proceedings.

While it is certainly important to guard against wrongful convictions, it is wasteful and counter-productive to provide additional review when there is no good reason to suppose that such review will produce a more just result. For these reasons, ~~the Department has~~ we have undertaken a careful review of the various habeas corpus reform proposals that have been advanced by the Task Force on Violent Crime and others.

We agree that legislation is needed to improve the handling of habeas petitions by the federal courts. We will submit legislation that will correct the major shortcomings of current procedures. This legislation will include:

- Allow state, rather than federal, courts to resolve factual issues raised in habeas corpus petitions.
- Prohibit federal courts from relitigating factual issues that had already been resolved by the state courts.

- Prevent unreasonable delay in the filing of habeas corpus petitions.
- Codify existing case law barring litigation of issues not properly raised in state court unless "cause and prejudice" is shown, and provide a statutory definition for "cause."

9. Juveniles and Youthful Offenders

Next, we must address the problem of crime committed by juveniles and young adults. The amount of serious and violent crime committed by these groups is appalling. In 1979, juvenile offenders (those up to eighteen years of age) and youthful offenders (those aged eighteen to twenty-one) together accounted for more than half of all serious crime arrests, more than one third of all violent crime arrests, and nearly two thirds of all serious property crime arrests. A small proportion of these youths commit an astonishing number of repeat offenses. In New York City, for example, a study of 500 juvenile delinquents showed that six percent were responsible for 82 percent of the violent offenses committed by the whole group. Much of the violence is attributable to more than 2,000 youth gangs, with close to 100,000 members located in some 300 American cities and towns.

Plainly, we must act more vigorously to contain these youthful and habitual offenders. The recommendations of the Violent Crime Task Force and proposals contained in the federal Criminal Code point the way.

We must begin by ceasing to treat as children young people whose serious criminal behavior belies their age. The federal courts should be allowed to proceed against all juveniles who commit federal crimes, and adult prosecution should be permitted if the offender is at least seventeen years old or is charged with a violent felony or trafficking in drugs. We will suggest to the full Judiciary Committee that S. 1630 be amended to provide the former authority, and we support the provisions to the latter effect that are already incorporated in the proposed Criminal Code. Additionally, we recommend that Section 5038 of the Juvenile Justice and Delinquency Prevention Act be amended to provide for fingerprinting and photographing of all juveniles convicted of serious crimes in federal courts.

10. Arson

The Task Force recommended that 18 U.S.C. 844(i) be amended to allow federal authorities to investigate arson fires of buildings used in or affecting interstate commerce started by any means, not just those fires started by a device

that meets the definition of "explosive," as is the case under current law.

At present, 18 U.S.C. 844(i) proscribes the damage or destruction by means of an explosive of any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. For purposes of section 844(i), "explosive" is defined so far as is relevant here as "any chemical compounds, mechanical mixture, or device that contains any oxidyzing and combustible units ... in such proportions ... that ignition by fire ... may cause an explosion." The problem centers around whether gasoline, kerosene, and similar liquids, meet the definition if they are simply poured out and lighted, a common way to "torch" a building. While it is our view that when gasoline vaporizes and combines with air (an oxidizing unit) a mechanical mixture constituting an explosive is created, the legislative history of the statute is unclear as to whether this broad interpretation of the section is warranted. The statute was passed in 1970 in response to the wave of campus bombings and other radical activity of that era and was not specifically designed to deal with arsons.

Some courts have refused to accept such a theory and have

dismissed counts charging violations of 844(i) by means of poured gasoline. See e.g., United States v. Birchfield, 486 F. Supp. 137 (M.D. Tenn. 1980). There are unreported cases to the contrary, such as United States v. Allyn B. Hepp, No. 80-1840, (8th Cir. Aug. 14, 1981) but proving that gasoline vapor is in such a state as to constitute an explosive is often difficult for investigators to establish and explain to a jury. Therefore, I have determined that this burdensome requirement should be eliminated and we will support legislation amending 18 U.S.C. 844(i) in the context of the Criminal Code Reform Bill.

11. Tax Law Reform

The Internal Revenue Service (IRS) has traditionally been one of the nation's most effective law enforcement agencies, particularly in piecing together the complex puzzle of financial transactions which so often mask tax fraud or non-tax crimes. Moreover, much of the information collected and developed by IRS is invaluable in connection with the investigation and prosecution of non-tax crimes involving large sums of money, particularly organized crime, narcotics trafficking and white collar crime. But the Tax reform Act of 1976, intended to protect taxpayer privacy, created a chasm between the IRS and other federal law enforcement

agencies and placed needlessly cumbersome restrictions upon federal investigators and prosecutors legitimately seeking access to tax information for use in cases of serious non-tax crime.

Although the Department of Justice recognizes the importance of protecting against abuses of tax information, we believe that a series of amendments are needed to the 1976 law to fine-tune tax disclosure procedures so as to achieve the delicate balance which the Congress sought to establish between legitimate law enforcement needs and individual privacy interests. The amendments needed include clarification of ambiguities in the law, proper distinction between the privacy rights of individuals as contrasted with those of corporations and other legal entities, conformance of statutory requirements with actual practice, elimination of the requirement that federal prosecutors obtain Washington approval before seeking disclosures of tax information, expansion of the number of instances in which IRS may initiate reports of non-tax crimes, authorization of disclosures of tax information in life-threatening and other emergency situations, and authorization for federal prosecutors to redisclose tax information to state and local prosecutors upon entry of a court order finding that such information constitutes evidence of a state felony offense.

We have developed a comprehensive package of tax disclosure amendments containing these and other provisions. Our proposal will be submitted to the Congress within the next few days. In summary, the proposal will be very similar to S. 732 but will include proposed amendments to Sections 7602 and 7609 of the Internal Revenue Code relative to the procedures by which IRS obtains information. In view of the strong support in the Senate for tax disclosure amendments, we are optimistic that needed amendments can be enacted during the 97th Congress. Again, the Task Force on Violent Crime recommended enactment of the amendments which we will be submitting for Congressional review.

12. Crimes Against Federal Officials

In the area of crimes against federal officials, the Violent Crime Task Force reommended, among other things, that the Department support legislation to make the murder, kidnapping or assult of certain high level government officials not now protected by federal statutes (e.g., Cabinet officers) a federal offense. It also recommended that such crimes against any other federal public servant while engaged in or on account of the performance of his official duties should be a federal crime. We concur in these recommendations, since it seems clear that there is a substantial federal

interest in vindicating such attacks through the extension of federal jurisdiction to prosecute these crimes. ~~Fortunately, these proposals are already receiving active consideration of federal jurisdiction to prosecute these crimes.~~ Fortunately, these proposals are already receiving active consideration in Congress. S. 1630, the proposed new Federal Criminal Code, would continue federal jurisdiction over serious attacks against the President, Vice President, and Members of Congress by defining them as "United States officials;" it would also cover attacks against a Supreme Court Justice or Cabinet Officer by including them in the definition of that same term. Such offenses would be federal crimes as is now the case with respect to the President, Vice President and Members of Congress, without a showing that the crime was motivated by the victim's status. In addition, I propose that this class be broadened to include all federal judges.

