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

DISCUSSION MEMORANDUM

Re: Bankruptcy Court Jurisdiction after Northern Pipeline Construction Co. v. Marathon Pipeline Co.

I. INTRODUCTION

In its recent decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., a majority of the Supreme Court invalidated the broad grant of jurisdiction made to the bankruptcy courts by the Bankruptcy Act of 1978.

The Court stayed its judgment until October 4, 1982 1/ in order to give Congress time to reconstitute the bankruptcy courts in a manner that is constitutional. If no action is taken by the Congress by that time, the bankruptcy courts will cease to function, and, indeed, it is arguable that no federal bankruptcy jurisdiction will exist after that date. Even if, as is more likely, the federal district courts would retain their jurisdiction over bankruptcies pursuant to 28 U.S.C. 1334, they are not equipped to handle the current caseload of the federal bankruptcy court system.

II. THE NORTHERN PIPELINE DECISION

The Supreme Court held unconstitutional in the Northern Pipeline case the grant of jurisdiction to the bankruptcy courts over all traditional common law claims in which a bankrupt debtor is a party. The Court found that such claims could be adjudicated only by judges who enjoyed life tenure and the protection from salary diminution which Article III of the Constitution requires. The bankruptcy courts, however, are composed of so-called "Article I" judges appointed to 14-year terms, whose tenure and salary are not given the constitutional protections provided under Article III.

Because it felt that the unconstitutional portions of the jurisdictional grant contained in the 1978 Act could not

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1/ The Supreme Court reconvenes on October 4. It may well have chosen that date so that it could grant, if necessary, a further stay of the Northern Pipeline decision.

readily be severed from the constitutional portions, the Court majority struck down the jurisdictional section in its entirety. The extent to which an Article I court could constitutionally assert jurisdiction over bankruptcy matters was, however, left quite unclear by the decision. In part, this confusion is the result of the disagreements over the issue among the justices, expressed by the various opinions filed in the case -- the plurality opinion of the Court was joined by only four justices, two more justices concurred with the result but not the reasoning, and three dissented.

III. PURPOSE OF THE 1978 BANKRUPTCY ACT REFORMS

Prior to 1978, bankruptcy proceedings were conducted primarily by referees in bankruptcy who were appointed by the district court judges in each district. The Bankruptcy Act replaced these referees with a system of about 220 bankruptcy judges operating independently from the district courts, with jurisdiction expanded to all matters "related to" a bankruptcy proceeding.

The 1978 Bankruptcy Act sought to achieve four major goals. The first was to consolidate in one forum all proceedings related to a bankruptcy in order to make bankruptcy proceedings shorter, more efficient, and less costly. The second was to attract more qualified persons as bankruptcy judges. Third, the 1978 reforms were intended to eliminate alleged cronyism on the bankruptcy bench by providing for presidential appointment of bankruptcy judges. Finally, the 1978 Act sought to limit the expense and inflexibility of the reforms by providing bankruptcy judges with fixed terms of office without protection against salary diminution and without a judicial retirement plan. The Northern Pipeline plurality clearly believed that all of these goals cannot be constitutionally achieved.

IV. OPTIONS FOR RESTRUCTURING THE BANKRUPTCY COURTS

As a general matter, there exist three broad alternatives for restructuring the bankruptcy courts. The first would be to return to a system similar to that which existed prior to 1978. The second would be to grant Article III status to the bankruptcy judges. The third alternative would be to continue the bankruptcy courts as Article I courts, but to narrow their jurisdiction sufficiently to eliminate the problems presented by Northern Pipeline.

A. Return to a Referee or "Adjunct" System

The referees handling bankruptcy claims prior to 1978 served, in effect, as adjuncts to the Article III district courts. Consequently, constitutional problems of the nature identified in Northern Pipeline were not present or at least minimized.

One alternative would be to restructure the bankruptcy courts along the pre-1978 lines, with bankruptcy judges to be appointed by the district judges and to serve under the supervision of the district courts. District courts would have broad powers of review of bankruptcy court orders. While the constitutionality of the pre-1978 system was never challenged, it is our opinion this arrangement would pass constitutional muster. However, it presents a mixture of advantages and disadvantages.

Advantages. Under a referee or "adjunct" system, it would be possible to maintain the broad jurisdictional grant established by the 1978 reforms. All proceedings could be concentrated in the hands of a single referee, albeit under the supervision of the district court. Because of its broad powers of review, there would, however, obviously be a need for greater district court involvement in the bankruptcy process. This may necessitate the creation of a number of new district judgeships.

This solution would allow for the greatest flexibility. The number of adjunct bankruptcy judges could be increased or diminished freely and only a comparatively small number of new Article III judges would be needed. It would also be possible to leave the difficult questions as to which matters should be referred to adjuncts for determination and the scope of review of such determinations to the Judicial Conference to promulgate by Rule or to the district courts to decide on a case-by-case basis, thereby obviating the need to delineate functions by statute. 2/

Disadvantages. Because district judges would appoint

2/ It is not possible to discern from the Northern Pipeline decision any clear line of demarcation between those issues which may be adjudicated by an Article I court and those issues which must be adjudicated by an Article III court. The plurality in Northern Pipeline indicated that those matters which are "public rights" may be adjudicated by non-Article III courts. In the context of a bankruptcy proceeding, it is not at all clear which rights are public and which are private. The plurality indicated that a discharge in bankruptcy "may well be a public right", and other precedent suggests this to be the case. However, a bankruptcy proceeding involves many issues which are ancillary to the grant of a discharge, e.g., the staying of law suits, collecting assets, and allowing or disallowing claims. In varying degrees, all of these functions require a bankruptcy judge to adjudicate questions of private civil law. Without any guidance from the Court, it is an open question which of these and similar adjudicatory functions may be performed by a non-Article III judge.

bankruptcy judges, the bankruptcy courts once again would be open to charges of cronyism. Even if the President appointed bankruptcy judges initially, if district judges have the power to reappoint those judges, cronyism charges might reappear. It is more difficult to attract well-qualified attorneys to serve as judicial "adjuncts" than as independent judges. Finally, the same interests that lobbied so intensively for the 1978 bankruptcy reforms would strongly oppose this arrangement as a return to the inefficient and discredited pre-1978 system. The Judiciary will probably oppose the creation of such a system because it would impose additional duties on district judges, who historically have shunned bankruptcy work. Chairman Rodino has strongly supported the creation of a specialized Article III bankruptcy court prior to 1978 and he continues to do so.

