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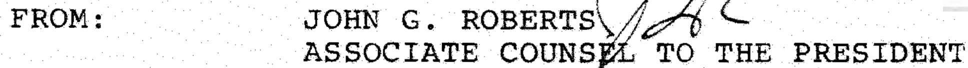
THE WHITE HOUSE

WASHINGTON

February 18, 1986

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT



SUBJECT: <u>Departments of State and Justice Draft Reports on H.R. 3321, a bill to codify the provisions of Title 8 of the USC Relating to the Immigration and Naturalization Laws</u>

Counsel's Office has reviewed the above-referenced draft reports and finds no objection to them from a legal perspective.

ID # CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: James Munn

☐ **MI Mail Report** **User Codes:** (A) ____ (B) ____ (C) ____

Subject: DOS + DOJ draft reports on H.R. 3321, a bill to codify the provisions of Title 8 of the USC relating to the immigration & naturalization laws

ROUTE TO: Office/Agency (Staff Name)	ACTION: Action Code	Tracking Date YY/MM/DD	DISPOSITION: Type of Response	Code	Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	86/02/12			/ /
	Referral Note:				
CUAT 18	R	86/02/12		S	86/02/21
	Referral Note:				
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ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
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5/81

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

SPECIAL

SPECIAL

February 11, 1986

LEGISLATIVE REFERRAL MEMORANDUM

TO:

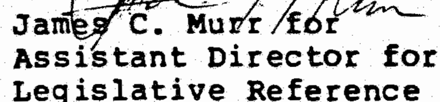
Department of Justice
Department of State
Department of Health & Human Services
Department of Transportation
Central Intelligence Agency
Department of Education
Department of Agriculture
Department of Labor

SUBJECT: Departments of State and Justice draft reports on H.R. 3321, a bill to codify the provisions of Title 8 of the USC relating to the immigration and naturalization laws.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than February 21, 1986.

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.



James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: John Cooney, Fred Fielding, Jim Barie, Tara Treacy, Russ Neely, Sarah Brentlinger

United States Department of State

Washington, D.C. 20520

DRAFT

Dear Mr. Chairman:

The Secretary has asked me to reply to your letter of October 1, 1985, concerning H.R. 3321, "A bill to revise, codify and enact without substantive change certain general and permanent laws, related to aliens and nationality, as Title 8, United States Code, 'Aliens and Nationality'".

The Department understands that this bill represents another step in a longstanding project by the Office of the Law Revision Counsel of the House of Representatives to revise, codify and enact into positive law each title of the United States Code. The Department, of course, perceives no objection to such enactments. There are, however, certain aspects of H.R. 3321 which the Department finds troubling.

As the Committee is aware, there has existed for many years an informal codification of the Immigration and Nationality Act and other related laws which is in current use in legal proceedings and other legal documents arising under the applicable laws. As an example, section 101 of the INA is informally codified as 8 U.S.C. 1101; section 212(a) of the INA as 8 U.S.C. 1182(a). In view of the long existence of this informal codification and its wide currency and extensive use, the Department questions the desirability of radically altering it at this time. The Department believes that the interests of all who work with the INA, both within the government and in the private sector, will be served if the formal codification preserved the structure of the informal codification.

Also, the Department is concerned about the changes in grammar, style and English usage which appear throughout the codification. The stated purpose of such changes is to substitute simple current language for awkward and obsolete terms. The Department agrees that simplicity of usage is desirable, but believes that in a curious way the effort to achieve such simplicity may, in this case, complicate matters. It is the

The Honorable,
Peter W. Rodino, Jr., Chairman,
Committee on the Judiciary,
House of Representatives

Department's observation that it is not so much the words of the INA which are confusing to the outside observer, but rather the meaning which has been ascribed to them by various courts. It is not uncommon that the courts will ascribe to certain words in the INA a meaning substantially different than the one which an outside observer would ascribe to them without the benefit of legal research. To the extent that this is so, the grammatical and stylistic changes proposed in H.R. 3321 will add to, rather than dispel, existing confusion. If these proposed changes are enacted, they will not have the effect of making any substantive change in law, according to information provided by the Office of the Law Revision Counsel. Taking this to be the case, the outside observer seeking to find the substantive meaning of the new words will have to, first, find the old words which have been replaced and then determine what meaning courts had ascribed to the old words, in order to achieve an understanding of the meaning of the new words. It does not appear to the Department that such a result will facilitate the orderly administration of the law or serve to enlighten the public as to the meaning and import of the law.

Finally, there are a number of specific proposed changes which the Department finds troubling in varying degrees. First, in H.R. 3321 the definitions of "world communism" (current section 101(a)(4)) and of "advocating" (current section 101(e)) are eliminated. This results in the repetition of the substance of these definitions in the text of proposed new section 8 U.S.C. 1308 on several occasions. The Department does not believe that the clarity of the statute is improved by eliminating a definition if its elimination necessitates the repetition of the substance of the definition several times elsewhere in the statute.

Second, in proposed Code section 101(a)(6)(B)(ii) which would replace current section 101(b)(1)(F), the word "emigration" is replaced by the word "immigration." The Department believes that these two words are not, and cannot by any standard of usage, be said to be synonymous and questions whether, in spite of the Law Revision Counsel's disclaimer, it can properly be said that the substitution is one having no substantive import.

The Department also notes what appears clearly to be a change of substantive import in proposed Code section 125, which defines "naturalization" and would replace current section 101(a)(23). Section 101(a)(23) defines "naturalization" as "the conferring of nationality of a state upon a person after birth, by any means whatsoever." Proposed Codes section 125 would define naturalization as the "conferring of citizenship of the United States on an individual after birth under chapter 33 of this title." There is, thus, excluded from the statutory definition of "naturalization" the conferral of nationality by any state other

than the United States. The Department notes that proposed Code section 3501(C) provides for loss of United States nationality "through the naturalization of a parent having legal custody." Applying the proposed definition of "naturalization" would be inconsistent with this provision, which applies to naturalization of the parent in a foreign country. The Department finds it impossible to accept the assertion that no substantive change has been effected thereby.

Current sections 101(a)(16) and (26) define the terms "nonimmigrant visa" and "immigrant visa", respectively. These two sections would be replaced by proposed Code section 142. The definition of "immigrant visa" currently contains the requirement that the visa have been issued by a consular officer at his office outside the United States. No such language appears in proposed Code section 142. On the other hand, proposed Code section 1503 contains language to perpetuate this requirement. While no substantive change has thus been effected, the Department cannot perceive what benefit is to be derived from removing this language from the definition, where it has existed for more than thirty years, and inserting it in this far-removed section.

Section 201(b) of the INA defines "immediate relatives" and provides that "The immediate relatives specified in this subsection who are otherwise qualified for admission as immigrants shall be admitted as such, without regard to the numerical limitations in this Act." Proposed Code 1111, which would replace section 201(b), says merely that "The numerical limitations of this subchapter do not apply to the immediate relative of a citizen of the United States or ..." The Department has always interpreted the current text of section 201(b) as indicating a specific Congressional intent to require immediate relatives to be processed as such, in order to prevent them from using an immigrant visa number under the annual limitation, even if also qualified as preference immigrants, to the prejudice of immigrants able to qualify only for preference status under the annual numerical limitation. It does not appear to the Department that such an interpretation of proposed Code section 1111 could be sustained and the Committee should consider whether it wishes to perpetuate the existing statutory interpretation.

Current section 203(a)(8) of the INA specifies that the spouse or child of an immigrant shall be entitled to the same immigrant status and order of consideration if not otherwise entitled to an immigrant status and the immediate issuance of a visa. Proposed Code section 1113, which would replace section 203(a)(8), does not include the language concerning the immediate issuance of a visa. An alien can be entitled to an immigrant classification, either as a preference or nonpreference immigrant, and not be entitled to the immediate issuance of an immigrant visa

because the immigrant classification to which the alien is entitled is heavily oversubscribed. Thus, in order to give full effect to the intent of section 203(a)(8), which the Department considers to be preventing the separation of families, it is necessary to incorporate both concepts and not simply the one. It seems that this may be a case of unintentional substantive change resulting from an insufficient understanding of the technical aspects of the law.

Current section 301(d), 301(e), 301(g), and 309(c) of the INA provide for acquisition of United States nationality at birth by persons born abroad whose citizen parent was "physically present" in the U.S. for specified periods. The drafters of the INA intentionally used that term to avoid confusion arising from use of the term "residence" in previous legislation. Proposed Code sections 3104(a)(1)(B), 3104(a)(1)(c), and 3502(a)(2) eliminate the adverb "physically." This is a substantive change which could lead to a new judically-imposed concept of constructive presence, expanding the application of the section to persons not eligible for U.S. citizenship at birth.

Current section 349(a)(4)(A) of the INA provides for loss of United States nationality by foreign government employment if the person "has or acquires" the nationality of the foreign state. Proposed Code section 3501(4)(A) would provide for loss of citizenship only by a person who "becomes" a national of the foreign state. This is a substantive change which would cease to provide for loss of nationality by a person who had already acquired the foreign nationality before accepting foreign government employment.

The language of the second sentence of proposed Code Section 1114(a)(1) establishes the numerical limitation (now contained in section 202(c) of the INA) on immigration by natives of dependent areas. Section 202(c) specifies that immigration under the numerical limitation system by natives of a dependent area may not exceed 600 per year. Proposed Code section 1114(a)(1) simply states that only 600 of the 20,000 limit for the governing country are chargeable to the dependent area. This is one of a number of instances in which the existing prescriptive language of the statute is replaced by language which is declarative in character. While the Department again recognizes the Law Revision Counsel's assertion that changes in language in codification bills do not produce changes in substance, we are concerned that, here as in a number of other cases, such a change may, in fact, be taken to represent a substantive change from a specific directive by the Congress to the administrators of the statute to a simple statement which does not have the same substantive import.

