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2/ JUN 1981

MEMORANDUM FOR THE ASSOCIATE ATTORNEY GENERAL

Re: Powers Available in the Event of a Cuban Boatlift

This responds to your two memoranda of May 20, 1981, raising several questions as to the powers available to the President in the event of another Mariel-style boatlift. These questions were modified by further information received from the State Department on May 27, 1981. 1/

1. You have asked whether the President may authorize Customs to prohibit U.S. registered vessels from traveling to Cuba without a license from the Department of Commerce. The present statutes administered by the Commerce Department do not permit an outright prohibition of travel to Cuba. Rather, the Coast Guard can arrest individuals violating the Export Regulation Act, 50 U.S.C. App. § 2401 et seq. (Supp. III 1979), which requires licenses for certain exports. We note that the Treasury Department has regulations, issued under the Trading with the Enemy Act, 5 U.S.C. App. § 5(b), that forbid travel to Cuba for the purpose of transporting Cubans lacking proper visas to the United States. 31 C.F.R. § 515.415 (1981).

2. You have asked whether the Coast Guard may seize and return vessels registered in the United States that have left our ports and that the Coast Guard has "reasonable cause" to believe may have done so for the purpose of transporting illegal aliens.

The Coast Guard has broad powers, which are exercised without declaration of a national emergency, to search out violations of federal laws on American vessels. 14 U.S.C.

1/ Except as discussed in paragraph 5 below, none of the powers available to the President would need to be triggered by the declaration of a national emergency. An explicit discussion of this point, therefore, is not included.

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§ 89(a). 2/ While the suspicion that leads them to single out a ship need not rise to the level of probable cause, the Fourth Amendment requires that arrests, searches and seizures be based on probable cause.

2/ This section states:

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

Prior to the time that any aliens are placed on board, the vessel's captain might be guilty of conspiracy, 18 U.S.C. § 371, to violate one of the general provisions of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1321-28. This memorandum does not address the practical aspects of developing evidence to support an arrest.

3. You have asked whether any of several scenarios would permit the Coast Guard to return American or foreign flag vessels to their last port of call or another point outside the United States. 3/

(a) Coast Guard/foreign flag vessel: The interdiction would occur somewhere on the high seas between Cuba and the United States. The ships would be stopped 4/ and searched for evidence of intent to violate our immigration laws. 5/ If sufficient evidence were discovered, the ship would be towed back to Cuba or to a third country, with, we assume, the permission of the flag state.

We do not believe that such an operation can be premised on an argument that the return of the aliens is authorized because it fulfills the legislative purpose of 8 U.S.C. § 1323 (unlawfully bringing aliens into the United States) and is "necessary" to the section's proper administration. Congress' enactment of 8 U.S.C. § 1323 is its clearest statement of how it wished to punish smugglers -- by a fine of $1000 per illegal alien. 8 U.S.C. § 1323(b). Further, since the primary purpose of § 1323 is to punish smugglers, not aliens,

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3/ Your question also covered use of the United States Navy. The Navy's regulations forbid use of its forces to enforce federal civil laws. SECNAVINST 5820.7. The regulations adopt the Posse Comitatus Act, 18 U.S.C. § 1385, as a guide to Navy conduct and state that members of the Navy may not enforce domestic laws in the absence of the specific approval of the Secretary of the Navy. We therefore address only the use of the Coast Guard.

4/ The permission of the flag state is necessary since we have no authority to exercise jurisdiction over the ship in its absence. Art. 6, Convention on the High Seas, 13 U.S.T. 2313, T.I.A.S. 5200.

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

the forcible return of the aliens to Cuba or a third country would not appear to fulfill the section's purpose. Certainly the section is meant to discourage illegal immigration. This argument, though, applies to all the penalty provisions -- indeed, to most of the INA. Where Congress has explicitly prescribed the method of dealing with smugglers -- arrest, fines, and felony prosecutions -- we do not believe that the Executive may create a new method of dealing with the problem. See United States ex rel. Martinez-Angusto v. Mason, 344 F.2d 673 (2d Cir. 1965); C. Gordon, E. Gordon, and H. Rosenfield, Immigration Law & Procedure, §§ 1.5b, 2.2, 4.4 (1980) and cases cited therein (Gordon & Rosenfield).

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

(1) Statutory Power

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

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

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

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

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

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

Using § 1182(f), the President could make a finding that the entry of all Cubans without proper documentation is detrimental to our interests and issue a proclamation suspending their entry. It could be argued that the entry of illegal aliens, Cuban or otherwise, is already "suspended" since it is already illegal for them to come, and that the section is directed against those who are otherwise eligible. The section, however, is not limited by its terms to documented aliens, and the legislative history is silent on this point. Since the section delegates to the President the authority to exclude entirely certain classes of aliens, we believe that a return of the Cubans could be based on the Coast Guard's power to enforce federal laws. 14 U.S.C. § 89(a). Likewise, § 1185(a)(1) makes it unlawful for any alien to enter the country unless in compliance with the rules and limitations set by the President. All of the undocumented Cubans who are attempting to enter the country are therefore doing so in violation of this section. See also 8 U.S.C. § 1103 (Attorney General's duty to control and guard the borders); Ex parte Siebold, 100 U.S. 371, 396 (1879).

(2) Implied Constitutional Power

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

> Petitioner contends that the 1941 Act and the regulations thereunder are void to the extent that they contain

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

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

We would argue that the President, in the exercise of this inherent authority, is acting to protect the United States from massive illegal immigration. The President's power to act to protect the Nation or American citizens or property that are threatened, even where there is no express statute for him to execute, was recognized in In re Neagle, 135 U.S. 1, 63-67 (1890). See also In re Debs, 158 U.S. 564, 581 (1895); United States ex rel. Martinez-Angosto v. Mason, 344 F.2d 673, 688 (2d Cir. 1965) (Friendly, J. concurring); 50 U.S.C. § 1541 (War Powers Resolution). 7/ But see United States v. Western Union Telegraph Co., 272 F. 311 (S.D. N.Y.) (A. Hand, J.), aff'd, 272 F. 893 (2d Cir. 1921), rev'd per stip., 260 U.S. 754 (1922) (President's inability to prohibit landing

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

of submarine cables). This argument would be joined with an argument that the President may act to return the boats with the flag state's permission as an exercise of his power in the field of foreign relations, a field in which "with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). See also Haig v. Agee, No. 80-83 (S.Ct. June 29, 1981); Narenji v. Civiletti, 617 F.2d 745, 747-48 (D.C. Cir. 1980) (regulation of Iranian students); Chicago & Southern Air Lines, Inc. v. Waterman SS. Co., 333 U.S. 95 (1948) (regulation of foreign airlines). The President's power is strongest where he has well recognized constitutional powers (foreign affairs) to which Congress has added statutory delegation (8 U.S.C. §§ 1182(f), 1185). 8/ Immigration is not an area, however, in which the President's independent power is well-established. 9/

(2) Arguments Against Power to Interdict

It must be recognized that Congress has put in place an extensive statutory scheme dealing with immigration -- a scheme that applies both within and without the United States. An alien anywhere in the world, whether on some country's soil or on the high seas, is subject to congressional regulation of his admission to the United States. Congress has mandated procedures for those who do arrive illegally -- some of

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

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

which are quite summary in nature. See 8 U.S.C. §§ 1282(b), 1323(d). While we would argue that the President is acting pursuant to Congressional authority, a strong counter-argument could be made that in fact the President is acting in the area of his least power -- contrary to the express or implied will of Congress as stated in the INA. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638-39 (1952) (Jackson, J., concurring). Not only does the INA represent the Congress' studied judgment of how it wants to treat smugglers and illegal aliens, but it is clear that Congress is willing to treat certain groups of illegal aliens favorably. See 2 Gordon & Rosenfield, § 7.8 (refugee legislation). As recently as last October, certain undocumented Haitians were granted a status that entitled them to some social welfare benefits. Refugee Education Assistance Act, Pub. L. No. 96-422, 94 Stat. 1799. This ratification process, repeated as it has been for many groups, would support an argument that Congress prefers to deal with such problems on an ad hoc basis, rather than equipping the President with more forceful exclusionary methods.

