Chapter 6
Immigration Law Enforcement

Introduction

This chapter provides detailed discussion regarding the most common laws enforced by the Coast Guard in conducting immigration law enforcement (LE) and disposition of migrants interdicted at sea.

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Section A. Introduction

Introduction

The nation's immigration laws and policies create an orderly process for the review and acceptance of prospective immigrants. The Coast Guard supports the national policy of orderly, safe, and legal migration, upholding U.S. immigration laws and international conventions against alien smuggling by:

- Conducting effective maritime interdiction.
- Engaging partner nations, supporting their efforts to enhance their border control and Maritime Law Enforcement (MLE) capabilities.
- Educating, communicating, and cooperating with both governmental and non-governmental partner agencies and organizations.
- Operating to uphold the human dignity of migrants and to ensure the safety of life at sea.
- Maintaining a pro-active public affairs posture to deter illegal and dangerous migrant departures.

This section contains overarching principles or philosophies that apply to immigration LE.

A.1. Interagency Relations

The Coast Guard works with the Border and Transportation Security (BTS) Directorate, Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS) in enforcing U.S. immigration laws and implementing U.S. immigration policies.

A.1.a. Border and Transportation Security Directorate

The BTS Directorate incorporates ICE and CBP to enforce the nation's immigration and nationality laws. BTS is also responsible for securing the transportation systems and includes the Transportation Security Administration (TSA).

A.1.b. Immigration and Customs Enforcement

ICE is responsible for the enforcement of immigration and customs laws within the U.S. ICE has investigations, intelligence, and deportation/removal programs. ICE also has the Federal Protective Service.

A.1.c. Customs and Border Protection

CBP has air and marine interdiction assets and is responsible for border inspections (people and merchandise), enforcement, protection, and patrolling areas between U.S. ports-of-entry. CBP also controls the U.S. Border Patrol (USBP).

A.1.d. U.S. Citizenship and Immigration Services

USCIS provides administrative immigration services such as processing applications for citizenship, permanent resident cards, and work authorization permits. USCIS manages the Asylum and Refugee programs and provides Asylum Prescreening Officers (APSOs) to conduct protection screenings at sea.

A.2. Migrant Interdiction Mission

The Coast Guard's migrant interdiction mission consists of two distinct functions: border control and LE. Although this distinction may be transparent during at-sea operations, Coast Guard personnel should be aware that a situation that begins as an exercise of the border control function may develop into an LE case, thereby changing the rights and processes to which particular aliens are entitled. Most migrant cases begin with an interdiction at sea conducted pursuant to the border control function or SAR. Subsequent actions will be governed by different legal authorities associated with either the border control function (e.g., repatriation) or the LE function (e.g., arrest for alien smuggling), depending on the circumstances. In carrying out these functions, the Coast Guard's role in migrant interdiction generally consists of:

- Preventing the entry of undocumented aliens into the U.S. through at-sea interdiction, including repatriation or return to third countries when directed to do so.
- Seizing the conveyance, arresting the smuggler(s), and/or gathering evidence in alien smuggling cases to facilitate criminal prosecution of the smuggler(s) and/or civil forfeiture of their vessels.
- Ensuring those aliens found after having already illegally entered the U.S. are held in custody (in the case of stowaways, by the vessel which brought them in) for further transfer to CBP.
- Ensuring aliens encountered during boardings are not engaged in activities inconsistent with their status (e.g., working in the U.S. without a permit, serving as master of a U.S. documented vessel).
- Complying with relevant procedures for handling requests for protection from persecution or torture.

A.3. Further Guidance

Pursuant to the border control function, DoD is authorized to support Coast Guard efforts to interdict illegal migrants at sea. Procedures for requesting DoD support are contained in *Section D.10* of this chapter.

Chapters 1 through 4 contain overarching policy regarding the conduct of MLE operations, including a law and policy framework, policy on the conduct of boarding operations, and rules governing use of force. These chapters apply to the entire enforcement of laws and treaties (ELT) program, including immigration LE and border control.

Tactics, lessons learned, and best practices for conducting immigration LE operations are contained in *Maritime Counter Drug and Alien Migrant Interdiction Operations*, COMDTINST M16247.4 (series)/NWP 3-07.4. Guidance in that manual covers the wide range of AMIO activities including patrol preparation; patrol tactics; guidelines for developing a unit AMIO Bill; and boarding, migrant care, and migrant processing procedures.

Persons who are not interdicted while illegally attempting to enter the United States as intending migrants (e.g., crewman encountered during a fisheries boarding), but affirmatively approach a Boarding Officer or boarding team member to seek protection or asylum in the United States shall be processed in accordance with *Appendix L* of this manual. Persons interdicted as intending migrants shall be processed in accordance with this chapter.

Section B. Legal Framework

Introduction

As previously discussed, the AMIO mission is unique in that Coast Guard actions and responsibilities are carried out pursuant to two distinct functions (LE and border control). The legal framework associated with both of these functions is discussed below.

This section contains discussion regarding the international and domestic legal framework for the migrant interdiction operations mission area.

B.1. Sources of Substantive International Law

Both customary and conventional international law endow coastal States with sovereign rights in their territorial seas and sovereign control in their contiguous zones, including the authority to restrict access to their borders, and to regulate admission of aliens by establishing circumstances and conditions over who enters the nation. Accordingly, the United States has a right to refuse entry to any particular individual. Likewise, a nation seeking to repatriate undocumented migrants interdicted at sea must first obtain host nation authorization.

B.1.a. Non-Refoulement

Notwithstanding the sovereign authority states exercise over their borders and immigration laws, principles of international law, as reflected in state practice, dictate that states must not expel or return ("*refouler*") persons to territories where their lives or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, or where there are substantial grounds for believing that they would be in danger of being subjected to torture. Article 33 of the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol, to which more than 130 states are parties, codifies this principle of non-refoulement. *See also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* February 4, 1985, S. Treaty Doc. No. 100-20, at 20 (1988), 23 I.L.M. 1027, 1028 (1984).

B.1.b. Human Rights Standards

Additionally, the United States has led and strongly supported the establishment of international human rights standards. Since World War II, the United States has signed several international human rights-related instruments that affect the conduct of the migrant interdiction mission, such as:

- Article 14 of the Universal Declaration of Human Rights, a fundamental international document, states the universal right to seek and enjoy in other country's asylum from persecution.
- Articles 19 and 33 of UNCLOS authorize coastal nations to establish a contiguous zone and exercise the control necessary to prevent infringement of their immigration laws.
- The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defined torture and the protocols for protection from torture and rearticulated the principle of non-refoulement.
- The United Nations Convention Against Transnational Organized Crime (TOC), and its Protocol Against the Smuggling of Migrants by Land, Sea and Air, and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. All three have entered into force and require, *inter alia*, that State Parties cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants at sea.
- The Maritime Safety Committee of the International Maritime Organization (IMO) has disseminated a circular (MSC/Circ. 896/Rev.1) containing non-binding measures for the prevention and suppression of unsafe practices associated with the transport of migrants by sea. The MSC circular served as interim guidance pending entry into force of the TOC and its protocols.

These obligations and principles of international law are factors in establishing U.S. law and policy. Further, the principle of non-refoulement influences the development of U.S. procedural safeguards necessary to ensure that migrants are not mistakenly returned to persecution or torture. These processes may affect repatriation decisions, and drive the need for bilateral agreements to provide for timely disposition options in appropriate cases.

B.2. Domestic Legal Framework

The United States has established its sovereign authority over immigration and border control in the U.S. Constitution and in the Immigration and Nationality Act (INA), codified in Title 8 U.S.C. and in implementing regulations found in Title 8 CFR. Of these laws, the most significant to the Coast Guard, pursuant to its LE function, are discussed in *Section C* of this chapter. *Appendix C* of this manual contains a list of other U.S. laws that may be applicable.

Many provisions of the INA do not apply outside of the "United States," which is defined in INA § 101(a)(38) as the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the U.S. Virgin Islands. That is, much of the INA applies only to aliens who are physically present within the United States, including those who seek admission at a U.S. port of entry.

In brief, the INA and its implementing regulations provide that aliens may lawfully enter the United States only after having passed through a U.S. immigration inspection station at which their compliance with various U.S. entry or admission requirements has been verified. Regardless of their compliance with U.S. entry requirements, aliens who are physically present in the United States may seek protection from persecution or torture, consistent with U.S. treaty obligations as implemented in U.S. law.

B.2.a. Executive Orders and Presidential Directives

Pursuant to INA §§ 212(f) and 215(a)(1), and acting under his constitutional authority as commander-in-chief to ensure the security of U.S. borders (U.S. Constitution, Art. 1, Sec. 2, cl. 1), the President issued three directives establishing policy for undocumented migrant interdiction and repatriation:

- Executive Order 12807: Interdiction of Illegal Aliens (E.O. 12807, May 24, 1992).
- Presidential Decision Directive-9: Repatriation Process (PDD-9, June 1993).
- Executive Order 13276: Delegation of Responsibilities Concerning Undocumented Aliens Interdicted or Intercepted in the Caribbean Region (E.O. 13276, Nov. 15, 2002).

B.2.a.1. Executive Order 12807

President Bush issued E.O. 12807 to the Secretary of the Department in which the Coast Guard is operating. Pursuant to E.O. 12807, the Coast Guard enforces the suspension of the entry of undocumented aliens by sea and interdicts vessels carrying such aliens. Consequently, the Coast Guard stops and boards vessels, in accordance with domestic and international law, when there is reason to believe that they are engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action. The Coast Guard makes inquiries of those onboard, examines documents, and takes other actions necessary to carry out the Executive Order. When there is reason to believe that an offense is being committed against U.S. immigration laws, or appropriate laws of a foreign country with which the U.S. has an arrangement to assist, then the Coast Guard shall return the vessel and its passengers to the country from which it came, or to another country. Coast Guard policy for enforcing E.O. 12807, pursuant to its border control function, is contained in *paragraph 6.C.1* below.

	The Executive Order (as amended by E.O. 13286) also provides that the Secretary of Homeland Security, in his or her unreviewable discretion, may decide that a person who is a "refugee" will not be returned involuntarily. In Sale v. Haitian Centers Council, 509 U.S. 155 (1993), the U.S. Supreme Court upheld the validity of E.O. 12807, ruling that neither U.S. law (i.e., the INA) nor Article 33 of the 1951 Refugee Convention restricted the power of the President to order the Coast Guard to repatriate undocumented aliens, including refugees, found seaward of U.S. territorial seas. Despite the Sale v. Haitian Centers Council decision, as a matter of policy, the U.S. Government affords migrants with an opportunity to seek and receive protection from persecution or torture.
B.2.a.2. Presidential Decision Directive - 9	In 1993, the President issued PDD-9 establishing U.S. Government organization and tasks for dealing with alien smuggling. PDD-9 provides that "[t]he U.S. Government will take the necessary measures to preempt, interdict, and deter alien smuggling into the U.S." PDD-9 specifically tasks the Coast Guard to "direct U.S. interdiction efforts at sea with appropriate DoD support if necessary." Consistent with E.O. 12807, PDD-9 establishes that U.S. policy is to "attempt to interdict and hold smuggled aliens as far as possible from the U.S. border and to repatriate them when appropriate." The Coast Guard "will direct/escort [interdicted suspect vessels] to flag States or the nearest non-U.S. port if practical and assuming host nation concurrence." Like E.O. 12807, PDD-9 also prescribes that it is U.S. policy to "ensure that smuggled aliens detained as a result of U.S. enforcement actions, whether in the U.S. or abroad, are fairly assessed and/or screened by appropriate authorities to ensure protection of bona fide refugees."
B.2.a.3. Executive Order 13276	E.O. 13276, as amended by E.O. 13286 (February 28, 2003) sets forth the duties and authorities of the Secretary of Homeland Security, Secretary of State, and Secretary of Defense with respect to maintaining custody of undocumented aliens interdicted or intercepted in the Caribbean region. This Executive Order provides authority to maintain such undocumented aliens in extraterritorial detention facilities and allocates responsibilities among the participating agencies.
B.2.b. Office of Legal Counsel Opinions	Between 1993 and 1996, the Office of Legal Counsel (OLC) of the Department of Justice (DOJ) issued a series of legal opinions binding on all federal agencies, which concluded that undocumented aliens seeking to reach the U.S., but who have not landed or been taken ashore on United States dry land, are not entitled to removal or other proceedings under the INA. Undocumented aliens who are on U.S. land, bridges, or piers are considered to have landed ashore in the United States, even if they subsequently reenter the water to complete their journey (e.g., wade from a rock out to a boat). However, migrants who are interdicted in U.S. internal waters, U.S. territorial seas, or onboard vessels moored to a U.S. pier are not considered to have landed ashore, and thus U.S. law permits direct repatriation without further process, except in the case of certain alien crewmembers or stowaways onboard a vessel and who express a fear of persecution or torture to a Department of Homeland Security (DHS) official who is examining the conveyance, which is addressed at 8 CFR 208.5(b) and 253.1(f).
B.2.c. Protection from Persecution	U.S. immigration policy long recognized protection from persecution as a general principle, but the past 20 years have seen Congress providing specific direction in handling asylum cases. The Refugee Act of 1980 established procedures and standards for adjudicating asylum applications for aliens present in the United States and refugee resettlement applications for certain aliens residing outside of the United States. The Immigration Act of 1990 established mandatory criminal- and security-related bars to asylum.

B.2.d. Protection from Torture	In addition to protection from persecution, the United States also has immigration laws and policies concerning protection from torture. In the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Congress directed U.S. immigration authorities to promulgate regulations implementing Article 3 of the 1984 Convention Against Torture. In December 1998, the President signed Executive Order 13107, Implementation of Human Rights Treaties (E.O. 13107, December 10, 1998), which ordered all agencies to "...respect and implement [their] obligations under the international human rights treaties to which [the Government of the United States] is a party."
B.2.e. Expedited Removal	The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) resulted in some of the most significant changes to U.S. immigration law in decades, including provisions for expedited removal for designated arriving aliens who are seeking admission to the U.S. but who are inadmissible either because they lack proper entry documents or they engaged in fraud/willful misrepresentation of a material fact.
B.2.e.1. Category of Aliens	In 2002, the DOJ issued regulations designating a category of aliens who may be placed in expedited removal proceedings. That designation includes: • Aliens who arrive in the United States by sea on or after November 13, 2002; • Either by boat or other means; • Who are not admitted or paroled; and • Who have not been physically present in the United States continuously for the two-year period prior to a determination of inadmissibility by an immigration officer.
B.2.e.2. Cuban Citizens	Expedited removal proceedings will not be initiated against Cuban citizens or nationals who arrive by sea, or alien crewmen or stowaways as described in the INA.
B.2.e.3. Detaining Aliens	This designation was deemed necessary to remove quickly from the United States aliens who arrive illegally by sea and who do not establish a credible fear of persecution or torture. The ability to detain aliens while admissibility is determined and protection claims are adjudicated, as well as to remove quickly aliens without protection claims, will deter additional aliens from taking to the sea and traveling illegally to the United States. Illegal migration by sea is perilous and the United States Government has repeatedly cautioned aliens considering similar attempts to reject such a hazardous voyage.
B.2.e.4. Determining Credible Fear	Any alien who falls within this designation who indicates an intention to apply for asylum or who asserts a fear of persecution or torture will be interviewed by an asylum officer to determine whether the alien has a credible fear. If that standard is met, the alien will be referred to an immigration judge for a hearing on the merits of the protection claim or claims. An alien found to have a credible fear and subsequently placed into removal proceedings before an immigration judge will be detained, with certain humanitarian exceptions, throughout those proceedings and will not be eligible to request a bond re-determination hearing before an immigration judge.

B.3. Authority and Jurisdiction

With the exception of those special circumstances described in *Chapter 2.C*, the Coast Guard must have both authority and jurisdiction before taking LE action. As discussed in *Chapter 2.A*, the Coast Guard's primary authority to enforce substantive U.S. immigration law pursuant to its LE function, is provided in Title 14 U.S.C. The Coast Guard's authority to exercise its border control function derives from E.O. 12807 (as confirmed by the Supreme Court in Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993)), Presidential Decision Directive 9 (PDD-9), and E.O. 13276. This border control authority directs the Coast Guard to stop and board vessels, make inquiries, examine documents, and take actions necessary to return interdicted migrants and their vessels to a nation other than the U.S.

Jurisdiction is comprised of three elements:

- Vessel status/flag
- Location
- Substantive law

Two of the three jurisdictional elements (vessel status/flag and location) are addressed in *Chapter 2.B*. Jurisdiction over substantive immigration laws is addressed in *Section C* of this chapter. Jurisdiction over the substantive law does not preclude the need for units to establish whether jurisdiction over the vessel status/flag and location also exist.

Section C. Offenses

Introduction

This section contains a list of the criminal and/or civil offenses applicable to the AMIO mission area. Each offense is discussed in terms of its elements, applicability, and enforcement policy.

C.1. Suspension of Entry of Undocumented Aliens

Under the Executive power to control the borders of the U.S., the President has suspended the entry of undocumented aliens into the U.S. In 1992, Executive Order 12807 was issued directing the Coast Guard to enforce this suspension as part of its border control function. PDD-9, issued in June 1993, establishes national policy to prevent and suppress alien smuggling, and mandates the Coast Guard interdict migrants as far at sea as possible. In Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993), the Supreme Court upheld the assertion of Executive Order 12807 that neither asylum screening procedures nor deportation processing requirements apply outside the territory of the U.S. More recently, various court opinions and executive agency practice have refined national policy related to interdiction, screening and processing of migrants, and repatriation.

C.1.a. Elements

Although "migration" is not necessarily a criminal offense, the legal scheme cited above clearly directs the Coast Guard to exercise its border control function in the interest of national security. As such, vessels may, in accordance with *Appendix D* of this manual, be stopped and boarded when there is reason to believe the vessel is engaged in unsafe practices associated with the transport of migrants by sea, violation of U.S. immigration law, or violations of the immigration law of a foreign country with which the U.S. has an agreement. "Unsafe practices" means any practice which involves operating a ship that is obviously in conditions which violate fundamental principles of safety at sea, in particular those of the SOLAS Convention, or not properly manned, equipped, or licensed for carrying passengers on international voyages, and thereby constitute a serious danger for the lives or the health of the persons onboard, including the conditions for embarkation and disembarkation.

C.1.b. Applicability	Units shall interdict undocumented migrants, wherever located, who are attempting to reach the U.S., but have not yet entered the U.S. This includes migrants intending to transit through the territory of a third country before proceeding to the U.S. Intent on the part of migrants to enter the U.S. may be established by statements made by the migrants, course and position of the vessel in relation to their claimed destination, and other evidence indicating a nexus to the U.S. Migrants are not deemed to have entered the U.S. unless they are located on U.S. dry land, bridges, or piers. According to a legal determination by the Office of Legal Counsel (OLC) of the DOJ, migrants interdicted in U.S. internal waters, U.S. territorial sea, or onboard a vessel moored to a U.S. pier are not considered to have entered the U.S. Migrants located on pilings, low-tide elevations, or aids to navigation are not considered to have entered the U.S. However, migrants who land ashore but subsequently reenter the water (e.g., wade from a rock out to a boat) are considered to have entered the U.S.
C.1.c. Enforcement Policy	Enforcement actions taken with respect to this section comprise the Coast Guard's border control function of the migrant interdiction mission. Interdiction and repatriation, carried out in support of the border control function, constitute the overwhelming majority of migrant interdiction activities conducted by the Coast Guard. *Appendix D* of this manual contains the command, control, approval, and coordination requirements for interdiction and disposition of migrants.
C.1.c.1. Interdiction	National and Coast Guard policy is to interdict undocumented migrants prior to landfall in the U.S. as far at sea as possible. While this appears a simple mandate, its execution can be complex and may not always be feasible. Operational Commanders can quickly exhaust available resources through interdiction and a lengthy at-sea detention process. Experience with interdiction in the Pacific has shown the U.S. Government is willing to allow time for interagency consideration of all options prior to Coast Guard action. The Coast Guard is not always required to immediately deploy surface forces upon detection of a migrant vessel. Unless timing is critical, the Coast Guard may evaluate the situation before acting.
C.1.c.2. Rendering Assistance	Many migrant cases involve persons traveling aboard unsafe, overcrowded, and/or unseaworthy vessels. As defined by international law and service regulations, it is the duty of Coast Guard units encountering such vessels to take appropriate actions to render assistance and alleviate distress. However, categorizing a situation as a SAR case does not preclude subsequent enforcement action. See *Chapter 2.C.3* for the legal basis for rendering assistance to persons/property at sea. See *Chapter 3.B.4.a.4* for policy regarding the relationship between ELT and SAR.
C.1.d. Disposition	See *Section D* of this chapter for further disposition policy and procedures.
C.2. **Bringing in and Harboring Certain Aliens, 8 U.S.C. 1324(a)(2)**	8 U.S.C. 1324(a)(2) prohibits the smuggling of undocumented migrants into the U.S. and is intended to hold smugglers responsible regardless of official action taken with respect to the migrants.

C.2.a. Elements	It is unlawful for any person knowing, or in reckless disregard of, the fact that an alien has not received prior official authorization to come to, enter, or reside in the U.S., to bring or attempt to bring such alien to the U.S. Intent to enter the U.S. may be presumed when: • The alien is aboard a vessel in the U.S. territorial sea or contiguous zone (other than a foreign flag vessel planning no port call in the U.S.). • The alien is aboard a U.S. vessel anywhere. • The vessel is destined to stop at a U.S. port at some point in the voyage. • The alien is the subject of intelligence reports. • Another person aboard indicates the alien intends to enter the U.S. An alien is any person that is not a citizen or national of the U.S. In general, except for individuals requesting protection from persecution or torture, aliens may lawfully enter the U.S. only after having passed through a U.S. port of entry where compliance with entry or admission requirements has been checked.
C.2.b. Applicability	This statute applies to all persons and vessels in all locations where the INA is applicable. See *Chapter 6.B.2* for more information on the INA.
C.2.c. Enforcement Policy	8 U.S.C. 1324(a)(2) provides for only criminal penalties. Enforcement options are described below. *Appendix D* of this manual contains approval requirements for arrest and seizure.
C.2.c.1. Immigration Proceedings	It is DHS policy to pursue administrative removal proceedings pursuant to 8 CFR 1240 against any parolee, lawful permanent resident, or other non-U.S. citizen with immigration status in the United States who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law. Accordingly, District Commanders shall contact ICE and CBP in all cases (including cases not referred or declined for criminal prosecution) involving the interdiction of suspected non-U.S. citizen migrant smugglers with parole or status in the United States and seek to have the suspected smugglers placed in section 240 proceedings. If 8 CFR 1240 proceedings result in a final order of removal, then any subsequent interdiction of the individual at sea (whether or not involved in migrant smuggling) may result in felony prosecution for 8 U.S.C. 1326 (see *paragraph C.3* below), as well as for 8 U.S.C. 1324d (Failure to Depart), 8 U.S.C. 1325 (Irregular Entry; Misrepresentation/Concealment of Facts), or 18 U.S.C. 1001 (False Statements).
C.2.c.2. Arrest	For a violation of 8 U.S.C. 1324(a)(2), suspected smugglers are subject to arrest or, in lieu of arrest, may be detained for further transfer to another LE agency (usually ICE/CBP). In all cases, units shall contact OPCON prior to arresting any suspected smuggler, and for guidance regarding disposition of all persons interdicted at sea.

C.2.c.3. Seizure	For a violation of 8 U.S.C. 1324(a)(2), the vessel and all property aboard are subject to seizure. Units shall contact OPCON prior to seizing any vessel, and for guidance regarding disposition of the vessel and all property aboard. When smuggled migrants are discovered aboard a vessel that is a common carrier, certain exceptions to seizure authority exist. A common carrier vessel is one engaged in the business of public employment for the carriage of goods or passengers for hire (e.g., ferries, head-boats, merchant break-bulk freighters carrying cargoes for many owners). Common carrier vessels are normally not seized unless the owner, master or person in charge (PIC) was a consenting party or privy to the discovered violation. While the ultimate burden is upon the ship owner to prove common carrier status, the requirement that a Boarding Officer seek guidance from OPCON prior to seizing any vessel is particularly important where the vessel appears to have the distinguishing characteristics of a common carrier.
C.2.c.4. Case Package Preparation	A case package is required for every interdiction. Where any suspected violation of this statute is being referred to a U.S. Attorney for prosecution, it is tremendously important to prepare a timely and complete case package in accordance with *Appendix G* of this manual. Even where the case is not being referred for prosecution, information on the vessel, suspected smugglers or organizers (and eventually - with soon to be realized technology - information on the migrants themselves, who might be previously deported felons, etc.) is of important intelligence and LE value. Thus, units should complete as much of *Appendix G* of this manual as practical, even where no prosecution is anticipated.
C.2.d. Material Witnesses	Aliens may be required as witnesses for prosecution. Concurrence by appropriate regional interagency stakeholders (e.g., ICE, CBP, U.S. Attorney) is required to determine whether to bring aliens who are potential witnesses into the U.S.
C.3. Attempted Entry of Removed Aliens, 8 U.S.C. 1326	8 U.S.C. 1326(a) prohibits, among other things, the attempted entry into the United States of any alien who has been previously removed from the United States.
C.3.a. Elements	It is unlawful for any alien who has been denied admission, excluded, or removed or departed the United States while an order of removal is outstanding, and thereafter to enter or attempt to enter the United States under the following delineated circumstances: • The Secretary of Homeland Security has consented to the alien reapplying for admission to the United States. • The alien establishes that he/she was not required to obtain such consent.
C.3.b. Applicability	This statute applies to aliens removed from the United States who are attempting to enter the United States. This includes persons who depart the United States with an outstanding final order of removal.

