U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 13, 1984

MEMORANDUM FOR: Members of the Cabinet Council on Legal Policy

FROM: Edward C. Schmults
Deputy Attorney General

SUBJECT: Status of the Administration's Immigration Reform Legislation

This memorandum sets forth the current status of immigration reform legislation in the 98th Congress.

I. Historical Overview

Following receipt of the Final Report of the Select Commission on Immigration and Refugee Policy in March of 1981, the President established a Cabinet Task Force, chaired by the Attorney General, to study the Commission's recommendations for comprehensive immigration reform. Based on that review the Administration submitted a legislative package of immigration reform proposals to the Congress in October of 1981 which embodied the most important recommendations of the Select Commission.

The principal provisions of the Administration bill were (1) penalties on employers who knowingly hire illegal aliens, (2) legal status for illegal aliens who were in the U.S. before January 1, 1980, (3) an expanded temporary foreign worker program where domestic workers are unavailable, (4) reform of our procedures to return persons who enter the U.S. illegally, (5) expanded legal authorities to deal with mass arrivals of undocumented aliens, and (6) increased legal immigrant admissions for Canada and Mexico.

After extensive hearings on the Administration bill, Senator Simpson and Congressman Mazzoli, the Chairmen of the Senate and House Immigration Subcommittees, respectively, in March of 1982 introduced their own immigration reform legislation which incorporated most of the Administration's proposals. The most significant exception to that incorporation was the deletion of the Administration's mass immigration emergency plan. At the Cabinet Council meeting on April 16, 1982, it was decided that the Simpson-Mazzoli bill would become the Administration's vehicle for immigration reform.

Thereafter, on August 17, 1982, the U.S. Senate passed a substantially unchanged Simpson-Mazzoli bill on an overwhelming, bipartisan vote of 80-19. The following month the House Committee on the Judiciary reported its amended version of the legislation to the House floor where it became stalled during the post-election "lame duck" session.

II. Current Status

On February 17, 1983, Senator Simpson introduced the Immigration Reform and Control Act of 1983, S. 529, an identical bill to the legislation which passed the Senate in the 97th Congress. On the same date Congressman Mazzoli introduced H.R. 1510, identical in all major respects to the reform legislation previously reported by the House Committee on the Judiciary.

Expedited hearing and mark-up schedules were established by the relevant Senate and House Committees. During the week of April 4, 1983, both the Senate and House Immigration Subcommittees completed mark-up on their respective bills. The Senate bill was reported to full Committee unanimously, and House Subcommittee passage was by a 7-1 vote.

Thereafter, on April 19th, the Senate Committee on the Judiciary reported S. 529 to the full Senate on a 13-4 vote and on May 18th that body passed the legislation on a gratifying 76-18 vote.

Obtaining House action on its version of the legislation, H.R. 1510, has been significantly more complex. On May 5th the House Judiciary Committee favorably reported the bill on a 20-9 vote. However, four other House Committees then requested sequential referral to consider those portions of the legislation under their jurisdiction. The referral period expired June 27th, at which time three of the Committees -- Agriculture, Education and Labor, and Energy and Commerce -- reported out fairly substantive amendments. The Ways and Means Committee elected not to invoke its referral jurisdiction.

Currently we are awaiting House Rules Committee action on establishing a procedure for floor consideration of H.R. 1510. Although Rules Committee Chairman Pepper has yet to schedule the matter, an effort will be made to ensure that his Committee acts before the Lincoln/Washington Congressional recess from February 10th to February 21st. This would be consistent with Speaker O'Neill's recent press statements that the immigration reform bill would be brought to the floor of the House early in 1984.

III. Significant Remaining Issues

The immigration reform issues which remain problematic principally reflect the differences between the Senate and House

bills, and between the House Judiciary Committee bill (on which the Administration has focused) and the amendments proposed by the sequential referral committees. The committees' proposals are discussed below to the extent they are relevant.

1. One of the most significant of the issues separating the Senate and House bills is the appropriate mechanism for assisting state and local governments with the costs which arise as the newly legalized residents gain access to welfare programs. The Senate bill takes the strongly preferred approach of establishing a block grant/impact aid program which the Administration has committed to fund at $1.4 billion for five years. The House bill authorizes the Federal government to reimburse 100% of all state and local welfare programs for legalized aliens, including educational expenses. OMB has estimated that the five-year cost of this approach would be $8.2 billion for welfare expenditures and $3 billion for educational program support.

2. A corollary issue is whether to advance the legalization eligibility date to adjust the status of a larger portion of the illegal alien population and in light of the fact the immigration reform effort is one year older. The Senate bill maintains last year's Administration-supported "Grassley compromise," which provides permanent resident status for eligible aliens who continuously resided in the United States since before January 1, 1977, and temporary resident status for such aliens who arrived here before 1980 with adjustment to permanent status after three years. Ineligibility for federal benefits would extend for three years from the time permanent resident status was obtained. The House bill utilizes a "one tier" approach, providing permanent resident status to eligible aliens who have resided in the U.S. since before January 1, 1982.

To date we have consistently opposed advancing the eligibility date both on equity grounds and from the point of view of limiting federal outlays. Our argument has been that legalization is not intended to give legal status to all illegal aliens, but only to those who have demonstrated a commitment to this country by long-term, continuous residence as contributing, self-sufficient members of their communities. Any other standard would be unfair to our legal residents and to <u>legal</u> immigrants waiting patiently in line, often for years, to obtain immigrant visas. Every effort will be made to obtain ultimately the legalization program outlined in the Senate bill.