Proposed Code section 1305(a)(7), which would replace section 212(a)(10) of the INA, omits the words "actually imposed" which now appear in section 212(a)(10). These words form the basis for the current interpretation under which the portion of a sentence

to confinement which is suspended or not served because the convict was paroled is not counted in determining whether or not the alien is ineligible under this section. Again, we are concerned that the omission of these words could have the effect of eliminating this interpretation, in spite of the Law Revision Counsel's disclaimer.

Proposed Code section 1305(b) would replace section 212(h) of the INA, which provides for a waiver of certain grounds of ineligibility for certain classes of immigrants. In drafting the text of this provision, the drafter included proposed Code section 1305(a)(9) as a ground of ineligibility which could be waived provided that the ineligibility arose solely from a single offense of simple possession of not more than 30 grams of marihuana. Proposed Code section 1305(a)(9) would replace that portion of section 212(a)(23) of the INA which renders ineligible an alien under whom the consular officer knows or has reason to believe is, or has been, an illicit trafficker in narcotics. The Department cannot imagine how a single offense of simple possession of such a small amount of marihuana could give reason to believe that the offender was a trafficker. Moreover, the Department strongly opposes allowing a trafficker to benefit from a waiver provision in any event. The Department urges that the reference to section 1305(a)(9) be stricken from section 1305(b).

Proposed Code section 1315(a) is an attempt to revise current section 212(d)(3) of the INA, which provides authority for a waiver of ineligibility to permit the temporary admission as a nonimmigrant of an ineligible alien. Current section 212(d)(3) states simply that such authority may be exercised except in the case of an alien ineligible under sections 212(a)(27), (29) or (33). In redrafting this section, the drafter undertook to reverse the text and to specify which grounds of ineligibility could be waived rather than to specify merely that any or all grounds could be waived except the three specifically identified. This effort has produced an anomalous result in that the text now specifies that a nonimmigrant alien may be granted a waiver of some grounds which do not even apply to nonimmigrants because by their very terms they apply only to immigrants. Consideration should be given to restoring the original text which would avoid such a result.

Proposed Code section 1541(c) which incorporates among other things current section 221(b) relating to the requirement that nonimmigrant aliens be fingerprinted reflects a substantial misunderstanding on the part of the drafter. It appears that the drafter believes that a diplomatic visa and a visa issued to an alien seeking admission as a foreign government official or international organization representative or employee are the same. This is not the case. A diplomatic visa is a nonimmigrant

visa bearing the superscription "DIPLOMATIC". Such a visa may be of any nonimmigrant classification, including, for example, visitor for pleasure. The superscription is placed on the visa if the alien occupies certain official positions in a foreign government and is the bearer of a diplomatic passport or its equivalent. An alien may be issued a visa as a foreign government official or international organization representative or employee (current sections 101(a)(15)(A) or (G) of the INA; proposed Code sections 127(1) - (9)) only if the alien is seeking to enter the United States for the specific purpose of acting in such capacity after entry. Consideration should be given to rectifying the results of this apparent misunderstanding.

Proposed Code section 1541(d) also represents an apparent misunderstanding. Current section 203(e) of the INA authorizes the Secretary of State to make estimates of anticipated immigrant visa issuance and to rely upon those estimates in authorizing visa issuance under the numerical limitations on immigration. From this provision, the Department has derived the authority to establish and maintain immigrant visa waiting lists. In 1976 the Congress added to section 203(e) a provision for termination of an intending immigrant's registration on an immigrant visa waiting list if the alien failed to pursue the application within a specified time period. In making this amendment, the Congress used the word "registration" which did not appear previously in this section of law, but which appears in Departmental visa regulations and had become a commonly-used term in this context. The term "alien registration" had long been in common use, deriving from sections 261 through 265 of the INA, and had a different meaning altogether. The drafter of H.R. 3321 apparently saw the word "registration" in section 203(e), took it to have the same meaning or import as in sections 261 through 265 and placed the two entirely distinct concepts in a single section. This has the effect of not only incorporating two entirely distinct concepts in a single section, but also of separating the provision for termination of registration of an intending immigrant from that provision of law with which logic would most properly associate it. Consideration should be given to rectifying this apparent misunderstanding.

Finally, the Department wonders whether it is timely to proceed with enactment of H.R. 3321 at this time in light of the substantial changes to United States immigration law which are currently under consideration by the Congress in S. 1200 and H.R. 3810.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

Sincerely,

James W. Dyer
Acting Assistant Secretary
Legislative and Intergovernmental Affairs

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DRAFT

Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request that we review the provisions of H.R. 3321, a bill to revise, codify, and enact without substantive change certain general and permanent laws relating to aliens and nationality, as Title 8, United States Code, "Aliens and Nationality." While the purpose of H.R. 3321 is to codify certain provisions of Title 8, in effect the bill proposes substantive changes. We are concerned that the substantive revisions that are contained in H.R. 3321 will fundamentally alter Title 8. While the purpose of H.R. 3321 is merely to codify certain provisions of Title 8, in effect H.R. 3321 would make substantive changes in Title 8.

<u>Section 108. Border Crossing identification card</u>

The revised language in subsection 2 which reads "an alien residing in foreign contiguous territory" is substantively different that the existing language which reads "an alien who is a resident in a foreign contiguous territory." In the revised language the word "residing" has a different legal connotation than the word "resident". The purpose of the existing language is to facilitate the entry of Canadians and Mexican nationals. The revised language would also permit entry to aliens of other countries who are temporarily "residing" in Mexico and Canada, a substantive change with which we disagree.

<u>Section 109. Child</u>

The definition of the word "child" has been the subject of unending litigation, and any "technical" changes to its definition will undoubtedly cause further litigation.

In subsection (6)(B)(ii), the word "emigration" should be "immigration."

Section 113. Entry

The words "of an alien" should be inserted after the word "coming" in line 11. In line 13, the words "having a lawful permanent residence" should be inserted in place of the revised language which states "an alien lawfully admitted for permanent residence." An alien who may have been admitted for permanent residence may, upon seeking readmission, no longer have a "lawful permanent residence."

Section 116. Good moral character

In subsection (1)(F), the words "aggregate period" have been omitted without an explanation. In our view this is a substantive change because it is unclear in the revised language whether the number of days served in a penal institute can be aggregated to establish the 180 days period to preclude a finding of good moral character. See Ruiz v. INS, 410 F.2d 382 (6th Cir. 1969).

Section 127. Nonimmigrant

Preliminarily, we should note that many of the changes in this provision parallel the language found in the Proposed Revision of the Immigration and Nationality Act, the April 30, 1981, staff report of the Select Commission on Immigration and Refugee Policy (SCIRP). The SCIRP report, in proposing to revise the nonimmigrant classification, stated:

> The concept of a nonimmigrant is established in a positive context so that it is freed of the subjectivity, instinct, or sixth sense of the adjudicating officer. The requirement that a nonimmigrant have a residence in a foreign country which he has no intention of abandoning is dropped. Instead not only such residence, but employment and family ties abroad are also taken into account in determining whether an alien qualifies for classification as a nonimmigrant.

It is clear that while the revised section 127 ostensibly restates words in "simple language," its overall effect is to substantively change the statutory language.

In clauses (15), (17), and (18), the words "bona fide" are omitted. The Report characterizes these words as "surplus." In our view the omission creates substantive changes. The words "bona fide" are terms of art. Within the context of immigration law, the words impose an evidentiary requirement upon an alien, such as a "bona fide student."

In clauses (10), (17), (18), (19) the words "having a residence in a foreign country which he has no intention of abandoning," have been restated as "having a residence in a foreign country that the alien intends to maintain." While the restated language "reads better" we think that it creates a substantive change. The word "abandon" has a different legal connotation than the word "maintain." An alien who wishes to enter the United States as a "nonimmigrant" must prove that he has no intention of "abandoning" his residence, and not that he intends to maintain his residence in his home country.

Clause (12) restates the definition of "crewmember." The words "serving in good faith" have been replaced with the words "serving in any capacity." The restated language eliminates the "good faith" requirement thereby creating a substantive change. These words should be restored in the restated provision.

Clause (16)(A) restates the requirement for obtaining a fiancee visa. However, while the current section specifically states that the alien must "conclude a valid marriage," the restatement simply states "only to marry." It is unclear whether in fact the marriage must be a legally valid one. In our view the interpretation of this restatement can be a basis for litigation.

Clause 17(a) eliminates the requirement that the student be "qualified to pursue a full course of study." This requirement cannot be implied from the restated provision. The omission of this language arguably creates a substantive change.

Section 131. Refugee

The revised language substitutes, without an explanation, the words "is unable or unwilling to avail himself or herself of the protection of, that country" for the words "enjoy the protection of, that country." In our view this revision creates a major substantive change because the meaning of the word "enjoy" is so nebulous that it inevitably will be subject to conflicting judicial interpretations. The current language conforms to the United Nation's Convention and Protocol Relating to the Status of Refugees and should be retained.

Section 132. Residence

The words "in fact" should be restored in the definition so as to remove any ambiguities. See, Chan Wing Cheung v. Hamilton, 298 F.2d 650 (1st Cir. 1962).