C.3.c. Enforcement Policy	8 U.S.C. 1326(b) provides for only criminal penalties. Enforcement options are described below. *Appendix D* of this manual contains approval requirements for arrest and seizure. There are enhanced penalty provisions under certain circumstances to include if the removal was subsequent to a conviction for commission of a felony or aggravated felony. [redacted] In those cases where local interagency coordination yields a possible violation of this statute, concurrence by appropriate regional interagency stakeholders (e.g., CBP, U.S. Attorney) is required to determine whether to bring an alien into the U.S. for prosecution under this statute. Where the enhanced penalty provisions are not triggered, OPCON should be prepared to discuss the merits of a prosecution under this statute versus speedy repatriation, if available.
C.3.c.1. Arrest	For a violation of 8 U.S.C. 1326(a)(2), removed aliens suspected to be attempting to enter the United States are subject to arrest or, in lieu of arrest, may be detained for further transfer to another LE agency (usually CBP). In all cases, units shall contact OPCON prior to arresting an alien suspected of violating this statute.
C.3.c.2. Case Package Preparation	A case package is required for every interdiction. Where any suspected violation of this statute is being referred to a U.S. Attorney for prosecution, it is tremendously important to prepare a timely and complete case package in accordance with *Appendix G* of this manual. Even where the case is not being referred for prosecution, information on the vessel, operator/charterer, crew, route and stowaway are of important intelligence and LE value. Thus, units should complete as much of *Appendix G* of this manual as practical, even where no prosecution is anticipated. If a prosecution for this statute is anticipated, it is particularly important to establish that the person was attempting to enter the United States, as opposed to merely transiting through waters subject to the jurisdiction of the United States.
C.3.d. Witnesses	Alien-witnesses are not needed for prosecution under this statute. Coast Guard witnesses may be required to establish the attempt to enter the United States, as opposed to merely transiting through waters subject to the jurisdiction of the United States.
C.4. Unauthorized Entry into Cuban Territorial Waters, 33 CFR Part 108	Cases involving Cuban migrants may be subject to criminal and/or civil penalties if a migrant smuggling vessel subject to the jurisdiction of the United States entered Cuban territorial waters after departing from the United States. Units shall give consideration to this enforcement option in all appropriate cases. See *Appendix O.17* of this manual for detailed enforcement policy.
C.5. Negligent Operations, 46 U.S.C. 2302 (a)-(b)	Units should consider civil and/or criminal penalty action in migrant smuggling cases involving negligent or grossly negligent operation of vessels, such as high-speed flight from or ramming or attempted ramming of LE vessels. See *Chapter 11.C.4* for detailed enforcement options.
C.6. Stowaways, 18 U.S.C. 2199	A stowaway is as an alien coming to the United States surreptitiously on an airplane or vessel without legal status for admission. Such an alien is subject to denial of formal admission and return to the point of embarkation by the transportation carrier. 18 U.S.C. 2199 prohibits any person from attempting to obtain transportation through concealment onboard a vessel or aircraft without consent of the owner, charterer, master, or PIC.

C.6.a. Elements	It is unlawful for any person, without the consent of the owner, master, or PIC of a vessel, with intent to obtain transportation, to board, enter, or secret themselves aboard such vessel and either remain aboard after such vessel departs a U.S. port, or remain aboard when such vessel has departed a certain place and subsequently enters an area shoreward of 12 NM from the baseline of the U.S.
C.6.b. Applicability	This statute applies to all persons and in all locations.
C.6.c. Enforcement Policy	18 U.S.C. 2199 provides for only criminal penalties. Enforcement options are described below. *Appendix D* of this manual contains approval requirements for arrest and seizure.
C.6.c.1. Arrest	For a violation of 18 U.S.C 2199, federal prosecutorial options are relatively limited. Although a violation of 18 U.S.C. 2199 technically renders a stowaway subject to arrest, units will normally not be directed to do so. Units shall discuss a case involving stowaways with the cognizant District legal office prior to making any arrests.
C.6.c.2. Fine	For a violation of 18 U.S.C. 2199, a person may be fined.
C.6.c.3. Case Package Preparation	A case package is required for every interdiction. Where any suspected violation of this statute is being referred to a U.S. Attorney for prosecution, it is tremendously important to prepare a timely and complete case package in accordance with *Appendix G* of this manual. Even where the case is not being referred for prosecution, information on the vessel, operator/charterer, crew, route and stowaway are of important intelligence and LE value. Thus, units should complete as much of *Appendix G* as practical, even where no prosecution is anticipated.
C.6.d. Disposition	CBP holds common carriers responsible for returning stowaways to their nation of origin. Due to the wide range of options for returning stowaways, units shall contact OPCON for relevant guidance. Coast Guard action regarding a stowaway located aboard a foreign vessel in, bound for, or arriving in a U.S. port shall be coordinated with CBP and the COTP. [redacted] *Chapter 10.C.10* provides policy guidance on high-risk crewmembers, absconders, deserters, and stowaways. All stowaways must be detained onboard the vessel. Responsibility for stowaway detention and care remain with the carrier. Typically, stowaways will be ordered detained and removed from the United States onboard the vessel. The master of the vessel may request that a stowaway be removed from the United States by other means of transportation where compelling or emergent reasons exist. Permission for removal is at the discretion of CBP, but all costs relating to stowaway removal remain with the carrier. Cuban stowaways present unique policy concerns and operational challenges. Notify Commandant (G-OPL) if a vessel bound for the U.S. reports having Cuban stowaway(s) onboard, and arrange to remove the Cuban stowaways before the vessel moors in a U.S. port and to process them in accordance with *paragraph* [illegible] of this chapter. If a stowaway has jumped overboard and the vessel of origin cannot be determined, the stowaway should be treated as a migrant in accordance with *paragraph* [illegible] of this chapter.

b7E

Section D. Policy and Procedures

Introduction

This section contains policy and procedures that apply to the following:

- Migrant disposition.
- Screening.
- Vessel disposition.
- Detention/arrest.
- Disclosure/requests for information.
- Terminology.
- Citizenship/immigration documents.
- Requests for DoD support.
- Activities inconsistent with immigration status.

D.1. Interdiction of Undocumented Aliens

Consistent with the OLC Opinions discussed in *Section B.2.b* of this chapter, undocumented aliens seeking to reach the U.S., but who have not landed or been taken ashore on U.S. dry land are not entitled to removal or other proceedings under the INA. Interdicted migrants who have not yet reached U.S. soil are normally returned to the country from which they departed. If suspicion or evidence exists that a migrant interdicted at sea may have previously been ashore in the United States, contact Commandant (G-OPL) and request disposition instructions.

The OLC Opinions provide that migrants are not deemed to have entered the U.S. unless they are located on U.S. dry land, bridges, or piers. Migrants interdicted in U.S. internal waters, U.S. territorial sea or onboard a vessel moored to a U.S. pier are not considered to have entered the U.S. Migrants located on pilings, low-tide elevations or aids to navigation are not considered to have come ashore in the U.S. However, migrants who land ashore but subsequently reenter the water (e.g., wade from a rock out to a boat) are considered to have come ashore in the U.S.

D.2. General Disposition of Migrants Interdicted at Sea

All migrant interdictions by Coast Guard assets, regardless of what level of the chain of command has disposition authority, must be reported to Commandant (G-OPL) by the most expeditious means available in real time.

- A Commandant (G-O) SNO is required unless otherwise noted in *paragraph D.2.a* below (or in subsequent published guidance) for the following:

[redacted] bE

[redacted]

D.2.a. Commandant (G-O) Statement of No Objection Not Required

A Commandant (G-O) SNO is not required for the following:

[redacted]

b7E

[redacted] b7E

D.2.b. Standing Statement of No Objection for Routine Haitian Migrant Cases

In accordance with *Appendix D* of this manual, Commandant (G-O) has no objection to the Seventh Coast Guard District Commander, or the officer acting in either capacity, authorizing the repatriation of Haitian migrants in cases meeting the criteria below:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

The District Commander's granting of an SNO pursuant to this delegation requires real-time notification to the Commandant (G-OPL) duty officer.

D.2.c. Unseaworthy Craft or Peril from the Sea

Every effort shall be made to rescue persons embarked in unseaworthy craft or otherwise in peril from the sea, and to offer assistance to those at risk of easily being so imperiled (due, for example, to the obvious overloading or absence of sufficient safety and lifesaving equipment aboard an otherwise seaworthy vessel), regardless of the nationality or other circumstances of the person onboard (POB).

Unless the persons onboard are in immediate and life threatening danger, assistance should not be provided to a foreign vessel not subject to the jurisdiction of the United States without the consent of the master or approval from the flag State. However, the decision to render such non-consensual rescue or assistance must be made by the On-Scene Commander (OSC) based on all the circumstances.

If persons rescued or assisted in foreign territorial waters appear to be migrants, notify Commandant (G-OPL), who will work with the Department of State (DOS) to transfer the migrants to the authorities of the coastal nation in whose territory they are located, or to otherwise determine disposition.

D.2.d. Distress at Sea

U.S. and international law requires mariners to recover people in distress at sea. If notified of search and rescue by a Good Samaritan, and absent exigent circumstances, U.S. Government policy is to require the rescuing vessel to safeguard the migrants in a place where the INA does not apply pending disposition instructions. See *Section B.2* of this chapter for more information on the INA.

Disposition of migrants intercepted at sea by non-government vessels is the responsibility of the vessel master and the vessel's flag State. For U.S. vessels, consult with Commandant (G-OPL) to determine disposition instructions to the vessel. For foreign vessels, any request, including from the vessel, agent, master, or flag State, to remove undocumented aliens at sea shall be referred to Commandant (G-OPL) for consultation with the interagency and decision.

D.2.e. Undocumented Migrants Not in Distress

Unless an international agreement or arrangement otherwise provides, units detecting persons suspected of being undocumented migrants who are not in distress and are located within foreign territory or territorial waters shall notify Commandant (G-OPL) by most expeditious means and via the chain of command. Commandant (G-OPL) shall work with DOS to contact the coastal State. If a vessel is detected in foreign territorial waters adjacent to U.S. waters, units shall monitor the vessel closely to interdict it upon entry into U.S. waters.

If persons suspected of being undocumented migrants are detected aboard vessels bound for countries other than the U.S., units shall notify Commandant (G-OPL) who will work with DOS to contact the appropriate flag and coastal States to coordinate a response.

D.3. Nationality- and Geographic-Specific Disposition Issues

Nationality-specific disposition issues are discussed below for:

- Cuba
- People's Republic of China (PRC)

D.3.a. Cuba

Absent exigent circumstances, interdicted Cuban migrants otherwise eligible for direct repatriation to Cuba will be detained at sea and an APSO will be provided by USCIS to complete the required screening process. In such cases, Commandant (G-OPL) will notify the District Command Center of the final disposition of all interdicted Cuban migrants following a credible fear determination by USCIS Headquarters.

Interdicted Cuban migrants who are eligible for direct return to a country other than Cuba pursuant to international agreements or arrangements in force (e.g., Dominican Republic, Bahamas) may receive APSO prescreening if they manifest a fear that they will be tortured, or persecuted upon return to the destination country due to their ethnicity, race, religion, or political beliefs. See *paragraph D.4* below for additional policy guidance regarding prescreening.

When USCIS Headquarters determines that a Cuban migrant has a credible fear of persecution or torture, Commandant (G-OPL) will normally initiate interagency action to transfer the migrant (including as appropriate, the migrant's spouse and/or unmarried children under the age of 21, or parents/guardians of migrants under the age of 21) to DHS facilities at Guantanamo Bay, Cuba. Once at Guantanamo Bay, USCIS determines whether the migrant ultimately requires protection from persecution or torture. Migrants not determined to be refugees or in need of protection are repatriated to Cuba.

See **Figure 6-1** for repatriation procedures for Cuban migrants. In addition to the procedures set forth in **Figure 6-1**, non-Coast Guard personnel (except USINT Havana and approved USCIS personnel) should not be present on deck during repatriation of Cuban migrants. See *Section C.3.d* of this chapter for policy regarding Cuban stowaways on vessels bound for the United States.

D.3.b. People's Republic of China

Prescreening of PRC migrants may be required. See *paragraph D.4* below for additional policy guidance regarding prescreening.

D.4. Prescreening

A prescreening is a limited-scope interview afforded to all Cuban migrants interdicted at sea and otherwise eligible for direct repatriation to Cuba, and to any other migrant interdicted at sea who manifests a fear of persecution or torture upon repatriation. A USCIS APSO conducts pre-screening interviews. When an APSO is embarked to conduct this prescreening, the CO shall attempt to provide a secure, private location for the APSO to confer with migrants.

D.4.a. Referral to Asylum Prescreening Officer

Migrants identified as manifesting a fear of persecution or torture will be referred to a USCIS APSO for a prescreening interview, except that:

- All Cuban migrants eligible for direct repatriation to Cuba, regardless of whether they manifest a fear of persecution or torture will receive the opportunity for an APSO prescreening; and
- All PRC migrants receive a questionnaire to elicit the reason(s) for their departure from China (**Figure E-16**, which is contained in *Appendix E* of this manual), which the Coast Guard transmits to USCIS Headquarters. After reviewing the responses to the questionnaires, USCIS determines whether any of the migrants' responses require further inquiry or a prescreening interview by an APSO.

D.4.b. Fear of Return Due to Persecution or Torture

Manifestations of fear of return due to persecution or torture may be verbal or physical. The responsibility of unit personnel is to identify individuals who, verbally or physically, have manifested a fear. No qualitative evaluation of that fear or its basis should be undertaken as part of the identification process. Migrants may not specifically articulate a fear, but a manifestation of fear may include the following:

- Evidence of an injury (e.g., burn, bruise, etc.).
- Statement that migrant was already harmed by persons in their country of origin.
- Statement that migrant will be harmed by persons in their country of origin upon return.
- Non-verbal actions such as self-inflicted harm or other gestures.

If doubt or ambiguity exists as to whether a migrant's statement, actions, or appearance should trigger pre-screening, then the matter shall be referred to Commandant (G-OPL) for further consideration by USCIS. Cutters shall NOT elicit statements from migrants unless and until directed to do so by TACON.

D.4.c. Role of Coast Guard Personnel

Unit personnel are responsible for ensuring that migrants who verbally or physically manifest a fear of return are referred to Commandant (G-OPL) via TACON for further consideration by USCIS for pre-screening. Unless otherwise directed by TACON, communications with migrants shall be limited to those necessary to accomplish embarkation, initial briefing, security, safety, medical care, food distribution, and disembarkation.

D.4.d. Role of the Interpreter

As a matter of policy, migrants should be afforded an opportunity to communicate in a language understood by shipboard personnel or immigration personnel ashore receiving communications from the ship. The Coast Guard coordinates with the interagency to ensure that an interpreter is made available to any migrant who manifests a fear of return due to persecution or torture, or who appears to be attempting to communicate such a fear. Although an onboard interpreter may be the preferred means to communicate with such migrants, if an interpreter is not readily available or it is not operationally feasible to make one readily available on the cutter, then translation services will be provided by interpreters not onboard the cutter via cellular phone, INMARSAT phone, radio, or other means.

A Coast Guard-contracted interpreter may be deployed for operational safety reasons on Coast Guard cutters (e.g., Creole interpreters in the Windward Passage, and Spanish interpreters in the Mona Passage). The Coast Guard provides these interpreters to afford migrants an opportunity to communicate with Coast Guard personnel to facilitate Coast Guard operations. These interpreters are not trained USCIS pre-screeners. If cutter personnel other than an embarked interpreter who can understand the migrant's statement observe a possible verbal manifestation of fear, the cutter will request that the embarked interpreter ask the migrant to repeat the statement, and thereafter transmit the information to Commandant (G-OPL) via TACON for consideration by USCIS; however, Coast Guard contracted interpreters shall not solicit or attempt to elicit claims for protection

D.4.e. Information Sensitivity

Information contained in asylum prescreening interviews is particularly sensitive.

- Generally, APSOs will be responsible for transmitting prescreening assessments directly to USCIS Headquarters, but, in certain circumstances, may require logistical or technical assistance from Coast Guard units. Should it be necessary to transmit USCIS interviews via message traffic, info addees will be limited to the appropriate Command Centers, Commandant (G-OPL), and USCIS.
- Coast Guard or other military personnel shall not be directly involved in the prescreening process, except to facilitate the prescreening through logistical, language, security, or administrative support to USCIS officials.

D.5. Disposition of Migrant Vessels

- Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of 8 U.S.C. 1324 may be seized and subject to forfeiture. Other laws in which illegal migrant activity is implicated may also permit vessel seizure.
- In cases involving U.S. vessels or vessels assimilated to without nationality status, operational units shall consult their servicing legal office for assistance in determining vessel disposition. Such determinations shall be coordinated with the CBP and servicing U.S. Attorney Office.
- In cases involving foreign flag vessels seaward of the contiguous zone, a Commandant (G-O) SNO is required for disposition.
- Coast Guard seizure of any vessel, in any location, requires the command, control, approval and coordination detailed in *Appendix D* of this manual. Final decisions to seize vessels will be made by ICE or CBP officials.
- Specific procedures and techniques regarding disposition of migrant vessels are contained in the *Maritime Counter Drug and Alien Migrant Interdiction Operations*, COMDTINST M16247.4 (series)/NWP 3-07.4, *Section 11*.

D.6. Aliens Detained for Prosecution or Arrested at Sea

In arresting or detaining for prosecution aliens interdicted at sea and suspected of violating U.S. law (including migrant and drug-related cases), units shall comply with the command, control, approval and coordination policy for arrests set forth in *Appendix D* of this manual. Except in exigent circumstances identified in *paragraph D.2.a* above, once interdicted migrants are onboard a Coast Guard unit, those migrants shall not be brought ashore in the United States without a Commandant (G-O) SNO. If a representative from another agency makes a specific request that any or all of the migrants be brought ashore, immediately forward that request with the name, title, and phone numbers of the requesting official to Commandant (G-OPL). In such cases, advise the other agency that Coast Guard Headquarters must approve all requests to bring aliens ashore, and that such requests are vetted in real time with senior interagency officials in Washington, DC. Accordingly, Coast Guard field units should encourage the requesting agency to contact their own headquarters in Washington, DC to initiate and participate in the interagency decision-making process. In addition to internal command and control, Operational Commanders shall not permit arrested or detained aliens to be brought into the U.S. without proper field coordination with ICE and CBP. Only CBP Port Directors may parole such persons into the U.S. for any purpose, to include criminal prosecution.

D.7. Disclosure/ Requests for Information	The location and personal information about any migrant interdicted by the Coast Guard is "For Official Use Only" (FOUO) and shall not be released to the public (including immediate family). Requests for this information shall be referred to local USCIS, ICE, or CBP offices. Refer all inquiries concerning Cuban migrants to the USCIS recording at 800-264-2577. For on-going cases, the ultimate disposition location is sensitive information for diplomatic and operational reasons. Refer all requests for information concerning the ultimate destination of the migrants to the District PAO. District PAOs shall obtain guidance as needed from Commandant (G-OPL).
D.8. Terminology	Coast Guard reports of, or official reference to "migrants encountered at sea" shall refer to these individuals as either "migrants" or "aliens." The descriptive terms "illegal" or "undocumented" may also be used, if accurate. See *Appendix B* of this manual for additional information.
D.8.a. Refugee	The term "refugee," which is defined in *Appendix B* of this manual and 8 U.S.C. 1101(a)(42), shall not be used in place of alien or migrant.
D.8.b. Political or Economic	The terms "political" or "economic" shall not be used to describe aliens/migrants encountered at sea.
D.8.c. Asylum	The term "asylum" has specific meaning under U.S. law. A request for asylum shall be referred to as a request for protection from persecution or torture.
D.9. Citizenship/ Immigration Documents	In conducting migrant interdiction operations, units are often required to validate the citizenship or immigration status of individuals to determine compliance with U.S. immigration law(s). For example, an alien may present an expired, false, or altered document, an authentic document belonging to someone else, or a document with incomplete or missing visas (or other attachments). *Appendix K* of this manual provides further guidance and a description of commonly used documents.
D.9.a. Race, Ethnicity, Religion, or English-Speaking	Race, ethnicity, religion, or the ability to speak English, shall not be the sole basis when determining the immigration status of an individual, and shall not be the sole basis for initiating that determination process. In all cases involving vessels entering or attempting to enter ports or places of the United States and apparently having most recently departed from a foreign port or place, Boarding Officers shall affirmatively identify everyone onboard a vessel, and that as part of this process, those without U.S. passports, U.S. birth certificates, or U.S. military identification, or "green cards," may be asked to present appropriate U.S. immigration documents.
D.9.b. U.S. Citizenship	Units should first determine whether the person is a U.S. citizen. This is particularly important with respect to statutes that require certain officers and crewmembers of U.S. vessels are U.S. citizens (see *Appendix C* of this manual regarding violations of 46 U.S.C. 8103).

D.9.c. Non-U.S. Citizenship	If the person is not a U.S. citizen, units shall attempt to determine the immigration status of the individual, including whether that person is a documented or undocumented alien, has been paroled into the U.S., or may be subject to a final order of removal. This information is significant in determining if the individual is subject to the suspension of the entry of undocumented aliens or otherwise in violation of U.S. immigration law, see *Section C.3* of this chapter. *Appendix K* of this manual provides further guidance and a description of immigration documents (e.g., Alien Registration Receipt Card, Reentry Permit, Refugee Travel Document).
D.9.d. Validity of Citizenship/ Immigration Documents or Eligibility for Current Immigration Status	In case of doubt concerning the validity of citizenship/immigration documents or the continuing eligibility for current immigration status, units shall seek assistance from local ICE or CBP office via OPCON. If an alien's documents are determined to be fraudulent or otherwise improper or inadequate, unless immigration officials otherwise direct, the Coast Guard shall treat the alien as an undocumented migrant in accordance with this chapter. If local or regional immigration officials are not readily available to assist and reasonable doubt remains as to the validity of the documents, contact Commandant (G-OPL) for immediate assistance.
D.9.d.1. Validation Assistance	When assisting in the enforcement of foreign immigration laws pursuant to an international agreement in force or arrangement, units shall seek assistance from appropriate foreign LE and/or immigration officials in determining the validity of documents.
D.9.d.2. Smuggling Evidence	Valid documentation is not the only requirement for legal entry into the United States (or most other countries). Accordingly, if aliens at sea present valid or apparently valid travel documents, boarding teams should be cognizant of and report to TACON statements and other evidence suggesting smuggling or other illegal entry activity, such as intent to enter at a place other than a designated port-of-entry.
D.10. Requests for Department of Defense Support	The following procedures apply when requesting DoD support for migrant interdiction operations. Area Commanders are encouraged to develop a Memorandum of Understanding (MOU) with the cognizant Combatant Commander(s) that establishes procedures for requesting incidental support for migrant interdiction events. Incidental support is that which DoD assets can provide without significant interference with normal DoD operations. In the absence of an MOU, requests for support shall be processed as follows: • Requests for incidental DoD support shall be accomplished via direct liaison between the Area Commander and the cognizant Combatant Commander. • Requests for other than incidental DoD support shall be made by the Area/District Commander via message to Commandant (G-OPL). The decision to provide such support will be made by the Joint Staff (JCS/J3). Informal liaison between the Area Commander and cognizant Combatant Commander in advance of a formal request for support is encouraged to expedite the process. Message requests for DoD support should not be classified higher than "SECRET" and shall adhere to the following guidelines: ➢ Requests shall include a description of the situation and basis for the request. ➢ Requests shall identify the capability required without specifying the type and number of units desired. ➢ Requests shall be addressed to Commandant (G-OPL) with the Joint Staff (J3) and the cognizant Combatant Commander as information addressees.

D.11. Activities Inconsistent with Immigration Status

Persons on certain non-immigrant visas may not be permitted to work for pay in the U.S. With certain exceptions, aliens (including permanent resident aliens) are not permitted to serve as a master, chief engineer, radio officer, or Officer-in-Charge of a deck watch or engineering watch on a U.S. documented vessel. However, permanent resident aliens, in many cases, may serve as a member of its crew as an unlicensed seaman. See *Appendix C* of this manual regarding violations of 46 U.S.C. 8103.

Persons suspected of migrant smuggling or other criminal activity, and interdicted at sea while possessing U.S. immigration documents or claiming immigration status in the U.S., may be brought into the U.S. upon validation of any documents or status claims and with the concurrence of CBP Port Director and ICE case agent.