The courts have been reluctant, in analogous situations, to find implied power to return aliens to their countries. The Second Circuit has held that, in the absence of express authority, the INS could not arrest a Spanish crewman who deserted his ship without violating the crewman's rights under the Fifth Amendment. United States ex rel. Martinez-Angosta v. Mason, 344 F.2d 673 (2d Cir. 1965). The court found that the INS only had authority to arrest an illegal alien in order to begin deportation proceedings, id. at 680, not to arrest to enforce the desertion provisions of a Spanish-American treaty. This was so even though the crewman admitted that he was in the country illegally. See also United States ex rel. Valentine v. Neidecker, 299 U.S. 5 (1936) (President lacked authority to extradite in the absence of a treaty). Opponents of the return procedure would no doubt argue that the Coast Guard lacks any statutory authority to arrest aliens except as the first step in processing them under the INA. We would note, however, that Judge Friendly concurred in Martinez-Angosta only because he believed that the President did have the inherent power to designate the INS

as the proper arresting authority and could exercise that power at once to fill the procedural void. Id. at 688. In our case, the Coast Guard would have received its directions from the President before any seizures were made.

We believe that the President's authority in the field of foreign affairs, coupled with the designations from Congress expressed in 8 U.S.C. §§ 1182(f) & 1185, authorizes a program in which foreign flag vessels are, with the permission of their government, stopped on the high seas while en route to the United States and forcibly returned to their last port of call or another point outside the United States. See Haig v. Agee, No. 80-83 (S.Ct. June 29, 1981). The President's power in this area, however, could clearly be clarified and strengthened by appropriate legislation, and the outcome of a legal challenge to such a program of interdiction without additional legislation is at best uncertain. 10/

We have assumed the permission of the flag state throughout this discussion. We have also assumed that any third country would be one that has given its permission for the landing and is willing to accept the Cubans on a permanent basis. We would note that although this Office has previously concluded that Cuba is

10/ There is some doubt whether anyone would be able to challenge the plan. Although the aliens returned to Cuba or a third country would probably lack standing to sue, see Kleindienst v. Mandel, 408 U.S. 753, 762 (1972); Johnson v. Eisentrager, 339 U.S. 763 (1950); Berlin Democratic Club v. Rumsfield, 410 F. Supp. 144, 152 (D.D.C. 1976), there is a statute which permits aliens to sue for torts committed in violation of the law of nations. 28 U.S.C. § 1350. A Second Circuit decision has interpreted this provision as incorporating a broad body of international human rights law. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). Filartiga was recently followed by a district court in Kansas. Fernandez v. Wilkinson, No. 80-3183 (D. Kan. Dec. 31, 1980), appeal docketed, No. 81-1238 (10th Cir. March 9, 1981). Fernandez held that the international norm prohibiting arbitrary detention protected Cubans who were being detained in American prisons as inadmissible aliens. Cf. Nguyen da Yen v. Kissinger, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975); De Pass v. United States, 479 F. Supp. 373 (D. Md. 1979).

violating international law by expelling and refusing to permit the return of its nationals, 11/ the issue of forcible return to Cuba raises another problem. Regardless of our arguments that the right of self-protection permits us to return the Cubans, Cuba may choose to look on any entry into its territorial waters by a United States government vessels as an act of war, obviously raising substantial policy issues. 12/

(b) Coast Guard/American flag vessel: You have asked whether the Coast Guard may, after ascertaining that there are illegal aliens on board a United States registered vessel, detain the Americans on board while taking the vessel to its last port of call or another point outside the United States. After the aliens have been landed, the Americans would be brought back to the United States, arrested, prosecuted as appropriate and their boats forfeited.

We believe that such a program is constitutional as long as the Government is able to show that it has endeavored to return the Americans to the United States as quickly as possible. Although the general rule is that an official seizure of a person must be supported by probable cause, Dunaway v. New York, 442 U.S. 200, 207 (1979), the Supreme Court has held that there are exceptions for limited intrusions that may be justified by special law enforcement interests. Michigan v. Summers, 49 U.S.L.W. 4776, 4778 (June 22, 1981). The detention of Americans who are on board a vessel carrying illegal aliens, if that detention is the only reasonable way to permit the return of the aliens to a third country, should fall

11/ Memorandum for the Attorney General from Assistant Attorney General Harmon, Office of Legal Counsel, June 6, 1980.

12/ The Coast Guard recently rescued 13 persons from two disabled craft that had been set adrift in the Florida Straits by Cuba's naval forces on the anniversary of the start of the Mariel boatlift. Washington Post, April 26, 1981, § A, at 31, col. 1. All those on board had originally come to the United States in the boatlift and then returned to Cuba because of their disenchantment with the United States. Four to six other boats carrying 34-40 people, which were alleged to have been abandoned at the same time, were never found.

within that class of exceptions. The Americans will be able to obtain a hearing on the merits of their detention once they have returned to the United States. The President's interest in conducting our foreign policy, protecting our national security and enforcing the immigration law are, in what would no doubt be exigent circumstances, a powerful argument in favor of permitting him to detain the Americans temporarily while effectuating an important law enforcement policy. See Haig v. Agee, No. 80-83 (S.Ct. June 29, 1981). We would empnasize, however, that the Government should be prepared to show that the Americans' detention is a reasonable way to enforce our laws and that every effort has been made to return the Americans to the United States as quickly as possible.

4. You have asked whether prosecution for violation of the INA may lie in the Northern and Middle District of Florida. Crimes "begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular . . . district, shall be in the district in which the offender . . . is first brought . . . ." 18 U.S.C. § 3238. Where to bring a ship is left to the Coast Guard's discretion. 13/ If the arrest occurs within our territorial waters, prosecutions for violation of the INA "may be instituted at any place in the United States at which the violation may occur . . . ." 8 U.S.C. § 1329. See also Fed. R. Crim. P. 18 (district in which offense was committed).

We do not know of any means by which the Attorney General can on his own motion transfer a criminal case from one district to another. This is a privilege reserved for the defendant at the court's discretion. Fed. R. Crim. P. 21.

5. You have asked whether the President may close all ports in Southern Florida to "any vessels over a pre-determined size or other high-risk vessels." The President may regulate the anchorage and movement of vessels in our territorial waters when he has declared a national emergency. 50 U.S.C. § 191. He may declare a national emergency if there is a "disturbance or threatened disturbance of the international relations of the United States . . . ." Id. Whether the

13/ The need for a timely arraignment, however, Fed. R. Crim. P. 5(a), will act as restraint on extensive detours.

unauthorized travel of certain privately owned boats from the Key West area to Cuba and their return bearing Cuban citizens not legally entitled to enter the United States represents such a disturbance is a fact and judgment-laden issue upon which we offer no opinion. If, however, the President could justifiably find that the use of American vessels to transport Cubans into this country will result in such disturbance by determining, for example, that this practice severely damaged our ability to negotiate the issue of migration with Cuba within established diplomatic routes, power under § 191 could be exercised. Since power over all vessels may be exercised under § 191, power over a category of vessels rationally connected to the danger that triggered the national emergency would be reasonable.

6. You have asked us to comment on INS' suggestion that cars be stopped on the Key West highway and excluded from the area. We attach a copy of an opinion that this Office prepared last year on the use of roadblocks on Route 1. In that opinion, we concluded generally that the proper inquiry is whether any reasonably unintrusive stop would be so likely to lead to evidence that would qualify as proof of an attempt to violate our laws as to justify the impositions the stop will occasion. 14/

Larry L Simms
DAAG
OLC

14/ Memorandum for Paul R. Michel, Associate Deputy Attorney General from Deputy Assistant Attorney General Hammond, Office of Legal Counsel, August 29, 1980.