In addition, S. 1630 adopts the other recommendation of the Task Force concerning crimes against federal public servants at any level of responsibility and extends federal jurisdiction over violent crimes against federal judges, federal law enforcement officers, and any other federal public servants designated for coverage under regulations issued by the Attorney General when engaged in the performance of official duties.

I have also concluded that the threat of attacks against Cabinet officers and top echelon White House staff members is so great that separate legislation apart from the Federal Criminal Code bill (which carries a substantially delayed effective date) is necessary to protect these persons. As the Committee will recall, Assistant Attorney General Jensen testified in support of these proposals during this Subcommittee's recent hearing on S. 904, introduced by Senator Quayle designed to protect Presidential and Vice Presidential staff, and S. 907, introduced by Senator Thurmond designed to protect Cabinet officers. We also suggested in that testimony that a violent crime against a Supreme Court Justice should now be made a federal offense. It is my understanding that our suggestions are being considered by the Subcommittee and that there is reason to expect that a bill will be reported in the near future.

The Task Force also recommended legislation to assert federal jurisdiction over the offenses of murder, kidnaping, or assault on a state law enforcement officer or private citizen committed in the course of a similar attack on the President or Vice President. The Task Force was justifiably concerned that exclusive state jurisdiction over such an offense would result in dual state and federal investigations

and prosecutions of the same case. This in turn would cause problems in the handling of evidence and pretrial procedures and result in greatly weakened cases. S. 1630 would eliminate such problems since it provides for federal jurisdiction over these serious crimes if they are committed in the course of another federal offense such as retaliating against a public servant. This would result in federal jurisdiction over crimes against police and bystanders in the course of an attack on any public servant, not just in the course of an attack on the President or Vice President.

13. [INSERT - PGS 39A - C]

14. Death Penalty

Federal law currently provides for the death penalty for certain homicides, air piracy, treason, and espionage. However, except for the air piracy statute, enacted in 1973, these death penalty provisions were rendered unenforceable by a series of Supreme Court decisions beginning in 1972, with Furman v. Georgia, 408 U.S. 238, because they set forth no legislated guidelines to control the exercise of sentencing discretion.

Since the Furman decision, more than two-thirds of the states have amended their death penalty statutes in an effort to reinstate capital punishment. During the same period, several bills to restore the death penalty at the federal

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13. Freedom of Information Act Amendments

The Freedom of Information Act (FOIA) has an adverse impact on law enforcement. Confidential informants hesitate or refuse to come forward because they fear that their identities may later be disclosed through a Freedom of Information Act request. Institutional information sources, including some local police departments, have likewise become increasingly reluctant to cooperate with federal authorities for fear of such disclosure. This problem must be addressed through legislation which clearly protects confidential information supplied to federal enforcement agencies and by more firmly administering the current law.

The Freedom of Information Act also imposes a great administrative burden on the Department of Justice, and diverts sorely needed resources from more worthwhile law enforcement programs. Criminal law enforcement agencies, such as the FBI, receive thousands of requests annually for criminal investigation files. The FBI alone employs over 300 persons full-time at a cost of over $11 million annually to process its FOIA requests.

These and other problems must be addressed through legislation which clearly protects confidential information supplied to federal enforcement agencies and by more firmly administering the current law. As many of you know, Assistant Attorney General, Jonathan C. Rose, testified on October 15, 1981, before the Subcommittee on the

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Constitution and presented our legislative proposals concerning the Freedom of Information Act. We support legislation to amend the Act to accomplish the following:

- o Protect law enforcement confidential informants by permitting the government to withhold information from disclosure whenever the information would "tend" to identify a confidential informant.
- o Permit the government to withhold any information provided to the government by a confidential informent.
- o Permit the government to withhold information provided to it in confidence by private businesses, state and local police, and foreign governments.
- o Permit the Attorney General to completely exempt from the FOIA any categories of investigations that he designates relating to terrorism, organized crime or foreign counterintelligence.
- o Permit the government to withhold information from disclosure whenever disclosure would endanger the physical safety of any persons, including witnesses and potential witnesses.
- o Protect law enforcement manuals, guidelines, procedures and priorities from disclosure under the FOIA.

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To the extent our proposals can ~~loosen~~ lessen the burdens imposed by the Act, they will significantly benefit our national law enforcement efforts.

level have been introduced in the Congress, but efforts to obtain their passage have been unsuccessful.

Both the President and I have repeatedly indicated in public statements that we support the imposition of the death penalty in carefully circumscribed conditions for the most serious crimes. In our view, the death penalty is warranted for two principal reasons. First, common sense tells us that the death penalty does operate as an effective deterrent for some crimes involving premeditation and calculation, and that it thus will save the lives of persons who would otherwise become the permanent and irretrievable victims of crime. Second, society does have a right -- and the Supreme Court has confirmed that right -- to exact a just and proportionate punishment on those who deliberately flout its laws; and there are some offenses which are so harmful and so reprehensible that no other penalty, not even life imprisonment without the possibility of parole, would represent an adequate response. The actions of our state legislatures over the past decade and the results of recent opinion polls clearly establish that this view that the death penalty is a necessary and appropriate sanction for the most heinous crimes is shared by a large majority of the American public.

Thus, we strongly recommend that enactment of legislation that would, by comporting with the constitutional requirements articulated in Furman and subsequent Supreme Court cases, restore the death penalty as an available sanction for the most serious federal crimes committed under aggravating circumstances.

A major step towards accomplishing this result has already taken place in the Judiciary Committee's approval, in July of this year, of S. 114. In the Spring, the Department testified in support of this bill which is designed to provide a set of constitutional procedures that would permit the imposition of the death penalty for a small number of the most serious federal crimes. During our testimony, we suggested a number of amendments to improve the bill, all but one of which (an amendment to require a unanimous jury finding of aggravating circumstances which we continue to support) were adopted by the Judiciary Committee.

It is our view that S. 114, which would permit the imposition of the death penalty only in a limited number of cases involving the brutal taking of human life or the creation of the gravest of risks to the national security and which sets forth the necessary procedures and safeguards to assure that the death penalty would not be imposed in an arbitrary

or discriminatory fashion, provides both a constitutional and enforceable means for the restoration of the death penalty at the federal level. Enactment of such legislation is long overdue, and I thus strongly urge passage of S. 114 by this Congress.

NEXT PAGE IS 44

15. Labor Racketeering

Recent convictions involving labor-management corruption on the waterfront and in other industries have demonstrated the continuing need for strong federal legislation to deter violence, extortion, and bribery among the parties to collective bargaining, and to address the problem of the infiltration of labor organizations by organized crime. Too often, we see the power and resources of labor organizations used not to benefit their members, but to serve the criminal interests of corrupt individuals.

In at least two respects, our ability to fight labor racketeering can be improved through legislation. First, we believe that sections 504 and 1111 of Title 29, which prohibit persons convicted of certain crimes from holding position in labor unions and employee benefit plans, should be strengthened through the enactment of the following amendments:

- The disqualifying crimes under both statutes should be brought into conformity with one another and expanded. For example, under current law, a person convicted of perjury is forbidden to administer an employee benefit plan, but he is free to occupy a responsible position in a union which is affiliated with the same plan and to bargain with employers about the funding of that plan.

