MEMORANDUM

THE WHITE HOUSE

WASHINGTON

June 14, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Proposed Testimony of INS Deputy Commissioner Riso on the Immigration Reform and Control Act

Jim Murr of OMB has requested comments on the above-referenced proposed testimony, scheduled to be delivered before the House Agriculture Committee on June 15. The testimony concerns H.R. 1510, the House version of the immigration bill, and focuses on those aspects of greatest concern to agricultural interests. In discussing employer sanctions, the testimony urges rejection of the Judiciary Committee amendment which would exempt employers from verifying the citizenship of prospective employees until after notification that the employers had an illegal alien in their employ. Riso also reviews INS plans for implementing the employer sanctions program, and the bill's temporary foreign worker scheme. I see no legal objections.

Attachment

THE WHITE HOUSE

WASHINGTON

June 14, 1983

MEMORANDUM FOR JAMES C. MURR
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING Orig. signed by F.F.
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Testimony of INS Deputy Commissioner Riso on the Immigration Reform and Control Act

Counsel's Office has reviewed the above-referenced proposed testimony, and finds no objection to it from a legal perspective.

FFF:JGR:aw 6/14/83

cc: FFFielding
JGRoberts
Subj.
Chron

ID # [redacted] CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

John

☐ O - OUTGOING
☐ H - INTERNAL
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Date Correspondence Received (YY/MM/DD) [redacted]

Name of Correspondent: Jim MURR

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Statement of Gerald R. Riso re: Immigration Reform and Control Act on June 15, 1983

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CWH011		ORIGINATOR	83/06/14			/ /
		Referral Note:				
CWAT 18		A	83/06/14		S	83/06/14
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5/81

U.S. Department of Justice

Assistant Attorney General
Legislative Affairs

SPECIAL June 13, 1983

TO: Jim Murr
OMB

FR: Yolanda Branche
OLA (633-2111)

RE: Testimony for Clearance

I have sent the attached testimony on the Immigration Reform and Control Act to Labor and Agriculture for their review and comments to you be 2 p.m. today.

cc: Fred F. Fielding

13

Office of the Commissioner

Washington, D.C. 20536

DRAFT

STATEMENT

OF

GERALD R. RISO
DEPUTY COMMISSIONER
IMMIGRATION AND NATURALIZATION SERVICE

BEFORE

THE

COMMITTEE ON AGRICULTURE
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

IMMIGRATION REFORM AND CONTROL ACT

ON

JUNE 15, 1983

- Chairman de la Garza and Members of the Committee,

I am pleased to be here and to have an opportunity to testify on H.R. 1510, the Immigration Reform and Control Act of 1983. Commissioner Nelson and other Service officials have met on numerous occasions with representatives of the agricultural community regarding their concern about the changes contemplated by the immigration reform package. This hearing affords an additional opportunity to address questions on the effect of immigration reform on agricultural employers and workers.

H.R. 1510 seeks a well balanced approach to the multiple immigration problems that we face in this country. It has the necessary elements of authority for enhanced enforcement of the law, humanitarian concern for aliens who have established strong equities in the United States, and provisions to meet the legitimate needs of employers. It has the added advantage of providing a more efficient, workable law which can be implemented fairly.

The conditions which have led to our present problems in immigration are neither new nor unusual. The United States has for many years presented an attractive lure to people from many parts of the world. The individual freedoms of its residents and the opportunities that are available have encouraged immigration since the very beginning of our country. Because of this, we have developed as a nation of many immigrants.

We must recognize, however, that there are limits to the number of immigrants which the country can reasonably accommodate. Most of all, immigration must be a controlled process accomplished under the provisions of law. The Immigration Reform and Control Act of 1983 recognizes this fact. By placing sanctions on hiring, the bill would eliminate one of the primary reasons aliens enter illegally - - employment. By providing for the legalization of aliens who have been productive members of our society for several years, the bill recognizes the reality of this situation and presents humanitarian and realistic approach. The bill also recognizes the need that some employers may have for legal short-term foreign workers in agriculture or other industries and it provides the means by which workers may be allowed to enter our country. Now I would like to comment on the specific provisions of H.R. 1510 of specific interest to this Committee.

Employer Sanctions

The cornerstone of the bill is the employer sanctions. The employer sanctions would be imposed on individuals who knowingly hire aliens who are unauthorized to work in the United States. As I have stated before, the most compelling reason for illegal immigration is employment. We feel that this provision is absolutely essential if we are to gain control of our borders. Only through this means can we remove the magnet which attracts so many illegal aliens to our country.

H.R. 1510 requires that a person who hires, recruits, or refers an individual for employment must complete a form for each potential employee and attest, under penalty of perjury, that the person's right to be employed has been determined through the examination of documents which identify the individual and show that he or she is eligible to be employed in the United States. An individual who seeks employment in the United States must complete a form and attest under penalty of perjury that he or she is a United States citizen, or an alien who has been authorized for employment.

The Attorney General has said in previous testimony, "In pursuing a law that will close the labor force to illegal arrivals, we must do so in a manner that is not unreasonably burdensome in cost and that is consistent with our values of individual liberty and privacy." Toward those ends, the Administration has several recommendations concerning employer sanctions.

The employment eligibility verification procedure mandated by H.R. 1510, when it was introduced last February, was essentially sound. It exempted 50 percent of employers - - those employing 3 or fewer employees - - from the verification requirement without diluting the impact of the procedures as a mechanism for control. The Judiciary Committee, amendment which exempted all

employers until given official notice by the Attorney General that there is an illegal alien in their employ, raises the question of whether employer sanctions can be effectively enforced. It creates the basis for discriminatory judgments by employers who are not obliged to keep any records, but who may still decide to screen out persons whom they think might be illegal aliens. The Department believes that uniform applicability of the verification requirements will work to the benefit of all concerned - - the employers, job applicants, the public, and the enforcement agencies. If there is a desire to lessen the paperwork burden, the Committee should return to the exemption for employers of three or less employees.

The amendment eliminates a crucial mechanism for the control of future illegal immigration: The verification system is the only way in which aliens personally feel the effects of the employer sanctions program, since all of the other provisions focus on the actions of the employer. The system imposes a passive but effective restraint on illegal immigration because aliens who seek unauthorized employment will experience an unwelcome examination of their status in the United States. This will deter their illegal entry or continued presence in the United States. The amendment rejects the verification system and discards the indispensable advantages of the system as a means of restoring control of illegal immigration.

