

CC: top page
to Burkhardt

(W)

4-21-00

Association of American Publishers, Inc.

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Patricia S. Schroeder
President and
Chief Executive Officer

cc: Sean Maloney

April 13, 2000

① call
PAT
& tell
her
we're
on this
michelle →
② get Sean to
do a
message
John

John Podesta, Chief of Staff
Office of the President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear John:

Last year's **Get Caught Reading** campaign was such a success. We are thrilled the Magazine Publishers Association will join us in May and we will have an even bigger campaign this year.

Since most book and magazine publishers are in New York, I am lobbying for the President, the Nation's number one reader, to issue a proclamation sometime in May or June. I've attached a copy of the letter I sent to the President requesting a proclamation. If you want any more details or have any questions, please feel free to call me at 202/220-4543.

Fondly,

Patricia Schroeder
President & CEO

Enclosure

Your TV
presence is
A+!

Copied
Berger
Nolan
Brain
Podest

THE WHITE HOUSE
WASHINGTON

IDENT - AS SEEN
4-21-00

April 20, 2000

THE PRESIDENT:

The attached Berger/Nolan/Brain memo asks you to assign primary responsibility for Vieques seizure and forfeiture proceedings to the Coast Guard and Customs Service, respectively.

Background. Justice advises that a security zone covering the waters around the Live Impact Area will be necessary. In the aggravated cases where it becomes necessary, you have broad authority to enforce the zone through seizures and forfeitures of vessels.

Action/Views. *Sandy, Beth and Chuck* ask you to allocate the responsibility for these enforcement actions as follows:

- **Seizure** – Coast Guard would be responsible; Navy would support;
- **Forfeiture** – Customs would be responsible; Marshals Service and Navy would support.

Treasury objects to making Customs responsible for forfeitures, arguing that doing so would divert scarce resources from Customs' border-protection mission. Your advisers disagree. They note that forfeiture responsibility in this case would not fall within the core mission of any agency; they think Customs has the expertise/infrastructure and is best suited to fulfill the role. *Podesta* concurs with their recommendation.

Approve ☒

Disapprove ☐

Discuss ☐

Sean Maloney 

THE WHITE HOUSE

WASHINGTON

April 19, 2000

00 APR 19 PM 8:13

ACTION

4-21-00

MEMORANDUM FOR THE PRESIDENT

FROM: SAMUEL BERGER 
BETH NOLAN 
CHARLES M. BRAIN  CMB

SUBJECT: Enforcement of the Vieques Security Zone -- Use
of Forfeiture Sanctions

Purpose

To obtain your approval of an allocation of responsibilities for seizures and forfeitures resulting from possible violations of the Vieques Security Zone.

Background

The Department of Justice, lead agency for law enforcement operations to allow resumption of Navy training on Vieques per your January 31 directive, advises that a security zone covering the waters around the Live Impact Area (LIA) will be necessary. Under the Magnuson Act and implementing regulations, the Coast Guard will establish the security zone prior to law enforcement operations to clear the area for May training exercises.

The Magnuson Act provides for substantial penalties (e.g., imprisonment, fines, and most importantly the seizure and forfeiture of vessels) to support law enforcement efforts and for deterrence. Justice advises that, in order to successfully keep vessels outside the zone, there must be a realistic threat that violators will risk forfeiture of their vessels. You have broad authority under the Magnuson Act to draw on Federal Government resources to enforce the security zone, including the conduct of seizures and use of forfeiture sanctions.

Justice recommends (Tab A) the following allocation of responsibilities:

cc: Vice President
Chief of Staff

- Seizure: The Coast Guard would be responsible for seizing vessels in aggravated cases or with respect to repeat offenders who violate the security zone, and transporting them for storage to the Roosevelt Roads Naval base. As may be necessary, the Navy would provide ships as platforms for Coast Guard law enforcement detachments.
- Forfeiture: The Customs Service would be assigned primary responsibility for handling forfeiture proceedings. The Navy would support the effort by providing storage space and attorney support, and, to the extent possible, by reimbursing the Customs Service (Treasury) and Marshals Service (Justice) for forfeiture-related costs. The Marshals Service would provide storage space and expertise in forfeiture matters to the extent they are not available from Customs and the Navy.

Treasury objects to the Customs Service being assigned Vieques forfeiture responsibilities (Tab B). Treasury acknowledges that you may designate any agency under your Magnuson Act authority, but argues that the operation would divert scarce resources from its border-protection mission. Treasury is also concerned that Customs Service involvement in the Vieques operation could cause Congress to reexamine Treasury's forfeiture authority. Finally, Treasury believes that the costs of forfeiting vessels will be substantial, beyond the ability of the Customs Service to absorb.

Justice counters that reinstating training exercises on Vieques requires a broad USG effort, that the burdens of Vieques operations should be shared, and that other agencies (e.g., the Marshals Service) have already taken on significant burdens outside the normal scope of their mission. Justice also believes the risks regarding pending legislation are small, noting that forfeiture will be sought only in the most serious cases and that there is substantial congressional support for resumption of training on Vieques.

Regarding costs, it is likely that Treasury has overestimated the number of vessels to be subjected to forfeiture. All agencies agree that forfeiture should only be sought in connection with fairly serious violations of the security zone, and Justice and Navy expect this number to be quite small. Justice further states that other agencies with forfeiture capabilities would face similar funding problems, and recommends that the Navy and the Department of Defense reimburse Customs for the costs of forfeiture to the extent possible. Navy and DoD generally concur in this recommendation and have agreed to

work out appropriate arrangements with the agency that is assigned forfeiture responsibilities.

There are no perfect options for implementing the Magnuson Act's forfeiture authority, which falls outside the core mission of all government agencies. Despite Treasury's arguments, however, we believe that the Customs Service should be assigned primary responsibility for Vieques forfeiture proceedings. Among the few agencies with the requisite infrastructure and expertise, Customs appears to be in the best position to fulfill this role. Also, we believe that Justice carefully considered available options in making its recommendations and should be afforded a degree of deference as lead agency for the Vieques operation.

RECOMMENDATION

That you approve the allocation of responsibilities, per Justice's recommendation outlined above, for seizures and forfeitures resulting from possible violations of the Vieques security zone. (A written order documenting the assignments will be forwarded to you for signature prior to operations to resume training exercises.)

Approve _____

Disapprove _____

Attachments

Tab A Deputy Attorney General Memorandum of April 5, 2000
Tab B Deputy Secretary of the Treasury Memorandum of
April 5, 2000



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

April 5, 2000

MEMORANDUM

TO: Mara E. Rudman, Deputy Assistant to The President For
National Security Affairs And Chief of Staff For The
National Security Council

FROM:  Eric H. Holder, Jr.

SUBJECT: Recommendations concerning the use of forfeiture
sanctions in connection with a law enforcement action
in support of Navy training exercises at Vieques, P.R.

As discussed below, I recommend the following division of responsibilities with respect to the use of forfeiture sanctions in appropriate cases of violations of the Vieques Security Zone: (1) the United States Coast Guard (USCG) should be responsible for seizing vessels in appropriate cases and transporting them for storage to the Roosevelt Roads Navy base; (2) the United States Navy (USN) should support forfeiture proceedings by providing vessels, storage space, attorney support and, to the extent possible, by reimbursing the Departments of the Treasury and Justice for forfeiture-related costs; (3) the United States Marshals Service (USMS) should provide additional storage space and expertise to the extent they are unavailable from other agencies; and (4) the United States Customs Service (USCS) should generally handle forfeiture proceedings. Further, based on legal as well as practical concerns, I recommend against reliance on detention of vessels without forfeiture. Finally, to allow adequate planning, a decision with respect to the assignment of forfeiture responsibilities should be made as soon as possible.

I. Background

At your request, I am submitting this memorandum on behalf of the Department of Justice (DOJ), which has been designated as the lead agency for operations designed to allow the United States Navy to resume training exercises at the Live Impact Area (LIA) on the island of Vieques, Puerto Rico. Set forth below are DOJ's recommendations as to how the President should assign

responsibilities concerning the use of forfeiture sanctions in connection with the enforcement of a security zone to be established pursuant to the Magnuson Act, 50 U.S.C. § 191 et seq., in and around the LIA (the Security Zone). I have shared a draft of this memorandum with representatives of the Department of the Treasury (Treasury) and have sought faithfully to represent their objections to my recommendations. However, this memorandum does not purport to speak for any department or agency other than DOJ, and I fully endorse Treasury's right to make a separate submission in support of its contrary position.¹

The FBI, USMS, USCG and USN concur in the view that, in order to successfully keep prohibited vessels outside of the Security Zone, there must be a realistic threat that violators will risk forfeiture of their vessels. Treasury agrees that forfeiture should be available as an enforcement option - and therefore agrees that the President should assign responsibilities for handling it - but disagrees with respect to the frequency with which forfeiture should be sought and takes the position that temporary detention of vessels (without forfeiture) during the pendency of Navy training exercises should also be used as an enforcement tool. While the legal viability and usefulness of detention without forfeiture is a matter of some disagreement that must be resolved before enforcement of the Security Zone begins, the matter may not require a decision by the President, and does not require as speedy a decision for planning purposes, as does the assignment of forfeiture-related responsibilities. Nevertheless, it is my understanding that Treasury's separate submission discusses this issue and takes the position that the President should require DOJ to employ detention even if Treasury is not involved. Accordingly, while this memorandum focuses primarily on the forfeiture issue, it also provides my views on the issue of detention.