3. Another contentious issue is the appropriate mechanism for assisting agricultural employers who have become dependent on an illegal migratory workforce. Both the Senate and House bills provide for a statutory and streamlined "H-2" (non-immigrant, temporary worker) program for agricultural workers similar to a regulatory program already in existence. Both bills also contain a supplementary program permitting agricultural employers to hire "undocumented" workers, subject to numerical limitations established by the Attorney General, for a three-year "transition"

period. The Administration position has been to support the streamlined H-2 program pursuant to an April 16, 1982, Cabinet Council meeting and to support the transition worker program. This latter decision was ratified at a May 10, 1983, White House meeting on the status of the immigration reform effort.

4. More recently, agricultural interests have initiated a strong lobbying campaign to obtain Administration support for yet another program to mitigate the effects of employer sanctions. Specifically, they urge that we support the Panetta amendment proposed by the Agriculture Committee to establish a "guest worker" program for growers of perishable commodities. The premise is that a more flexible program than H-2 is necessary because of the uncertainty of harvest schedules for certain fragile crops. The question arises, however, whether such an additional program would "unbalance" the reform legislation in agriculture's favor.

5. The Education and Labor Committee has proposed a substantive amendment to H.R. 1510, also relating to the ongoing tension between Labor and Agricultural interests on the appropriate criteria for the admission of temporary workers to the U.S. The Miller amendment adopted by the Committee would, in general terms, eliminate some of the "streamlining" in the proposed statutory H-2 program while at the same time establishing a "commission" to resolve some of the most divisive issues separating Labor and Agriculture. The Committee also adopted a Hawkins amendment modifying employer sanctions by creating a special counsel within the U.S. Immigration Board to bring actions against employers who knowingly hire illegal aliens (instead of INS District Directors bringing those actions) and against employers who discriminate against legal residents under the guise of complying with employer sanctions. This last provision is in response to the assertion by some Hispanic groups that employer sanctions will be discriminatory because employers will avoid hiring those with certain linguistic or physical characteristics. The Administration has taken the position that increased discrimination is not anticipated (indeed there may be less discrimination when employers are no longer permitted to hire "malleable" illegal workers in preference to legal residents) and that the legislation contains extensive reporting requirements to ensure that increased discrimination does not result. It is also notable that the legislation mandates a uniform employment eligibility verification procedure for all new hires specifically designed to eliminate any incentive for an employer to discriminate. Finally, a legal remedy is already available for discriminatory employment practices under Title VII of the Civil Rights Act of 1964.

6. Two other important, though less problematic, differences between the Senate and House bills should be mentioned. The first is the changes in our current system for legal immigration contained in the Senate bill, principally the "overall cap" of 425,000 on legal immigration including immediate relatives. The

House bill, at the insistence of Chairman Rodino, specifically rejects changes in our current preference system. The Administration has likewise argued that changes in our legal immigration system should be deferred until after we have addressed the more urgent problem of uncontrolled illegal migration. Indications are that our view will prevail in conference and significant other portions of the Senate bill may well be obtained in exchange.

7. The second "second tier" issue concerns the Senate and House treatment of our current overburdened adjudication and asylum system. The Senate bill provides for more streamlined procedures which promise some finality in judgments while the House procedures are in several particulars even more cumbersome than current law. Attempts will be made to narrow the gap by amending the House bill and to have our preference for the Senate procedures prevail in conference.

IV. Prospects

Despite the apparent multitude of issues remaining to be resolved, prospects for final enactment of immigration reform legislation are good. As previously indicated, Speaker O'Neill has publicly stated his intention to bring the House bill to the floor and, significantly, he predicts it will pass. National editorial support for immigration reform continues to be overwhelming, and the public opinion polls, without exception, indicate strong support for each of the major elements of the legislation. As to the final Congressional product, the 76-18 vote on the Senate bill, which reflects the Administration's position, augurs well for our success in the conference committee which will resolve the differences between the House and Senate versions.

THE WHITE HOUSE
WASHINGTON

CABINET AFFAIRS STAFFING MEMORANDUM

Date: 1/13/84 **Number:** 168885CA **Due By:** _____

Subject: Cabinet Council on Legal Policy - Monday, January 16, 1984

2:00 p.m. - Roosevelt Room

	Action	FYI
ALL CABINET MEMBERS	☐	☐
Vice President	☑	☐
State	☑	☐
Treasury	☑	☐
Defense	☐	☑
Attorney General	☑	☐
Interior	☑	☐
Agriculture	☐	☑
Commerce	☑	☐
Labor	☑	☐
HHS	☑	☐
HUD	☑	☐
Transportation	☑	☐
Energy	☐	☑
Education	☐	☑
Counsellor	☑	☐
OMB	☑	☐
CIA	☐	☑
UN	☐	☑
USTR	☐	☑
GSA	☐	☐
EPA	☐	☐
OPM	☐	☐
VA	☐	☐
SBA	☐	☐

	Action	FYI
CEA	☐	☑
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OSTP	☐	☐
ACUS	☑	☐
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Baker	☑	☐
Deaver	☐	☐
Clark	☐	☑
Darman *(For WH Staffing)*	☑	☐
Jenkins	☐	☑
Svahn	☑	☐
Fielding	☑	☐
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CCCT/Gunn	☐	☐
CCEA/Porter	☐	☐
CCFA/	☐	☐
CCHR/Simmons	☐	☐
CCLP/Uhlmann	☑	☐
CCMA/Bledsoe	☐	☐
CCNRE/	☐	☐

REMARKS:

Attached is an additional paper for the CCLP meeting which is scheduled for Monday, January 16, 1984.

The agenda was sent to you earlier today with the background papers.

RETURN TO:

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for Cabinet Affairs
456-2823

☐ Katherine Anderson ☐ Don Clarey
☑ Tom Gibson ☐ Larry Herbolsheimer
Associate Director
Office of Cabinet Affairs

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

JAN 13 1984

MEMORANDUM FOR: CABINET COUNCIL ON LEGAL POLICY

FROM: DAVID A. STOCKMAN

SUBJECT: OMB's Concerns with the Immigration Legislation

The purpose of this memorandum is to express OMB's budgetary and policy concerns with the immigration legislation and to urge the Administration to determine the budget magnitude and policy compromises it is willing to support in preparation for devising a legislative strategy to effect passage of a bill the Administration can accept.