- The positions as to which disqualification applies should also be expanded. There are too many instances in which loopholes in the current law are exploited, and convicted persons are permitted to continue to exert power over unions and benefit plans by being hired as "consultants" or "clerical workers."
- Disqualification should become effective immediately upon conviction. Under present law, a union official or employee who has used his position to engage in bribery or extortion or who has embezzled union funds can retain his position pending appeal of his conviction, despite the fact that, having been found guilty beyond a reasonable doubt, his unsuitability for union office has been amply demonstrated.
- The penalty for a violation of these statutes should be elevated to that of a felony.

Second, we recommend that enactment of a "labor bribery" statute that would impose felony penalties in cases involving a high risk of corruption in labor-management relations and that would uniformly prohibit corrupt payments in all industries now covered by the Taft-Hartley and Railway Labor Acts.

While 29 U.S.C. 186 now prohibits such corrupt payments, as well as simple "conflict of interest" payments, the penalty for a violation of this statute is limited to a maximum fine of $10,000 and one year's imprisonment. Thus, it does not provide a sufficient penalty in cases of significant corruption or where large amounts of money are involved, nor does it focus sufficiently on the corrupt nature of the conduct in the way a general "labor bribery" statute would.

S. 1163, which has been introduced by Senators Hatch and Nunn, is designed to facilitate our fight against labor racketeering. With some minor changes, its amendments to 29 U.S.C. 504 and 1111, would do much to assure that labor unions and employee benefit plans are free of the control and influence of persons who pose a danger to the integrity of such organizations, as demonstrated by their convictions for serious crimes. In addition, we believe that this bill would be a good vehicle for enactment of a general "labor bribery" statute. This bill also recognizes the importance of providing stiff penalties for labor graft and bribery by increasing the penalties for a violation of 29 U.S.C. 186. We support the spirit of this provision, but believe that it would be better served by amending the bill to incorporate a general "labor bribery" offense that would be included in Title 18.

16. Program Fraud Civil Penalties Act

One of the highest priorities of this Administration is to curb fraud against the government. Such fraud involving federal programs represents a theft of tax dollars just as surely as if the funds were stolen directly from the vaults of the United States Treasury. In addition, program fraud diverts limited resources from the purposes for which they were intended; Food Stamp fraud, for example, literally takes food from the mouths of needy people. Finally, program fraud has a heavy indirect cost as it necessitates development of additional procedures and accounting safeguards with the result that more of each program dollar must be devoted to administrative costs and less to program needs. The total direct costs of fraud against the government has been estimated to be in excess of $10 billion per year; the indirect costs in terms of added administrative expense are even greater.

But despite expanded efforts to control fraud against the government, including the Inspector General Act of 1978, we have not achieved an acceptable level of success in deterring such fraud in recovering federal funds paid out pursuant to false claims. In large part, this is due to the massive numbers of small fraud cases being detected; prosecutors and courts are awash in small program fraud cases. Of course, the typical response to such a situation is to call

for the creation of additional judgeships and an increase in the number of federal prosecutors so that all program fraud cases can be pursued. Yet such a response is not the answer. In fact, judicial proceedings, which are inherently costly and time-consuming, are an inappropriate means of dealing with many small program fraud cases. Rather, what is needed is a less formal and more expeditious alternative to judicial proceedings.

The Department of Justice has developed an important new legislative proposal, presently undergoing interdepartmental review within the Administration, which we will submit to the Congress within a short period of time. This proposal, the Program Fraud Penalties Act, would authorize all major federal departments and agencies to initiate administrative proceedings against perpetrators of fraud against the government in those cases where the Department of Justice has determined that criminal or civil judicial proceedings are impractical because of the small amount of money involved, overcrowded court dockets, or other reasons. The administrative proceedings so authorized would be less costly and formal than judicial proceedings and, if an administrative determination results in a finding that a false claim has been filed, the department or agency would be authorized to levy a civil penalty for

each false claim and to assess damages of double any loss suffered. At all stages of these administrative proceedings, which would be conducted pursuant to the Administrative Procedure Act, the due process rights of the respondent would be protected; an opportunity for judicial review in a United States Court of Appeals would be available upon conclusion of the administrative proceeding.

We believe this new administrative alternative to judicial proceedings would serve as a substantial deterrent to program fraud and that it would result in the recovery of significant amounts of monies now being lost. The Administrative Conference of the United States has endorsed this administrative civil penalty concept and the Congress has established such authority in connection with a number of specific federal programs in recent years, most recently in Secton 2105 of the Omnibus Budget Reconciliation Act of 1981 which authorizes administrative civil penalties in connection with Medicare/Medicaid fraud. Our proposal will be more comprehensive in scope than any previously considered by the Congress and we believe that the procedures it would establish ensure an efficient, effective, and coordinated mechanism by which federal departments and agencies can act to protect the integrity of their programs.

18 U.S.C. 1961-1968, and the Continuing Criminal Enterprise statute,

17. Criminal Forfeiture

If we are to deal with the tremendous problem of organized crime and drug trafficking in this country we must be able to deprive organized crime figures and narcotics traffickers of their vast sources of economic power. Thus, criminal forfeiture, a sanction imposed upon conviction which requires a criminal to forfeit to the United States the property he has amassed and used during the commission of crimes, can, in our view, be a powerful tool in the fight against this type of criminal activity. Presently, both the Racketeer Influenced and Corrupt Organization (RICO) statute, 21 U.S.C. 848, which punishes those who conduct drug trafficking networks and organizations, permit criminal forfeiture in addition to the traditional sanctions of fine and imprisonment.

It is now the policy of the Department of Justice to seek criminal forfeiture in every RICO and Continuing Criminal Enterprise case where there are substantial forfeitable assets and a resonable likelihood of success. Unfortunately, however, present criminal forfeiture statutes have not proven to be as effective tools in combatting organized crime and drug trafficking as we had hoped. Since few major narcotics trafficking cases present the elements necessary for conviction under the Continuing Criminal Enterprise statute, criminal

forfeiture is rarely available in these cases, despite the fact that it would be a particularly appropriate sanction in light of the enormous profits reaped by those who deal in drugs. The effectiveness of the RICO forfeiture statute has been limited by the fact that although it permits forfeiture of "enterprises" conducted or acquired by organized crime, it is questionable whether it permits the forefiture of the enormous profits produced by these "enterprises." Furthermore, these statutes often fail to give us the authority to address the practical problems that arise in attempting to achieve forfeiture of crime-related property, particularly where defendants have concealed or removed such prperty or transferred it to third parties in an attempt to defeat forfeiture.

While there have been bills introduced in the Congress this year that would address some of these problems, none incorporated the range of improvements which we believe are necessary to make criminal forfeiture a fully effective tool in combatting organized crime and drug trafficking. Therefore, the Department will submit to Congress comprehensive legislation to facilitate criminal forfeiture in RICO and narcotics trafficking cases.

This legislation would improve on the current criminal forfeiture statutes by:

- Providing specific authority for the forfeiture of the proceeds of an "enterprise" acquired or maintained in violation of the RICO statute;
- Making criminal forfeiture an available sanction in all major drug trafficking cases;
- Permitting forfeiture of substitute assets of the defendant where property specifically subject to forfeiture cannot be located or identified, or has been transferred to third parties;
- Providing clear authority, in appropriate cases, for the forfeiture of property which a defendant has transferred to a third party;
- Permitting the government to obtain, prior to arrest or indictment, a protective order that would preserve the government's ability to obtain forfeiture property; and
- Providing clear authority for the government to obtain a stay of civil forfeiture proceedings pending the disposition of criminal charges.

