Testimony

Of

Bo Cooper

General Counsel

Immigration and Naturalization Service

Department of Justice

Regarding a hearing on

Convention Against Torture

And

HR 5285, the Serious Human Rights Abusers Accountability Act of 2000

Before

Subcommittee on Immigration and Claims

Committee on the Judiciary

U.S. House of Representatives

Thursday, September 28, 2000

10:00am

2226 Rayburn House Office Building

Mr. Chairman, Congresswoman Jackson Lee and Members of the Subcommittee, my name is Bo Cooper and I am the General Counsel of the Immigration and Naturalization Service (INS). Thank you for inviting me to speak about our experiences since the Department of Justice promulgated regulations implementing U.S. obligations under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), human rights abusers, and the provisions of the bill recently introduced by Chairman Smith entitled the "Human Rights Abusers Accountability Act of 2000."

First, I will address issues relating to the Convention Against Torture. Then, I will discuss the Administration's legislative proposal, the "Human Rights Abusers Act of 2000," and the particular provisions of Chairman Smith's bill that was introduced last Friday.

Implementation of the Convention Against Torture

The interim regulation was published on February 19, 1999 and became effective on March 22, 1999. On June 29, 1999, the Immigration and Naturalization Service appeared before the House Subcommittee on International Operations and Human Rights, at which time I introduced the new torture regulations and explained how they were carefully designed to strike the proper balance between twin goals: (1) ensuring that no person was removed from the United States under circumstances that would violate Article 3 of the Convention Against Torture; and (2) ensuring that the new procedures do not unduly disrupt the issuance and execution of removal orders.

Last week marked the eighteenth month of practice under the torture regulations. This initial period under the new rule has been an outstanding success. Some have

expressed concern that the new torture regulations are being abused by criminal aliens who are ineligible for all other relief from removal, but who apply for torture protection as a means of delaying their removal from the United States. When drafting the new rule, we anticipated this possibility. The torture rule was crafted to minimize the incentives for such abusive, dilatory tactics.

Such charges of abuse are exaggerated. We have been very pleased with the implementation of the torture regulations over the past eighteen months. Fulfilling our international obligations under the Convention Against Torture has not impeded our ability to expeditiously enforce our immigration laws and remove criminal aliens from the United States. At the same time, I want to underscore that the torture regulations were promulgated because the United States signed, and the Congress provided its advice and consent to United States ratification of the Convention Against Torture, under which our nation made a commitment not to return any person to a place where he or she is more likely than not to be tortured.

Let me now draw your attention to statistics from the Executive Office for Immigration Review (EOIR) that shed significant light on our experience under the new regulations. Below a chart breaks down the number and disposition of Convention Against Torture claims adjudicated during the sixteen month period from March 22, 1999 to July 31, 2000. Most saliently, this chart indicates (1) that only a small number of cases have been adjudicated, and (2) that only a small percentage of claims asserted are actually granted protection under the Convention Against Torture.

Disposition of CAT Claims
March 22, 1999 - July 31, 2000

	CAT Grants			Denied	Other	Total
	Total	**Withholding**	**Deferral**			
Number	**581**	295	286	8,110	2,747	**11,438**
% of Total Adjudications	**5.1**	2.6	2.5	70.9	24.0	100.0

Source: Executive Office for Immigration Review, Office of Planning and Analysis, September 19, 2000.

"Other" includes 1,833 cases administratively closed, 796 applications withdrawn by the applicant, and 118 applications abandoned by the applicant.

During the sixteen month period, less than 12,000 Convention Against Torture claims were adjudicated, an average of 750 claims per month nationwide. By comparison, during the same sixteen month period, over 75,000 asylum claims were adjudicated by immigration judges, or almost 4,700 claims per month nationwide. Far from impairing effective enforcement of the immigration laws, the number of Convention Against Torture claims has been small, especially relative to asylum applications.

