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Office of the
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Washington, D.C. 20530

1 DEC 1981

MEMORANDUM FOR DORIS M. MEISSNER
Acting Commissioner
Immigration and Naturalization Service

Re: Assessment of Inspectional Overtime Charges at Other than Designated Ports of Entry

In a memorandum dated January 26, 1981, you requested the views of this Office on whether existing INS regulations exempting airlines from inspection charges for overtime services exceed the scope of the underlying statutory authority. As a practical matter, you noted that these regulations do not parallel those of the Customs Service, Public Health Service and the Department of Agriculture, which assess airlines for overtime services unless the aircraft arrive on schedule at specific "designated ports of entry." Because INS does not charge airlines arriving on schedule for inspectional overtime at either "designated ports of entry" or so-called "landing rights only" airports, the Service pays millions of additional dollars each fiscal year for overtime compensation. Although our legal conclusion differs from yours -- we find that the Attorney General had and continues to have the discretion to promulgate the questioned regulations -- we also believe there is discretion under the relevant statutes for the Attorney General to amend the current regulations to assess airlines arriving at "landing rights only" airports.

We believe your inquiry can be reduced to whether the implementing regulations, 8 CFR §§ 100.4(c)(3) and 239.2, exceed the INS' power to exempt airlines from overtime inspection charges incurred, as defined in 8 U.S.C. §§ 1353a and 1353b. 1/

1/ In pertinent part the sections provide:

> § 1353a. The Attorney General shall fix a reasonable rate of extra compensation for overtime services of immigration officers and employees of the Immigration and Naturalization Service who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock ante-

(Footnote cont'd on p. 2)

These sections require the payment of overtime compensation to INS employees for the performance of duties in connection with the arrival of persons from foreign ports. The cost of such overtime must be borne by the master, owner, agent or consignee of the vessel except for certain vessels arriving at "designated ports of entry" when such vessels are "operating on regular schedules." The implementing regulations exempt airlines from the overtime inspection charges if they are operating on regular schedules but do not require that arrival be at a designated port of entry. The question, then, is whether, by expanding the apparent reach of the proviso of § 1353b, referring to "designated ports of entry," to encompass airports at which official permission to land has been given

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1/ (Cont'd from p. 1)

> meridian, or on Sundays or holidays, to perform duties in connection with the examination and landing of passengers and crews of steamships, trains, airplanes, or other vehicles, arriving in the United States from a foreign port by water, land, or air . . . the Attorney General is vested with authority to regulate the hours of such employees so as to agree with the prevailing working hours in said ports, but nothing contained in this section shall be construed in any manner to affect or alter the length of a working day for such employees or the overtime pay herein fixed.
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> § 1353b. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance arriving in the United States from a foreign port to the Attorney General, who shall pay the same to the several immigration officers and employees entitled thereto as provided in section 1353a of this title. Such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual inspection or examination of passengers or crew takes place or not: Provided, That this section shall not apply to the inspection at designated ports of entry of passengers arriving by international ferries, bridges, or tunnels, or by aircraft, railroad trains, or vessels on the Great Lakes and connecting waterways, when operating on regular schedules.

("landing rights only"), 2/ the INS regulations go beyond the statutory authorization? Further, do the regulations interfere with the power of the Secretary of the Treasury to designate ports of entry for civil aircraft pursuant to 49 U.S.C. § 1509(b)?

There is nothing in the language of 8 U.S.C. § 1353a and § 1353b that expressly prohibits the Attorney General from exempting regularly scheduled airlines from overtime liability. Moreover, both the 1952 Immigration and Naturalization Act, 8 U.S.C. § 1229, and its predecessor, the Air Commerce Act of 1926, 49 U.S.C. § 177(d), grant the Attorney General broad rulemaking authority with respect to civil air navigation as it applies to the entry of aliens. The language of § 1353b is mandatory -- owners shall pay unless they fall within the time and place conditions of the proviso. But the general thrust of § 1353a is that the Attorney General is authorized to set overtime wages and to collect them. 3/ The proviso in § 1353b limits the Attorney General's discretion in only one way: he may not demand reimbursement from aircraft operating on regular schedules that land at designated ports of entry. Nothing on the face of the statute prevents the Attorney General from construing the exemption to apply to regularly scheduled aircraft that have obtained permission to enter at "landing rights only" airports as having effectively arrived at an officially designated international airport. See also 19 CFR § 6.1(h) (definition of "international airport"); 19 CFR § 6.2 (landing requirements); 19 CFR § 6.12 (list of international airports). Thus, based solely on the language of the statute, the Attorney General's decision that "landing rights airports" are the equivalent of "designated ports of entry" would appear to be a permissible exercise of discretion.