This amendment will severely increase Service costs and resource requirements. The level of voluntary compliance with the statute will be negligible. Employers are aware of the limited resources of the Service and will continue to follow current practices in hiring illegal aliens until they receive a notice from the Service. The single task of approaching all employers would take in excess of 15 years using all current Enforcement resources. While this occurs the Service cannot abandon other vital enforcement programs. The amendment imposes an intolerable burden on the Service which would require an unacceptable increase in resources to maintain effective enforcement.

The amendment requiring a warrant for entry onto open lands also contradicts the goal of curbing illegal entry to the United States and its labor market. It will undercut employer sanctions and other immigration law enforcement.

The Administration is ready to work with Congress to ensure the adequacy of our system for verifying employment eligibility, but we should do nothing that would result in a national identity card or system. The President's Task Force on Immigration and Refugee Policy reviewed the alternatives to the use of existing documentation for establishing employment eligibility.
The Administration is willing to study and report on the need for and

feasibility of improvements in present documentation. We would be prepared to begin the implementation of appropriate changes within three years of enactment of this legislation. This period will provide us with an opportunity to evaluate the efficacy of relying on existing documentation and to determine what, if any, improvements would be appropriate.

The provisions for administrative and judicial review of employer sanctions violations should be simplified. The potential for employers to seek administrative and judicial review of civil penalties and the requirement that the Government affirmatively institute a collection suit to secure payment of penalties ultimately upheld on appeal could so burden the system that it would dramatically reduce the number of actions brought. Both administrative and judicial rights of appeal should be limited and consistent with due process. In addition, a final order affirming the imposition of a civil penalty should not require a subsequent action to secure payment.

Implementation of Employer Sanctions

If H.R. 1510 is enacted, the Immigration and Naturalization Service will approach its task of enforcing employer sanctions with two objectives. First, we believe that it is our responsibility to encourage employers to voluntarily comply with the law. Second, we will carefully target enforcement actions so maximum impact is assured. Extensive planning, that began when the Administration's omnibus immigration bill was introduced in 1981, has resulted in the following plans:

1. Public Information

An extensive program has been developed to provide information about employer sanctions to employers, business, labor organizations, and the public. The information will explain to employers how to comply with the law, and stress what is expected from employers to make a good faith effort to verify the eligibility of individuals seeking employment.

Instructions will be available from a number of sources. All employers will be mailed a detailed description of procedures to be followed. The media will be used for press releases, prepared announcements, and appearances by INS officials. Brochures will be distributed at INS offices, and our telephone information system will provide taped responses to inquiries about employer sanctions.

2. Enforcement

A broad strategy has been developed to identify enforcement targets to achieve the greatest impact. Operations will be based on historical data compiled against habitual employers of illegal aliens, and on profiles of industries which are known to attract illegal aliens. In addition INS and the Department of Labor will cooperate to assure that compliance audits are made on a representative sample of all businesses.

During the initial period of education following enactment, the INS will notify employers found in violation of the law and advise them of its provisions. When it is determined that an employer has committed a violation subsequent to an initial citation, the INS will issue a notice of intent to fine. Hearing procedures have been outlined and the INS plans to utilize automated data processing techniques to facilitate effective enforcement. The INS is developing guidelines for employers which should assist the verification of employment eligibility and reduce the likelihood of unlawful discrimination. Finally, the INS has identified procedures to monitor the enforcement of employer sanctions and is developing standards to measure productivity and the effectiveness of the program.

Temporary Foreign Workers

The Administration supports the goals of H.R. 1510 which are to protect domestic workers from adverse impacts due to foreign labor and to provide a legal means for the entry of temporary foreign workers when a need is clearly shown that cannot be met by American workers. This will be extremely important if we are to have workable sanctions against the hiring of illegal aliens. This will help to avoid the harmful effects that shortfalls of domestic workers would have on some employers, particularly agricultural employers, during the transition period between the introduction of employer sanctions and development of new sources of American workers.

Transitional Nonimmigrant Agricultural Worker Program

In an attempt to lessen the short term impact of the employer sanctions provision of the Simpson/Mazzoli bills on agricultural employers, the House Judiciary Immigration Subcommittee added an amendment to H.R. 1510 to establish a Transitional Nonimmigrant Agricultural Worker Program. A somewhat similar program relying on regulations for much of its specification was passed by the Senate. The final form and provisions of a transitional agricultural worker program will depend on reconciliation of the House and Senate versions, but several general observations and recommendations are warranted. It is essential that this program not be a magnet for illegal entry.

The provision contained in H.R. 1510 would require agricultural employers who desire to employ nonimmigrant aliens to submit a request for certification to the Attorney General during the first year of the transitional program and to provide information on the employer's requirements for seasonal agricultural labor in future years and the use of such labor in the past. After consideration of the historical needs of agricultural employers and the availability of domestic agricultural labor, the employment of specified numbers of nonimmigrant agricultural workers during designated periods of the year could be approved.

Upon approval to an agricultural employer for the employment of such nonimmigrant workers, work permits for each individual alien would be issued to the employer. A copy of the permit, which would be valid for a specified period of time, would be endorsed by the employer and given to the alien. An additional endorsed copy would be transmitted to the Attorney General and a copy would be retained by the employer. According to the current bill the endorsed permits issued to the nonimmigrant workers by their employers would be evidence of alien registration and authorization for employment.

During the first year of the program, employers could be authorized to employ nonimmigrant workers for 100% of their needs. The authorizations would be reduced to 67% in the second year and 33% in the third.

It is important that this phase down program come to an end with the third year, as currently written.

As presently written, the transitional program provisions contain two primary problem areas for INS. Although the class of aliens which it intends to reach is not defined, it would clearly be those not covered by legalization. It would seem likely that illegal aliens in the United States are included as well as aliens outside the country since there is the provision for agricultural employers to forward work permits to consular officers abroad for the purpose of issuing nonimmigrant "O" visas.

The lack of a clear definition of the target group would cause a number of problems, the most serious being the incentive it would give to aliens outside the United States to illegally enter in search of employers with work permits. This would defeat the primary intent of the reform legislation, which is to control immigration.

By defining the eligible group more clearly, this problem could be reduced to some extent. It is suggested that they be identified as aliens who currently employed by approved employer or have been employed in agriculture in the United States during the year preceding the enactment. Aliens who enter the United States illegally or who violate the terms of their admission as nonimmigrants after enactment should be excluded from the program. The bar to aliens who enter illegally is necessary or INS officers would be obliged to register for the program aliens whom they have just apprehended at the border.