B. Keep the Present System, But Narrow Bankruptcy Court Jurisdiction

A second option would be to retain the present system, but narrow bankruptcy court jurisdiction to eliminate the features found objectionable by the Court in Northern Pipeline. To implement this system, we would continue to have bankruptcy judges serve fixed terms and provide no protection from reduction of salary. Those matters which bankruptcy judges could not constitutionally adjudicate would be referred to the district courts for resolution.

Advantages. The greatest advantage of this option would be that it would permit us to retain almost intact the bankruptcy court system established in the 1978 reforms. It would operate more independently than the pre-1978 referee system; it would be somewhat cheaper and more flexible than an Article III system; and it would attract better judges than the referee system. In addition, because it gives additional jurisdiction to the district courts, it would lay the basis for creating more federal district judges. Although creation of new district court judgeships would encounter opposition, particularly in the House, the exigencies of the Northern Pipeline decision give us some leverage over this opposition.

Disadvantages. Because it is unclear just which claims Article I courts may or may not decide, 3/ it would be extremely difficult to delineate by statute the respective jurisdictions of the bankruptcy courts and of the district courts. This question could be left to case-by-case resolution; however, there would be endless litigation of this question, and we might end up with the Supreme Court once again throwing out whatever line Congress or the lower courts finally were to draw. A second disadvantage to this system would be that any bifurcation of jurisdiction between the bankruptcy and district courts

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3/ See p. 3 n.2, supra.

will result in less efficient and more prolonged bankruptcy proceedings. 4/

C. Create Additional Article III Judges

The safest solution to the problems raised by Northern Pipeline would be to create additional Article III judgeships. This would have the following pros and cons.

Advantages. The problems raised by the Northern Pipeline decision would be settled while the substantive and procedural reforms of the 1978 Act could be retained. It would also ensure that all proceedings related to an individual bankruptcy would be heard before one judge.

Disadvantages. The Judicial Conference and many influential Senators are very strongly opposed to making bankruptcy judges Article III judges. This opposition is based primarily on the belief that the infusion of 200 or so Article III bankruptcy judges lessens the prestige of an Article III judgeship. There are also less persuasive arguments that

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4/ It would be possible to limit the problems with bifurcated jurisdiction by implementing one of several "sub-options" of this Article I arrangement. Congress might, for example, create a limited number of "senior" bankruptcy judges who would be Article III judges. "Senior" bankruptcy judges would hear those claims which bankruptcy judges themselves could not hear; because the senior judges would be part of the bankruptcy court, we could expect them to work more closely with the bankruptcy courts than district judges would. A second idea would be to create the bankruptcy courts as "adjuncts" of the district courts for this purpose. Whenever a bankruptcy court had a Northern Pipeline-type claim that it could not itself adjudicate fully, it would act on behalf of the district court as a referee or special master. The bankruptcy court would hold evidentiary hearings and make recommended findings of fact and conclusions of law to the district court. The district court would review the bankruptcy court's recommendations (under either a de novo or "substantial evidence" standard), and adopt them if proper. Thus, the bankruptcy court would conduct most proceedings in each bankruptcy case.

this would be expensive, 5/ primarily because of the size of judicial retirement benefits, and inflexible 6/ because of the difficulty of reducing the size of the bankruptcy judiciary in the future.

V. CONCLUSION

The Department of Justice has not yet concluded its evaluation of these options. It is clear, however, that the Administration must determine its position on this matter very shortly if it is to affect the course of the legislative efforts to address this problem that have already begun in Congress.

5/ There is no constitutional requirement that bankruptcy judges be paid salaries commensurate with those paid to other Article III judges. Miscellaneous expenses could also be minimized. For example, it is not be necessary to provide bankruptcy judges with the same number of law clerks or secretaries as other Article III judges have, nor need salaries of support staff be the same as those paid in the case of Article III judges.

6/ It has been argued that should the number of bankruptcy petitions decline, there would exist a number of federal judges with insufficient work. It should be noted that bankruptcy judges could sit in other types of cases. See Glidden Co. v. Zdanok, 370 U.S. 530 (1962). Further, should Congress eventually decide to handle bankruptcies by some unforseeable means which entirely dispensed with the need for judges, Congress could probably abolish the bankruptcy courts entirely.

THE WHITE HOUSE

WASHINGTON

CABINET COUNCIL ON LEGAL POLICY

June 28, 1982

AGENDA

1. Immigration Legislation

2. Federal Antitrust Laws and Local Government Activities

3. President's Crime Legislative Package

THE WHITE HOUSE

WASHINGTON

June 25, 1982

MEMORANDUM FOR THE PRESIDENT

FROM THE CABINET COUNCIL ON LEGAL POLICY

SUBJECT: Worker Identification Provisions in Pending Immigration Reform Bill

ISSUE:

Whether the Administration should continue to support the Simpson-Mazzoli bill in light of its provisions dealing with workers' identification cards.

ACTION FORCING EVENT:

Senate floor action imminent on S.2222, the Simpson-Mazzoli Immigration bill.