II. Recommended Assignments Regarding Forfeiture

The Magnuson Act, 50 U.S.C. § 191 et seq., empowers the President to draw on virtually all of the resources of the federal government to enforce the Vieques Security Zone. I recommend dividing responsibilities for the possible seizure and forfeitures of vessels that violate the Security Zone among four

¹ Treasury has completed such a submission and sent it to a member of my staff late this morning. In seeking to revise this memorandum in light of Treasury's previously submitted comments on an earlier draft, I have not yet had an opportunity to review thoroughly the Treasury memorandum.

agencies from four different departments. In making these recommendations, I do not intend to suggest that the proposed assignment of responsibilities is legally required or even favored. The President's broad authority under the Magnuson Act renders lawful the division of responsibilities I propose as well as a myriad of other possible arrangements.²

In making the recommendations set forth below, I have sought to balance the abilities of and the constraints operating against each affected agency, as well as concerns about the potential impact of participation on each agency's core mission. I have also given consideration to the fact that implementation of the Magnuson Act is, by its nature, outside the core mission of every government agency. In essence, the Act is an emergency provision that allows the President to draw on all parts of the government to respond to circumstances that are by definition extraordinary. Accordingly, in my view, no federal entity should be considered uniquely eligible or ineligible to contribute its available resources to the successful enforcement of the Magnuson Act.

I further recognize that the following recommendations place burdens on agencies other than my own Department. However, the recommended assignments with respect to forfeiture are only part of the overall picture. In an effort to help ensure that the United States Navy can fulfill its mission, the Department of Justice has agreed to contribute heavily to the resolution of the emergency situation on Vieques. It has already dedicated a considerable amount of time, effort, resources and personnel to this matter, and will continue to do so. Most importantly, it will place a large number of its law enforcement agents in harm's way to help a sister Department fulfill its mission, and will likely bear the brunt of any public criticism that may result from such actions. Against this background, and recognizing that there is no perfect or risk-free resolution of the matter, I believe the following recommendations with respect to how forfeiture responsibilities should be assigned are eminently fair and reasonable.

² While there may be a legal issue under the Posse Comitatus Act regarding the extent to which primary responsibility for handling seizures and forfeitures can be assigned to the USN, the fact that the USN has no existing process for handling forfeiture but can unquestionably (and lawfully) serve in a supporting role strongly suggests that the legal issue need not be resolved.

A. The President's Authority to Assign Responsibilities

In the absence of any further action by the President, I believe that there is a strong argument that the USCG is already authorized to conduct forfeiture proceedings pursuant to the Magnuson Act regulations codified in part 6 of title 33 of the Code of Federal Regulations. Moreover, the USCG has argued, not unreasonably, that it is itself authorized under the Magnuson Act regulations to designate an agency to conduct forfeitures. See 33 C.F.R. § 6.04-11 ("The captain of the port may enlist the aid and cooperation of Federal, State, county, municipal, and private agencies to assist in the enforcement of regulations issued pursuant to this part"). Nevertheless, considerations of litigation risk as well as the USCG's lack of a regulatory structure to conduct forfeitures suggest that the President should expressly designate the governmental entities that will have responsibility to conduct forfeitures under the Magnuson Act. There is no question that the Magnuson Act provides the President with authority to do so. See 50 U.S.C. § 194.

B. Recommended Assignments

1. United States Coast Guard
Department of Transportation

The USCG has stated that it fully intends to serve as the seizing agency for violations of the Security Zone,³ and no other agency has sought this role or suggested another candidate for it. I concur in this assignment of responsibility and recommend that the President endorse it. Specifically, the USCG plans to invoke the seizure authority in aggravated cases or with respect to repeat offenders who violate the Security Zone. In such cases, the USCG will perform the seizure, take temporary custody of the seized vessels, and transport them to an appropriate custodial facility (see sections II.B.2-3 below). At the custodial facility, the seized vessels will be transferred to the forfeiting agency, and will characterize the action as a "Coast Guard seizure adopted by [the forfeiting agency] at the request of the Coast Guard."

³ The USCG's position, as well as the views of the FBI, USMS, USN, and Treasury, are all briefly set forth in attachments to a memorandum prepared by a member of my staff dated March 28, 2000, a copy of which is appended hereto.

2. United States Navy
Department of Defense

I recommend that the USN be assigned responsibility to support forfeiture proceedings in several ways, all of which are consistent with the constraints of the Posse Comitatus Act. First, to the extent necessary and appropriate, the USN should provide vessels as platforms for USCG law enforcement detachments. This will enhance the USCG's ability to patrol the Security Zone and make appropriate seizures.

Second, the USN should have primary responsibility to provide storage space for seized vessels at the Roosevelt Roads Naval Station. The USN has stated that Roosevelt Roads has sufficient facilities to store approximately 50 vessels. To the extent that these facilities (and any others that the USN can provide) are insufficient to store all of the seized vessels, the USMS can provide additional storage space as described below in section II.B.3.

Third, the USN has indicated that there is no legal impediment to using Navy attorneys to litigate forfeiture actions, insofar as military attorneys may be and have previously been appointed Special Assistant United States Attorneys pursuant to 28 U.S.C. § 515 and 10 U.S.C. § 806(d)(1). While the DOJ Office of Legal Counsel has yet to examine the precise duties that could be assigned to Navy attorneys in connection with such litigation, to the extent that it is lawful and to the extent that the designated forfeiting agency is prepared to accept such assistance, the USN should be required to provide it.

Finally, conducting forfeiture proceedings may impose a severe financial burden on whichever agency is assigned to do so. While practical considerations - particularly the USN's lack of an existing forfeiture process - suggest that the responsibility for handling forfeitures should be assigned either to DOJ or Treasury, there is no comparable reason to impose the costs associated with forfeiture on either of those departments. The purpose for conducting forfeitures in connection with enforcement of the Vieques Security Zone is to allow the USN to continue training exercises at the LIA. Accordingly, I believe that the burdens associated with accomplishing that purpose should, to the extent possible, fall upon the USN or, more generally the Department of Defense. For this reason, I recommend that the USN or Department of Defense be required to reimburse Treasury and

DOJ agencies for forfeiture-related costs to the extent possible.⁴

3. United States Marshals Service
Department of Justice

The USMS, which faces severe budget and manpower constraints, has already committed 150 employees, as well as many other resources, to participate in the operations needed to put the USN in a position to conduct training exercises on Vieques. Nevertheless, it has stated that it can support forfeiture proceedings by providing expertise on comprehensive vessel management and disposal as well as limited commercial contractor storage (on a cost-reimbursable basis) in Puerto Rico and Florida. Given the constraints facing the USMS and the fact that it has already contributed heavily to the success of the overall mission on Vieques, I recommend that, with respect to forfeiture proceedings, the President assign to the USMS only the supportive tasks described above, namely, providing expertise and storage space (to the extent not available from the USN).⁵

4. United States Customs Service
Department of the Treasury

I recommend that the USCS should be assigned primary responsibility for handling forfeiture proceedings. Treasury takes the view that such responsibilities should be assigned to DOJ. Treasury and DOJ are the only two departments that can reasonably be expected to take on this responsibility. Unlike other departments, Treasury and DOJ (often through the USCS and

⁴ Treasury likewise recommends requiring the Navy and Department of Defense to provide reimbursement, but would delete the qualifying phrase "to the extent possible."

⁵ As we discussed at a meeting at the White House on March 30, 2000, the two most logical candidates for handling forfeiture proceedings (based on their handling of such matters in other contexts) are the USMS and USCS. For that reason, and because the FBI is already contributing heavily to the Vieques mission as the lead law enforcement agency despite being severely under-budgeted, I do not recommend that any forfeiture related responsibility be assigned to the FBI. If, despite its enormous contribution to the overall mission, DOJ is further tasked with assuming forfeiture responsibilities, the Attorney General and I will make further recommendations about which component(s) of the Department should be assigned to do so.