Even more importantly, of the 11,438 claimants, only 581 were granted protection. That is, only 5.1 percent of all claimants could meet the higher burden of proof required for Convention Against Torture protection than the burden necessary for asylum. By comparison, some 15.8 percent of asylum claims raised in removal proceedings are granted each year. While we obviously do not target any particular grant rate for either asylum or torture protection, the difference in such rates for the two related forms of protection provides strong evidence that the stringent standards set out in the new torture regulations are not resulting in overbroad protection of criminal aliens.

Of those 581 grantees, 286 (49 percent) were granted "deferral of removal," a more limited form of torture protection reserved for those otherwise barred from

receiving asylum, statutory withholding of removal, or withholding of removal under the Convention Against Torture. Deferral of removal is a much narrower form of relief than asylum, statutory withholding of removal, or even withholding of removal under the Convention Against Torture. First, deferral of removal does not confer any lawful or permanent immigration status on the alien. Second, deferral of removal only precludes the INS from removing the alien to the particular country in which it has been determined that the alien is more likely than not to be tortured. The alien may be removed to another country at any time. Third, the INS may continue to detain an alien granted deferral of removal. Fourth, an alien's deferral may be terminated upon changed conditions through an expedited motion by the INS. Finally, an immigration judge who grants an alien deferral of removal must warn the alien of these limitations.

Our approach to adjudicating claims under the Convention Against Torture has not impeded enforcement efforts for two reasons. First, as mentioned above, the torture regulations articulate clear standards that closely track the language of the Convention itself and carefully avoid any expansion of the obligations imposed by it. The precision of those standards is evidenced by the relative uniformity of dozens of unpublished decisions by the Board of Immigration Appeals. The low grant rate (5.0 percent) indicates that the rule's stringent burden of proof is being applied faithfully and accurately.

Second, the torture regulations do not generally afford aliens a second or third opportunity to apply for protection at hearings separate from the original removal proceedings. When the INS developed its strategy for hearing Convention Against Torture claims, we believed it would be administratively efficient to generally require

that such claims be raised in removal proceedings. That is, Convention Against Torture claims are generally raised in a single, unified hearing, most often as an alternative to asylum and statutory withholding of removal. While separate standards apply for asylum, statutory withholding of removal, and Convention Against Torture protection, we believe that an individual seeking Convention Against Torture protection should be expected to make such claims before an immigration judge in the course of removal proceedings. It is clearly in the interest of administrative efficiency for an adjudicator to assess the merits of all three claims at the hearing stage. Similarly, those who wish to assert torture claims in more accelerated procedures - such as expedited removal under section 235 of the Act, administrative removal for criminal aliens under section 238, and reinstatement under section 241(b)(5) - must do so at the same time and in the same manner as they normally would for asylum and/or statutory withholding of removal. Thus little additional time or expenditure is generally required to adjudicate claims under even these more accelerated procedures. These unified approaches to adjudication are the most important reason why the torture regulations have not impaired our ability to enforce the immigration laws.

There is one subset of cases where Convention Against Torture claims have been raised after a final decision had been rendered. The regulations permit motions to reopen for persons who had a final decision prior to the March 22, 1999 effective date of the regulations. We believed it was appropriate to give persons this option, where they did not previously have an opportunity to apply for torture protection in immigration court. These cases most likely made it appear that the Convention Against Torture could be

used as a dilatory tactic. While we expected delays in those cases, that caseload is rapidly coming to a close, since it was purely a transitional feature of the new regulations.

The torture regulations were carefully designed to balance (1) our commitments under Article 3 of the Convention Against Torture and (2) our ability to enforce U.S. immigration laws. As for the first goal, faithfully complying with our international obligations, we are confident that the regulations afford a transparent adjudicatory system with well-articulated standards. The structure of the torture regulations closely parallels our long-standing approach to asylum and statutory-based withholding of removal. The contours of new elements unique to Convention Against Torture protection, such as the meaning of "torture" and government "acquiescence," are gaining shape through the development of interpretive caselaw.

