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Memorandum

TO: FFF

FR: RAH

Re: Interdiction of Haitian Vessels

Late this past Thursday, August 13, Kate Moore, Special Assistant to Jim Baker, advised me that a meeting was scheduled for the following day at the Department of Justice (DOJ), on the ^{above} captioned subject. She asked only that I review a memorandum for the Attorney General prepared by Ted Olson on the legal authority for the interdiction. Our Office had had no prior involvement with the issue. Upon review of the ~~legal~~ memorandum, ^{Michael, H.P. and I} ~~our staff~~ concluded that certain of the legal issues apparently resolved by the Office of Legal Counsel required further analysis. I 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 Guttig and myself, and representatives from OLC, Department of State, INS, and the Coast Guard attended that meeting on Friday. The meeting focused exclusively on the mechanical and logistical concerns of the interdiction itself. ~~As meeting~~ I seemed to be presupposed by all in attendance that the decision to move forward ^{immediately} with the interdiction ~~and so immediately~~ 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~~ ^{subtleties} in the law which suggested that the President's authority ~~was~~ to ~~undertake~~ ^{undertake} such a measure ~~was~~ ^{was} anything but definitively settled. We were summarily referred to the OLC memorandum. ^{During the} ~~the~~ ^{balance of the meeting the participants discussed the extensive media coverage that they believed certain to arise and the litigation ~~which~~ ^{which} was expected and in fact ~~known~~ ^{known} already to be in preparation.}

had been brought to the attention of those who apparently had made the final decision

Following the meeting, Michael approached the woman from OLC and indicated to her his concern that the authority cited ^{seemed} ~~was~~ 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 ~~such a~~ ^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

2
what gave rise to that conclusion. She did say, however, that ~~after~~ a very recent OLC opinion on essentially the same issues, had been cast in a wholly different manner, much more equivocal ~~etc~~ on the President's authority to interdict under these circumstances.

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On Saturday, Michael obtained from Ted Olson, a memorandum for the Associate Attorney General dated July 2, 1981. That memorandum, from Larry Simms, 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 ~~most~~ ^{many} instances, from that July 2 memorandum. But ~~Olson~~ but that virtually all discussion and authority ~~in any way~~ of which questioned the President's authority had been omitted from the recent memorandum on the Haitian interdiction.

FOR: FRED F. FIELDING
FROM: RICHARD A. HAUSER
SUBJECT: Interdiction of Haitian Vessels

*mix d. f. type
Report R44
Hutton*

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*RAH additions
to JML draft*

Later that day Kate

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In this regard Kate admitted that the IT had approved the operation in the context of obtaining ^{new statutory} ~~legislative~~ authority. She also stated that to her knowledge the IT had not approved the current concept but that the A.G. had ^{publicly} stated that interdiction could lawfully be accomplished under existing authority. w/ respect to the stopping of their decision, Kate indicated that the WH was not in receipt of either State Dept or NSC analyses of the problem.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 17, 1981

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.

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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

*Final of memo,
incorporating RAH addition*

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.

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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.

Board - determine boats ID, these people. Haitian law require docs to be selective introduction

~~Does~~ concerns is

w'd specify that only Haitian law of immigration being enforced (its OK)
Doris: we must board w/ officials familiar w/ immigration law. Must be US interpreters

free to have INS official - size at some pt problem.
will have litigation over this. (Doris)
logistics of boarding discussed

What detem screenng? Alien raises asylum or no document. No individual
What when everyone claims asylum? Interview all. Decide pretty much on spot. 10-15 min each
Logistics. Ship to Guantanamo Bay, Cuba or Miami, or stay on ship.

Was in agree to hold harmless, but dropped this
Whether to have intl observer on board. State Dept. view is split. Probably not even on 2d ship for any
He might be short-circuiting statute requirement if ~~State Dept~~ State Dept asylum ^{office} representative not included. INS inspects docs. + " " review asylum issue.
Proposed onboard - INS, State, Interpreter, Intl Observer.

Legal Authority

State legal - problem w/ use of Haitian immig. laws if problem with intent in U.S. law.