USMS, respectively) have existing procedures, personnel and funds dedicated to the handling of asset forfeitures, and regularly process such matters in other contexts. In choosing which of these two departments should be required to handle forfeitures at Vieques, there is no good option. Whichever department handles forfeiture will take on unwanted burdens and will as a result have a diminished ability to fulfill its core mission. If this were a normal operation designed solely to achieve DOJ's law enforcement mission, I would recommend that the President assign forfeiture responsibilities to DOJ. But this is not a normal operation, and it is not being undertaken to serve DOJ's goals. It is instead an extraordinary circumstance in which a number of governmental entities must come together in the overall national interest.⁶ DOJ is taking the lead both in terms of planning and the commitment of resources. But that leadership should not exempt other departments from taking part. Given the severe burdens already undertaken by DOJ and the fact that Treasury is not otherwise assigned any responsibilities in connection with the Vieques operations, I believe it is appropriate to assign this burden to Treasury.

Of necessity, I base this recommendation on an assumption that the USCS does have facilities that, if required by the President, can be diverted to use in connection with the operations at Vieques. However, unlike other agencies that have given some indication of what they can accomplish if so required by the President, Treasury has provided no such assessment but has instead raised several concerns about such an assignment. I address these concerns in turn below.

a. Adverse effect on the USCS mission.

Treasury claims that assigning forfeiture responsibilities to the USCS will adversely affect the agency's ability to fulfill

⁶ In commenting on an earlier draft of this memorandum, Treasury comments that it does not understand the claim that this is not a normal DOJ operation undertaken to serve DOJ's goals. In Treasury's view, the fact that DOJ has general jurisdiction over then enforcement of the federal criminal code means that "[f]orfeiture actions arising out of civil disobedience relating to military facilities in violation of federal law, if required, should logically be assigned to the DOJ" [Treasury] Comments To Draft Department of Justice Memorandum on Options for Sanction for Violations of the Vieques Security Zone if Required as a Result of Navy Training Exercises ("Treasury Comments") at 2-3.

its critical mission of protecting the borders by diverting funding and staff from normal uses and by vitiating the good will that the USCS relies upon in Puerto Rico to help deter smuggling. I have no doubt that handling forfeiture will be a burden on whatever agency is assigned to do so, nor do I take issue with the critical importance of the mission of the USCS or the importance of local good will in helping to accomplish it. But these concerns are not unique to the USCS. The USMS and other DOJ agencies likewise have critical missions to accomplish, and will similarly suffer adverse effects by taking on assignments outside the normal scope of their mission. But DOJ, and in particular the USMS, have already done so. If the government as a whole is to pursue the goal of reinstating training exercises on Vieques while doing the least overall damage to its ability to accomplish its many other functions, I believe the best approach is to spread the burdens of the Vieques operations as widely as possible, and not to concentrate them exclusively or primarily in one department. Accordingly, I recommend that Treasury, like DOJ, contribute in the manner best suited to its capabilities; namely, by performing the forfeiture-related activities that it already conducts in enforcing the nation's customs laws. To ease the burden of doing so, I also recommend that the USN reimburse Treasury to the extent possible for the costs associated with forfeiture.

b. USCS is not the appropriate agency.

Treasury next argues that the USCS is not the appropriate agency to process USCG seizures. Specifically, Treasury asserts that, absent Presidential authorization, USCS cannot process a USCG seizure unless there has been a violation of Customs law or a breach of other laws normally enforced by the USCS. Treasury adds that there is precedent for the USCG to turn seized vessels over to DOJ for forfeiture when the underlying offense is a non-Customs violation. I believe these arguments miss the mark for several reasons. First and most important, regardless of what the situation might be absent Presidential action, there is no dispute that the President can assign forfeiture duties in this case to the USCS. Second, it is far from obvious that the USCS could not handle forfeitures here absent Presidential authorization: the Magnuson Act explicitly states that vessels violating the Security Zone may be forfeited to the United States "in the same manner as merchandise is forfeited for violation of the customs revenue laws". 50 U.S.C. § 192.⁷ Third, as the USCG

⁷ Moreover, unlike some other statutes that similarly allow for forfeitures to be processed in accordance with customs laws,

notes, prior vessel forfeitures under the Magnuson Act have been adopted by the USCS, and it is at least arguable that existing regulations, in the absence of additional Presidential action, empower the USCG to enlist Treasury's assistance in processing forfeitures resulting from violations of the Security Zone. However, I do not make my recommendation based on any such legal analysis. In the end, the issue is a matter of policy rather than law, and my policy recommendation is based on my assessment of how best to allow the government to achieve its overall purpose at Vieques with the least damage to its overall duties to the public.⁸

c. Other agencies are available.

Treasury's third argument is that the FBI and USMS are readily available to process forfeitures in this case, and that because these agencies - which Treasury notes historically have responsibility for responding to acts of civil disobedience - are

the Magnuson Act does not explicitly state that forfeitures are to be handled by some other agency. See, e.g., 16 U.S.C. § 670j(d) (forfeiture of vessels violating conservation-related fishing prohibition to be handled pursuant to customs laws "except that all powers, rights, and duties conferred or imposed by the customs laws upon any officer or employee of the Department of the Treasury shall, for the purposes of this section, be exercised or performed by the Secretary of the Interior or the Secretary of Agriculture, as the case may be, or by such persons as he may designate"); 21 U.S.C. § 881(d) (applying customs laws and procedures to narcotics-related forfeitures "except that such duties as are imposed upon the customs officer . . . shall be performed with respect to seizures and forfeitures under this subchapter by such officers, agents, or other persons as may be authorized or designated by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer").

⁸ In its Comments, Treasury notes that USCS is an inappropriate choice. "Customs has responsibility for enforcing laws at the international borders. This operation is essentially a domestic law enforcement matter unrelated to any border issue. Customs, like the majority of other federal law enforcement agencies, is simply not an appropriate participant in forfeiture proceedings related to such an enforcement action, any more than any other federal agency would be in the absence of a relationship between the action and its mission." Treasury Comments at 3.

already planning to perform major roles in the Vieques operations, there is no compelling reason to enmesh the USCS. In arguing that the FBI and USMS are "readily available," however, Treasury does not take the position that these agencies would enjoy some sort of economy of scale by adding forfeiture responsibilities to their other duties in the Vieques operations, and I do not believe that these agencies enjoy any such advantage that makes them more readily available than USCS. Nor do I believe that they are more readily available, or that the burdens associated with forfeiture are necessarily different, simply because the underlying basis for the forfeiture is a violation of the Security Zone rather than a violation of a Customs law. Any agency that handles forfeiture will take on a potentially substantial burden, and the fact that the FBI and USMS are already assuming other burdens seems to argue more for relieving them of forfeiture responsibilities than for straining their limited resources even further.

d. The risk of adverse legislative consequences.

The one concern that does appear to be unique to Treasury is the perceived risk that assigning forfeiture responsibilities in Vieques to the USCS will endanger its "carve-out" from the more stringent procedural requirements of a pending bill to reform civil asset forfeitures. See H.R. 1658, the Civil Asset Forfeiture Reform Act. I do not take this concern lightly, nor would I want to endanger the USCS carve-out in that bill. But, for a number of reasons, I disagree with Treasury's assessment that assigning forfeiture responsibility here to the USCS will inevitably subject USCS to intense Congressional criticism and therefore threaten the carve-out.'

First, I do not believe that the proponents of civil asset forfeiture reform will necessarily criticize the use of forfeiture at Vieques. The government will seek forfeiture of vessels violating the Security Zone only in the most serious cases (a determination with respect to which the United States Attorney will exercise appropriate prosecutorial discretion), and solely for the purpose of allowing the USN to conduct vital training exercises. Given the intense pressure from Congress to

⁹ Treasury "believe[s] that this is much more than simply a perceived risk." In support of the proposition that "a withdrawal of the 'carve-out' . . . is well within the realm of possibility," it cites "the potential for adverse publicity, and the reluctance on the part of certain congressional leaders to grant Customs a 'carve out.'" Comments at 3.

achieve the latter result, I strongly suspect that many of the sponsors of H.R. 1658 will approve of the limited number of vessel forfeitures needed to permit training exercises, and will not cite such forfeitures as a reason to amend the pending legislation.

Second, even if there were some movement to reconsider the carve-out on the basis of Treasury's participation in forfeitures at Vieques, Treasury would have a number of strong arguments in its favor. Treasury could argue, for example, that it pursued such forfeitures not of its own volition or as a natural outgrowth of its normal forfeiture policies, but solely as a result of a directive from the President that it sought to avoid. Also, Treasury could rightly argue that the reasons for the original carve-out, being based on the normal forfeiture policies of the USCS, are not undermined here precisely because of the extraordinary nature of the situation at Vieques. I am confident that the legislative affairs specialists of Treasury and the USCS are fully competent to make these and other arguments persuasively to the extent that they are needed at all. But to the extent that they might benefit from the assistance of legislative affairs specialists from DOJ or the White House, I am certain that such assistance can and will be provided.¹⁰

e. The USCS is poorly positioned to support the Vieques operation.

