

8 AUG 1979

MEMORANDUM FOR DORIS M. MEISSNER
Deputy Associate Attorney General

Re: Justice Department Responsibility for Refugees
Landing in the United States

This memorandum responds to your request of June 26, 1979, that we consider two aspects of the draft contingency plan for refugee encampment: (1) does the Attorney General have custody of a group of refugees landing on U.S. soil? (2) would the location of the refugee camp affect the legal options of the U.S. Government in devising a plan to resettle the refugees in other parts of the world?

I. Attorney General's Custody of Refugees

Section 103 of the Immigration and Naturalization Act, 8 U.S.C. § 1103, makes the Attorney General responsible for the administration and enforcement of that Act, and "all other laws relating to the immigration and naturalization of aliens," except as those laws relate to the powers and duties of the President, Secretary of State, and consular and diplomatic officials. The relevant powers of the Secretary of State and consular officials are limited here to the determination of nationality and the issuance of visas. 8 U.S.C. § 1104. The President may suspend the entry of any aliens or class of aliens if he finds their entry would be "detrimental to the interests of the United States;" alternatively, he may impose restrictions on their entry. 8 U.S.C. § 1182(f). However, the principal role in the enforcement of the immigration laws is reserved to the Attorney General. He has "the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens" 8 U.S.C. § 1103(a). And he prescribes the regulations that determine the terms and conditions under which a non-immigrant may enter the United States. 8 U.S.C. § 1184(a).

Custody does not exist prior to apprehension; nobody has custody of a group of refugees simply by virtue of their landing

on U.S. territory. The Attorney General can assume custody of refugees attempting entry, however, in two different ways. He may exercise his power to parole the refugees into the U.S. under such terms and conditions as he deems appropriate. Alternatively, he may treat the refugees as illegal entrants and exercise his power to detain such aliens pending deportation or exclusion, as may be applicable.

The Attorney General's parole authority is set forth in 8 U.S.C. § 1182(d)(5). This section provides that the Attorney General may parole into the United States any alien applying for admission, "under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest." Such parole is not, however, regarded as an admission of the alien. This parole authority has been delegated to the district directors of INS and may be exercised at any point in the process of determining admissibility, or even after a finding of inadmissibility has been made. 8 C.F.R. § 212.5(a). The "terms and conditions" of parole are to be set by the officer exercising the parole authority. These conditions could include residence in a refugee camp, under custody of the supervisory authority there.

The only limitation upon the Attorney General's parole granting authority is that parole may not be granted to an alien who "has ordered, assisted or participated in the persecution of any person because of race, religion or political opinion, or if he refuses to make a sworn statement with respect thereto." 8 C.F.R. § 212.5(a). The term of parole may be set in advance, and may be terminated at any time upon written notice given by the district director in charge of the area in which the alien is located. 8 C.F.R. § 212.5(b). At termination the alien returns to the custody from which he was paroled and to the status he had at the time parole was granted.

An alien attempting entry without a valid immigration visa may be excluded, 8 U.S.C. § 1182(c); an alien who enters either without a proper visa or at an undesignated time and place may be deported. 8 U.S.C. § 1251(a). In either case the Attorney General has responsibility for such an alien pending his final removal from the country.

The Attorney General has delegated to the Commissioner of Immigration and Naturalization his power to control the entry of illegal aliens. 28 C.F.R. § 0.105(d). An officer of the Immigration and Naturalization Service may arrest, without a warrant, any alien who he sees either entering or attempting to enter, or who he believes did enter, the U.S. in violation of the laws regulating the admission of aliens. 8 U.S.C. § 1375(a). If an arrest is made without a warrant, the Service has 24 hours to obtain one, if it plans to maintain custody. 28 C.F.R. § 287.3.

With respect to an alien subject to deportation proceedings and in custody pursuant to a valid warrant, the Attorney General has three options: he may (1) continue custody, (2) release the alien under bond, (3) release him on a conditional parole. 8 U.S.C. § 1252(a). Maintaining the refugee in a refugee camp would either be a continuation of custody or a conditional parole, the condition being residence in the camp.

Following a final order of deportation, the Attorney General has six months to effect the departure of the alien, unless deportation is not "practical, advisable, or possible," 8 U.S.C. § 1252(c). During the period pending departure, the Attorney General is "authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain" Id.

If an alien has not yet entered the United States, the provisions for exclusion rather than deportation apply. Under 8 U.S.C. § 1182(a)(20), aliens applying for admission into the U.S., but not in possession "of a valid unexpired immigrant visa, reentry permit . . . or other valid entry document . . ." are to be excluded from the U.S. All aliens arriving at U.S. ports are to be examined "by one or more immigration officers at the discretion of the Attorney General" 8 U.S.C. § 1225(a). If an alien does not appear to such officers to be "clearly and beyond a doubt entitled to land," he is to be detained for further inquiry. 8 U.S.C. § 1225(b).

Upon a final finding of excludability the alien may surrender himself to the custody of INS: if he does not surrender himself, the Service may take him into custody. 8 C.F.R. § 237.2. Immediate expulsion is the rule following such a finding, but the Attorney General has the discretionary power to conclude that "immediate deportation is not practical or proper." 8 U.S.C. § 1227(a).

Unlike the deportation provisions, 8 U.S.C. § 1253(a), the provisions governing exclusion of aliens provide only for return "to the country whence he came." 8 U.S.C. § 1227(a). An alien

subject to exclusion may, however, apply for asylum in the United States. If such application is made, the regulations provide for a hearing and determination on the issue of whether "he would be subject to persecution in the country to which he would be returned under an order of exclusion and deportation because of race, religion, nationality, membership in a particular social group, or political opinion" 8 C.F.R. § 236.3(a)(1), 44 Fed. Reg. 21259 (April 10, 1979). Presumably most Southeast Asian refugees could meet this burden. Therefore, unless the alien volunteers to go to a third country, and unless that country is willing to receive him, there may be no alternative to allowing him to remain in this country.

II. Location of the Refugee Camp

As used in the immigration laws generally, the term "United States" is defined to include Puerto Rico, Guam and the Virgin Islands--along with the fifty States. 8 U.S.C. § 1101(a)(38). Therefore, locating the camp in any of these areas would not affect the authority of the Attorney General to deal with the refugees.

The Covenant to Establish a Commonwealth of the Northern Mariana Islands specifically excludes application of the Immigration and Naturalization Act, except for a few provisions dealing with citizenship. Art. V, sec. 506. When the Covenant comes into effect, therefore, the Attorney General will have no authority either to parole aliens into, or detain them in, the Northern Mariana Commonwealth. The Covenant does, however, leave Congress the option of extending by law the immigration and naturalization laws to the Commonwealth. Art. V, sec. 503(a). Establishing a camp there would, therefore, require congressional action.

The immigration and naturalization laws do not apply to the Trust Territory of the Pacific Islands. The Secretary of the Interior has had vested in him all executive, legislative, and judicial authority necessary "for the administration of civil government in all of the trust territory." Exec. Order No. 11021, May 8, 1962, as amended by Exec. Order No. 11944, October 25, 1976. The President could redelegate this authority, but presently the Attorney General would not have custodial authority over refugees reaching the Trust Territories.

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