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1	MEMO	ATTORNEY GENERAL TO PRES. RE FORT CHAFFEE	4	7/6/1981	

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Document No. 018390CS

WHITE HOUSE STAFFING MEMORANDUM

DATE: July 6, 1981 ACTION/CONCURRENCE/COMMENT DUE BY: -------

SUBJECT: Cabinet Meeting/Ft. Chaffee Problem

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	JAMES	☐	☐
MEESE	☐	☐	MURPHY	☐	☐
BAKER	☒	☐	NOFZIGER	☒	☐
DEAVER	☒	☐	WILLIAMSON	☒	☐
STOCKMAN	☐	☐	WEIDENBAUM	☐	☐
ALLEN	☐	☐	CANZERI	☐	☐
ANDERSON	☐	☐	FULLER *(For Cabinet)*	☐	☒
BRADY	☐	☐	HICKEY	☐	☐
DOLE	☒	☐	HODSOLL	☒	☐
FIELDING	☐	☐	MC COY	☐	☐
FRIEDERSDORF	☒	☐	CEQ	☐	☐
GARRICK	☐	☐	OSTP	☐	☐
GERGEN	☒	☐	USTR	☐	☐
HARPER	☐	☐	ROGERS	☐	☐

Remarks:

You are invited -- 11:00 a.m. Tuesday, July 7.

Richard G. Darman
Deputy Assistant to the President
and Staff Secretary
(x-2702)

THE WHITE HOUSE

WASHINGTON

CABINET ADMINISTRATION STAFFING MEMORANDUM

DATE: July 6, 1981 NUMBER: 018690CA DUE BY: ---

SUBJECT: Alternative Facilities -- Fort Chaffee and Alien Populations

	ACTION	FYI
ALL CABINET MEMBERS	☑	☐
Vice President	☐	☐
State	☐	☐
Treasury	☐	☐
Defense	☐	☐
Attorney General	☐	☐
Interior	☐	☐
Agriculture	☐	☐
Commerce	☐	☐
Labor	☐	☐
HHS	☐	☐
HUD	☐	☐
Transportation	☐	☐
Energy	☐	☐
Education	☐	☐
Counsellor	☐	☐
OMB	☐	☐
CIA	☐	☐
UN	☐	☐
USTR	☐	☐
CEA (Weidenbaum)	☑	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐

	ACTION	FYI
Baker	☐	☐
Deaver	☐	☐
Allen	☑	☐
Anderson	☑	☐
Garrick	☐	☐
Darman *(For WH Staffing)*	☑	☐
Gray	☐	☑
Beal	☐	☐
A. Anderson	☐	☑
Al Holmer	☐	☑
Dan Murphy	☐	☑

Remarks:

The Attorney General has submitted the attached document for tomorrow's Cabinet meeting. Your views on alternative facilities can be presented at the meeting.

This is the only agenda item for the Cabinet meeting tomorrow at 11:00 a.m., Tuesday, July 7, 1981.

RETURN TO:

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

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

July 6, 1981

MEMORANDUM FOR THE PRESIDENT

FROM: The Attorney General

SUBJECT: Alternative Facilities -- Fort Chaffee and Alien Populations

At the Cabinet meeting of July 1 you asked that options be presented for relocating the 950 Cubans detained at Fort Chaffee. In addition, if the Administration pursues a policy of detaining illegal aliens pending deportation, which the Task Force recommends, facilities with additional capacity of up to 10,000 will be required.

THE PROBLEM

1. The Fort Chaffee population

All 950 Cubans remaining at Fort Chaffee have problems that prevent their release into the community (250 mentally ill and retarded; 400 antisocial; 100 homosexual; 100 alcoholics or drug users; 100 women, babies, elderly, and handicapped). Placements into state and private facilities possibly could be arranged, but if Fort Chaffee is closed by August 1 another site for at least 650 Cubans will be needed. The State Department has been directed to approach Cuba in an effort to return the detainees, but near-term diplomatic prospects are limited.

2. Detention of Other Illegals

The Task Force recommends that the Administration detain rather than release illegals pending exclusion hearings. This is now the policy in the southwest (e.g., Mexicans) and was the policy in Florida (e.g., Haitians) until 1977. Release into Florida adversely affects the local community; Governor Graham and the congressional delegation urge dispersal of the illegals to other areas of the country. Haitians are arriving in Florida at a rate of

1,000 to 1,500 a month; existing facilities in Florida are overflowing.

A detention policy requires facilities for up to 10,000.