OPERATIONAL PROCEDURES
AGREED TO BETWEEN THE UNITED STATES COAST GUARD
AND THE TROPAS GUARDA FRONTERAS
REGARDING CUBAN REPATRIATION

The following are the operational procedures to be used between the United States Coast Guard (USCG) and the Tropas Guarda Fronteras (TGF) for the repatriation of Cubans attempting to illegally enter the United States and picked up upon the High Seas by the United States Coast Guard:

1. When the United States Government has decided to repatriate Cuban citizens illegally attempting to enter the United States and who have been placed aboard a USCG Vessel, the following information will be provided by the Coast Guard Command Center, Seventh Coast Guard District, Miami, Florida, to the Tropas Guarda Fronteras, Havana, Cuba, via both facsimile and TELEX and to the U.S. Interests Section in Havana via FAX. USINT Havana will informally send to MINREX copies of the personal data listed below available to it:
   a. Date/time/position of embarkation of Cuban migrants.
   b. A description of individuals who were placed aboard the vessel including nationality; total number of migrants.
   c. Personal data as available of individuals to be provided to the TGF:
      (1) Full name (include both surnames if available)
      (2) Nationality
      (3) Sex
      (4) ID Card Number
      (5) Date of Birth
      (6) Place (city, province, country) of birth
      (7) Address in Cuba
   d. Name of Coast Guard cutter (CGC) designated to execute the repatriation.
   e. Date and time a CGC will be available to repatriate migrants at designated port.
   f. Date/time the CGC will enter Cuban territorial water.
   g. Date/time the CGC will be expected pier side of repatriation port.
   h. Whether a Harbor Pilot will be required.
2. Once the TGF have reviewed the above information, they will indicate concurrence in writing to Coast Guard Command Center, Miami, or redesignate the repatriation port/time. The concurrence by the TGF of date, time, and location will serve as the authorization for the U.S. Coast Guard to enter Cuban territorial waters to repatriate the Cuban migrants. This information will be passed by the Cuban Border Guard Command Center to both the Seventh District Command Center and the U.S. Interests Section in Havana.
3. Once Cuban concurrence is received, the Seventh District Command Center will relay via the fastest available means to the designated repatriation USCG cutter the date, time, and repatriation port. Additionally, the designated Coast Guard cutter will establish communications with the TGF via HF (2182 KHZ) or VHF/FM channel 16/22A prior to entering Cuban territorial seas. Direct tactical communications between the designated Coast Guard cutter and the TGF is authorized until the Coast Guard cutter has safely discharged all migrants and returned to International Waters.
4. It is further agreed that:
   a. All repatriations will be conducted during daylight hours.
   b. The Coast Guard cutter will be first boarded pierside by the U.S. officer designated by the U.S. Interests Section in Havana to explain legal migration procedures to those being returned and escort and those being returned to TGF representatives on the pier.
   c. Neither USCG nor any other USG personnel will at any time disembark from the cutter while in the territorial seas or internal waters of Cuba.
   d. Cuban nationals (other than the designated Harbor Pilot if used) will not at any time embark onto the cutter while the cutter is in the territorial seas or internal waters of Cuba.
   e. Communications between the Coast Guard cutter and the TGF will be in Spanish if Spanish-speaking crew members are available.
   f. The Coast Guard cutter will get underway immediately after the safe transfer of all migrants is completed to proceed directly to international waters.
5. Deviations from these operational procedures are to be resolved through direct communications via facsimile between the TGF Command Center and the Seventh District Command Center, with concurrence of USINT Havana.
6. This set of procedures is effective [illegible] and will remain indefinite until either party gives 24-hour advance notice in writing of intention to terminate.

Figure 6-1
Procedures for Cuban Repatriations

Office of Legal Counsel
U.S. Department of Justice

IMMIGRATION CONSEQUENCES OF UNDOCUMENTED ALIENS' ARRIVAL IN UNITED STATES TERRITORIAL WATERS

October 13, 1993

*77 Undocumented aliens interdicted within the twelve-mile zone that comprises the United States's territorial sea are not entitled to a hearing under the exclusion provisions of the Immigration and Nationality Act.

The Immigration and Naturalization Service had the authority to promulgate an interpretative rule construing the "territorial waters" of the United States, as referred to in section 287 of the INA, to extend for twelve nautical miles.

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum responds to requests made by the Office of the Associate Attorney General and the General Counsel's Office of the Immigration and Naturalization Service ("INS") for our views on the consequences under the Immigration and Nationality Act ("INA") of an undocumented alien's arrival in United States territorial waters. 8 U.S.C. § § 1101-1537. Specifically, we have been asked whether undocumented aliens who have been interdicted within the United States's territorial waters are entitled to an exclusion hearing under section 236 of the INA, [FN1] 8 U.S.C. § 1226. We have also been asked to review the INS's enforcement authority under INA section 287, 8 U.S.C. § 1357, and to assess the INS's recent interpretive regulation, 8 C.F.R. § 287.1(a)(1) (1993), insofar as it purports to define the "external boundaries" of the United States under INA section 287.

We understand that resolution of these issues is of some urgency because the United States has been interdicting, within its territorial waters, vessels transporting large numbers of undocumented aliens seeking admission into the United States from various foreign countries. These activities have raised the question whether the United States must provide exclusion proceedings for such aliens. Agencies represented on the Working Group on Ocean Policy and the Law of the Sea, in particular the State Department and the United States Coast Guard, have expressed an interest in the issues. We have therefore invited, and received, the views of the State Department and the Coast Guard.

*78 I. Background

The background to these requests is as follows. Historically, the United States adhered to the rule that the territorial sea extends three nautical miles out. [FN2] In 1988, however, President Reagan, by proclamation, extended the United States's territorial sea to a distance of twelve nautical miles. See Proclamation No. 5928, 3 C.F.R. 547 (1989), reprinted in 103 Stat. 2981 (1989), ("the Proclamation"). [FN3] Although the Proclamation by its terms purported not to extend or otherwise alter existing Federal law or any jurisdiction, rights, legal interests, or obligations derived therefrom, questions arose concerning the possible or alleged effects of the Proclamation on domestic law or law enforcement. [FN4] Among these questions are the two considered in this opinion, relating to the procedural rights under the INA of undocumented aliens intercepted within twelve miles of the United States's shores, and to the authority of the INS to board and search sea vessels suspected of transporting undocumented aliens if such vessels are found within that twelve mile zone.

The INS's former General Counsel has taken the position that the Proclamation operated so as to extend the scope of the INA to the new twelve mile limit of the territorial waters. Specifically, the INS argues in the submissions considered here

that an entitlement to an exclusion proceeding now arises whenever an undocumented alien arrives within the twelve mile limit. As the INS acknowledges, however, its past practice and views on this subject have not been consistent. In 1980, an INS memorandum to this Office concerning the treatment of Cuban refugees maintained that an alien apprehended within the territorial waters before landing "does not appear to have a right to apply for asylum" under the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 ("Refugee Act"), and could be towed to a third country where he or she would not face persecution. See Memorandum for John Harmon, Assistant Attorney General, Office of Legal Counsel, from David Crosland, Acting Commissioner, INS, Re: Cases on Illegal Entry to Cubans in Boats at 1 (May 6, 1980) ("INS Cuba Memorandum"). However, a different INS position is reflected in a 1986 memorandum concerning procedures to be followed under Executive Order No. 12324, 46 Fed. Reg. 48,109 (1981), which provided for the return of Haitians interdicted on the high seas, with the exception of refugees. See Memorandum for Alan C. Nelson, Commissioner, INS, from Maurice C. *79 Inman, Jr., General Counsel, INS, Re: Interdiction of Aliens (Feb. 21, 1986) ("INS Haiti Memorandum"). Executive Order No. 12324 stated that its provisions for the interdiction-and-return of Haitians "are authorized to be undertaken only outside the territorial waters of the United States." 46 Fed. Reg. at 48,109. Following the terms of that Executive Order, the INS memorandum stated that "[i]ndividuals interdicted within the territorial waters of the United States are transported to a port of the United States for an adjudication of their immigration status pursuant to the Immigration and Nationality Act." INS Haiti Memorandum at 3. The memorandum further asserted that "it is rather well settled that individuals within our territorial waters may not be forcibly removed to the high seas." Id. at 4. [FN5] Thus, the INS's current position is at variance with its views as of 1980 -- though not with its views as of 1986 -- as well as being inconsistent with the position of the State Department and the Coast Guard. [FN6]

We conclude in Part II below that an undocumented alien who is intercepted within the twelve mile zone now comprising the United States's territorial waters is not entitled to an exclusion hearing under the INA. We base this conclusion primarily on an examination of the text of the statute -- most importantly, its explicit requirements for exclusion proceedings. See INA sections 235, 236, 8 U.S.C. § § 1225, 1226. We also examine the statute's provisions for asylum and withholding of deportation, and conclude that these provisions are consistent with, and indeed support, our reading of the statutory sections regarding exclusion. See Refugee Act, § § 201(b), 202(e), 94 Stat. at 105, 107 (codified as amended at 8 U.S.C. § § 1158, 1253). We then consider the INA's definition of the term "United States," INA section 101(a)(38), 8 U.S.C. § 1101(a)(38), and reject INS's contention that this definition, coupled with the Proclamation, compels the conclusion that the INA's procedural protections must apply to undocumented aliens who have entered the twelve mile zone. We also consider, and reject, INS's alternative claim that the jurisdictional section of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333, ("OCSLA") operates to extend the INA -- and in particular the right to an exclusion hearing -- to the limit of the territorial waters. Finally, we scrutinize the Proclamation itself, and conclude that it has no effect on the procedural entitlement that the INA provides to undocumented aliens.

*80 In Part III below, we review the INS interpretative regulation, 8 C.F.R. § 287 (1993), that purports to construe the meaning of the "external boundaries" of the United States, as that term is used in INA section 287, 8 U.S.C. § 1357. The latter statute sets forth various investigative and enforcement powers of the INS. Of particular relevance, it empowers the INS to conduct certain warrantless searches within "a reasonable distance from any external boundary of the United States." INA section 287(a) (3), 8 U.S.C. § 1357(a)(3). We conclude that the INS had the authority to construe that section in a manner that reflected the enlargement of the United States's territorial waters under the Proclamation, and we offer two theories to justify that result. We also note an ambiguity in the INS's regulation, and recommend that, if INS decides to maintain its interpretation of INA section 287, it cure this defect.

II.

A. Exclusion Proceedings Under The INA

"It is undoubtedly within the power of the Federal Government to exclude aliens from the country." Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973); see also Landon v. Plasencia, 459 U.S. 21, 32 (1982); Kleindienst v. Mandel, 408 U.S. 753, 765-66 (1972); 1 Charles Gordon and Stanley Mailman, Immigration Law and Procedure, § 1.03[2][a] (rev. ed. 1993) ("Gordon & Mailman").

The means by which the Federal Government may prevent aliens from coming into the country are varied. Some aliens seeking to enter the United States must first be accorded the procedural rights provided by the INA, including an evidentiary hearing, before any determination to exclude them from this country can be made. Other aliens may, however, be prevented from entering the United States by Executive actions that do not implicate any INA procedures. Thus, in its recent decision in Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 187 (1993), the Supreme Court held that neither the INA nor the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 ("the Protocol"), placed any limit "on the President's authority to repatriate aliens interdicted beyond the territorial seas of the United States." [FN7] The question presented here is whether undocumented aliens seeking to enter the United States but interdicted within its territorial waters -- that is, within twelve nautical miles from the United States' baselines -- must be accorded an exclusion proceeding under the INA.

*81 Section 235(b) of the INA, 8 U.S.C. § 1225(b), "provide[s] the jurisdictional basis for an exclusion hearing before an immigration judge." Matter of Waldei, 19 I. & N. Dec. 189, 191 (1984). That section reads in part as follows:

> Every alien (other than an alien crewman) and except as otherwise provided in subsection (c) of this section and in section 1323(d) of this title, [[FN8]] who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer.

8 U.S.C. § 1225(a) (emphasis added).

Section 236(a), 8 U.S.C. § 1226(a), provides for exclusion hearings before a "special inquiry officer" (i.e., an immigration judge, see 8 U.S.C. § 1101(b)(4)). Section 236(a) states:

> A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under section 1225 of this title shall be allowed to enter or shall be excluded and deported.

As the plain language of the INA makes clear, it is a predicate for conducting exclusion proceedings that the alien seeking admission be examined "at the port of arrival" by an immigration officer. 8 U.S.C. § 1225(b); see also id. § 1225(a) ("All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe.") (emphasis added); 8 C.F.R. § 235.1 (1993) ("Application to enter the United States shall be made . . . in person to an immigration officer at a U.S. port of entry enumerated in part 100 of this chapter.) (emphasis added); id. § 100.4 (c)(2) (designating ports of entry); 1 Gordon & Mailman, at § 8.05[2][b] ("There are many places designated as ports of entry along the land borders of the United States and at international airports and seaports. It is to such a place, and at a time open for inspection, that an alien seeking entry to the United States must make his or her application for admission. . . . 'Instream' inspections are conducted aboard arriving ships."). [FN9] An alien interdicted *82 at sea -- even if within the territorial waters of the United States -- is not at any "port." [FN10] Consequently, there is no jurisdiction to conduct an exclusion proceeding in such a case. [FN11]

This construction of INA sections 235(b) and 236(a) comports with the text and structure of the INA. Both sections are located within Part IV, "Provisions Relating To Entry And Exclusion," of Subchapter II, "Immigration," of the INA. An analysis of these provisions confirms that statutory arrangements for exclusion proceedings presuppose that the alien is no longer at sea, but has reached port. The first provision of Part IV relates to the duties of persons transporting alien

and citizen passengers to provide immigration officers with lists or "manifests" of the persons they are transporting. The duty to provide such a list attaches under INA section 231(a), 8 U.S.C. § 1221(a), "[u]pon the arrival of any person by water or by air at any port within the United States from any place outside the United States" (emphasis added); see also 8 C.F.R. § 231.1(a) (1993). Under INA section 232, 8 U.S.C. § 1222, aliens "arriving at ports of the United States" may be detained for observation and examination by immigration officers and medical officers if it is thought that they may be excludable for medical reasons (emphasis added). Before its repeal in 1986, the next section, INA section 233, 8 U.S.C. § 1223, authorized immigration officers to order the temporary removal of aliens "[u]pon the[ir] arrival at a port of the United States, . . . but such temporary removal shall not be considered a landing" (emphasis added). Section 234, 8 U.S.C. § 1224, deals with physical and mental examinations of certain arriving aliens, and provides for appeals therefrom. Sections 235 and 236, as discussed above, concern other inspections of arriving aliens and the institution of exclusion proceedings. *83 Section 237, 8 U.S.C. § 1227, provides for the immediate deportation of excluded aliens.

Judicial support for our interpretation is provided by Haitian Refugee Center, Inc. v. Gracey, 600 F. Supp. 1396 (D.D.C. 1985), aff'd on other grounds, 809 F.2d 794 (D.C. Cir. 1987), a suit challenging the Government's interdiction of visaless aliens on the high seas. There the district court stated:

> The Immigration and Nationality Act has established procedures for the exclusion of aliens, including the entitlement to a hearing. See 8 U.S.C. § 1226. Those rights, however, are reserved for aliens arriving "by water or by air at any port within the United States from any place outside the United States." Id. Contrary to plaintiffs' assertion, the interdicted Haitians also have no statutory "right to counsel", which is reserved to those aliens in "exclusion or deportation proceedings." 8 U.S.C. § 1362. Again, because those "exclusion or deportation proceedings" are restricted to aliens arriving "at any port within the United States," 8 U.S.C. § 1221, it is clear that the interdicted Haitians are entitled to none of these statutorily-created procedural rights, including the right to counsel.

Id. at 1404.

In sum, then, the overall statutory scheme regulating the exclusion of an alien is activated by the alien's arrival at a port of the United States. That event triggers significant legal effects, including the transporter's duty to provide a manifest, the immigration officers' powers to inspect and detain, and the alien's right, if detained, to an exclusion proceeding. Nothing in the statute contemplates that the same effects are to follow if the alien is interdicted at sea before reaching port -- even if interdiction occurs within United States territorial waters. For purposes of exclusion under the INA, the ports of the United States -- not the limits of its territorial waters -- are functionally its borders. Accordingly, we conclude that aliens interdicted within United States territorial waters do not have a right to exclusion proceedings under INA section 236.

B. Asylum and Withholding Provisions of the INA

Examination of the INA's basic distinction between exclusion and deportation proceedings, and of its provisions for asylum and withholding of deportation or return, confirms the conclusion reached in the previous section.

"'[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the *84 former category who are merely "on the threshold of initial entry."''' Sale, 509 U.S. at 175 (quoting Leng May Ma v. Barber, 357 U.S. 185, 187 (1958)) (quoting Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953)). The distinction in the rights and privileges accorded to these two groups is reflected in the different procedures applied to each. "The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission." Landon v. Plasencia, 459 U.S. at 25.

The differences between exclusion and deportation, and the varying procedural protections attached to each, turn on whether the alien has made an "entry" into the United States. "Entry" is here a term of art. [FN12] See id. at 28-29; Matter of Patel, 20 I. & N. Dec. 368, 370 (1991). "Physically coming into the United States does not necessarily accomplish an entry, else all inspections would effectively have to be made on foreign soil. Presence after inspection and admission, without further restraint, however, does amount to entry. So does penetrating the functional border by intentionally evading inspection before being apprehended." 1 Gordon & Mailman, at § 1.03[2][b]. Aliens who have made an "entry" are entitled to deportation proceedings; those who are seeking admission but who have not entered are accorded, at most, an exclusion proceeding -- "a process in which the alien usually has less protection under the statute and little, if any, under the Constitution." Id. [FN13]

Before 1980, aliens who were excludable but not deportable did not have the right to apply for either asylum or withholding of deportation or return. [FN14] By the enactment of the Refugee Act, § 203(e), 94 Stat. at 107, Congress extended those benefits to both types of aliens. [FN15] Section 201(b) of the Refugee Act, as amended, now codified at 8 U.S.C. § 1158(a), prescribed that the Attorney General was to establish procedures for asylum applications. The Refugee Act's asylum provision states in part: "The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum." 8 U.S.C. § 1158(a) (emphasis added). As explained immediately below, aliens interdicted within United States territorial waters are neither "at a land border or port of entry," nor even "physically present in the United States" within the meaning of the asylum statute. *85 See Sale, 509 U.S. at 160 (INA's protections apply "only to aliens who reside in or have arrived at the border of the United States") (emphasis added).

In Haitian Refugee Center, Inc. v. Baker, 953 F.2d 1498 (11th Cir.), cert. denied, 502 U.S. 1122 (1992), the court construed the language of the asylum provision and held:

> [T]he plaintiffs in this case -- who have been interdicted on the high seas -- cannot assert a claim based on the INA or the Refugee Act. . . . The plain language of the statute is unambiguous and limits the application of the provision to aliens within the United States or at United States' borders or ports of entry. The plaintiffs in this case have been interdicted on the high seas and have not yet reached "a land border" or a "port of entry."

Id. at 1510 (citations omitted).

Precisely the same can be said of aliens who have been interdicted within territorial waters: they have not yet reached a land border or a port of entry. [FN16]

Furthermore, aliens interdicted within the territorial waters are also not "physically present in the United States," 8 U.S.C. § 1158(a), in the sense of that expression evidently intended by Congress. The statute's distinction between aliens "physically present in the United States" and aliens "at a land border or port of entry" is evidently designed to refer to the difference between deportable and excludable aliens: as pointed out above, the former are understood to be "already physically in the United States," while the latter are deemed to be "outside the United States seeking admission." Landon v. Plasencia, 459 U.S. at 25. Aliens interdicted within the territorial waters are undoubtedly not entitled to deportation proceedings. They are therefore not "physically present in the United States" within the meaning of the Refugee Act's asylum provision.

The Refugee Act also amended the INA to allow aliens in exclusion proceedings to seek "withholding" under INA section 243(h), 8 U.S.C. § 1253(h). See Sale, 509 U.S. at 175-76 ("The 1980 amendment erased the long-maintained distinction between deportable and excludable aliens for purposes of section 243(h). By adding the word 'return' and removing the words 'within the United States' from § 243(h), Congress extended the statute's protection to both types of aliens."). [FN17] In Sale, the Supreme Court held that this amendment did not limit the *86 President's power to order the Coast Guard to repatriate undocumented aliens interdicted on the high seas. Id. at 174-77. In our view, the amendment also does not limit the President's power to order the Coast Guard to turn back undocumented aliens interdicted within

United States territorial waters.

INA section 243(h), 8 U.S.C. § 1253(h), provides that:

> The Attorney General shall not deport or return[[FN18]] any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

Section 243(h) by its terms applies only to the actions of the Attorney General. See Sale, 509 U.S. at 177 (Attorney General is "the government official at whom [section 243(h)] is directed"). Nothing in the language of the provision speaks to the responsibilities of the Coast Guard or of any other agency that may encounter undocumented aliens, whether in the territorial waters or elsewhere. Moreover, the INA confers authority on executive branch officers other than the Attorney General, specifically including the President. See, e.g., 8 U.S.C. § 1182(f) (authorizing the President by proclamation to suspend the entry of "any class of aliens" or to "impose on the entry of aliens any restrictions he may deem to be appropriate"); see also Sale, 509 U.S. at 171-72. If the President orders the Coast Guard to interdict and turn back aliens within the territorial waters, nothing in section 243(h) precludes that agency from obeying his instructions, any more than the section precluded the agency from obeying a similar Presidential order with regard to aliens on the high seas. Cf. id. at 172. [FN19]

*87 This analysis of the scope of section 243(h) is consistent with Congress's understanding of the scope of Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 6259, 189 U.N.T.S. 150 ("United Nations Convention"). As the Supreme Court has noted on several occasions, see Sale, 509 U.S. at 177-78; INS v. Stevic, 467 U.S. at 421, the main intent of the Refugee Act's changes in section 243(h) was to clarify the language of the provision so that it conformed to Article 33. The legislative history of the Refugee Act discloses that Congress construed the United Nations Convention to "insure fair and humane treatment for refugees within the territory of the contracting states." H.R. Rep. No. 96-608, at 17 (1979) (emphasis added). While this legislative reference to "refugees within the territory" of a contracting State could conceivably include aliens within the marginal waters over which the State claimed sovereignty, [FN20] we think it accords better with the realities of immigration practice (particularly the difficulties of patrolling a border in the sea) to understand Congress to be referring only to aliens who have reached port or who have landed. [FN21]

Furthermore, Article 33 does not convey any entitlements that could be relevant here but that are not provided by section 243(h) itself. See Stevic, 467 U.S. at 428-30 n.22; Haitian Refugee Center v. Gracey, 809 F.2d at 841 (Edwards, J., concurring in part and dissenting in part). Thus, Article 33 does not serve as an independent basis for requiring procedural protections not conferred by the statute. [FN22] In addition, the State Department has advised us of its view that the United States's international law obligations under the Protocol do not require it to provide exclusion hearings to aliens who have merely arrived in its territorial waters. [FN23] That conclusion concerning the territorial scope of the signatories' obligations under *88 Article 33 is re-enforced by the negotiating history of the article and the interpretations of commentators. [FN24]

Accordingly, we conclude that the INA's sections relating to asylum and withholding do not require that an exclusion hearing be provided for aliens interdicted within territorial waters.

C. The Geographical Limits of the "United States"

Our reading of the INA is consistent with the statute's definition of the "United States," 8 U.S.C. § 1101(a)(38): "[t]he term 'United States', except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States."

That definition makes no reference to the United States's territorial waters and on its face is consistent with the view, supported by other sections of the INA,

that an undocumented alien is entitled to an exclusion hearing only if he or she has actually arrived at a port of entry. [FN25]

The INS takes a contrary view, arguing that the procedural protections of the INA are triggered whenever an undocumented alien arrives within United States territorial waters. INS Draft Memorandum, at 2. As INS concedes, however, id. at 3, its current position conflicts with an opinion of the INS General Counsel issued only four years ago. [FN26]

In its current submission, INS relies primarily upon International Longshoremen's and Warehousemen's Union v. Meese, 891 F.2d 1374 (9th Cir. 1989) *89 ("ILWU"). There, the INS had determined that Canadian nationals who operated cranes aboard vessels operating in U.S. coastal waters were bona fide "alien crewmen" within the meaning of 8 U.S.C. § 1101(a)(15)(D), and were therefore not required to obtain labor certification from the Department of Labor under 8 U.S.C. § 1182(a)(5). In an action challenging that determination brought by an American labor union, the court of appeals held that the crane operators did not qualify as "alien crewmen" under the INA and therefore were subject to domestic labor certification requirements. The court rejected the Government's contention that the INA's labor certification requirements were inapplicable because the crane operators never "'actually enter the United States as that term is applied to the crew of vessels in U.S. waters because the crane operators never leave the vessel."' Id. at 1384. In rejecting this argument, the court stated:

> An "entry," however, is not a prerequisite to the applicability of the immigration laws; those laws are triggered whenever an alien merely arrives in the United States, regardless of whether he actually effectuates an "entry." The territorial waters surrounding this country are classified as part of the United States. Thus, if persons employed aboard a foreign vessel do not fall within the definition of an alien crewman, then their arrival into U.S. territorial waters could violate provisions of the Act.

Id. (citations omitted).

INS's reliance on ILWU is misplaced. The court was not presented with any question that required it to decide whether mere arrival within territorial waters entitles an undocumented alien to an exclusion hearing. Moreover, to the extent that the court's broad language implied an answer to that question, its analysis was flawed.

First, the ILWU court paid no attention to the detailed requirements for any exclusion hearing that are specified by the statute. It is the specific language of the specialized provisions in the INA that determines the extent of an undocumented alien's procedural rights in pursuing the various legal methods of gaining admission into the United States. In reaching out for an unduly broad result, the court failed to analyze those provisions.

Second, the court's assertion that a vessel's mere arrival in United States territorial waters triggers the general applicability of the domestic immigration laws was unsupported by any pertinent reasoning or legal authorities. The court cited only two cases, neither of which in fact supports its conclusion. One of the cases does no more than establish that the United States has the legal capacity to assert jurisdiction and apply its penal statues within territorial waters; the other case tends, if anything, to undercut ILWU by demonstrating the significance of reaching a port of *90 entry, rather than the territorial seas, for triggering jurisdictional consequences under the INA. [FN27]

INS also relies on Piledrivers' Local Union No. 2375 v. Smith, 695 F.2d 390 (9th Cir. 1982). There the court held that the INA and its labor certification requirements apply to the outer Continental Shelf because the OCSLA extended the general legal jurisdiction of the United States to the outer Continental Shelf. See 43 U.S.C. § § 1331-1356. Specifically, the operative section of OCSLA extends "[t]he Constitution and laws and civil and political jurisdiction of the United States . . . to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon." Id. § 1333(a)(1).