BACKGROUND AND ANALYSIS:

The position adopted last year and specifically incorporated in the Administration's immigration reform bill with your approval was that a national identification card was neither necessary nor desirable. The principal basis of objection was that a national identification card or system (called by whatever name) was philosophically repugnant to the idea of a free society and contrary to American customs. In addition, several practical objections were raised: (1) that, short of nationalizing birth and death records, such a system would not be cost-beneficial; (2) that such a system could be discriminatory, because, as a practical matter, only those who looked or sounded "foreign" might be asked to produce identification cards; and (3) that various interest groups, ranging from the ACLU to the NRA, would voice the strongest possible opposition.

The Administration recognized, however, that given employer sanctions, employers need a means of distinguishing illegal aliens from persons authorized to work.

The full Senate Judiciary Committee and a House Judiciary subcommittee believe that the Administration's provisions for worker identification were not sufficient. The relevant language of the latest Senate version is as follows:

> "Within three years...the President shall implement such changes in or additions to the (existing documents) as may be necessary to establish a secure system to determine employment eligibility....the system will reliably determine that a person with the

> identity claimed...is not claiming the identity of another individual...such document must be in a form which is resistant to counterfiting and tampering,...unless the President and the Judiciary Committees of the Congress have determined that such form is unnecessary to the reliability of the system."

There are opposing views on the meaning of this language.

Justice, State, Labor, and Agriculture believe that this language will not require creation of a national ID card or process. In their view the statutory language leaves discretion in the Administration to determine whether and what changes to existing documents may be appropriate. Moreover, they believe that the language is likely the best that can be achieved in view of Congressional opinion that the language is already weak and that existing ID's need to be invigorated. OMB, Interior, and the Office of Policy Development believe that the language would set the nation on a path toward the establishment of a national ID system.

OPTION 1:

Oppose S.2222 unless amended to eliminate all requirements leading to a national identity card or system.

OPTION 2:

Continue to support S.2222 generally, while seeking to modify the language leading toward a national identification card. (Indicates probability of signing even if sufficient changes are not made in the language.)

DECISION:

1. Oppose S.2222 unless amended as above. Approve _____

2. Continue efforts to change the language, but support S.2222 even if those efforts fail. Approve _____

THE WHITE HOUSE

WASHINGTON

June 25, 1982

MEMORANDUM FOR THE PRESIDENT

FROM THE CABINET COUNCIL ON LEGAL POLICY

SUBJECT: Legalization Provisions of Immigration Reform Legislation

ISSUE:

What should be the Administration's position regarding legalization?

ACTION FORCING EVENT:

Senate floor action imminent on S. 2222, the Simpson-Mazzoli Immigration bill.

BACKGROUND AND ANALYSIS:

The Senate Judiciary Committee has reported out S. 2222, the Simpson-Mazzoli immigration reform bill. The bill offers immediate permanent resident status to illegal aliens residing continuously in the U.S. since January 1, 1978 and temporary status for those who entered between January 1978 and 1982.

The bill grants all welfare benefits to permanent residents and Medicaid and SSI to temporary residents. Temporary residents become eligible for all benefits when, after two years, they become permanent residents.

The original Administration bill proposed temporary resident status for all illegal aliens who entered as of January 1980. Those who have resided continuously for ten years from date of entry would be eligible for immediate permanent resident status. In the interim, family reunification and welfare eligibility were prohibited, except for job-related disabilities incurred after legalization. This proposal attracted considerable opposition and almost no support in Congress. Consequently, the Attorney General proposed, as a compromise, a January 1981 entry limit and an eight rather than a ten year residency requirement. No compromise on benefits was proposed.

The added costs to Federal, State and local governments of providing benefits to permanent and temporary residents under the bill as reported by the Committee would be extremely high, since the bill would provide benefits to an estimated 4.8 million aliens from the first year of the program onward. The Office of Management and Budget and the Department of Health and Human Services estimate that the annual Federal welfare costs under the bill range from $642 million in FY 83 to $2.5 billion by 1986. State and local costs could range from $425 million in FY 83 to $1.4 billion by FY 86. The National Association of Counties has testified that State and local costs would be $546 million in the first year.

S. 2222 is also inconsistent with the basic principles which the Administration sought to incorporate in its proposal:

(1) that it was unfair to ask the American body politic to absorb, more or less immediately, several million illegal aliens;

(2) that illegal entry should not be rewarded by offering easy access to the benefits of permanent resident status, which in turn would lure others to enter illegally;

(3) that generous benefits to illegal aliens not be offered at a time when many Americans are unemployed and jeopardized by budget cuts in social programs, and

(4) that we should avoid creating welfare dependence in a group now viewed to have a strong work ethic.

Moreover, a program which gradually adjusted aliens to permanent resident status would ease the impact of welfare costs on all levels of government. State and local governments would have more leeway to plan for service delivery and to budget for additional costs.

OPTION 1:

Support S. 2222 as reported. Total 1983 - 1986 cost: $10.2 billion.

OPTION 2:

Maintain the Administration's Revised Position. Total 1983 - 1986 cost: $2.4 billion.

OPTION 3:

Seek a middle ground. Compromise possibilities include:

(a) Administration's Revised Position & Limited Benefits. Total 1983 - 1986 cost: $5.5 billion.

(b) A 1976 (or other) entry date for permanent residents and a four-year prospective temporary residency status with benefits for those who entered by 1981. This option would legalize a group of permanent residents immediately and offer benefits to temporary residents. Prospective four-year residency requirements delay adjustments to permanent resident status until FY 88. Total 1983 - 1986 cost: $5.1 billion.

(c) A 1982 entry date for temporary residents; limited benefits and 5 to 10 year prospective residency depending on welfare use. This option grants temporary resident status to all illegal aliens and would offer medicaid and SSI type benefits. Aliens who do not use welfare in the first 5 years could then adjust to permanent resident status. Total 1983 - 1986 cost: $1.2 billion.