Treasury has expressed the concern that supporting the Vieques forfeiture operation will require the long-term mobilization of personnel to Puerto Rico and will result in years of litigation which will represent an enormous cost to the USCS. To the extent that such burdens can be shared with other agencies - such as by having the Department of Defense provide funding and attorneys - I have recommended that such support be provided. To the extent it cannot, the burden is not unique to Treasury, but would otherwise fall similarly on other agencies that, unlike the

¹⁰ Treasury has also expressed the concern that if the Security Zone enforcement occurs after enactment of H.R. 1658, it would appear duplicitous for the first post-enactment forfeiture undertaken by the USCS to be in connection with a non-commercial police action with no clear nexus to the border. I am certain that in the unlikely event such an unwarranted charge is raised, the USCS is competent to satisfy its critics that the timing was fortuitous and not the result of any attempt to mislead Congress.

USCS, are already bearing the brunt of the burdens associated with the overall operations at Vieques.¹¹

f. Treasury cannot bear the costs.

Finally, Treasury argues that it cannot bear the costs associated with processing forfeitures resulting from enforcement of the Security Zone. While I believe its estimate of the costs are likely overstated,¹² I agree that neither Treasury nor DOJ should be required to bear the costs associated with forfeitures at Vieques. For this reason, I have recommended that the USN and Department of Defense be required to reimburse such costs, to the extent possible, to whichever department is assigned forfeiture responsibilities.¹³

III. Detention as an Alternative to Forfeiture

As noted above, all of the participating agencies believe that forfeiture should be an available option. Unlike the other participating agencies, however, Treasury recommends reliance on temporary detention - lasting from the time of seizure until, conceivably, the end of the subsequent Navy training exercise at the LIA - as an alternative to forfeiture in most cases. As discussed below, I believe that there are legal and practical reasons not to rely on extended detention for purposes of enforcing the Security Zone.

¹¹ In its Comments, Treasury adds that the burden of moving personnel to support Vieques forfeitures would be greater on Treasury than on DOJ because "many of the relevant Customs personnel are represented by a bargaining unit; union personnel relocation is much more complex and exposes Treasury to grievance procedures and litigation." Treasury Comments at 3.

¹² Treasury has estimated a cost of approximately \$2 million for the first six months, based on an assumption that 100 vessels will be seized. I do not know the basis for the latter assumption. The USN has estimated that there may be a need to forfeit only a very small number of vessels - as few as three or four - and the USCG, USN and DOJ all agree that forfeiture should only be sought in connection with particularly serious violations of the Security Zone, and not with respect to every violation.

¹³ As noted above, Treasury concurs in this recommendation but would delete the qualifying phrase "to the extent possible."

A. Reliance on Detention Alone Presents Legal Problems

The Office of Legal Counsel has considered the legality of using temporary detention of vessels violating the Security Zone as a substitute for forfeiture. Although time constraints have precluded OLC from providing a formal and definitive opinion on this issue, it has provided its informal analysis, as set forth in greater detail below. Briefly stated, OLC takes the view that a brief temporary detention (in its analysis, OLC referred to a period of up to a few days without purporting to set any bright-line rule) may be permissible, but only if the government accedes to rapid post-seizure judicial process. Further, even with such limitations, OLC has expressed concerns that such detention presents litigation risks and could subject the United States to civil liability. Those risks clearly rise considerably if, as Treasury proposes, such detention is extended for a period of weeks from the time of seizure until the completion of training exercises.

In considering the issue, OLC examined the regulations that implement the Magnuson Act that might be considered to permit the USCG to detain vessels violating the Security Zone. In particular, 33 C.F.R. § 6.04-8 provides:

The captain of the port may supervise and control the movement of any vessel and shall take full or partial possession or control of any vessel or any part thereof, within the territorial waters of the United States under his jurisdiction, whenever it appears to him that such action is necessary in order to secure such vessel from damage or injury, or to prevent damage or injury to any vessel or waterfront facility or waters of the United States, or to secure the observance of rights and obligations of the United States.

Although the USCG has expressed the view that the authority provided by § 6.04-8 is limited to the temporary control of vessels that violate a security zone until the immediate threat posed by such vessels is eliminated by their removal from the security zone, OLC believes the plain language of the regulation is broad enough to authorize the holding of vessels for some more extended period if the captain of the port determines "that such action is necessary in order ... to prevent damage or injury to any ... waterfront facility." And while holding vessels for a few days pursuant to the authority of the regulations presents serious and difficult constitutional issues, OLC also believes that its exercise, under appropriate circumstances, would be

constitutional. In sum, OLC believes that reliance on this provision, assuming appropriate circumstances, would be legally justifiable. However, OLC views the matter as a close case, and believes there would be significant litigation risk associated with relying on this authority to hold vessels even for just a few days.

There are several specific issues related to this litigation risk. First, a major concern is whether detention of vessels beyond the time needed to remove them from the Security Zone would violate the due process rights of the vessels' owners. OLC concluded that it would not because the exigencies of the situation would excuse the lack of pre-deprivation process and because an aggrieved owner could seek a rapid, post-deprivation hearing for a temporary restraining order or perhaps for a return of the vessel under Federal Rule of Criminal Procedure 41(e). OLC's conclusion, however, is premised on an assumption that the government would not oppose a rapid hearing on jurisdictional or procedural grounds. Such an attempt to deny vessel owners quick access to post-deprivation judicial process would raise very serious due process concerns, and OLC's views concerning the possible legality of temporary detention are expressly premised on an expectation that the government would not make such arguments. Even with such good faith acquiescence to rapid post-seizure judicial process, there is a potential risk that a court might find that the continued holding of the vessel without any intent to forfeit it (or to use it for legitimate investigatory or evidentiary purposes) constitutes an unreasonable seizure under the Fourth Amendment or presents some other constitutional problem.

Finally, it is not clear how courts would interpret the word "necessary" in § 6.04-8 in the context of the planned invocation of the Magnuson Act. While there is support in the case law for providing significant discretion to executive branch determinations of what is necessary under the Magnuson Act, a post-hoc judicial evaluation likely will depend on the specific circumstances, e.g., the number of boats attempting to reach Vieques; whether any boat violating the security zone, or only boats towed out that attempt to reenter, are held; and the length of time for which the vessels are held. Such a post-hoc judicial evaluation could be particularly problematic if the court believes that, instead of a legitimate necessity to hold the vessels, the procedure was an attempt to impose a limited form of punishment without going through the criminal process. Accordingly, OLC believes that there is some significant risk that a program of seizing and holding the vessels under the authority of § 6.04-8 could quickly be enjoined and, although

less substantial, also a risk of an action for damages, such as lost fishing revenues.¹⁴

In its comments on an earlier draft of this memorandum, Treasury contests the proposition that "detention for more than 'a few days' raises any more serious legal issues than detention for the 10 days duration of the USN exercises, or even longer." Treasury Comments at 2. To be clear, the OLC position is not that there is any bright-line rule, but rather that the litigation risks increase along with the length of detention for purposes other than forfeiture (or investigative or evidentiary use).¹⁵

¹⁴ The analysis set forth above considers the legality of detention under the Magnuson Act regulations only. OLC advises that there may be other statutory problems and has also offered the informal view that the government otherwise lacks a general law enforcement authority to hold the vessels if there is no good faith intention to proceed with forfeitures and the vessels are not needed for a legitimate investigatory or evidentiary purpose.

¹⁵ Treasury also asserts that the legal risks associated with forfeiture are "much higher" than those associated with detention.

Forfeiture would nearly always result in litigation, which certainly could subject the forfeiting agency to adverse holdings on constitutional grounds. Further, given the importance of the First Amendment rights involved, detention may well be a more defensible option than forfeiture in a court proceeding. The government could argue that detention was selected as the least restrictive option to protect the USN operation, while respecting the important rights of the protesters. Forfeiture proceedings could raise thornier constitutional questions about whether forfeiture were an excessive penalty, in violation of the Eighth Amendment, for actions taken during the course of a political protest. Further, forfeiture proceedings in the absence of an arrest or conviction would have a much higher litigation risk.

Treasury Comments at 2 (footnote omitted).