While citing Piledrivers' Local, INS states that it "disagrees" with its holding that the INA and its labor certification requirements extend to alien workers on the outer Continental Shelf. INS adds, however, that "if the Act did apply to the outer continental shelf, a fortiori it would extend through the territorial sea." INS Draft Memorandum, at 3 n.2.

Our Office has previously considered the relationship between the INA and the OCSLA in Outer Continental Shelf -- Drilling Rigs -- Alien Workers, 3 Op. O.L.C. 362 (1979). Specifically, we addressed the question whether, in light of certain 1978 amendments to the OCSLA, the INA applied to drilling rigs on the outer Continental Shelf. We characterized the OCSLA, which was originally enacted in 1953, as "basically a guide to the administration and leasing of offshore mineral-producing properties." Id. at 362. Considering OCSLA's federal jurisdiction provision, 43 U.S.C. § 1333(a)(1), without reference to the 1978 amendments to the Act, we found that (3 Op. O.L.C. at 363-64):

> Based on a literal reading of that provision, it is certainly possible to conclude that the immigration laws should apply. The 1953 law adopts Federal law "to the same extent as if the Outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State." The immigration laws apply, of course, to Federal enclaves within States. It appears that § 1333(a)(1) was drafted so that it would include Federal laws which, read by themselves, might be *91 interpreted as being limited in their application to the continental United States.

See also id. at 364 (citing legislative history supporting such an interpretation); Warren M. Christopher, The Outer Continental Shelf Lands Act: Key to a New Frontier, 6 Stan. L. Rev. 23, 38, 41-42 (1953) (to like effect). [FN28]

In light of our 1979 analysis, we are prepared to assume here that, except as OCSLA otherwise specifically provides, that statute extended the INA to "the subsoil and seabed of the outer Continental Shelf," as well as to "artificial islands" and certain "installations or other devices" attached to the seabed or used for transport. See 43 U.S.C. § 1333(a)(1). We do not see, however, how such an extension of the INA would be relevant to the question whether undocumented aliens are entitled to an exclusion hearing if they are interdicted in the territorial waters.

First, OCSLA's very definition of the "outer Continental Shelf" shows that INS's argument is mistaken. The "outer Continental Shelf" is defined at 43 U.S.C § 1331(a) to mean "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." There is an obvious distinction between the Continental Shelf's "subsoil and seabed" (and certain structures attached to the Shelf or used in exploiting its resources) and the waters lying above the Shelf. The extension of Federal jurisdiction to the subsoil and seabed of the Shelf would by no means require or imply its extension to the waters above it. Congress's intent in enacting OCSLA was to protect the Federal Government's "paramount rights to the seabed beyond the three-mile limit," and specifically its interests in "the leasing and development of the resources of the seabed," including oil, natural gas, and minerals. United States v. Maine, 420 U.S. 515, 526-27 (1975) (emphases added). Nothing in that purpose requires, or even suggests, the extension of the immigration laws to the waters lying above that seabed.

Moreover, as a matter of international law, the waters lying above the seabed and subsoil of the Continental Shelf are considered to be open sea to the extent that they are outside territorial waters. See Oil Tanker Officer Tax Liability Case, Bundesfinanzhof [BFHE][Supreme Tax Court] 123, 341 (F.R.G.), translated in 74 Int'l L. Rep. 204, 210 (E. Lauterpacht and C.J. Greenwood eds., 1987). Thus, "a *92 ship operating beyond the territorial sea above the area of the continental shelf is still to be regarded as being on the high seas and not subject to the sovereignty of the coastal State." Id. at 211. Sale, of course, has settled the issue of the President's power under the INA to return, without any hearing, aliens interdicted on the high seas -- including, therefore, the high seas above the outer Continental Shelf.

D. Effect Of Presidential Proclamation No. 5928

As discussed above, Presidential Proclamation No. 5928 of December 27, 1988, announced that the territorial sea of the United States would extend to twelve nautical miles from the baselines of the United States. The President further stated:

Nothing in this Proclamation:
(a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom; 54 Fed. Reg. at 777.

Despite this expressed intent not to alter domestic law, the INS suggests that the Proclamation did operate to extend the scope of the INA. More precisely, the INS appears to argue that the Proclamation operated to enlarge the INA's definition of the "United States," found in 8 U.S.C. § 1101(a)(38). See INS/OGC Memorandum, at 1-3. [FN29]

When the Proclamation was proposed, this Office considered various issues relating to its legality. As to the possible effect of the Proclamation on domestic law, we opined:
By its terms, the Proclamation will make clear that it is not intended to affect domestic law. Congress may, however, have enacted statutes that are intended to be linked to the extent of the United States' territorial sea under international law. The issue, therefore, in determining the effect of the proclamation on domestic law is whether Congress intended for the jurisdiction of any existing statute to include an expanded territorial sea. Thus, the question is one of legislative intent.
Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea, 12 Op. O.L.C. 238, 253 (1988).

*93 Our 1988 opinion invites the question whether Congress intended the INA, or particular sections of the INA, to track any changes in the bounds of the United States's territorial sea. We have therefore considered whether Congress intended the INA's definition of the "United States" at 8 U.S.C. § 1101(a)(38) to track, and conform to, changes in international law determining the extent of the United States's territorial sea. We believe that Congress had no such intent. The INS has offered no evidence that Congress meant either the INA as a whole, the INA's provisions governing the treatment of aliens seeking entry in particular, or the INA's definition of the "United States," to track such changes in international law. After reviewing the legislative history, we have discovered no such evidence ourselves. Thus, we conclude that it is extremely unlikely that Congress intended the INA's definition of the "United States" to be ambulatory, and to follow changes in international law.

We shall, however, assume arguendo that Congress intended the INA's definition of the "United States" to track changes in the extent of the United States's territorial sea recognized by international law. Cf. Argentine Republic, 488 U.S. at 441 (suggesting by negative implication that if injury had occurred in territorial waters, it would have taken place within the "United States" as defined in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330). It still does not follow that exclusion proceedings must be provided for undocumented aliens interdicted within the twelve mile bounds that now comprise the territorial waters. An implicit enlargement of the INA's definition of the "United States" to include the new territorial waters has no bearing on the scope of the statute's exclusion provisions, INA sections 225- 226. As discussed above, these sections do not refer to the "United States" in any relevant way; rather, they refer to "the ports of the United States," and condition exclusion proceedings on arrival at such ports. Id. (emphasis added). In short, by enlarging the territorial waters, the Proclamation may also have extended the geographical scope of the "United States" under the INA; but it does not follow that aliens for whom exclusion proceedings need not previously have been provided have become entitled to them.

Furthermore, the Proclamation should have no impact on the procedural entitlements of undocumented aliens under the INA because the statute's only significant reference to the territorial waters occurs in a provision establishing the Government's power to deter illegal immigration rather than in any of the

provisions establishing an alien's procedural rights in seeking to enter the United States. A computer search shows that the terms "territorial waters" or "territorial sea" are mentioned in only one section of title 8 (which includes the INA). [FN30] That provision *94 is section 287(a)(3) of the INA, 8 U.S.C. § 1357(a)(3), discussed in detail in Part III below, which authorizes the INS to conduct warrantless searches of vessels "within the territorial waters of the United States." The absence of any other use in the INA of the terms "territorial waters" or "territorial sea" -- and particularly their absence in the detailed provisions governing the treatment of aliens seeking to enter the United States -- strongly suggests that an alien's arrival or presence in the territorial waters is simply not a relevant consideration for establishing or expanding the rights of aliens seeking entry. Had Congress wanted to make mere entry into the territorial waters sufficient to guarantee the entrant an exclusion hearing, it could easily have written such language into an appropriate section of the INA, as it did elsewhere in the Act. Indeed, inasmuch as the only usage of the term "territorial waters" appears in section 287's description of INS's authority to search vessels in order to thwart aliens attempting illegal entry, there is reason to view the territorial waters as a buffer zone, rather than as a safe harbor, in the overall scheme of the INA.

Accordingly, we conclude that Presidential Proclamation No. 5928 does not have the effect of requiring exclusion hearings to be provided to undocumented aliens interdicted within the territorial sea.

III.

A. INS's Enforcement Powers Under INA Section 287

Section 287 of the INA, 8 U.S.C. § 1357, sets forth various investigative and enforcement powers granted to INS. Of particular relevance here, INA section 287(a)(3) provides that the INS shall have power, without a warrant --

> (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, ...

8 U.S.C. § 1357(a)(3).

In the wake of the Presidential Proclamation No. 5928, INS amended its interpretative regulation construing section 287. See 57 Fed. Reg. 47,257 (1992), codified at 8 C.F.R. § 287.1(a)(1) (1993). This interpretative rule construes the term "external boundary," as used in INA section 287(a)(3), as follows:

> (a)(1) External boundary. The term external boundary, as used in section 287(a)(3) of the Act, means the land boundaries and the territorial sea of the United States extending 12 nautical miles from the baselines of the United States determined in accordance with international law.

*95 8 C.F.R. at § 287.1(a)(1). The regulation does not purport to construe any provision of the INA other than section 287.

The main question posed to us concerning INA section 287 is whether the INS had the authority to construe that provision so as to reflect the enlargement of the United States's territorial waters effected by the Proclamation. We believe that INS's authority to issue the regulation could be defended on either of two theories. First, the Proclamation may have operated of its own force to enlarge the scope of section 287. Second, the INS may have the authority to construe section 287 by regulation in a manner that reflects changed circumstances, including such facts as the expansion of the territorial waters by Presidential proclamation. Of these two theories, the latter appears to us the more persuasive.

We also note that the broad enforcement powers granted to the Attorney General under section 103 of the INA, 8 U.S.C. § 1103 -- powers which have been delegated to the INS -- could provide a separate legal basis for a regulation establishing that INS's seaward search authority extends to the limits of the twelve-mile territorial waters and even beyond. See United States v. Chen, 2 F.3d 330 (9th Cir. 1993), cert. denied, 511 U.S. 1039 (1994), discussed infra in Pt. III(C).

B. "Territorial Waters" Under INA Section 287

As discussed in Part II above, this Office has taken the position that the question of the Proclamation's effect upon domestic law depends on a case-by-case analysis of the legislative intent behind each statute. Accordingly, we sought evidence that Congress intended the INA's definition of the "United States," 8 U.S.C. § 1101(a)(38), to track changes in international law respecting the United States's territorial waters. We discovered no such evidence. The legislative history of section 287's "territorial waters" limitation provides some guidance as to that term's origins, but we find it inconclusive on the question of whether the meaning of the term was meant to be static or dynamic.

The language of section 287 authorizing warrantless vessel searches was originally enacted as an amendment to a Justice Department appropriations bill in 1925. Appropriations for Department of State and Justice, the Judiciary, and Departments of Commerce and Labor, Pub. L. No. 68-502, 43 Stat. 1014, 1049- 50 (1925). That amendment was primarily intended to provide authority for INS border patrol officials to make arrests upon sighting illegal entry of aliens, but it also provided authority for warrantless searches of vessels and other vehicles in that same context. 66 Cong. Rec. 3201-02 (1925) (statements of Sen. McKellar and Sen. Reed). The limitation of vessel searches to the territorial waters was added as a House floor amendment to the bill as reported out of the conference committee. Id. at 4553, 4555. The sponsor of that amendment, Mr. Connally of Texas, offered the amendment to address his concern that the absence of any limitations on the vessel *96 search authority was "apt to entangle our Government in difficulties with foreign nations." Id. at 4555. In further addressing this concern, Mr. Connally stated, "But why not limit it? It is just such loose legislation as this that produces complications with other nations."Id. Just before offering the amendment, Mr. Connally specifically considered using "within the 3-mile limit" as alternative language to "within territorial waters," but he opted for the latter formulation and the amendment was adopted by voice vote. Id. The amendment was accepted by the Senate with little discussion. Id. at 4519. [FN31]

In 1946, Congress amended the INS's search authorization statute by inserting the additional provision limiting searches to "within a reasonable distance from any external boundary of the United States." Act of Aug. 7, 1946, Pub. L. No. 79-613, 60 Stat. 865. Although there was some House debate on that bill, S. 386, 79th Cong. (1945), it did not make any reference to the term "territorial waters" or indicate that any change in the scope or effect of that term was intended. See 91 Cong. Rec. 5504-05, 5513 (1945). The debate did indicate that some Congressmen viewed the scope of the INS's sea search authority under the then existing territorial waters provision as quite broad. As one Member stated, "under the present law [an official] may go on any boat in any waters and search that boat, without a warrant, to see if there are any people there attempting to enter." Id. at 5505 (emphasis added). [FN32]

Although the legislative history of the territorial waters provision is inconclusive on the precise issue at hand, it does demonstrate that the phrase was inserted in order to avoid friction with other nations by limiting vessel searches within the three-mile territorial waters claimed by the United States in 1925. The legislative record also reveals that the author and sponsor of the territorial waters amendment considered but rejected alternative language that would have explicitly limited the vessel search authority to a "three-mile limit" -- a factor that militates against the view that an immutable three-mile limit was intended. It is also apparent that the limitation ultimately imposed by Congress reflected international rather than domestic concerns. While these factors are inconclusive on the question of whether Congress intended a fixed or expandable interpretation of the territorial waters, they do suggest that the term should be interpreted with international perspective in mind. Inasmuch as the 1988 Proclamation expanded United States territorial waters in conformity with international law and practice, interpreting the term as used in section 287 to reflect that reality could be viewed as consistent with the provision's *97 original design -- i.e., limiting the INS's search authority to within United States's territorial waters as declared and recognized under international law.

Accordingly, there is little evidence to show that Congress intended its use of the term "territorial waters" to constitute an irrevocable commitment to the three-mile limitation in effect at the time of section 287's enactment. A reasonable

interpretation of that term, taking into account the statute's evident intention to provide sufficient enforcement powers to prevent illegal immigration, would therefore incorporate the expansion of the territorial sea declared in the Presidential proclamation.

Alternatively, it can be argued that even if the Proclamation did not of its own force enlarge section 287's reference to the territorial waters, it nonetheless provided a sufficient basis for INS to promulgate its interpretative regulation. Under section 103(a) of the INA, 8 U.S.C. § 1103(a), the Attorney General has broad authority to promulgate regulations interpreting and implementing provisions of the INA in furtherance of her duties, including the duty to protect the Nation's borders against illegal entry by unauthorized aliens. [FN33] The courts have accorded substantial deference to the Attorney General's regulations under the INA. [FN34]

INS appears to have regulatory authority to construe the terms "external boundary" and "territorial waters" in INA section 287 to refer to the twelve-mile territorial sea announced in Presidential Proclamation No. 5928, rather than to the historic three-mile territorial sea. Even if the Proclamation did not operate of its own force to alter the scope of section 287, it represented a significant change in circumstances -- the international law definition of the United States's territorial waters -- which INS could reasonably take into account in deciding to revise its construction of that statutory provision.

Neither the language of section 287 nor (as discussed above) the legislative history demonstrates an unambiguous congressional intent either to link the term "territorial waters" permanently to the historic three-mile boundary or to track subsequent *98 developments in the law, including international law. Accordingly, in adopting its interpretative rule, INS has not failed to "give effect to the unambiguously expressed intent of Congress." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Rather, because "the statute is silent or ambiguous with respect to the specific issue," the question is whether INS's construction of section 287 was "permissible." Id. at 843. Here, we believe, INS was engaging in rulemaking to fill a "gap" implicitly left open by Congress. In such a case, Congress has impliedly delegated the question of construction to the enforcing agency. Id. at 843-44. The INS's interpretation should therefore be upheld so long as it is "a reasonable one." Id. at 845. We think that the interpretation was reasonable.

First, the INS's interpretation ensures that section 287 will be understood in a manner that is consistent with the current international law understanding of the United States's "territorial waters," as declared by the Proclamation. As discussed above, the territorial waters limitation was originally inserted in section 287 in order to promote just such clarity of understanding with other nations as to the scope of United States search authority at sea.

Moreover, the special problems of maritime enforcement of the law appear to support the extension of the INS's authority to board and search vessels beyond the three-mile limit. Such problems have been recognized in the context of customs enforcement, but they apply to immigration enforcement with equal force. Thus, in United States v. Tilton, 534 F.2d 1363, 1365 (9th Cir. 1976), the court observed that "it is not practical to set up checkpoints at the outer perimeters of the territorial waters. Nor is it likely that incoming vessels will pick up or discharge passengers or cargo between their points of entry into territorial waters and their anchorages at United States ports." Accordingly, the courts have upheld warrantless customs searches of vessels beyond the three-mile limit but within "customs waters" as valid border searches under the Fourth Amendment [FN35] See id. (holding that a customs search of a vessel within customs waters can be valid as a border search); United States v. Victoria-Peguero, 920 F.2d 77, 80-81 & n.3 (1st Cir. 1990) (pointing out that customs officers are statutorily authorized to search vessels within customs waters, and noting suggestions that the contiguous zone, i.e., the waters lying between three and twelve nautical miles off the coast, be considered the functional equivalent of the border for purposes of the Fourth Amendment); cert. denied, 500 U.S. 932 (1991); United States v. Hidalgo-Gato, 703 F.2d 1267, 1273 (11th Cir. 1983) (holding the contiguous zone to be the functional equivalent of the border); United States v. MacPherson, 664 F.2d 69, 72 & n.2 (5th

Cir. 1981) (similar to Victoria-Peguero); Note, *99High On The Seas: Drug Smuggling, The Fourth Amendment, And Warrantless Searches At Sea, 93 Harv. L. Rev. 725, 733-34 (1980) (detailing difficulties in law enforcement at sea near borders, and arguing for "functional" understanding of borders that could extend them beyond three-mile limit). Analogously, the special difficulties in policing the seaward boundaries can justify INS's regulatory extension of its search authority up to the twelve-mile limit [FN36]

Finally, it is no objection to INS's regulation that it might be said to represent a departure from the agency's prior position. An agency's position is "not instantly carved in stone," and "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." Chevron, 467 U.S. at 863-64; see also Rust v. Sullivan, 500 U.S. 173, 186 (1991) [FN37]

C. INA Section 103 Authority and "United States v. Chen"

Although we have been specifically asked to examine the validity of the INS interpretive regulation expanding its authority to conduct warrantless searches in the territorial waters under section 287 of the INA, it should be pointed out that the broad enforcement powers granted the Attorney General under section 103 of the INA could provide the legal basis for a substantive regulation authorizing an equal or even greater range for INS search authority at sea. Section 287 authorizes and limits INS's direct authority to conduct searches at sea, but its territorial limitations do not apply to the Attorney General's broader enforcement powers (which are delegable to INS) under the INA. The recent opinion in United States v. Chen, 2 F.3d 330 (9th Cir. 1993) provides strong support for this position.

In Chen, the court unanimously held that section 103 of the INA provided INS with adequate statutory authority (under delegation from the Attorney General) to conduct an undercover "sting" operation some three hundred and twenty miles off the coast of the United States to thwart the smuggling of illegal aliens from China. *100 The operation upheld in the Chen opinion included the apprehension of approximately 132 aliens, who were transferred to a vessel operated clandestinely by INS agents for transport to custody in the United States. The court specifically held that the territorial limitations on warrantless INS searches set forth in section 287(a)(3) did not offset or contradict INS's authority to conduct such an extraterritorial enforcement operation when exercising the enforcement powers delegated to it by the Attorney General. Id. at 334.

The court pointed out that section 274 of the INA, 8 U.S.C. § 1324, prohibiting the smuggling of illegal aliens into the United States, was intended to have extraterritorial application. It then stressed that "Congress intended to grant the Attorney General the corresponding power to enforce the immigration laws both within and without the borders of the United States." Chen, 2 F.3d at 333. Noting that the Attorney General has delegated these broad enforcement powers to the INS, the court reasoned that INS has "the power to take such acts as are deemed necessary for the enforcement of the immigration laws, including extraterritorial enforcement." Id. at 334. In rejecting the defendants' argument that section 287(a)(3)'s territorial limitations on INS warrantless search authority also circumscribed its power to conduct enforcement operations in international waters (i.e., on the high seas), the court stated, "because the Attorney General may delegate her authority, the list of powers granted [to INS] in section 1357(a) cannot be read as exhaustive." Id.

Thus, the Chen decision demonstrates that INS may draw upon the broad section 103 authority delegated to it by the Attorney General to conduct undercover investigations and seizures of undocumented aliens in international waters extending far beyond the territorial waters of the United States. That same authority would appear to provide ample basis -- apart from the authority granted directly to INS by section 287 -- for a substantive regulation authorizing INS to conduct warrantless searches of vessels transporting illegal aliens within the limits of the twelve-mile territorial waters and beyond [FN38]

D. The INS Regulation

Although we conclude that INS had authority to promulgate a regulation interpreting the section 287 search authority to encompass the twelve-mile territorial sea, the language of the regulation adopted is susceptible to ambiguous and uncertain application when read in relation to the statute. We recommend that if the policy decision to retain the regulation is made, INS should redraft it to dispel this *101 ambiguity or, if it concludes that curative legislation is necessary, submit such a proposal to Congress.

Section 287 limits INS authority for warrantless searches at sea to vessels found "within the territorial waters," but then superimposes the additional limitation that such searches (along with INS searches of vehicles on land) must be confined "within a reasonable distance from any external boundary of the United States." As outlined in Part III(B) above, these two limitations -- which on their face are difficult to reconcile -- were inserted in the statute at different times and for different purposes. The territorial waters limitation was added as an amendment to the original 1925 enactment to provide a seaward limitation upon searches of vessels at sea. In contrast, the "reasonable distance" limitation was added to the statute in 1946 for the apparent purpose of allowing INS officials to stop and search "vehicles" within a reasonable distance inland from the external boundaries of the United States.

Despite the different functions and origins of section 287's two limiting phrases, the INS regulation attempts to combine them in its definition of the "external boundary" of the United States. See 8 C.F.R. § 287.1(a)(1). It provides that, for purposes of section 287, the external boundary means both the land boundary and the twelve-mile territorial sea. It then provides that the "reasonable distance" limitation (100 air miles) is to be measured from the external boundary thus defined -- i.e., it can be measured either from the land boundary or from the outer limit of the territorial waters. Id. § 287.1(a)(2).

Because section 287 expressly limits INS's vessel-search authority to the territorial waters, the question arises whether the separate "reasonable distance from any external boundary" limitation has any relevance to searches of vessels at sea. Whether the statute's reference to territorial waters is equated with the pre-1988 three-mile zone or the expanded twelve-mile zone, it seems clear that any search within either of those zones would also be well within "a reasonable distance from any external boundary." In that regard, the courts have upheld distances of up to one hundred (land) miles from that boundary as constituting a reasonable distance within the meaning of section 287. See Fernandez v. United States, 321 F.2d 283, 286 (9th Cir. 1963). It therefore seems that section 287's "reasonable distance" provision does not impose any additional limitation upon the INS's authority to search any vessel found within the territorial waters. Nor does the "reasonable distance" provision serve to expand the area of permissible INA searches of vessels at sea. Since vessel searches are confined to vessels within the territorial waters by the specific terms of section 287, the "reasonable distance" provision cannot operate to override that specific limitation.

These considerations support the view that the reasonable distance limitation has no meaningful application to INS searches at sea. INS points out, however, that the reasonable distance limitation may have conceivable application to searches of vessels on the inland waters. As the INS Draft Memorandum states (at 6-7):

*102 Although there appears to be surface tension between the requirement that the enforcement powers be exercised within the territorial waters and the provision that it may be exercised within 100 miles of any external boundary, this tension is resolved if the "reasonable distance" provisions are read to limit the distance inland from any external boundary within which Service officers may board and search vessels or carry out their other enforcement powers under section 287(a)(3) of the INA. Read together, § 287(a)(3) of the INA and 8 C.F.R. § § 287.1(a)(1)-(2) provide that the Service may, without a warrant, board and search vessels beginning twelve miles seaward from the coast line and extending 100 air miles inland.

However, this interpretation of section 287 also generates complications. If INS may search vessels found on waters located 100 miles inland of "any external boundary of the United States," see 8 C.F.R. § 287.1(a)(2) (emphasis added), there appears to be no need to deviate from use of the land boundary alone as the

baseline for such purposes. Using the outer limit of the territorial sea as the baseline for fixing the inland scope of the section 287 authority -- an interpretation suggested by INS's current submission (INS Draft Memorandum at 7, quoted above) and its past practice [FN39] -- would appear to reduce the scope of inland search authority that would otherwise be allowed by reference to the land boundary as the baseline.

The INS regulation would be clarified by explicitly recognizing that searches at sea are limited only by the scope of United States territorial waters, and that inland searches (including searches on inland waters) are separately governed by the reasonable distance inland measured from the land boundary. This would entail providing separate definitions for the "external boundary" and the "territorial waters," and linking the reasonable distance limitation solely to the "external [land] boundary."

IV. Conclusion

Undocumented aliens interdicted within the twelve-mile zone that now comprises the territorial sea of the United States are not entitled to a hearing under the exclusion provisions of the INA, and may be turned back from the United States by the Coast Guard if the President so orders.

*103 The INS had the authority to promulgate an interpretative rule construing the "territorial waters" of the United States, as referred to in INA section 287, to extend for twelve nautical miles, and not merely three nautical miles.

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FN1. See Memorandum for Office of Legal Counsel, Department of Justice, from Grover Joseph Rees III, General Counsel, Immigration and Naturalization Service, Re: Immigration Consequences of Arrival into the Territorial Waters of the United States (June 15, 1993). Together with this cover memorandum, the INS has submitted a Memorandum for Maureen Walker, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State, from the Office of the General Counsel, Re: Information Request from Working Group on Ocean Policy and Law of the Sea (Dec. 17, 1992) ("INS/OGC Memorandum") and a draft memorandum of law ("INS Draft Memorandum").