Practical problems of "intent" for both US + Haitian law

Proclamation - broadly stated.

frame proclamation to encompass everyone w/ whom we have agreement

What is President's authority to enforce Haitian law if not the statute mentioned in memo? Agreement?

Politically - we're enforcing laws we have said are repugnant
time table - one week to 2 weeks. (Aug 21)

(in Miami)

My partner in the restaurant, wants
to know where he will find lousboys
and dishwashers of the U.S. indict
the Hampton vessels.

Bob Badd

not much of memo

definite bad

serious

no juris to do it

all must rest on Exec authority (p. 7 many authorities
state membership -
no rules set area is
point)

key issue: does Pres have inherent authority
no attachments to flag political sensitivity

→ what is Haitian law they're enforcing.
procedures Draconian

Why not raise War Powers Act issue - Coast Guard
crossed in territorial waters. Congress

Inadequate as decision memo
point but that really subject to legal challenge

→ Apprend may capsize. What is US liability therefore
liability for mistake injuries

→ Read agreements (attachments)

Larry Simon on vacation

"Hammond"

→ INS^{as} weak generally

Legislative History on Immigration
+ Naturalization Act (gathered for Haitian introduction Q)

98 CR:

H.R. 5678	82d/2d Cong	
	Introd. by Mansfield (Comm. Int. & Ins. Aff.)	(82/1st 97CR/2928)
2/14/52	Rpt. w/ amd (H. Rpt. 82-1365)	1053 *
4/23/52	Made spec. order (H. Res. 554)	4301
4/23/52	Debated:	4301 *
		4399 *
		4422 *
		4433 *
4/28/52	And r p H	4450
5/1/52	Dir. plcd on S. cal.	4665
	Obj. to	5803
	And r p. S (in lieu of S. 2550)	—
	S. insists on amendments, asks for conf	—
	Conf apptd	—
	H disag w/ S amendments, agrees to conf.	5862 *
	Conf apptd	"
	Conf. Rpt (H. Rpt 82-2096) agreed	
	to by H	6947
	Conf Rpt agreed to by S	7016
	Pres. vetoed (H. Doc. 82-620)	8082 *
	Passed H over Pres's veto	8214 *
	" S " " "	8253 *

S.2550

82d/2d Cong

98 CR

Introd. by McCarran (Com. Jud.)

1/29/52

Rpt. (S. Rpt. 1137)

563 #

"

Ord. placed on Cal.

563

Obj.'d to

1293

3/13/52

Minority views (S. Rpt. 1137, pt. 2)

2229 #

5/7/52

Debated

4890

5/9/52

4986

4996

- 5003 -

5088

5100

~~5149~~

✓ 5162

5184

5207

5209

5216

5228

5314

5326

5408

5425

5441

5603

5615

5637

5756

5777

Indef. postponed, H.R. 5678 passed in lieu } 5803

Authority to Return Those Attempting to Enter U.S. Illegally

1. Statutory - 8 USC §1182(f) [3]
1185 (a)(1) [3]
USCG authority enforce fed law [4]

2. Implied Constitutional

- (Commander in Chief power: 15 quote p 4 out of context 543)
- Meindner v Mandel* 408 US 753, 766 (1972) [4]
 - Ekin v US* 142 US 651, 659 (1892) [4]
 - US v Shaughnessy* 338 US 537 (1950) [4]
 - Youngstown* 343 US 579 (1952) [4]
 - Savelis v Vlachos* 137 F. Supp 389, 395 [5]
 - 50 USC §1541
 - US v Curtiss Wright* 299 US 304, 319 (1936) [5]

Coast Guard Authority to Enforce Haitian Law Pursuant to Agreement

1. Authority to Enter into Agreement to Return Haitians for Violation of their Laws
8 USC §1103(a) [6]
Foreign Affairs & the Constitution (Henkin) (1972) [6]
Treaties, Conventions, Joint Acts, Protocols &
Agreements by Malloy p743 (1910)
[1891 Agree]
Roid v Covert 354 US 1, 16-19 (1957) [8]
22 USC §2151 [8]

Coast Guard's Authority to Act

- 14 USC 1
- 589 ~~FF~~ F2d 1258, 1265 (CA 5 1979)
- 14 USC §89(a)