The second serious shortcoming of the program is that except for those aliens who obtain visas abroad, no specific provision is made for the Government to screen and document those aliens who are to participate in the program. As written, an alien who is in the United States and does not obtain a visa from a consular officer, would only have to be in possession of a work permit issued by an employer. The existing provisions would make the work permit valid evidence of alien registration and would protect the alien from deportation for illegal entry or as being excludable at entry for lack of documents or for fraudulent entry as long as his work permit was valid. It would not protect him from deportation for other reasons nor provide valid documentation while moving from one agricultural employer to another.

We urge that the proposal be amended to provide for INS screening of all participants in the United States to determine their eligibility and for the issuance of appropriate official identification apart from the work permit issued by the employer. If this was done, we could control the number of aliens who participate and again reduce the incentive for illegal entries in search of work permits, and screen out the undesirable aliens. This screening and registry would be conducted within the United States during the first twelve months. Only those aliens registered in the first year of the program should be eligible to participate in the second and third years.

In most instances Government screening and registry would take place after an alien had been hired by an approved employer. We would recommend that within 30 days of being hired (or earlier if the work permit was for a lesser period) the alien would be obliged to come to an INS office to be registered and documented by INS. If an alien came forward directly to INS, he should have to provide proof of prior employment in U.S. agriculture in the previous year. He would be issued a registration card identifying him as a lawful nonimmigrant with authorization to work for employers participating in the transitional program. This documentation would facilitate movement from one employer to another and reentry to the United States after return to one's home country.

Among other consideration, participating employers should provide reasonable access to records and workers, so that the program can be properly monitored. Finally, a mechanism should be sought to assure that transitional workers do return to their homelands. This transitional program should not contribute to further

illegal alien presence in the United States.

The Immigration Service is developing workload and costs estimates related to this program and will be submitting them shortly to the Department of Justice and the Office of Management and Budget for their review. We expect that the processing expenses of this program will be covered by fees charged to participating employers and aliens.

We will continue conversations with agricultural employer organizations, even as we welcome the opportunity to meet with this Committee to discuss the operation of this proposed program.

This completes my prepared remarks. I would be glad to answer any questions.

THE WHITE HOUSE

WASHINGTON

June 21, 1983

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS JGR

SUBJECT: Statement of James I. K. Knapp Re: H.R. 7039 "U.S. Marshal's Service and Witness Security Reform Act of 1983"

We have been provided with a copy of the above-referenced testimony, which is to be delivered tomorrow before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice. The proposed statement expresses general support for Title I of H.R. 7039. Title I lists specific services which may be provided under the witness protection program, and specifies that factors other than security may be taken into account in administering the program.

The bulk of the testimony concerns three objectionable provisions. The first describes the program in contractual terms. The testimony objects to this on the ground that it is inadvisable and illegal (18 U.S.C. § 201(h), (i)) to compensate someone for testimony. If the program were viewed as a contract, the contract would have to be considered one for money and services (protection) in exchange for testimony. The testimony also objects to a provision omitting the Director and Associate Director of the Officer of Enforcement Operations, Criminal Division, from the permitted delegation of authority to approve applications to the program. Since these officials are the ones who actually run the program, they should be permitted to approve applications. Finally, the testimony seeks to refine provisions in the bill addressed to the problem of civil suits against protected witnesses.

I see no legal objection. The bill is a response to highly-publicized abuses of the witness protection program. The proposed testimony is well-considered and judicious.

Attachment

THE WHITE HOUSE

WASHINGTON

June 21, 1983

MEMORANDUM FOR GREGORY JONES
OFFFICE OF MANAGEMENT AND BUDGET

FROM: RICHARD A. HAUSER
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Statement of James I. K. Knapp Re: H.R. 7039 "U.S. Marshal's Service and Witness Security Reform Act of 1983"

Counsel's Office has reviewed the above-referenced statement and finds no objection to it from a legal perspective.

FFF:RAH:JGR:aw 6/21/83

cc: FFFielding
RAHauser
Subj.
Chron

ID #_____ CU

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CORRESPONDENCE TRACKING WORKSHEET

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Name of Correspondent: Greg. Jones

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Subject: Statement of James I. K. Knapp re: H.R. 7039 "U.S. Marshals Service and Witness Security Reform Act of 1983"

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUH011	ORIGINATOR	83/06/21			/ /
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CUAT 18	A/D	83/06/21		5	83/06/22
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U.S. Department of Justice

Assistant Attorney General
Legislative Affairs

IF YOU HAVE ANY COMMENTS PLEASE CONTACT GREG JONES, OMB, 395-3856.

DRAFT

STATEMENT OF JAMES I. K. KNAPP

DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

U.S. DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND
THE ADMINISTRATION OF JUSTICE

JUNE 22, 1983

Mr. Chairman, I appreciate this opportunity to appear before the Subcommittee today to discuss H.R. 7039, a bill entitled "United States Marshals Service and Witness Security Reform Act of 1983" and its impact on the Witness Security Program. With me here today is Gerald Shur, Associate Director, Office of Enforcement Operations who administers the Program for the Criminal Division.

The bill is divided into two parts. Title I deals with the Witness Security Program and Title II deals with the Marshals Service. The comments contained in this statement concern Title I. Our basic position is one of support for this legislation, with three significant exceptions which will be discussed below.

The Witness Security Program is one of the most effective and most important tools in the prosecution of organized criminal conspiracies. Over the years, the Program has grown to a structured, multi-service program that seeks not only to assure the security of protected witnesses but also to address the variety of other problems faced by individuals and families who must adopt new identities and relocate to safer areas of the country. In this period of growth, the Attorney General has been called upon to develop special procedures and techniques to deal with the protection and relocation of witnesses.

We believe that the Program in its present form accords fully with the intent of the 1970 legislation establishing the Program (Title V of the Organized Crime Control Act of 1970, P.L. 91-452, 84 Stat. 933). The Department, however, has long supported legislation describing in more detail the authority the Attorney General may exercise in making the Program effective. To the extent that Title I of this legislation would also accomplish this purpose, we support it. For example, proposed section 3521(b) emphasizes that the Program is not limited to security considerations, but should extend -- as it now does -- to concerns about the social and psychological difficulties faced by the relocated witness. This section also lists specific services that may be provided. Section 3523 provides guidance in our dealings with State authorities, and proposed section 3524 provides clear authority for the Attorney General to enter into contracts or other agreements to carry out the purposes of the Witness Security Program. The legislation also provides for the active supervision of witnesses who are on state parole or probation by federal probation officers, a measure which we strongly support.