DISCUSSION AND RECOMMENDATIONS

I. Fort Chaffee Relocation

In order to relocate the Cuban illegal immigrants from Fort Chaffee, a facility is needed both for detention and for hospitalization of the mentally ill. A federal facility also is needed so that a large number of the Cuban mental patients can successfully be dispersed to state institutions.* No suitable facility can be available with certainty on August 1.** Three facilities, however, have been identified as the most suitable, and could be ready in 30 to 90 days.

(1) Naval Training Center, Bainbridge, Maryland is in a rural area 15 miles west of Elkton. It is presently being partially used by the Job Corps but is still owned by the Navy, although not operated for a military purpose. It has 137 barracks, most of which cannot be salvaged; enough temporary structures could be put in place on an emergency basis within two to three months to hold the Fort Chaffee population. Bainbridge could be expanded by constructing permanent facilities to house ultimately as many as 25,000 people.

(2) The Port Isabel Service Processing Center in Los Fresnos, Texas, is approximately 25 miles northwest of Brownsville. INS is presently using it as a detention facility for approximately 250 aliens. Temporary facilities could be erected within 30 to 60 days to hold the Fort Chaffee population. Port Isabel could be expanded in stages to hold up to 10,000 aliens if a detention policy is adopted.

---

* Crucial to the success of a dispersal program is creating a federal back-up facility so that the federal government can guarantee to state institutions that those patients who create serious problems can be returned to federal custody.

** It was impossible to consider all available options, because the Department of Defense declined to provide information concerning Defense facilities (active or partially active).

(3) Ellington Air Force Base, Houston, Texas, is 18 miles southeast of Houston. About 10% of the base is being used by NASA, the Texas National Guard, the Coast Guard and the Army Reserve. There are existing unused barracks which could be renovated within 30 to 60 days to hold the Fort Chaffee population. Ellington could be expanded to hold approximately 5,000 people. Its limited expansion capacity and its location, near Houston in a suburban area, make it an inappropriate site for developing a long term detention facility. Community opposition would be considerable. Accordingly, Ellington should be considered only as a temporary solution to the Fort Chaffee problem.

It is recommended that INS be directed to acquire (if necessary) and renovate one of these three facilities. GSA should assist in acquiring the facility; the Department of Defense should assist in constructing the necessary temporary facilities and constructing and renovating the necessary permanent facilities; and HHS should provide the staffing for the mental patients. HHS should be directed also to continue its negotiations with state institutions to disperse as many of the Cuban mental patients as possible.

Port Isabel _____

Bainbridge _____

Ellington _____

Other _____

II. Long Term Detention Facilities

If a detention policy is adopted for illegal immigrants, facilities which can be renovated to hold up to 10,000 people are needed. The facilities should be readied in stages, to meet foreseeable increases. They also should have the reserve capacity to hold up to 20,000 illegal aliens in the event of an immigration emergency (e.g., Mariel boatlift).

Two of the facilities recommended to solve the Fort Chaffee problem -- Bainbridge and Port Isabel -- are also the best options for expansion to carry out a detention policy. Bainbridge could be expanded in steps by new construction to hold up to a maximum of 25,000 people. Similarly, Port Isabel could be expanded in stages, first by erecting tents and then permanent facilities, to house eventually as many as 10,000.

Both Bainbridge and Port Isabel are in relatively isolated areas, but the costs of providing services would not be prohibitive. Community opposition is likely to be limited. Other facilities considered, in urban areas or suburban residential areas, would pose larger community problems.

It is recommended that both Bainbridge and Port Isabel be used. INS should be directed to begin renovations at Port Isabel, first to house temporarily 1,000 illegal aliens (in part to ease the burden on South Florida), and then to build permanent facilities to house up to 5,000. The Navy and GSA should be directed to convey Bainbridge to INS and INS should be directed to build enough facilities to house 5,000. The Department of Defense should be directed to assist in the construction and renovation. INS also should be directed to prepare a contingency plan for expansion of both Port Isabel and Bainbridge to meet a possible immigration emergency.

Agree _____

Disagree _____

Other _____

Respectfully submitted,

William French Smith

FACILITIES CONSIDERED AND FOUND INADEQUATE

1. Matagorda Island Air Force Range

Five miles off Gulf Coast of Texas, near Port O'Connor. Barrier island with significant environmental/ legal problems; high cost of transporting services.

2. Hamilton Air Force Base

Marin County, California. Surburban residential area. Litigation pending involving legal title, environmental questions, and planned conflicting local use.

3. Almaden Air Force Station

Santa Clara County, California. Existing structures in disrepair and unsuitable (single-family units). Mountaintop site with severely limited capacity for expansion.

4. V.A. Medical Center, Augusta

Outside Augusta, Georgia. Located in suburban residential area.