Budget Concerns

- Both the House and Senate bills have serious budget implications for 1984-89: $13.3 billion in H.R. 1510 and $10.1 billion in S. 529.

- Despite repeated expressions of Administration concern, the budgetary impact of the legislation has not been addressed, especially in the House bill.

  -- The Senate ignored the Administration's request to limit the block grant to $1.4 billion over four years. The block grant remains uncapped.

  -- The House Judiciary Committee defeated amendments to control costs by limiting Federal reimbursements as well as the population of legalized aliens.

  -- Representative Lungren, intended block grant sponsor on the House Floor, has indicated the lack of support for a block grant. He is considering more expensive amendments.

  -- Given the costs of the current House and Senate bills, the conference outcome (if it splits the difference) is likely to be an unacceptable $11.7 billion for 1984-89 without forceful intervention by the Administration.

Policy Concerns

- Both bills create a large new entitlement group of legalized aliens contrary to Administration efforts to control entitlement spending.

- Reimbursement authority in the House bill has no cost control. States determine costs and the Federal Government pays. For example, the Federal Government would pay the full cost of educating legalized aliens.

- The uncapped block grant in the Senate still creates serious budget exposure. States will argue that immigration is a Federal problem and press for the Federal Government to pay all costs.

- The House bill also significantly weakens enforcement:

  -- Verification of employment eligibility is voluntary until the first violation, thereby giving employers an affirmative defense against sanctions.

  -- Employers of casual labor (i.e., agriculture and construction) are not required to check worker ID for 24 hours. This provision eliminates any fear of penalty and effectively exempts day labor from employer sanctions.

  -- There would be no penalty assessed for an employer's first violation.

  -- Employers of illegals would be exempted from employer sanctions for three years by participating in the transition worker program.

Unless the Administration reasserts its budget and policy concerns before the bill is scheduled for House action, the Administration will be faced with a conference bill that is too expensive and contains significant enforcement loopholes. Senator Simpson's offer to take the post-conference bill to the President for concurrence puts pressure on the President to take responsibility for the outcome of the bill. Given these factors, the Administration needs to determine the dollar magnitude and policy compromises it is willing to accept and to follow that determination with an appropriate legislative strategy.

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Office of the Deputy Attorney General

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Washington, D.C. 20530

January 13, 1984

MEMORANDUM FOR: Members of the Cabinet Council on Legal Policy

FROM: Edward C. Schmults
Deputy Attorney General

SUBJECT: Status of the Administration's Anti-Crime Legislation

Enactment of the President's Comprehensive Crime Control Act is most important. Enactment of its provisions will greatly increase the effectiveness of the unprecedented advances we have made through our various law enforcement initiatives over the last three years. Securing Congressional approval of meaningful criminal justice reforms this year is still possible but prompt action is required. We must seize the opportunity. It is particularly important that the Senate pass the legislation early this spring, so that we may concentrate our efforts on the House.

I. Senate

In the Senate, the President's 42-point Comprehensive Crime Control Act of 1983 (submitted to the Congress on March 16, 1983) was favorably reported by the Senate Committee on the Judiciary in July of 1983. Attached is a capsule summary of the President's anti-crime package as it emerged from the Senate Judiciary Committee.

The President's 42-item "package" has been reported as four new bills, in order to implement an agreement reached among Chairman Thurmond and Senators Laxalt, Biden, and Kennedy. In summary, the four Senators agreed to co-sponsor a "core" package (S. 1762) which includes all of the provisions of the President's bill except for habeas corpus reform, exclusionary rule reform, the death penalty, and Tort Claims Act amendments. They also agreed to stand together against all efforts to amend the "core" bill. The Committee reported separate bills on habeas, exclusionary rule, and death penalty. The Tort Claims Act amendments were reported subject to unanimous concurrence on its final language between Senators Biden and Grassley and the Department of Justice. To date agreement has not been achieved. The agreement between the four Senators also includes a pact to stand in opposition to any filibuster or other delaying device which

could jeopardize a floor vote on each of the controversial items: habeas corpus reform, exclusionary rule, death penalty, and Federal Tort Claims. In other words, they have agreed to work together to secure floor votes on each of these items.

It must also be noted that at the time the four bills (the core bill, habeas, death penalty, and exclusionary rule) were reported, the committee also reported, as separate bills, Senator Biden's "drug tsar" bill, and bills on sentencing and forfeiture reform. Sentencing and forfeiture are two major titles in the core bill.

Thus, in the Senate the current status of the anti-crime proposals (plus the "drug tsar" proposal) is that the Committee on the Judiciary has reported favorably on the following bills:

1. S. 1762 - sponsored by Thurmond (14 co-sponsors have been added since introduction), containing 37 of the 42 items proposed */ by the President (plus four congressionally initiated proposals to which we do not object);

2. S. 1763 - sponsored by Thurmond (12 co-sponsors have since been added), habeas corpus reform;

3. S. 1764 - sponsored by Thurmond (5 co-sponsors have since been added), reform of the exclusionary rule;

4. S. 1765 - sponsored by Thurmond (12 co-sponsors have since been added), which is now the vehicle for the President's reinstitution of the death penalty;

5. S. 668 - sponsored by Kennedy, identical to the sentencing reform provision of S. 1762;

6. S. 948 - sponsored by Biden, identical to our forfeiture reform proposals in S. 1762; and

7. S. 1787 - Senator Biden's "drug tsar" proposal.

Demands by Senator DeConcini that capital punishment be considered at the same time as the noncontroversial bill (S. 1762) prevented our getting the core measure to the Senate Floor last year. Senator Baker was willing to bring the core bill to the floor, but he insisted that a time agreement be reached. DeConcini would not agree to a time agreement which did not allow floor consideration of the death penalty, and any agreement allowing such a debate was rejected by opponents of that provision. We believe

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*/ One part of the President's crime package, product tampering (the "Tylenol" bill), has been approved by the Congress as a separate measure, leaving 41 of the original 42 items still pending before the Congress.

that the core bill, S. 1762, will pass the Senate with an overwhelming majority. We also believe that the other separate bills have enough support to pass, if they can survive procedural obstacles which will be attempted by opponents not party to the Thurmond-Biden-Laxalt-Kennedy agreement.