Despite our support of the foregoing provisions, we believe that this bill should be modified in several key respects because it contains provisions which would significantly and detrimentally alter the Witness Security Program. We have three

fundamental concerns: (1) the contract-like language contained in Section 3521 (d)(1)(a); (2) the delegation provisions which omit reference to the Director and Associate Director of the Office of Enforcement Operations; and (3) the provisions for judicially ordered disclosure.

We oppose Section 3521(d)(1)(a), because it appears to create a contract between the parties in that there is an exchange, i.e., the promise of Program services, which includes payment of money, by the government for the promise to comply with the terms of the agreement including "the agreement of the person, if a witness or a potential witness, to testify in and provide information to all appropriate law enforcement officials concerning all appropriate proceedings . . ." Any compensation for providing testimony is strictly prohibited by Title 18 U.S.C. 201(h) and (i). This issue is now handled by a Memorandum of Understanding, a statement drafted by the Marshals Service detailing the services to be furnished to the witness, which the witness signs and acknowledges that he has read and understood.

Section 3521(d)(1)(a) is clearly a departure from the language presently contained in the Memorandum of Understanding which states:

> ". . . This memorandum is not a contract or an agreement to provide protection or maintenance assistance to the witness in return for testimony . . ."

This language is designed to emphasize that there is not an exchange of money for testimony.

The relationship between the government and the witness is not contractual. Participation in the Program is voluntary, and acceptance in the Program is within the discretion of the Attorney General. The services provided by the government to a witness are not a payment to the witness for his testimony, as they would appear to be in this bill. These services are a means of providing protection against the danger created by the witness carrying out the obligation of all our citizens to testify in court concerning the commission of a crime.

We believe the Memorandum of Understanding now in use is sufficient for our needs. We object to the provision in the bill requiring that either the Attorney General, the Associate Attorney General, or Assistant Attorney General, Criminal Division, sign the agreement. It is appropriate for a representative of the United States Marshals Service to sign this document since it is that agency which provides the services described. In addition, the United States Marshals Service is a neutral body, free from any prosecutorial concerns. Retaining this authority in the United States Marshals Service preserves the integrity of the Program, dispelling any implications of a "bargain."

We also object to Section 3521(d)(3). This Section omits from the delegation to approve applications for the Witness Security Program the Director and Associate Director of the Office of Enforcement Operations, Criminal Division, who presently exercise the authority to perform this function. We believe that this authority should remain where it is, and therefore recommend that it be delegated also to the Director and Associate Director of the Office of Enforcement Operations.

The Office of Enforcement Operations was created in the Criminal Division in February 1979, and was assigned sole responsibility for the Division's role in the Witness Security Program. The creation of the Office of Enforcement Operations resulted not only in the centralization of control over admissions to the Program, but also in the application of uniform admission criteria. The Office of Enforcement Operations now has the primary authority for determining which witnesses will be assisted in the Program. As a result, a tightening up of the admission process and a greater uniformity of application of rules now exists over that which occurred prior to the creation of the office.

The initial application to use the Program is submitted by the United States Attorney, the chief federal law enforcement officer in the judicial district. The Office of Enforcement Operations has implemented the use of the Witness Security Program Application Form, which requires the prosecutor to submit very specific and detailed information about the significance of the case, the prospective defendants, the witness' testimony, and the anticipated benefits of successful prosecution. The Office of Enforcement Operations forwards a copy of the prosecutor's application to the appropriate litigative section in the Criminal Division, where it is reviewed for significance of prosecution, significance of defendants in light of their criminal activity, and the significance of the witness' testimony.

In addition, the investigative agency involved submits to its headquarters a report detailing the threat to the witness and describing the need to use the Program. Agency headquarters reviews the report and forwards it, along with the headquarter's recommendation, to the Office of Enforcement Operations. In the Federal Bureau of Investigation, four people actually review the report, including the Chief of the Organized Crime Intelligence Unit and the headquarters case supervisor.

While these two independent reviews are being conducted, the United States Marshals Service interviews the witness and the adult members of the household to ensure that the witness understands what the Program can and cannot do and to identify any problems which may arise in the relocation process. In addition, the witness is advised to obey all laws and to comply with all regulations of the Program or risk being terminated from

the Program. This report is reviewed by five people at the United States Marshals Service headquarters. The United States Marshals Service then forwards a copy of this preliminary interview report to the Office of Enforcement Operations, along with its recommendations concerning the witness' suitability for the Program.

When this process is completed, seven people in the Office of Enforcement Operations review and consider all four reports before making a decision. If the investigative agency headquarters determines there is no threat to the witness, the prosecutor's request is denied. If the litigative section determines the case is not important, or that the witness' testimony is not essential, or that the evidence is not sufficient for conviction, the request is denied. If the United States Marshals Service determines that the witness is not a suitable candidate for the Program and the anticipated problems in relocation are insurmountable, the request is denied. Occasionally, authorization is given despite the United States Marshals Service objections with the understanding that the authorization is based on the witness' participation in necessary programs such as drug counseling, treatment for alcohol abuse, or psychiatric care.

The delegation of authority to approve Witness Security Program applications as it presently exists has proven effective and efficient. The sharp decline in the usage of the Program since the Office of Enforcement Operations was created is the direct result of the efforts of the Director and Associate Director to carefully screen applications. The Witness Security Program was developed in 1970. In 1971, 92 witnesses were protected. From 1975 through 1977, an average of 450 new witnesses entered the Program each year. In February, 1979, the Office of Enforcement Operations was created to administer the Program and Program entries decreased significantly. In FY 1980, there were 315 entries into the Program. In FY 1981, there were 260 and in FY 1982, 300. In the first 8 months of FY 1983, 200 persons have been placed in the Witness Security Program. In addition, monitoring of admissions by the Office of Enforcement Operation has resulted in a significant upgrading of the prosecutions for which witnesses are placed in the Program and an increased certainty that there is no other alternative to ensure the witness' safety at that time.

As written, Section 3521(d)(3) places an extraordinary burden on persons who are charged with a great many responsibilities. This designation to approve Witness Security Program applications would not just be burdensome to the named designees, but would result in some disadvantage to the operation of the Program. In many cases time is a crucial factor and applications must be processed very quickly. Additionally, the

volume of witness security requests would be unduly burdensome on the designees, and the new Narcotics Task Forces will cause increased use of the Program. To ask persons already charged with a high level of responsibility to add a task of this nature, and to by-pass an office which is charged with the responsibility of the day to day administration and coordination of the Witness Security Program, is not prudent. Further complications arise in the absence or unavailability of the designee who is already overburdened with sufficient real time problems (i.e. wire taps).