Memorandum

To : FFF

FR : JML

RE : 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 ~~or~~ ~~not~~ 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 certainly} ~~one~~ ^{is to have} ~~with~~ far-reaching international repercussions and to draw intense media attention, it is ~~a~~ essential that he know whether the legal authority ^{for} ~~so~~ ~~action~~ ^{the decision} ~~existence~~ is substantial and well-defined, ~~weak and tenuous~~ or something less. ~~than that~~. Even without ^{actual} review of the authorities cited in the two OLC memoranda that we have, ^{but upon comparison of the two,} ~~the OLC~~ it appears that ^{the President} ~~he~~ has not been adequately informed on the ~~legal~~ ^{issue} strength of his legal authority to initiate the interdiction. 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 ~~in the enforcement of~~ ^{to} United States law and its authority to interdict ~~in the enforce~~ ^{to} Haitian law.

In support of the authority ^{of the President, 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. §§ 1182(f), ~~and~~ 1185(a)(1). ~~The~~ Section 1182(f) permits the President, upon a finding that the entry ^{into the United States} of a class of aliens ~~to~~ 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 ^{the reasonable} rules formulated by the President.

~~It seems a weak argument to say that~~

~~the insurmountable presumption of~~

^{necessary,} 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" ~~has~~ ^{tries} in fact ~~to~~ to enter the United States. There would appear to be a serious logical flaw, ^{not to mention a logical one,} ~~as~~ ^{as OLC does,} in saying 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. It is highly improbable ~~that~~ ^{else} whatever they are doing at that distance from the United States, only with great difficulty can one say that ~~these persons~~ ^{they} are "trying to enter the United States," an absolute prerequisite ^{for} of the term "suspend entry" ^{in the context of the statute} to ~~take on~~ have meaning. Not unimportantly, ~~in the context of~~ 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) ~~that the violation of federal law, the Court would be without the authority to~~ ^(emphasis added) ~~Of course it is theoretically possible to find that~~ Not surprisingly, the word "entry" ~~act under, 14 USC § 89(a).~~

^{is given, in the statute its day-to-day common sense meaning, a meaning that is ignored}
^{background if not ignored under the G.C. interpretation}
 Section 1185(a)(1) offers ~~only~~ ^{slightly} ~~more~~ ^{the necessary} ~~with~~ support for

the interdiction than does section 1182(f). Under section 1185(a)(1), one must prove that the aliens were "attempt[ing] to enter the United States". Again the proof problems, given ^{both} the distance from the United States and that in ^{the} Mindward Passage it cannot be said with ~~any~~ ^{the necessary} certainty that a vessel is unquestionably travelling to the United States, are formidable. At a minimum. As under section 1182(f), the term "enter" as defined in the statute ^{represents} ~~becomes~~

a rather substantial hurdle^{to reaching the conclusion that one does}, as does 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)

Finally, ^{as} the strength of the argument that there is a violation of a federal statute diminishes, so does the ^{strength of the} concomitant argument that the Coast Guard has the implied authority to return the aliens to the port from which they came.

In sum, ^{a persuasive argument exists that} these statutes were never intended to have applicability to the

^{Both memoranda recognize this possible construction of inapplicability by arguing, in addition, reliance on the inherent authority of the President to act in these circumstances.} case at hand in circumstances such as these ^{even during that}

^{Finally, even assuming} applicability of the statutes cited, and that a violation of federal laws ^{could} be established, they were so intended, it is still quite a leap to say that ^{in the circumstances under consideration,}

It is still quite a leap to say that the Coast Guard ~~has~~ is empowered

* to return ^{the} violators to Haiti, ^{because in} Title 14, section 89(a), the Coast

Guard is given explicit directions on ~~what~~ their response to a detected violation of federal law, directions which do not include return of the violators to their

port of embarkation. ~~unless~~ ^{the Coast Guard} except to the extent that they may take "other [other

than arrest] lawful and appropriate action upon finding a violation 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, at least}

The OLC memorandum is supported on the Cuban boatlift cited and relied upon §§ sections 1182(f) and 1185(a)(1) but I repeat the facts there as distinguishable from the ones before us now.