II. House of Representatives

In the House, the President's crime package was introduced as H.R. 2151 by Representative Fish and now has 28 co-sponsors. No action whatsoever has been taken by the House Judiciary Committee on H.R. 2151. There has, however, been piecemeal action on some of the issues in the President's package, as follows:

1. Justice Assistance Legislation -- the Judiciary Committee has reported and the House has approved H.R. 2175 (Rep. Hughes) which is a defective version of Title VIII of the President's bill.

2. Insanity Defense Reform -- the full Judiciary Committee has reported H.R. 3336 (Rep. Conyers) which is generally consistent with Title V of the President's bill.

3. Child Pornography -- the House has approved H.R. 3635 (Rep. Hughes) which is similar to Title XV, Part B of the President's crime bill.

4. Extradition Reform -- the House Judiciary Committee has reported H.R. 3347 (Rep. Hughes) which is similar to Title XIV, Part M of the President's crime bill.

5. Forfeiture Reform -- the Subcommittee on Crime has reported H.R. 3299 (Rep. Hughes) which would accomplish most of the purposes of Title IV of the President's crime bill, but the Hughes' bill must be considered a weakened version.

6. Drug Tsar -- the House Judiciary Committee has reported H.R. 3664 (Rep. Hughes) to establish a federal drug tsar. Hughes' bill builds upon an existing structure (the White House Drug Abuse Policy Office) rather than creating a new structure as is the case in Biden's bill.

In short, the House has only dealt with five of the items found in the President's bill plus the "drug tsar". Further, the House has not acted on the "big ticket" items of sentencing or bail reform. It should be noted that Chairman Rodino did introduce a sentencing bill the day the House adjourned. Unfortunately, this

otherwise positive step by the Chairman is diminished by the language of his version. For example, the Rodino sentencing bill does not permit Government appeal of excessively lenient sentences, it preserves the Parole Commission (which we want to abolish), and it does not strengthen criminal fine collection mechanisms.

III. Prospects

In the Senate, failure to secure Floor action on the core bill last year was a setback. Nevertheless, Senate passage early this year would place us in a good position from which to bring pressure to bear on the House to move the comprehensive crime legislation. Moreover, Senate leaders (including Biden) have agreed to use all possible parliamentary steps to force a House vote on the package, primarily by repeatedly tacking the core crime bill onto House-passed bills and sending them back to the House.

Despite the reluctance of the House Judiciary Committee to act on the President's crime bill, we believe that the Senate's core bill, S. 1762, would have majority support if it reached the House Floor. Therefore, our objective must be to get the issues to the House Floor. Even if attaching the Senate-passed bill to other House-passed bills falls short of forcing a Floor vote in the House on the entire package, such efforts may force some House action on major crime legislation.

We believe that the critical first step is Senate Floor action. Such action would put the entire focus on House inaction. The pressure of Senate passage should create opportunities in addition to enabling the Senate to add the core bill to various House-passed pieces of legislation. Members of the House will thus be more amenable to taking some action on significant crime legislation. Unlike the Senate, the House (especially the Committee on the Judiciary) is almost incapable of processing omnibus bills. However, with Senate action as a forcing device, House Members should become more willing to process more of the individual elements of the President's bill, even if the bill is not considered as a whole. With enough elements moving in the House we could gain a conference with the Senate from which we might be able to obtain major portions of our criminal justice legislative agenda.

IV. Needed Action

In short, the earliest possible Senate action on S. 1762 is necessary if we are to be successful in securing enactment of urgently needed crime legislation. Majority Leader Baker must be urged to force the crime legislation to the Senate Floor, allowing time to fight out the death penalty issue. We could then get the core package out of the Senate in February. Once that is accomplished, we will -- assuming White House and Administration leadership in an active public education effort -- have a significant

prospect of securing true criminal justice legislative reforms this year. We would therefore urge that this entire matter be placed on the agenda of an early meeting of the legislative strategy group in order that the necessary, specific action-forcing steps may be agreed upon.

Attachment

President Reagan's Comprehensive Crime Control Act
of 1983 as Reported by the Senate Judiciary Committee

S. 1762

Title I - Bail Reform would amend the Bail Reform Act of 1966 to:

-- permit courts to consider danger to the community in setting bail conditions and to deny bail altogether where a defendant poses an especially grave danger to others;

-- tighten the criteria for post-conviction release pending sentencing and appeal;

-- provide for revocation of release and increased penalties for crimes committed while on release; and

-- increase penalties for bail jumping.

Title II - Sentencing Reform would revise the sentencing system to:

-- establish a determinate sentencing system with no parole and limited "good time" credits;

-- promote more uniform sentencing by establishing a commission to set a narrow sentencing range for each federal criminal offense;

-- require courts to explain in writing any departure from sentencing guidelines; and

-- authorize defendants to appeal sentences harsher and the Government to appeal sentences more lenient than the sentencing commission guidelines.