FN2. See Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 441 n.8 (1989); Cunard S.S. Co. v. Mellon, 262 U.S. 100, 122 (1923); United States v. Postal, 589 F.2d 862, 869 (5th Cir.), cert. denied, 444 U.S. 832 (1979). The "territorial" or "marginal" sea is the belt of water immediately adjacent to a nation's coast. See Restatement (Third) of the Foreign Relations Law of the United States, § 511(a) (1986).

FN3. On the Proclamation, see Argentine Republic, 488 U.S. at 441 n.8; John E. Noyes, United States of America Presidential Proclamation No. 5928: A 12- Mile U.S. Territorial Sea, 4 Int'l J. Estuarine and Coastal L. 142 (1989); Comment, The Extension of the United States Territorial Sea: Reasons and Effects, 4 Conn. J. Int'l L. 697 (1989).

FN4. See generally Hearing Before the Subcomm. on Oceanography and Great Lakes of the House Comm. on Merchant Marine and Fisheries, 101st Cong. 49, 60 (1989) ("1989 Hearings").

FN5. No authority was cited for this proposition.

FN6. In a letter responding to this Office's invitation to submit views on this issue, the State Department stated, "[a]t a minimum, it appears that the conduct of INS exclusion and deportation procedures by their very nature are only relevant once an alien has reached the land territory of the United States." Letter for Robert Delahunty, Acting Deputy Assistant Attorney General, Office of Legal

Counsel, from Maureen Walker, Chief, Division of Marine Law & Policy, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State at 2 (July 28, 1993) ("State Department Submission"). The State Department's views are discussed further, infra, p.87 n.23. In a similar submission, the Coast Guard took the position that undocumented aliens interdicted within the three mile zone encompassed by the pre-1988 territorial waters would be entitled to exclusion proceedings, but that those interdicted in the waters beyond that zone would not be entitled to such proceedings. Letter for Robert Delahunty, Acting Deputy Assistant Attorney General, Office of Legal Counsel, from David Kantor, Chief, Maritime and International Law Division, United States Coast Guard at 1 (Aug. 10, 1993).

FN7. The Court also noted that a provision of the INA, 8 U.S.C. § 1182(f), "grants the President ample power to establish a naval blockade that would simply deny illegal . . . migrants the ability to disembark on our shores." Sale, 509 U.S. at 187.

FN8. 8 U.S.C. § 1225(c) refers to the temporary exclusion by summary procedures of certain aliens who appear to be excludable on national security or related grounds. 8 U.S.C. § 1323(d) refers to aliens who arrive as stowaways, and renders them subject to exclusion without a hearing. See Matter of Waldei, 19 I. & N. Dec. at 192.

FN9. Mere arrival at a port of the United States, without more, does not entitle an alien to an exclusion hearing before a special inquiry officer under INA section 236. Rather, that section limits the special inquiry officers' authority to conduct exclusion proceedings to cases in which aliens have reached port and have been detained or taken into custody by immigration officers.

FN10. Black's Law Dictionary (6th ed. 1990) defines a "port" as:

> A place for the loading and unloading of the cargoes of vessels, and the collection of duties or customs upon imports or exports. A place, on the seacoast, great lakes, or on a river, where ships stop for the purpose of loading and unloading cargo, or for the purpose of taking on or letting off passengers, from whence they depart, and where they finish their voyage. A port is a place intended for loading or unloading goods; hence includes the natural shelter surrounding water, as also sheltered water produced by artificial jetties, etc. The Baldhill, C.C.A.N.Y., 42 F.2d 123, 125.

Id. at 1161.

A "port" must thus be a "place" and, as Chief Justice John Marshall wrote, "[t]he objects with which the word 'place' is associated, are all, in their nature, fixed and territorial." United States v. Bevans, 16 U.S. (3 Wheat.) 336, 390 (1818) (emphasis added) (United States warship lying at anchor in Boston Harbor not a "place" within meaning of 1790 statute); see also id. at 340 (argument of Daniel Webster, citing common law meaning of "port"); Devato v. 823 Barrels of Plumbago, 20 F. 510, 515 (S.D.N.Y. 1884).

Being at a port does not require that a "landing" be made. A "landing" occurs when a vessel is left and the shore is reached. Taylor v. United States, 207 U.S. 120, 125 (1907). We note that an alien who has arrived at a port but who has not landed may be entitled to an exclusion proceeding. See Matter of Pierre, 14 I. & N. Dec. 467, 469-70 (1973).

FN11. Even if it is assumed that an alien's presence at a "port" is not a jurisdictional requirement of an exclusion proceeding, the statute nonetheless makes clear that the right to such a proceeding does not attach unless the alien is at a "port."

FN12. The term "entry" is defined in the INA to "mean[] any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise." 8 U.S.C. § 1101(a)(13).

FN13. For an explanation of the different entitlements under each procedure, see Landon v. Plasencia, 459 U.S. at 25-28.

FN14. See Leng Ma May v. Barber; Maldonado-Sandoval v. INS, 518 F.2d 278, 280 n.3 (9th Cir. 1975); United States ex rel. Tom We Shung v. Murff, 176 F. Supp. 253, 260 (S.D.N.Y. 1959), aff'd sub nom. United States ex. rel. Tom We Shung v. Esperdy, 274

F.2d 667 (2d Cir. 1960); Matter of Cenatice, 16 I. & N. Dec. 162, 164-65 (1977).

FN15. See Sale, 509 U.S. at 176 n.33 (withholding); id. at 159-60 (asylum and withholding); Haitian Refugee Center v. Gracey, 809 F.2d at 841 (Edwards, J., concurring in part and dissenting in part); 8 C.F.R. § 208.2(a) (1993); Matter of Salim, 18 I. & N. Dec. 311, 314 (1982); 2 Gordon & Mailman, at § 33.05[2] [a]-[b].

FN16. We note that, in its 1980 memorandum concerning the treatment of Cuban refugees, INS itself agreed that "an alien apprehended within territorial waters before landing does not appear to have a right to apply for asylum under the Immigration and Nationality Act." INS Cuba Memorandum at 1.

FN17. Withholding and asylum differ in significant ways, not the least of which is that asylum is discretionary relief which the Attorney General may or may not bestow upon qualified applicants, whereas withholding is mandatory as to those who qualify for it. See, e.g., Sale, 509 U.S. at 162 n.11; INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); INS v. Stevic, 467 U.S. 407, 421 n.15, 423 n.18, 426 (1984). Relatedly, the alien's proof burden is more readily discharged in asylum cases. See 2 Gordon & Mailman, at § 33.05[3].

FN18. As explained above, without having made an "entry" into the United States, an alien would not be subject to deportation; necessarily, therefore, he or she would not be eligible for withholding of deportation. An alien who has not made an "entry" but is in exclusion proceedings can, however, apply for the relief of withholding of "return." As the Supreme Court explained in Sale, the amendments made by the Refugee Act added the word "return" to section 243(h) to ensure that a form of relief analogous to withholding of deportation would be available in exclusion proceedings. See Sale, 509 U.S. at 174 ("We can reasonably conclude that Congress used the two words 'deport' and 'return' only to make § 243(h)'s protection available in both deportation and exclusion proceedings.").

FN19. Furthermore, it would be incongruous if the INA provided that an alien seeking admission had the right to a hearing on a withholding claim, but not on an asylum claim, if he or she were intercepted in the territorial waters. The two forms of relief are broadly similar in substance, and petitions for both are alike founded on the fear of persecution. Applicants frequently plead (and are invited by immigration officers and judges to plead) for both types of relief together: indeed, under Board of Immigration Appeals rules, an asylum application presented initially to an immigration judge in an exclusion proceeding, or renewed in such a proceeding following denial by an INS officer, is also deemed an application for withholding. See Matter of Gharadaghi, 19 I. & N. Dec. 311, 316 (1985); 8 C.F.R. § 208.3(b) (1993); see also id. § 208.5(a) (INS shall make available application forms for asylum and withholding to requesting aliens in its custody); id. § 208.16(a) (if Asylum Officer denies asylum application, he or she shall also decide whether alien is entitled to withholding); id. § 236.3(a)(1)-(2) (immigration judge is to advise an alien expressing fear of persecution that he or she may apply for asylum or withholding and shall make appropriate forms available). There is no apparent reason, therefore, why the statutory requirement that an applicant be at a port or a land border in order to seek asylum in an exclusion proceeding should not also govern applicants seeking withholding.

FN20. The word "territory" can in some contexts be understood to include the territorial sea. See Cunard S.S. Co. v. Mellon, 262 U.S. at 122 (Eighteenth Amendment); Lam Mow v. Nagle, 24 F.2d 316, 318 (9th Cir. 1928) (Fourteenth Amendment); In re A--, 3 I. & N. Dec. 677, 679 (1949) (quoting Mellon, 262 U.S. at 100).

FN21. Certain international law documents distinguish between a nation's "territory" and its "territorial seas." For example, the 1982 United Nations Convention on the Law of the Sea declares that in the zone contiguous to its territorial sea, a State may exercise the control necessary to prevent and punish infringements of its immigration and other laws "within its territory or territorial sea." See Third United Nations Conference on the Law of the Sea, Dec. 10, 1982, art. 33(1), 21 I.L.M. 1245, 1276 ("1982 Conference").

FN22. In any event, we have previously opined that there is no private right of

action under Article 33. See Memorandum for Edwin D. Williamson, Legal Adviser, Department of State, from Timothy E. Flanigan, Acting Assistant Attorney General, Office of Legal Counsel, Re: Article 33 of the Refugee Convention at 3 (Dec. 12, 1991).

FN23. The State Department takes the position that "the non-refoulement obligation of the Protocol [which is reflected in the "withholding of return" language of INA § 243(h)] applies only with respect to aliens who have 'entered' the United States in the immigration law sense. That is, the international treaty obligation only applies with respect to an alien who is physically present on the land mass of the United States and who has passed a port of entry . . . [T]he non-refoulement obligation of the Refugee Protocol does not apply at sea at all and therefore has no bearing on the questions presented to you by INS." State Department Submission, at 2.

FN24. The materials cited in Sale, 509 U.S. at 179-87 reflecting the negotiations on Article 33, do not suggest that the signatories contemplated obligations extending beyond their land borders. Rather, at least some commentators imply a contrary conclusion. See 2 A. Grahl-Madsen, The Status of Refugees in International Law 94 (1972) ("[Article 33] does not obligate the Contracting States to admit any person who has not already set foot on their respective territories." (emphasis added)); N. Robinson, Convention Relating to the Status of Refugees: Its History, Contents and Interpretation 163 (1953) ("[I]f a refugee has succeeded in eluding the frontier guards, he is safe [under Article 33]; if he has not, it is his hard luck."). A person who has merely entered the territorial waters within three or twelve miles of a nation's coast can hardly be viewed as having "set foot" in that nation or as having "eluded" its frontier guards.

FN25. In numerous other statutes, Congress has specifically included a reference to the territorial waters when defining the "United States." For example, the Longshore and Harbor Workers Compensation Act defines the term "United States" "when used in a geographical sense [to include] the several States and Territories and the District of Columbia, including the territorial waters thereof." 33 U.S.C. § 902(9). The Congressional Research Service has identified a large number of statutes referring explicitly to the territorial sea. See Memorandum for Committee on Merchant Marine and Fisheries, from American Law Division, Re: Effect of Territorial Sea Extension on Selected Domestic Law, CRS-12 (Mar. 16, 1989), reprinted in 1989 Hearings, at 60.

FN26. See INS General Counsel's Opinion 89-30, entitled "8 C.F.R. § 274a.1(h) - 'employment' and 'touches at port': in the United States" (Mar. 15, 1989). That opinion's main conclusion was that labor performed on a United States vessel within United States territorial waters, but while the vessel is not touching at a port in the United States, does not constitute "employment" in the United States within the meaning of the INA. The opinion further concluded that "[t]he term 'United States', as defined in INA § 101(a)(38), does not include its 'territorial waters."' Id. at 4.

FN27. The court cited Cunard S.S. Co. v. Mellon, 262 U.S. at 122, and Lazarescu v. United States, 199 F.2d 898, 900-01 (4th Cir. 1952). ILWU, 891 F.2d at 1384. Cunard held that the Eighteenth Amendment and the National Prohibition Act implementing it applied to both foreign and domestic merchant ships within the territorial waters of the United States. 262 U.S. at 124-26. Lazarescu involved the prosecution of a previously deported seaman for unlawful re-entry into the United States. The court's discussion of the geographical factors governing application of the INA in that case does not, in fact, place controlling significance on arrival in the territorial waters. As the court observed, "[t]he port and harbor of Baltimore is territory of the United States. Entry into that territory even in a vessel amounted to a violation of the act unless appellant was under restraint which prevented his departing from the vessel." Id. at 900-01 (emphasis added). The court's language seems to undermine ILWU's suggestion that an alien's arrival in the territorial waters (rather than at a port) triggers the INA's procedures governing exclusion.

FN28. In connection with our 1979 opinion, we note United Ass'n of Journeymen v. Thornburgh, 768 F. Supp. 375 (D.D.C. 1991). That case dealt with the question whether aliens, in order to perform work installing oil rigs on the outer

Continental Shelf, must obtain visas of the type issued to nonimmigrant aliens entering the United States to perform temporary service or labor. The district court granted summary judgment, holding that the INA applied to the outer Continental Shelf, and explicitly disagreeing with our Office's conclusion that OCSLA precluded application of the INA to the Shelf. Id. at 379. However, the court of appeals vacated the district court's grant of summary judgment and remanded for resolution of matters of fact. See United Ass'n of Journeymen v. Barr, 981 F.2d 1269 (D.C. Cir. 1992), cert. denied, 117 S. Ct. 49 (1996). The court of appeals specifically declined to decide "the broad question whether the Immigration and Nationality Act generally applies on the outer Continental Shelf." Id. at 1274.

FN29. There is no basis for assuming, as INS perhaps does, that the Proclamation's expansion of the territorial sea would uniformly affect each discrete provision or definition in the INA, without regard to its particular phrasing or function.

FN30. The computer search also identified a provision in the notes following 8 U.S.C. § 1101, referring to the "Treatment of Departures from Territorial Waters of Guam or Departures from Guam." The note states that section two of the Act of Oct. 21, 1986, Pub. L. No. 99-505, 100 Stat. 1806, had provided that "[i]n the administration of section 101(a)(15)(D)(ii) of the [INA] . . . an alien crewman shall be considered to have departed from Guam after leaving the territorial waters of Guam, without regard to whether the alien arrives in a foreign state before returning to Guam."

FN31. Senator Jones, the Floor Manager, commented on the amendment as follows before its adoption: "It seems to me that is entirely proper; I doubt if a vessel could be searched outside of territorial waters even if we did not have that language in it; so I think the Senate should concur in the amendment of the House." 66 Cong. Rec. at 4519.

FN32. The present language of section 287(a)(3) was enacted as part of the INA in 1952. That language, which made no significant changes to the statute as modified in 1945, was adopted by unanimous consent, without any debate or discussion as a floor amendment to the bill -- H.R. 5678, 82d Cong. (1952) -- that became the INA. 98 Cong. Rec. 4400 (1952).

FN33. INA section 103(a) provides:

> The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as [power is delegated to other Executive Branch officials] . . . . He shall establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this chapter . . . . He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens . . . .

See 8 U.S.C. § 1103(a).

The INA further provides that the Attorney General's determinations and rulings "with respect to all questions of law [under the INA] shall be controlling." Id. Without divesting the Attorney General of any powers, privileges or duties, the Attorney General's authority under section 103(a), including the authority to promulgate regulations, has been delegated to the Commissioner of INS. See 8 C.F.R. § 2.1 (1993); 1 Gordon & Mailman, at § 3.03 [1].

FN34. See, e.g., Jean v. Nelson, 727 F.2d 957, 967 (11th Cir. 1984), aff'd, 472 U.S. 846 (1985) (INA "permits wide flexibility in decision-making on the part of executive officials involved, and the courts are generally reluctant to interfere"); Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980) (immigration regulations promulgated by the Attorney General under the INA will be upheld as long as they are "directly and reasonably related to the Attorney General's duties and authority under the Act").

FN35. "[T]he laws of the United States have since 1790 prohibited various acts within 12 miles, or 4 leagues, of the shore, as a means to enforce compliance with the customs laws." William W. Bishop, International Law: Cases and Materials 622-23 (3d ed. 1971). The offshore waters reaching to the twelve-mile limit in which such enforcement was authorized were known as the "customs waters." See 19 U.S.C. § 1401(j).

FN36. We also believe that INS officials would have authority to make arrests under the provisions of INA section 287(a)(2) within the twelve-mile territorial sea recognized in the INS regulation. Section 287(a)(2) authorizes INS officials, without warrant, "to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of [the immigration laws regulating admission, exclusion, or expulsion of aliens]." Although undocumented aliens detected in the twelve-mile territorial waters before reaching a port might not yet be "entering" the United States, there will be circumstances where an INS official's observations provide reasonable grounds to believe that aliens are "attempting to enter" in violation of the immigration laws, thereby providing the basis for arrest under section 287(a)(2).

FN37. We also can discern no international law objection to the INS regulation. See 1982 Conference, at 1276 (allowing regulation within contiguous zone for purpose of enforcing immigration law); U.N. Conference on the Law of the Sea, Convention on the Territorial Sea and the Contiguous Zone, opened for signature Apr. 29, 1958, art. 24, 15 U.S.T. 1606, 1612, 516 U.N.T.S. 205, 220 (entered into force Sept. 10, 1964) (same); see also Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234-35 (1804); United States v. Bengochea, 279 F. 537, 539-41 (5th Cir. 1922). In Molvan v. Attorney General, [1948] App. Cas. 351 (P.C. 1964), the Privy Council implied that international law was not violated by a British destroyer's seizing a vessel on the high seas and forcing it to port when the seized vessel was carrying several hundred undocumented aliens who intended to land illegally.

FN38. We note that the INS regulation at issue here was intended to be only an "interpretative" regulation that construed section 287, not a substantive regulation deriving from the authority ascribed to the Attorney General by Chen. A substantive regulation issued pursuant to the Attorney General's broad section 103 authority to enforce the immigration laws would not be limited by the particularized restrictions of section 287, which were specifically designed to place limits on the warrantless search authority of the INS's Border Patrol.

FN39. INS applied the reasonable distance limitation in this fashion as long ago as 1952. See Memorandum for the INS Commissioner, from the General Counsel, Re: Meaning of "external boundary" of the United States in Act of February 27, 1925, as amended, 8 U.S.C. 110, with relation to coastlines: Texas gulf coast (July 7, 1952). There, INS took the position that the "external boundary" baseline from which a reasonable distance inland should be measured for search purposes was the outer limit of the three-mile territorial waters off the eastern shore of Padre Island, Texas, a narrow strip of land ten miles from the coast line which enclosed an arm of the Gulf of Mexico.

17 U.S. Op. Off. Legal Counsel 77, 1993 WL 778023 (O.L.C.)

END OF DOCUMENT

[redacted] LCDR

From: [redacted] LCDR
Sent: Wednesday, January 04, 2006 11:46 AM
To: [redacted] LCDR; [redacted] LCDR; [redacted] LCDR
Cc: [redacted] CAPT; [redacted] LT; [redacted] LT; [redacted] LT; [redacted] CDR; [redacted] PO1; [redacted] LT; [redacted] LT; [redacted] CDR; [redacted] CAPT
Subject: Moser Channel Bridge - Feet Wet/Dry determination

Attachments: 7 mile bridge 002.jpg; 7 mile bridge 008.jpg; bridge fenders.bmp; bridge end.bmp

Gentlemen,

15 Cuban migrants were recovered from the base of the old Flagler Bridge abutment at the south/west/Key West side of Moser Channel in the Florida Keys. The old Flagler Bridge is unused and this segment is not connected to anything; it is bounded by channels on both ends. The migrants are currently being held at sea aboard a Coast Guard unit.

Request feet wet/dry determination for this old bridge structure consistent with MLEM Ch 6 and the OLC interpretation. D7 Legal [redacted]

View from Ocean-side of bridge looking North…bridge runs East/West:

b7C
b5
b2

7 mile bridge 002.jpg (2 MB)

Close up view of old Flagler Bridge abutment…taken from ocean-side looking North. Migrants were recovered from the base structure beneath the end of the brown pipe:

7 mile bridge 008.jpg (2 MB)

Aerial view of Moser channel; top of picture is North. Migrant location was on the structure in the upper left.

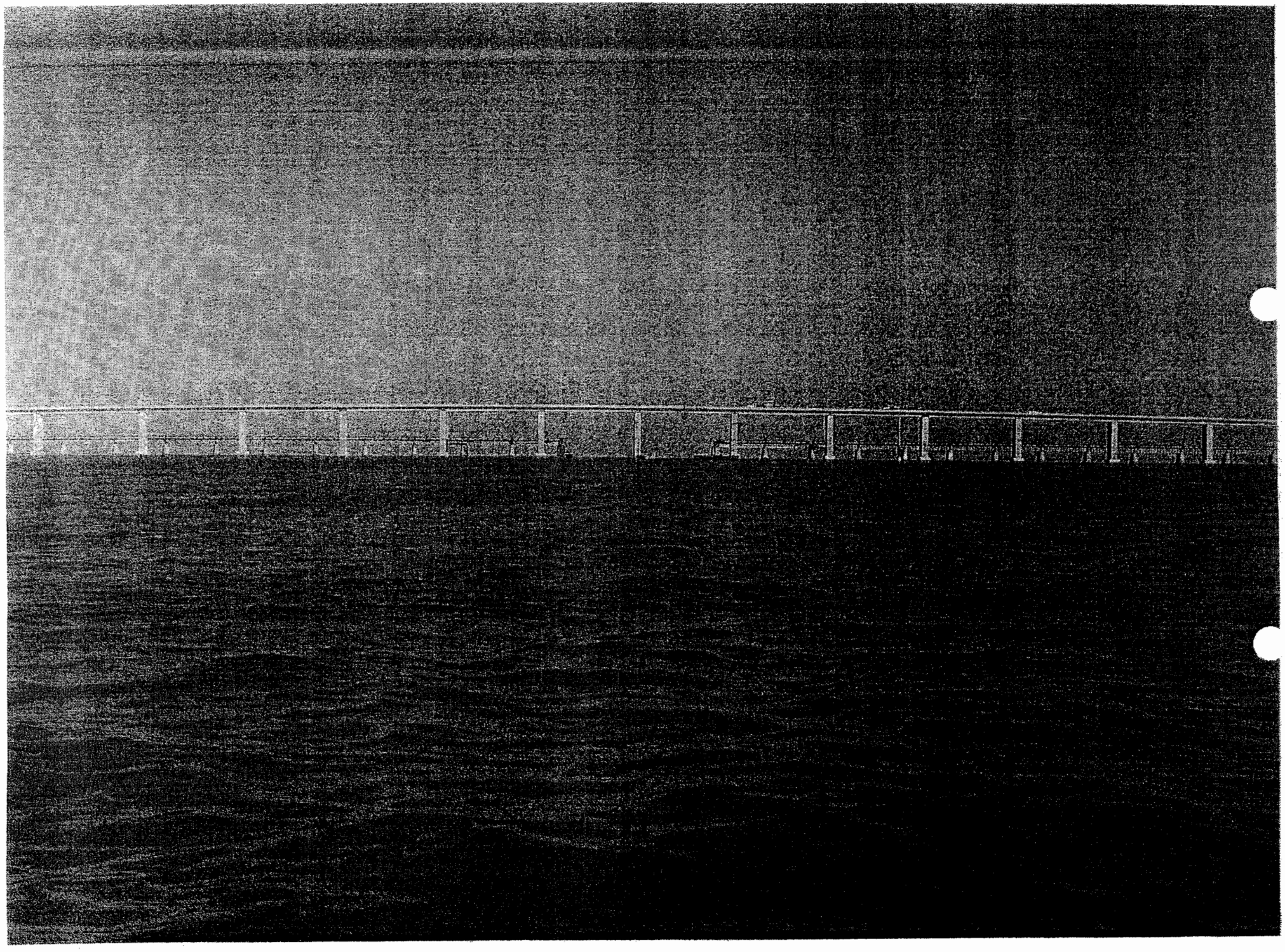
bridge nders.bmp (3 MB

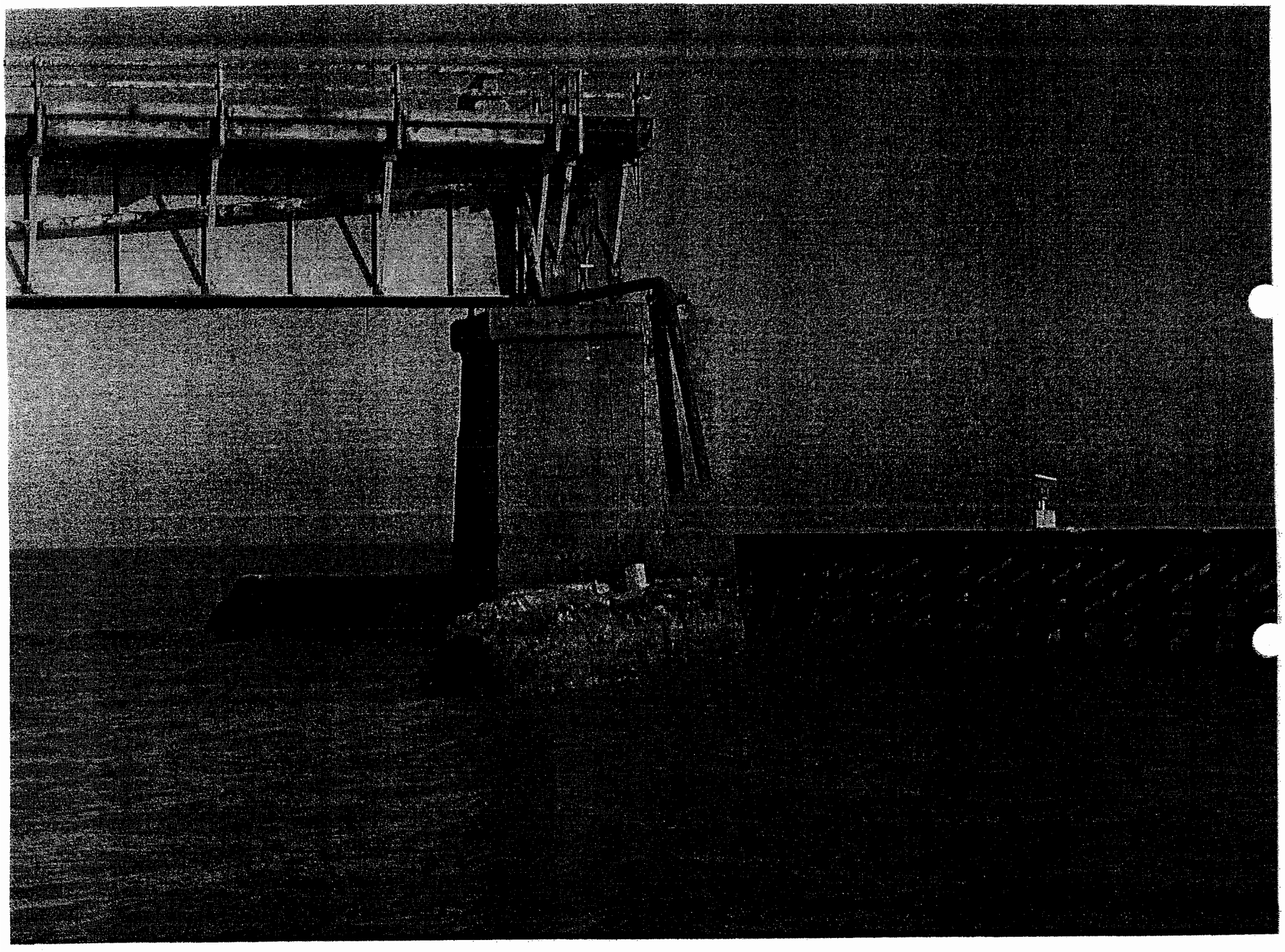
Aerial view of western end of structure showing another channel; structure not connected to land.