Finally, it is important to remember 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 are easily distinguishable from ~~what~~ ^{those that} would exist under the proposed Haitian interdiction plan, ~~the OLC is far more reasonable to argue that a vessel was trying to enter or attempting to enter the~~

principally because of the ^{greater distance between Haiti and the United States than} distance between Cuba and the United States, and depending upon the point of interdiction, the inability ^{of the helmsmen of} for the interdicted Cuban vessels, ^{as opposed to the Haitians,} to reasonably contend that they were not going to the United States. ~~These factual differences seem critical with respect to whether the statutes apply. In addition, the interdiction could well have~~

* Finally, even assuming... (see prior page)

2. The OLC memorandum also predicates the President's authority to interdict Haitian vessels ^{in violation of U.S. laws} on ~~the~~ his implied Constitutional ~~with~~ powers.

It ~~indeed~~ ^{however,} notes, that his authority in this regard is ~~more~~ ^(the implicit presumption that the reader is given is that the statutory authority is clear) less ~~substantive~~ clear than under the discussed statutes. This ~~appears to be~~ ^{is} an accurate assessment of

~~the OLC, in the recent memorandum, (it omits virtually all reference to authority suggesting that the President's implied ^{powers are} authority is~~

6

President's ^{implied} authority vis-a-vis ~~the~~ ^{noted} statutory authority, but ~~standing alone it does~~
~~not~~ the ensuing discussion omits all references ^{from the former, prior memorandum} to which suggest that
the President is without the ^{implied} authority to interdict. The effect is that the
implied-authority ~~argument~~ claim is cast as ~~without~~ relatively persuasive,
when in reality it is ^{decidedly} ~~decidedly~~ not. ~~Thus the OLC reflects to note~~

Immigration is ^{primarily, if not altogether, a} Congressional concern in the first instance.
The authority to the contrary is minimal and dated. Thus, the President's
independent authority in the area of immigration matters ~~is~~ is ~~it~~

The OLC reflects to note
~~that~~ ^{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 the discussion to
this effect, OLC should have mentioned, ^{but did not, an argument for the implied authority} that ~~the President's implied~~
~~authority~~ of the President ^{to act} is ~~weakest~~ where Congress has consistently asserted
its undisputed authority ^(as it has with immigration matters) and the President's independent authority is not
well-established ^{similarly in} (i.e. immigration). ^{Also,} ~~Similarly,~~ the opinion should have
discussed the analogous situations in which the courts have specifically

Finally, it should
have noted that
legislation is now pending
that would specifically
give the President the
authority here in question

rejected claims of implied authority to return aliens to their countries, and
the respected treaties ~~with~~ which suggest that the President has little or no implied authority in the immigration matters.
All of the above points were fully and ~~lengthy~~ ^{as} in length discussed in the prior

OLC memorandum under & the separate heading "Arguments Against Power to Interdict". Absent these ^{or similar ones} discussions, ^{negative legal advice could not} ~~was given~~ the President ~~was~~ ^{was} presented all of the legal information necessary to make his decision.

In addition to the omissions, ~~the~~ ^{the} OLC, ~~opinion~~, by taking verbatim certain sentences ^{from} of the earlier opinion, suggests incorrectly that the Haitian interdiction would be an effort by the President to protect the United State from "massive" illegal immigration". This alone would not be so ^{disturbing} ~~aggravating~~ ~~as~~ under ordinary circumstances, but the ~~as~~ ^{that the immigrations are massive in number} claim is made in the context of a discussion of the President's ~~implied~~ ^{proper} inherent Constitutional ~~authority~~ to act ~~with~~ to protect the Nation in times of emergency.

¶ Absent emergency conditions, ~~the~~ ^{the} authority cited ~~is~~ ^{is} inapplicable to citing the authority in support of an implied power to interdict Haitian vessels is at least misleading and at worse intellectually dishonest. ~~The~~ ^{The gratuitous reference to the recent Agre case at this point in the opinion contributes to the confusion.}

~~Again~~ ^{with the memorandum} In part, the problem ^{day and a} stems from relying wholesale on language ^{with different facts} ~~as~~ drafted for another ^{problem} of an entirely different magnitude. ~~But in~~ ^{fact it appears to be a purposeful effort to}

Other problems in this section of the memorandum ~~are~~ ^{are} more readily understood but ~~not~~ ^{not} so easily defended.