Attachment

August 29, 1980

MEMORANDUM FOR PAUL R. MICHEL
Associate Deputy Attorney General

Re: Enforcement of Illegal Alien Smuggling Laws

You have asked whether law enforcement officers of the United States may, without violating the Fourth Amendment, set up a roadblock on Route 1, a highway leading from the Florida mainland to Key West, and stop and question persons driving towards Key West who are hauling boats. We are informed that the influx of Cubans (who cannot be returned because of the unwillingness of the Castro regime to readmit them) to the United States is a major problem. The objective of the stopping and questioning would be to identify the boat operators attempting to use their craft to bring to the United States from Cuba aliens not lawfully entitled to enter this country in violation of 8 U.S.C. § 1324. Route 1 is the only road to Key West. Key West (and other land areas in its vicinity) is closer to Cuba than any other point in the United States and, as we understand it, is the most likely spot from which small boats might embark to go to that island nation to pick up illegal aliens. The United States has been unable to control effectively the movement of small boats from Key West and vicinity to Cuba once those boats are in the water.

The Supreme Court has held that, under limited circumstances, the Fourth Amendment does not prohibit law enforcement officers operating neither under warrants nor with articulable suspicion, from stopping vehicles at fixed checkpoints in the United States and briefly questioning their occupants. United States v. Martinez-Fuerte, 428 U.S. 543 (1976); cf. Delaware v. Prouse, 440 U.S. 648, 663 (1979). Such stops are seizures within the meaning of the Fourth Amendment but may be reasonable, although conducted without warrant and on less than probable cause, if, on balance, the legitimate government interest served by them outweighs the degree of their intrusion--both as to individuals and the public in general--on the values which the Amendment protects, including personal security and reasonable expectations of privacy. United States v. Martinez-Fuerte, supra. It seems clear from the cases, and inherent in the Fourth Amendment itself, that no matter how minimal the intrusion and how great the government interest involved, such stops are unreasonable if ineffective. Central also to the question of their reasonableness is their necessity--that is,

without them.

The facts that you have related and others that may be developed will be tested under the requirements of Martinez-Fuerte. For example, it would seem that the checkpoints, if established, would be reasonably located to intrude upon the minimum number of people possible to achieve the objective sought. The peculiar geographical situation of Key West and of Route 1's being the only road to it assures this. Also the geographic proximity of Key West to Cuba insures that Route 1 is the road most likely to be taken by small boat operators headed for Cuba by a combination of highway and the high seas. Further, only those hauling boats of a size likely to be able to make the trip to Cuba would be questioned. This again would limit the degree of intrusion of the roadblock as to the population as a whole. Presumably, knowledgeable law enforcement authorities will be able to develop additional criteria that might further reduce the interference with the general populace.

Although we may conclude, as outlined above, that a number of the factors which make a checkpoint reasonable, as articulated in Martinez-Fuerte, would be present here, we are unable to evaluate several others which might prove crucial to the overall constitutionality of the proposal. Two are primary. First, we have not been informed of the nature and the number of questions that would be asked of the boat operators selected for special attention. Thus we cannot judge whether the intrusion on the rights of individuals, as opposed to the public at large, would be great or small. Second, we have no way of knowing whether the roadblock would be effective in achieving the governmental interest cited.

As we see it, the only power of the government to effect the Cuban boatlift by means of the roadblock would be to arrest those identified pursuant to it as involved in an attempt to bring into or land in the United States aliens not lawfully entitled to enter or reside here, a violation of 18 U.S.C. § 1324. Any such arrest would have to be based upon probable cause. 1/ It would, we believe be difficult to prove an attempt to violate § 1324 under Fifth Circuit precedents. See United States v. Brown, 604 F.2d 347 (5th Cir. 1979) and cases cited therein at 350, particularly

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1/ We would note that the government could not conduct searches at the checkpoint based on less than probable cause in order to develop probable cause to make such arrests. United States v. Ortz, 422, U.S. 891 (1975). Probable cause to arrest could, however, develop from the brief questioning or evidence in plain view.

United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976). While we have not exhaustively examined the law of criminal attempt, the order of proof required to convict appears to be demanding. In the Oviedo case (which is not a case arising under the illegal alien smuggling laws), the Fifth Circuit made clear that the person charged with attempting to violate a statute must have engaged in acts that are uniquely associated with the commission of a crime and are not ones that are "so commonplace that they are engaged in my persons not in violation of law." 525 F.2d at 858. Applying that standard to this case, the question will be whether the acts of outfitting a boat, traveling toward departure points in the Keys, and any other indicia of travel to Cuba for the purpose of carrying back illegal aliens are sufficiently unique and not commonplace to justify prosecution.

While we cannot answer the question, we do think that the proper inquiry should be whether any reasonably unintrusive stop is so likely to lead to evidence that would qualify as proof of an attempt as to justify the impositions it will occasion. We would be happy to assess this issue in greater detail as further factual details are developed. 2/

Larry A. Hammond

Larry A. Hammond
Deputy Assistant Attorney General
Office of Legal Counsel

2/ It appears that Miranda warnings might not be necessary prior to the initial questioning of persons passing through the checkpoint or prior to the further routine questioning that may occur when a motorist is asked to "pull off to the side." Routine border checks are not ordinarily considered the kind of custodial interrogation for which Miranda warnings are required in order to protect the privilege against self-incrimination. United States v. Martinez, 588 F.2d 495 (5th Cir. 1979); United States v. Smith, 557 F.2d 1206 (5th Cir. 1977); cf., United States v. Martinez-Fuerte, 428 U.S. 543, 563-64 (1976). We recommend, however, that further consideration be given to the need for Miranda warnings once you have decided upon the procedural details for conducting the checkpoint operation. It especially should be considered whether, if particular persons are called over for secondary questioning, investigation will already have so focused upon them as to raise the requirement for Miranda warnings. United States v. Del Soccorro Castro, 573 F.2d 215 (5th Cir. 1978).

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 27, 1981

MEMORANDUM FOR ROBERT BEDELL

FROM: RICHARD A. HAUSER

SUBJECT: Interdiction of Undocumented Aliens: Presidential Proclamation and Executive Order

The attached is for your information.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

26 AUG 1981

GENERAL COUNSEL

August 26, 1981

Honorable Richard Hauser
Deputy Counsel to the President
The White House

Dear Mr. Hauser:

Enclosed is a proposed Executive order entitled "Direction Relating to the Interdiction of Illegal Aliens" and a proposed proclamation entitled "Proclamation to Authorize High Seas Interdiction."

In accordance with Executive Order No. 11030, as amended, these documents were submitted to this office, along with the enclosed memoranda from the Attorney General.

On behalf of the Director of the Office of Management and Budget, I would appreciate receiving any comments you may have concerning these proposals. If you have any comments or objections they should be received no later than noon, Friday, August 28, 1981.

Comments or inquiries may be submitted to Mr. Robert P. Bedell of this office (395-5600).

Sincerely,

Michael J. Horowitz
Counsel to the Director

Enclosures

For your information - agencies from whom we have requested comments.

OPD State DOT NSC Defense CIA Justice

Office of the Attorney General
Washington, D. C. 20530

25 AUG 1981

August 25, 1981

MEMORANDUM FOR: Rudolph Giuliani
Associate Attorney General

Doris Meissner,
Acting Commissioner, INS

Frank Hodsoll
Deputy Assistant to the President

Richard Hauser
Deputy Counsel to the President

Nick Schowengerdt
Coast Guard

Kevin McIntyre
Department of State

Ted Briggs
Department of State

Carol Williams
Office of Legal Counsel

FROM: David Hiller DH
Special Assistant to
the Attorney General

SUBJECT: Interdiction of Undocumented Aliens:
Presidential Proclamation and
Executive Order

There are attached drafts of a decision memorandum from the Attorney General to the President, a Presidential Proclamation, and Executive Order authorizing a limited program of interdiction. The operative language of these documents follows quite closely the language contained in the draft diplomatic note. I would be grateful for your comments by the close of business today.

Thank you.