2/ Although no formal statutory term "landing rights only" airport exists, the eponym has arisen de facto from the granting of permission to land in accordance with 19 CFR § 6.2, "Landing Requirements."

3/ Indeed, the bill that became §§ 1353a and 1353b, H.R. 3309, was described in the House report as "a bill to authorize the [Attorney General's predecessor] to fix rates of overtime inspection . . . to collect it from transportation companies that may request inspection and landing of crews at extraordinary hours, and to pay it over to the inspectors . . . ." H.R. Rep. No. 1214, 71st Cong., 2d Sess. 1 (1930).

If the Attorney General is not prohibited by the language of the relevant statutory sections from not imposing liability for the overtime inspection charges on airlines operating substantially on schedule, the next question is whether the regulations conflict with any compelling legislative history to the contrary underlying the Act of March 2, 1931 (46 Stat. 1467; 8 U.S.C. §§ 1353a and b). The Senate and House Committee Reports on the bill articulate two basic concerns: (1) immigration employees should receive overtime pay that places them on a par with Customs employees; and (2) the transportation companies "should reimburse the Government for special services at unusual hours that advance their own interests." See H.R. Rep. No. 1214, 71st Cong., 2d Sess. 4 (1930). The first concern about equal pay treatment is not implicated because the questioned regulations deal with the source of the overtime payment, not the amount. With respect to the second concern -- that private interests should reimburse the Government for special services -- the congressional debate and legislative history focused only on the time of arrival, not the place. The words "designated port of entry" entered the statute without any debate or definition. See 72 Cong. Rec. 10320-321 (June 9, 1930); 74 Cong. Rec. 6123-24 (Feb. 16, 1931); 74 Cong. Rec. 6274 (Feb. 27, 1931). Indeed, no administrative distinction between officially "designated ports of entry" for aircraft and "landing rights only" airports existed in 1931. Because the existing regulations only cover aircraft operating on schedule, they do not expressly contravene the legislative intent in enacting §§ 1353a and 1353b.

Moreover, the regulations in issue are buttressed by a long history of administrative practice. See Haig v. Agee, 49 U.S.L.W. 4869, 4872-4875 (U.S. June 30, 1981)(venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong); Red Lion Broadcasting v. FCC, 395 U.S. 367, 381 (1969) (accord). As noted in the Final Report on the 1931 Act which you received from the auditors, the exemption from inspectional overtime costs for aircraft arriving on schedule dates back to January 1, 1942. See Final Report on 1931 Act Overtime Reimbursement by Field Inspectors at 33 (Oct. 2, 1981)(original regulations promulgated under the authority of the 1926 Air Commerce Act). The present regulation treating places where permission to land has been granted as equivalent to designated international airports received its form in 1951. See 8 CFR § 110.3(1951); 16 Fed. Reg. 8319 (Aug.

22, 1951). Thus, based on the broad powers conferred in § 7(d) of the Air Commerce Act of 1926, 44 Stat. 572, 49 U.S.C. § 177 (d)(3), the Attorney General had developed a practice of exempting airlines arriving on schedule at authorized landing places from overtime service charges. 4/ If there has been a long and unbroken administrative interpretation of a statute which has two or more possible reasonable interpretations, the construction placed on the statute by those charged with its implementation generally is controlling. See Zemel v. Rusk, 381 U.S. 1, 11 (1965); 2A C. Sands, Sutherland on Statutory Construction §§ 49.03-04 (4th Ed. 1973). Faced with an agency's broad rulemaking authority, courts will follow the consistent administrative construction of a statute "unless there

4/ Although the labels have changed over time, the Attorney General has continually treated all airports at which official permission to land has been granted equally for purposes of the § 1353b exemption. He has never made the distinction between "landing rights only" and "designated international airports" that you draw. The 1941 regulation, 8 CFR § 116.52 read:

> Aircraft, how considered:
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> Aircraft arriving from Canada or Mexico and landing at a land border port of entry . . . . shall for the purposes of the immigration laws and regulations, except as otherwise provided in this Part, be regarded the same as other common carriers arriving at . . . . land border ports of entry. All other aircraft operating in foreign commerce or between areas of the United States shall for the purposes of the immigration laws and regulations be subject to the same requirements and liabilities as are vessels (operating on waters) except as otherwise provided in this part or by statute specifically relating to aircraft.