But there is little room for question that ^{even larger} in part the problem ~~lies~~ ^{what appears to have been} with the memorandum stem from a conscious omission of discussion and authority which counsels against the interdiction on the basis of implied Constitutional authority. The omissions ~~can~~ ^{can} result in ~~the~~ ^a

piece resembling more a party brief than an objective legal analysis. It may well be, ~~that the P~~ as was concluded in the earlier memorandum, that the President has the inherent ^{power} ~~authority~~ to ~~interdict~~ ^{and} authorize the interdiction, but ~~if he does~~ it is far from certain, and only through a full discussion of the authorities ~~can~~ can one appreciate the precise degree of uncertainty.

3. The OLC memorandum

Coast Guard

3. The recent OLC memorandum also discusses ^{introduction of} ~~discusses~~ Haitian vessel 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} ~~present~~ in the prior section of this memorandum do not obtain in this section.

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

With this introduction, the memorandum suggests that the President's ~~own~~ authority to enter into an agreement to ^{enforce} ~~enforce~~ Haitian law can be supported by 8 U.S.C. § 1103(a) and by his foreign relations powers, and it begins an analysis of both.

~~The~~ Title 8, section 1103(a), in relevant part reads: ~~The Attorney General~~ I shall have the power and duty to control and guard

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

a

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 latitude indeed. The possible problem that it does not identify, however, is that if the ~~authority~~^{act} is justified by ~~reference~~^{reliance} upon 8 USC §1103, it becomes increasingly difficult to ~~use~~ argue at the same time that it was also a valid exercise of the President's foreign affairs powers. Either he ~~was~~^{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. ~~The central~~ Arguments advanced which ~~bring the interdiction close to an exercise~~ ~~defense~~

imply that the interdiction was authorized as an effort to protect United States borders, ^{consequently} 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 memo~~

b

The memorandum next outlines ~~the~~ authority 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 is, admittedly, precedent of some kind, but what is not highlighted is that the ~~incident~~ agreement was entered into almost a century ago and presumably never challenged in the courts. ~~Of the matters~~ There are also significant factual 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 ~~between~~ by Presidents Roosevelt and Taft, with Santa Domingo and Liberia between 1905 and 1911. Again, the ^{effect of the} dates of these agreements is not underscored, nor apparently were they 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 treaties and social-science type materials are cited generally, ^{as in support of these alleged precedents,} ~~the report~~ which I find at least noteworthy, if not troubling.

Finally, against the 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 ~~all~~ the aforementioned treatment of the issue. Even were it ^{a problem of practical} ~~one~~ of 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, ~~would~~ at least ^{would} cause one to question the wisdom of the interdiction.

Conclusion The foregoing discussion is presented only to suggest that the OLC memorandum perhaps could have.

Conclusion

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 ~~this~~ that, pursuant to his foreign relations powers, he is ordering the interdiction ~~as~~ in an effort to assist Haiti ~~in~~ to enforce its laws. But in any event, the legal arguments which suggest that the President does or does not have this authority, or the authority to interdict the vessels to enforce United States law, deserved ~~fuller~~ a more exacting treatment than they received in the OLC memorandum.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 17, 1981

FOR: FRED F. FIELDING
FROM: J. MICHAEL LUTTIG *JML*
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 President, 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 latitude 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

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 accomplished 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.



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:

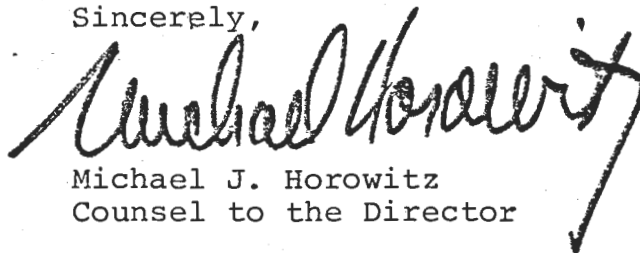
Enclosed is a proposed Executive order entitled "Direction Relating to the Interdiction of Illegal Aliens" and a proposed proclamation entitled "Proclamation to Authorize High Seas Interdiction."

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