Section 135. Spouse, wife, and husband

The current and only statutory definition of the terms "spouse," "wife," or "husband" is a negative one excluding a "marriage ceremony where the contracting parties thereto are not

physically present in the presence of each other, unless the marriage shall have been consummated." The revised language contains an affirmative definition that requires "a marriage ceremony during which both parties were not present only if the parties consummated the marriage."

In our view, the omission of the word "physically" is clearly a substantive change because legally one can be present somewhere without a physical presence. We recommend that the word "physically" be included in the restatement.

301. General authority of the Attorney General

In subsection (a)(1), the words "carry out" are substituted for "the administration and enforcement of" to eliminate unnecessary words. In our view these words should not be substituted because this language has been cited in court litigation to emphasize the role of the Attorney General in "enforcing" immigration laws. See Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979), cert. denied 446 U.S. 957. See also revised section 306(a)(3) where the word "enforcement" has not been replaced with the words "carry out."

In subsection (a)(2), the words "boundaries" and "control" have been omitted as surplus. In our view the change is substantive. "Control" is not necessarily mere surplus to "guard." The word "border" may only refer to the "continental border" as opposed to the United States boundaries in Hawaii or the U.S. Virgin Islands. We recommend that the original language be restored.

In subsection (b)(1), the Attorney General's authority to "prescribe forms of bonds" has been omitted as "unnecessary words." In our view the omission arguably creates substantive changes. It is questionable whether the Attorney General can "prescribe forms of bonds" absent Congressional authorization. The words should be restored in this subsection and wherever they may have been omitted. See for example revised sections 1101(a), 1712(b), and 2124.

In subsection (b)(2), the words "other independent establishment" should be restored, as not all "independent establishments" may qualify as an "agency" under the definition set forth at section 105.

In subsection (b)(3), the word "consent" has been substituted for the word "concurrence." In our view, the word "concurrence" should be restored, because both the Secretary of State and the Attorney General "concur" on a decision. To state otherwise would diminish the Attorney General's authority on this particular matter.

In subsection (d), it is unclear as to the scope of the jurisdiction of the "Attorney General's decision on a question of law related to immigration and naturalization..." In the current

law at 8 U.S.C. 1103, it is clear that the Attorney General's decision effects the Secretary of State, the officers of the Department of State, or diplomatic or consular officers.

Section 303. Searches and arrests

In subsection (a)(1), the word "question" has been substituted for the word "interrogation." The report makes this change for consistency with other titles of the United States Code. However, within the context of immigration law, the word "interrogation" connotes a "detentive situation," and immigration officers have the authority to "interrogate" aliens to the fullest extent permissible under the Fourth Amendment. See Zepeda v. United States, INS, 753 F.2d 719, 725-726 (9th Cir. 1985) (as amended) for the interpretation of the word "interrogation." Therefore, we recommend that word "interrogation" be restored in this section and in any other section where it may have been omitted.

In subsection (a)(2), the words "railway car, ...conveyance" should be restored to remove any ambiguities which may arise with the legal definition of the word "vehicle".

In subsection (b), it appears that, to execute a warrant or other process, the Attorney General must promulgate regulations. This requirement is not found under the current law, and its imposition would create a substantive change. Accordingly, we recommend that the added requirement be deleted.

Section 304. Oaths and testimony

The restatement omits the words "special inquiry officers" because "the definition of an immigration officer includes a special inquiry officer." However, "special inquiry officers" otherwise known as "immigration judges" are a special, distinct class of immigration officers. They are not employees of the INS, but employees of the Executive Office for Immigration Review. See 48 FR 8039 (Feb. 25, 1983). Therefore, for purposes of clarity and consistency, we recommend that the words "special inquiry officers" be restored in this section and in any other section where they may have been omitted.

Section 305. Local jurisdiction over immigrant stations

The restated section is much broader than the current law. Under current law, state or local officers have the right to enter an immigrant station to "preserve the peace and make arrests for crimes under the laws of the State." Under the restated version, these officers may enter the station to enforce any laws of the State. We think the restated version is too broad.

Section 331. General authority of the Secretary of State

Whether or not the restated language creates substantive changes is a question on which the Department of Justice defers to the Department of State.

Section 332. Bureau of consular affairs

See our comment to Section 331.

Section 1301. Documentary requirements and entering by fraud

The word "expire" is used in reference to the required documentation in lieu of the word "valid" used in existing provisions such as section 1182(e)(26). Validity does not depend only upon the issue of expiration. In our view the word "valid" should be retained.

In subsection (b)(1)(A), the words "valid...immigrant visa, reentry permit, border crossing identification card or other valid..." have been omitted as surplus. In our view these words define "entry document" and to that extent they should not be omitted.

Section 1302. Exclusion of aliens with physical or mental impairments

In subsection (a)(3), the restated language seems to exclude aliens who have had one attack of insanity, but not those with two or more attacks. While the latter may be implied, the current provision explicitly states that aliens who have had one or more attacks of insanity are excludable. These comments also apply to subsection (b)(3).

Section 1305. Exclusion of immoral and criminal aliens

In subsection (a)(8)(B), the words "compounding...sole...giving away" are omitted as surplus. In our view this creates a clear loophole under the plain meaning of the current section 1182(a)(23).

Section 1308. Exclusion of aliens associated with undemocratic ideals

The caption of this proposed section is inaccurate and misleading. While the new section restates the grounds for exclusion set forth in existing language sections 1182(a)(27),(28), and (29), all of which trace their origin to section 22 of the Internal Security Act of 1950, much of the revised section 1308 has

nothing to do with ideals, undemocratic or otherwise. We note that the SCIRP recommends that present paragraphs (28) and (29) be consolidated under the caption of "Espionage/Sabotage/Criminal Activities," and that paragraph (27) be captioned as "Foreign Policy." Accordingly, the Department of Justice recommends that the caption to revised section 1308 be changed to reflect the true nature of those grounds of exclusion.

In subsection (2), the word "affiliated" has been omitted whenever it occurs. In our view the omission creates a substantive change.

Section 1309. Exclusion of aliens with Nazi government associations

The word "assisted" is omitted as surplus. In our view the word is not "surplus," and should not be omitted.

Section 1314. Admission of aliens in the public or security interest

This provision is currently found under Title 50 of the United States Code. Absent a contrary congressional indication, there is no reason why the provision should be transferred to Title 8.

We note that in subsection (b)(1), the words "Commissioner of Immigration and Naturalization" have been omitted. However, in section 7 of the Act of June 20, 1949, 63 Stat. 212, the decision to admit a particular alien is made by the Director of the CIA, the Attorney General, and the INS Commissioner. In our view the restated language in omitting the words "Commissioner of Immigration and Naturalization" creates a substantive change. See Conference Report on H.R. 2419, Intelligence Authorization Act for Fiscal Year 1986, Section 601, where the Director of Central Intelligence, the Attorney General, and the Commissioner of Immigration, have been delegated the authority to jointly act on certain immigration matters.

Section 1315. Temporary admission and parole of aliens

In subsection (a)(3), the mandate of the Attorney General should be restored to that provided in the existing language of section 1182(d)(b), to include the specific power to "exact bonds" in controlling and regulating the admission and return of aliens. See our comments to revised section 301(b)(1).

Section 1501. Petitions for preference and immediate relative classification

In subsection (g), the first sentence should refer to revocation of "approval" of a petition, not merely revocation of a "petition."

Section 1503. Granting immigrant visas

Throughout this section, the word "qualified" is substituted for "eligible" for clarity. In our view, the word "qualified" implies more than being "eligible". Not all "eligible" aliens may "qualify" for a particular visa. Accordingly, the word "qualified" should be retained in this section and in any other section where it may have been changed. But see revised section 1551 where under similar circumstances the word "eligible" has been retained.

Section 1708. Inspecting arriving aliens

In subsection (a)(1), the word "shall" should be substituted for the word "may," because under current law all aliens "shall be inspected."

Section 1710. Aliens associated with undemocratic ideals

See our comments to section 1308.

Section 2104. Deportation of aliens associated with undemocratic ideals

See our comments to section 1308.

Section 2122. Arrest, detention, and release of aliens during deportation proceedings

In subsection (b), the law is restated to create a substantive change. The current law reads in pertinent part; "upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability." (emphasis added) The revised section states "if conclusively shown that the Attorney General is not proceeding reasonably quickly to decide if the alien is deportable."(emphasis added) In our view, the restated provision creates substantive changes, because "quickness" is not the only determinative factor in the current law.

Section 2124. Detention, release, and deportation of aliens ordered deported

In subsection (c), the words "reasonably quickly" should be restored to provisions more accurately reflecting a totality of circumstances approach. See our comments to section 2122(b).

Section 2126. Countries to which the Attorney General may deport aliens

In subsection (a)(2)(A), the word "participated" is substituted for the words "ordered, incited, assisted, or otherwise participated" in persecution. The issue of the degree of involvement sufficient to trigger ineligibility remains open, and it appears that the language "participated" may be construed as disqualifying a more narrow group of aliens than the present statutory language. For these reasons, the original language should be restored. *See* revised section 131(2) where the identical language has remained intact.

In subsection (e)(2)(B), the restatement adds the requirement that the Attorney General "decide" the alien is dangerous to the community after conviction of a particularly serious crime. The present statutory language suggests no need for a separate decision concerning "seriousness" once the existence and serious nature of the collateral conviction is established.