Section (f)(1) of 3521 provides for the resolution of civil matters involving relocated witnesses. This section requires the Attorney General to accept service of process for the witness, make a return of service to the plaintiff, and assert the intentions of the witness in response to the judgment.

Acceptance of service of process by the Attorney General for the witness would create an agency relationship which should be clearly limited to service of process. However, it should not be in the province of the Attorney General to convey to the plaintiff the intentions of the witness regarding compliance with the judgment. Instead, it is suggested that the following language provides sufficient safeguards to the plaintiff.

> . . . If a judgment in such action is entered against that person, the Attorney General shall take appropriate steps to urge the person to comply with the judgment. If the person has not complied with the judgment within a reasonable time, the Attorney General shall, after considering the danger to the person and whether the person has the ability to respond to the judgment, (1) disclose the identity and location of the person to the plaintiff entitled to recovery pursuant to the judgment and/or (2) direct the person to take such action in accordance with the judgment as the Attorney General determines is appropriate. 1/

Section 3521(f)(2) provides for judicial review of the Attorney General's disclosure decision. We oppose this provision because we believe that it could open the door for unnecessary and costly litigation against the United States. An unwarranted judicial decision could needlessly endanger a witness' life.

1/ S. 474, 98th Congress, 1st. Session

We recommend an alternative approach. First, a recently authorized procedure would continue under which the Associate Attorney General would direct the Marshals Service to disclose the location of the witness to legitimate judgment creditors in the event that the witness willfully refused to pay a legitimate debt. Second, a statute could provide for the use of a court appointed master to enforce judgment where the Associate Attorney General determines there would be undue danger to the witness if his address was disclosed to creditors. The master would be furnished with all necessary powers. This approval would require the Attorney General to divulge the witness' location only to the master and not to a third party.

We believe this approval should be given a chance to work before the Pandora's box of judicially ordered disclosure is opened.

I hope you will consider these comments and suggestions and I appreciate the opportunity to present them. We will be pleased to answer any questions the Subcommittee may have.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

June 22, 1983

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: Proposed Testimony of Deputy Assistant Attorney General Knapp on H.R. 3299, "Comprehensive Drug Penalty Act of 1983"

We have been provided with a copy of the above-referenced proposed testimony, to be delivered tomorrow. H.R. 3299 would strengthen forfeiture provisions and sentences in drug felony cases. The testimony expresses basic agreement with H.R. 3299, and notes the similarities between it and portions of the Administration omnibus crime bill. The proposed statement criticizes H.R. 3299 for (1) applying the forfeiture amendments only to drug felony cases (not RICO cases as well, as in the Administration bill), (2) lacking a substitute asset provision, and (3) not sanctioning forfeiture of real property used to grow marihuana. The testimony also lauds those provisions of H.R. 3299 increasing the ability to use administrative as opposed to judicial procedures in civil forfeiture cases.

Knapp proposes to announce in his testimony a change in Justice Department policy concerning petitions for remission and mitigation from an order of criminal forfeiture. Justice has now decided that third party claims inconsistent with the forfeiture itself -- e.g., a claim by a third party that he, not the criminal, owns the subject property -- should be decided in court. This policy change responds to expressed legislative concerns and necessitates a change in H.R. 3299, which Knapp volunteers to help prepare. Knapp's testimony concludes by discussing the appropriate standard of proof in criminal forfeiture cases in a non-commital way. He notes that a preponderance standard would make cases easier, but that there has really been no difficulty meeting the beyond reasonable doubt standard in the past, and that use of a different standard might confuse jurors.

I see no legal objections to the testimony, but have noted several stylistic errors in the attached draft memorandum to Greg Jones.

Attachment

THE WHITE HOUSE

WASHINGTON

June 22, 1983

MEMORANDUM FOR GREGORY JONES
OFFICE OF MANAGEMENT AND BUDGET

FROM: RICHARD A. HAUSER
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Testimony of Deputy Assistant Attorney General Knapp on H.R. 3299, "Comprehensive Drug Penalty Act of 1983"

Counsel's Office has reviewed the above-referenced proposed testimony, and finds no objection to it from a legal perspective. On page 2, H.R. 3299 is twice mistyped as H.R. 3922. The same error recurs on page 3. On page 10, line 15, "of" should be deleted, and on page 16, line 23, either "submit" or "prepare" should be deleted.

FFF:RAH:JGR:aw 6/22/83

cc: FFFielding
RAHauser
JGRoberts
Subj.
Chron

ID #_____ [redacted]

WHITE HOUSE
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Subject: H.R. 3299 "Comprehensive Drug Penalty Act of 1983"

ROUTE TO: Office/Agency (Staff Name)	ACTION Action Code	ACTION Tracking Date YY/MM/DD	DISPOSITION Type of Response	DISPOSITION Code	DISPOSITION Completion Date YY/MM/DD
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DRAFT

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before the Subcommittee to discuss H.R. 3299, the "Comprehensive Drug Penalty Act of 1983." The goals of this legislation, strengthening the use of forfeiture as a weapon in attacking drug trafficking and increasing the fines available for serious drug offenses, are ones which this Administration regards as of the highest priority, for they are essential to our efforts in combatting one of the gravest crime problems facing our country: the importation and distribution of dangerous drugs. Indeed, two of the titles of the President's comprehensive crime legislation, introduced in the House as H.R. 2151, are similarly designed to improve forfeiture and increase drug offense fines.

In comparing H.R. 3299 and the Administration's analogous proposals, it is clear that we are largely in agreement about the major concepts set forth in this legislation. In addition to increasing the now unacceptably low maximum fines for drug crimes, these objectives include creating a strong criminal forfeiture statute that would be applicable in all felony drug trafficking cases, providing authority for the civil forfeiture of real property used in the commission of major drug crimes, providing a funding mechanism whereby amounts realized in forfeiture cases can be used to defray the mounting costs associated with forfeitures, and amending the forfeiture provisions of the Tariff Act of 1930 -- a statute which governs civil forfeitures under both the customs and drug laws -- to increase the use of efficient administrative forfeiture procedures in

uncontested cases. While our approaches to each of these issues differ somewhat, I believe the areas of agreement far outweigh the differences, and we would be pleased to work with the Subcommittee to resolve these differences in a mutually acceptable way.

Let me begin by outlining the particular subjects on which my testimony will touch. First, I will address the major differences between H.R. 3922 and the Administration's forfeiture proposal. One such difference is scope. While H.R. 3922 is confined to improvements in the forfeiture of drug related assets, the Administration's forfeiture proposal also amends the RICO criminal forfeiture statute (18 U.S.C. 1963). A second major difference concerns the question of including a substitute assets provision in criminal forfeiture legislation. Our proposal contains such a provision; H.R. 3299 does not. Another difference, although not of the magnitude of the RICO and substitute assets issues, is that H.R. 3299's provision for the civil forfeiture of real property used in serious drug crimes does not permit the forfeiture of land used for the domestic cultivation of marihuana.