And a 1951 amendment to 8 CFR Part 116 changing the term "airport of entry" to "international airport" stated specifically that the amendment made no substantive charge. See 16 Fed. Reg. 2468 (March 16, 1951).

are compelling indications that it is wrong." E.I. du Pont de Nemours & Co. v. Collins, 432 U.S. 46, 54-55 (1977); Zemel v. Rusk, supra.

Further, Congress must be deemed to have known about the practice. About the same time the original regulations were drafted, Congress passed a bill providing for Treasury deposit of moneys collected as extra compensation for INS overtime services to the credit of the appropriation for the payment of salaries. See 8 U.S.C. § 1353d; S. Rep. No. 1985, 76th Cong., 1st Sess. (1940). 5/ We do not presume that Congress is unaware of the amounts collected and credited for salary payments. 6/ Against this background, Congress enacted the 1952 Immigration and Naturalization Act. There is no evidence of any intent to repudiate the existing administrative practice of exempting airlines arriving on schedule from overtime liability. Indeed, the legislative history relating to the Attorney General's powers to designate ports of entry states: "The authority granted is similar to the present authority granted to the Attorney General under section 7(d) of the Air Commerce Act of 1926 (44 Stat. 572, 49 U.S.C. 177(d))." H.R. No. 1365, 82d Cong., 2d Sess. reprinted in [1952] U.S. Code Cong. & Ad. News 1725. Whenever Congress

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5/ 8 U.S.C. § 1353d states:

> Moneys collected on or after July 1, 1941, as extra compensation for overtime service of immigration officers and employees of the Immigration Service pursuant to sections 1353a and 1353b of this title, shall be deposited in the Treasury of the United States to the credit of the appropriation for the payment of salaries, field personnel of the Immigration and Naturalization Service, and the appropriation so credited shall be available for the payment of such compensation.

6/ We have been advised that there is a separate entry in the budget categories and costs for 1931 Act Overtime Costs. Both Government costs and airline liabilities are individually recognized. In the final appropriation, Government liability for 1931 Act Overtime is listed.

adopts a new law incorporating sections of a prior law, "Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." Lorillard v. Pons, 434 U.S. 575, 581 (1978). Therefore, absent contrary indications, we conclude that Congress effectively adopted and implicitly ratified the administrative policy that had been in effect for at least ten years. See Haig v. Agee, supra at 4874, 4876. 7/

The final inquiry is whether the regulations should be viewed as unlawful because they allegedly interfere impermissibly with the Secretary of the Treasury's authority to designate ports of entry for civil aircraft. 49 U.S.C. § 1509(b).

7/ The Executive Branch certainly construed the 1952 Act to leave unaltered the Attorney General's discretion to exempt regularly arriving carriers from overtime charges at specified places of entry. The INS final draft report on § 239 of the 1952 Act (now 8 U.S.C. § 1229), setting forth the Attorney General's authority to designate ports of entry for aliens arriving by aircraft noted:

> It appears from the tenor of this section that the authors of the bill intended to carry forward the statutory authority of the Attorney General over civil aircraft which may now be found in the Air Commerce Act (and in the immigration laws incorporated by reference). Under the language used here, the Attorney General will be in a position to promulgate regulations designating ports of entry for aircraft, and providing for the manner, and means by and under which such ports may be used by aircraft, and the landing requirements surrounding such use if there is nothing to the contrary specifically spelled out elsewhere in the bill.

See INS Report on H.R. Rep. No. 5678, 82d Cong., 2d Sess. (1951) at 43 (Jan. 11, 1952) reprinted in 2 U.S. Dept. of Justice Immigration and Nationality Act, Bills with Reports 1951-52.