B. Reliance on Detention Alone Presents Operational Problems

Even assuming that it is lawful to detain vessels violating the Security Zone for a period longer than necessary to remove them from the area, I believe that relying primarily on detention is likely to make the Coast Guard's task in patrolling the Security Zone significantly more difficult¹⁶ and poses a severe risk that the Navy will be unable to conduct training exercises. As noted above, the extended detention of a vessel, if permissible at all, must be predicated on the government's willingness to provide rapid post-seizure process and may not be possible for more than a few days. This may have two practical consequences. First, because the Security Zone will have to be in place for more than just a few days, detained boats could return to the Security Zone upon release without any realistic fear of forfeiture, thereby making detention alone an insufficient sanction to deter violations of the Security Zone. Second, because the government would have to accede to speedy judicial process, the fact that the government was generally relying on detention rather than forfeiture would quickly become known.¹⁷ At that point, I believe temporary detention would be counter-productive to the government's efforts to enforce the Security Zone: it would not deter vessels from violating the restrictions but it would drain resources dedicated to the task of detention.

Finally, it is my understanding that Treasury's position is that its recommendation concerning the use of detention should be implemented even if it is absolved of all participation in Vieques operations. While I do not believe that the detention issue needs to be resolved as quickly as the assignment of forfeiture-related responsibilities, I think it is important to

¹⁶ In its position paper, the USCG stated that it "will only seize vessels for forfeiture. The Coast Guard will not seize vessels unless there is an intention at the outset to forfeit the vessels. . . . [E]ach case will be weighed on its merits [by the United States Attorney's Office] as to whether the vessel will ultimately be forfeited, but each seizure will be performed at the outset with a good faith intention to carry through the full extent of the forfeiture mechanism."

¹⁷ I assume that the government would be required to make its intentions regarding a seized boat known no later than the time of the court proceeding, and that a concession that forfeiture was not being sought would quickly be communicated to other protesters.

make clear my strong belief that if, contrary to my recommendation, Treasury is not assigned a role in the Vieques operations, it should not dictate the manner in which participating agencies enforce the Security Zone. Such decisions should be made by those assuming responsibility for the operations.

Conclusion

For the reasons set forth above, I recommend that the President allocate responsibilities for seizures and forfeitures resulting from violations of the Vieques Security Zone in the manner discussed above. I also recommend that enforcement of the security zone not rely on extended detention absent a good faith intent to pursue forfeiture (or investigative or evidentiary need).



DEPARTMENT OF THE TREASURY
WASHINGTON

April 5, 2000

MEMORANDUM FOR: MARA E. RUDMAN
DEPUTY ASSISTANT TO THE PRESIDENT
FOR NATIONAL SECURITY AFFAIRS AND
CHIEF OF STAFF FOR THE
NATIONAL SECURITY COUNCIL

FROM: STUART E. EIZENSTAT *SE*

SUBJECT: SANCTIONS FOR VIOLATION OF THE VIEQUES
SECURITY ZONE

PURPOSE: To make recommendations concerning the possible use of
sanctions in connection with a law enforcement action in support
of Navy training exercises at Vieques, P.R.

TIMETABLE: To allow adequate planning, a decision with respect to the use of
sanctions should be made as soon as possible.

SYNOPSIS: Vessel forfeiture should be sought only in the most egregious
cases. A warning should be issued alerting vessel owners and
operators that a breach of the Security Zone may subject a vessel to
forfeiture. Where warranted, vessels should be detained or seized,
with notice of possible forfeiture provided. However, in keeping
with current forfeiture practice, a decision on whether to actually
initiate a forfeiture proceeding should not be made until after the
conclusion of military exercises. Initiating a forfeiture action
against every vessel that breaches the Security Zone will
exacerbate a highly volatile political situation and, has the potential
to incite, rather than deter, civil disobedience. Furthermore,
initiating wholesale forfeitures will negatively affect the outcome
of the Vieques referendum upon which the Navy is depending for
its continued presence on the island. Initiating wholesale
forfeitures also poses a substantial litigation risk. A federal court
may determine, especially in the absence of an arrest, that
forfeiture constitutes an excessive fine or punishment for what is
essentially an act of civil disobedience. Such an adverse holding
could undermine the scope of the President's authority under the
Magnuson Act and should not be risked. Justice agencies already
slotted for major roles at Vieques have the full capability to initiate

forfeitures resulting from Coast Guard seizures. These agencies, the Marshals Service and the FBI, have historically had the responsibility for responding to acts of civil disobedience, including violations of the Magnuson Act. In contrast, Customs seizures have been limited to violations of Customs laws or cases involving a border nexus. With regard to processing forfeiture proceedings, neither the Customs Service nor the Treasury Forfeiture Fund is positioned to support the Vieques operation. For FY 2000, Congress expected the Treasury Forfeiture Fund to have a Super Surplus of \$177,906,000, which Congress proceeded to earmark to pay for expenses of Treasury's law enforcement bureaus. The Forfeiture Fund fell short of its expected mark by \$35,959,000, leaving Treasury scrambling to cover core mission expenses of Customs and its other law enforcement bureaus. Customs forfeiture personnel are unionized and cannot be easily detailed to Puerto Rico, a problem not facing the Marshals Service or the FBI. Finally, of great concern, designating Customs to handle forfeitures would needlessly jeopardize Customs forfeiture authority.

DISCUSSION:

I. Forfeiture Must be an Available Option

In his draft memorandum,¹ the Deputy Attorney General states that "the government will seek forfeiture of vessels violating the Security Zone only in the most serious cases, and solely for the purpose of allowing the USN to conduct vital training exercises." Treasury concurs with the DOJ position that the use of forfeiture in appropriate cases as a sanction for violating the Vieques Security Zone should be authorized. However, Treasury disagrees with the manner that DOJ proposes to implement the possible use of forfeiture for Security Zone violations. Treasury recommends that vessels violating the Security Zone be seized by the Coast Guard for both detention and possible forfeiture under the Coast Guard regulations that specifically apply to such violations. Following such seizure the vessels should be held in the temporary custody of the Coast Guard or the Marshals Service until a decision can be made whether or not to proceed with forfeiture. This decision should be made when the Security Zone expires (10-14 days). If the decision is made not to proceed with forfeiture, the vessels may be released without the institution of formal forfeiture proceedings. If the decision is made to proceed with forfeiture, the Marshals Service should assume responsibility for handling the forfeitures. Except for the fact that vessels may be used to breach the Security Zone thereby requiring seizure by the Coast Guard, the law enforcement action on Vieques is totally within the statutory jurisdiction of DOJ.

Initially, it must be understood that the DOJ recommendation memorandum incorrectly states Treasury's position on this subject. DOJ inaccurately reports that Treasury believes short-term detention alone is an enforcement option. This is not Treasury's position. Rather, what Treasury proposes is seizure of violative vessels for both detention *and* possible forfeiture.

¹ DOJ provided us with a draft dated April 3, 2000.

Our alternative is far superior to the DOJ recommendation for several reasons. First, it serves a deterrent value because of the threat of forfeiture. Second, it allows the government to lawfully remove violative vessels from the Security Zone for the period of time that the Zone is in effect (a period that has been described to us as between 10 and 14 days). Third, it avoids the necessity of immediately instituting forfeiture proceedings against violative vessels, thereby avoiding needless expenditure of money and manpower. Fourth, it gives the President the broadest latitude in handling the delicate Vieques situation. As explained below, our proposal is unquestionably authorized by law.

The Law:

The DOJ recommendation memorandum recognizes that there are two lawful grounds for seizing vessels violating the Security Zone: seizure for forfeiture, and detention under Coast Guard regulations.² However, DOJ postures the issue as a Hobson's choice, whether the course of action should be seizure for forfeiture or detention alone. There is no good reason, in either law or policy, for making these two alternatives mutually exclusive. Rather, the wisest plan would be to seize vessels for both reasons, as this gives the government the widest latitude for dealing with this situation. Enforcement agencies routinely make seizures of property under multiple authorities. The most common example, and one which the DOJ paper recognizes, is the seizure of an item for use as evidence and for possible forfeiture. For Security Zone violations there is absolutely no legal proposition that we are aware of that would prevent the seizure of vessels on both grounds.

Consider how our plan would work:

1. The Coast Guard would seize a vessel violating the Security Zone. At the time of seizure the Coast Guard would give the owner or person in charge of the vessel a notice that the vessel has been seized under 33 CFR 6.04-8 and for possible forfeiture for violating the Security Zone.
2. The Coast Guard would transport the vessel to USN Roosevelt Roads facility.
3. The vessel would be maintained at the USN Roosevelt Roads facility under the custody of the Coast Guard or the Marshals Service.
4. By the end of the Security Zone period (which has been described to us as being from 10 to 14 days duration) the custodial agency, either the Coast Guard or Marshals Service, will make a decision whether to proceed with forfeiture of the vessels or whether to release them back to the owner.

² Although this is described as a detention, under Fourth Amendment jurisprudence such a detention constitutes a seizure. See *United States v. Jacobsen*, 466 U.S. 109 (1984) (a seizure occurs when there has been a meaningful interference with a possessory interest in an object).