In addition to addressing these differences between H.R. 3299 and the Administration's forfeiture proposal, my statement will stress the importance of the Tariff Act amendments to our civil forfeiture efforts since these amendments were not before the Subcommittee in its consideration of forfeiture legislation in the last Congress. I will also take this opportunity to inform the Subcommittee of a change in the Justice

Department's policy with respect to petitions for remission and mitigation, a change that we believe necessitates a revision in the hearing procedure set out in the criminal forfeiture provisions of H.R. 3299. Finally, at the request of the Subcommittee's staff, I will briefly discuss the concept of lowering the standard of proof in criminal forfeiture cases.

RICO Criminal Forfeiture

An important part of the Administration's forfeiture legislation focuses on strengthening the criminal forfeiture provisions of the Racketeer Influenced and Corrupt Organization or RICO statute (18 U.S.C. 1961 et seq.). H.R. 3922's forfeiture amendments are confined to those applicable to drug offenses. The authority to reach the profits and financial underpinnings of organized criminal activity through forfeiture is a necessary part of effective law enforcement in this area. This is the very reason that in 1970 the Congress included criminal forfeiture as one of the sanctions applicable to violations of RICO. In our view combatting racketeering is a top priority of federal law enforcement, and depriving those involved in organized criminal activity of the financial resources they amass and use in this crime is an integral part of that enforcement effort. To be successful in this effort, however, we must improve existing forfeiture authority under the RICO statute.

Briefly, the need to improve the RICO criminal forfeiture provisions arises in two areas. First, the forfeitability of profits of racketeering should be clarified. Whether the RICO statute now encompasses such profits is a question currently before the Supreme Court in Russello v. United States (No. 82-472, cert. granted, Jan. 10, 1983). The property at issue in Russello is more than $300,000 in fraudulently obtained insurance proceeds from an arson-for-profit scheme. We believe it is essential that such profits be subject to forfeiture under the RICO statute. Should the Congress fail to address this issue and Russello is decided against the government, the effectiveness of the RICO forfeiture provisions will be severely limited.

The second problem posed by the RICO forfeiture statute is one that arises from the distinctive nature of criminal forfeiture. In criminal forfeiture, unlike civil forfeiture, the government cannot obtain control of the assets until after a judgment of forfeiture is entered. As a result, a defendant has ample opportunity to conceal or transfer his forfeitable assets in advance of trial, and such pre-conviction transfers can render the sanction of forfeiture an illusory one. This is the greatest problem posed in using criminal forfeiture effectively, and in the case of RICO violations, in contrast to many drug violations, there is no alternative remedy of civil forfeiture; criminal forfeiture is the sole procedure available.

Presently, under the RICO statute, the only mechanism to address the problem of pre-conviction transfer or disposition of assets is a restraining order, and that remedy is available only after indictment. As is recognized in the drug felony criminal forfeiture statute proposed in H.R. 3299, the authority to obtain a restraining order should be extended, under certain limited circumstances, to the pre-indictment period. This additional authority should apply to RICO forfeitures as well. The Administration also urges that the RICO criminal forfeiture provisions, and the proposed drug felony criminal forfeiture statute proposed in H.R. 3299, be amended to include a substitute assets provision to address those cases where a restraining order cannot be obtained or is ineffective.

Substitute Assets

As noted above, it is the position of the Department of Justice that a substitute assets provision would greatly enhance the effectiveness of criminal forfeiture. Briefly, a substitute assets provision works as follows. The government must prove in the criminal trial that specified property of the defendant was used or obtained in such a way as to render it subject to forfeiture under the applicable statute. If after the entry of the special verdict of forfeiture, however, it is found that those specified assets have been removed, concealed, or transferred by the defendant so that they are no longer available to satisfy the forfeiture judgment, the court may order the defendant to forfeit other of his assets in substitution. Thus, by

applying a substitute assets provision, defendants would not be able to avoid the criminal forfeiture sanction simply by making their forfeitable assets unavailable at the time of conviction.

Substitute assets is a novel concept. It departs from the traditional concept of forfeiture upon which civil forfeitures are based. In civil forfeitures, it is the property that is "guilty," and indeed, with the exception of a few of the most recently enacted civil forfeiture provisions, the guilt or innocence of the owner of the property is irrelevant. Thus, in civil forfeiture, a nexus between the property forfeited and a violation of law is essential. It is in this respect that a substitute assets provision of a criminal forfeiture statute would differ. Although the government would have to prove that the original asset did have the necessary nexus to the offense, an asset ordered forfeited in substitution (where the original asset was no longer available) would not have to bear a "tainted" relationship to the offense.

The nexus requirement applicable in civil forfeiture, however, should not bar application of a substitute assets provision in the context of criminal forfeiture. Criminal forfeiture differs from civil forfeiture in two important ways. The first is a practical one to which we have already alluded: in civil forfeiture, the action is commenced with the government's seizure of the property. In criminal forfeiture, on the other hand, the government cannot obtain custody of the property until after conviction. Therefore, the very procedural nature of

criminal, as opposed to civil, forfeiture creates greater opportunities for a defendant to transfer or dispose of his forfeitable assets.

The second difference between criminal and civil forfeiture is a conceptual one. As noted above, in civil forfeiture, it is the property itself which is the defendant, and the government has a right to the property because it is contraband, or a fruit or instrumentality of a crime. Criminal forfeiture, however, is a punitive sanction imposed against a convicted person. Where, prior to conviction, a defendant transfers his forfeitable property or removes it from the jurisdiction of the court, he can effectively avoid this sanction. A substitute assets provision, therefore, would preserve the sanction of criminal forfeiture in such cases.

In understanding the importance of a substitute assets provision, we must be realistic about the sophistication of many drug traffickers and organized crime figures. Concealing the extent of their financial assets is not uncommon; rather it is a common practice, for such individuals must fear not only the prospect of forfeiture, but also the fact that exposure of their financial dealings would subject them to liability for tax and currency law violations. This is one reason the use of offshore banks has been such a boon to drug traffickers and such a problem to law enforcement officials. These banks serve both as safe depositories for illicit drug profits and as money laundering facilities that can thwart our efforts to trace "tainted" sources of a trafficker's stateside assets.