Of course, it is still early to assess fully the progress of interpretive law development. Convention Against Torture cases are wending their way up the ladder of administrative adjudication. The Board of Immigration Appeals (BIA, or the Board) recently issued its first published decision, Matter of S-V-, that addresses the scope of the term government "acquiescence." The Board has also properly applied the torture regulations in dozens of unpublished, non-precedential decisions. To date, no federal appellate court has reviewed an administrative decision interpreting the standards of the torture regulations. A decision on the merits of a Convention Against Torture claim can be appealed to a federal court only through the same, narrow mechanism available for asylum and statutory withholding appeals. The INS continues to monitor closely the development of case law throughout the country to assure the regulations are being implemented accurately and uniformly.

Let me conclude this portion of my statement by saying that our early experience under the torture regulations has been extremely successful. While the regulations may need further development in the future, such action would be premature at this early stage in our experience. Similarly, the INS believes there is no cause for legislative action at this time. Our best course of action is to continue to monitor closely the development of case law pertaining to Convention Against Torture protection and to take action when necessary to avoid an improper loosening of the legal standards. In so doing, we can be assured that adjudicators, government attorneys, and the private bar understand and properly apply the standards set out in the regulations.

Human Rights Abusers Act of 2000

Now, I would like to turn to the efforts of Congress and the Administration to enhance the ability of the United States Government to deny visas and admission, to remove, and to deny relief to aliens who have engaged in or been otherwise responsible for serious violations of human rights and humanitarian law. You may recall that on February 17, 2000, Associate Deputy Attorney General James Castello testified before this Subcommittee regarding H.R. 3058, the "Anti-Atrocity Alien Deportation Act," introduced by Congressman Mark Foley. Mr. Castello testified that the Department of Justice ("the Department") recognized that the current immigration laws do not provide sufficiently strong bars for human rights abusers, but believed that H.R. 3058 was unnecessarily limited by targeting only those who have committed torture. Mr. Castello explained that the Department was in the process of drafting legislation to cover

additional forms of human rights abuse and expressed the Department's willingness to work with the Subcommittee to move forward with comprehensive legislation.

The Administration continues to believe that legislative action is necessary to deny admission to, to remove, and to deny relief to those who have participated in or been responsible for serious violations of human rights or humanitarian law. Since February, the Administration has worked tirelessly to fashion the best possible bill on human rights abusers. In this process, we focused specifically on the need to develop legislation that both a consular officer and an immigration officer, as well as an immigration judge handling a proceeding, could administer. I am happy to report that our efforts have reached conclusion and the Administration informally forwarded a final bill to Congress late last week. The bill was formally transmitted to Congress earlier this week. A copy of the bill is attached to this testimony.

We appreciated your patience and that of your staff, Mr. Chairman, as numerous inquiries were made as to the status of our bill. We recognize the importance of this issue and had hoped to be able to forward the bill to you at an earlier date. As is often the case with complex legislation that involves numerous agencies and the need to develop legal principles that both reflect our policy objectives and will be practicable to implement on a day-to-day basis, the process was time consuming.

In February, Mr. Castello expressed the Department's belief that war crimes, crimes against humanity, and persecution should be added to the Immigration and Nationality Act (INA) as grounds of inadmissibility, deportability and as bars to relief. The bill introduced by the Chairman makes these amendments to the INA. As we developed the Administration proposal, however, it became apparent that there were