I urge support for this legislation which would make criminal forfeiture a truly powerful weapon against organized crime and drug trafficking.

CONCLUSION

Crime, like other intractable problems such as inflation, daily takes its toll on our society. Yet we must devote our energies to combatting such problems that strike at the heart of our democracy.

We are a nation at the mercy of ~~violent~~ crime. It is an internal enemy that spreads fear through our citizenry, that damages our quality of life, that causes death and suffering of a magnitude to any war we have fought.

Now is the time to break the grip of fear and take action to end the cycle of violence. Our defense and the weapon we can use against this enemy is the legislative program I have presented today. It is designed to protect us, the innocent, and to punish the guilty. For too long the opposite has been happening.

It is the law we must use to fight to preserve our rights to live decent and safe lives; to fight to defeat this enemy that stalks our city streets, that menaces our schoolyards, that destroys our neighborhoods and communities, that imprisons our elderly. We must fight this tyranny and we must win. And we will win given the commitment and cooperation of the Congress.

DRAFT

THE WHITE HOUSE

WASHINGTON

DRAFT

October 20, 1981

MEMORANDUM FOR FRED F. FIELDING
COUNSEL TO THE PRESIDENT

FROM: H.P. GOLDFIELD

SUBJECT: Status of Immigration Policy
Legislative Proposals

I met with representatives of the Office of Management and Budget ("OMB") and the Office of Policy Development ("OPD") last week to discuss the above-referenced subject. While it appears that the legislative proposals, currently being re-drafted at the Department of Justice, represent either agreement or compromise among the various interested departments and agencies, there are still several outstanding issues which merit your review and possible action by you. OMB and OPD have been advised that there will be an opportunity, albeit limited in time, for review of the final legislation, and, therefore, I propose that Counsel's Office coordinate with OMB, OPD and Justice officials at the appropriate time this week to resolve the issues raised herein. I have attached hereto at Tab A "section by section" summaries prepared by Justice of the eight proposed bills which compromise the complete legislative package.

With respect to the proposed bill "To amend the immigration and nationality act relating to the provisions for appeal, asylum and exclusion," there is disagreement between OMB and Justice as to the issue of providing counsel at government expense to the refugees at the exclusion hearing stage. Currently, an alien who enters the United States without inspection can submit his asylum request and remain in the United States for an extensive period of time while such request receives both administrative and judicial review. Under the proposed legislation, the United States would conduct expedited proceedings with respect to undocumented aliens encountered at U.S. borders and ports of entry, and at points outside the territorial limits of the U.S. Such legislation, Justice claims, will streamline the proceedings when an alien cannot present any documentation to support his claim of admissibility. The initial questioning of an alien would be conducted by an Immigration and Naturalization Service ("INS") asylum officer. Such examination would be oral and there would be no transcript made. In most cases

involving aliens who have no documentation to support a claim of admissibility, the examining officer would make an immediate decision to exclude the alien and there would be no right to an administrative appeal.

I have attached hereto at Tab B a memorandum, dated September 16, 1981, from Mike Horowitz to Ed Harper, Glenn Schleede, and Annelise Anderson of OMB, in which it is alleged that a small number of defense lawyers representing Haitian aliens have been able to "tie the exclusion process up in knots, preventing their exclusion and transportation back to Haiti." Such information was also reported in yesterday's Washington Post article on the Haitian immigration issue as well. (A copy of such article is attached at Tab C.)

According to the Horowitz memo:

> 1. "The response of INS has been to attempt mass processing of Haitians, pleading courts to enjoin deportations and exclusions on the ground the Haitians were "unable to adequately present their claims for asylum and would be deprived of full and fair consideration of that which they did present." Haitian Refugee Center v. Civiletti, 503 F. Supp. 442.
>
> 2. The Administration should "smother claimants with due process," inasmuch as the lack of counsel for the Haitians is the major reason for the "bottleneck in the process."
>
> 3. "Without counsel, the courts can be expected to continue discovering due process violations at every turn. By giving the refugees all the due process in the world -- and fast -- we can avoid our problems with the courts, and spare ourselves the budgetary and political problems involved in massive detention centers."

Horowitz proposes that the only long-range solution "is to provide the refugees with enough due process at the exclusion hearings to withstand court challenges. Deputy Commissioner Nelson of INS is purportedly interested in pursuing OMB's suggestion for providing such counsel. However, as you will note from the Horowitz memo, it appears that the Attorney General has informed INS that as a policy matter, the U.S. would not pay for lawyers for Haitian refugees and that he would not permit OLC to review the legal questions pertinent to the Government's authority to provide for such counsel. OMB is apparently determined to hold up the legislation in order to get OLC to consider on the merits its recommendations. I am told by Kate Moore that Frank Hodsell considered such a tactic inappropriate and that the specific legislation should go forward.

According to the Horowitz memorandum, when the State of California was faced with a similar problem, albeit regarding welfare rights, then Governor Reagan responded to the attempts to frustrate welfare reform by tying up the hearing process with judicial due process based appeals by adopting "modern case management techniques, increasing hearing personnel providing full and speedy due process for all claimants." On the other hand, there is considerable merit to Attorney General Smith's arguments that it would be difficult to defend providing counsel to the Haitian aliens at a time when no such free counsel is provided other aliens and at a time when free legal services are being so drastically cut back. I have attached hereto at Tab D a memorandum, dated October 15, 1981, from Bob Carlstrom, Associate Director of OMB, which sets forth the Attorney General's rationale. Such memo also outlines the remaining policy issues which need resolution.

The second bill which merits your attention according to OMB and Hodsel's office is the bill "To provide the President with special authority to declare an immigration emergency." This proposed emergency authority empowers the President when faced with an emergency immigration situation, to close ports and airports and thereby restrict travel and commerce and to direct emergency actions be taken by appropriate federal agencies The draft bill gives the President power to declare an immigration emergency for 120 days, renewable for additional 120 day periods. While the authority granted the President substantially strengthens his power to respond quickly to another "Muriel boatlift" situation, OMB has raised the question as to whether the International Emergency Economic Powers Act (P.L. 95-223), a copy of which is attached hereto at Tab E, already provides the President with sufficient authority to take the necessary action in this area. If it does not, OMB profers that amending such legislation to provide the President with the necessary and specific powers to act in an immigration emergency should be explored. I would recommend that OLC, after careful review of the legality of the legislative proposal, provide guidance on the issue.

While I would assume that OLC has reviewed <u>each</u> of the legislative proposals submitted by Justice to OMB for review and comment, I would, however recommend that Counsel's Office confirm this as fact.

Attachments

[illegible]

This proposal permits immediate legalization of illegal aliens who entered the United States prior to January 1, 1980, and have had a continuous residence in the United States since that time, by providing a "temporary resident status" for such aliens. The proposal provides for adjustment to status to that of a lawful permanent resident for these aliens after they have completed ten years of continuous residence.