DECISION:

1. Support S. 2222. Approve_____.

2. Maintain Administration's revised position. Approve_____.

3. Seek a middle ground. Approve _____.

APPENDICES

A. Comparison of Welfare Costs by Option

B. Explanation of Cost Calculation for S. 2222

C. Estimated Population Eligible for Legalization by Option

D. Terms of Legalization by Option

COMPARISON OF VARIOUS IMMIGRATION LEGISLATIVE PROPOSALS' WELFARE COSTS OVER PRESIDENT'S BUDGET
($ in millions)

	Proposal	FY 83			FY 84			FY 85			FY 86			Total 4 Year		
		Fed	State	Total	Fed	State	Total	Fed	State	Total	Fed	State	Total	Fed	State	Total
	Admin. Bill															
	High Est.	77	45	122	185	108	293	216	126	342	309	180	489	787	459	1,246
	Mid Est.	39	22	61	93	54	147	108	63	171	154	90	244	344	229	623
	Low Est.	10	5	15	23	14	37	27	16	43	39	22	61	98	57	155
(Senate)	Simpson/Mazzoli															
	High Est.	642	425	1,067	1,283	880	2,163	1,877	1,146	3,023	2,473	1,442	3,915	6,275	3,893	10,168
	Mid Est.	321	213	534	642	440	1,082	939	573	1,512	1,237	721	1,958	3,137	1,947	5,084
	Low Est.	80	53	133	160	110	270	235	143	378	309	180	489	784	487	1,271
(House)	Simpson/Mazzoli															
	High Est.	448	282	730	895	565	1,460	1,093	688	1,781	1,390	810	2,200	3,825	2,345	6,170
	Mid Est.	224	141	365	448	282	730	546	344	890	695	405	1,100	1,913	1,173	3,085
	Low Est.	56	35	91	112	71	183	137	86	223	174	101	275	478	293	771
	1978 Entry															
	High Est.	531	345	876	1,062	689	1,751	1,062	689	1,751	1,062	689	1,751	3,717	2,412	6,129
	Mid Est.	266	173	438	531	345	876	531	345	876	531	345	876	1,859	1,206	3,065
	Low Est.	66	43	110	133	86	219	133	86	219	133	86	219	465	301	766
	1977 Entry															
	High Est.	480	319	799	961	638	1,599	961	638	1,599	961	638	1,599	3,363	2,233	5,596
	Mid Est.	240	160	400	480	319	799	480	319	799	480	319	799	1,682	1,116	2,798
	Low Est.	60	40	100	120	80	200	120	80	200	120	80	200	420	379	699
	1976 Entry															
	High Est.	431	294	725	863	588	1,451	863	588	1,451	863	588	1,451	3,020	2,058	5,078
	Mid. Est.	216	147	363	432	294	726	432	294	726	432	294	726	1,510	1,029	2,539
	Low Est.	54	37	91	108	74	182	108	74	182	108	74	182	376	257	633
	Attorney Gen. Proposal/Benefits															
	High Est.	410	313	723	863	588	1,451	961	638	1,599	1,062	689	1,751	3,296	2,228	5,524
	Mid. Est.	205	157	361	432	294	726	480	319	799	531	345	876	1,648	1,114	2,762
	Low Est.	51	39	90	108	74	182	120	80	200	133	86	219	412	278	690

Proposal	FY 83 Fed	FY 83 State	FY 83 Total	FY 84 Fed	FY 84 State	FY 84 Total	FY 85 Fed	FY 85 State	FY 85 Total	FY 86 Fed	FY 86 State	FY 86 Total	Total 4 Year Fed	Total 4 Year State	Total 4 Year Total
Attorney Gen. Proposal															
High Est.	108	63	171	309	180	489	463	270	733	619	390	1,009	1,499	903	2,402
Mid Est.	54	31	85	155	90	245	232	135	367	310	195	505	750	451	1,201
Low Est.	14	7	21	39	23	61	58	34	92	77	49	126	187	113	300
New Option															
High Est.	120	82	202	240	164	404	240	164	404	240	164	404	840	574	1,414
Mid Est.	60	41	101	120	132	252	120	132	252	120	132	252	420	462	882
Low Est.	52	8	60	103	16	119	103	16	119	103	16	119	361	56	417

Appendix B

Estimated First Full Year Federal Costs*
Simpson-Mazzoli (Senate)

Federal Program	FACTORS: % Eligible	% Participating	Unit Cost	Total Federal Cost ($millions)
Status:	Permanent Resident (1978) Entry			
AFDC	39	87	$ 740	$241
Medicaid				
Adult	13	100	$ 570	73
Child	26	100	$ 280	69
SSI	4	100	$1,596	58
SSI	4	25	$2,374	22
Food Stamps	39	87	$ 480	156
			Subtotal	619
Status:	Temporary Resident (1982) Entry			
SSI	4	25	$2,374	65
Medicaid				
Adult	13	100	$ 570	218
Child	26	100	$ 280	206
SSI	4	100	$1,596	175
			Subtotal	663
			Grand Total	1,283

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* During the first year of legalization (assumed FY 1983) a 6-month cost is expected. The first full year cost would be incurred in FY 1984.

Costs assume 80% participation rate in legalization.

	Eligible Pop.	80% Participation
PR:	1,200,000	960,000
TR:	3,600,000	2,880,000

Appendix C

Population Estimates
Aliens Eligible for Legalization
(thousands)

Option	FY 83	FY 84	FY 85	FY 86
Simpson-Mazzoli (Senate)				
PR	1,200	1,200	3,000	4,800
TR	3,600	3,600	1,800	--
Simpson-Mazzoli (House)				
PR	1,200	1,200	1,950	2,700
TR	1,500	1,500	750	--
1978 Entry				
PR	1,200	1,200	1,200	1,200
TR	2,400	2,400	2,400	2,400
1977 Entry				
PR	900	900	900	900
TR	2,700	2,700	2,700	2,700
1976 Entry				
PR	600	600	600	600
TR	3,000	3,000	3,000	3,000
AG Proposal				
PR	420	600	900	1,200
TR	3,180	3,000	2,700	2,400
New Option				
PR	--	--	--	--
TR	4,800	4,000	4,800	4,800
Admin. Bill				
PR	300	360	420	600
TR	2,400	2,340	2,280	2,100

PR = Permanent resident status
TR = Temporary resident status

Appendix D

Terms of Legalization by Option

Simpson-Mazzoli (House) - 1978 entry date for permanent residents (PR) and 1980 entry date for temporary residents (TR). Two year residency requirement for TRs to adjust to PR status. Adjusts 1.2 million PR and 1.5 million TR in first year.