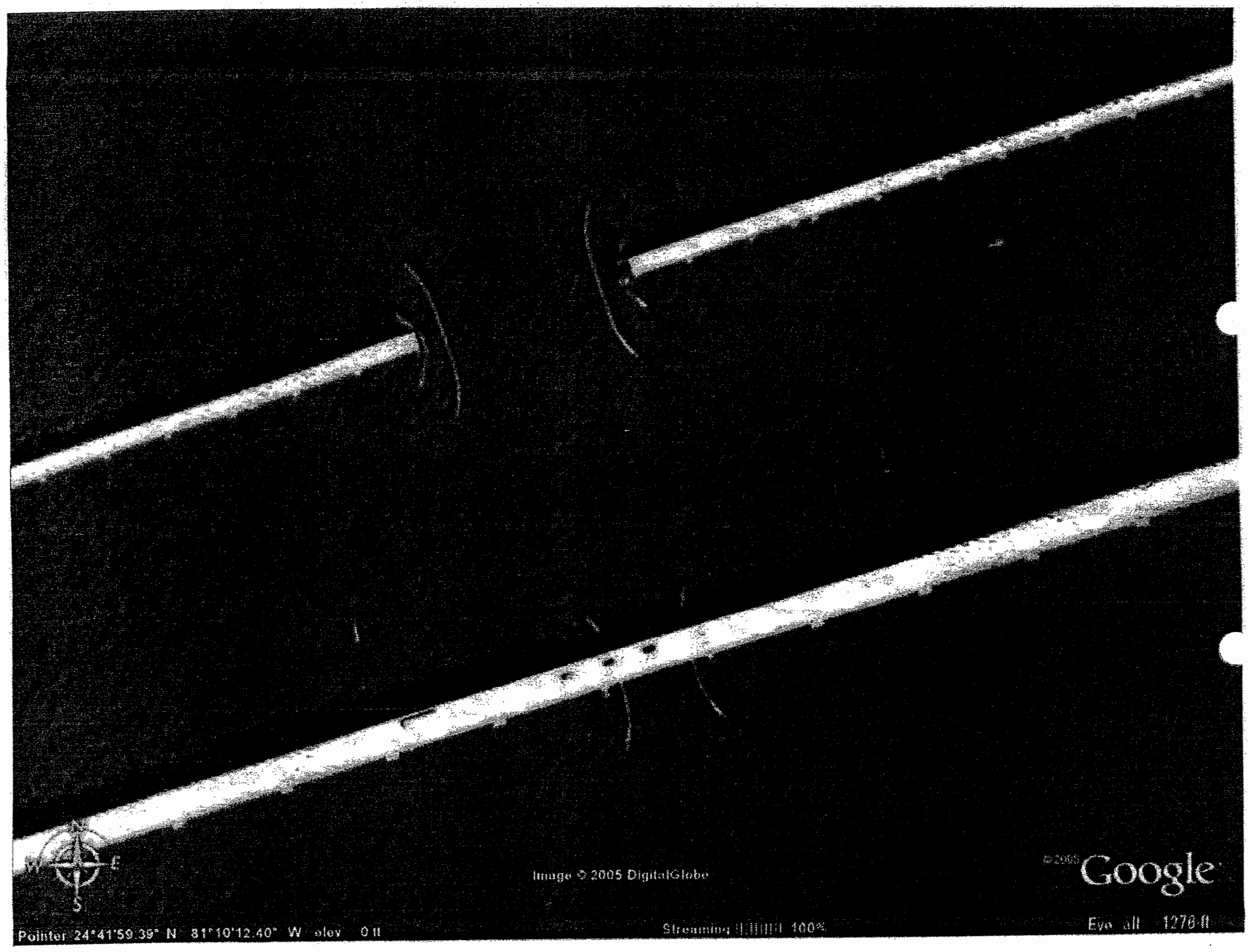
bridge end.bmp (3 MB)

v/r

LCDR [redacted]
Seventh District Legal Office (dl)
[redacted] (office)
[redacted]@d7.USCG.mil
[redacted]@uscg.smil.mil (SIPRNET)



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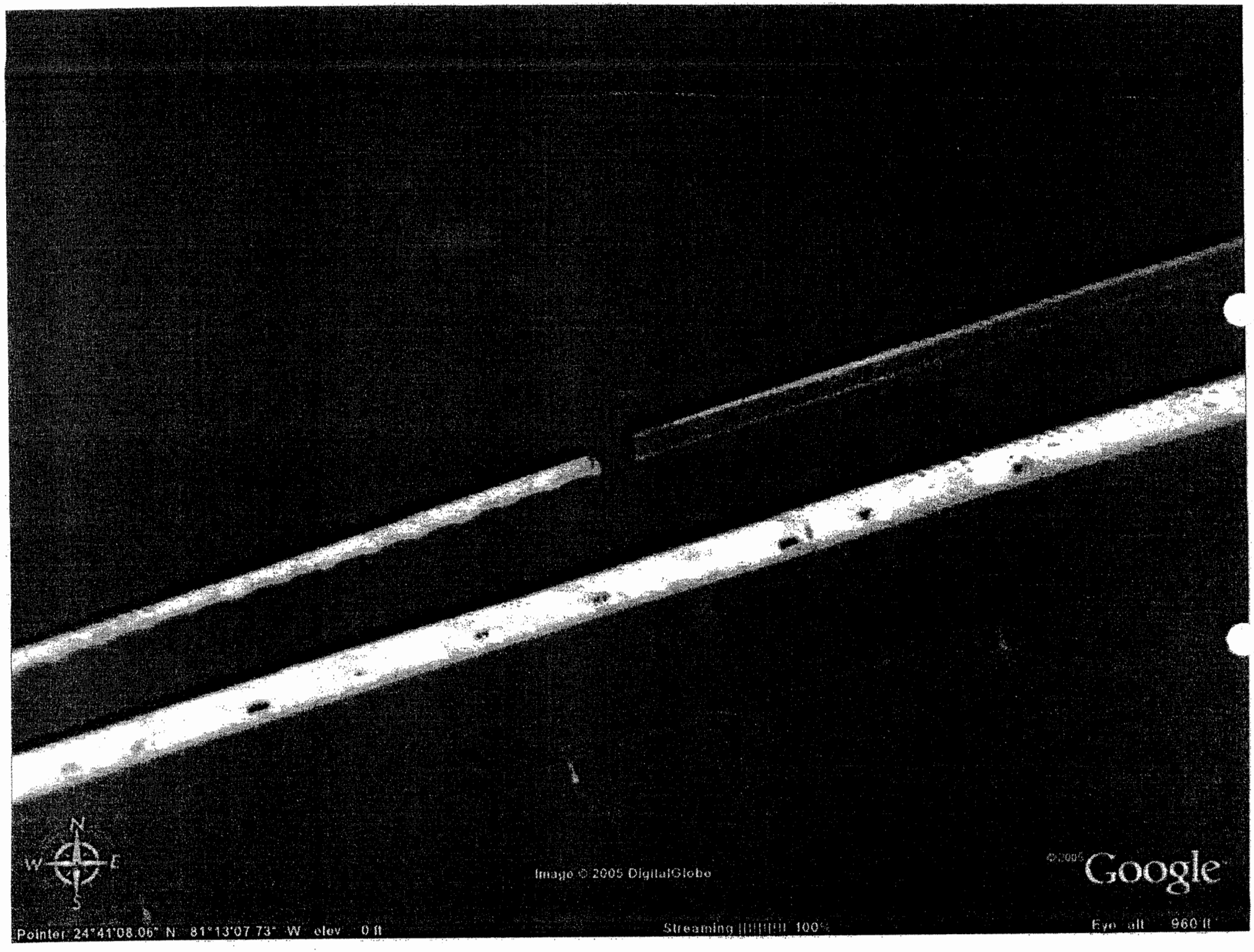
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P 050252Z JAN 06 ZUI ASN-ASS005000292
FM USCGC KODIAK ISLAND
TO COMCOGARD SECTOR KEY WEST FL
CCGDSEVEN MIAMI FL//DRMC/DRE/DRI//
INFO COMLANTAREA COGARD PORTSMOUTH VA//AO/AOFC//
COMCOGARD SECTOR ST PETERSBURG FL//RESPONSE//
USCGC VIGILANT
USCGC RELIANCE
USCGC MATAGORDA
USCGC NANTUCKET
BT
UNCLAS //N16240//
SUBJ: LAW ENFORCEMENT-AMIO SITREP ONE -15 CUBAN MIGRANTS LANDED ON SEVEN MILE BRIDGE.
1. SITUATION:
A. CURRENT STATUS: PATROLLING WITH 15 MIGRANTS ONBOARD.
B. NARRATIVE: DIRECTED BY SEC KW TO RDVS WITH CG 41329 TO RECIEVE 15 MIGRANTS THAT LANDED ON SEVEN MILE BRIDGE.
C. ONSCENE WX: WINDS: 060/10, SEAS: 350/10, SWELLS: 340/01, VIS:7, AIR TEMP: 76, BARO: 30.00(D)
2. ACTION TAKEN:
A. 041630Z CONTACTED BY SEC KW VIA HF TO RECEIVE 15 MIGRANTS FROM STA MARATHON 04 JAN 06.
B. 1930Z SET AMIO BILL.
C. 1943Z 15 MIGRANTS XFERED TO ORIG BY CG 41329.
3. TOTAL MIGRANTS: 15
ADULT MALES: 11
ADULT FEMALES: 02
MALE CHILDREN: 02
FEMALE CHILDREN: 00
4. MIGRANT INFO:
A. NAME: [redacted]
NATIONALITY: CUBAN
SEX:MALE
ID CARD NUMBER: [redacted]
DATE OF BIRTH: [redacted]
PLACE OF BIRTH: MATANZA
ADDRESS: [redacted]
B. NAME: [redacted]
NATIONALITY: CUBAN
SEX: MALE
ID CARD NUMBER: [redacted]
DATE OF BIRTH: [redacted]
PLACE OF BIRTH: MATANZA
ADDRESS: [redacted]
C. NAME: [redacted]
NATIONALITY: CUBAN
SEX: FEMALE
ID CARD NUMBER:N/A
DATE OF BIRTH: [redacted]
PLACE OF BIRTH:N/A
ADDRESS: [redacted]
D. NAME: [redacted]
NATIONALITY: CUBAN
SEX: MALE
ID CARD NUMBER: [redacted]
DATE OF BIRTH: [redacted]
PLACE OF BIRTH: N/A
ADDRESS: [redacted]
E. NAME: [redacted]
NATIONALITY: CUBAN
SEX: MALE
ID CARD NUMBER: [redacted]

b7C

DATE OF BIRTH: [redacted]
PLACE OF BIRTH: MATANZA
ADDRESS: [redacted]

F. NAME: [redacted]
NATIONALITY: CUBAN
SEX: MALE
ID CARD NUMBER: [redacted]
DATE OF BIRTH: [redacted]
PLACE OF BIRTH: N/A
ADDRESS: [redacted]

G. NAME: [redacted]
NATIONALITY: CUBAN
SEX: MALE
ID CARD NUMBER: [redacted]
DATE OF BIRTH: [redacted]
PLACE OF BIRTH:N/A
ADDRESS: [redacted]

H. NAME: [redacted]
NATIONALITY: CUBAN
SEX: MALE
ID CARD NUMBER: N/A
DATE OF BIRTH: [redacted]
PLACE OF BIRTH: CUBA
ADDRESS: [redacted]

I. NAME: [redacted]
NATIONALITY: CUBAN
SEX: FEMALE
ID CARD NUMBER: [redacted]
DATE OF BIRTH: [redacted]
PLACE OF BIRTH: CUBA
ADDRESS: [redacted]

J. NAME: [redacted]
NATIONALITY: CUBAN
SEX: MALE (CHILD)
ID CARD NUMBER: N/A
DATE OF BIRTH: [redacted]
PLACE OF BIRTH:N/A
ADDRESS: [redacted]

K. NAME: [redacted]
NATIONALITY: CUBAN
SEX: MALE
ID CARD NUMBER: [redacted]
DATE OF BIRTH: [redacted]
PLACE OF BIRTH: MATANZA
ADDRESS: [redacted]

L. NAME: [redacted]
NATIONALITY: CUBAN
SEX:MALE (CHILD)
ID CARD NUMBER: N/A
DATE OF BIRTH: [redacted]
PLACE OF BIRTH:N/A
ADDRESS: [redacted]

M. NAME: [redacted]
NATIONALITY: CUBAN
SEX:MALE
ID CARD NUMBER: [redacted]
DATE OF BIRTH: [redacted]
PLACE OF BIRTH:N/A
ADDRESS:N/A

N. NAME: [redacted]
NATIONALITY: CUBAN
SEX:MALE
ID CARD NUMBER: [redacted]

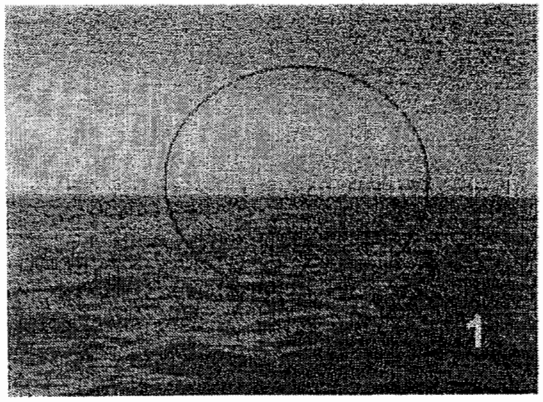
b7C

DATE OF BIRTH: [redacted]
PLACE OF BIRTH:N/A
ADDRESS: [redacted]
O. NAME: [redacted]
NATIONALITY: CUBAN
SEX:MALE
ID CARD NUMBER: [redacted]
DATE OF BIRTH: [redacted]
PLACE OF BIRTH: MATANZA
ADDRESS: [redacted]
5. FUTURE PLANS/INTENTIONS:
A. PATROL RIGHT FIELD.
6. CO'S COMMENTS: MIGRANTS CLAIMED THEY LEFT MATANZA, CUBA ON 02JAN06 VIA CHUG. SINCE THEY LANDED ON SEVEN MILE BRIDGE, STATUS AS FEET WET OR FEET DRY PENDS.
7. CASE STATUS:
A. OPEN.
B. AMIO CASE 004-06.
8. POC: [redacted]
INMARSAT [redacted]

b7C

BT
NNNN

P 061925Z JAN 06 ZUI ASN-A07006000121
FM COGARD STA MARATHON FL
TO COMCOGARD SECTOR KEY WEST FL//OPS//
INFO CCGDSEVEN MIAMI FL//OLE/O/OI//
COGARD STA ISLAMORADA FL
COGARD STA KEY WEST FL
COGARD INTELCOORDCEN WASHINGTON DC
COGARD INVSER KEY WEST FL
COGARD INVSER MIAMI FL
BT
UNCLAS
SUBJ: LAW ENFORCEMENT SITREP ONE AND FINAL (LECN 024-06)
1. SITUATION:
A.04JAN06 STA RECEIVED CALL FROM MONROE COUNTY SHERIFFS OFFICE (MCSO) STATING THAT THERE WAS APPROX 15 MIGRANTS ON THE PILING ABUTMENT OF THE OLD SEVEN MILE BRIDGE. CG41329 AND CG25577 U/W TO INVESTIGATE. MIGRANTS WERE TRANSFERED FROM BRIDGE TO CG41329. CG41329 TRANSFERRED THE 15 MIGRANTS TO CGC KODIAK ISLAND.
2. ACTION TAKEN:
A. 0705Q RECEIVED INITAL REPORT.
B. 0706Q NOTIFIED SECTOR KEY WEST AND CG41329 U/W.
C. 0719Q CG41329 O/S WITH MIGRANTS WHO ARE REFUSING TO GET ONBOARD CG41329.
D. 0720Q CG25577 U/W TO ASSIST.
E. 0731Q CG41329 SLOWLY PUTTING MIGRANTS ONBOARD.
F. 0740Q CG41329 DIRECTED BY SECTOR TO BRING MIGRANTS BACK TO STATION.
G. 0800Q CG41329 DIRECTED BY SECTOR NOT TO BRING MIGRANTS TO STATION UNTIL THE RECEIVED WORD BY D-7.
H. 0920Q CG25577 M/S.
I. 1404Q CG41329 ENROUTE TO XFER MIGRANTS TO CGC KODIAK ISLAND.
J. 1500Q CG41329 HAS COMPLETED XFER OF MIGRANTS TO CGC KODIAK ISLAND AND IS RTB.
K. 1533Q CG41329 M/S.
3. AMPLIFYING INFO:
A. VESSEL: BLUE MAN MADE CHUG MADE OF ALUMINUM. 20FT LOA. CHUG WAS SUNK BY CG25577 AS A HAZARD TO NAVIGATION.
B. POB INFO:
1. ADULT MALES:11
2. MALE CHILDREN:2
3. ADULT FEMALES:2
4. FEMALE CHILDREN:0
C. WX INFO: 6FT SEAS, 8-10 KNOT NORTH EAST WINDS.
4. FUTURE PLANS AND RECOMMENDATIONS: NONE
5. AMPLIFYING INFO:
A. THE PART OF THE OLD 7 MILE BRIDGE WHERE MIGRANTS WERE IS NOT CONNECTED TO LAND ON EITHER SIDE. THE MIGRANTS STATED THAT THEY LEFT FROM MANTANZAS THREE DAYS PRIOR TO LANDING ON OLD BRIDGE.
BT
NNNN



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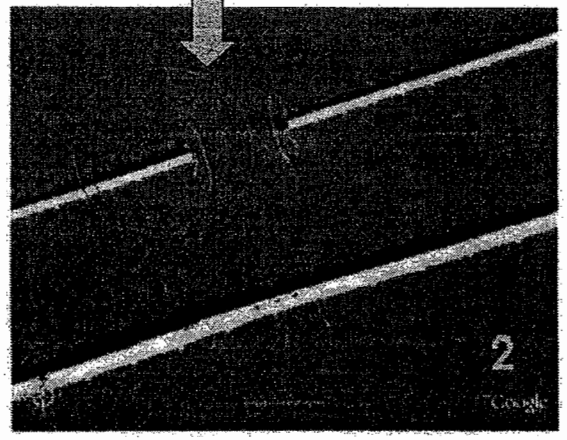
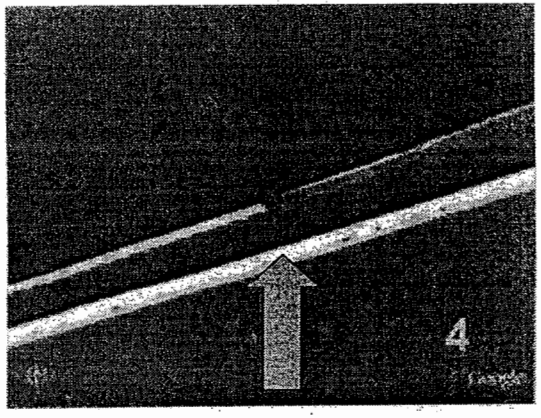
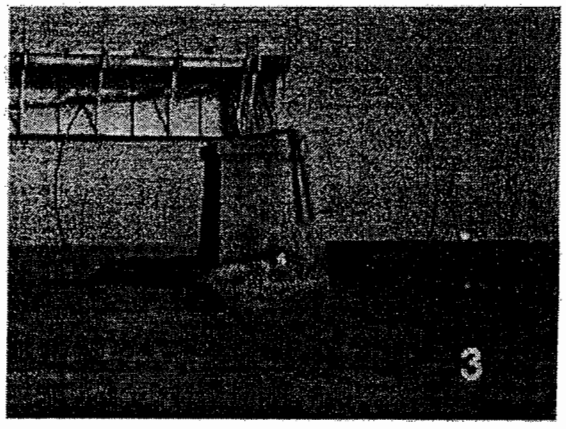




ENDS HERE

Not connected to dry land



Picture 1 shows the view from ocean-side of bridge structures looking North. The bridge runs East/West. The abandoned bridge structure where the migrants were interdicted is behind the active bridge in the foreground. Picture 2 is an aerial view of the bridge pier on which the migrants were interdicted – the pier faces on to a navigable channel and is not connected to dry land. Picture 3 is a close up sea-level view of the interdiction site. Picture 4 is where the structure on which the migrants were interdicted terminates 2.8 miles to the southwest of the interdiction point – it is not connected to dry land.

Memorandum

HQCOU 120/10.16-C
HQCOU 70/21.2-C

Subject:	Date:
Rights Of Aliens Found In United States Internal Waters	AUG 12 1996
To:	**From:**
Christopher Schroeder Acting Assistant Attorney General Office of Legal Counsel	Office of the General Counsel

We previously asked your office for its views on the consequences under the Immigration and Nationality Act of the arrival of an undocumented alien in United States territorial waters, specifically with regard to his entitlement or not to an exclusion proceeding under section 236 of the Act. You stated in two opinions that the Immigration and Nationality Act does not entitle an alien to an exclusion proceeding unless he arrives at a designated port of entry and applies to an immigration officer for admission. Office of Legal Counsel Memorandum for the Attorney General, Immigration Consequences of Undocumented Aliens' Arrival in United States Territorial Waters, October 13, 1993 (hereafter "OLC 1993"), and Memorandum for T. Alexander Aleinikoff, General Counsel, Immigration and Naturalization Service, Whether the Interdiction of Undocumented Aliens Within United States Territorial Waters Constitutes an "Arrest" Under Section 287(a)(2) of the Immigration and Nationality Act, April 22, 1994 (hereafter "OLC 1994"). You also said that aliens who have not yet reached a land border or port of entry are not entitled to apply for asylum or withholding of deportation. OLC 1993, citing Haitian Refugee Center, Inc. v. Baker, 953 F.2d 1498 (11th Cir.), cert. denied, ___U.S. ___, 112 S. Ct. 1245, 117 L.Ed. 2d 477 (1992). See Sale v. Haitian Centers Council, Inc., 509 U.S. ___, 113 S. Ct. 2549, 125 L.Ed. 2d 128 n. 33 and related text (1993). We did not specifically ask you to determine the rights of aliens interdicted in internal waters,[1] i.e., from the baseline shoreward

[1] "Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State." Part I, sec. II, art. 5 (1), Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 UST 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; entered into force on September 10, 1964; ratified by the United States on April 12, 1961. "[T]he normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." Id. at part I, section II, article 3. Under 33 U.S.C. § 2003(o), "'Inland Waters' means the navigable waters of the United States shoreward of the navigational demarcation lines dividing the high seas from harbors, rivers, and

That could include an alien encountered on board ship or in the water (not yet on dry land) in a bay or inlet, in a river, or at high tide shoreward of the baseline. We hereby request your views regarding the application of the relevant law in such a situation.

I. QUESTIONS PRESENTED

A. Does penetration of internal waters of the United States constitute entry under present law, mandating deportation proceedings?

B. Does apprehension in internal waters constitute an arrest, requiring institution of exclusion proceedings?

C. If apprehension in internal waters does not necessarily constitute arrest, do our treaty obligations require us to implement *non-refoulement* protections if an alien apprehended in internal waters demonstrates that his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion if he is returned to his country?