Because under this plan formal administrative forfeiture proceedings will not have yet commenced, it will be unnecessary to issue a formal remission or mitigation decision with respect to released vessels. As to those vessels that will be held for forfeiture, the Marshals Service will assume the responsibility for handling the necessary proceedings.

One of the advantages of this proposal is that it will fully meet DOJ's concern that any seizure of vessels contain a speedy mechanism by which vessel owners are afforded their due process rights to challenge the government's actions. That is, if a vessel owner seeks a TRO, files a replevin action, or files a Rule 41 motion for the return of property, the government will be able to defend its actions as it routinely does in any forfeiture case. The government will explain to the court that there was probable cause to seize the vessel for forfeiture **and** that there was probable cause to seize the vessel under 33 CFR 6.04-8 to remove it from the Security Zone to secure the rights and obligations of the United States under the Magnuson Act. The government will further explain that, in accordance with familiar forfeiture practices and constitutional principles, the government may be instituting forfeiture proceedings against the vessel and that under established case law the appropriate mechanism for the owner to seek relief is through such proceedings. See *DOJ's Asset Forfeiture and Practice Manual*, Vol. I, page 3-6, section 2 and footnote 20.

Although our proposal totally avoids the necessity of defending the detention of vessels under the Magnuson Act alone, we feel compelled to address DOJ's analysis of this subject. As an initial matter, we note that OLC has not yet issued a final opinion on this issue. Without citation to cases, the DOJ memorandum states that OLC takes the view that a brief temporary detention of only a "few days" would be lawful under the Coast Guard regulations implementing the Magnuson Act. We believe that OLC takes too narrow a view of the President's powers under the Magnuson Act. In the landmark Supreme Court decision on the precise issue of the President's powers to seize property, the Court stated:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all he possesses in his own right plus all that Congress can delegate. . . . A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitudes of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

Youngstown Sheet and Tube Company, et al. v. Sawyer, 343 U.S. 579, 636-37 (1952)(J. Jackson, concurring).

Given the Supreme Court's very clear language, we believe that the detention of a vessel for violating the Security Zone could be for a period of time in excess of a "few days." Pursuant to the Magnuson Act, we have a specific Congressional authorization to seize vessels and a critical need to carry out vital military exercises in a legally authorized Security Zone. Under the circumstances, we feel strongly that the courts would uphold the detention of violative vessels for the 10 to 14 day period that the Zone is in effect. In this regard, we note that the Magnuson Act does not contain any specific time limitation.

The government would have a number of very compelling arguments that its temporary seizure of vessels was reasonable. First, the detentions are authorized by law and specific regulations. Second, the detentions will be necessary to allow the naval exercises. Third, the detentions will be specifically tailored to last only the amount of time necessary to ensure that the vessels will not again be used to violate the zone. Fourth, detentions of vessels for a 10 to 14 day period are far less onerous to owners than if the government proceeds with their forfeiture.

Finally, we agree with DOJ that if detention alone were pursued, a speedy due process mechanism must be available to owners. However, there are a variety of means by which this could easily be accomplished (e.g., at the time of seizure the Coast Guard could give the owner a notice of the reasons for seizure, how the owner could petition for return of the vessel, and the fact that the owner could file a Rule 41 motion for the return of the vessel or could file a replevin action).

However, as we previously explained, it is unnecessary and unwise for the government to plan for detentions alone or for forfeitures alone. The best way to proceed is to seize for both detention under the Magnuson Act **and** possible civil forfeiture.

Litigation Risks:

The DOJ paper states that there are significant litigation risks with the proposal to use the Magnuson Act detention authority as a basis for seizure of vessels. However, DOJ does not address the very serious litigation risks that the government will face in any forfeiture proceedings.

Past experience demonstrates that the courts will scrutinize the mechanism used to enforce the security zone, and the reasonableness of the government's actions. In *Bay Area Peace Navy, et al. v. U.S.*, 914 F.2d 1224 (9th Cir. 1990) the Ninth Circuit held that "because the government [had] failed to meet its burden of demonstrating that the 75-yard security zone is a reasonable time, place and manner restriction, [the court held] that the zone is a violation of the First Amendment rights of persons desiring to demonstrate in boats. . . ."

The forfeitures of the vessels will subject the government to lengthy litigation, and, in the absence of some egregious conduct on the part of the protesters, will subject the government to greater potential liability. The issue that will be before the district court in Puerto Rico is whether the forfeiture of protesters' interests in vessels is proportional given the gravity of the offense. Ultimately the courts will have to determine whether forfeitures of vessels are "grossly disproportional" fines under the Excessive Fines Clause pursuant to the approach enumerated in *United States v. Bajakajian*, 118 S.Ct. 2028 (1998). There is a distinct litigation risk that a court might find that forfeiting an entire vessel would be "grossly disproportional," given the basis of the action arises in part out of the expression of free speech under the First Amendment.

In *Bajakajian*, the Court suggested that the maximum penalties provided under the Sentencing Guidelines should be given greater weight than the statutory maximum because the Guidelines take into consideration the culpability of the individual defendant. 118 S. Ct. at 2038 n. 14; *United States v. 3814 N.W. Thurman St.*, 164 F.3d 1191, 1197 (9th Cir. 1998). Many of the

protesters will no doubt be first time offenders. Moreover, neither the statute nor the Guidelines can “override the constitutional requirement of proportionality review.” *Bajakajian*, 118 S.Ct. at 2038, n.14.

An Eighth Amendment right not to be subjected to excessive fines is a core constitutional right deemed substantial. *United States v. Beras*, 183 F.3d 22; 1999 U.S.App. LEXIS 15062 (1st Cir. 1999). Even while upholding a conviction and a twelve-month sentence, the First Circuit found that “a forfeiture order that is so excessive as to violate the Eighth Amendment would constitute a miscarriage of justice.” *Id.* The Court of Appeals remanded the case to the district court with directions to consider the analysis laid out in *Bajakajian* in setting a forfeiture order that was not grossly disproportional to the gravity of Beras’ offense. The district court was directed to consider the following factors: (1) whether Beras’ violation was related to any other illegal activities; (2) the maximum penalty provided by the Sentencing Guidelines, (3) the extent of the harm caused by Beras’ actions and, (4) whether Congress had authorized other penalties for Beras’ crimes. Puerto Rico is in the First Circuit and thus the *Beras* decision will serve as precedent in any potential vessel forfeiture where the *Bajakajian* issue is raised.

We are also concerned because we have been unable to obtain a commitment that forfeiture will only proceed where the owner or operator of a vessel has been arrested. Absent an arrest, the appropriateness of forfeiture as a remedy will be particularly vulnerable to attack.

Based on this analysis, it is Treasury’s assessment that significant litigation risks will accompany any forfeiture action at Vieques. At a minimum, litigation risks will include the constitutionality of the forfeitures under the First and Eighth Amendments. In the absence of egregious conduct, such as that sufficient to support an arrest, it is essential that forfeitures be utilized judiciously.

II. Recommended Assignments Regarding Forfeiture

DOJ’s argument that Customs should be responsible for forfeitures is premised on its view that DOJ is assisting the Navy in the Vieques matter and that Customs and Treasury should bear some of the burden in this enforcement effort. However, DOJ is not merely assisting the Navy. Rather, DOJ is, as it ought to, fulfilling its assigned statutory mission to enforce federal laws relating to military facilities (for example, 18 U.S.C. § 1382). On the other hand, neither Customs nor any other Treasury bureau has statutory jurisdiction related to the Vieques matter.³ It is highly telling and supportive of our position, that DOJ worked with the Navy and Coast Guard for months planning this operation before it ever notified Treasury and Customs that it desired assistance in this matter.

The FBI and the Marshals Service have the responsibility for responding to acts of civil disobedience involving military facilities, and this explains why they have the lead enforcement roles for the Vieques operation. Moreover, as the DOJ memorandum recognizes, both FBI and

³ The DOJ paper incorrectly argues that because the Magnuson Act has a Customs forfeiture incorporation clause, Customs likely has jurisdiction to enforce these forfeitures. However, interestingly, in 1989 OLC formally opined that under a very similar incorporation clause, 21 U.S.C. § 881(d), Customs had absolutely no authority to conduct seizures and forfeitures under the Controlled Substances Act.

the Marshals Service, as well as DEA and INS, have the full capability to process these forfeitures.

Customs Faces Unique Problems in Handling Forfeitures:

Although the President can designate any agency, including Customs, to handle the forfeitures, Treasury feels strongly that there are important legal and policy reasons not to make Customs the forfeiting agency. First, requiring Customs to process vessel seizures will adversely affect the ability of Customs to protect our borders. Through its interdiction efforts, Customs guards against the importation and exportation of contraband and illicit commercial goods. Customs should not be asked to divert funding and staffing from border interdiction to a non-commercial domestic police action which clearly is the responsibility and within the assigned jurisdiction of DOJ.⁴ Further, Customs must comply with the restrictive provisions of existing union agreements concerning temporary assignments of personnel, an obstacle that neither the FBI nor Marshals Service faces. Finally, work related to forfeiture proceedings can last many years, and Customs could find itself encumbered with years of such work in an area outside of its jurisdiction.