Simpson-Mazzoli (Senate) - 1978 entry date for PR and 1982 entry date for TR. Two year residency requirement for TRs to adjust to PR status. Adjusts 1.2 million PR and 3.6 million TR in first year.

1978 Entry Date - 1978 entry date for PR and 1981 entry date for TR with 4 year prospective residency requirement from date of enactment, for adjustment of status. Adjusts 1.2 million PR and 2.4 million TR in first year.

1977 Entry Date - 1977 entry date for PR and 1981 entry date for TR, with four year residency requirement for TRs to adjust to PR status. Adjusts 900,000 PR and 2,700,000 TR in first year.

1976 Entry Date - 1976 entry date for PR and 1981 entry date for TR, with four year residency requirement for TRs to adjust to PR status. Adjusts 600,000 PR and 3,000,000 TR in first year.

Attorney General's Proposal. 1981 entry date for TR with 8 year retroactive residency requirement for adjustment of status. Adjusts 420,000 PR and 3,180,000 TR in first year.

Attorney General's Proposal/Benefits. Same as above includes SSI and medicaid for TR.

New Option. 1982 entry date for TR, 10 year prospective residency requirement (shortened to 5 years if no claim for benefits), provides medicaid and SSI. Adjusts 4.8 million TR in first year.

Administration Bill. 1980 entry date for TR, 10 year retroactive residency requirement for adjustment of status. No benefits. Adjusts 300,000 PR and 2.4 million TR in first year.

THE WHITE HOUSE

WASHINGTON

June 28, 1982

MEMORANDUM FOR THE PRESIDENT

FROM: CABINET COUNCIL ON LEGAL POLICY

SUBJECT: The Federal Antitrust Laws and Local Governments

ISSUE:

In Community Communications Co., Inc. v. City of Boulder, the Supreme Court recently held that a regulatory ordinance of a "home rule" municipality is subject to antitrust scrutiny unless it constitutes action in furtherance or implementation of a clearly articulated and affirmatively expressed state policy. This decision raises concerns that traditional local regulatory activities may be invalidated by federal antitrust laws. The question arises whether the federal antitrust laws should be amended to afford municipalities and other subordinate state entities a broad exemption beyond that afforded them by the "state action" doctrine.

ACTION FORCING EVENT:

Assistant Attorney General Baxter is scheduled to testify before the Senate Judiciary Committee on the implication of the Supreme Court's Boulder decision on June 30, 1982.

BACKGROUND AND ANLYSIS:

Under the "state action" doctrine, competitive restraints imposed by a state as sovereign are immune from the federal antitrust laws, if the state has clearly articulated and affirmatively expressed a policy to limit competition and has provided for active state supervision. Municipalities may be eligible for such a state action exemption where the state has authorized or directed their conduct pursuant to such a state policy. The Supreme Court held in its 1978 City of Lafayette decision that municipalities are not equated with states for this purpose, however, and may not claim a state action exemption in the absence of a state policy to limit competition. The Court's recent Boulder decision established that home-rule municipalities are not exempt from that standard and, like other municipalities, must base any claim for state action immunity on a clearly expressed and actively supervised state policy.

Local government officials have expressed serious concerns that fear of antitrust treble damage liability could inhibit the performance of legitimate governmental functions. They fear that the City of Lafayette and Boulder rulings could require state legislatures to prescribe municipal policy in detail in order to avoid antitrust liability. Thus, the National League of Cities proposes that the antitrust laws be amended to exempt the actions of a municipality or other governmental subdivision of a state from the antitrust laws whenever a state would be exempt so long as the action is undertaken pursuant to general or specific enabling legislation.

State officials, on the other hand, generally oppose granting subordinate governmental entities antitrust immunity in the absence of a state policy to limit competition. Twenty-three states, including Colorado, filed an amicus brief in the Boulder case opposing the city's claim of immunity, arguing that "[fe]deralism neither requires nor allows cities, whether home rule or otherwise, to disregard the antitrust laws when acting on their own in the execution of municipal policies to displace competition."

Although the concerns of local governments are serious ones, it is not clear that the Boulder decision is so sweeping as to justify Administration support for an amendment to the antitrust laws providing a special antitrust exemption beyond the scope of the state action exemption. It is important to note that the Supreme Court did not hold in Boulder or City of Lafayette that the city had violated the antitrust laws. The Court emphasized in Boulder that it was dealing only with antitrust immunity, and specifically suggested that a "flexible" approach to the question of actual liability would probably be appropriate. The Court also emphasized, as the plurality had in City of Lafayette, that it was not reaching the question of what remedies might be appropriate if municipal conduct were found to constitute an antitrust violation. Finally, the Court repeated in Boulder the standard articulated by the plurality in City of Lafayette, which requires only that anticompetitive municipal conduct be "authorized or directed" by the state to qualify for state action immunity. The plurality in City of Lafayette explained that its holding did not mean that a city "necessarily must be able to point to a specific, detailed legislative authorization" before it may assert a state action exemption.

Thus, it is not clear that the antitrust laws as interpreted in Boulder and City of Lafayette pose a serious threat to local governmental activities. Although those decisions require municipalities to obey the antitrust laws if the state has not authorized or directed a competitive restraint, traditional municipal activities should rarely be held illegal under proper antitrust analysis even in the absence of immunity. The antitrust laws are directed primarily at restraints on commercial competition through anticompetitive agreements or monopolizing

conduct. The normal conduct of municipal affairs gives rise to few, if any, occasions to engage, knowingly or unknowingly, in such conduct.