Section 1 of the proposal authorizes the Attorney General, in his discretion, to grant "temporary resident status" to any alien who entered the U.S. prior to January 1, 1980, and has continuously resided in the U.S. since that time, if the alien is otherwise admissible to the U.S., with certain exclusion provisions waived. To be eligible for adjustment under this section, the alien must register with the INS within 12 months after the Attorney General announces that registration has begun. An alien granted temporary resident status must register with the Immigration and Naturalization Service every three years. The Attorney General is authorized to set additional registration requirements in his discretion. An alien granted temporary resident status may not bring his spouse or children to the U.S. and is ineligible for benefits under Aid to Families with Dependent Children, Supplemental Security Income, and food stamps programs, but may be authorized to work by the Attorney General.

Section 2 provides that an alien who is granted temporary resident status may have his status adjusted to that of lawful permanent resident, once he completes 10 years of continuous residence in the U.S., if he remains otherwise admissible and has a minimal English language ability.

Section 3 defines "continuous residence" for purposes of this Act as being broken by an absence from the U.S. of more than 30 consecutive days or an aggregate of more than 30 days in any 12-month period.

Section 4 makes the numerical provisions of the INA inapplicable to adjustments under this Act.

SECTION-BY-SECTION ANALYSIS

I. Subsection (d)(1) of Section 274 of the Act.

This subsection includes a provision exempting certain employers from coverage by this bill. An employer who can establish (a) that he did not employ four or more persons, on a permanent, seasonal, or part-time basis is not subject to the penalties and fines incorporated in this bill. This procedure requires an employer to come forward with evidence that he is not a "four-or-more-person employer" once it is established by the government that he has employed an alien who does not have employment authorization, or who is not a lawful permanent resident. This approach is considered necessary to establish that the employer meets the numerical limitations of the bill's coverage. Employers should be easily able to establish the employment history of their business from business records such as tax returns, FICA statements, and other means, which will show the employment level at the time of and prior to the violation. The evidence will be provided from ordinary business records, which will not impose additional record-keeping burdens on employers.

II. Subsection (d)(2).

This subsection provides for a $500 - $1,000 fine per violation for each alien employed in violation of this section. The fine is to be paid to the district director of the Immigration and Naturalization Service in whose district the violation occurs. This procedure would allow a system of notice of intent to fine similar to the procedure used presently in fine cases under section 273. The procedures are set forth in 8 C.F.R. 280 et seq. Payment would be enforced by civil suit in a district court.

III. Subsection (d)(3).

This provision is aimed at an employer who shows a disregard for the law, as it establishes a means for the government to go into district court to sue for civil penalties and injunctive relief. An action may be brought in any district where the violation occurs, the employer transacts business, or the employer is found.

IV. Subsection (d)(4).

This provision attempts to define the term "knowingly". It combines the standard used in section 287 of the Act, 8 U.S.C. 1357, which is the basis for interrogating an alien or any person who is believed to be an alien, as to his right to be in the United States, with an affirmative duty on the part of the

employer to make an inquiry into the individual's employment status, once the employer has reason to believe that the individual is an alien. This is in essence a standard of "reasonable diligence". This approach will allow the use of a standard with which the Immigration and Naturalization Service and the Board of Immigration Appeals have a certain amount of experience, and would allow reference to the body of administrative and judicial interpretations which exists in regard to fine cases.

V. Subsection (d)(5).

This subsection provides for a procedure by which the Attorney General shall by regulation prescribe an employment form establishing the employment status of a prospective employee. The Attorney General will by regulation prescribe the type of documents that a job applicant must provide to establish his United States citizenship, lawful permanent resident status or employment authorization granted by the Attorney General. The forms prescribed would be retained by the employer for inspection by Immigration and Naturalization Service officers.

VI. Subsection (f).

This provision pre-empts any state or local laws which may be enacted to penalize employers who employ aliens without employment authorization.

VII. Section 275 (b) of the Act.

A new section 275(b) of the Act is added to provide for criminal penalties for persons who fraudulently duplicate or copy documents used to established citizenship, permanent resident status or employment authorization granted by the Attorney General. Persons who present such fraudulent documents are subject to the same penalties, which consist of a fine up to $5,000 or five years imprisonment or both.

CUBAN/HAITIAN TEMPORARY RESIDENT LEGISLATION

Section-by-Section Analysis

Section 2 of the bill grants "Cuban/Haitian temporary Resident" status to Cubans who were paroled into the United States between April 20, 1980, and January 1, 1981, or who had applications for asylum pending with the Immigration and Naturalization Service on December 31, 1980, and to Haitians who were (1) subjects of exclusion or deportation proceedings on December 31, 1980, or (2) were paroled into the United States before December 31, 1980, or (3) who had applications for asylum pending on December 31, 1980. Cuban/Haitian temporary resident status would be granted 30 days after enactment of this Act. The Attorney General would be authorized to deny Cuban/Haitian temporary resident status to, or terminate the status of, any alien who is excludable under section 212(a) of the Immigration and Nationality Act (8 U.S.C. 1182), with certain exceptions. It makes temporary resident status inapplicable to detainees and to aliens certified as inadmissible by the Public Health Service. This section would also permit the Attorney General to authorize Cuban/Haitian temporary residents to engage in employment in the United States. Subsection (d) provides that, notwithstanding that this section gives legal status to these aliens, the penalty provisions of section 273 and section 274 of the Immigration and Nationality Act would still apply to the boat captains who brought them in.

The section provides that aliens granted Cuban/Haitian temporary resident status must register with the Attorney General every three years and makes them ineligible for any government benefits once benefits under the Refugee Assistance Act of 1980 expire.

Section 3 provides for detention of aliens denied Cuban/Haitian temporary resident status until a final determination of admissibility is made, or pending determination, so that an alien may be detained for an indeterminate period. The section limits judicial review of such detention to habeas corpus proceedings on the question of whether that person falls within the category of aliens subject to exclusion. Persons eligible for deportation proceedings would be processed under section 242, as presently.

Section 4 authorizes the Attorney General to adjust the status of a Cuban/Haitian temporary resident to that of an alien lawfully admitted for permanent residence after the alien has maintained temporary resident status for five years. The Cuban/Haitian temporary resident may be denied adjustment if he is firmly resettled in another country or inadmissible under the Immigration and Nationality Act (8 U.S.C. 1182). The Attorney General is authorized to waive grounds for exclusion (with the exception of the provisions regarding national security, association with the Nazi government or trafficking in narcotics) for humanitarian purposes, to assure family unity, or when it otherwise would be in the public interest. These adjustments would not count against the numerical limitations of the Immigration and Nationality Act.

Section 5 terminates asylum proceedings for all temporary residents who have not been granted asylum under section 208 of the Immigration and Nationality Act (8 U.S.C. 1158) as of the date they are granted Cuban/Haitian temporary resident status. Those aliens granted asylum prior to the enactment of this Act will retain their status and will also be granted Cuban/Haitian temporary resident status if

eligible under this Act. For purposes of adjustment of status and family reunification, such aliens will be treated as Cuban/Haitian temporary residents.

Section 6 repeals the Cuban Refugee Adjustment Act, P.L. 89-732. Under P.L. 89-732, the Cubans would otherwise be eligible for adjustment once they complete a year of physical presence.