Section 2128. Suspension of deportation

In subsection (a)(1)(B) and (a)(2)(B), the word "physical" is omitted from the words "continuous physical presence." In light of the past and continuing litigation over the "presence" requirement, the modifier "physical" cannot be deemed mere surplus. The word "physical" cannot be eliminated absent a substantive change.

In subsection 2128(d), it should be noted that the Supreme Court in *INS v. Chada*, 103 S. Ct. 2769 (1983) found this particular Congressional veto provision to be unconstitutional.

Section 3302. Eligibility requirements

The modifier "physical" omitted in subsection (b)(8) should be restored. See our comments to section 2138.

Section 3304. Residence and presence of individuals married to citizen of the United States

In subsection (b)(i)(F) and (G), the word "bona fide" has been omitted, and in subsection (b)(3), the word "good faith" has been omitted. In our view, for the reasons stated in our comments to revised section 127, these phrases should be restored.

Section 3331. Individuals associated with undemocratic ideals

See our comments to revised section 1308.

Section 5101. Passports

Whether subsection (c) creates substantive changes is a question on which the Department of Justice defers to the views of the Department of State. We do think, however, that the definition contained in clause (1) is an unwarranted and unacceptable expansion of the existing provision of 22 U.S.C. 211(a). To specify, as the existing statute does, that a passport may restrict travel or use does not authorize the creation by implication of the additional statutory language contained in clause (1).

Section 6106. Asylum

The modifier "physically" now appearing in 8 U.S.C. 1158 (a) should be restored in describing those aliens "present" and eligible to apply for asylum.

Section 6 of H.R. 3321 sets forth the repeals of various statutes to be superseded by the codification. This, too, is under the mandate that the restatement must work no substantive change in existing law. However, page 94 of the bill indicates that the Cuban Adjustment Act (Pub. L. No. 89-732, November 2, 1966) is among the statutes to be repealed. This is an error. The Cuban Adjustment Act (presently set forth at 8 U.S.C. 1255 note) remains valid, contains no expiration date or other limitation, and continues to be implemented and provide a special means for the disbursement of immigration benefits. H.R. 3321 must be modified to strike the indicated "repeal" and to make appropriate changes within the operative provisions of the bill concerning adjustment of status and limitation on immigration (e.g., new sections 1112 and 2141).

The Department of Justice anticipates that there may well be other changes in H.R. 3321 which may arguably be substantive in nature. We would recommend that the Office of the Law Revision Counsel compile a side-by-side comparison of the existing laws with the revised language. This would facilitate a more thorough review by the Department of Justice and other affected agencies.

Finally, we are concerned that the codification will alter radically the current numbering system of the Immigration and Nationality Act. INS has relied on this numbering system to publish regulations, 8 C.F.R. 101 et seq., Operating Instructions, and other administrative manuals. Moreover, there are approximately 1,000 immigration forms, 100 of which are for public use. These forms also use the same numbering system. We estimate that simply to reprint the Operations Instruction will cost INS $646,000. We must also note that the changes in the numbering system will certainly be disruptive in the legal community. Therefore, the Department of Justice, would urge that any formal codification of the immigration laws preserve the existing numbering system to the maximum extent possible.

Since both Houses of Congress are considering major immigration reform legislation, it may be preferable to defer codification proposals until the ultimate fate of the legislation is determined.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

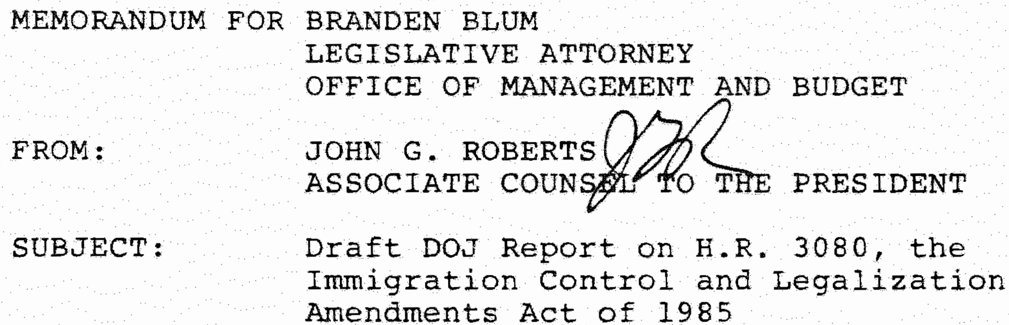
Sincerely,

John R. Bolton
Assistant Attorney General

THE WHITE HOUSE

WASHINGTON

October 30, 1985



MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Draft DOJ Report on H.R. 3080, the Immigration Control and Legalization Amendments Act of 1985

Counsel's Office has reviewed the above-referenced report, and finds no objection to it from a legal perspective. On page 12, line 10, "employers" should be "employees."

ID # _______________ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
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Date Correspondence Received (YY/MM/DD) __/__/__

Name of Correspondent: James C. Miller

☐ **MI Mail Report** **User Codes:** (A) ______ (B) ______ (C) ______

Subject: Draft DOJ report on H.R. 3080, the Immigration Control and Legalization Amendments Act of 1985

ROUTE TO: **ACTION** **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
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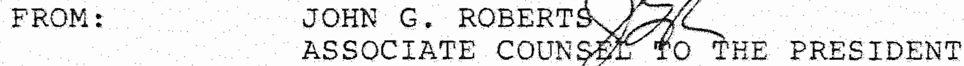
THE WHITE HOUSE

WASHINGTON

August 28, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT



SUBJECT: DOJ Draft Report on S. 196, a Bill to Amend the Immigration and Nationality Act Concerning Barring Certain Aliens from Admission into the United States

Counsel's Office has reviewed the above-referenced draft report, and finds no objection to it from a legal perspective.

332838

ID # CU

JV

IM

JR

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

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Name of Correspondent: James C. Miller

☐ **MI Mail Report** **User Codes:** (A) ______ (B) ______ (C) ______

Subject: DOJ draft report on S.196 a bill to amend the Immigration and Nationality Act concerning barring certain aliens from admission into the U.S.

ROUTE TO: Office/Agency (Staff Name)	ACTION: Action Code	ACTION: Tracking Date YY/MM/DD	DISPOSITION: Type of Response	DISPOSITION: Code	DISPOSITION: Completion Date YY/MM/DD
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

332838

July 15, 1985

LEGISLATIVE REFERRAL MEMORANDUM

TO: Department of State

Department of Health and Human Services

National Security Council

SUBJECT: DOJ draft report on S. 196, a bill to amend the Immigration and Nationality Act concerning barring certain aliens from admission into the United States

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than

Tuesday, August 6, 1985.

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.

Gregory M Jones for
James C. Murr for
Assistant Director for
Legislative Reference

cc: F. Fielding
J. Cooney
T. Treacy
S. Gates
S. Brentlinger

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

82-0120 - meb:am

Office of the Assistant Attorney General

Washington, D.C. 20530

DRAFT

Honorable Strom Thurmond
Chairman, Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on S.196, a bill to repeal section 212(a)(4) of the Immigration and Nationality Act, as amended. For the reasons set forth below this Department recommends against enactment of the legislation in its current form.

Section 212(a)(4) of the Immigration and Nationality Act of 1952 provides that "[a]liens afflicted with psychopathic personality, or sexual deviation, or a mental defect" are ineligible to receive visas and are barred from admission into the United States. The proposed bill would repeal that section and add a new section 212(a)(4) which encompasses only: "aliens afflicted with a mental disease or defect". While it is uncertain from this language exactly which aliens are included in the new category, we assume that one of the bill's primary purposes is to remove homosexual aliens from coverage under the present section 212(a)(4).

Although the current section 212(a)(4) does not contain a specific reference to homosexual aliens, the legislative history of that section clearly shows that Congress intended it to include homosexual aliens. The Conference Report to the 1952 Immigration and Nationality Act shows that Congress adopted the Public Health Service view that homosexuality was a form of sexual perversion. This Congressional interpretation currently provides the basis for the exclusion of homosexual aliens under 212(a)(4), even though in 1979 the Public Health Service refused to certify homosexual aliens as having a "mental disease or defect".

The Department of Justice supports legislation to eliminate homosexuality as a ground for exclusion. However, merely changing section 212(a)(4) to encompass aliens with a "mental disease or defect," without explicitly defining that phrase, would not accomplish that goal. It is necessary to provide some clear indication that Congress does not now consider homosexual aliens to have a "mental defect."

The Department of Justice recommends adoption of medical terminology proposed by the Public Health Service instead of the language used in section 212(a)(4) or in the proposed bill. Those aliens excludable under the Public Health Service proposal include "aliens with an antisocial personality disorder or a paraphilia condition." The Public Health Service states that these terms are the proper psychiatric diagnostic classifications currently in use, and are medically defined so as not to include homosexuality. This language replaces the term "psychopathic personality" and "sexual deviation" contained in section 212(a)(4). The term "mental defect" is not used.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's programs.

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General

THE WHITE HOUSE

WASHINGTON

August 28, 1985

MEMORANDUM FOR THE FILE

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Correspondence Regarding Deportation Proceedings Against Karl Linnas, a Citizen of Estonia

No action is appropriate in response to Juhan Simonson's letter to the President urging action to prevent the deportation of Karl Linnas by the Justice Department Office of Special Investigations. The matter is a particular matter pending before the courts, and the views of the Government are being presented in the course of litigation by the Department of Justice. In the course of related litigation (the Fedorenko case), the Department of State determined that deportation of a citizen of one of the Baltic states to the Soviet Union would not contravene the U.S. Government non-recognition policy. Mr. Simonson's organization is already aware of these facts.