There are a somewhat larger number of contexts in which a city, acting as a purchaser or as a provider of municipal services, might arguably violate one of the "vertical" prohibitions which the courts have created over the years. But, "vertical" agreements involving, for example, buyer and seller, licensor and licensee, or franchisor and franchisee, often enhance the vigor of the competitive process and should not be held illegal absent an overall anticompetitive effect in a realistically-defined market. Misguided court decisions with respect to vertical practices represent a major problem for all business units, not just municipalities. The Department of Justice has been attempting, in a variety of ways, to address that problem other than through legislation. If a legislative approach is thought desirable, it should take the form of substantitve antitrust amendments, not exemptions for a favored class of potential defendants.

The cities' argument that, as a matter of law and policy, municipalities ought to be treated like states for purposes of antitrust liability, is one that the Administration may want to address, but legislation to clarify the scope of the Boulder decision should be carefully crafted not to sweep too broadly. No specific bills are currently pending for comment.

OPTION 1:

The Administration could endorse legislation to afford municipalities an exemption beyond that afforded by the state action doctrine. The National League of Cities' approach would effectively equate municipalities and states, where municipalities act within the scope of their enabling legislation. Other approaches could be tailored more specifically to perceived problems.

OPTION 2:

The Administration could indicate that, while it is sympathetic to the concerns of the cities and will continue to monitor the situation, legislation at this time is premature. Municipalities would be free to advocate state legislation affording them a state action exemption for any activity raising antitrust concerns.

OPTION 3:

The Administration could indicate that it is continuing to study the problem. The hearings on June 30 will not focus on specific legislation, and congressional staff members indicate that further hearings on specific proposals are likely later this summer.

DECISION:

Option 1. (Endorse legislation now.)

APPROVE _____

Option 2. (Continue to monitor; meanwhile encourage state legislation.)

APPROVE _____

Option 3. (Continue to study.)

APPROVE _____

The President's Crime Legislative Package.

The acquittal of John Hinckley by reason of insanity this week has once again, in dramatic fashion, focused public attention on the basic infirmities of the federal criminal justice system. Commentary by the press, psychiatric experts and the jurors themselves uniformily has been that the instructions given by the judge, which reflected federal law, left the jury no choice but to acquit Hinckley. The problem with the insanity defense, as with many other aspects of the federal criminal justice system, lies with existing federal statutes and judicial interpretations, extensive changes to which can be made only by Congress.

On May 24, the Cabinet Council on Legal Policy discussed the Administration crime package, which was introduced two days later as the Violent Crime and Drug Enforcement Improvements Act, S. 2572 (Thurmond, Biden), and H.R. 6497 (McClory). The major elements of these identical bills include:

- Bail Reform, to authorize pretrial detention of dangerous criminals, and allow consideration of dangerousness in setting release conditions.
- Sentencing Reform, to replace the parole system with a nationally uniform set of determinate sentences, and permit the government to appeal lenient sentences.
- Insanity, to eliminate insanity as a defense for offenders who have the requisite state of mind to commit an offense, make other mental conditions factors to be considered in sentencing, and provide for federal custody of persons acquitted by reason of insanity if the states will not assume responsibility.
- Criminal Forfeiture, to improve the ability of the government to reach proceeds and instrumentalities of organized crime operations.
- Witness/Victims Protection, to restrain and provide criminal penalties for acts of intimidation, aid witness relocation, and establish liability for government gross negligence resulting in the release or escape of a dangerous prisoner.
- Controlled Substances, to increase penalties for drug trafficking.

This bill excluded certain, more controversial, proposals in order to achieve bipartisan Senate support. On May 24 we discussed, and later that week the President publicly endorsed adding three important reforms by amendment on the Senate floor. These reforms are:

- Exclusionary Rule, to admit at trial evidence obtained in violation of the defendant's Fourth Amendment rights if the search or seizure was made by the law enforcement official in good faith, including made pursuant to a warrant.

- Capital Punishment, to establish constitutionally supportable procedures to reinstitute a federal death penalty and apply it to murder, treason, espionage and attempted Presidential assassination.
- Habeas Corpus Reform, to limit the ability of prisoners to repeatedly challenge the correctness of their convictions.

S. 2572, now cosponsored by 52 senators, has been held at the desk, and could be brought up for consideration at any time. In contrast, Chairman Rodino has referred H.R. 6497 to four different subcommittees with the apparent intention of not moving the legislation. Only the title on controlled substances has been referred to a friendly subcommittee chaired by Rep. Hughes. Bail reform is in Rep. Kastenmeier's subcommittee and the rest of the proposals are in Rep. Conyers' subcommittee, the unofficial graveyard for crime bills.

At this late stage in the session, all of our hopes for significant crime legislation are wrapped up in these bills. With the possible exception of bail reform, there is next to no chance for passage of existing separate legislation containing these proposals. No action has been taken on any bill to eliminate or modify the insanity defense, although more bills have been introduced in the wake of the Hinckley verdict.

While it would be impolitic for the President to comment publicly on the need to eliminate the insanity defense, the other proposals clearly are appropriate for Presidential attention. We should take advantage of the coalescing of public concern over the fundamental inadequacies of the nation's criminal justice system to press vigorously for the enactment of the Violent Crime and Drug Enforcement Improvements Act. This public awareness may be sufficient to obtain action by the House. If the House does not act in the wake of the current public uproar, such inaction would certainly create a very important debate for the fall elections. Such a lack of responsiveness to the public's concern over crime and justice by the current Democrat-controlled House of Representatives would constitute an issue that could be exploited by Republican candidates.