By way of illustration you may recall the recent guilty plea of one of the defendants in the DeLorean case. As part of the plea, he agreed to forfeit hundreds of thousands of dollars in an account in the Cayman Islands. Had this case gone to trial, this money would not have been available for forfeiture, and no forfeiture of substitute assets could have been ordered under current law.

A 1982 prosecution of a large scale hashish smuggling operation, United States v. Ashbrook, provides a similar example. The primary defendant was apprehended leaving the country with $170,000 intended as partial payment on a two million dollar hashish deal. This defendant had operated for several years. He would deposit the proceeds of his drug trafficking in a Cayman Islands bank account in the name of a fictitious corporation. Amounts needed for new drug deals would be transferred from the Caymans to Lebanon. In this case, not only were substantial forfeitable drug proceeds in a bank outside the jurisdiction of a United States court, but a $300,000 boat used to smuggled the hashish was in Italy, also outside the reach of the government. Fortunately, by virtue of a plea agreement, a substantial forfeiture was obtained. Again, however, had this case gone to trial, it is doubtful that, absent a substitute assets provision, a forfeiture of much significance could have been assured, despite the fact that the defendant had a number of extremely valuable stateside assets.

The need for a substitute assets provision is not confined to cases involving the use of offshore banks. For example, in United States v. Webster, 639 F.2d 174 (4th Cir. 1981), modified on rehearing, 669 F.2d 185 (1982), a defendant used a bar as a front in a heroin dealing operation. The bar was clearly subject to forfeiture under the RICO or Continuing Criminal Enterprise (21 U.S.C. 848) statutes. However, it was sold a month before indictment. Without a substitute assets provision, there could be no forfeiture.

It is argued that the imposition of substantial fines would be an effective alternative to a substitute assets provision. Certainly, the two remedies serve the same purpose of imposing an economic sanction on a defendant, and we strongly support the increased drug fines proposed in H.R. 3299. Nonetheless, we do not view fines as an adequate alternative to a substitute assets provision for two reasons. First, the imposition of a fine, is not mandatory. Moreover, in H.R. 3299, a new procedure is set out to allow the court to excuse all or part of the fine imposed on a drug trafficker. A special verdict criminal forfeiture, however, is binding on the court, and under our proposal this would extend to cases in which forfeiture of substitute assets was appropriate. Second, collection of criminal fines is difficult. Once a fine is imposed, the United States must pursue collection remedies in State court in the same manner as an ordinary creditor. In the case of criminal forfeiture, the government is authorized by the trial court to seize specific

assets. Furthermore, under the Administration's forfeiture proposal, after conviction the government could obtain a strong restraining order pending its actual seizure of the property. For these reasons, we believe that forfeiture through a substitute assets provision can, in certain cases, prove a substantially more effective sanction than the possibility of imposition of fines.

Civil Forfeiture of Real Property

Section 102 of H.R. 3299 adds a new provision to allow the civil forfeiture of real property used to store controlled substances or equipment used in the illegal manufacture or distribution of drugs. This provision, which would, for the first time, give clear authority for the forfeiture of "stash houses" and illicit drug laboratories, is one the Administration strongly supports. We are concerned, however, that it does not allow us to reach land used in of domestic, commercial cultivation of marihuana -- a problem of increasing dimensions.

We have no firm figures on the quantities of marihuana produced domestically, although an inter-agency effort has been recently initiated to provide sound estimates in this area. Clearly, the primary source for marihuana remains foreign. The Drug Enforcement Administration's 1980 estimates for illicit marihuana availability limited the domestic supply to about seven percent. Nonetheless, there is a consensus in the drug enforcement community, both state and federal, that domestic cultivation of marihuana for commercial distribution is significant and growing. Part of this growth, we believe, is a response to

successes in interdicting foreign shipments. Moreover, the mere quantities of marihuana produced within the country do not fully indicate the seriousness of this problem, for domestic cultivation operations appear increasingly to concentrate on production of sinsemilla, an extremely powerful type of marihuana that can command prices in excess of $1,000 a pound. For example, in hearings last September before the Senate Subcommittee on Forestry, Water Resources, and Environment, the Sheriff of Mendocino County, California stated that over a three year period, his county's eradication program resulted in the confiscation and destruction of more than 100,000 pounds of sinsemilla. Just this month, the United States Attorney in Sacremento successfully prosecuted a case involving cultivation of more than 4,000 high-grade marihuana plants on both public and private land. (United States v. Corey Wright, et al.)

The United States Attorney for the Eastern District of Oklahoma indicates that he is receiving reports of large amounts of marihuana cultivation in his district, and has successfully prosecuted two marihuana growing operations in the last year. (United States v. Warhop and United States v. Barnard.) One of these cases involved the transportation, on a regular basis, of marihuana from southeastern Oklahoma to Kansas City and Chicago. In another case, a cooperating witness provided information that he and two partners moved from California to Oklahoma specifically for the purpose of buying a farm to grow sinsemilla. This operation included not only the cultivation of plants but also irrigation and drying facilities.

Right now, we can combat large-scale growing operations only through prosecution and eradication efforts. In our view, forfeiture of the land used in these lucrative commercial operations should be added to the arsenal of enforcement resources. Therefore, we strongly urge the Subcommittee to augment H.R.3299's provisions for forfeiture of real property by including the authority to reach land used in commercial cultivation operations. The present provision's limitation to felony offenses, coupled with its specific protection of any innocent owners of misused real property, provide adequate assurances against unfair application of the use of this land forfeiture authority.

Tariff Act Amendments

Title II of H.R. 3299, like the Administration's forfeiture legislation, sets forth extremely important amendments to the forfeiture provisions of the Tariff Act of 1930. These provisions govern civil forfeitures under both the customs and drug laws. By far the most significant of these amendments are those that would increase the availability of more efficient administrative forfeiture procedures.

Under current law, civil forfeitures may be the subject of either judicial or administrative proceedings. Administrative proceedings, which are applicable only in uncontested cases, can be used now, however, only if the property at issue is valued at less than $10,000. As you can imagine, assets in drug trafficking cases frequently exceed this $10,000 ceiling. For example, cash seized in a large drug transaction will often

exceed this amount, as will the value of most boats and airplanes used to smuggle illicit drugs. Yet many forfeiture cases involving these valuable assets go uncontested. The problem posed by current law's requirement that these uncontested cases be the subject of judicial, rather than administrative, proceedings is one of tremendous inefficiency in terms of both time and money.