D. What is the effect of section 414 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), amending section 241 of the INA?

In order to help frame your inquiry, we offer below our conclusions on these issues.

II. SUMMARY CONCLUSIONS

A. Penetration of internal waters of the United States does not constitute entry under present law and, therefore, does not mandate deportation proceedings.

B. It is our view that apprehension of aliens in the internal waters of the United States constitutes an arrest. Under this interpretation, the Immigration and Naturalization Service would, therefore, be obligated to bring any alien so apprehended to a port of entry and process him or her for exclusion proceedings.

C. Even if an apprehension in internal waters does not necessarily constitute an arrest (in line with what your office stated with regard to interdictions in territorial waters), it is our view that our treaty obligations require us to implement *non-refoulement* protections if an alien apprehended in internal waters demonstrates that his life or freedom would be threatened on account of race, religion,

other inland waters of the United States and the waters of the Great Lakes on the United States side of the International Boundary." "Inland waters," therefore, include the territorial waters and the internal waters.

nationality, membership in a particular social group, or political opinion if he is returned to his country.

D. AEDPA § 414 provides that aliens who have not been admitted to the United States after inspection and who are encountered on dry land in the United States are to be placed in exclusion, rather than deportation, proceedings: In our view, AEDPA is not intended to give any greater rights to aliens encountered either on board ship or in the water in internal waters than would apply under previous law.

III. ANALYSIS

A. Penetration Of Internal Waters Does Not Constitute Entry

"Physical presence" is one of the requirements for an "entry" into the United States. Yang v. Maugans, 68 F.3d 1540 (3rd Cir. 1995); Zhang v. Slattery, 55 F.3d 732 (2d Cir. 1995); Chen v. Carroll, 48 F.3d 1331 (4th Cir. 1995); Matter of Ching and Chen, 19 I&N Dec. 203 (BIA 1984); Matter of Pierre, 14 I&N Dec. 467 (BIA 1973). All of the above-cited court cases held that an alien has not satisfied the "physical presence" prong of the three-pronged entry requirement of Pierre and Ching and Chen[3] until he reaches dry land. Zhang involved an alien aboard the smuggling ship Golden Venture. The Golden Venture ran aground approximately 100 to 200 feet off Rockaway Beach, Queens County, New York, on June 6, 1993. Zhang climbed down a ladder into the water and swam ashore, where, after a few steps, he collapsed. Citing Correa v. Thornburgh, 901 F.2d 1166 (2d Cir. 1990),[4] the United States Court of Appeals for the Second Circuit found that Zhang was not physically present even when he disembarked from the Golden Venture into the Rockaway waters.

> . . . United States immigration law is designed to regulate the travel of human beings, whose habitat is land, not the comings and goings of fish or birds. We hold that an alien attempting to enter the United States by sea has not satisfied the physical presence element of Pierre at least until he has landed.

---

[3] "[A]n entry involves (1) a crossing into the territorial limits of the United States, *i.e.*, physical presence; (2)(a) inspection and admission by an immigration officer or (b) actual and intentional evasion of inspection at the nearest inspection point; and (3) freedom from official restraint." Matter of Ching and Chen, 19 I&N Dec. at 205, citing Pierre.

[4] In Correa, the alien arrived in the United States aboard a commercial flight from Guatemala. The Correa court rejected the notion that the alien was "physically present" for purposes of entry at the moment her airplane crossed into United States airspace or even when it landed on the ground at the Houston airport. The Correa court noted that the alien "satisfied the first prong, 'physical presence,' when she disembarked her Avianca flight from Guatemala to Houston." Correa v. Thornburgh, 901 F.2d at 1171.

Zhang v. Slattery, 55 F.3d at 754. Under present law, the appropriate removal proceedings for aliens who have made an entry are deportation proceedings pursuant to section 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252. Because an alien on board a ship in internal waters has not landed, he has not entered the United States and is not entitled to deportation proceedings.

B. **Apprehension Of Aliens In The Internal Waters Of The United States Constitutes An Arrest**

It is our view that apprehension of aliens in the internal waters of the United States in furtherance of the enforcement of United States immigration laws constitutes an arrest, at least when it involves the boarding of the vessel by United States officers, the forced diversion of the vessel at the command of United States officers, or the physical custody of an individual (for example, after being pulled from the water). This type of exercise of the coercive authority of the United States Government in waters that are regarded, under international law, as an integral part of United States territory, must be viewed as an arrest under the Immigration and Nationality Act § 287(a)(2), 8 U.S.C. §-187(a)(2). Under this interpretation, the Immigration and Naturalization Service would, therefore, be obligated to bring any alien so apprehended to a port of entry and process him or her for exclusion proceedings.

C. **Our Treaty Obligations Require Us To Implement *Non-Refoulement* Protections If An Alien Apprehended In Internal Demonstrates That His Life Or Freedom Would Be Threatened On Account Of Race, Religion, Nationality, Membership In A Particular Social Group, Or Political Opinion If He Is Returned To His Country**

The United States is a party to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, and is therefore derivatively bound by the central operative provisions of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150.

Article 33 of the Convention provides:

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

This provision says nothing about where the refugee is found, unlike other Articles, which refer to presence in the territory (Articles 2, 4, and 27), illegal presence (Article 31), or lawful presence (Articles 18, 26, and 32). Section 243(h) is the section of the INA that is based on Article 33, and the legislative history indicates that it is to be construed consistently with United States obligations under the United Nations Protocol Relating to the Status of Refugees. House

Conf. Rep. No. 781, 96th Cong., 2d Sess. 19, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 141, 160. As was pointed out in your 1993 opinion, the Refugee Act amended the INA to add the word "return" and remove the words "within the United States" from section 243(h). OLC 1993 at 11. In Sale v. Haitian Centers Council, 509 U.S. ___, 113 S.Ct. 2549, 2560-63 (1993), a case involving the interdiction on the high seas of ships bringing aliens to the United States, the Supreme Court held that aliens interdicted on the high seas were not eligible to apply for withholding of deportation pursuant to section 243(h). The question regarding the rights of aliens interdicted in internal waters did not arise, and was not dealt with, in that case.

Because internal waters are an integral part of United States territory, we consider that removal of an alien therefrom would constitute a "return" within the meaning of INA § 243(h) and Article 33 of the Convention. With a few exceptions not relevant here, under current regulations, the withholding of return under section 243(h) must be determined by an immigration judge. 8 C.F.R. §§ 208.16 and 253.1(f). Therefore, even if apprehension in United States internal waters is not a technical "arrest," the appropriate action would be for the Service to bring to port for inspection and institution of exclusion proceedings an alien apprehended in inland waters who claims that his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion. At those proceedings, the alien could also apply for asylum. 8 C.F.R. § 208.2(b). (The regulations, however, could be amended, consistently with United States treaty obligations, to provide other means to honor the *non-refoulement* obligation in these circumstances.)

We urge you to seek the views of the Department of State regarding our obligations under the Convention and Protocol Relating to the Status of Refugees. By copy of this memorandum we are inviting the Department of State to provide its views on the treaty's application in the circumstances addressed in this memorandum.

D. AEDPA Will Have No Bearing Regarding Aliens Arriving By Water Who Have Not Set Foot On Dry Land

Section 414 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), section 241 of the INA was amended by adding subsection (d), which says:

> Notwithstanding any other provision of this title, an alien found in the United States who has not been admitted to the United States after inspection in accordance with section 235 is deemed for purposes of this Act to be seeking entry and admission to the United States and shall be subject to examination and exclusion by the Attorney General under chapter 4. In the case of such an alien the Attorney General shall provide by regulation an opportunity for the alien to establish that the alien was so admitted.

This provision is to become effective on November 1, 1996, unless it is modified or repealed.

Nothing in the legislative history of AEDPA suggests that the language in this section regarding aliens "found in the United States" was meant to expand the availability of exclusion

proceedings, if it were determined that aliens apprehended in the internal waters are not otherwise entitled to such treatment. AEDPA § 414 instead should be read simply to provide that aliens who have not been admitted to the United States after inspection and who are encountered on dry land in the United States are to be placed in exclusion, rather than deportation, proceedings--a major change in the law's treatment of entrants without inspection. AEDPA would not grant greater rights to aliens encountered in internal waters, either on board ship or in the water, than it would to aliens who have actually landed.

Lori Scialabba for
David A. Martin
General Counsel

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI, FLORIDA

MOVIMIENTO DEMOCRACIA, INC.,

MERCEDES HERNANDEZ GUERRERO,

ARACELYS HERNANDEZ, et al.
:

Plaintiffs,

CIV. 06-20044

v.
:

Michael CHERTOFF, et al.,

Defendants.
:

DECLARATION OF LIEUTENANT COMMANDER BRAD J. KIESERMAN

I, Brad J. Kieserman, hereby declare that:

1. I am the Chief of the Operations Law Group in the Office of Maritime and International Law of The Judge Advocate General of the United States Coast Guard, Washington, D.C. In this capacity, one of the activities I oversee is the interdiction of undocumented aliens attempting illegally to enter the United States by sea. I have been a member of the Coast Guard since 1986, and the Chief of the Operations Law Group since 2004. Prior to becoming the Chief of the Operations Law Group, I served as the Legal Advisor to the Chief of Law Enforcement, United States Coast Guard Headquarters, Washington D.C. for three years.

2. On Wednesday January 4, 2006, I was notified that Coast Guard assets had interdicted fifteen undocumented Cuban migrants who had alighted from a vessel onto the base of a structure known as "the old Flagler Bridge" on the southwest side of Moser Channel in the Florida Keys.

3. I was informed that the structure onto which the fifteen undocumented Cuban aliens alighted was free standing in the water and not connected to U.S. dry land.

3. I investigated whether there was any record of undocumented aliens attempting to enter the U.S. by sea ever landing on this specific structure previously. Finding no record or any person with a recollection of such an event, I deemed this to be a matter of first impression with respect to this specific structure. Consequently, I conducted an independent review of the facts and the law regarding this matter. Specifically, I sought and received a site survey of the area focused on determining whether the structure in question was currently connected to U.S. dry land, the circumstances under which the structure had come to be freestanding in U.S. territorial waters, specific measurements of the structure, and imagery of the entire structure (including photographs of both ends of the structure, frontal views, and aerial imagery). I also

reviewed the controlling legal authority, including section 235(a)(1) of the INA; Memorandum for the Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: Immigration Consequences of Undocumented Aliens' Arrival in United States Territorial Waters (Oct. 13, 1993) ("1993 Opinion"); Memorandum for T. Alexander Aleinikoff, General Counsel, Immigration and Naturalization Service, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: Whether the Interdiction of Undocumented Aliens Within United States Territorial Waters Constitutes an "Arrest" under Section 287(a)(2) of the Immigration and Nationality Act (Apr. 22, 1994) ("Arrest Opinion"); Memorandum for the Attorney General, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Rights of Aliens Found in U.S. Internal Waters (Nov. 21, 1996) ("1996 Opinion"); OLC Memorandum of 18 March 1997 to Commandant (G-LMI) (the "1997 OLC memorandum"); Executive Order 12807; and Presidential Proclamation 4865.

4. On January 6, 2006, after thorough consideration of the matter, I reached a conclusion that the structure was not U.S. dry land or in any way connected to U.S. dry land, as that term is construed in the relevant legal documents referenced in paragraph 3. I also concluded based on the 1997 OLC memorandum that the decision in this matter was committed to the U.S. Coast Guard as the agency charged by the President with enforcing the law in this matter. I briefed supervisors and program managers on the matter, and then thoroughly discussed the facts and the law with The Judge Advocate General of the Coast Guard, reviewing all of the associated imagery and legal authorities. The Judge Advocate General concurred in the analysis and provided a detailed oral analysis to the Commandant of the Coast Guard on or about Friday, January 6, 2006. Based on the advice of The Judge Advocate General, the Commandant concurred that this structure was not U.S. dry land, and directed the Assistant Commandant for Response to proceed in accordance with standard operating procedures regarding undocumented aliens interdicted at sea attempting illegally to enter the U.S. At the direction of the Assistant Commandant for Response, I immediately thereafter instructed officers of the Seventh Coast Guard District to process the fifteen undocumented Cuban aliens in question as interdicted at sea, rather than as apprehended on U.S. dry land.

5. On the morning of January 6, 2006, I directed the legal advisor to Chief of Law Enforcement (an attorney under my direct supervision) to prepare a draft opinion in this matter for my review both for internal due diligence and in anticipation of litigation. I reviewed and edited the draft opinion on Saturday, January 7, 2006, which I prepared in the form of a memorandum to The Judge Advocate General.

6. I attach a copy of the legal opinion drafted Saturday, January 7, 2006, and also a copy of all the material relevant to my preparation of that opinion.

I declare under penalty of perjury, that the foregoing is true and correct.

Dated: January 25, 2006

Brad J. Kieserman

U.S. Department of Transportation
United States Coast Guard

Commandant
United States Coast Guard

2100 Second Street, S.W.
Washington, DC 20593-0001
Staff Symbol: G-LMI
Phone: (202) 267-0091
Fax: (202) 267-4496
Email: bkieserman@comdt.uscg.mil

16274
07 January 2006

MEMORANDUM

From: LCDR Brad Kieserman
Chief, Operations Law Group

Reply to: G-LMI
Attn of: LCDR Kieserman
7-0091

To: RADM John E. Crowley, Jr.
The Judge Advocate General

Subj: DETERMINATION: THE MAN-MADE STRUCTURE CALLED A "BRIDGE PIER" IN THE FLORIDA KEYS, IN THE VICINITY OF MOSER CHANNEL, WHICH IS NOT CONNECTED IN ANY WAY TO THE SHORE OR OTHER U.S. DRY LAND, AND UPON WHICH FIFTEEN UNDOCUMENTED CUBAN ALIENS ALIGHTED ON 04 JANUARY 2006, IS NOT U.S. DRY LAND FOR PURPOSES OF ENFORCING THE IMMIGRATION AND NATIONALITY ACT

1. Summary. This memorandum summarizes the facts and the law underlying my determination that the fifteen Cuban migrants interdicted by the Coast Guard on 04 January 2005, at the base of the Old Flagler Bridge ("the bridge") on a man-made structure called a "bridge pier" in the Florida Keys, in the vicinity of Moser channel, are not arriving aliens for purposes of the Immigration and Nationality Act (the INA). This decision is a matter of agency discretion and is committed to the Coast Guard pursuant to a letter from Deputy Assistant Attorney General (OLC) Richard Shiffrin dated March 18, 1997.

2. Facts. On 04 January 2006, a Coast Guard Station Marathon small boat interdicted fifteen Cuban migrants on an artificial structure called a "bridge pier", in the vicinity of Moser channel. The bridge & bridge pier:

- Are artificial structures
- Are not connected to United States dry land (see attached slide for clear imagery demonstrating that the structure is not connected to U.S. dry land)
- The Coast Guard interdicted the migrants on the northeast bridge pier of the structure, which is not connected to land and terminates in a navigable maritime channel
- The bridge pier supports an abandoned bridge that runs southwest over water for approximately 2.8 miles before terminating over water and without connecting to dry land
- Do not possess the status of an island and do not generate a territorial sea or affect the delimitation of the territorial sea (*see* Article 60(8) of the 1982 U.N. Law of the Sea Convention, which provides: "Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf."

3. Law.

a. In 1981, the President suspended the entry into the United States of undocumented aliens by sea. *See* Pres. Proc. 4865. In 1992, the President directed the Coast Guard to take certain measures to enforce the suspension of such aliens, including interdiction and repatriation. *See* Exec. Order 12,807. In 1994 and 1995, the United States & Cuba issued joint communiqués (often called the "Cuban Migrant Accords") establishing a framework for the repatriation of Cuban migrants intercepted at sea by the United States and attempting to enter the United States.

b. Between 1993 and 1996, the Office of Legal Counsel (OLC) of the Department of Justice (DOJ) issued a series of legal opinions binding on all federal agencies articulating the legal foundation for determining under what circumstances undocumented aliens are entitled to the status of "applicant for admission" for purposes of process under the Immigration and Nationality Act (INA), *see* Memorandum for the Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: Immigration Consequences of Undocumented Aliens' Arrival in United States Territorial Waters (Oct. 13, 1993) ("1993 Opinion"); Memorandum for T. Alexander Aleinikoff, General Counsel, Immigration and Naturalization Service, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: Whether the Interdiction of Undocumented Aliens Within United States Territorial Waters Constitutes an "Arrest" under Section 287(a)(2) of the Immigration and Nationality Act (Apr. 22, 1994) ("Arrest Opinion"); Memorandum for the Attorney General, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Rights of Aliens Found in U.S. Internal Waters (Nov. 21, 1996) ("1996 Opinion").

c. The 1996 Opinion, interpreting section 235(a)(1) of the INA, concluded that undocumented aliens seeking to reach the U.S., but who "have not landed or been taken ashore on United States dry land," are not entitled to removal (including deportation) proceedings under the INA, including inspection, screening, and attendant procedures that will result in either admission, asylum, or removal. The 1996 Opinion relied, inter alia, on the plain language of section 235, which describes an "alien brought to the United States after having been interdicted in . . . United States waters." OLC opined that Congress did not regard such an alien as already present or arrived in the United States; instead, "Congress provided that the unlanded alien interdicted in United States waters must first be 'brought to' the United States -- i.e., taken ashore to U.S. dry land -- before he can be said to have 'arrived' there and before he acquires the right to be treated as an applicant for admission." 1996 Op. at 4. Likewise, OLC cited several cases applying the relevant rule of law, including: Yang v. Maugans, 68 F.3d 1540, 1546-49 (3rd Cir. 1995); Zhan v. Slattery, 55 F.3d 732, 754 (2d Cir. 1995) ("an alien attempting to enter the United States by sea has not satisfied the physical presence element . . . **until he has landed**" (emphasis added), cert. denied, 116 S. Ct. 1271 (1996); id. (alien was not fully present **until he came to the beach**") (emphasis added); Chen Zou Chai v. Carroll, 48 F.3d 1331, 1343 (4th Cir. 1995) (alien has not entered the United States because he was apprehended **"before he reached the shore"**) (emphasis added).

d. Accordingly, undocumented aliens who are interdicted in U.S. internal waters or U.S. territorial seas are not considered to have landed or been taken ashore to on United States dry land. OLC has announced that this is a "clear and workable legal standard" that the Coast Guard must apply in each case. OLC Memorandum of 18 March 1997 to Commandant (G-LMI) (the "1997 OLC letter"). Because such aliens have not arrived in

the United States, the United States considers them to be subject to the suspension of entry by sea set forth in Exec. Ord. 12807 and Pres. Proc. 4865, and as "migrants interdicted at sea" for purposes of the 1994 and 1995 Cuban Migrant Accords. As a matter of US policy, interdicted Cuban migrants who have not landed or been taken ashore on United States dry land are provided asylum pre-screening at sea by USCIS. If USCIS determines that such migrants have a credible fear of persecution or torture (and are not otherwise barred from protection), they are delivered to DHS facilities in Guantanamo Bay for further screening. Alternatively, if USCIS determines that such migrants do not have a credible fear of persecution or torture or are otherwise barred from protection, they are then repatriated directly to Cuba.

e. The 1997 OLC letter clarified that the decision of whether, in a particular case, an undocumented alien has arrived in the United States is committed to the Coast Guard. OLC stated: "We recognize, as your letter makes clear, that there may be difficult determinations to be made in some cases. This is the case whenever particular facts are applied to legal standards contained in statutes, regulations, and opinions. In our view, however, the Coast Guard is in the best position to determine how the rule should be implemented in these specific cases. As is the necessarily the case whenever a statute, regulation, or a legal opinion is to be applied, the agency that is charged with implementation should attempt to follow the relevant rule using its own good judgment and common sense."

f. Consistent with the OLC Opinions discussed above and consistent interagency practice since 1996, undocumented aliens seeking to reach the U.S., but who have not landed or been taken ashore on U.S. dry land are not entitled to removal or other proceedings under the INA. Interdicted migrants who have not yet reached U.S. soil are normally returned to the country from which they departed. If suspicion or evidence exists that a migrant interdicted at sea may have previously been ashore in the United States, field units contact Coast Guard Headquarters via the chain of command for instructions. Migrants are not deemed to have entered the U.S. unless they are located on U.S. dry land, or bridges or piers connected thereto. Migrants interdicted in U.S. internal waters, U.S. territorial sea or onboard a vessel moored to a U.S. pier are not considered to have reached U.S. dry land. Migrants located on pilings, low-tide elevations or aids to navigation are not considered to have come have reached U.S. dry land. However, migrants who land ashore but subsequently reenter the water (e.g., wade from a rock out to a boat) are considered to have reached U.S. dry land.

4. Analysis.

a. In the instant case, the migrants were found on a bridge pier that is not connected in any way to the shore or to U.S. dry land. The Coast Guard found no evidence that the migrants had previously landed ashore on U.S. dry land. Even if the migrants had been able to scale up to the top of the bridge, they would not have been able to arrive ashore on U.S. dry land because, as noted above, this abandoned bridge structure is not built upon or connected to dry land at either of its ends. Likewise, under international law, this bridge is an artificial structure that does not have the status of land territory that generates a territorial sea. As such, the bridge pier (and the section of the bridge below which the migrants were interdicted) is simply a collection of man-made structures placed in the waters of the United States - it is not U.S. dry land for purposes of the INA and by embarking the bridge pier the migrants did not land ashore on U.S. dry land. This is because the bridge pier upon which the Coast Guard interdicted the migrants is legally indistinguishable from a single piling or multiple pilings driven into the ocean or channel

bottom, but not into U.S. dry land, to display a fixed light as an aid to navigation in a channel. Likewise, the bridge pier in the instant case is analogous to a buoy moored to the bottom of a channel by chain and concrete in that the pier is man-made structure installed in the water and affixed to the bottom of the channel, but not installed on dry land. Since 1996 the interagency has consistently treated such structures as not constituting dry land and therefore not meeting the legal standard for process under the INA. Accordingly and consistent with the OLC opinions and consistent interagency practice, we do not view the bridge pier upon which the Coast Guard interdicted this group migrants as U.S. dry land for purposes of enforcing the INA.

b. As a matter of policy, we note that to reach an alternate conclusion in this case would be inconsistent with past practice and potentially introduce substantial confusion and disorder into so-called "feet wet-feet dry" determinations. For example, if a bridge pier wholly unconnected to dry land were to be considered "dry land" for purposes of the INA & OLC Opinions, then any man-made structure affixed to the ocean bottom in US internal waters, whether or not connected to dry land, would be susceptible to the same characterization. Man made structures affixed to the ocean bottom might include anchored vessels. Thus, a migrant (or migrant smuggler) could simply anchor a vessel in US waters and assert that it was, like the bridge pier, unconnected to dry land but affixed to the ocean bottom; or although not presently connected to dry land, the boat, like the bridge pier, was once connected to dry land since it was tied to a pier directly connected to dry land or stored ashore; or migrants on US oil rigs (and other structures affixed to the ocean bottom) in US waters in the Gulf of Mexico could argue they had arrived ashore on dry land - the arguments are potentially endless, which is why, as a matter of policy, it is helpful that the law supports a bright line distinction between dry land and artificial structures affixed in some manner to the ocean floor, but not connected to U.S. dry land.

5. Conclusion. It is my opinion that, as a matter of law, the man-made structure called a "bridge pier" in the Florida Keys, in the vicinity of Moser channel, which is not connected in any way to the shore or other U.S. dry land, and upon which fifteen undocumented Cuban aliens alighted on 04 January 2006, is not U.S. dry land for purposes of determining whether a person is an arriving alien pursuant to the INA.

#

Enclosure: (1) Imagery & SITREPs

Copy: File; G-RPL

From: [redacted]LT
Sent: Tuesday, January 10, 2006 3:25 PM
To: [redacted]CAPT
Cc: [redacted]CDR; [redacted]LCDR; [redacted]LCDR; [redacted]LT; [redacted]LT
Subject: FOIA For CG's NEW WET FOOT DRY FOOT DETERMINATION RE. BRIDGES

Capt,
We received our first FOIA re. the recent bridge case. The FOIA request is well tailored and essentially asks for the USCG's recent legal determination in re. to a bridge that does not connect to land. I assume we should coordinate any potential FOIA releases with HQ and want to make you aware.

[redacted]
LT [redacted]
D7 Prevention/General Law
[redacted](direct)
305.415.6950 (general)

b2
b7C

AN-AMERICAN ACTIVISTS AND POLITICIANS CONDEMN DECISION TO REPATRIATE MIGRANTS FROM
From: [redacted]@earthlink.net on behalf of [redacted]@earthlink.net]
Sent: Tuesday, January 10, 2006 7:44 PM
To: CGF FORWARD
Subject: CGF: CUBAN-AMERICAN ACTIVISTS AND POLITICIANS CONDEMN DECISION
TO REPATRIATE MIGRANTS FROM BRIDGE

b7C

The Associated Press / The South Florida Sun-Sentinel Tuesday, January 10 2006

Activists, politicians condemn decision to repatriate 15 Cubans

By LAURA WIDES-MUNOZ
Associated Press

MIAMI -- Cuban-American community activists and politicians lambasted the U.S. government's decision to repatriate 15 Cubans picked up from the base of an abandoned bridge in the Florida Keys and urged officials to review the country's ``wet-foot dry foot'' policy.

An attorney for the families of the migrants said he planned to file a lawsuit Tuesday asking a federal judge to allow the group to return, while a local activist vowed to continue a three-day hunger strike protesting the treatment of the Cubans.