Therefore, we recommend that the President meet with Senators Baker and Thurmond to assure that the crime package is one of the first bills considered by the Senate when it returns from its July recess. He also should emphasize his desire that the Senate amend the bill on the floor to add the exclusionary rule, death penalty, and habeas corpus proposals. The President should meet with Speaker O'Neill, Chairman Rodino and the ranking Judiciary Committee Republicans to emphasize the effort that the Administration is prepared to make to obtain consideration of this bill by the House of Representatives. We further recommend that either this Cabinet Council, or a sub-group thereof be charged with monitoring the progress of this anti-crime package and making recommendations for White House and Departmental actions to secure its passage.

THE WHITE HOUSE

WASHINGTON

June 25, 1982

MEMORANDUM FOR THE PRESIDENT

FROM THE CABINET COUNCIL ON LEGAL POLICY

SUBJECT: Pending Immigration Reform Bill

ISSUE:

Whether the Administration should continue to oppose legislation establishing or leading to the establishment of a national identity card or system.

ACTION FORCING EVENT:

Senate floor action imminent on S.2222, the Simpson-Mazzoli Immigration bill.

BACKGROUND AND ANALYSIS:

The position adopted last year and specifically incorporated in the Administration's immigration reform bill with your approval was that a national identification card (called by whatever name) was neither necessary nor desirable. The principal objections were:

(a) that a national identification card was philosophically repugnant to the idea of a free society and contrary to American customs:

(b) that the most feasible means of establishing a national identification card system (i.e., converting the Social Security card) was in the short term at least prohibitively expensive and logistically problematic;

(c) that, in any event, any such system would be only so effective as the database on which it relied -- we would, e.g., have to nationalize birth and death record-keeping;

(d) that such a system would be discriminatory because, as a practical matter, the only people who would be asked to produce indentification cards would be those who look or sound "foreign";

(e) that diverse groups concerned with privacy and generally fearful of national databases of any kind -- running the gamut from the ACLU to the NRA -- would vigorously oppose such a measure;

(f) finally, that a compelling case had not yet been made that a national identification card system was essential to making employer sanctions work.

In light of these concerns, it was decided that only standard, existing identifiers -- birth certificates, Social Security cards, drivers' licenses, INS papers, etc. -- would be required to be shown. The Administration explicitly opposed the creation of a national ID card or system.

During the course of legislative hearings and mark-up, Senator Simpson and others softened their original proposal, which would have mandated a national identification card, but only partly so. At an April, 1982 meeting of the Cabinet Council on Legal Policy, when the issue was again addressed, the Administration's original position was reiterated, and the Attorney General so testified on April 20. As a gesture to Senator Simpson and his co-sponsors, however, it was agreed that the Attorney General would indicate a willingness to "study" the problem and report to Congress from time to time on the successes and failures of using existing identifiers.

The Senate Committee bill, however, goes considerably beyond a study-and-report requirement:

> "Within three years...the President shall implement... a secure system to determine employment eligibility....the system will reliably determine that a person with the identity claimed...is not claiming the identity of another individual...such document must be in a form which is resistant to counterfitting and tampering,...unless the President and the Judiciary Committees of the Congress have determined that such form is necessary to the reliability of the system." (Emphasis supplied.)

OPTION 1:

Oppose S.2222 unless amended to eliminate all requirements leading to a national identity card or system.

OPTION 2:

Continue to support S.2222 generally, while seeking to modify the language leading toward a national identification card. (Indicates probability of signing even if sufficient changes are not made in the language.)

DECISION:

1. Oppose S.2222 unless amended as above.

2. Continue efforts to change the language, but support S.2222 even if those efforts fail.

EMPLOYEE IDENTIFICATION

The position adopted by the Administration last year and specifically incorporated in our bill with your approval was that a national identification card (called by whatever name) was neither necessary nor desirable. The principal objections were:

(a) that a national identification card was philosophically repugnant to the idea of a free society and contrary to American customs; ~~and had potential for abuse~~

(b) that the most feasible means of establishing a national identification card system (i.e., converting the Social Security card) was in the short term at least prohibitively expensive and logictically problematic;

(c) that, in any event, any such system would be only so effective as the data base on which it relied -- we would, e.g., have to nationalize birth and death record-keeping;

(d) that such a system would be discriminatory because, as a practical matter, the only ~~workers~~ people ~~folks~~ who would be asked to produce identification cards would be those who "look" or sound "foreign";

(e) that diverse groups concerned with privacy and generally fearful of national data bases of any kind -- running the gamut from the ACLU to the NRA -- would vigorously oppose such a measure;

(f) finally, that a compelling case had not yet been made that a national identification card system was essential to making employer sanctions work.

Accordingly, after much debate, it was decided that only standard, existing identifiers -- birth certificates, drivers' licenses, INS papers, etc. -- would be required to be shown. We explicitly opposed the creation of a national identity card.

During the course of legislative hearings and mark-up, Senator Simpson and others backed off their original proposal mandating a national identification card, but only

partly so. At the CCLP meeting in April, when this was again addressed, the Administration's original position was reiterated, and the Attorney General so testified on April 20. As a gesture to Simpson and his cosponsors, however, it was agreed that the Attorney General would indicate a willingness to "study" the problem and report to Congress from time to time on the successes and failures of using existing identifiers.

The Committee bill, however, goes considerably beyond the requirement of a study-and-report requirement.

~~Xx xxxxxxxxx Within--bill---~~

requirement:

> "Within three years...the President shall implement... a secure system to determine employment eligibility... the system will reliably determine that a person with the identity claimed...is not claiming the identity of another individual...such document must be in a form which is resistant to counterfitting and tampering...unless the President and the Judiciary Committees of the Congress have determined that such form is necessary to the reliability of the system."

Options

1 Oppose S. 2222 unless amended to eliminate the requirement for a "secure" system and the requirements that the system reliably determine that a person is not claiming the identity of another individual and that documents be resistant to counterfitting and tampering, as these requirements lead inevitably to a national identity system. (indicates a possible veto).