As the members of the Subcommittee are no doubt aware, the number of civil cases filed in the United States District Courts is staggering. As of June, 1982, more than 200,000 civil cases were pending. This huge backlog of civil cases means that periods of more than a year can elapse between the time a civil forfeiture case is filed and the time it is decided. During this period, seized property is subject to deterioration, and in the case of property requiring considerable maintenance, such as a boat, this deterioration can be significant. Moreover, during these periods of delay, the expenses to the government in storing, safeguarding, and maintaining the property mount. Thus, depreciation of the property coupled with huge expenses incurred by the government while awaiting judgement can often mean that the sale of the property ultimately results in little or no return to the government. The interests of third parties can be jeopardized as well in such cases, for there may be inadequate sale proceeds to satisfy liens against the forfeited property.

To address this problem, H.R. 3299 would allow the use of far more efficient administrative forfeiture proceedings with respect to any cars, boats, and planes used in the illegal

transport of dangerous drugs and with respect to any other property of a value up to $100,000. As under current law, administrative proceedings would be available only when, after notice, no party comes forward to post bond and require a judicial resolution of the forfeiture.

The bill would also raise the current bond amount, now set at $250. This amount dates from the 1920's when the limit on property subject to administrative forfeiture was $2,500. In H.R. 3299, the bond is to be set at ten percent of the value of the property up to a maximum of $2,500. The Administration's bill would specify a maximum of $5,000, a figure we prefer. However, even a maximum of $2,500 would be a vast improvement over the current bond which is so low as to provide no disincentive to the filing of clearly frivolous claims and which bears no relationship to the costs to the government in pursuing a successful forfeiture.

Two other aspects of the Tariff Act amendments would have a beneficial impact on our efforts to enhance cooperation with state and local law enforcement agencies in our drug forfeiture investigations. The first would clarify our authority to discontinue a federal forfeiture action in favor of state forfeiture proceedings. The second would allow the United States to transfer forfeited property directly to state and local agencies assisting in our investigative efforts.

Another part of the Tariff Act amendments establishes a Customs Forfeiture Fund which would make available for appropriation the proceeds of profitable customs forfeitures to defray

expenses incurred by the Customs Service in storing, maintaining, and disposing of forfeitable property. This fund for the Customs Service is analogous to the Drug Enforcement Fund appearing in the first part of H.R. 3299 and approved in the last Congress. The Administration's bill contains two similar funds. Again, the basic conceptual framework of the funds in H.R. 3299 and those in the Administration's bill is the same, and to the extent that our approaches differ, we would be pleased to work with the Subcommittee to resolve these matters as quickly as possible.

Resolution of Third Party Claims

Until recently, the Department entertained a variety of petitions for relief from an order of criminal forfeiture in what is known as the remission and mitigation process. These petitions included not only requests for relief which did not challenge the validity of the forfeiture itself, but also claims made by third parties which by their very nature were inconsistent with the order of forfeiture. In essence, this latter category of claims includes those in which a third party asserts that the order of forfeiture is improper because the property was his rather than the defendant's or because his legal interest in the property was superior to that of the defendant. It is now our position that this latter category of claimants -- those asserting a legal interest in forfeited property that cannot be co-extensive with the order of forfeiture -- are entitled to a judicial resolution of their claims, and that it is improper and arguably even unconstitutional for the remission and mitigation

process, which has traditionally been viewed as solely a matter of executive discretion, to be used as the forum for resolution of their asserted interests.

H.R. 3299 now includes a procedure whereby third parties may obtain a judicial hearing after the close of the criminal case to adjudicate their claims to property which has been the subject of a special verdict of criminal forfeiture. However, all third parties are required, in the first instance, to seek relief from the Attorney General through the remission and mitigation process. This aspect of the hearing procedure was designed to accommodate our former policy concerning the remission and mitigation process. In light of our new policy, however, we now firmly believe that true third party claimants (as opposed to persons asserting merely equitable grounds for relief) should not be required to pursue the remission and mitigation process. While we apologize for the fact that in the last Congress the Subcommittee shaped the hearing procedure to accommodate the very policy which we have now changed, this change should allow a more even-handed and expeditious adjudication of third party interests, an issue about which, Mr. Chairman, I understand you and other members of the Subcommittee have had strong concerns.

If it is acceptable to the Subcommittee, the Department would be pleased to submit prepare draft amendments to H.R. 3299's hearing procedure that reflect our change in position.

Standard of Proof for Criminal Forfeiture

Subcommittee staff has requested the Department's views on changing H.R. 3299's standard of proof for criminal forfeiture from one of beyond a reasonable doubt to one of preponderance of the evidence. The standard of proof issue is not addressed in current criminal forfeiture statutes, and to our knowledge, no court has ever ruled on this matter. From a procedural standpoint, criminal forfeiture is treated in the same manner as an element of an offense. It must be alleged in the indictment, is the subject of a special verdict by the jury in the criminal trial, and as with an element of the offense, it has been the practice in the courts to require proof beyond a reasonable doubt.

However, criminal forfeiture is not an element of an offense. Instead, it is a special sanction, applicable only after criminal conviction, and based on a factual showing of a specified connection between the criminal offense and the property to be forfeited. In at least one other context, the dangerous special offender (18 U.S.C. 3575) and dangerous special drug offender (21 U.S.C. 849) statutes, proof of circumstances to support imposition of a special sanction need only meet a preponderance of the evidence standard. Moreover, even though civil forfeiture has, in certain contexts, been said to be quasi-criminal in nature, a preponderance test applies in all civil forfeiture cases, and so it could be said that there is nothing about forfeiture per se, whether pursued in civil or criminal proceedings, that requires a beyond a reasonable doubt

standard. Thus, a good argument could be made that since criminal forfeiture is not in the nature of a determination of criminal liability but rather is an assessment of a special penalty following a finding of guilt, a preponderance of the evidence standard would be sufficient.

While, therefore, an argument can be made for the preponderance standard, we question whether such a change in the law would, on balance, be beneficial. To date, meeting the beyond a reasonable doubt test in our criminal forfeiture cases does not appear to have been particularly troublesome. This may well be due to the fact that most of the essential elements supporting a forfeiture concern the criminal violation itself and will have to be proven beyond a reasonable doubt in any event before conviction can be obtained. Nonetheless, were the standard of proof lowered, there may well be cases where would the government prevail where under the current standard we would not. On the other hand, however, changing the standard of proof will inevitably invite years of litigation. Moreover, since criminal forfeiture is determined by the jury, there may be considerable confusion if they must assess guilt according to one standard of proof and criminal forfeiture according to another. Thus, our concerns about this change stem not from the legal merits of the proposal, but rather from the potential problems of jury confusion and additional litigation such a revision may generate.