The migrants, including a 2-year-old and a 13-year-old, were sent back to Cuba Monday after U.S. officials concluded that the section of the partially collapsed bridge where they landed did not count as dry land under the government's policy because it was no longer connected to any of the Keys.

``Through a legal review, the migrants were determined to be feet- wet and processed in accordance with standard procedure,'' Coast Guard spokesman, Petty Officer Dana Warr, said in a statement.

U.S. Sen. Mel Martinez, R-Fla., called the government's decision an example of ``the complete and utter failure'' of the wet-foot, dry-foot policy, which generally allows Cubans who reach dry land to stay and those who don't to be sent home without an immigration hearing.

``Because they reached an old bridge and not a new bridge there's a judgment they didn't reach American soil? The semantics used to return these men and women - who have risked so much to reach freedom and are now returned to an uncertain future - are an embarrassment,'' Martinez said in a statement.

U.S. Rep. Ileana Ros-Lehtinen, R-Miami, called the decision absurd. ``If any crime would have been committed on that bridge, the

perpetrators would have been arrested and charged with violating U.S. laws,'' she said in a statement.

Ros-Lehtinen's spokesman Alex Cruz said the congresswoman would continue to follow the case, but he did not immediately know what further action she would take.

The group left Matanzas Province in Cuba late on the night of Jan. 2 aboard a small, homemade boat. The migrants were rescued Wednesday morning by the Coast Guard from the base of the bridge just south of Marathon Key.

Mercedes Hernandez Guerrero said initially she was elated to receive a call from her niece Elizabeth Hernandez, telling her that she and her husband and their 2-year-old son John Michael had reached the bridge.

``I said stay there. The currents are strong. I thought I was giving them good advice,'' Hernandez recalled.

But her joy at her niece's arrival turned to concern as the days passed and she heard nothing more from the group.

At least a dozen Cuban-Americans protested the government's decision Monday outside Freedom Tower in downtown Miami.

Ramon Saul Sanchez, head of the Democracy Movement, a Cuban-American advocacy group, who began a hunger strike on Saturday to protest the federal government's treatment of the group, said Monday he would not stop until President Bush agreed to meet with a commission of leaders from the Cuban exile community about the ``the arbitrary manner in which the wet-foot, dry-foot policy is being implemented.''

Sanchez said he is also concerned about the Coast Guard's failure to allow those picked up at sea to contact their families while they are being held on the agency's boats.

``People on both sides of the ocean think their family members have died,'' he said.

Sanchez and others said they were particularly shocked by the speed of the repatriation.

William Sanchez, an attorney for relatives of the Cubans migrants who planned to file a motion asking for the group's return, said he was on his way to file an emergency injunction to halt their return when he learned they were already back in Cuba.

He noted that the Coast Guard's own Web site states that if immigrants ``touch U.S. soil, bridges, piers or rocks,'' their feet are considered dry.

AN-AMERICAN ACTIVISTS AND POLITICIANS CONDEMN DECISION TO REPATRIATE MIGRANTS FROM

But Coast Guard Lt. Commander Chris O'Neil said the structure the migrants landed on didn't fall into any of those categories.

``The 'bridge' is kind of a misnomer,'' said O'Neil, spokesman for the department's Southeast region. He said officials in Washington determined the Cubans should be considered ``feet wet,'' because they were not able to walk to land from where they landed.

URL:
http://www.sun-sentinel.com/news/local/southflorida/sfl-110cubanrepat,0,314289.story?coll=sfla-home-headlines

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From: [redacted] LCDR
Sent: Tuesday, January 10, 2006 10:26 AM
To: [redacted] LCDR
Cc: [redacted] CAPT
Subject: RE: Cuban Migrants Dropped Off on Abandoned Bridge
Please do. ICE was not involved in the decision, although I spoke with & explained the decision to [redacted] at CPB who had fielded a call from ICE Miami on the issue. [redacted] also has this analysis.

From: [redacted] LCDR
Sent: Tuesday, January 10, 2006 9:59 AM
To: [redacted] LCDR
Cc: [redacted] CAPT
Subject: FW: Cuban Migrants Dropped Off on Abandoned Bridge

[redacted]

b7C

May I share your email analysis with ICE Counsel in Miami?

v/r
[redacted]

From: [redacted]@dhs.gov [mailto:[redacted]@dhs.gov]
Sent: Tuesday, January 10, 2006 10:01 AM
To: [redacted] LCDR
Cc: [redacted] CAPT; [redacted]
Subject: RE: Cuban Migrants Dropped Off on Abandoned Bridge

[redacted]

The Miami Herald articles today suggest that the decision to repatriate was made with ICE's concurrence. Please advise if that statement is correct, and if so if you can, please identify the person or component making the decision on ICE's behalf.

Thanks,
[redacted]

From: [redacted] [mailto:[redacted]@dhs.gov]
Sent: Friday, January 06, 2006 12:19 PM
To: [redacted] LCDR; [redacted]
Cc: [redacted] (CIV); [redacted] CAPT; [redacted]
Subject: RE: Cuban Migrants Dropped Off on Abandoned Bridge

Adding [redacted]

From: [redacted] LCDR [mailto:[redacted]@uscg.dhs.gov]
Sent: Friday, January 06, 2006 11:30 AM
To: [redacted]
Cc: [redacted] (CIV); [redacted] CAPT
Subject: RE: Cuban Migrants Dropped Off on Abandoned Bridge

Greetings,

For clarification, the structure from which the migrants were recovered was a paved surface (Old Flagler bridge which parallels the existing 7 mile bridge) as opposed to a railroad structure. It may have, at one time, been a railroad bridge - however I don't want the structure to be confused with any existing railroad bridges. As [redacted] indicated, the structure is not connected to land on either end.

Coast Guard District 7 has been directed by our headquarters in Washington to treat the migrants recovered from the structure as "feet wet." Any issues with these intentions would need to be addressed at the Washington level.

Sincerely,

[redacted]

b2
b7C

LCDR [redacted]
Seventh District Legal Office (dl)
[redacted](office)
[redacted]@d7.USCG.mil
[redacted]@uscg.smil.mil (SIPRNET)

[redacted]

Referred to DOJ

[redacted]

Holland, Michelle

From: [redacted]LCDR
Sent: Wednesday, January 11, 2006 7:19 PM
To: [redacted]CAPT
Cc: [redacted]LCDR; [redacted]
Subject: FW: Flagler15 Flag Advisory

Attachments: Flagler15 fay v3.doc

Approved by DJAG for flag/SES usage.

v/r,

Brad

From: [redacted]LCDR
Sent: Wednesday, January 11, 2006 5:20 PM
To: [redacted]CAPT
Cc: [redacted]LCDR
Subject: RE: Flagler15 Flag Advisory

Sir,

Here is the advisory with the distance included.

v/r

LCDR [redacted]

b7C

Flagler15[redacted] v3.doc (63 KB)

From: [redacted]
Sent: Wednesday, January 11, 2006 3:32 PM
To: [redacted]CAPT [redacted]LCDR
Cc: [redacted]LCDR; Crowley, John RDML
Subject: Flagler15 Flag Advisory

Good to go for release to Flags?

<< File: Flagler15[redacted] v3.doc >>

Status of Cuban Migrants Found on a Florida Bridge Pier

Purpose: There has been considerable media interest in the 4 January 2006 interdiction of fifteen Cuban migrants on a "bridge pier" in the Florida Keys, and this backgrounder is provided for the information of the Flag/SES corps by the Judge Advocate General.

Facts:

- On 4 January 2006, a Coast Guard Station Marathon small boat interdicted fifteen migrants on a "bridge pier," in the vicinity of Moser channel in the Florida Keys.
- The bridge pier supports an abandoned bridge that runs southwest over water for approximately 2.8 miles before terminating over water and without connecting to dry land. The abandoned and unused bridge and bridge pier are artificial structures and are not connected to U.S. dry land, unlike a nearby parallel bridge that does connect to land. The bridge pier is approximately one nautical mile from the dry land at which they would have been considered to have arrived in the U.S.
- The migrants were subsequently repatriated to Cuba. On 11 January, suit was filed in the U.S. District Court for the Southern District of Florida challenging the Government's action.

Background:

- [redacted]
- [redacted]
- [redacted]
- [redacted]

Questions: Media inquiries should be directed to Public Affairs channels. Questions concerning this advisory may be directed to COMDT, G-LMI (LCDR [redacted].

b7C
b5

Holland, Michelle

From: [redacted] CAPT
Sent: Thursday, January 12, 2006 11:07 AM
To: [redacted] LCDR
Cc: [redacted] CDR; [redacted] CDR; [redacted] LT; [redacted] LT; [redacted] LT [redacted] LT
Subject: FW: 15 CUBANS PROTEST THEIR REPATRIATION, R 111712Z JAN 06 USINT HAVANA

[redacted]

Important for the litigation and for future cases with duty Attys.

b5
b7C
b7E

From: [redacted] CAPT
Sent: Thursday, January 12, 2006 11:11 AM
To: [redacted]
Cc: [redacted] LCDR; Crowley, John RDML; [redacted] CDR; [redacted] CAPT
Subject: RE: 15 CUBANS PROTEST THEIR REPATRIATION, R 111712Z JAN 06 USINT HAVANA

[redacted]

D7 is well plugged in with USAO and aware of requirements to preserve evidence.

From: [redacted]
Sent: Thursday, January 12, 2006 10:58 AM
To: [redacted] CAPT
Cc: [redacted] LCDR; Crowley, John RDML; [redacted] CDR
Subject: RE: 15 CUBANS PROTEST THEIR REPATRIATION, R 111712Z JAN 06 USINT HAVANA

Assume that primary POC's for litigation have collected and retained all of the particulars concerning the 15 that will become relevant to the litigation sooner or later.

From: Crowley, John RDML
Sent: Thursday, January 12, 2006 10:16 AM
To: [redacted] CAPT
Cc: [redacted] LCDR
Subject: FW: 15 CUBANS PROTEST THEIR REPATRIATION, R 111712Z JAN 06 USINT HAVANA

From: Peterman, Brian RADM
Sent: Thursday, January 12, 2006 10:02 AM
To: Crea, Vivien VADM
Cc: Sirois, Dennis RADM; Justice, Wayne RDML; Crowley, John RDML; [redacted] CAPT; [redacted] CAPT; [redacted] CAPT
Subject: FW: 15 CUBANS PROTEST THEIR REPATRIATION, R 111712Z JAN 06 USINT HAVANA

Admiral- This was a volatile situation well handled. The 15 migrants initially refused to leave our cutter under their own power. The cutter quickly notified us (I believe thru SIPRNET chat which is one of the real good C4ISR improvements on the 123's) of the situation. We quickly developed a course of action:

1) [redacted]
2) [redacted]
3) [redacted]

4) [redacted]

5) [redacted]

6) [redacted]

I believe we have options established for handling this situation. We will work with our DIS to coordinate with the Interest Section.

V/r,
Brian

b6
DTE

RADM Brian Peterman
Commander, Seventh Coast Guard District
305.415.6670

From: Peterman, Brian RADM
Sent: Thursday, January 12, 2006 6:55 AM
To: Peterman, Brian RADM
Subject: FW: 15 CUBANS PROTEST THEIR REPATRIATION, R 111712Z JAN 06 USINT HAVANA

Refered to DOS

[redacted]

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Holland, Michelle

[redacted]

Referred to DOJ

[redacted]

From: [redacted]@D7.USCG.mil [mailto[redacted]@D7.USCG.mil]
Sent: Thursday, January 12, 2006 2:26 PM
To: [redacted]
Cc: [redacted] CAPT; [redacted] LT; [redacted] LCDR
Subject: FW: Movimiento Democracia et al. v. Chertoff
Importance: High

Referred to DOJ

[redacted]

b7c

From: [redacted] LCDR
Sent: Thursday, January 12, 2006 2:22 PM
To: [redacted] CAPT; [redacted] CAPT; [redacted] CAPT; [redacted] CAPT
Cc: [redacted] CDR; [redacted] LCDR; [redacted] LT; [redacted] LT; [redacted]
LT; [redacted] LCDR
Subject: FW: Movimiento Democracia et al. v. Chertoff
Importance: High

Greetings all.
Received word from Captain [redacted] that he heard from a source that the AP will report tomorrow that Judge Moreno is inclined to rule against the CG in the below cited case, and, questions the Government's reasoning in the decision.

I note the only reporter in attendance was from AP, but the comments seem to stray from the account of the proceedings and I wouldn't think a federal judge would not offer personal/professional opinions for an ongoing case, so I'm not sure how/if wires got crossed or there's been a dramatic turn in events.

v/r
LCDR [redacted]

From: [redacted] CAPT
Sent: Thursday, January 12, 2006 11:48
To: [redacted] LCDR
Subject: FW: Movimiento Democracia et al. v. Chertoff
Importance: High

b7C

From: [redacted] LCDR
Sent: Thursday, January 12, 2006 11:33 AM
To: [redacted] CAPT; [redacted] LT; [redacted] LT; [redacted] LT
Cc: [redacted] CDR
Subject: FW: Movimiento Democracia et al. v. Chertoff
Importance: High

FYI

[redacted]

Referred to DOJ

Holland, Michelle

From: [redacted] LCDR
Sent: Thursday, January 12, 2006 4:50 PM
To: [redacted] CAPT; [redacted] CAPT; [redacted] CAPT; [redacted] CAPT; [redacted]
Cc: [redacted] LCDR; [redacted] CDR; [redacted] LT; [redacted] LT; [redacted] LT; [redacted] LCDR; [redacted] LT
Subject: FW: Movimiento Democracia et al. v. Chertoff
Importance: High

b2
b7C

Received below article (bold text) from LCDR [redacted] at (dl).

From a PA point of view, since the case is pending litigation, policy prohibits us from discussing the case, however, giving that reply affords an opportunity to place a command message:

"Coast Guard policy prohibits me from discussing the details of this case due to pending litigation, however what I can tell you is that the Coast Guard enforces U.S. Government laws and policies to protect and secure our borders. Our enforcement of those laws helps save lives at sea, serves as a deterrent to those who would try to illegally enter the United States from the sea and to those intent on exploiting undocumented aliens."

"Coast Guard policy prohibits me from discussing the details of this case due to pending litigation, however what I can tell you is that the Coast Guard does not establish national immigration policy, we enforce it. We are committed to providing a strong deterrent that helps promote the national policy of orderly, safe, and legal migration.

"Coast Guard policy prohibits me from discussing the details of this case due to pending litigation, however what I can tell you is that the Coast Guard does not determine the disposition of Cuban migrants interdicted at sea. Once aboard Coast Guard cutters, U.S. Citizenship & Immigration Services (CIS) Asylum Pre-screening Officers (APSOs) ascertain whether or not migrants have credible fear concerns if repatriated. Final decisions for Cuban migrants regarding the credible fear standard are made in Washington, DC, not in the field."

"Coast Guard policy prohibits me from discussing the details of this case due to pending litigation, however what I can tell you is that the rise in undocumented alien smuggling increases the propensity for violence because of the monetary incentive to reach U.S. soil. This environment endangers not only the migrants, but our Coast Guard and DHS men and women as well."

We have, through our coordinated efforts, ensured the story thus far has centered on the policy, not the Coast Guard. This article has the potential to shift the media's focus more to the Coast Guard's decision making process. As before, media inquiries regarding the process should be referred to [redacted] at G-IPA.

v/r

[redacted]
Lieutenant Commander, U.S. Coast Guard
Public Affairs Officer
Seventh Coast Guard District
[redacted]

Attorneys William Sanchez and Kendall Coffey talk with reporters after the hearing.

MIAMI, Florida (AP) -- A federal judge suggested Thursday that the U.S. government made a

foolish error Monday when it sent back 15 Cubans who had landed on an abandoned bridge in the Florida Keys.

U.S. District Judge Federico Moreno said he would not rule immediately on the emergency lawsuit filed on the Cubans' behalf, but he questioned the government's reasoning.

Under the government's long-standing "wet-foot, dry-foot" policy, Cubans who reach U.S. soil are generally allowed to stay, while those stopped at sea are returned to the communist island.

In this case, the government said it sent the Cubans back to their homeland because the bridge no longer connects to land.

"So the question is whether this bridge is U.S. territory." Moreno told Assistant U.S. Attorney Dexter Lee. "I'll follow the law, whatever it is ... but the average person would say that's a ridiculous distinction" of whether the bridge was U.S. land.

The judge called the abandoned bridge, built by railroad magnate Henry Flagler and wrecked by a 1935 hurricane, "as American as apple pie."

Lee said that the government would respond to the lawsuit by January 26 and would ask the judge to dismiss the case. Even if it were ruled that the 15 Cubans could return, it is highly unlikely Cuba's Fidel Castro would permit it.

The attorneys representing the Cubans, as well as the Cuban advocacy group Democracy Movement, also urged the judge to clarify U.S. policy as to what constitutes U.S. territory under the wet-foot, dry-foot policy. (Full <http://www.cnn.com/2006/LAW/01/11/cubans.wetfoot.ap/index.html> story)

The Cubans set out from their homeland in a small boat and thought they were safe when they reached the bridge January 4 after more than a day at sea. But the bridge, which runs side by side with a newer bridge, is missing several chunks, and the group had the misfortune of reaching a section that no longer touches land.

Earlier this week, members of Florida's congressional delegation called for a review of the wet-foot, dry-foot policy.

The rule was established in 1995 to stem a wave of Haitians and Cuban immigrants arriving on U.S. shores.

 b7C

From: [redacted] LCDR
Sent: Thursday, January 12, 2006 14:22
To: [redacted] CAPT; [redacted] CAPT; [redacted] CAPT; [redacted] CAPT
Cc: [redacted] CDR; [redacted] LCDR; [redacted] LT; [redacted] LT; [redacted]
LT; [redacted] LCDR
Subject: FW: Movimiento Democracia et al. v. Chertoff
Importance: High

Greetings all.
Received word from Captain [redacted] that he heard from a source that the AP will report tomorrow that Judge Moreno is inclined to rule against the CG in the below cited case, and, questions the Government's reasoning in the decision.

I note the only reporter in attendance was from AP, but the comments seem to stray from the account of the proceedings and I wouldn't think a federal judge would not offer personal/professional opinions for an ongoing case, so I'm not sure how/if wires got crossed or there's been a dramatic turn in events.

v/r
LCDR [redacted]

From: [redacted] CAPT
Sent: Thursday, January 12, 2006 11:48
To: [redacted] LCDR
Subject: FW: Movimiento Democracia et al. v. Chertoff
Importance: High

b7C

From: [redacted] LCDR
Sent: Thursday, January 12, 2006 11:33 AM
To: [redacted] CAPT; [redacted] LT; [redacted] LT; [redacted] LT
Cc: [redacted] CDR
Subject: FW: Movimiento Democracia et al. v. Chertoff
Importance: High

FYI

[redacted]

Referred to DOJ

Holland, Michelle

From: [redacted] LCDR
Sent: Thursday, January 12, 2006 9:02 AM
To: [redacted] LT; [redacted]
Cc: [redacted] LCDR
Subject: RE: Old Bridge distances

Thanks [redacted]

[redacted] - I asked for confirmation of this data after talking to [redacted] last night & I've forwarded this to him. Reviewing your matrix this morning.

Best regards,

[redacted]

From: [redacted] LT
Sent: Thursday, January 12, 2006 8:16 AM
To: [redacted]
Cc: [redacted] LCDR; [redacted] LT; [redacted] LCDR
Subject: Old Bridge distances

[redacted],

The closest point of actual dry land to the span of the bridge where the people were picked up is .9 miles.

The closest structure (US 1, 7-Mile Bridge) is .07 miles, or 375 feet.

The width of the channel at the point where the people were picked up is .04 miles.

The width of the distance of the SW break in the bridge is 37 feet.

Please let us know if you have any questions or issues,

[redacted]

LT [redacted]
7th CG District Legal Office
(desk) [redacted]
(fax) 305.415.6960
[redacted]@d7.uscg.mil

From: [redacted]LT
Sent: Tuesday, January 17, 2006 11:40 AM
To: [redacted]
Cc: [redacted]LT; [redacted]LCDR
Subject: Initial report of 15 migs on old 7-Mile Bridge

Attachments: LE SR 1 & FINAL - STA MARATHON -.rtf

LE SR 1 & FINAL - STA MARATHON...

b2
b7C

[redacted]

According to this SITREP, Monroe County Sheriff's Office notified Station Marathon at 0705 on January 4th, 2005 that there were 15 migrants on the piling abutment of the old Seven Mile Bridge. The Coast Guard began to transfer the migrants aboard at 0730 the same day.

Please let us know if there is anything else we can help you with. Do you need to know how MCSO learned about the migrants? We can find that out.

Regards,

[redacted]

LT [redacted]
7th CG District Legal Office
(desk) [redacted]
(fax) 305.415.6960
[redacted]@d7.uscg.mil

P 061925Z JAN 06 ZUI ASN-A07006000121
FM COGARD STA MARATHON FL
TO COMCOGARD SECTOR KEY WEST FL//OPS//
INFO CCGDSEVEN MIAMI FL//OLE/O/OI//
COGARD STA ISLAMORADA FL
COGARD STA KEY WEST FL
COGARD INTELCOORDCEN WASHINGTON DC
COGARD INVSER KEY WEST FL
COGARD INVSER MIAMI FL
BT
UNCLAS
SUBJ: LAW ENFORCEMENT SITREP ONE AND FINAL (LECN 024-06)
1. SITUATION:
A.04JAN06 STA RECEIVED CALL FROM MONROE COUNTY SHERIFFS OFFICE (MCSO) STATING THAT THERE WAS APPROX 15 MIGRANTS ON THE PILING ABUTMENT OF THE OLD SEVEN MILE BRIDGE. CG41329 AND CG25577 U/W TO INVESTIGATE. MIGRANTS WERE TRANSFERED FROM BRIDGE TO CG41329. CG41329 TRANSFERRED THE 15 MIGRANTS TO CGC KODIAK ISLAND.
2. ACTION TAKEN:
A. 0705Q RECEIVED INITAL REPORT.
B. 0706Q NOTIFIED SECTOR KEY WEST AND CG41329 U/W.
C. 0719Q CG41329 O/S WITH MIGRANTS WHO ARE REFUSING TO GET ONBOARD CG41329.
D. 0720Q CG25577 U/W TO ASSIST.
E. 0731Q CG41329 SLOWLY PUTTING MIGRANTS ONBOARD.
F. 0740Q CG41329 DIRECTED BY SECTOR TO BRING MIGRANTS BACK TO STATION.
G. 0800Q CG41329 DIRECTED BY SECTOR NOT TO BRING MIGRANTS TO STATION UNTIL THE RECEIVED WORD BY D-7.
H. 0920Q CG25577 M/S.
I. 1404Q CG41329 ENROUTE TO XFER MIGRANTS TO CGC KODIAK ISLAND.
J. 1500Q CG41329 HAS COMPLETED XFER OF MIGRANTS TO CGC KODIAK ISLAND AND IS RTB.
K. 1533Q CG41329 M/S.
3. AMPLIFYING INFO:
A. VESSEL: BLUE MAN MADE CHUG MADE OF ALUMINUM. 20FT LOA. CHUG WAS SUNK BY CG25577 AS A HAZARD TO NAVIGATION.
B. POB INFO:
1. ADULT MALES:11
2. MALE CHILDREN:2
3. ADULT FEMALES:2
4. FEMALE CHILDREN:0
C. WX INFO: 6FT SEAS, 8-10 KNOT NORTH EAST WINDS.
4. FUTURE PLANS AND RECOMMENDATIONS: NONE
5. AMPLIFYING INFO:
A. THE PART OF THE OLD 7 MILE BRIDGE WHERE MIGRANTS WERE IS NOT CONNECTED TO LAND ON EITHER SIDE. THE MIGRANTS STATED THAT THEY LEFT FROM MANTANZAS THREE DAYS PRIOR TO LANDING ON OLD BRIDGE.
BT
NNNN

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Please be advised that two pages have been removed from this document at this location pursuant to Freedom of Information Act exemption (b)(5) and (b)(7)(C).

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Holland, Michelle

From: Peterman, Brian RADM
Sent: Friday, January 27, 2006 10:06 AM
To: [redacted] CAPT
Cc: [redacted] CAPT; [redacted] CDR; [redacted] LCDR; [redacted] LCDR
Subject: RE: FW: Movimiento Democracia et al. v. Chertoff

Agree. In fact, HQ may want DHS to handle queries since the Second is a party.

-----Original Message-----
From: [redacted] CAPT
Sent: Fri Jan 27 06:53:33 2006
To: Peterman, Brian RADM
Cc: [redacted] CAPT; [redacted] CDR; [redacted] LCDR; [redacted] LCDR
Subject: FW: Movimiento Democracia et al. v. Chertoff

Admiral, Sir --

FYI... Will work w/ HQ PA re media inquiries -- recommend HQ respond vs. a D7 local response ...

b7C

v/r
CAPT [redacted]

From: [redacted] LCDR
Sent: Thursday, January 26, 2006 4:56 PM
To: [redacted] CAPT; [redacted] CDR; [redacted] LT; [redacted] LT; [redacted] LT; [redacted] LT; [redacted] CDR; [redacted] CAPT; [redacted] CAPT; [redacted] LCDR
Subject: FW: Movimiento Democracia et al. v. Chertoff

FYI. Government's motion for summary judgment in the Flagler 15 case. Note that the content of the motion and the exhibits attached clearly show that the Coast Guard played a very large role in the foot wet determination. With the filing of the motion and the availability to the public, I anticipate that the Coast Guard could be subjected to increased public scrutiny for the role we played and perhaps shift the focus from the broader policy debate to our actions.

v/r
LCDR [redacted]

[redacted]

Refer to DOJ

[redacted]

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