ID# 291921

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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DATE RECEIVED: MARCH 25, 1985

NAME OF CORRESPONDENT: MR. JUHAN SIMONSON

SUBJECT: WRITES REGARDING DEPORTATION PROCEEDINGS AGAINST KARL LINNAS, A CITIZEN OF ESTONIA

ROUTE TO: OFFICE/AGENCY (STAFF NAME)	ACTION: ACT CODE	ACTION: DATE YY/MM/DD	DISPOSITION: TYPE RESP	DISPOSITION: C D	DISPOSITION: COMPLETED YY/MM/DD
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REFERRAL NOTE:					
CU ATTN: JOHN ROBERTS	A	85/04/08			/ /
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COMMENTS:

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*C-COMMENT/RECOM	*B-NON-SPEC-REFERRAL	* CODE = A
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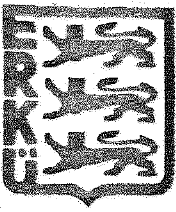

ESTONIAN AMERICAN NATIONAL COUNCIL

ESTONIAN HOUSE · 243 EAST 34TH STREET
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Acting Secretary General
Jaan Tiivel

March 20, 1985

President Ronald W. Reagan
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C.

Re: Republic of Estonia
U.S. Nonrecognition Policy
Deportation Proceedings against Karl Linnas

Dear Mr. President:

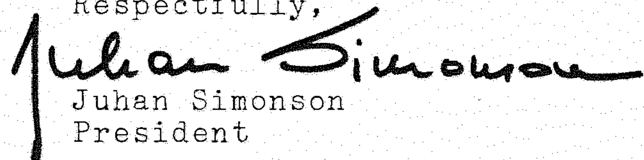
We are compelled to bring to your urgent attention the deportation proceedings against Karl Linnas, a citizen of the Republic of Estonia, for the reason that the outcome may have a serious negative impact on the long-standing foreign policy of the United States to not recognize the forcible and illegal incorporation of Estonia, Latvia, and Lithuania into the U.S.S.R.

Mr. Linnas has been found deportable on the basis of evidence provided by the Soviet K.G.B. The Soviet Union alone has agreed to accept Mr. Linnas into its territory. However, it must be pointed out that Karl Linnas was condemned to death in absentia by a Soviet Court in Estonia (with the verdict published prior to the conclusion of the trial!) and the Soviets demanded his extradition in 1961. The demand was denied by the United States Government.

Under the circumstances, the deportation of Karl Linnas to the U.S.S.R. or Estonia would constitute imposition of the death penalty for a violation of U.S. immigration law, reverse a U.S. Government decision not to extradite Mr. Linnas to the U.S.S.R., and very seriously weaken the credibility of the U.S. nonrecognition policy.

We urge you, Mr. President, to do whatever is in your power to prevent Karl Linnas from being deported to the Soviet Union and prevent a miscarriage of justice.

Respectfully,



Juhan Simonson
President

cc: Hon. George P. Shultz

The Estonian American National Council, founded in 1952, is a non-governmental, non-profit organization, nationally elected to represent Americans of Estonian descent.

THE WHITE HOUSE

WASHINGTON

September 27, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOL & DOA Testimony on H.R. 3080, the Foreign Agricultural Workers Provisions Contained in the Immigration Control and Legalization Amendments Act of 1985

Counsel's Office has reviewed the above-referenced testimonies, and finds no objection to them from a legal perspective.

ID # ______ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Date Correspondence Received (YY/MM/DD) __ / __ / __

Name of Correspondent: J. C. Miller

☐ **MI Mail Report** **User Codes: (A)** ______ **(B)** ______ **(C)** ______

Subject: DOL & DOA testimony on H.R. 3080, the foreign agricultural workers provisions contained in the Immigration Control and Legalization Amendments Act of 1985

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CUAT18	R	85/09/27		S	85/09/27
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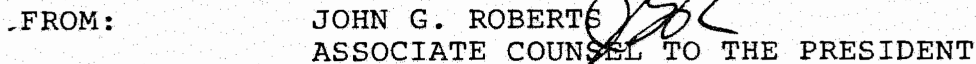
THE WHITE HOUSE

WASHINGTON

September 16, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET



FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Draft EEOC Statement Discussing the Anti-Discrimination Provisions Contained in H.R. 3080, the Immigration Control and Legalization Amendments Act of 1985

Counsel's Office has reviewed the above-referenced proposed testimony. On pages 6-7 of this testimony, Chairman Thomas states that the employer sanctions provision may result in an increase in discrimination against documented individuals, on the basis of national origin. Previous Justice testimony, particularly that of Brad Reynolds, went to considerable lengths to establish the opposite. This inconsistency should be resolved. Perhaps paragraph (6) could be deleted, or rephrased along the lines of "some have argued that," without the Chairman appearing to agree that discrimination will increase.

ID # _______________ CU

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Name of Correspondent: James Mun

☐ **MI Mail Report** **User Codes:** (A) ______ (B) ______ (C) ______

Subject: Draft EEOC statement discussing the anti-discrimination provisions contained in H.R. 3080 the Immigration Control and Legalization amendments act of 1985

ROUTE TO: **ACTION** **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
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EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

OFFICIAL

September 12, 1985

LEGISLATIVE REFERRAL MEMORANDUM

TO:
Department of Agriculture - Eric Mondres (447-7095)
Department of Health and Human Services - Frances White (245-7760)
Department of Justice - Jack Perkins (633-2113)
Department of State - Bill Farrah (632-0430)
Department of Education - JoAnne Durako (732-2670)
Department of Commerce - Mike Levitt (377-3151)
Department of the Treasury - Carol Toth (566-8523)
National Security Council
Council of Economic Advisers

SUBJECT: Draft EEOC statement discussing the anti-discrimination provisions contained in H.R. 3080, the Immigration Control and Legalization Amendments Act of 1985

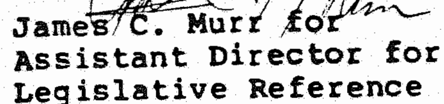
The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than

NOON MONDAY, SEPTEMBER 16, 1985.

(NOTE: Justice testimony for the this hearing, scheduled for 9/18/85, has already been circulated.)

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.



James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: F. Fielding, J. Cooney, T. Treacy, S. Gates, S. Elliff, P. Hanna, B. White, A. Hoffman

1ST DRAFT

STATEMENT OF CLARENCE THOMAS, CHAIRMAN
OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
FOR THE SUBCOMMITTEE ON IMMIGRATION, REFUGEES,
AND INTERNATIONAL LAW REGARDING H.R. 3080
TO AMEND THE IMMIGRATION AND NATIONALITY ACT

THANK YOU FOR INVITING ME, AS CHAIRMAN OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TO COMMENT UPON THE ANTI-DISCRIMINATION PROVISIONS CONTAINED IN H.R. 3080. THE LEGISLATION PROPOSES TO AMEND THE IMMIGRATION AND NATIONALITY ACT TO REVISE AND REFORM THE IMMIGRATION LAWS. H.R. 3080 ALSO PROPOSES TO ENACT AN ALTERNATIVE ENFORCEMENT MECHANISM TO INVESTIGATE AND PROSECUTE ANY RESULTING EMPLOYMENT RELATED CHARGES OF DISCRIMINATION.

SIMILARLY, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) IS CHARGED WITH THE ENFORCEMENT OF THE CIVIL RIGHTS STATUTES, INCLUDING TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C 2000e ET SEQ. TITLE VII PROHIBITS EMPLOYMENT DISCRIMINATION ON THE BASIS OF RACE, COLOR, SEX, NATIONAL ORIGIN AND RELIGION. TITLE VII APPLIES TO ANY CHARGE OF EMPLOYMENT DISCRIMINATION BY AN EMPLOYER OF FIFTEEN OR MORE PERSONS AGAINST ANY INDIVIDUAL ON THE BASIS OF THE INDIVIDUAL'S NATIONAL ORIGIN. THE TERM "NATIONAL ORIGIN" REFERS TO THE COUNTRY OF ORIGIN WHERE A PERSON WAS BORN OR, MORE BROADLY, THE COUNTRY FROM WHICH HIS OR HER ANCESTORS CAME. IT IS NOT RESTRICTED TO ANY ONE ETHNIC GROUPING.

FURTHER, TITLE VII, BY ITS TERMS, APPLIES TO ALL WORKERS AND APPLICANTS, WHETHER DOCUMENTED OR UNDOCUMENTED, EXCEPT AS PROVIDED IN SECTION 702, WHICH ADDRESSES THE EMPLOYMENT OF ALIENS OUTSIDE THE JURISDICTIONAL BOUNDARIES OF THE UNITED STATES. TITLE VII ALREADY MAKES IT UNLAWFUL FOR AN EMPLOYER TO DISCRIMINATE WITH REGARD TO THE HIRING, DISCHARGE, OR ANY TERMS AND CONDITIONS OF EMPLOYMENT ON THE BASIS OF NATIONAL ORIGIN. ADDITIONALLY, THE ACT HAS BEEN INTERPRETED BY THE SUPREME COURT AS ALLOWING THE AGGRIEVED INDIVIDUAL FULL "MAKE WHOLE" RELIEF AND BACKPAY FOR TWO YEARS PRIOR TO THE CHARGE FILING.