The legislative history does suggest such a qualification on the scope of the Attorney General's power:

> The authority to provide reasonable landing requirements with respect to civil aircraft is limited to those cases where such requirements are necessary for the control of the entry of aliens into the United States, and it is not intended that the exercise of such authority will conflict with the jurisdiction of other Government agencies to regulate civil air navigation. See H.R. Rep. No. 1365, 82d Cong., 2d Sess. reprinted in [1952] U.S. Code Cong. & Ad. News 1725.

But in light of a 40-year period of unchanging administrative practice, implicit congressional ratification, and the absence of any dispute or objection by the Secretary of the Treasury, the possibility of any serious infringement would appear to be de minimis. Moreover, whenever two potentially overlapping statutes -- and their administrative interpretations -- can be read consistently so as to avoid conflicts, they will be. See Morton v. Mancari, 417 U.S. 535, 551 (1974) ("when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective"); United States v. Borden Co., 308 U.S. 188, 198 (1939)(accord). Your concern, however, seems to be that by treating places where permission to land has been granted as the functional equivalent of designated ports of entry for overtime payment purposes, the Attorney General has somehow infringed on the Secretary of the Treasury's power in this area as defined in 49 U.S.C. § 1509(b).

Initially, we would observe that the Attorney General has not directly usurped Treasury's role because he has not actually designated "landing rights only" airports as international airports of entry; 8/ he is simply treating "landing

8/ The airports officially designated as international ports of entry, pursuant to the Attorney General's power in 8 U.S.C. § 1229 exactly replicate those designated by Treasury under 49 U.S.C. § 1509(b). Compare 8 CFR § 100.4(c)(3) with 19 CFR § 6.13.

rights airports" in a similar fashion. Indeed, the language in 8 CFR § 100.4(c)(3) carefully specifies that "other places where permission for certain aircraft to land officially has been given . . . shall be regarded as designated for the entry of aliens arriving by such aircraft" (emphasis added). Second, there is no indirect trespassing on the Secretary of the Treasury's function, for, according to 8 CFR § 239.2 (in conformity with 19 CFR § 6.2(a)), permission for scheduled airlines to land elsewhere must first be obtained from the Commissioner of Customs. 9/ Because the INS regulations prescribe reasonable landing requirements solely for ports of entry where Customs has already approved landings, they comply with the legislative intent that the Attorney General's powers not "conflict with the jurisdiction of other Government agencies to regulate civil air navigation." See, supra at 7-8.

In addition, we do not find the existing cases or the administrative decisions to which you have referred as controlling the present matter. For example, in Bishop v. United States, 355 F.2d 617 (Ct. Cl. 1966), the question was whether after-hours examinations on adjacent islands were to be equated with overtime inspections on the mainland, and whether the airlines or the Government was ultimately liable for overtime pay. The Court held that the INS inspectors were entitled to overtime because they were performing statutorily prescribed duties "in connection with the examination and landing of passengers." But the airlines were required to reimburse the Government because adjacent islands are not among the "designated ports of entry, real or constructive" at which exemptions were permitted. The Secretary of the Treasury can only designate places in the United States as ports of entry under 49 U.S.C. § 1509(b). Unlike adjacent islands, however, "landing rights airports" are within the continental United States. In fact, many landing rights airports appear to fulfill the criteria for international airports at least as well as airports presently designated as such. See 19 CFR § 6.12; Department of Treasury Circular, re: Establishing New Ports of Entry (June 15, 1973)(need for new ports since no designation as international airport has been made for some time)(noting that most large airports are

9/ Authority to grant permission to land elsewhere than at an international airport of entry was delegated to Customs officers in 1974 by Treasury Decision 74-94.

"landing rights" airports and "as far as commercial airlines are concerned, the official international airport designation is virtually meaningless"); Treasury Dept. Notice re Air Commerce: Designation of International Airports (July 24, 1961) (criticizing present policy for designating international airports and granting landing rights as unsuitable in light of tremendous increase in international air traffic).