2 Support S. 2222 if amended to eliminate requirements leading to a national identity card or system. (Indicates bill will be signed even if changes are not made.)

1a If S. 2222 is not amended to eliminate these provisions, support the Kennedy amendment to terminate employer sanctions after three years unless the President certifies in a report to the Judiciary Committees of the House and the Senate that the provisions of the law have been carried out satisfactorily, have not resulted in a pattern of discrimination against any U.S. citizen or other eligible worker seeking employement, and have not cause any unnecessary regulatory burden to employers hiring such workers.

This amendment also calls for a review by GAO to be submitted to [redacted] Congressional committees and authorizes the U.S. Commission on Civil Rights to investigate accusations of discrimination under the employer sanctions provisions.

file CCLP

Issues Which Have Been Resolved in the CCLP

Narcotics

Ratification of a five-point program for dealing with this issue:

1) General strategy for law enforcement

2) A general strategy for increasing international cooperation

3) Prevention of drug abuse

4) Treatment of addicts and users

5) Research

This strategy is being executed on an ongoing basis by the establishment of two working groups, one on the health side in CCHR, and one on the law enforcement side under CCLP.

The establishment of the Vice President's South Florida Task Force is aimed at the most critical drug problem area in America, involving the coordination of all federal components dealing with narcotics, the purpose of which is to demonstrate that by concentrating federal resources in critical mass and by cooperating to the maximum extent possible with State and local authorities one can in fact have a significant impact on the drug problem.

The Administration's Anti-Crime Program

The Administration has proposed one of the most comprehensive legislative programs on crime in recent memory. We have about a dozen major anti-crime bills pending on the Hill, a significant group of which has been incorporated in the omnibus bi-partisan bill now pending in the Senate, which includes all of the major Administration initiatives with the exclusion of the exclusionary rule, habeas corpus reform, and the death penalty. These three, however, may be added as floor amendments during the Senate debate.

Immigration Reform Policy

Comprehensive reform of the nation's immigration laws was proposed prior to the establishment of the CCLP, but its major controversial components have subsequently been reviewed by the CCLP. Most prominent among these are 1) the terms and conditions for legalization, and 2) the creation of an employer's sanction

program (which raises the issue of worker identification). At this point, the only major remaining issue concerns the pace at which illegal immigrants are introduced into the mainstream of the American legal and political system. The most critical factor here concerns the benefit levels for social services.

School Prayer

The CCLP approved the proposed constitutional amendment on school prayer.

School Busing

The CCLP approved the Justice Department's position on various measures to restrict forced busing.

A variety of other issues which have at their core significant legal policy questions which are housed elsewhere in the EOP, for example TRIS Indemnification, Product Liability, and Betamax copyright.

For a number of reasons, issues of this character might be better handled within CCLP, although it is hard to be dogmatic on the point. In any event, more thought should be given to making better use of "legal policy" as a rubric for exercising greater White House leverage over certain policy issues.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 8, 1982

EXECUTIVE SECRETARIES ISSUES

Cabinet Council on Legal Policy

Meeting Date	Issue
?	EEO Policy Statement
Mid-late July	Pension Equity for Women
Mid-late July	Review of Working Group Report on Equity for Women
?	Betamax-tape copyright

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 8, 1982

EXECUTIVE SECRETARIES ISSUES

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7/8/82

CABINET COUNCIL ON COMMERCE AND TRADE
ISSUE CALENDAR

7/15/82	Product Liability
7/21/82	Maritime Promotional Policy
7/28/82	Export Financing and Eximbank Funding Truck Size and Weight Limits

Tentative Agenda
July 8, 1982

CABINET COUNCIL ON ECONOMIC AFFAIRS

July 13	Federal Debt Collection and Tax Refund Offset
July 16	Report on OECD Executive Committee Special Session
	India Borrowing from the Asian Development Bank
	Report of the Working Group on LDC Financial Problems
July 20	Review of the Economic Outlook
	Budget Outlook
July 22	Rural Housing Block Grants
	African Development Bank Membership
July 27	Report of the Working Group on Federal Credit Policy
	Review of the Report of the President's Commission on Housing
July 29	Report of the Working Group on International Investment
	Unitary Taxation

THE WHITE HOUSE

WASHINGTON

EXECUTIVE SECRETARIES MEETING

July 8, 1982

Cabinet Council on Natural Resources and Environment

Mid-July	With President.
	1. Synthetic Fuels Policy
	2. Energy Overview
October	Electric Utility Reform
November (tentative)	Policy Review of "Global 2000"

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 8, 1982

Cabinet Council on: Human Resources

Meeting Date	Issue
July 12	Mandatory Retirement -- Additional Issue (CCHR w/ President)
On hold	Cigarette Warning Labels -- CCHR/President
Week of July 12	Annual Federal Plan for Assistance to Black Colleges (CCHR/President)
Week of July 12 ?	Urban Policy -- CCHR/President or Decision Memo
July	Census Briefing (CCHR/President or Cabinet)
July	Kidney Dialysis Regulations -- Final regulations (depending on analysis of comments from notice period) -- without President
July	Drug Abuse Policy -- Health (Cabinet w/President)
August	Administration's Indian Policy (with the President)
August	Higher Education -- Student Financial Aid -- loans vs. grants vs. work study mix and limiting Federal costs and getting States involved (with the President -- requested by Secretary Bell)
August or Sept.	Further Initiatives (1983 Congress) in Food Stamp. AFDC/Medicaid Areas.
August or Sept.	Technical Manpower for Sustaining the Economic Recovery -- CCHR/President
August or Sept.	Education -- Federal support for research in terms of national defense (requested by Secretary Bell)
August or Sept.	Education -- Foreign Scholars in U.S. Issues (requested by Secretary Bell)
November	Food Safety -- CCHR w/President