As a legal matter, designating Customs as the forfeiting agency in the Vieques operation would needlessly jeopardize Customs forfeiture authority. Just last week the Senate voted to approve a civil asset forfeiture reform act. The House is expected to follow suit. Reluctant congressional leaders have agreed to exclude Customs commercial forfeitures from the most stringent provisions in the legislation. This "carve-out" provision for Customs forfeitures is essential to the continued efficacy of the border interdiction program. Adverse publicity could easily result in withdrawal of congressional support for the Customs "carve-out." Moreover, while DOJ cites "intense pressure from Congress" for naval training activities on Vieques to resume as support for forfeiting vessels, Treasury firmly believes that Congressional critics of asset forfeiture will raise a cry that will offset any such pressure from the Armed Services committees.

This threat to the Customs "carve-out" should be avoided. Furthermore, should the Vieques operation be delayed beyond enactment of asset reform legislation, it would appear duplicitous if the first major forfeiture action that Customs undertook was a non-commercial, domestic police action seizure without a clear nexus any international border. None of the DOJ entities able to handle these forfeitures is covered by the Customs "carve-out" and this alone is reason to designate one of them responsible for these forfeitures.

Treasury Enforcement Faces Severe Funding Constraints:

In terms of funding, neither the Treasury Forfeiture Fund nor Customs can support vessel forfeiture on behalf of the U.S. Navy. Treasury Forfeiture Fund Surpluses for FY 2000 have been earmarked by Congressional appropriators to fund Treasury law enforcement core law enforcement missions, such as drug interdiction and presidential candidate protection. Moreover, the projected Surplus for FY 2000, \$142 million, will fall an estimated \$36 million

⁴ Although the Customs Service previously adopted two Coast Guard seizures for violation of the Cuban Security Zone, both those violations involved the movement of vessels across international borders. Moreover, Customs is responsible for enforcing the Cuban embargo.

short of the \$178 million earmarked by Congress for core law enforcement programs for the Treasury bureaus.

The programs that will benefit from the earmarking are vital to law enforcement functions. Examples of such programs include: Secret Service protection of presidential candidates (over \$15 million); the Southwest Border Initiative, which will support increased funding for the U.S. Customs Service for additional agents, inspectors, and detection technology in order to prevent trafficking in illegal drugs on the Southwest Border (\$25 million); and the relocation of the Bureau of Alcohol, Tobacco & Firearms (ATF) Headquarters to ensure adequate security for ATF employees pursuant to the President's Directive. Other significant programs receiving funds through the Super Surplus include ballistic imaging and detection technologies for countering chemical and biological threats.

Additionally, the President's FY 2001 Budget proposes to fund \$42.5 million in Treasury law enforcement initiatives using projected surpluses from the Treasury Forfeiture Fund. At this point, the Fund has no scenario that would result in such a surplus at the end of this fiscal year. Consequently, the Treasury Forfeiture Fund may be forced to adjust its original FY 2000 financial plan downward, leading to a situation where the Fund may not be able to meet all the needs of the Treasury law enforcement bureaus as they conduct their seizure/forfeiture activities.

Given the Treasury Forfeiture Fund's inability to fully fund core law enforcement programs, including those identified for funding by Congress, the Fund is certainly unable to support the wholly unexpected cost of vessel forfeitures on behalf of the U.S. Navy. Forfeiture fund expenditures must be consistent with the program's strategic objectives and fulfill Congressional mandates. Expenses in support of vessel forfeitures at Vieques would not meet these standards. Such a deviation might very well harm the Treasury Forfeiture Program and law enforcement initiatives for many years to come.

Finally, Customs cannot absorb the costs resulting from the vessel forfeiture. Increased vessel seizures related to drug interdiction in South Florida and the pending transition costs associated with the recompetition of the Customs National Seized Property Contract have created a funding shortfall for Customs. Therefore, the financial commitment for this operation must rest with the U.S. Navy.

Forfeiture Expenses will be Substantial:

Treasury also disagrees with DOJ's assessment concerning the expenses that should be planned for respecting the forfeiture of vessels. We believe that the cost of forfeiting vessels will be substantial. While an accurate assessment of the costs associated with the proposed enforcement action is difficult, we should estimate that, at a minimum, such costs would approach \$2 million for each 180 day period that the vessels are in the government's possession. This estimate is based on the seizure of 100 small vessels and costs for such items as contractor storage/maintenance costs, repairs, transportation, disposal by auction, travel and expenses of temporary assignments of personnel, etc. However, it does not include any expenses related to the seizure of larger vessels, lien payments, extended litigation expenses, and any compensation paid to violators who subsequently prevail in post-seizure legal proceedings. These expenses

relate to only one military exercise, and would naturally increase should there be additional naval exercises.

An additional consideration is that vessel forfeitures will require a long-term mobilization of staff to Puerto Rico. The Treasury Forfeiture Fund in itself is not an operational entity, and does not possess the personnel required to assist the Coast Guard in the administrative processing of seized property. Any agency processing forfeitures can expect to face years of litigation concerning the constitutionality of the seizures and tort claims for damage to returned property. It is questionable whether a federal court will uphold forfeiture as an appropriate remedy when the underlying offense involves assertion of a First Amendment right.

III. Conclusion

In conclusion, Treasury strongly urges that, if warranted, vessels violating the Security Zone be detained and seized under 33 CFR 6.04-8 for possible forfeiture. Further, as noted by the Deputy Attorney General, forfeitures should only be sought "in connection with particularly serious violations of the Security Zone, and not with respect to every violation" to avoid the Eighth Amendment risks presented by these cases. Accordingly, we recommend that the President authorize the use of seizure and forfeiture sanctions in appropriate cases, and that he allocate responsibilities for such seizures and forfeitures in the manner discussed above.

Cc: The Honorable Eric H. Holder, Jr.
The Honorable Raymond Kelly

INFORMATION REPORT

Document No. 416453

WHITE HOUSE STAFFING MEMORANDUM

Date: 4/20/00 ACTION / CONCURRENCE / COMMENT DUE BY: ---

Subject: The Honorable Don Siegelman, Governor of Alabama, expresses concern about significant environmental contamination in Alabama from Polychlorinated Biphe

	ACTION		ACTION	FYI
VICE PRESIDENT	☐		☐	☐
PODESTA	☐		☐	☐
ECHAVESTE	☐		☐	☐
RICCHETTI	☐	☐	MOORE	☐
LEW	☐	☐	NASH	☐
BAILY	☐	☐	NOLAN	☐
BERGER	☐	☐	REED	☐
BLUMENTHAL	☐	☐	SPERLING	☐
BRAIN	☐	☐	STREETT	☐
BURSON	☐	☐	TRAMONTANO	☐
CAHILL	☐	☐	UCELLI	☐
EDMONDS	☐	☐	VERVEER	☐
FRAMPTON	☐	☐		☐
IBARRA	☐	☐		☐
JOHNSON, B.	☐	☐		☐
JOHNSON, J.	☐	☐		☐
LANE	☐	☐		☐

REMARKS: Please return this report to the Staff Secretary's Office after review. If you would like a copy of this report to keep, please contact this office. Thank you.

RESPONSE:

**THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET**

ID# 416453
PAGE 1

DATE RECEIVED: 04/19/2000

NAME OF CORRESPONDENT: THE HONORABLE DON SIEGELMAN

SUBJECT: EXPRESSES CONCERN ABOUT SIGNIFICANT ENVIRONMENTAL CONTAMINATION IN ALABAMA FROM POLYCHLORINATED BIPHENYLS (PCB'S) AND REQUESTS FEDERAL ASSISTANCE IN REMEDYING THE SITUATION

ROUTE TO: OFFICE/AGENCY		(STAFF NAME)	ACTION CODE	DATE YY/MM/DD	TYPE RESP	C D	COMPLETED YY/MM/DD
CORRESPONDENCE		JOHN WERTMAN	ORG	2000/04/19			
ACTION COMMENTS							
00 APR 20 AM 9:33							
ACTION COMMENTS:							
ACTION COMMENTS:							
ACTION COMMENTS:							

COMMENTS

ADDITIONAL CORRESPONDENTS: 0

MEDIA: LETTER

INDIVIDUAL CODES:

REPORT CODES:

USER CODES:

ACTION CODES:

A - APPROPRIATE ACTION
C - COMMENT/RECOMMENDATION
D - DRAFT RESPONSE
F - FURNISH FACT SHEET
I - INFO COPY/NO ACT NECESSARY
R - DIRECT REPLY W/ COPY
S - FOR SIGNATURE

DISPOSITION CODES:

A - ANSWERED
B - NON-SEPC-REFERRAL
C - COMPLETED
S - SUSPENDED

OUTGOING CORRESPONDENCE:

TYPE RESP = INITIALS OF SIGNER
CODE = A
COMPLETED = DATE OF OUTGOING

**REFER QUESTIONS AND ROUTING UPDATES TO RECORDS MANAGEMENT (ROOM 72, OEOP) EXT-62590
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.**

DON SIEGELMAN
GOVERNOR

STATE CAPITOL
600 DEXTER AVENUE, ROOM N-104
MONTGOMERY, ALABAMA 36130

OFFICE OF THE GOVERNOR
STATE OF ALABAMA

(334) 242-7100
FAX: (334) 242-0937

April 10, 2000



The Honorable William Jefferson Clinton
The White House
Washington, D.C. 20500

Dear Mr. President:

I wish to bring to your attention a situation of extensive and significant environmental contamination in Alabama from polychlorinated biphenyls (PCB's), and to request federal assistance in remedying the environmental contamination and resultant human exposures.