Of similar import is the Comptroller General's opinion which contested the legality of a proposed regulation to designate as "ports of entry" certain places outside the continental United States so as to exempt carriers from the payment of overtime compensation. See 36 Comp. Gen. 166 (1956). The Comptroller General concluded that, based on history, legislative intent and existing law, "places outside the United States may not be designated . . . as 'ports of entry.'" 36 Comp. Gen. at 170. Consequently, carriers could not be relieved of the burden of overtime payments under the 1931 Act. Although the opinion suggested in dicta that the Attorney General may only designate as ports of entry those that the Secretary of Treasury had selected under 49 U.S.C. § 1509(b), it did not address the question whether the Attorney General could regard as equivalent to ports of entry places that the Secretary could have designated as such. 10/

Thus, the statutory language, legislative history and case law do not prohibit the Attorney General from exercising his discretion as he did in promulgating 8 CFR §§ 100.4(c)(3) and 239.2. On the other hand, because this is a matter within his discretion, he is not obligated to bind himself and the INS with the present rules concerning "landing rights only"

10/ Nor is Comp. Gen. Op. B-140891 (Nov. 20, 1959)(unpublished opinion) persuasive. Admittedly, the decision relied heavily on the belief that Congress intended the Customs and INS statutes to achieve essentially the same results -- which would argue against the INS alone permitting exemptions in the present case. But the Comptroller General placed particular significance on the previous practice of INS and Customs which had required reimbursement from non-commercial aircraft. Here, the argument based on congressional ratification of existing practices decisively supports the legality of the regulations.

airports. 11/ As the courts have pointed out, it is possible for the Attorney General to amend or revoke regulations that are not statutorily compelled. See United States v. Nixon, 418 U.S. 683, 696 (1974); Service v. Dulles, 354 U.S. 363, 388 (1957); United States ex. rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). Agencies are empowered, within the limits of law and fair administration, to reverse their interpretation of what a statute requires. See Andrus v. Sierra Club, 442 U.S. 347, 358 (1979)(CEQ reverses position that NEPA requires federal agency to submit EIS with appropriations request). Indeed, an agency's ability to adapt its rules and practices to changing needs constitutes the very strength of the rulemaking process. See American Trucking v. A.T. & S.F.R. Co., 387 U.S. 397, 416 (1967)(ICC, faced with new developments, or upon reconsideration of the relevant facts, may alter its past interpretation and overturn past administrative rulings with respect to piggyback transportation). Thus, when the unreasonable consequences of a rule come to an agency's attention, or when inconsistencies between existing rules become apparent, an agency is well within its authority to alter past interpretations and reverse past practices. See Spartan Radiocasting Co. v. FCC, 619 F.2d 314, 322 (4th Cir. 1980)(agency changes network blackout rules promulgated ten years ago to create rule favoring competition); Commonwealth of Pennsylvania v. ICC, 561 F.2d 178, 291 (D.C. Cir. 1977)(notwithstanding policy of not accepting joint through rates from 1908-1970, new rule is supported by a well-reasoned and adequate justification for the change).

11/ As the legislative history to the 1952 Act indicated:

> Section 239 of the bill provides authority for the Attorney General to designate by regulation ports of entry for aliens arriving by civil aircraft and to provide by regulation reasonable requirements for civil aircraft with respect to notice of intention to land in advance of landing, or notice of landing, where such requirements are necessary for purposes of administration and enforcement of the provisions of the bill.

See H.R. Rep. No. 1365, 82d Cong., 2d Sess. reprinted in [1952] U.S. Code Cong. & Ad. News 1725. This authority preserved then existing power granted the Attorney General under § 7(d) of the Air Commerce Act of 1926 (44 Stat. 572; 49 U.S.C. § 177(d)).

Clearly, the Attorney General could decide that the overtime exemption is no longer required for enforcement of the immigration laws. The experience of the Customs Service, Public Health Service and the Department of Agriculture indicates that charging for overtime services at landing rights only airports is a feasible alternative. Indeed, the INS practice may be undesirable insofar as it conflicts with Customs practices. Amending the overtime regulation would also bring the INS regulations into greater conformity with the literal language of 8 U.S.C. § 1353b. 12/ Finally, such a revision would eliminate any arguable conflict between the Secretary of the Treasury's powers pursuant to 49 U.S.C. § 1509 (b) and the Attorney General's authority under 8 U.S.C. § 1229. Therefore, we believe the Attorney General could amend the regulations.

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12/ As we point out above, the current regulations are supported largely by a gloss placed on the proviso in § 1353b and substantiated by decades of administrative practice reflecting that gloss. We have discovered no evidence that the Attorney General has ever believed the exemption to be statutorily compelled or that Congress has believed it to be compelled.