potential problems with adding those terms. "War crimes" and "crimes against humanity" are complex criminal concepts that have multiple elements. As a practical matter, the need to establish all the elements of a war crime or crime against humanity could limit the effectiveness of the legislation by requiring proof of a large number of elements, some of which would be difficult to establish. These terms also require complex, sensitive determinations about situations in foreign countries that could have significant ramifications for the foreign policy of the United States. For instance, to find that a "war crime" was committed, a determination must be made that an international armed conflict existed at the time the crime was committed or, in some cases, that an internationally protected person was the victim of the crime. The introduction of such sensitive political questions into visa and immigration adjudications seemed undesirable and could be counterproductive. In addition, the law of war crimes and crimes against humanity is a body of international substantive criminal law that has traditionally been developed in the context of courts martial or international criminal tribunals, not in the context of civil administrative proceedings such as immigration proceedings. Indeed, consular and immigration officers historically, and with only a few recent exceptions, have not been asked to determine whether an alien may have committed a crime. Instead they have denied visas or entry to criminal aliens based on criminal convictions or confessions. We wanted to find a way to exclude abusers without turning consular and immigration proceedings into criminal proceedings, and without having to coordinate the application of substantive international criminal law by courts martial or international criminal tribunals with consular or immigration proceedings.

We also decided not to include a broad exclusion for "persecutors." The term "persecution" has never been defined in statute or by treaty. Although the word "persecution" is found in the 1951 Convention Relating to the Status of Refugees and was added to domestic immigration law in the Refugee Act of 1980, the definition of "persecution" has evolved through Board of Immigration Appeals and federal court precedent and continues to evolve.

In short, both the Department of Justice and the Department of State concluded that it would be extremely difficult for consular officers overseas, who handle roughly 7 million visa applications, and immigration officers at ports of entry, who inspect millions of visitors, to make complex legal determinations regarding whether an alien had engaged in a "war crime," a "crime against humanity," or persecution. We recognized that we had to develop more specific, workable standards that would be more readily understood and that could be implemented more straightforwardly.

Consequently, the Administration chose to adapt the principles of international human rights and humanitarian law for use within the context of adjudications under the INA. The grounds of inadmissibility, removal and the bars to relief in the Administration's proposal include the underlying actions that form the key elements of human rights and humanitarian law violations. For example, "war crimes" include, but are not limited to acts such as: willful killing, torture, compelling service in hostile forces, mutilation, unlawful confinement, attacking civilians, rape, forced pregnancy, enforced sterilization, and conscripting children, when they occur in the context of an international armed conflict and when other conditions exist. Similarly, "crimes against humanity" include, but are not limited to acts such as: murder, extermination,

enslavement, imprisonment, torture, rape, forced pregnancy, enforced sterilization, and enforced disappearance, again when certain other elements exist.

The Administration's proposal applies to aliens who have participated in or been responsible for the following twelve identical or very similar acts: homicide, disappearance, genocide, rape, torture, kidnapping, mutilation, prolonged and arbitrary detention, enslavement, forced pregnancy, forced sterilization, and the recruitment for use in armed conflict of persons under the age of fifteen. Under our proposal, however, these acts will more readily result in a visa denial or ineligibility for immigration benefits because it will not be necessary to find that all of the preconditions to a war crime or crime against humanity exist. Instead, our proposal defines each of the twelve acts and sets forth clearly the kind of purpose and the degree of participation that the alien must have in order to be excludable for having committed such an act. It is essential to review the definitions, which would be added to Section 101 of the INA, to understand the full scope of our proposal.

As just noted, the Administration's proposal also addresses the degree of participation required to result in an ineligibility. We believe we have identified an appropriate range of levels of complicity in such human rights or humanitarian law violations. An alien is inadmissible, removable or ineligible for relief only if the alien "committed, ordered, incited, assisted, or otherwise knowingly participated in or been responsible for" any of the twelve specified acts. The statutory language clearly states that an alien is responsible for certain actions if, while in a position of power or authority, the alien knew or should have known that such acts were being or were likely to be committed, and he failed to take all necessary and reasonable steps within his power or