DRAFT

Office of the Attorney General
Washington, D. C. 20530

MEMORANDUM FOR: The President

FROM: The Attorney General

SUBJECT: Interdiction of Illegal Aliens Arriving in the United States by Sea.

As part of the Administration's recently announced immigration and refugee policy, you asked that I seek necessary legal authority to conduct a limited program of intercepting illegal aliens traveling to the United States by sea. It is the opinion of the Office of Legal Counsel, with which I concur, that existing Presidential authority is adequate to support the cooperative program now being negotiated with the Government of Haiti. That authority will be clarified and strengthened by the legislation we will submit to Congress in September. In view of the urgency of the situation in south Florida caused by continuing illegal migration, we propose that you authorize the Secretary of State, the Secretary of Transportation, and the Attorney General to proceed with a program of limited interdiction at this time.

There are attached a Presidential Proclamation and Executive Order authorizing and directing that a program of interdiction be undertaken in cooperation with foreign governments. The Proclamation is necessary to invoke the Presidential authority on which the program depends. It contains a finding that the continued illegal migration by sea to the southeast United States is detrimental to the national interest, suspends the entry of such illegal migrants, and directs the Secretary of State, the Secretary of Transportation, and the Attorney General to take necessary actions. The Executive Order implements the Proclamation.

RECOMMENDATION

The Secretary of State, the Secretary of Transportaiton, and the Attorney General recommend that you sign the attached Proclamation and Executive Order, authorizing a limited program of interdicting illegal alien traffic by sea.

Approve _____ Disapprove _____

EXECUTIVE ORDER

Direction Relating to the Interdiction of Illegal Aliens

By the authority vested in me as President by the Constitution and statutes of the United States, including sections 212(f) and 215(a)(1) of the Immigration and Nationality Act (8 U.S.C. 1182(f) and 1185(a)(1)), in view of the continuing problem of migrants coming to the United States, by sea, without necessary entry documents, upon which I based my August ____ Proclamation ____, it is hereby ordered that, as of the effective date of this Order:

1-101. The Secretary of State shall enter into, on behalf of the United States, cooperative agreements with foreign governments for the purpose of preventing illegal migration to the United States by sea.

1-102. The Secretary of Transportation shall instruct the Coast Guard to stop and board U.S. vessels, unregistered vessels, and vessels of foreign nations with whom we have agreements authorizing such actions, suspected of carrying illegal aliens to the United States; and to make inquiries of those on board, examine documents and take such actions as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel. When these measures suggest that an offense against United States immigration laws, or an offense under appropriate laws of a foreign country whom we have agreed to assist is being committed, the Coast Guard shall return the vessel and its passengers to the country from which they came.

ided, however, that no person who is a refugee, who has proper immigration documents, or who is otherwise entitled to proceed will be returned without his consent. These actions are authorized to be undertaken outside the territorial waters of the United States.

1-103. The Attorney General, shall, in cooperation with the Secretary of State and the Secretary of Transportation, take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration and the strict observance of our obligations to those who genuinely flee persecution in their homeland.

1-104. This Order shall be effective immediately.

PROCLAMATION TO AUTHORIZE HIGH SEAS INTERDICTION
BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

The ongoing migration of persons to the U.S. in violation of our laws is a serious national problem, and one to which I have given much attention. Recently, the Attorney General, on behalf of the Administration, presented to the Congress a series of administrative and legislative measures intended to deal comprehensively with this problem. A particularly difficult aspect of the problem is the continuing illegal migration by sea of large numbers of undocumented aliens into the southeast United States. These arrivals have severely strained the law enforcement resources of the Immigration and Naturalization Service, and have threatened the welfare and safety of communities in that region.

Accordingly, after consultation with the governments of affected foreign countries and with agencies of the Executive Branch of our government, I have determined that new and effective measures to curtail these unlawful arrivals are necessary. In particular, I have determined that international cooperation to intercept vessels trafficking in illegal migrants is a necessary and proper means of insuring the effective enforcement of our laws.

Now, therefore, I, RONALD REAGAN, President of the United States of America, acting under the authority vested in me by the Constitution and the statutes of the United States, including sec-

tions 212(f) and 215(a)(1) of the Immigration and Nationality Act, to protect the sovereignty of the United States, and in accordance with cooperative agreements with certain foreign governments, do proclaim that:

(1) The entry of undocumented aliens, arriving at the borders of the United States from the high seas, is detrimental to the United States. Such entry is hereby suspended and shall be prevented by the interdiction by the Coast Guard of vessels suspected of carrying such aliens.

(2) The Secretary of State shall enter into, on behalf of the United States, cooperative agreements with foreign governments for the purpose of preventing illegal migration to the United States by sea.

(3) The Secretary of Transportation shall instruct the Coast Guard to stop and board U.S. vessels, unregistered vessels, and vessels of foreign nations with whom we have agreements authorizing such actions, suspected of carrying illegal aliens to the United States; and to make inquiries of those on board, examine documents and take such actions as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel. When these measures suggest that an offense against United States immigration laws, or an offense under appropriate laws of a foreign country whom we have agreed to assist is being committed, the Coast Guard shall return the offending vessel and passengers to the country from which they came.

Provided, however, that no person who is a refugee, who has proper immigration documents, or who is otherwise entitled to proceed will be returned without his consent. These actions are authorized to be undertaken outside the territorial waters of the United States.

(4) The Attorney General, in cooperation with the Secretary of State and the Secretary of Transportation, shall take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration and the strict observance of our obligations to those who genuinely flee persecution in their homeland.

(5) Sums appropriate to carry out the proclamation and accompanying orders shall be made available.

IN WITNESS THEREOF, I have hereunto set my hand this _____ day of August, in the year of our Lord nineteen hundred and eighty-one, and of the Independence of the United States of America the two hundred and fifth.

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

11 AUG 1981

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Proposed interdiction of Haitian flag vessels

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

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

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

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

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

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

3/ This section states:

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

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

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

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

> (a) Unless otherwise ordered by the President, it shall be unlawful --
>
> > (1) for any alien to . . . attempt to . . . enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe; . . . .

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

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

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

Guard's power to enforce federal laws. 14 U.S.C. § 89(a). Likewise, § 1185(a)(1) makes it unlawful for any alien to enter the country unless in compliance with the rules and limitations set by the President. All of the undocumented Haitians who are attempting to enter the country are therefore doing so in violation of this section. See also 8 U.S.C. § 1103 (Attorney General's duty to control and guard the borders); Ex parte Siebold, 100 U.S. 371, 396 (1879). 6/

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

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

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

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

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

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

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

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

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

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

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

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

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

11/ Henkin, supra, at 179.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

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

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

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 17, 1981

FWF

FOR: FRED F. FIELDING

FROM: RICHARD A. HAUSER

SUBJECT: Interdiction of Haitian Vessels

On Thursday morning, August 13, this Office received a memorandum from Kate Moore asking that we review and comment on an OLC memorandum analyzing the legal issues involved in the proposed interdiction effort. This was the first exposure we had been given to this issue. Later that day, Kate advised me that a meeting was scheduled for the following day at the Department of Justice (DOJ), on the above-captioned subject. Upon review of the memorandum, Michael, H.P. and I concluded that certain of the legal issues apparently resolved by the Office of Legal Counsel required further analysis. I then suggested to Kate Moore that perhaps representatives from our Office might be included in Friday's meeting, and she agreed.

Rudy Giuliani, Kate Moore, Michael Luttig and myself, and representatives from OLC, Department of State, INS, and the Coast Guard attended the meeting on Friday. The meeting focused exclusively on the mechanical and logistical concerns of the interdiction itself. It seemed to be presupposed by all in attendance that the decision to move forward immediately with the interdiction had been made. During the meeting, Michael and I questioned the strength of the legal authority cited in the OLC opinion and whether the subtleties in the law which suggested that the President's authority to undertake such a measure was anything but definitively settled, had been brought to the attention of those who apparently had made the final decision. We were summarily referred to the recent OLC memorandum on the Haitian interdiction. During the balance of the meeting, the participants discussed the extensive media coverage that they believed certain to ensue and the litigation known already to be in preparation.