H.R. 3080 PROPOSES TO MAKE IT UNLAWFUL FOR A PERSON TO HIRE OR RECRUIT UNDOCUMENTED WORKERS KNOWING THAT THE WORKER IS AN "UNAUTHORIZED ALIEN" OR WITHOUT COMPLYING WITH THE VERIFICATION REQUIREMENTS OF THE BILL. THE LEGISLATION ALSO PROVIDES BOTH CIVIL AND CRIMINAL SANCTIONS FOR PERSONS WHO HAVE ENGAGED IN A PATTERN OR PRACTICE OF EMPLOYING UNDOCUMENTED WORKERS AND PROVIDES A CIVIL MONEY PENALTY FOR THE PAPERWORK VIOLATIONS. ADDITIONALLY, THE LEGISLATION WOULD ALLOW LIMITED AMNESTY FOR UNDOCUMENTED WORKERS CURRENTLY IN THIS COUNTRY, A SYSTEM FOR EXPANDING THE TEMPORARY FOREIGN AGRICULTURAL WORKER PROGRAM, ALONG WITH ITS BROAD ANTI-DISCRIMINATION PROVISIONS.

H.R. 3080, WOULD AMEND THE IMMIGRATION AND NATURALIZATION ACT TO ADD SECTION 274(B)(b)(2), WHICH SPECIFICALLY STATES THAT THERE IS BE NO OVERLAP BETWEEN EEOC COMPLAINTS AND THOSE SUBMITTED PURSUANT TO H.R. 3080. ADDITIONALLY, SECTION 274(d)(2)(e) PROVIDES:

> EXCEPT AS MAY BE SPECIFICALLY PROVIDED IN THIS SECTION, NOTHING IN THIS SECTION SHALL BE CONSTRUED TO RESTRICT THE AUTHORITY OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TO INVESTIGATE ALLEGATIONS, . . . , AS PROVIDED IN SECTION 706 OF THE CIVIL RIGHTS ACT OF 1964 (42 U.S.C. 2000e-5), OR ANY OTHER AUTHORITY PROVIDED THEREIN.

AS OF THIS DATE, THE COMMISSION, AS A BODY, HAS NOT ADDRESSED THE RAMIFICATIONS OF H.R. 3080 OR S. 1200, A SIMILAR BILL WHICH WAS RECENTLY APPROVED ON JULY 30, 1985 BY THE SENATE JUDICIARY COMMITTEE.

HOWEVER, GIVEN THE CLARIFICATION OFFERED WITHIN H.R. 3080, I ANTICIPATE THAT, IF ENACTED, H.R. 3080 SHOULD HAVE A MINIMAL IMPACT ON THE EEOC'S AUTHORITY TO INVESTIGATE AND PROSECUTE COMPLAINTS. THEREFORE, I WILL CONFINE MY COMMENTS TO THOSE SECTIONS OF THE BILL WHICH MAY POSE TECHNICAL INCONSISTENCIES WITH TITLE VII.

EEOC STAFF HAS MADE THE FOLLOWING OBSERVATIONS:

1) TITLE VII, AS INTERPRETED BY THE SUPREME COURT IN ESPINOZA v. FARRAH MANUFACTURING CO., 414 U.S. 86 (1973), ALREADY PROVIDES COVERAGE WITH REGARD TO CLAIMS OF EMPLOYMENT DISCRIMINATION BECAUSE OF NATIONAL ORIGIN. FURTHER, THE EEOC ALREADY HAS AN ENFORCEMENT ORGANIZATION IN PLACE, WITH TWENTY-TWO DISTRICT OFFICES AND MORE THAN THREE THOUSAND EMPLOYEES, WHOSE MAIN FUNCTION IS TO INVESTIGATE THE EMPLOYMENT RELATED DISCRIMINATION CHARGES ON THE BASIS OF NATIONAL ORIGIN, RACE, SEX, RELIGION OR COLOR.

2) TITLE VII APPLIES TO PRIVATE SECTOR EMPLOYERS WITH FIFTEEN OR MORE EMPLOYEES. H.R. 3080 WOULD EXTEND COVERAGE TO EMPLOYERS WITH FEWER THAN FIFTEEN EMPLOYEES, BUT ONLY WITH REGARD TO NATIONAL ORIGIN CLAIMS. TO THE EXTENT THAT STRENGTHENED ENFORCEMENT PROTECTION IS AFFORDED INDIVIDUALS AGGRIEVED BY H.R. 3080, THAT SAME PROTECTION SHOULD APPLY TO THE LARGER EMPLOYERS AND OTHER CHARGES BROUGHT UNDER TITLE VII, INCLUDING RACE, COLOR, SEX, AND RELIGION. OTHERWISE, ONLY CHARGES BROUGHT ON THE BASIS OF NATIONAL ORIGIN, AND UNDER H.R. 3080, WOULD RECEIVE THE BENEFIT OF THE EXPEDITED PROCESSING PROCEDURES, CEASE AND DESIST AUTHORITY, AND AN ENFORCEMENT MECHANISM DEVOTED TO NATIONAL ORIGIN CLAIMS ONLY, AS PROPOSED IN H.R. 3080. IRONICALLY, THE SMALLER EMPLOYER, THOSE WITH FOUR TO FOURTEEN EMPLOYEES, COULD BE SUBJECT TO TOUGHER ENFORCEMENT PROCEDURES UNDER H.R. 3080 THAN ARE THE EMPLOYERS WITH MORE THAN FIFTEEN EMPLOYEES, WHO ARE SUBJECT TO TITLE VII.

3) H.R. 3080 IS AIMED AT RECRUITMENT AND HIRING DISCRIMINATION ONLY. TITLE VII COVERS DISCHARGE, TERMS AND CONDITIONS OF EMPLOYMENT, WAGES AND ALL OTHER EMPLOYMENT RELATED BENEFITS AND PRIVILEGES. MOST OF THE NATIONAL ORIGIN CHARGES, WHICH THE COMMISSION RECEIVES, ALLEGE DISCRIMINATION IN DISCHARGE (TERMINATIONS) OR TERMS AND CONDITIONS OF EMPLOYMENT. THEREFORE, AS PROPOSED, H.R. 3080 MAY NOT REACH MANY OF THE CHARGES WHICH MAY RESULT FROM THE ENACTMENT OF H.R. 3080.

4) EEOC REGULATIONS ADDRESS DISCRIMINATION ON THE BASIS OF CITIZENSHIP. ALTHOUGH TITLE VII DOES NOT MAKE IT UNLAWFUL FOR AN EMPLOYER TO DISCRIMINATE ON THE BASIS OF AN INDIVIDUAL'S CITIZENSHIP, THE COMMISSION, IN ITS COMPLIANCE MANUAL SECTION 622, "CITIZENSHIP, RESIDENCY REQUIREMENTS, ALIENS AND UNDOCUMENTED WORKERS" (COPY ATTACHED) HAS CONCLUDED THAT DISCRIMINATION AGAINST ANY INDIVIDUAL BECAUSE OF A LACK OF CITIZENSHIP, WHILE NOT *PER SE* DISCRIMINATION, MAY UNDER CERTAIN CIRCUMSTANCES, CONSTITUTE UNLAWFUL DISCRIMINATION BECAUSE OF NATIONAL ORIGIN WITHIN THE MEANING OF TITLE VII. SPECIFICALLY, IN THOSE CIRCUMSTANCES WHERE CITIZENSHIP REQUIREMENTS HAVE THE PURPOSE OR EFFECT OF DISCRIMINATING AGAINST AN INDIVIDUAL ON THE BASIS OF NATIONAL ORIGIN, THE IMPOSITION OF THE REQUIREMENTS WOULD BE PROHIBITED BY TITLE VII.

H.R. 3080, IF ENACTED, SIMILARLY WOULD PROHIBIT DISCRIMINATION ON THE BASIS OF "CITIZENSHIP OR ALIEN STATUS", IF THE PERSON CLAIMING DISCRIMINATION IS A U.S. CITIZEN OR "PERMANENT RESIDENT ALIEN, REFUGEE, ASYLEE, OR NEWLY LEGALIZED ALIEN WHO HAS FILED A NOTICE OF INTENT TO BECOME A U.S. CITIZEN." IT IS UNCLEAR HOW MUCH MORE PROTECTION WOULD BE AFFORDED UNDER H.R. 3080 THAN CURRENTLY IS PROVIDED UNDER EEOC'S INTERPRETATION OF TITLE VII.

5) <u>IN FACT, IT IS POSSIBLE THAT H.R. 3080 MAY PROVIDE LESS NATIONAL ORIGIN PROTECTION THAN DOES TITLE VII</u>. FOR EXAMPLE, H.R. 3080 PROVIDES A LIMITATION ON BACK PAY LIABILITY. UNDER H.R. 3080, BACK PAY LIABILITY MAY NOT ACCRUE FROM A DATE MORE THAN TWO YEARS PRIOR TO THE FILING OF A CHARGE WITH AN ADMINISTRATIVE LAW JUDGE. YET, THE INITIAL FILING OF THE CHARGE IS WITH THE SPECIAL COUNSEL. IT MAY BE YEARS BEFORE THE CHARGE IS PRESENTED TO THE ADMINISTRATIVE LAW JUDGE. TITLE VII, BY CONTRAST, ALLOWS BACK PAY FOR A PERIOD OF TWO YEARS PRIOR TO THE CHARGE FILING.