authority to prevent or stop such acts. This reflects the principle of command responsibility: that persons in positions of power or authority should be held accountable for the actions of others in certain instances. This language is significant because in many cases there are aliens who have been in charge of regimes or groups carrying out atrocities and there is no direct proof of the alien giving a particular order or engaging personally in the atrocities. Adapting the principle of command responsibility and including it in our proposal will allow us to deny visas and other immigration benefits to those who were part of the decision making process that led to the commission of such atrocities. The other specified actions—"committed, ordered, incited, assisted, or otherwise knowingly participated in"—are intended to reach the behavior of those aliens more directly or personally associated with the covered acts. The Administration believes that the specific range of conduct covered by our proposal will reach many aliens who have allegedly been involved in human rights and humanitarian law violations, and will ensure that senior level persons are within the reach of the law for acts which would not have occurred without their acquiescence or endorsement. .

In order to place these twelve common crimes within the framework of human rights or humanitarian law violations, the proposal further requires that the acts must be undertaken in whole or in significant part for a political, religious or discriminatory purpose. The language—"for a political, religious, or discriminatory purpose"—contemplates actions motivated by the actor's political or religious purposes, as well as actions motivated by a particular trait held by or imputed to the victim. The statutory language clarifies this point by providing explicitly that a discriminatory purpose includes acts taken "because of the victim's political opinion, nationality, race, religion,

gender, sexual orientation, or membership in a particular clan, tribe, caste or ethnic group." These traits may be actually held by the victim or imputed to the victim by the perpetrator. The motivation for these acts is broader than what can be considered in determining whether an alien has engaged in persecution because case law requires that the persecution be taken because of a particular trait held by or imputed only to the victim.

Also, the Administration's bill adopts a "reasonable grounds to believe" standard to establish inadmissibility. The alien is inadmissible if the "consular officer or immigration officer knows, or has reasonable grounds to believe, [that the alien] has committed, ordered, incited, assisted, or otherwise knowingly participated in or been responsible for any of the acts, undertaken in whole or in significant part for a political, religious, or discriminatory purpose." Neither the ground of inadmissibility nor the grounds of removal require a conviction, criminal charge, or confession. The "reasonable grounds to believe" standard, coupled with the requirement that the act be undertaken for political, religious or discriminatory purposes, will facilitate our ability to exclude human rights abusers and humanitarian law violators from the United States while maintaining the traditional requirement of a conviction or confession before a person is excluded for having committed a common law crime without a human rights or humanitarian law dimension.

Further, the Administration's proposal authorizes the Secretary of State to determine that the presence of certain aliens in the United States is incompatible with United States policy regarding the promotion of international human rights or humanitarian law. This authority is consistent with the Secretary's overall authority to

conduct foreign relations and with United States policy to monitor and promote the international observance of human rights and humanitarian law. The authority would complement the Secretary's existing authority in Sections 212(a)(3)(C) and 237(a)(4)(C) of the INA to deny a visa to or render deportable an alien, if the alien's entry or presence would have potentially serious adverse foreign policy consequence for the United States. These existing provisions could be used, in appropriate cases, to deny visas to or to remove aliens who have participated in or been responsible for serious human rights or humanitarian law violations if the standard is met. It is important to note that, due to the high standard, the Secretary has used the existing authority in only three deportation cases in the past decade. The proposed additional provision adopts a standard more directly reflective of United States interest in the promotion of human rights and humanitarian law. Without this provision, the United States may still find itself used as a refuge by aliens whose presence in the United States is offensive to our fundamental values. For example, we may find in the United States aliens who are closely and symbolically associated with serious human rights abuses, but there is not clear and convincing evidence that they personally committed a human rights abuse. The Secretary's determination regarding a particular alien would render the alien inadmissible, removable, and ineligible for relief. A determination, however, would not preclude protections that implement U.S. obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (deferral of removal) and the 1967 Protocol Relating to the Status of Refugees (withholding of removal).

We note that your bill included a defense for aliens who may claim that they engaged in the covered behavior under duress. We originally intended to include such a defense because there is a similar defense in the International Criminal Court (ICC) statute. However, in further analyzing the issue in the context of the underlying conduct now covered by the Administration's proposal, such as homicide, rape, and kidnapping, we decided that a duress defense was neither necessary nor appropriate. The grounds of inadmissibility focus on very serious acts and require an element of intent.