Title III - Forfeiture Reform would strengthen criminal and civil forfeiture laws by providing for:

-- forfeiture of profits and proceeds of organized crime (RICO) offenses;

-- criminal forfeiture in all narcotics trafficking cases;

-- expanded procedures for "freezing" forfeitable property pending judicial proceedings;

-- forfeiture of substitute assets where assets originally subject to forfeiture have been removed from the reach of the Government;

-- forfeiture of land used to grow, store and manufacture dangerous drugs; and

-- expanded use of efficient administrative forfeiture procedures in noncontested cases.

Title IV - Insanity Defense Reform would narrow the insanity defense currently available in the federal system to:

-- limit the defense to those who are unable to appreciate the nature or wrongfulness of their acts;

-- place the burden on the defendant to establish the defense by clear and convincing evidence;

-- prevent expert testimony on the ultimate issue of whether the defendant had a particular mental state or condition; and

-- establish procedures for federal civil commitment of persons found not guilty by reason of insanity if no State will commit him.

Title V - Drug Enforcement Amendments would:

-- strengthen federal penalties applicable to narcotics offenses;

-- reduce the regulatory burden on law-abiding manufacturers and distributors of legitimate controlled substances; and

-- strengthen the ability of the Drug Enforcement Administration to prevent diversion of legitimate controlled substances to illegal uses.

Title VI - Justice Assistance Act would:

-- authorize a modest program of financial assistance to State and local law enforcement to help finance anti-crime programs of proven effectiveness; and

-- streamline the components of the Department of Justice responsible for statistical, research and other assistance to State and local law enforcement.

Title VII - Surplus Property Amendments would facilitate donation of surplus federal property to State and local governments for urgently needed prison space.

Title VIII - Labor Racketeering Amendments would strengthen federal laws with respect to labor-related racketeering activity by:

-- raising from five to ten years the period of time that a corrupt official can be debarred from union or trust fund positions; and

-- making debarment effective upon the date of conviction rather than the date all appeals are exhausted.

Title IX - Foreign Currency Transaction Amendments would improve federal laws designed to prevent international "money laundering" by:

-- adding an "attempt" provision to existing laws prohibiting transportation of currency out of the United States in violation of reporting requirements;

-- strengthening penalties for currency violations and authorizing payment of rewards for information leading to the conviction of money launderers; and

-- clarifying the authority of U. S. Customs agents to conduct border searches related to currency offenses.

Title X - Miscellaneous Violent Crime Amendments.

A. Establish federal jurisdiction over murder-for-hire and crimes in aid of racketeering.

B. Establish federal jurisdiction over solicitation to commit a crime of violence.

C. Expand felony-murder rule (18 U.S.C. 1111) to include "escape, murder, kidnaping, treason, espionage and sabotage."

D. Establish a minimum mandatory 5-year sentence for use of a firearm in a federal crime of violence.

E. Establish an additional minimum-mandatory 5-year sentence for use of armor-piercing bullets in a federal crime of violence.

F. Expand 18 U.S.C. 1201 to include kidnaping of federal officials.

G. Establish a new federal offense for crimes against family members of federal officials.

H. Expand the Major Crimes Act, which sets out offenses in Indian country, to include maiming and sodomy.

I. Expand 18 U.S.C. 31 to cover destruction of trucks.

J. Establish federal sanctions for causing serious damage to an energy facility.

K. Expand 18 U.S.C. 1114 to include attempted assaults and assaults upon U. S. intelligence officers, and to allow the AG to designate other persons for coverage.

L. Create federal penalties for escape from custody resulting from civil commitment.

M. Amend extradition laws to codify case law and facilitate extradition of foreign fugitives.

N. Amend 18 U.S.C. 844 to clarify present law to ensure that tougher penalties for arson are applicable where firemen suffer personal injury. (Congressionally initiated proposal.)

O. Establish federal jurisdiction over robberies and burglaries directed at pharmacies and others registered to dispense, manufacture or distribute controlled substances. (Congressionally initiated proposal.)

Title XI - Serious Non-Violent Offenses

A. Amend child pornography laws to delete commerciality and obscenity requirements.

B. Amend 18 U.S.C. 2232 to cover warning the subject of a search.

C. Establish federal sanctions for theft or bribery involving federal program funds.

D. Establish federal sanctions for counterfeiting of State and corporate securities and a misdemeanor penalty for forged endorsements on U. S. securities.

E. Amend 18 U.S.C. 2113 to cover receipt of stolen bank property.

F. Add a new § 215 to title 18 to cover bank-related bribery.

G. Add a new § 1344 to title 18 to cover bank fraud including check kiting.

H. Improve penalties for trafficking in drugs, weapons or other contraband in federal prisons.

I. Establish federal penalties for fraud of $10,000 or more involving livestock. (Congressionally initiated proposal.)

Title XII - Procedural Amendments

A. Lower from 16 to 15 the age at which a juvenile may be prosecuted as an adult for serious crimes of violence and drug trafficking offenses.

B. Amend wiretap laws to permit emergency wiretaps in life-endangering situations and expand the range of predicate offenses to include child porn, illegal currency transactions and crimes against victims and witnesses.

C. Revise 18 U.S.C. 3237 to permit prosecution of threat offenses in any district from, to or through which the threat travels.

D. Authorize civil injunctions against fraud pending criminal prosecution.

E. Authorize government appeal of new trial orders.

F. Improve the Witness Security Program through codification of case law and other changes.

G. Amend tax venue statute to avoid unnecessary splintering of criminal tax prosecutions.

H. Amend Foreign Agent Registration Act to shift powers now held by Secretary of State to the AG. (Congressionally initiated proposal.)

S. 1763

Reform of Federal Intervention in State Proceedings would reduce federal court interference in State adjudications by:

-- requiring federal deference to "full and fair" State court proceedings;

-- limiting the time within which State adjudications may be challenged in federal court, and

-- making other improvements in federal habeas corpus laws.