Section 7 adopts a new term to describe the class of individuals to whom section 501 of the Refugee Education Assistance Act of 1980 may be applicable. Persons granted Cuban/Haitian Entrant status by this Act represent only part of the class of whom section 501 applies. However, the term used in section 501, "Cuban and Haitian entrant", is so close to the term describing the status created by this Act as to make highly desirable the use of some other term for the broader category. Persons granted Cuban/Haitian status under this Act would meet the definition of the class to whom section 501 of the Refugee Education Assistance Act applies under subsection 501(e)(1) of that Act.

Section 8 authorizes appropriations to carry out the provisions of this Act.

BY SECTION ANALYSIS

Section (a) would amend section 201(a) of the Act to create separate numerical limitations of 40,000 each on immigration from Canada and Mexico, our two contiguous neighbors. The overall limitation on immigration from the rest of the world would be reduced from 270,000 to 230,000.

Under this proposal qualified immigrants from each of the two countries would compete for immigration only among themselves. The substantive rules for qualification to immigrate would remain unchanged, as would the apportionment of the respective limitations among the various classes of qualified immigrants (preference and nonpreference) set forth in section 203(a) of the Act.

This proposal also contains provisions for increasing the limitation for either Canada or Mexico by an amount equal to the amount, if any, unused by the other country. If, in a given fiscal year, immigration under the 40,000 limitation from either country fell below the 40,000 maximum, in the next fiscal year the limitation for the other country could be increased by an amount equal to the previous year's shortfall. In no case, however, would the basic 40,000 limitation for either country be reduced.

As an example, in the first year of operation of this proposed system the limitation for each country would be 40,000. If, at the end of the year, immigration from Canada had reached only 25,000, then in the second year the limitation for Canada would again be 40,000, but the limitation for Mexico would be 55,000 - the basic 40,000 plus 15,000 (the difference between 40,000 and Canada's previous year usage of 25,000).

This calculation of the limitation would be made each year on the basis of the previous year's level of immigration. In theory, if immigration from both countries fell below 40,000 in any fiscal year, both countries would be entitled to an increase in the next year. It is unlikely, however, that such a situation would occur.

Section (b) would make a conforming technical amendment in section 202(a).

SECTION-BY-SECTION ANALYSIS
AUTHORITY TO DECLARE AN "IMMIGRATION EMERGENCY" TO FILL
TO THE MASS MIGRATION OF VISITORS ALIENS

Declaration of the Emergency

Section 240A(a) allows the President to declare an immigration emergency if, in his judgment, a substantial number of undocumented aliens are about to embark or have embarked for the United States, and the procedures of the Immigration and Nationality Act or the resources of the Immigration and Naturalization Service would be inadequate to respond to the expected influx. The triggering criteria have been broadly worded to allow the President reasonable flexibility. Clearly, the Secretary of State and the Attorney General would play key roles in advising the President concerning the need for and the consequences of declaring an emergency.

The language pertaining to a "substantial number" of aliens is necessarily inexact. The President could not have expected to have precise estimates of the number of undocumented aliens who may be about to travel to the United States. The phrase "substantial number" would clearly permit the declaration of an immigration emergency in response to a situation such as existed before the 1980 Cuban flotilla, in which well over 100,000 aliens came to the United States. It is not, however, intended that declarations of emergencies be limited to situations involving the exceptionally large numbers associated with the 1980 Cuban flotilla. Rather, it is anticipated that an immigration emergency could be declared even if only a few thousand aliens were expected to arrive over the course of several weeks. Consequently, a key factor in assessing the need for invoking these emergency powers is the adequacy of the response that would be made using the normal exclusion and asylum procedures of the Immigration and Nationality Act and the available resources of the Immigration and Naturalization Service. On the other hand, while serious problems exist with respect to daily illegal border crossings, it is not expected that such activity would lead to the declaration of an emergency absent other exceptional circumstances.

Subsection (b) of section 240A provides that within forty-eight hours of the declaration of an immigration emergency the President must inform the President pro-tempore of the Senate and the Speaker of the House of his reasons for invoking the emergency provisions. The emergency would end automatically after 120 days, or earlier if ordered by the President, unless extended for an additional 120-day period or periods by the President.

Emergency Powers

Section 240B of the bill sets forth the emergency powers and procedures which could be invoked pursuant to a declaration of an emergency. Under subsection (a)(1), the President could restrict

or ban the travel of vessels, vehicles, and aircraft to a designated country or area. This would deter such vessels, vehicles, and aircraft from picking up undocumented aliens seeking to enter the United States. This subsection would also authorize the interception of vessels, vehicles, and aircraft travelling to the prohibited country or area and force them to return to the United States, or to other reasonable locations. Intercepted conveyances not likely to violate the travel restrictions could be allowed to proceed freely to other places.

Subsection (a)(1) would have a clear impact on the constitutionally protected right to international travel. In the recent decision of Haig v. Agee, ____ U.S. ____ (June 29, 1981), the Supreme Court noted, however, that "the freedom to travel outside the United States must be distinguished from the right to travel within the United States." Slip op. p. 25. Quoting from Califano v. Aznovorian, 439 U.S. 170, 176 (1978), the Court stated:

> Aznovorian urges that the freedom of international travel is basically equivalent to the constitutional right to interstate travel, recognized by this Court for over 100 years. But this Court has often pointed out the crucial difference between the freedom to travel internationally and the right of interstate travel.
>
> The constitutional right of interstate travel is virtually unqualified. By contrast the "right" of international travel has been considered to be no more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment. As such this "right" the Court has held, can be regulated within the bounds of due process. [Citations omitted.] Slip op. pp. 25-26.

It is clear from the Agee decision, that the right to travel outside the United States can be restricted subject to due process limitations.

This emergency legislation provides the requisite due process by establishing a licensing process in section 240C which would allow the Government to approve such travel where adequate safeguards exist to insure that the Government's interests are protected. The provision is tailored to address the perceived harm, namely, the influx into the United States of a large number of visaless aliens. Furthermore, the restriction does not unnecessarily infringe on the right of travel, because individuals are free to travel to a designated foreign country or geographical area, by foreign common carriers for example, as long as no United States owned or controlled conveyances are transported to the designated country or area. Compare Zemel v. Rusk, 381 U.S. 1 (1969), with Kent v. Dulles, 357 U.S. 116 (1958).

Subsection (a)(3) of section 240B is intended to permit the interception of vessels on the high seas and to permit the return of any aliens or vessels, vehicles, or aircraft carrying such aliens to the designated country or to any other suitable country or area. The power to return aliens to the designated country or to any other suitable country or area should be administered with due regard for this nation's international obligations related to refugees and the granting of asylum.

Subsection (a)(3)(i) and (ii) would permit the utilization of procedures designed to expedite the adjudication of exclusion and asylum proceedings. It would not, however, absolve the Government from the responsibility to make admission and asylum determinations, and thus should not amount to an abrogation of our treaty obligations in this area. One of the primary means of expediting exclusion procedures is the elimination of the requirement that an immigration judge conduct hearings.

Since the Attorney General is authorized to set up procedures for making exclusion and asylum determinations, he can set up different procedures for different types of cases. Thus, those undocumented aliens who claim to be United States citizens or to be lawfully admitted aliens may receive different review than that afforded aliens who have no colorable claims for admission into the United States.