Under the Administration's proposal, the proposed grounds of inadmissibility, like most grounds of inadmissibility, can be waived for nonimmigrants. This is consistent with how other grounds of inadmissibility, even the grounds relating to past participation in terrorist activity, are applied to nonimmigrants. This will allow those grounds to be waived when it may be in the interests of the United States to admit an alien temporarily. Furthermore, these grounds, like the admissibility grounds enumerated in section 102 of the INA, will not apply to aliens traveling to the United States on the diplomatic (A and G) visas.

Our proposal would also make these grounds waivable for aliens intending to remain in the United States permanently if the alien committed one of the covered acts when the alien was under the age of 18 and the alien has the requisite immediate family relationship with a United States citizen or lawful permanent resident. The waiver is not mandatory in such cases, but allows the Attorney General to waive this ground of inadmissibility, removal, or bar to relief in her discretion. This waiver provision will provide discretion to deal with compelling cases. For example, in the case of a child who was unlawfully recruited for use in armed conflict and forced to commit a heinous act,

the Attorney General would have the authority to waive this provision in her discretion so that the child could be admitted for family reunification purposes.

The Administration strongly opposes Section 12 of the Smith bill, which would extend the mandatory bars of withholding of removal to the more limited protection afforded under deferral of removal. The Senate adopted specific understandings, declarations and reservations when it approved the United States ratification of the Convention Against Torture. The Congress enacted legislation in 1998 instructing the Attorney General to implement U.S. obligations under the Convention Against Torture. The Convention Against Torture imposes an absolute obligation not to return someone to a country where he or she would be tortured. Clearly, this obligation might require us to protect undesirable individuals from being tortured. But this is the obligation the United States assumed, in recognition of the unacceptability of torture under any circumstances.

In drafting the torture regulations, we were extremely careful to reconcile our absolute obligations under the Convention Against Torture with our need to protect the United States from becoming a haven for dangerous individuals. Deferral of removal is not an immigration benefit for criminals. Rather, it offers the narrowest, bare minimum protection against torture for those otherwise ineligible to remain in the United States.

Neither the Convention Against Torture nor the 1998 implementing legislation permit the INS to extend the mandatory bars to deferral of removal. Section 12 would require the Attorney General to issue a rule inconsistent with existing treaty and statutory obligations. Domestically, Section 12 would generate a tremendous amount of litigation. Internationally, Section 12 would suggest that the United States is prepared to ignore its

international law obligations under the Convention Against Torture and impair the United States' role as a world leader in the campaign against torture.

The Administration strongly supports the efforts being made to ensure that aliens who have participated in or been responsible for serious human rights violations or acts that form the key elements of serious violations of humanitarian law are rendered inadmissible, removable, and ineligible for immigration relief. The Administration requests careful consideration of our own legislative proposal. After many months of collaboration within the Executive Branch, we are persuaded that we have developed a proposal that will significantly advance the interests of the United States in keeping human rights and humanitarian law violators out of the United States. The Administration's proposal adopts a scheme more easily implemented by those charged with day-to-day application of the INA provisions, including consular officers, immigration officers and immigration judges. It is tailored to consular and immigration proceedings, and designed to facilitate the denial of visas, entry, and other benefits in appropriate cases. Because it adopts simpler and more easily administered standards, we believe that our legislative proposal will render more aliens who have participated in or been responsible for serious human rights or humanitarian violations inadmissible, removable and ineligible for relief.

I appreciate the time you have extended to me to discuss these important issues and ask for your help to ensure that the United States is not a safe haven for those aliens who are participating in or are responsible for such atrocities. At this time, I would be happy to provide more details on the Convention Against Torture or our legislative proposal and to answer any other questions you may have.