S. 1764

Exclusionary Rule Reform would create an exception to the application of the Exclusionary Rule to prevent suppression of evidence where it can be shown that officers were proceeding in a good faith and objectively reasonable belief that they were acting in compliance with the law.

S. 1765

Reinstitution of Capital Punishment would establish constitutionally permissible procedures for imposition of the death penalty in certain homicide, treason and espionage cases.

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 13, 1984

MEMORANDUM FOR: Members of the Cabinet Council on Legal Policy

FROM: Edward C. Schmults
Deputy Attorney General

SUBJECT: Status of Bankruptcy Courts Legislation

The Nation's bankruptcy court system faces a complicated and threatening crisis on April 1 of this year. At that time, the transition period in the Bankruptcy Reform Act of 1978 (the "Reform Act") will end. The new court system created by the Reform Act is then scheduled to come into existence, but the Supreme Court has declared much of the new courts' jurisdiction unconstitutional, and Congress never fully implemented the Reform Act by creating any judicial positions. As a result, it is very unclear where jurisdiction over the heavy bankruptcy caseload will lie on April 1 and who will be available to handle it. Although the urgent needs of bankrupt parties, their creditors and their employees make congressional action imperative, a deadlock in Congress has prevented it from occurring.

I. BACKGROUND

A. The Bankruptcy Reform Act of 1978

The pending crisis faced by the bankruptcy court system is a result of Congress' failure to address some significant constitutional questions when it enacted the Reform Act. The Reform Act granted the bankruptcy courts broad jurisdiction over all matters related to bankruptcy cases in order to eliminate jurisdictional litigation and consolidate all actions and motions into one case before the same judge. However, because the Senate refused to agree to the over 200 life-tenured bankruptcy judgeships proposed by the House, the Reform Act provided that the bankruptcy courts would be staffed with judges appointed for fourteen-year terms. Congress realized there was considerable doubt whether these limited-tenured judges could exercise the broad jurisdiction granted them without offending Article III of the Constitution, which requires that the "judicial Power of the United States" be exercised only by judges with life tenure and protection against diminution of salary. For this reason, the Reform Act denominated the new bankruptcy courts as "adjuncts" to the district courts, although by any objective standard they were independent entities.

Because the House and Senate could not agree on the number and location of bankruptcy judges, these judgeships were not created when the Reform Act was passed. Rather, the Judicial Conference was instructed to study and report by January 1983 on the number of judges needed, after which Congress was to create those judgeships.

B. The Marathon Case

In Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 1/ the Supreme Court invalidated the jurisdiction of the bankruptcy courts. In that case, Northern Pipeline, the bankrupt party (called the "debtor"), sued Marathon in bankruptcy court on a breach of contract claim. Marathon had not filed a bankruptcy claim against Northern Pipeline or otherwise consented to the jurisdiction of the bankruptcy court; this state law action would have been filed in state court but for the plaintiff being in bankruptcy. The Court held that at least when a debtor is the plaintiff in an action that could stand independently of the bankruptcy case (a "related case"), which action is based on state law, the case must be heard by a judge with life tenure if the defendant has not consented to the bankruptcy judge hearing the case. Because the Court did not believe that it could sever the unconstitutional grant of jurisdiction over such cases from the remainder of the bankruptcy courts' authority, it declared their entire jurisdiction invalid.

Our ability to act at this time is hampered because the Court provided little guidance on the scope of its opinion or the availability of constitutional alternatives. No opinion of the Court issued. Rather, Justice Brennan wrote a sweeping, plurality opinion, signed by four Justices, that purported to limit the adjudications that need not be made by judges with life tenure to three narrow exceptions. He implied that these exceptions do not encompass bankruptcy cases generally, but stated only that they at least do not include cases like Marathon. Justices Rehnquist and O'Connor agreed that related cases require a judge with life tenure, but expressed doubts about the broad language of their colleagues' opinion. All six Justices in the majority agreed that the bankruptcy courts were more than mere adjuncts of the district courts. The Court did not preclude the use of limited-tenured judicial officers as long as the "essential attributes of the judicial power" remain with life-tenured officers, 2/ but found that the appellate review by life-tenured judges provided

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1/ 458 U.S. 50 (1982).

2/ Marathon, id., at 84, 87; see Raddatz v. United States, 447 U.S. 667 (1980), upholding the authority of magistrates to determine pretrial motions in criminal cases, subject to de novo district court review.

by the Reform Act was not sufficient. This narrow and ambiguous decision has left a number of questions open.

C. Legislative Deadlock

The Court twice stayed the effective date of its ruling to give Congress time to enact a legislative solution. Congress did not do so. Congress also failed to create the judgeships to staff the new bankruptcy courts, so there are no positions that the President could fill with people to handle the caseload. 3/

A deadlock continues between those who would create a life-tenured bankruptcy bench, led by Rep. Rodino, and those who would limit bankruptcy judges' jurisdiction and increase the authority of the district courts over bankruptcy cases, led by Senators Thurmond and Heflin and Rep. Kastenmeier. This impasse is compounded by the insistence of Senator Dole and the influential consumer credit lobby that substantive bankruptcy law amendments be linked to any bill solving the courts problem. Rep. Rodino opposes many of these amendments on the merits and strongly opposes linkage. The House Democratic leadership has demonstrated its unwillingness to create any new judgeships that President Reagan could fill, while Congressional Republicans have sought to use a bill creating bankruptcy judgeships as a vehicle to create needed district and circuit court judgeships as well (an "omnibus judges bill").