Following the meeting, Michael approached the woman from OLC and indicated to her his concern that the authority cited seemed tenuous at best and that the tenuousness of the

authority had been glossed over in both the memorandum and the meeting. A State Department official overheard this exchange and commented in a way that suggested that, within the government, there was fairly serious doubt as to the objectivity in thought and presentation of the OLC position. She articulated her belief that OLC had been told of the decision and urged to defend it. She did not say what gave rise to that conclusion. She did say, however, that a very recent OLC opinion on essentially the same issues, had been cast in a wholly different manner, much more equivocal on the President's authority to interdict under the circumstances.

Friday evening, Kate Moore came to our Office to discuss the matter, and to learn what we thought remained to be done. Michael and I alluded to our concerns about the legal authority and to the apparent haphazard manner in which the entire matter had been staffed. We had earlier asked for background material and received very little. In this regard, Kate admitted that the President had approved the operation in the context of obtaining new statutory authority. She also stated that to her knowledge the President had not approved the current concept, but that the Attorney General had publicly stated that interdiction could lawfully be accomlished under existing authority. With respect to the staffing of this decision, Kate indicated that the White House was not in receipt of either State Department or NSC analysis of the problem. We explained to her the importance of apprising the President of the conflicting legal opinions when they exist, and we highlighted the importance of obtaining legal counsel from a number of sources on this kind of issue, including, OLC, INS, State and NSC. When Kate left our office, she said she believed that a resolution of the issue was needed by Monday, August 17, at the latest.

On Friday evening, I briefly discussed the legal authority with Ted Olson who felt comfortable with the President's authority in this area. Ted also indicated that he had not been asked to find authority for a position already adopted. On Saturday, Michael obtained from Ted Olson, a memorandum for the Associate Attorney General dated July 2, 1981, the date about which there is some question since Larry Simms had approved it. That memorandum discussed the legal issues surrounding the Cuban boatlift. Upon review, it was evident that a substantial portion of the memorandum on the Haitian interdiction was drawn directly, and verbatim in many instances, from that July 2 memorandum, but that virtually all discussion and authority which questioned the President's authority had been omitted from the recent memorandum on the Haitian interdiction.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 17, 1981

FOR: FRED F. FIELDING

FROM: J. MICHAEL LUTTIG

SUBJECT: Interdiction of Haitian Vessels

At this juncture, whether the President has the requisite authority to affect the interdiction of Haitian vessels is not of as much concern as whether he has been fully apprised of the precise nature of the legal authority upon which he would rely were he to authorize the interdiction. When the President makes a decision such as this, one certain to have far-reaching international repercussions and to draw intense media attention, it is essential that he know whether the legal authority for the decision is substantial and well-defined, or something less. Even without actual review of the authorities cited in the two OLC memoranda that we have, it appears that the President has not been adequately informed on the strength of his legal authority to initiate the interdiction. The following are concerns that I have on the legal issues and authority, gleaned only from a reading and comparison of the two memoranda, and from independent thinking on several of the issues not addressed in the OLC memorandum on the Cuban boatlift, but raised by the proposed Haitian vessel interdiction. I treat them in an abbreviated fashion so that, as requested, they may serve as "talking points."

1. The OLC memorandum discusses separately the Coast Guard's authority to interdict the Haitian vessels to enforce United States law and its authority to interdict to enforce Haitian law. In support of the authority of the Presisent, and thereby the Coast Guard, to interdict to enforce United States law, the OLC relies upon two statutes and upon the President's implied Constitutional powers in Article II. The two statutes are 8 U.S.C.A. §§ 1182(f) and 1185(a)(1). Section 1182(f) permits the President, upon a finding that the entry into the United States of a class of aliens would be detrimental to the interests of the United States, to "suspend the entry" of that class of aliens or impose restrictions on their entry. Section 1185(a)(1) makes it illegal for any alien to "attempt to enter the United States" except under reasonable rules formulated by the President.

The underlying presumption in § 1182(f) is that the President's authority only becomes operative when one of the class of aliens for whom the President has "suspended entry" in fact tries to enter the United States. There would appear to be a serious logical flaw, not to mention a legal one, in saying, as OLC does, that because the President is authorized to "suspend entry" into the United States of certain classes of aliens, he can stop vessels some 600 miles from the United States coast or its Territorial waters and return the aliens on board to their respective country. Whatever else they are doing at that distance from the United States, only with great difficulty can one say that they are "trying to enter the United States," an absolute prerequisite for the term "suspend entry" to have meaning in the context of the statute. Not unimportantly, 8 U.S.C.A. § 1101 (a)(13) defines the term "entry" as used in Chapter 12 to mean, "any coming of an alien into the United States, from a foreign port or place or from an outlying possession . . . " (emphasis added). Not surprisingly, the word "entry" is given in the statute its day-to-day common-sense meaning, a meaning that is strained if not ignored under the OLC interpretation.

Section 1185(a)(1) offers slight, if any, more support for the interdiction than does Section 1182(f). Under Section 1185 (a)(1), one must prove that the aliens are "attempt[ing] to enter the United States". Again the proof problems, given both the distance from the United States and that in the Windward Passage it cannot be said with the necessary certainty that a vessel is traveling to the United States, are formidable. As under Section 1182(f), the term "enter" as defined in the statute, coupled with the definition of "United States" to include only "the continental United States, Alaska, Hawaii, Puerto Rico, Guam and the Virgin Islands of the United States," 8 U.S.C.A. § 1101(a)(38), represent rather substantial hurdles to reaching OLC's conclusion.

In sum, a persuasive argument exists that these statutes were never intended to have applicability in circumstances such as these. Both memoranda recognize this possible construction of inapplicability by urging in addition, reliance on the implied authority of the President to act in these kind of circumstances. Nevertheless, both memoranda characterize the statutory argument as stronger than the implied powers claim.

Important to remember also is that although the prior OLC memorandum cited the two statutory provisions discussed above in support of the President's authority to interdict, the facts giving rise to that earlier memorandum might be easily distinguishable from those that would exist under the proposed Haitian interdiction plan, principally because of the greater distance between Haiti and the United States than between Cuba and the

United States, and depending upon the point of interdiction, the resulting inability of the helmsmen of the interdicted Cuban vessels, as opposed to the Haitians, to reasonably contend that they were not going to the United States.

Finally, even assuming applicability of the statutes cited, and that a violation of these federal laws could be established, it is still quite a leap to say that the Coast Guard is empowered to return the violators to Haiti, because in Title 14, Section 89(a), the Coast Guard is given explicit directions on their response to a detected violation of federal law, directions which do not include, at least explicitly, return of the violators to their port of embarkation. The Coast Guard may take "other [other than arrest] lawful and appropriate action" to deal with the violators, but absent additional statutory authority, it is questionable whether the return of aliens to another country would be regarded as within the contemplation of the statute.

2. The OLC memorandum also predicates the President's authority to interdict Haitian vessels in violation of U.S. laws on his implied Constitutional powers. It notes, however, that his authority in this regard is less clear than under the discussed statutes (the implicit presumption that the reader is given is that the statutory authority is clear). This is an accurate assessment of the President's implied authority vis-a-vis the statutory authority noted, but the ensuing discussion omits all references from the prior memorandum which suggest that the President is without the implied authority to interdict. The effect is that the implied-authority claim is cast as relatively persuasive, when in reality it is decidedly not.

The OLC memorandum neglects to note prominently, for instance, that immigration is primarily, if not altogether, a Congressional concern in the first instance, and that authority to the contrary is minimal and dated. Coupled with a preface to a discussion to this effect, OLC should have mentioned, but did not, that an argument for the implied authority of the President to act is weakest where Congress has consistently asserted its undisputed authority (as it has with immigration matters) and where the President's independent authority is not well-established (similarly, in immigration matters). Also, the opinions should have discussed the analogous situations in which the courts have specifically rejected claims of implied authority to return aliens to their countries, and the respected treatises which suggest that the President has little or no implied authority in immigration matters. Finally, it should have noted that legislation is now pending that would specifically give the President the authority here in question.