5. Highlands Air Defense Site

Highlands, New Jersey (60 miles from New York City). Capacity limited to less than 500.

6. Roanoke Rapids Air Force Station

Roanoke Rapids, North Carolina. Limited capacity; extensive improvements in sewage and water plant necessary.

7. U.S. Naval Home

Downtown Philadelphia, Pennsylvania. Limited capacity; concentrated urban environment.

8. Sault St. Marie Air Force Station, Minnesota

Small facility; extreme climate; structures unsuitable for detention.

9. Fort Jefferson National Monument, Florida

Sixty-eight miles west of Key West. Historic structure; no other facilities; environmental/legal challenges likely; high cost.

10. Ellis Island, New York

New York Harbor, one mile from Manhattan. No utilities; structures in bad repair; historic site.

11. Alcatraz, California

San Francisco Bay, one and one-half miles from mainland. Essentially no utilities; historic site; popular tourist attraction.

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THE WHITE HOUSE

WASHINGTON

March 6, 1981

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

Following up discussion at the Cabinet meeting February 26, I hereby establish the Task Force on Immigration and Refugee Policy. The Task Force will be chaired by the Attorney General and include the Secretaries of State, Defense, Education, Labor, Health and Human Services, Transportation, the Treasury, and the Director of the Federal Emergency Management Agency. Frank Hodsoll will be the White House staff member of the Task Force.

The Task Force should review the entire range of immigration and refugee policies and programs and report back to me by the first week of May with recommendations or alternatives on the basis of which we can make progress. The Task Force's work should include consideration of new international approaches, the adequacy of the U.S. legal framework, and improved methods for control of illegal immigration and the handling of mass asylum or immigration crises. I have separately asked our White House staff and OMB to look at the question of Executive Branch organization to deal with these problems.

Please give the Attorney General your cooperation in this effort. Our review will require rapid action and close collaboration with the Congress.

Ronald Reagan

March 5, 1981

MEMORANDUM FOR THE PRESIDENT

FROM: CRAIG L. FULLER

SUBJECT: Task Force on Immigration and Refugee Policy

During the February 26, 1981 Cabinet meeting you created a Task Force on Immigration and Refugee Policy to be chaired by the Attorney General.

The attached document is a Presidential Memorandum prepared for your signature. It will officially establish the Task Force, its members and its functions.

Attachment

Copy 033009SS

Dick — 7/24 You may want to retrieve the original. President approved "B". CR

THE WHITE HOUSE

WASHINGTON

July 24, 1981

President also agreed to allowing Max and Roger to seek a delay in the Immigration hearings

MEMORANDUM FOR THE PRESIDENT

FROM: JAMES A. BAKER, III JAB III

SUBJECT: Immigration -- Remaining Issue

It is proposed to announce your decision on immigration today at the noon press briefing. There remains one issue outstanding on which we need your guidance. It concerns what kind of documentation an employer can request of new hires in order to provide a defense if he unwittingly hires an illegal alien.

Everyone is agreed on the following:

The Administration is explicitly opposed to the creation of a national identity card. But, given employer sanctions, the Administration recognizes the need for a means of compliance with the law that would provide an employer with a good faith defense if he requests from the employee and examines:

(a) documentation issued by the Immigration and Naturalization Service,

or any two of the following:

(b) Birth certificate

(c) Drivers license

(d) Social Security card

(e) Registration certificate issued by the Selective Service system

Your advisers are divided on the following point:

PTION A

Some believe that in addition to (a) through (e) above, there should be a general category such as "a sworn statement or any other unspecified evidence of lawful residence." They also object to requiring employers to fill out a new form.

OPTION B

Others believe that the requisite documentation should be specific rather than general, and that employers and employees should be required to sign a form at the time of hire.

Proponents of (A) argue that, since there is no standardized form of identification in the U.S., any commonly accepted proof of identity should stand on equal footing with every other. The fear is that, if any particular form of identification is preferred over others, one of the preferred forms (especially the Social Security card) could evolve into a national identity card. Further, in an Administration dedicated to reducing regulatory burdens, additional government forms and procedures should be avoided.

Proponents of (B) argue that employers need certainty in deciding whether they have a good faith defense against unwittingly hiring an illegal alien. Specifying particular identifiers assists in this. From the point of view of assuring effective employer sanctions, an employee should not be allowed simply to sign a piece of paper asserting he is a legal resident. Further, to avail himself of the defense, the employer will need to keep records of what he did when he hired the employee; hence, the need for a form. The form will also permit prosecution of employees who use fraudulent documents.