Subsection (a)(3)(iii) would authorize returning an alien to a country, other than the country from whence he came, if the Attorney General determines that it would not be practicable or appropriate to return the alien to the country from which he came. Under section 237 of the Act (8 U.S.C. 1227), an excluded alien must be returned to the country from "whence he came." This limitation of the current law does not provide the flexibility needed in times of crisis. Subsection (a)(3)(iii) will provide flexibility by permitting the Attorney General to deport the alien to his native land, even if that is not the country "from whence he came," or to any country which is willing to accept the excluded alien. As stated above, in the discussion of section 240B(a)(2), the deportation of aliens should be administered with due regard for this nation's international obligations related to refugees and the granting of asylum.

Subsection (a)(3)(iv) authorizes the Attorney General to prescribe the terms and conditions under which an alien would be admitted to the United States. The posting of a bond with sufficient surety to ensure compliance with the conditions of admission is specifically authorized.

Subsection (a)(3)(v) would eliminate judicial review of exclusion and asylum determinations. For years, aliens who are clearly not entitled to enter the United States have come here and been able to remain indefinitely while their cases proceed through the labyrinth of administrative and judicial proceedings.

[illegible] been able [illegible] automatic stays of deportation [illegible] interest of such aliens to take advantage of every procedural and judicial avenue available to them regardless of the merits of their cases. By expediting the administrative procedure and eliminating judicial review of the administrative decision, it will be possible to dispose of these cases much more quickly than is possible under current law.

The elimination of judicial review is a significant step and has been taken only after serious consideration. The law is clear, however, that those aliens seeking admission to the United States have only the due process rights which Congress decides to give them. Knauff v. Shaughnessy, 338 U.S. 537 (1950). Moreover, our treaty obligations with respect to refugee claimants do not mandate any particular procedures which must be followed in resolving claims of persecution.

Subsection (a)(4) of section 240B provides for the detention of every alien, except those who are beyond a doubt entitled to be admitted to the United States, pending a final determination of admissibility, or pending release on parole, or pending deportation if the alien is found excludable. This paragraph makes clear that the Attorney General has complete discretion as to where such aliens will be detained, including in federal prisons where appropriate. This paragraph is not intended to grant the Attorney General power to direct other governmental agencies to house detained aliens. The power of the Attorney General to request assistance from such agencies is addressed in subsection (c) of section 240B.

If an alien is found excludable he can be detained until such time as he can be deported. The language of this paragraph is also intended to permit the indefinite detention of the alien if no country is willing to accept him, such as occurred in the Cuban flotilla situation. The Attorney General's decision as to where an alien should be detained is not subject to judicial review; however, an alien can obtain habeas corpus review on the issue of whether he falls within the category of aliens subject to detention.

Subsection (a)(5) of section 240B would exempt actions taken during an immigration emergency from the restraints of the nation's environmental laws. The first paragraph merely references existing Presidential exemption authority under the Clean Air Act, Clean Water Act, Safe Drinking Water Act, Resource Conservation and Recovery Act and the Noise Control Act. The second paragraph provides the President with additional exemption authority with respect to other major Federal environmental requirements, as well as state and local requirements, but limits that authority in that it must be closely tied to the demands of an immigration emergency. The third paragraph places limits on the time the exemptions can remain in effect but in no event can they last longer than one year.

the Federal Government should be [illegible] after a year [illegible] environmental requirements such as [illegible] discharge from a detention facility. If this will not be possible, legislation granting further exemptions can be obtained from Congress.

These environmental exemptions will allow the Government to deal quickly with an emergency without litigants impeding those efforts though court stays and injunctions such as occurred during the 1980 Cuban flotilla when efforts to transfer aliens to Fort Allen, Puerto Rico were blocked by a court injunction. See Commonwealth of Puerto Rico v. Muskie, 507 F. Supp. 1035 (D.P.R. 1981).

Subsection 240B (b) creates special emergency powers which would allow the President to order the sealing or closing of roads or harbors if necessary to prevent the arrival of the aliens in the United States. The purpose of this provision is to permit authorities to close a harbor or airport before ships or planes can depart for the purpose of picking up aliens and bringing them to the United States. In addition, roads leading to harbors, for example, may be closed in order to prevent people from launching their boats. It is obviously easier for authorities to quarantine harbors and airports and to prevent boats and planes or other conveyances from leaving, than it is to try and intercept such conveyances once they have dispersed or have entered foreign territory.

During the time a harbor, port or road is sealed, it will be left to the designated agency or the agency which is closing the harbor, port or road to determine whether a vessel, vehicle or aircraft will be allowed to depart or to travel on such road. If the facts indicate that the vessel, or aircraft is not bound for the designated foreign country, then permission will be given to proceed. The burden, however, will be on the party seeking permission to depart to show that he in fact is not intending to go to the designated foreign country. A party who is denied permission to depart may seek judicial review of the agency's decision in a United States District Court. Judicial review prior to the exhaustion of administrative remedies can be obtained if a party can show he would suffer irreparable injury should his departure be delayed. Thus, a captain of a ship with perishable cargo will be able to seek immediate judicial review if it appears that awaiting a final administrative decision would be itself result in loss or spoilage of the cargo.

Subsection (b)(3) provides that the agency designated by the President shall set up procedures to be followed in requesting departure permission. The provision recognizes, however, that there may be no procedures established for granting permission to depart. In this situation, the agency which is responsible for the closing of the harbor, airport, or road will make such determinations. However, once the designated agency establishes procedures for obtaining departure permission, these procedures will have to be followed.

The sealing [illegible] interfere with the right to travel. As discussed previously, however, the right to travel outside the United States is not absolute and can be restricted where the limitation is tailored to a perceived harm and does not unnecessarily infringe on the right to travel, and where the necessary due process safeguards are provided. Haig v. Agee, ____ U.S. ____ (June 29, 1981), Slip op. pp. 25-26.

Some constraints on domestic travel may also result from the sealing of harbors or airports or the closing of roads. Individuals would, of course, remain free to travel within the United States. However, it is recognized that restricting the movement of conveyances may also at least temporarily restrict the movement of the persons owning or using those conveyances.

The requirement that an administrative decision on departure permission be made within 72 hours recognizes the need not to unduly restrain domestic travel, as well as legitimate international travel. Compelling justifications for some limitations on domestic travel, moreover, exist because of the practical enforcement problems associated with the interdiction of widely dispersed vessels, aircraft in flight, and vehicles that have entered foreign territory, and because of the injury to the United States which would occur if a mass migration of undocumented aliens were to take place.

Subsection (c) of section 240B authorizes the President to designate an agency or agencies which are to be responsible for carrying out the emergency provisions once they have been invoked by the President. In addition, state or local agencies or any civilian Federal agency may be called on for assistance. The President may direct that any component of the Department of Defense provide assistance. By specifically permitting the Army, Navy, and Air Force to enforce these provisions, any problems with the Posse Comitatus Act are eliminated. State and local agencies would be called upon to render aid within the limits of their general competence and would not be asked to make asylum and admissibility determinations.

Subsection (d) grants search and seizure powers to agencies enforcing the provisons of this emergency legislation. The body of law governing the search and seizure powers of the INS and Coast Guard has seen some changes in recent years, and no attempt has been made to define the permissible limits of law enforcement in this respect. The actual exercise of these search and seizure powers would, however, be consistent with prevailing interpretations of the Fourth Amendment.