All of the above points were fully, and in length, discussed in the prior OLC memorandum under the separate heading, "Arguments Against Power to Interdict". Absent these precise discussions or similar ones, it could not properly be said that the President was presented with all of the legal information necessary to make his decision.

In addition to these omissions, OLC, by taking verbatim certain sentences from the earlier opinion, suggests perhaps incorrectly, that the Haitian interdiction would be an effort by the President to protect the United States from "massive illegal immigration". This alone would not be so disturbing under ordinary circumstances, but the claim that the immigrations are "massive" in number is made in the context of a discussion of the President's inherent Constitutional power to act to protect the Nation in times of emergency. Absent emergency conditions, citing the authority in support of an implied power to interdict Haitian vessels is at least misleading, and at worst, somewhat intellectually dishonest. The gratuitous reference to the recent Agee case at this point in the opinion contributes to the confusion.

In part, the problem with this portion of the memorandum stems from relying wholesale on language drafted for another day and a problem of an entirely different magnitude, with different facts. But there is little room for question that even in larger part the problems stem from what appears to have been a conscious omission of discussion and authority which counsels against the interdiction on the basis of implied Constitutional authority. The omissions result in a piece resembling more a party brief than an objective legal analysis. It may well be, as was concluded in the earlier memorandum, that the President has the inherent power to authorize the interdiction, but it is far from certain, and only through a full discussion of the authorities can one appreciate the precise degree of uncertainty that exists.

3. The recent OLC memorandum also discusses Coast Guard interdiction of Haitian vessels to enforce Haitian law, as opposed to United States law. This issue was not specifically addressed in the earlier memorandum, thus the concerns about omissions of authority noted in the preceding section of this memorandum do not obtain here.

The recent memorandum correctly asserts that the President's authority to enter into executive agreements with foreign nations may emanate either from express statutory provisions or from the President's inherent, Constitutional powers. The precise limits on his inherent powers continues to be a controversial issue, as the memorandum properly highlights. With this introduction, the memorandum suggests that the President's

authority to enter into an agreement to enforce Haitian law can be supported by 8 U.S.C.A. §1103(a) and by his foreign relations powers, and it begins an analysis of both.

Title 8, Section 1103(a), in relevant part reads:

> He [the Attorney General] shall have the power and duty to control and guard the boundaries and borders of the United states against the illegal entry of aliens . . . .

As with the statutory language posited in support of the President's authority to interdict to enforce United States law, it represents quite a leap in logic to contend that the power to guard the United States borders embraces the power to interdict vessels some 600 miles from any United States border. The argument can be made and it might well prevail, but there at least should have been discussion on its relative merits vis-a-vis claims that it is wholly inapplicable in circumstances such as these. Moreover, at least an element of the logic of the argument is removed when the purpose of the interdiction is cast in terms of enforcing Haitian, not United States law. Yet, on the other hand, if one attempts to justify the act as one with dual purposes -- including as an additional justification that the President is enforcing United States immigration law -- he necessarily must confront again the claims that "immigration matters" are within the plenary authority of Congress and that the President's authority to act in a manner unauthorized by statute is presumptively less in this field than in others. As the prior OLC memorandum notes, at best the limits of the President's powers in this area are uncertain.

The memorandum next sets forth the argument based upon the President's power in the area of foreign relations and correctly suggests that he has wide latitutde indeed. The possible problem that it does not identify, however, is that if the act is justified by reliance upon 8 U.S.C. § 1103, it becomes increasingly difficult to urge at the same time that it was a valid exercise of the President's foreign affairs powers. Either he is enforcing Haitian law as an indirect means to enforce United States law, or he acted independently of United States statutory law but within the scope of his foreign relations authority. In short, there is at least a facial inconsistency in a reliance upon both the statutory and the implied powers arguments. Arguments advanced which imply that the interdiction was authorized as an effort to protect United States borders, correspondingly enhance the possibility that a court will construe the act not as a valid exercise of foreign affairs powers, but as a circumvention of Congress.

The memorandum next outlines what it terms as "precedent" for an agreement by one country with another to enforce the other's laws. The 1891 agreement between Great Britain and the United States to enforce mutual laws against the killing of seals in the Bering Sea, admittedly is precedent of some kind, but what is not highlighted is that the agreement was entered into almost a century ago and presumably never challenged in the courts. There are also significant dissimilarities between the substance of that agreement and its factual setting, and that of the proposed agreement with Haiti. The memorandum then notes that a series of agreements were made by Presidents Roosevelt and Taft, with Santa Domingo and Liberia between 1905 and 1911. Again, the effect of the dates of these agreements on their precedential value is not underscored, nor apparently were the agreements challenged. In addition, although it is not clear from the memorandum alone, it appears that these agreements were of a wholly different nature from the one contemplated with Haiti. Only treatises and social science-type materials are cited, generally, in support of these alleged precedents, which I find at least noteworthy, if not troubling.

Finally, against this backdrop, the memorandum leaves the impression that the problem well may be, quoting Corwin, "a problem of practical statesmanship rather than of Constitutional Law", an impression, it would seem, not wholly consistent with the aforementioned treatment of the issue. But even were it a problem alone of practical statesmanship, that immigration is a matter over which Congress has plenary power; that legislation is pending presently that would explicitly grant the President the authority being considered here; and that the political fallout is likely to be substantial, at least would cause one to question the degree of statesmanship in the proposal.

Conclusion

It may well be that the President currently has the requisite legal authority to initiate the interdiction of Haitian vessels just off the coast of Haiti. If he does, the better argument in support of his authority would seem to be that, pursuant to his foreign relations powers, he is ordering the interdiction in an effort to assist Haiti enforce its laws. But in any event, the legal arguments that the President does or does not have this authority, or the authority to interdict the vessels to enforce United States law, deserved a more exacting treatment than they received in the OLC memorandum.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 17, 1981

FWF

FOR: FRED F. FIELDING

FROM: RICHARD A. HAUSER

SUBJECT: Interdiction of Haitian Vessels

On Thursday morning, August 13, this Office received a memorandum from Kate Moore asking that we review and comment on an OLC memorandum analyzing the legal issues involved in the proposed interdiction effort. This was the first exposure we had been given to this issue. Later that day, Kate advised me that a meeting was scheduled for the following day at the Department of Justice (DOJ), on the above-captioned subject. Upon review of the memorandum, Michael, H.P. and I concluded that certain of the legal issues apparently resolved by the Office of Legal Counsel required further analysis. I then suggested to Kate Moore that perhaps representatives from our Office might be included in Friday's meeting, and she agreed.

Rudy Giuliani, Kate Moore, Michael Luttig and myself, and representatives from OLC, Department of State, INS, and the Coast Guard attended the meeting on Friday. The meeting focused exclusively on the mechanical and logistical concerns of the interdiction itself. It seemed to be presupposed by all in attendance that the decision to move forward immediately with the interdiction had been made. During the meeting, Michael and I questioned the strength of the legal authority cited in the OLC opinion and whether the subtleties in the law which suggested that the President's authority to undertake such a measure was anything but definitively settled, had been brought to the attention of those who apparently had made the final decision. We were summarily referred to the recent OLC memorandum on the Haitian interdiction. During the balance of the meeting, the participants discussed the extensive media coverage that they believed certain to ensue and the litigation known already to be in preparation.

Following the meeting, Michael approached the woman from OLC and indicated to her his concern that the authority cited seemed tenuous at best and that the tenuousness of the

authority had been glossed over in both the memorandum and the meeting. A State Department official overheard this exchange and commented in a way that suggested that, within the government, there was fairly serious doubt as to the objectivity in thought and presentation of the OLC position. She articulated her belief that OLC had been told of the decision and urged to defend it. She did not say what gave rise to that conclusion. She did say, however, that a very recent OLC opinion on essentially the same issues, had been cast in a wholly different manner, much more equivocal on the President's authority to interdict under the circumstances.