When Congress failed to act by the end of the Court's second stay in December 1982, every judicial district adopted what is known as the "Emergency Rule" to keep the bankruptcy courts operational. While it provides for district judges to handle related cases and certain other matters, the bankruptcy judges have continued to do almost all of the work, with only perfunctory district court review. Bankruptcy judges act either pursuant to the consent of the parties or in a capacity analogous to that of magistrates, with their decisions ostensibly subject to de novo review by the district courts. Upheld in most

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3/ 28 U.S.C. § 152, effective April 1, 1984, provides that "The President shall appoint, by and with the advice and consent of the Senate, bankruptcy judges for the several judicial districts." This section could be read as giving the President the power to appoint however many judges he believes are needed, or to appoint at least one judge per district. While not completely foreclosing this possibility, it is not consistent with the legislative history, which indicates that further Congressional action was contemplated before judges could be appointed. Also, proceeding with the appointment of judges at this time without such Congressional action would be a provocative and high-risk strategy.

instances, the Emergency Rule has enabled the bankruptcy court system to continue to function, thereby preventing a national crisis but relieving the pressure on Congress to take action.

II. WHAT WILL HAPPEN ON APRIL 1, 1984

A. Effect of Congressional Inaction on Bankruptcy Jurisdiction and Judges

The statutory basis for the Emergency Rule is in the Reform Act's transitional provisions, which expire on March 31, 1984. At that time, the current "courts of bankruptcy" cease to exist and their cases are transferred to the new United States Bankruptcy Courts. However, these latter courts' jurisdiction was invalidated by Marathon, at least to the extent they are staffed by limited-tenured judges. While all commentators agree that it would be unreasonable to read Marathon as resulting in an elimination of bankruptcy jurisdiction, it is far from clear which court has that jurisdiction.

Although the Court invalidated the bankruptcy courts' jurisdiction, the constitutional infirmity was in the judges, not the courts. Therefore, the bankruptcy courts' jurisdiction might survive in the hands of circuit and district judges designated and assigned under 28 U.S.C. §§ 291 and 292 to serve temporarily on the bankruptcy courts. If the bankruptcy courts' jurisdiction, which is contained in 28 U.S.C. § 1471(c), is invalid under all circumstances, the district courts probably could act pursuant to their bankruptcy jurisdiction under § 1471(a) and (b), or their federal question jurisdiction under § 1331. If it is held that § 1471 fails in its entirety and § 1331 is inapplicable, then it would probably be held that the district courts' jurisdiction under the Bankruptcy Act of 1898 is revived. It is impossible to know the answer definitively until the courts rule.

While bankruptcy jurisdiction will survive somewhere, the same cannot be said with confidence for the jobs of the bankruptcy judges. Their jobs as judges of the "courts of bankruptcy" expire with those courts on March 31. It has been argued that § 404(b) of the Reform Act, which provides that a judge's term shall expire "on March 31, 1984 or when his successor takes office," means that the current bankruptcy judges will remain in office until others are appointed to take their places. This reading might be correct if, as Congress expected, there were in existence on April 1 judgeships to which "successors" could be appointed. However, we believe that this interpretation loses its meaning when no positions sufficiently analogous to be called "successors" have been authorized by Congress.

B. Difficulties with a Judicial Solution

We anticipate that if Congress takes no action by April 1, the judiciary would try to fashion another makeshift

remedy. The greatest problem it would face is how to re-employ the current bankruptcy judges, pay them, and assign them bankruptcy cases.

If jurisdiction over bankruptcy cases remains in the bankruptcy courts, it is very probable that life-tenured judges could be designated to sit there. However, there would be a need to rehire the current bankruptcy judges in some capacity since the district judges already have their hands full with their civil and criminal caseloads; they could not handle the more than 800,000 pending bankruptcy cases as well. Unfortunately, it is not clear that the bankruptcy courts will have the authority to appoint the current bankruptcy judges as magistrates, and if they were hired as district court magistrates, it is not clear whether they could be assigned to do bankruptcy work, or whether they could be paid from existing bankruptcy court appropriations. On the other hand, if jurisdiction is held to be in the district courts, it is clear that those courts could appoint the current bankruptcy judges as magistrates to do at least some of the bankruptcy work, but it is again unclear whether they could be paid without an amendment to the judiciary's appropriation.

The judiciary may try to keep the current bankruptcy judges in office under a modified form of the Emergency Rule, but that would require a very substantial leap of statutory construction. This sort of judicial creativity would present the unseemly spectacle of the courts circumventing the effects of their own decisions through judicial legislation.

Finally, even if the judiciary can create a mechanism to keep the current bankruptcy judges working, it will become increasingly difficult to persuade them to do so. Under the Reform Act, bankruptcy judges' salaries will decrease from $65,800 to $50,000 per year on April 1. Also, the improved retirement benefits provided for bankruptcy judges who work until March 31 will become vested. Given that about half of the current judges are over 60 years of age, we can assume that a large percentage of them are remaining on duty in order to receive these increased benefits. Even younger judges will be less inclined to remain on the job and be productive in light of this decrease in pay and their resentment over the unfair treatment they believe they have received from the Article III judges and the Congress.

We should note that due to a drafting error in the Reform Act, most magistrates' salaries will also decrease from $65,800 to $48,500 per year on April 1. Unless corrected by Congress, this could impair the effectiveness of the judiciary, which increasingly relies on magistrates to handle pretrial motions and routine civil and criminal cases.

III. PROPOSED LEGISLATION

A. Summary and Status of Bankruptcy Courts Bills

There are three principal bills under consideration to resolve the bankruptcy courts problem.

H.R. 3, sponsored by Rep. Rodino, would create 227 life-tenured bankruptcy court judgeships. These would be "non-fungible" positions, i.e., these judges could not preside over civil and criminal cases when their workloads permitted. The Democratic House leadership insisted on non-fungibility so that President Reagan's appointees would be handling only bankruptcy cases. While H.R. 3 was reported out by the Judiciary Committee in February 1983, it has remained stalled in the Rules Committee. 4/

S. 1013 was passed by the Senate last April as a result of a compromise between Senators Thurmond and Heflin. It provides for the Presidential appointment of 232 bankruptcy judges with 14-year terms, omnibus judges (24 circuit and 61 district court positions), and the substantive bankruptcy law amendments supported by the consumer credit lobby. It addresses the constitutional deficiency of the Reform Act's jurisdictional provisions by providing broader district court review of bankruptcy judges' decisions, greater district court control over cases through a recall mechanism, and federal abstention where related cases are grounded in state law. Rep. Rodino is holding S. 1013 in the Judiciary Committee and no action is expected.