Under current law, the Coast Guard has broad authority to stop and inspect ships for possible violations of various laws. See 19 U.S.C. 1581(a); 14 U.S.C. 89(a). The courts have upheld against Fourth Amendment challenges the right of the Coast Guard under

[illegible] United States v. [illegible] (3d Cir. 1980) (approving [illegible] documentation checks); United States v. Hilton, 619 F.2d 127 (1st Cir. 1980); United States v. Harper, 617 F.2d 35 (4th Cir. 1980); United States v. Warren, 578 F.2d 1058, 1064-1065 (5th Cir. 1978)(en banc).

The intrusion justified by such an administrative inspection is limited. The scope of permissible Coast Guard inspection is restricted to those matters reasonably relating to checking documentation and safety. United States v. Arra, supra, at 841 n. 6; United States v. Demanett, supra; United States v. Robbins, 623 F.2d 418, 420 (5th Cir. 1980). However, where probable cause or reasonable suspicion of criminal activity arises during such an inspection, the inquiry and search may be appropriately expanded. See United States v. Demanett, supra; United States v. Ricardo, 619 F.2d 1124, 1129 (5th Cir. 1980); United States v. Hilton, supra, 619 F.2d at 131; United States v. Warren, supra, 578 F.2d at 1065. Aside from administrative inspections, brief investigatory interceptions of vessels may be permissible if there is a reasonable suspicion of a criminal violation. See United States v. Williams, 617 F.2d 1063 at 1078 (5th Cir. 1980).

In United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the Court upheld the INS procedure of setting up fixed checkpoints away from the border at which cars could be stopped and the occupants questioned as to their citizenship and immigration status. The court held that such stops could occur even if there was no reason to believe the particular automobile contained illegal aliens. While Martinez-Fuerte concerned a different type of problem, it indicates that interior vehicle checkpoints could lawfully be established to aid in identifying persons who intend to transport a conveyance from the United States to a designated foreign country or geographical area.

Subsection (e) of 240B provides that agencies will have the same authority as they now have for disaster relief under 42 U.S.C. 5149. Under 42 U.S.C. 5149, a Federal agency in a disaster type situation can, with the consent of a state or local government, utilize the services or facilities of such government. In addition, 42 U.S.C. 5149 authorizes a Federal agency to hire temporary personnel and to purchase, rent, or hire equipment, materials and supplies for such things as shipping, travel and communications and for the administration and supervision of such activities.

Subsection (f) of 240B provides that paragraphs 3 and 4 of subsection (a), which authorize expedited exclusion and asylum proceedings and the detention of aliens, will remain in effect for those aliens who were subject to those provisions, even after the immigration emergency has ended. It is important to note that during an immigration emergency, not every alien attempting to enter the United States will be subjected to expedited proceedings and detention, only those undocumented aliens who are travelling directly or indirectly from the

designated [illegible] or area [illegible] ings.

Subsection (g) would permit the President to direct enforcement of subsection (a) beyond the territorial limits of the United States. As in the initial decision to declare an immigration emergency, the Attorney General and Secretary of State would have major roles in advising the President concerning the need for and appropriate procedures for handling such enforcement.

There are customary international law limitations which restrict the ability of the United States to interdict foreign flag vessels absent the consent of the foreign flag state. Despite these limitations, the Fifth Circuit has held that 14 U.S.C. 89(a) authorizes the Coast Guard to board foreign flag vessels in international waters when there is reasonable suspicion that the vessel's occupants are engaged in conduct which violates a United States statute having extraterritorial application. United States v. Williams, 617 F.2d 1063 (5th Cir. 1980). As a matter of our domestic law, this emergency legislation would thus permit the halting of a foreign flag vessel, in the absence of foreign state approval, if there was reasonable suspicion that the vessel was transporting visaless aliens to the United States in violation of our civil or criminal immigration laws. Such action would, however, be inconsistent with international law, and it is not anticipated that the United States would violate those customary rules of international law which restrict the boarding of foreign flag vessels, except in the most compelling of circumstances. The statute, though, is broadly worded to permit the necessary lawful actions to be taken in response to a situation such as the 1980 Cuban flotilla.

Subsection (g) also authorizes, inter alia, the making of admissibility and asylum determinations outside the territorial limits of the United States, including on the high seas. Aliens intercepted at sea could be given their hearings on ships and if they are found excludable, they would never set foot in the United States.

Subsection (h) makes clear that the fact that an immigration emergency has been declared does not relieve any carrier or other person from any of the other civil or criminal liabilities, duties or consequences which arise elsewhere from the transportation or the bringing of any alien to the United States.

Travel Restrictions and Licensing

Section 240C provides for travel restrictions on vessels, vehicles, and aircraft and for licensing procedures. The travel restrictions would apply to all United States vessels, vehicles and aircraft and such other vessels, vehicles, and aircraft which are owned by, leased by or controlled by United States citizens or residents or by United States corporations. This latter phrase prevents a United States citizen from hiring a foreign registered vessel and using that vessel to bring undocumented aliens to the United States. As a result,

with respect to ... statute would ... for a Mexican to... ... to Cuba if that ship was owned by a United States corporation, even if the ship could never reasonably be expected to travel to the United States. It is expected, however, that regulations promulgated by the designated agency would provide almost blanket approval for foreign registered vessels and aircraft to travel to designated countries or areas as long as they are not also involved in any travel to the United States. Such blanket approval could help eliminate some of the problems associated with the purported regulation of foreign flag vessels, a problem which occurs repeatedly in the statute. Broad language, however, has been consistently employed in order to reach conduct that must be regulated in order to deal effectively with a flotilla-like situation.

Penalties

Section 240D provides for both civil and criminal penalties for violations of either section 240B(b)(2) or section 240C, and a misdemeanor penalty for aliens violating the terms of admission under section 240B. Subsection (a) provides for a civil fine of up to $10,000 and the forfeiture of any vessel, vehicle or aircraft which is used to violate the travel restrictions imposed in section 240C, or the limitations on departing from a sealed harbor or closed road under section 240B (b). The same forfeiture procedures that are used under the customs laws are adopted for purposes of this provision. A person who knowingly engages in conduct prohibited with respect to travel restrictions or the sealing and closing of harbors and roads is guilty of a criminal offense and is subject to a fine of up to $50,000 and imprisonment for up to five years.

Subsection (e) of section 240D provides that violations of the immigration laws committed during an immigration emergency may be investigated by various Federal agencies. Once one of these agencies commences an investigation of a violation, it may conclude the investigation even though the immigration emergency has ended. This provision also specifies that assistance in investigating or enforcing section 240D may be provided by other Federal agencies including the Army, Navy and Air Force and also from state and local agencies. By specifically including the Army, Navy and Air Force, any problems with the Posse Comitatus Act are eliminated.

Definitions

Section 240E contains definitions which apply to the terms used in sections 240A through 240D.

The Section 273(b) Amendment

While not an emergency provision, an amendment to section 273(b) of the Act, 8 U.S.C. 1323(b), has been included. It is intended to increase the deterrent effect of that statute by increasing the monetary penalty for unlawfully bringing to the United States aliens without visas, and to provide greater authority for imposing sanctions