PCB's were produced at a plant on the west side of Anniston, Alabama, from the late 1920s until their production was banned in the 1970s. Waste products disposed in dumps and landfills have leached out and contaminated surrounding residential and commercial properties. The affected area is an industrial section of Anniston that is economically distressed, and it is home to many who lack primary health care access and have poor sanitation.

Of all the places in the nation where environmental PCB contamination is known to exist and where human exposure has been evaluated, west Anniston is the only location where significant human exposure has been found. For example, in 1995-1996, the Alabama Department of Public Health obtained blood specimens on 103 persons, and 33 had more than 20 parts of PCB's per 1 billion parts of blood (ppb). During 1995-1996, an average American was expected to have a PCB level of less than 20 ppb. In 1999, a local citizens' group obtained blood tests on 2,966 persons; 562 of these had values greater than 20 ppb.

Environmental sampling data, obtained in part by the responsible industry, Solutia, Inc., have shown PCB's in soil, sediment, air, and fish downstream from Anniston. Residents reportedly believe that PCB's also are in their drinking water, domestically raised livestock and locally grown fruits and vegetables.

To date, the Alabama Department of Public Health and the Alabama Department of Environmental Management have worked collaboratively with the Agency for Toxic

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The Honorable William Jefferson Clinton
April 10, 2000
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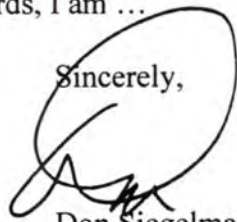
Substances and Disease Registry and the Environmental Protection Agency to characterize further the extent of contamination and conduct other community-based activities. Nonetheless, many community members have not been tested for PCB's. These individuals would like to know their blood levels, seek a comprehensive study to determine the health effects of PCB exposures, and would like either the contamination removed or their community moved.

Because of the severity of the situation, I respectfully request that the federal government provide funding and technical assistance to address these concerns. Specifically, at a minimum, I feel it would be helpful to be able to offer testing for all those who wish to be tested and to establish a system to monitor their health effects over the long term.

I am grateful for your concern for our state and for your consideration of this matter.

With warm personal regards, I am ...

Sincerely,

A handwritten signature in black ink, appearing to read 'Don Siegelman', is written over the word 'Sincerely,'.

Don Siegelman
Governor

DS/jh/me

SUPPORTING CHRISTIAN MINISTRY TO CHILDREN AND FAMILIES IN COSTA RICA

Do you work

Yes
No

work with
with them
etc.

THE PRESIDENT HAS BEEN
4-21-00



PURA VIDA
COFFEE

NET WEIGHT: 1LB (454G)

4-21-00

To Burkhardt for reply
after you have seen?

Yes ☒ No ☐
Coordinate w/
NSC ~~Yes~~ ? Yes ☐ No ☐
cc: AID ? Yes ☐ No ☐

B.



Contact: John Sage (206) 328-9606 or Cathia Geller, Brainwave: (425) 837-0321

Online Coffee Company Devotes 100% of Profits to Help Kids In Need *Harvard MBAs launch Internet venture to raise funds for Costa Rican relief*

April 5, 1999 - SEATTLE, WA – John Sage, a retired Microsoft executive and Chris Dearnley, a pastor in Costa Rica today opened the digital doors on **Pura Vida Coffee** (www.puravidacoffee.com), the first coffee retailer to commit 100% of net profits to helping some of the poorest children and families living in Costa Rica. The new website enables coffee lovers to purchase Costa Rica's famed Tarrazú coffee at great prices and gives them a tangible way to help families in some of the country's most destitute areas. By directing **all net profits** back into locally run ministry and social programs, Pura Vida Coffee is truly a "coffee that cares."

The origins of Pura Vida Coffee go back ironically to a small coffee house at Harvard Business School, where Sage and Dearnley met more than a decade ago. Upon graduation, they set off on dramatically different paths, with Sage forging a successful marketing career at Microsoft and Internet pioneer Starwave and Dearnley moving to Costa Rica to start a church reaching out to street kids and drug addicts.

The two reconnected in 1997 and created **Pura Vida Coffee** to fund Dearnley's ministry and outreach efforts. "We think we have put together a formula where everyone wins," commented Sage. "Coffee lovers get great coffee that supports a great cause and Chris is able to feed, clothe and sustain more kids."

So far, the company has shipped more than 3,000 pounds of coffee to more than 500 customers and is winning repeat business from individuals and churches as well as applause from those who welcome an entrepreneurial approach to Christian relief work. Dr. Tony Campolo, professor at Eastern College and noted Christian lecturer commented, "This is the perfect embodiment of all that I've ever dreamed of in the way of micro-economic development for the poor."

Packaged in one and five pound air-tight bags, as well as in boxes of convenient "10-Cup" packs, Pura Vida Coffee is competitively priced at \$6.95-\$8.95 per pound. Customers can order directly on the web or by calling the toll-free order number (1-888-577-4JOY).

The mission of Pura Vida Coffee is to help meet the physical, emotional and spiritual needs of children and families living in Costa Rica.

#

Sales

6611 NW 84th Ave
Miami, FL 33166
Tel (888) 577-4JOY
Fax (305) 594-3319

Ministry

Dept SJO-2561
PO Box 025216
Miami, FL 33102-5216

Administration

2800 E. Madison, Suite 304
Seattle, WA 98112
Tel (206) 328-9606
Fax (206) 329-7243

THE WHITE HOUSE

Assistant to the President and
Director of Political Affairs

Nancy:

00 APR 21 PM 8:25

This is a memo that
the President requested
after his meeting
w/ some clergy
leaders in
San Francisco.

Shaw
M

4-21-00

To Burkhardt for reply?

Yes ☒ No ☐

B.
coord w/ DPC

RITA R. SEMEL
2190 Washington Street #907 San Francisco, CA 94109
415 673 2190 FAX 415 673 7931

00 APR 21 PM 8:25

April 17, 2000

TO: Ms Minyon Moore
Deputy Assistant to the President for Political Affairs

FROM: Rita R. Semel, Co-Chair, San Francisco Homeless Coordinating Board

At President Clinton's request, George Smith, Mayor's Homeless Coordinator and I met with City officials to solicit ideas for a possible White House Conference on Homelessness. Following are some of the ideas, which we propose for consideration.

On the shape and format of a suggested White House Conference on Homelessness: we agreed that the focus needed to be on:

1. Seeing homelessness as one part of poverty
2. Integration of services
3. Rethinking the concept of categorical grants vs. block grants
4. Addressing the balance between people taking responsibility for themselves and those who can't.
5. Rethinking the concept of the safety net
6. Owning up to the limits of our partnership thus far

A possible title for such a conference might be:

Rethinking the Federal/Urban Partnership to Address Homelessness

The opening session might be an address by an academic giving the urban perspective.

Then a panel: The problem as viewed from five cities. Possible participants from Phoenix, LA, NY, SF, Seattle, Chicago, Boston, Philadelphia, Denver, Detroit

Luncheon speaker - one suggestion - Tipper Gore on the personal responsibility vs. public responsibility to those who can't take care of themselves.

Goals for the day - How to change conditions in the cities of America; defining the minimum standard for the quality of life. Designing a public education program on the homeless problem in America, its complexities and possible solutions; Redesign the relationship between federal, state, regional and local authorities.

Who needs to be there: large cities, business, labor, private non-profits, community folks, representatives of the Federal depts. i.e. HHS, HUD, Labor, Justice, relevant Congressional committees.

Target date for conference - September. Invitations out by August. We would be pleased to continue in anyway you suggest that might make this proposed conference a reality. I look forward to hearing from you.

Sincerely,
Rita R. Semel