Friday evening, Kate Moore came to our Office to discuss the matter, and to learn what we thought remained to be done. Michael and I alluded to our concerns about the legal authority and to the apparent haphazard manner in which the entire matter had been staffed. We had earlier asked for background material and received very little. In this regard, Kate admitted that the President had approved the operation in the context of obtaining new statutory authority. She also stated that to her knowledge the President had not approved the current concept, but that the Attorney General had publicly stated that interdiction could lawfully be accomlished under existing authority. With respect to the staffing of this decision, Kate indicated that the White House was not in receipt of either State Department or NSC analysis of the problem. We explained to her the importance of apprising the President of the conflicting legal opinions when they exist, and we highlighted the importance of obtaining legal counsel from a number of sources on this kind of issue, including, OLC, INS, State and NSC. When Kate left our office, she said she believed that a resolution of the issue was needed by Monday, August 17, at the latest.

On Friday evening, I briefly discussed the legal authority with Ted Olson who felt comfortable with the President's authority in this area. Ted also indicated that he had not been asked to find authority for a position already adopted. On Saturday, Michael obtained from Ted Olson, a memorandum for the Associate Attorney General dated July 2, 1981, the date about which there is some question since Larry Simms had approved it. That memorandum discussed the legal issues surrounding the Cuban boatlift. Upon review, it was evident that a substantial portion of the memorandum on the Haitian interdiction was drawn directly, and verbatim in many instances, from that July 2 memorandum, but that virtually all discussion and authority which questioned the President's authority had been omitted from the recent memorandum on the Haitian interdiction.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 17, 1981

FOR: FRED F. FIELDING

FROM: J. MICHAEL LUTTIG J.M.L.

SUBJECT: Interdiction of Haitian Vessels

At this juncture, whether the President has the requisite authority to affect the interdiction of Haitian vessels is not of as much concern as whether he has been fully apprised of the precise nature of the legal authority upon which he would rely were he to authorize the interdiction. When the President makes a decision such as this, one certain to have far-reaching international repercussions and to draw intense media attention, it is essential that he know whether the legal authority for the decision is substantial and well-defined, or something less. Even without actual review of the authorities cited in the two OLC memoranda that we have, it appears that the President has not been adequately informed on the strength of his legal authority to initiate the interdiction. The following are concerns that I have on the legal issues and authority, gleaned only from a reading and comparison of the two memoranda, and from independent thinking on several of the issues not addressed in the OLC memorandum on the Cuban boatlift, but raised by the proposed Haitian vessel interdiction. I treat them in an abbreviated fashion so that, as requested, they may serve as "talking points."

1. The OLC memorandum discusses separately the Coast Guard's authority to interdict the Haitian vessels to enforce United States law and its authority to interdict to enforce Haitian law. In support of the authority of the Presisent, and thereby the Coast Guard, to interdict to enforce United States law, the OLC relies upon two statutes and upon the President's implied Constitutional powers in Article II. The two statutes are 8 U.S.C.A. §§ 1182(f) and 1185(a)(1). Section 1182(f) permits the President, upon a finding that the entry into the United States of a class of aliens would be detrimental to the interests of the United States, to "suspend the entry" of that class of aliens or impose restrictions on their entry. Section 1185(a)(1) makes it illegal for any alien to "attempt to enter the United States" except under reasonable rules formulated by the President.

The underlying presumption in § 1182(f) is that the President's authority only becomes operative when one of the class of aliens for whom the President has "suspended entry" in fact tries to enter the United States. There would appear to be a serious logical flaw, not to mention a legal one, in saying, as OLC does, that because the President is authorized to "suspend entry" into the United States of certain classes of aliens, he can stop vessels some 600 miles from the United States coast or its Territorial waters and return the aliens on board to their respective country. Whatever else they are doing at that distance from the United States, only with great difficulty can one say that they are "trying to enter the United States," an absolute prerequisite for the term "suspend entry" to have meaning in the context of the statute. Not unimportantly, 8 U.S.C.A. § 1101 (a)(13) defines the term "entry" as used in Chapter 12 to mean, "any coming of an alien into the United States, from a foreign port or place or from an outlying possession . . . " (emphasis added). Not surprisingly, the word "entry" is given in the statute its day-to-day common-sense meaning, a meaning that is strained if not ignored under the OLC interpretation.

Section 1185(a)(1) offers slight, if any, more support for the interdiction than does Section 1182(f). Under Section 1185 (a)(1), one must prove that the aliens are "attempt[ing] to enter the United States". Again the proof problems, given both the distance from the United States and that in the Windward Passage it cannot be said with the necessary certainty that a vessel is traveling to the United States, are formidable. As under Section 1182(f), the term "enter" as defined in the statute, coupled with the definition of "United States" to include only "the continental United States, Alaska, Hawaii, Puerto Rico, Guam and the Virgin Islands of the United States," 8 U.S.C.A. § 1101(a)(38), represent rather substantial hurdles to reaching OLC's conclusion.

In sum, a persuasive argument exists that these statutes were never intended to have applicability in circumstances such as these. Both memoranda recognize this possible construction of inapplicability by urging in addition, reliance on the implied authority of the President to act in these kind of circumstances. Nevertheless, both memoranda characterize the statutory argument as stronger than the implied powers claim.

Important to remember also is that although the prior OLC memorandum cited the two statutory provisions discussed above in support of the President's authority to interdict, the facts giving rise to that earlier memorandum might be easily distinguishable from those that would exist under the proposed Haitian interdiction plan, principally because of the greater distance between Haiti and the United States than between Cuba and the

United States, and depending upon the point of interdiction, the resulting inability of the helmsmen of the interdicted Cuban vessels, as opposed to the Haitians, to reasonably contend that they were not going to the United States.

Finally, even assuming applicability of the statutes cited, and that a violation of these federal laws could be established, it is still quite a leap to say that the Coast Guard is empowered to return the violators to Haiti, because in Title 14, Section 89(a), the Coast Guard is given explicit directions on their response to a detected violation of federal law, directions which do not include, at least explicitly, return of the violators to their port of embarkation. The Coast Guard may take "other [other than arrest] lawful and appropriate action" to deal with the violators, but absent additional statutory authority, it is questionable whether the return of aliens to another country would be regarded as within the contemplation of the statute.

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The OLC memorandum neglects to note prominently, for instance, that immigration is primarily, if not altogether, a Congressional concern in the first instance, and that authority to the contrary is minimal and dated. Coupled with a preface to a discussion to this effect, OLC should have mentioned, but did not, that an argument for the implied authority of the President to act is weakest where Congress has consistently asserted its undisputed authority (as it has with immigration matters) and where the President's independent authority is not well-established (similarly, in immigration matters). Also, the opinions should have discussed the analogous situations in which the courts have specifically rejected claims of implied authority to return aliens to their countries, and the respected treatises which suggest that the President has little or no implied authority in immigration matters. Finally, it should have noted that legislation is now pending that would specifically give the President the authority here in question.

All of the above points were fully, and in length, discussed in the prior OLC memorandum under the separate heading, "Arguments Against Power to Interdict". Absent these precise discussions or similar ones, it could not properly be said that the President was presented with all of the legal information necessary to make his decision.

In addition to these omissions, OLC, by taking verbatim certain sentences from the earlier opinion, suggests perhaps incorrectly, that the Haitian interdiction would be an effort by the President to protect the United States from "massive illegal immigration". This alone would not be so disturbing under ordinary circumstances, but the claim that the immigrations are "massive" in number is made in the context of a discussion of the President's inherent Constitutional power to act to protect the Nation in times of emergency. Absent emergency conditions, citing the authority in support of an implied power to interdict Haitian vessels is at least misleading, and at worst, somewhat intellectually dishonest. The gratuitous reference to the recent Agee case at this point in the opinion contributes to the confusion.

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authority to enter into an agreement to enforce Haitian law can be supported by 8 U.S.C.A. §1103(a) and by his foreign relations powers, and it begins an analysis of both.