6) <u>TO THE EXTENT THAT THE EMPLOYER SANCTIONS ARE TO BE STRICTLY ENFORCED, THE COMMISSION ANTICIPATES THAT EMPLOYERS, NOT WANTING TO VIOLATE THE IMMIGRATION LAWS, MAY BE RELUCTANT TO HIRE ANY INDIVIDUAL WHOM IT SUSPECTS AS BEING UNDOCUMENTED</u>. CONSEQUENTLY, EMPLOYERS MAY REFUSE TO CONSIDER, OR DISCHARGE, DOCUMENTED INDIVIDUALS, ESPECIALLY

HISPANICS AND ASIANS, BASED ON THEIR APPARENT NATIONAL ORIGIN. EMPLOYMENT DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN MAY INCREASE. CONSEQUENTLY, THE COMMISSION ANTICIPATES THAT ITS NATIONAL ORIGIN DISCRIMINATION CHARGE ACTIVITY MAY INCREASE WITH THE PASSAGE OF H.R. 3080 OR ANY OTHER IMMIGRATION LEGISLATION WHICH IMPOSES CIVIL OR CRIMINAL PENALTIES.

7) H.R. 3080, AT SECTION 274B(c) CREATES AN OFFICE OF SPECIAL COUNSEL IN THE DEPARTMENT OF JUSTICE WITH THE RESPONSIBILITY "FOR [THE] INVESTIGATION OF CHARGES AND ISSUANCE OF COMPLAINTS UNDER THIS SECTION AND IN RESPECT TO THE PROSECUTION OF COMPLAINTS UNDER THIS SECTION. . ."

I HAVE BEEN TOLD THAT PROPONENTS IN FAVOR OF THE ESTABLISHMENT OF A SEPARATE "SPECIAL COUNSEL" OUTSIDE OF THE EEOC HAVE ARGUED THAT TITLE VII IS INADEQUATE BECAUSE:

1. TITLE VII, WHICH APPLIES TO EMPLOYERS OF FIFTEEN OR MORE PERSONS, WOULD NOT COVER THE SMALL BUSINESS AND SEASONAL EMPLOYERS, I.E. THOSE WITH FOUR TO FOURTEEN EMPLOYEES;

2. TITLE VII DOES NOT PROHIBIT DISCRIMINATION ON THE BASIS OF CITIZENSHIP;

3. SECTION 703(h) OF TITLE VII ALLOWS A "BONA FIDE OCCUPATIONAL QUALIFICATION" EXCEPTION AS A DEFENSE TO A NATIONAL ORIGIN CHARGE;

4. TITLE VII ALLOWS AN OTHERWISE DISCRIMINATORY BUSINESS PRACTICE WHICH MAY HAVE A DISCRIMINATORY IMPACT IF THE PRACTICE BEARS A REASONABLE BUSINESS RELATIONSHIP TO THE BUSINESS AND IS SUPPORTED BY BUSINESS NECESSITY;

5. A TITLE VII CHARGE IS VIEWED AS TOO DIFFICULT AND TIME CONSUMING TO PROCESS;

6. TITLE VII DOES NOT HAVE AN EXPEDITED ADMINISTRATIVE PROCESS FOR ADJUDICATING CLAIMS, SUCH AS CEASE AND DESIST AUTHORITY; AND

7. THERE IS A BELIEF THAT HISPANIC INDIVIDUALS HAVE NOT AVAILED THEMSELVES OF EEOC'S SERVICES DUE TO SUCH SHORTCOMINGS AS A LACK OF OUTREACH TO HISPANICS.

I WILL NOT ATTEMPT TO ARGUE THE PROCEDURAL POINTS WHICH HAVE BEEN RAISED. HOWEVER, IT WOULD SEEM THAT IF THERE ARE DEFICIENCIES WITHIN TITLE VII, THE SOLUTION MAY BE TO STRENGHTEN TITLE VII, NOT CREATE ANOTHER AGENCY.

MOREOVER, IF STRENGTHENED ANTI-DISCRIMINATION PROCEDURES ARE INSTITUTED WITH REGARD TO ONLY THE NATIONAL ORIGIN CHARGES WHICH MAY RESULT DUE TO THE ENACTMENT OF H.R. 3080, IT APPEARS TO RELEGATE TITLE VII NATIONAL ORIGIN, SEX AND RACE CHARGES TO A LOWER STATUS BY NOT EXTENDING A SIMILAR LEVEL OF PROTECTION.

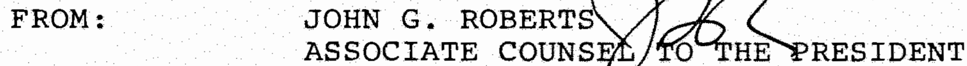
I HOPE THESE COMMENTS ARE HELPFUL IN ADDRESSING SOME OF THE CONCERNS WHICH HAVE BEEN SUGGESTED BY THE ANTI-DISCRIMINATION PROVISIONS OF H.R. 3080, AS PROPOSED.

THE WHITE HOUSE

WASHINGTON

September 12, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET



FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Testimony of William Bradford Reynolds on H.R. 3080, the Immigration Control and Legalization Amendments Act of 1985

Counsel's Office has reviewed the above-referenced testimony, and finds no objection to it from a legal perspective.

ID # ________ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Date Correspondence Received (YY/MM/DD) __/__/__

Name of Correspondent: Brandin Blum

☐ **MI Mail Report** **User Codes:** (A) ______ (B) ______ (C) ______

Subject: DOJ testimony of Wm. Bradford Reynolds on H.R. 3080, the Immigration Control and Legalization amendments act of 1985

ROUTE TO: | **ACTION** | **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUI Hall	ORIGINATOR	85/09/12			/ /
	Referral Note:				
CUat 18	R	85/09/12		S	85/09/16
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ACTION CODES:

- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:

- A - Answered
- B - Non-Special Referral
- C - Completed
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5/81

OFFICE OF MANAGEMENT AND BUDGET
ROUTE SLIP

TO ✓John Roberts

Lou Hays

- Take necessary action ☐
- Approval or signature ☐
- Comment ☐
- Prepare reply ☐
- Discuss with me ☐
- For your information ☐
- See remarks below ☐

FROM Branden Blum BB

DATE 10/2/85

REMARKS

Attached FYI is a copy of the Civil Rights Commission's testimony on the anti-discrimination provisions contained in immigration reform legislation (H.R. 3080). Copies have also been forwarded to concerned agencies.

OMB FORM 4

TESTIMONY OF CLARENCE M. PENDLETON, JR

CHAIRMAN, U.S. COMMISSION ON CIVIL RIGHTS

BEFORE THE SENATE SUBCOMMITTEE

ON IMMIGRATION AND REFUGEES

AND

THE HOUSE SUBCOMMITTEE ON

IMMIGRATION, REFUGEES, AND INTERNATIONAL LAW

October 7, 1985

Mr. Chairman, Members of both Subcommittees, I am pleased to appear here today in response to your invitation that I testify on the anti-discrimination provisions of H.R. 3080.

I should note at the outset of my testimony that the reconstituted Commission on Civil Rights has not adopted a position on the anti-discrimination provisions of H.R. 3080 or on immigration reform generally. I am, therefore, speaking on behalf of the Commission only to the extent that my remarks address the Commission's role in the proposed legislation. In this connection, I want to discuss this bill's lack of clarity in defining the Commission's role and the Commission's ability to fulfill that role.

H.R. 3080 assigns an important enforcement function to the Commission. Under section 402(b) of the bill, the Commission

would be required to monitor the implementation and enforcement of the provisions of section 274A of the Immigration and Nationality Act, and to investigate allegations that the enforcement or implementation of that section has resulted in discrimination against citizens or aliens who are not unauthorized aliens. In addition, the Commission is required to submit three reports at eighteen-month intervals to the House and Senate Judiciary Committees, describing the implementation and enforcement of the Act for the purpose of determining whether implementation and enforcement of the Act have resulted in discrimination.

It is unfortunate, given what appears to be the significant role that the Commission is intended to assume, that the bill provides insufficient guidance to the Commission to understand clearly the intent of Congress. For example, when the bill states that the Commission shall investigate allegations of "unlawful discrimination by race or nationality against citizens of the United States or aliens who are not unauthorized aliens," what does the word "nationality" mean? Is it synonymous with the phrase "national origin" that is currently used in Title VII of the Civil Rights Act of 1964 which prohibits discrimination in employment or Title VIII of the Civil Rights Act of 1968 which prohibits discrimination in housing? While the phrase "national origin" is well-defined through court cases and other sources of authority, the term "nationality" is undefined in both civil rights case law and the bill itself.

For that matter, inasmuch as the provisions regarding the Commission, the Special Counsel, and the President are in the bill to allay concerns that the employer sanctions will produce discrimination, one would expect consistency with respect to the kinds of discrimination each is to address.

Yet the language in these provisions is markedly different. The Commission is directed by H.R. 3080 to investigate allegations that the employer sanctions have resulted in "unlawful discrimination by race or nationality" against U.S. citizens or permanent or temporary resident aliens intending to become citizens. The President is directed under the bill to publish three reports describing the impact of employer sanctions on "discrimination against citizen and permanent resident alien members of minority groups." And the Office of Special Counsel is to investigate discrimination "against any individual (whether a citizen or permanent or temporary resident alien) with respect to hiring, or recruitment or referral for a fee, because of national origin or citizenship status."

Why is the Commission directed to examine racial discrimination when the Special Counsel has not been so directed? Why is the Commission directed to investigate discrimination based on nationality and the Special Counsel, discrimination based on "national origin"? Why are the Commission's investigations of discrimination restricted to unlawful discrimination, while the reports by the President are not so circumscribed? There is a substantial difference

between discrimination and unlawful discrimination so far as aliens are concerned, since they do not enjoy the same measure of protection as citizens against employment discrimination.