Finally, this system does not add much in terms of government intrusiveness or burden: Employees are already required to give their Social Security numbers when hired; employers are already required to document employees for tax, Social Security and unemployment insurance. The estimated additional time to fill out a new form for immigration purposes is 1-2 minutes.

OPTIONS

A. Include in documentation that will provide a good faith defense (1) a sworn statement of lawful U.S. residence, or (2) any other evidence of lawful U.S. residence status or citizenship; but not require a new form for both employer and employee to sign.

   OMB, Commerce, Martin Anderson, Lyn Nofziger, Fred Fielding and Murray Weidenbaum favor this option.

APPROVE_____ DISAPPROVE_____

B. Do not include the additional documentation mentioned in Option (A); but require the new hire and employer to sign a form.

In addition, the new hire and the employer would sign a form certifying, respectively, that (i) the new hire is either a U.S. citizen, a lawful permanent resident alien, or a foreign temporary worker authorized to work in the U.S., and (ii) the employer has inspected two of the above identifiers and has no reason to believe the employee is not entitled to lawful residence.

Justice, State, Treasury, DOD, Labor, HHS, Education, Elizabeth Dole and Frank Hodsoll favor this option.

APPROVE President approved 7/24 DISAPPROVE_____

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THE E HOU
W NGTON

March 13, 1981

MEMORANDUM FOR THE PRESIDENT

FROM: JAMES A. BAKER III

SUBJECT: Haitian Refugee Boat

I should close the loop regarding the Haitian boat I spoke with you about several days ago.

The boat never entered U.S. waters with its passengers. All (except two with valid visas) were off-loaded at night. The boat was towed into Key West. No action is being taken against the boat or its owners because with the departure of the illegal aliens there is no proof of illegality. We presume that the 70 Haitians are all now somewhere in Florida.

You should be aware that a boat with 107 Haitians on board landed last Monday night at Boca Raton and another boat with 140 Haitians arrived yesterday. These boats are being seized and the Haitians detained in temporary camps. There is evidence that additional boats of this type are being built in Haiti.

For every boat apprehended more get through. The Haitian population in South Florida is probably now increasing at a rate of 1,500 - 2,000/month. This could increase as the weather improves.

In the view of Justice, there is no clear legal authority to take persons without valid visas on such boats back to the country of their origin, even though that country is willing to receive them and there is no evidence of potential political persecution. Your Task Force is looking at these issues (including contingency plans in the event of another major influx) on a priority basis.

THE WHITE HOUSE
WASHINGTON

CABINET ADMINISTRATION STAFFING MEMORANDUM

DATE: April 18, 1981 NUMBER: 018507CA DUE BY: --

SUBJECT: Immigration Task Force: 4/10 Report

	ACTION	FYI
ALL CABINET MEMBERS	☐	☐
Vice President	☐	☐
State	☐	☐
Treasury	☐	☐
Defense	☐	☐
Attorney General	☐	☐
Interior	☐	☐
Agriculture	☐	☐
Commerce	☐	☐
Labor	☐	☐
HHS	☐	☐
HUD	☐	☐
Transportation	☐	☐
Energy	☐	☐
Education	☐	☐
Counsellor	☐	☐
OMB	☐	☐
CIA	☐	☐
UN	☐	☐
USTR	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐

	ACTION	FYI
Baker	☐	☐
Deaver	☐	☐
Allen	☐	☐
Anderson	☐	☐
Garrick	☐	☐
Darman *(For WH Staffing)*	☑	☐
Gray	☐	☐
Beal	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐

Remarks: For your review and information.

RETURN TO:

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

Memorandum

Subject	Date
Immigration Task Force -- Cuban and Haitian Materials	April 10, 1981

To Task Force Members

From David Hiller, Special Assistant to the Attorney General

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

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

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

Office of the Attorney General

Washington, D. C. 20530

April 10, 1981

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

FROM: THE ATTORNEY GENERAL

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

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

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

I look forward to seeing you on Wednesday.

Enclosures

William French Smith

Attachment B

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

ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

MEMORANDUM FOR THE ATTORNEY GENERAL

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

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

I. Background

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

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

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

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

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

II. Arguments in Favor of Power to Interdict

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

3/ See 8 U.S.C. §§ 1324(b), 1357(a).

4/ See 8 U.S.C. § 1323(b).

5/ See 8 U.S.C. § 1324(a).

A. Statutory Power

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

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

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

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

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

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

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

B. Implied Constitutional Power

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

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

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

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

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

7/ This Office invoked inherent authority in a recent opinion, stating that the President could act to prevent airplane 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, dated September 30, 1970, at 2-3.

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

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

III. Arguments Against Power to Interdict

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

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

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

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

IV. Conclusion

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

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

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We do not address the policy of this operation.

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