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As with the statutory language posited in support of the President's authority to interdict to enforce United States law, it represents quite a leap in logic to contend that the power to guard the United States borders embraces the power to interdict vessels some 600 miles from any United States border. The argument can be made and it might well prevail, but there at least should have been discussion on its relative merits vis-a-vis claims that it is wholly inapplicable in circumstances such as these. Moreover, at least an element of the logic of the argument is removed when the purpose of the interdiction is cast in terms of enforcing Haitian, not United States law. Yet, on the other hand, if one attempts to justify the act as one with dual purposes -- including as an additional justification that the President is enforcing United States immigration law -- he necessarily must confront again the claims that "immigration matters" are within the plenary authority of Congress and that the President's authority to act in a manner unauthorized by statute is presumptively less in this field than in others. As the prior OLC memorandum notes, at best the limits of the President's powers in this area are uncertain.

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Conclusion

It may well be that the President currently has the requisite legal authority to initiate the interdiction of Haitian vessels just off the coast of Haiti. If he does, the better argument in support of his authority would seem to be that, pursuant to his foreign relations powers, he is ordering the interdiction in an effort to assist Haiti enforce its laws. But in any event, the legal arguments that the President does or does not have this authority, or the authority to interdict the vessels to enforce United States law, deserved a more exacting treatment than they received in the OLC memorandum.

25 AUG 1981

Office of the Attorney General
Washington, D. C. 20530

August 25, 1981

MEMORANDUM FOR: Rudolph Giuliani
Associate Attorney General

Doris Meissner,
Acting Commissioner, INS

Frank Hodsoll
Deputy Assistant to the President

Richard Hauser
Deputy Counsel to the President

Nick Schowengerdt
Coast Guard

Kevin McIntyre
Department of State

Ted Briggs
Department of State

Carol Williams
Office of Legal Counsel

FROM: David Hiller
Special Assistant to
the Attorney General

SUBJECT: Interdiction of Undocumented Aliens:
Presidential Proclamation and
Executive Order

There are attached drafts of a decision memorandum from the Attorney General to the President, a Presidential Proclamation, and Executive Order authorizing a limited program of interdiction. The operative language of these documents follows quite closely the language contained in the draft diplomatic note. I would be grateful for your comments by the close of business today.

Thank you.

Office of the Attorney General
Washington, D. C. 20530

DRAFT

MEMORANDUM FOR: The President

FROM: The Attorney General

SUBJECT: Interdiction of Illegal Aliens Arriving in the United States by Sea.

As part of the Administration's recently announced immigration and refugee policy, you asked that I seek necessary legal authority to conduct a limited program of intercepting illegal aliens traveling to the United States by sea. It is the opinion of the Office of Legal Counsel, with which I concur, that existing Presidential authority is adequate to support the cooperative program now being negotiated with the Government of Haiti. That authority will be clarified and strengthened by the legislation we will submit to Congress in September. In view of the urgency of the situation in south Florida caused by continuing illegal migration, we propose that you authorize the Secretary of State, the Secretary of Transportation, and the Attorney General to proceed with a program of limited interdiction at this time.

There are attached a Presidential Proclamation and Executive Order authorizing and directing that a program of interdiction be undertaken in cooperation with foreign governments. The Proclamation is necessary to invoke the Presidential authority on which the program depends. It contains a finding that the continued illegal migration by sea to the southeast United States is detrimental to the national interest, suspends the entry of such illegal migrants, and directs the Secretary of State, the Secretary of Transportation, and the Attorney General to take necessary actions. The Executive Order implements the Proclamation.

RECOMMENDATION

The Secretary of State, the Secretary of Transportaiton, and the Attorney General recommend that you sign the attached Proclamation and Executive Order, authorizing a limited program of interdicting illegal alien traffic by sea.

Approve _____ Disapprove _____

EXECUTIVE ORDER

Direction Relating to the Interdiction of Illegal Aliens

By the authority vested in me as President by the Constitution and statutes of the United States, including sections 212(f) and 215(a)(1) of the Immigration and Nationality Act (8 U.S.C. 1182(f) and 1185(a)(1)), in view of the continuing problem of migrants coming to the United States, by sea, without necessary entry documents, upon which I based my August ____ Proclamation ____, it is hereby ordered that, as of the effective date of this Order:

1-101. The Secretary of State shall enter into, on behalf of the United States, cooperative agreements with foreign governments for the purpose of preventing illegal migration to the United States by sea.

1-102. The Secretary of Transportation shall instruct the Coast Guard to stop and board U.S. vessels, unregistered vessels, and vessels of foreign nations with whom we have agreements authorizing such actions, suspected of carrying illegal aliens to the United States; and to make inquiries of those on board, examine documents and take such actions as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel. When these measures suggest that an offense against United States immigration laws, or an offense under appropriate laws of a foreign country whom we have agreed to assist is being committed, the Coast Guard shall return the vessel and its passengers to the country from which they came.

ided, however, that no person who is a refugee, who has proper immigration documents, or who is otherwise entitled to proceed will be returned without his consent. These actions are authorized to be undertaken outside the territorial waters of the United States.

1-103. The Attorney General, shall, in cooperation with the Secretary of State and the Secretary of Transportation, take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration and the strict observance of our obligations to those who genuinely flee persecution in their homeland.

1-104. This Order shall be effective immediately.

PROCLAMATION TO AUTHORIZE HIGH SEAS INTERDICTION
BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

The ongoing migration of persons to the U.S. in violation of our laws is a serious national problem, and one to which I have given much attention. Recently, the Attorney General, on behalf of the Administration, presented to the Congress a series of administrative and legislative measures intended to deal comprehensively with this problem. A particularly difficult aspect of the problem is the continuing illegal migration by sea of large numbers of undocumented aliens into the southeast United States. These arrivals have severely strained the law enforcement resources of the Immigration and Naturalization Service, and have threatened the welfare and safety of communities in that region.

Accordingly, after consultation with the governments of affected foreign countries and with agencies of the Executive Branch of our government, I have determined that new and effective measures to curtail these unlawful arrivals are necessary. In particular, I have determined that international cooperation to intercept vessels trafficking in illegal migrants is a necessary and proper means of insuring the effective enforcement of our laws.

Now, therefore, I, RONALD REAGAN, President of the United States of America, acting under the authority vested in me by the Constitution and the statutes of the United States, including sec-

tions 212(f) and 215(a)(1) of the Immigration and Nationality Act, to protect the sovereignty of the United States, and in accordance with cooperative agreements with certain foreign governments, do proclaim that:

(1) The entry of undocumented aliens, arriving at the borders of the United States from the high seas, is detrimental to the United States. Such entry is hereby suspended and shall be prevented by the interdiction by the Coast Guard of vessels suspected of carrying such aliens.

(2) The Secretary of State shall enter into, on behalf of the United States, cooperative agreements with foreign governments for the purpose of preventing illegal migration to the United States by sea.

(3) The Secretary of Transportation shall instruct the Coast Guard to stop and board U.S. vessels, unregistered vessels, and vessels of foreign nations with whom we have agreements authorizing such actions, suspected of carrying illegal aliens to the United States; and to make inquiries of those on board, examine documents and take such actions as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel. When these measures suggest that an offense against United States immigration laws, or an offense under appropriate laws of a foreign country whom we have agreed to assist is being committed, the Coast Guard shall return the offending vessel and passengers to the country from which they came.

Provided, however, that no person who is a refugee, who has proper immigration documents, or who is otherwise entitled to proceed will be returned without his consent. These actions are authorized to be undertaken outside the territorial waters of the United States.

(4) The Attorney General, in cooperation with the Secretary of State and the Secretary of Transportation, shall take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration and the strict observance of our obligations to those who genuinely flee persecution in their homeland.

(5) Sums appropriate to carry out the proclamation and accompanying orders shall be made available.

IN WITNESS THEREOF, I have hereunto set my hand this _____ day of August, in the year of our Lord nineteen hundred and eighty-one, and of the Independence of the United States of America the two hundred and fifth.