Further, the President is directed to publish reports on discrimination against "citizen and permanent resident alien members of minority groups." Is it not your intent that these reports also discuss discrimination against temporary resident aliens who evidence an intent to become citizens, a category that is included within the scope of investigations by the Special Counsel and the Commission? Any why does the phrase "minority groups" appear in the section detailing the President's duties and not in the sections detailing the responsibilities of the Commission or Special Counsel? Which minority groups are intended?

Another line of questions is raised by the bill's charge that the Commission "shall investigate allegations" of discrimination. Is the Commission obligated to respond to anyone's allegation of discrimination, or only the allegations of someone who is directly and adversely affected by an unfair immigration-related employment practice as defined in section 274B of the bill? And how must we respond? Is the Commission being directed to oversee the operations of the Office of the Special Counsel, which is also directed to investigate allegations of discrimination?

H.R. 3080 also directs that the Commission "shall monitor the implementation and enforcement" of section 274A. This

language needs to be clarified, as well. The way in which the Commission has defined its monitoring function traditionally is that our Office of Federal Civil Rights Enforcement conducts a series of studies of specific government programs and anti-discrimination efforts by the Federal government. A typical study is one with a limited scope carried out by only a few employees on any one project. Is this the type of monitoring that the bill intends, or is a broader definition of monitoring meant that includes the use of field agents and a large number of employees?

A final point with respect to the role of the Commission involves the requirement imposed by the bill that the Commission publish three reports at eighteen-month intervals for the purpose of determining whether a pattern of unlawful discrimination has resulted from the implementation and enforcement of section 274A. If the proposed legislation is passed in October of this year, our first report would be due in April of 1987, the second in October of 1988, and the third in April of 1990. Issuance of the third report in April of 1990 may be problematic, however, as the Commission is scheduled to terminate at the end of September 1989. Obviously, some amendment of the bill is necessary in this regard.

Another point that I wish to make on behalf of the Commission is that we will find ourselves unable, at current funding levels, to carry out the tasks assigned to us under

H.R. 3080. The bill regarding the role of the Commission is identical to language in last year's House measure. At that time, the Commission expressed its concern in letters from the Commission's Staff Director to Chairman Rodino and to Senator Simpson that, while the Commission would do its best to undertake the broad responsibilities under the proposed legislation, it could not do so without severely straining its resources. The Commission stated therein:

> The Commission believes it is preferable that the Immigration Reform and Control Act not contain requirements for prescribed Commission activity unless Congress provides substantial increases in funding for the Commission to discharge the required duties.

The Commission further stated in these letters:

> Absent a congressionally mandated role to monitor, investigate and report on discrimination flowing from employer sanctions, the Commission would, of course, undertake appropriate, though less comprehensive, program activity to seek to determine whether this new law causes discrimination. Such activity, in the form of a hearing, a study or monitoring, would be more possible within the range of our current resources.

Our position is entirely understandable when one considers the size of the Commission and the resources it could bring to bear on the tasks it is being asked to assume. For fiscal year 1985, our budget is $12,869,000, and the Commission has a current total of 236 full-time employees. This must be contrasted with the size of an enforcement agency like the Equal Employment Opportunity Commission, which has a budget of

$163,655,000 and 3,034 full-time employees for fiscal year 1985. Our point is simply that the Commission is too small at present to undertake a full-scale monitoring role with respect to immigration legislation.

Nor is it clear that a full-scale monitoring role by the Commission is needed. Under H.R. 3080, the responsibilities the Commission is directed to undertake overlap with those of the Office of Special Counsel and the President. Hence both the Special Counsel and the Commission are to investigate allegations of immigration-related employer discrimination, although the Special Counsel's duties in this regard are carefully described under the bill while the Commission's are not. Moreover, both the President and the Commission are to transmit to the House and Senate Judiciary Committees, at eighteen-month intervals, three reports on the impact of employer sanctions on immigration-related employment discrimination.

In addition, the issue of discrimination against aliens is not one with which the Commission has a great deal of experience. Our last relevant project was in 1980, and that concerned itself more with certain legal issues in connection with aliens than it did with monitoring the enforcement of immigration laws. In general, it is fair to characterize the Commission as more concerned with the identification and analysis of civil rights issues than with massive oversight efforts.

The fact that the Commission is unaccustomed to the role that would be thrust upon it by this bill is exacerbated by the numerous uncertainties surrounding the immigration issue. A National Research Council report entitled "Immigration Statistics: A Story of Neglect" concluded this year that government agencies do not produce the data that "we need to answer the fundamental policy issues of the day" (p. 5).

In the absence of meaningful data with respect to the contours of the immigration problem, it is difficult for the Commission to estimate the amount by which our budget would need to be increased to meet the demands placed on us by H.R. 3080. We believe it curious, however, that last year the House Judiciary Committee did not authorize additional funds for the Commission to carry out monitoring, investigating, and reporting activities identical to that which are asked of the Commission this year. Yet the Committee authorized $6 million for each of three years for the activities of a task force which, under the language of last year's bill, were substantially the same as the Commission's. This year, we ask that additional funding for the Commission be authorized if the language regarding the Commission remains the same. The figure authorized for the task force last year may provide a beginning point in your deliberations. We would, of course, be glad to work with you on this task.

Turning to the anti-discrimination provisions of H.R. 3080, I must speak on my own behalf, but offer the following objections.

First is the question of the appropriateness of setting up a new administrative mechanism to handle employment discrimination claims. Government civil rights agencies already include the Commission on Civil Rights, the Justice Department's Civil Rights Division, the Equal Employment Opportunity Commission, the Department of Labor's Office of Federal Contract Compliance Programs, and the Department of Education's Office for Civil Rights. Each state, in addition, has civil rights enforcement agencies, as do many major cities. In my opinion, creation of a separate mechanism to enforce discrimination claims, particularly one to carry out responsibilities which in large measure have already been delegated by Congress to the EEOC, would be a mistake.

The EEOC now has the responsibility under Title VII to investigate and prosecute claims of employment discrimination based on national origin. To address the problem of the overlapping jurisdiction that would arise between the EEOC and the Office of Special Counsel, H.R. 3080 provides that complaints of national origin discrimination cannot be filed concurrently in both forums. The question, however, of conflicting precedents between the EEOC and the Office of Special Counsel is not addressed, nor is it specified whether a plaintiff is barred from pursuing a remedy in one forum if the result in the other forum has proven unsatisfactory.

Those who advocate the creation of an Office of Special Counsel contend that EEOC cannot investigate claims of employer

discrimination based on national origin where the employer has fewer than 15 employees. The appropriate response, if national origin discrimination by small employers were truly to become a problem once employer sanctions were enacted, would be to amend Title VII, preferably at a later date, to expand the EEOC's national origin jurisdiction over these employers.

My second difficulty with the anti-discrimination provisions of H.R. 3080 relates to the question whether Congress ought to enact a Federal statutory cause of action based on alienage discrimination. Current Federal statutory and case law provides some measure of protection against discrimination based on alienage. Section 1981 of Title 42 of the U.S. Code states, in relevant part, that "all persons ... have the same right ... to make and enforce contracts ... as ... white citizens." The Supreme Court has interpreted this to include private employment discrimination based on race, and one Federal court of appeals has extended the Court's interpretation of section 1981 to prohibit alienage discrimination as well.

But beyond this, most Federal court cases addressing employment discrimination based on alienage have done so in the context of reviewing state statutes containing alienage-based classifications. The thrust of these cases is that such statutes will trigger a court's strict scrutiny unless the discrimination is based on a "political function."

To highlight some of these cases, in 1973 the Supreme Court

struck down a New York statute which barred aliens from employment in the state civil service (Sugarman v. Dougall); and invalidated a Connecticut State bar requirement that all bar examination applicants be U.S. citizens (In re Griffiths). In 1976, the Court invalidated a Puerto Rican law which prohibited aliens from practicing civil engineering privately (Examining Board v. Flores de Otero).

But two years later, the Court upheld a New York statute that required that state police officers be citizens (Foley v. Cornelie), and declined to invalidate a statute of that state which prohibited non-citizen elementary and secondary school teachers from teaching in the state educational system (Ambach v. Norwick). In 1982, the Court upheld a California law requiring that state peace officers be citizens against a challenge brought by an alien applying to be a California probation officer (Cabell v. Chavez-Salido). Finally, in 1984 the Court applied strict scrutiny to a Texas statute which required that notary publics be U.S. citizens. The Court found that the statute affected a lawful economic interest inasmuch as the function of a notary public was not an essential part of the political community (Bernal v. Fainter).

Legal aliens therefore enjoy some measure of constitutional protection when it comes to the issue of public employment, and I support application of the strict scrutiny standard to alienage-based statutory classifications provided the "political function" exception does not come into play.

But I oppose creation of a new cause of action for alienage discrimination in private employment. I oppose it as set forth in H.R. 3080 because it is based on an assumption that alienage discrimination will be a problem once employer sanctions are enacted. If we are to create a new protected class, we ought first to determine that such protection is necessary and, if necessary, whether the protection could not be provided simply by amending Title VII to include alienage. That could be done by enacting the employer sanctions, and permitting time to determine whether alienage discrimination does in fact occur because of those sanctions. But to create a new cause of action based on alienage discrimination complete with a separate enforcement mechanism and the provision for attorney's fees would, absent a demonstrated need, be the wrong way to shape our national civil rights policy.