H.R. 3257 was introduced by Reps. Kindness and Kastenmeier, and is also being held in the Judiciary Committee by Rep. Rodino. It would authorize the courts of appeals to appoint bankruptcy judges for fourteen-year terms in such numbers and locations as are determined by the Judicial Conference. It addresses the constitutional issues in a manner similar to S. 1013, but provides for greater district court control over cases

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4/ A majority of the Rules Committee are co-sponsors of the substantive bankruptcy law amendments and seek a rule waiving germaneness, which would enable those amendments to be considered in floor debate on H.R. 3. Rep. Rodino has indicated that he would withdraw his bill if germaneness were waived. The House Republican leadership supports a waiver of germaneness so that both the substantive amendments and omnibus judges could be considered. Last year, the Speaker instructed the Rules Committee not to report a rule, in order to avoid both a bitter fight between Rep. Rodino and other Democratic leaders, and give the President less time to fill any judgeships that ultimately may be created.

through a discretionary reference mechanism. H.R. 3257 also provides for omnibus judges (24 circuit and 52 district court positions); its sponsors are willing to accept the substantive amendments.

B. Comparative Merits of the Bills

H.R. 3 is clearly constitutional and would retain the benefits that arise from having all aspects of a case heard before a single, expert judge. However, it is not clear that we always would need 227 judges who could hear only bankruptcy cases, even though that many incumbents are busy now. The existing bankruptcy caseload is likely to decline for a number of reasons. Bankruptcy filings fluctuate with and are a lagging indicator of the economy. Substantive amendments supported by the credit industry would likely make bankruptcy a less attractive option for debtors. Also, one reason 225-240 bankruptcy judges are currently needed is that they generally are not top quality personnel. With the status, independence, and security that come with life tenure, more qualified individuals would be willing to serve. Nevertheless, H.R. 3 would permanently lock in this large number of life-tenured positions.

The principal objection made to the limited tenure bills, S. 1013 and H.R. 3257, relates to their constitutionality. While any such bill would be subject to attack on constitutional grounds, some stand on firmer ground than others, and there is no reason to believe that all such bills are fatally flawed. Marathon represented the worst case that could have been brought before the Court under the Reform Act. To the extent that a new system subjects limited-tenured judges and bankruptcy cases to more extensive supervision and control by life-tenured judges, provides for bankruptcy judges appointed by life-tenured judges, provides for parties to consent to adjudication by limited-tenured judges, and contains a strongly worded severability clause, the constitutional status of such a system would be on firmer ground.

The other criticism of the limited tenure bills is that they would forfeit many of the efficiencies in case management achieved by the Reform Act. While the proposed division of responsibility between bankruptcy and district judges is heavily criticized by the bankruptcy bar, experience demonstrates that this is not a serious problem. The bankruptcy judges have handled all aspects of the vast majority of cases under the Emergency Rule with perfunctory or no district court involvement. There are some practical problems with S. 1013 and H.R. 3257, but they do not go to the core of the proposals and could be addressed by amendment.

C. Outlook for Congressional Action this Session

The Speaker has said that Congress will address this issue and "meet the deadline." House action in March seems

likely. We understand that the Speaker would prefer to postpone the end of the Reform Act's transition period from March 31 until after the election, but that Rep. Rodino is adamantly opposed to this.

Rep. Rodino believes that he can convince the Speaker and a majority of the House to accept the creation of life-tenured judgeships as long as they become effective during the next presidential term. It would be impossible for us to appoint more than a handful of these positions even if they were effective this March because the Senate minority will virtually stop the judicial confirmation process in May or June. Rep. Rodino believes the Speaker would agree that the winner of the November election could select all 227 life-tenured bankruptcy judges, and possibly the omnibus judges as well. Nevertheless, the creation of 227 life-tenured judgeships has been opposed by the Senate, the Article III judiciary, the House Republican leadership, and a large number of other House members who have been convinced that H.R. 3 is a bad idea, so it is by no means certain that a life tenure bill will prevail. It may be possible to fashion a compromise that would provide for life-tenured bankruptcy judges, but it would require an understanding of whether or not the President elected in 1984 would have a free hand in selecting the judges, and possibly an agreement to reduce the number of judgeships created.

The other course of action would be for the House to accept the position of the Senate and the Article III judges and create limited-tenured bankruptcy judgeships. In this event, we would hope to amend either S. 1013 or H.R. 3257 to address the practical problems they would create for bankruptcy litigation in their current form, such as unnecessarily splitting cases among several forums and assigning the judges administrative duties that would be inconsistent with their adjudicatory functions. Such a bill would probably include the substantive bankruptcy law amendments included in S. 1013 as they apparently are supported by a majority of the members of the House. However, Rep. Rodino believes that he can convince the Speaker to prevent the substantive amendments from being considered with the courts bill, so that his committee will have the opportunity to study them before they go to the House floor.

IV. CONCLUSION

The crisis that faces our bankruptcy court system, and the new judgeships that would be included in any legislative solution, make the resolution of this matter a top Administration concern. The Department of Justice will analyze what will happen on April 1 in the absence of congressional action, and we expect to report in the near future on steps that the Administration can take to press for enactment of an acceptable legislative solution. The restructuring of bankruptcy court jurisdiction and the creation of bankruptcy and other needed judgeships are needed immediately.