EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

March 3, 1986

LEGISLATIVE REFERRAL MEMORANDUM

TO: Department of Justice (Copeland 633-4117)
Department of the Treasury (Toth 566-8523)
Department of Defense (Windus 697-1305)
Central Intelligence Agency
Department of Transportation (Collins 426-4687)

SUBJECT: Department of State testimony on antiterrorism legislation

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with Circular A-19.

Please provide us with your views no later than

12:00 NOON -- FRIDAY -- MARCH 7, 1986

Direct your questions to Gregory Jones (395-3454), of this office.

Gregory M. Jones Jr.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: John Cooney Karen Wilson Jim Barie Russ Neeley
Dave Hunn Jim Nix

DRAFT

STATEMENT OF ABRAHAM D. SOFAER

LEGAL ADVISER, U.S. DEPARTMENT OF STATE

BEFORE THE SUBCOMMITTEE ON CRIME

OF THE HOUSE COMMITTEE ON THE JUDICIARY

MARCH 6 1986

Recvd 4:42 PM

Mr. Chairman, and Members of the Subcommittee on Crime:

I appreciate the opportunity to express the Department of State's views on H.R. ____ -- the proposed Antiterrorism Act of 1986. Regretably, the very short notice we received of this hearing, left us little opportunity to study this complex legislation. Thus, in my prepared testimony, apart from stating our position in general, I will confine myself to those aspects of the bill of greatest concern to the Department of State. The Department of Justice will comment on some of the more technical aspects of the bill.

Moreover, because time did not permit complete interagency coordination of this testimony, I must stress that the views I am expressing are not necessarily those of the Administration.

The State Department's general assessment is that this legislation is ill-advised. The bill has some positive aspects, but overall it is fundamentally flawed and inferior to current law. This committee should not attempt to rush through comprehensive reforms in complex areas of law, crucial to international law enforcement, such as extradition.

Two titles of the bill are of special concern to the Department of State: Title I, the Extradition Act of 1986, and Title III, which creates a new criminal offense called "international terrorism." Title II calls for a study on "the threat of terrorist attack and of technological means to control the availability and use of explosives for terrorist and other criminal activities." Such studies have been

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Steve Catlett, State
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underway for some time. The substance of Title IV, offering the sense of the Congress that an international convention to prevent and control terrorism should be negotiated, is already contained in § 507 of the International Security and Development Cooperation Act of 1985.

Extradition Reform

Title I of the Act proposes a sweeping reformulation and codification of our extradition laws and procedures. We recognize that some extradition reform may be advisable. But this bill is flawed in several important ways.

First, the overall approach of the bill is troublesome. To a large extent, the Act codifies existing extradition practices. This unnecessarily removes flexibility from the extradition process. Some flexibility is needed for international extradition to work effectively. One example of this problem is section 3196, which deals with surrender of the fugitive after he has been determined extraditable, and the Secretary of State's discretionary power to issue or not issue a surrender order. The present law, 18 U.S.C. § 3186, provides simply that "the Secretary of State may order the person . . . delivered to [the] . . . foreign government to be tried . . . ." The proposed section replaces this simple declaration with an elaborate scheme. This scheme does, in

effect, codify existing practice. But codification in this way limits the Secretary's discretion. Situations may well arise in which the Secretary will, for good cause, want to deviate somewhat from existing practices. We also have problems with the substance of many of Title I's provisions. For example, those sections of the Act dealing with bail are unacceptable. They would drastically change current law. The Supreme Court recognized in 1903 that bail was generally inappropriate in cases of extradition. In Wright v. Henkel, 190 U.S. 40, 62 (1903), the Court noted that:

> "The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused . . . and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted."

The proposed legislation would erase this longstanding doctrine, and in several instances establish a presumption in favor of bail. Sections 3192(f) and 3195(a)(3), for example, state that individuals detained for an extradition hearing or appealing an extradition order should be released on bail unless the Government can show by a preponderance of the evidence that the person presents "a substantial risk of flight" or a "danger to any other person or the community."

The nature of extradition proceedings makes it difficult for the Government to meet the proposed burden. We usually lack access to the type of extensive information needed to establish a serious risk of flight or danger to the community. Moreover, an individual sought for extradition is by definition already a fugitive from justice. Such individuals thus should be, and under current law are, considered likely to flee.

More significantly, as the Court noted in Wright v. Henkel, permitting bail too readily may put the United States in a position where it cannot fulfill its treaty obligations. If a requesting country concludes that the United States is not meeting its treaty obligations, it may be unwilling to cooperate when we seek extradition of a fugitive from that country. The remedies for bail jumping -- forfeiture of bond and imposition of criminal penalties under U.S. law -- do nothing to rectify the injury to a foreign nation sustained when that country does all it can to secure extradition and we let the fugitive slip through our hands. We should not build such problems into the law.

The second, and even more significant, area of concern to the Department is the political offense exception. Some of the language in this section reads more like it belongs in a Pro-Terrorism Act of 1986 than in an act that purports to be

designed to combat terror.

The Act directs that a person may not be extradited if he establishes, by a preponderance of the evidence, that the offense for which his extradition is sought is a "political offense." The Act then limits to an extent the crimes that may be considered "political offenses." The operative provision, section 3194, has two basic parts. Subsection 2 lists six offenses that are absolutely excluded from the exception -- that is, the listed offense can never be held "political." Subsection 3 provides that other crimes may also be excluded from the political offense category, listing six factors a court "shall consider" in "determining whether an offense is a political offense."

Subsection 2's exclusion of offenses like forcible sexual assault or acts proscribed by a multilateral convention, for example, the convention against hostage-taking, is certainly appropriate. We also agree with the exclusion of "wanton or indiscriminate act[s] of violence" from the reach of the poltical offense exception. This so-called "wanton crimes exception was upheld in Zain v. Wilkes, 641 F.2d 504 (2d Cir. 1981), but has not been universally adopted by other courts.

Subsection 2 is fine as far as it goes, but we should not stop there. With respect to certain of our extradition treaty

partners, additional offenses should be excepted from the reach of the "political offense" doctrine. But because this legislation is by definition applicable to every country with which we have extradition relations, it reflects the lowest common denominator. The lowest common denominator may be correct for certain countries, but this list of offenses that can never be considered "political" is too limited with respect to stable democracies. This is exactly why the Administration has determined that treaty-by-treaty revision of the exception is a more careful, tailored approach to modifying the political offense doctrine, permitting a more extensive exclusion of offenses from the doctrine. With stable democracies such as the United Kingdom, we must go beyond the meager list of offenses in subsection 2, and, for example, agree that murder, manslaugher, and bombing also should never be considered appropriate political conduct.

Subsection 3's flaws run deeper than merely excluding too few crimes from treatment as political. This subsection lists six factors a court should consider in determining whether an offense is political. But no guidance is provided regarding what "consider" means. What weight should be given to each factor? Which way do the factors cut? Do these factors replace or supplement existing tests for determining an offense's political character? The courts are left to sort out the answers to these and other such questions, adding to the

confusion already present in this area.

More substantively, some of the factors that the Act directs the courts to consider should not always be part of an appropriate analysis under the political offense doctrine. For example, the first factor listed is the status of the victim. This invites courts to draw conclusions regarding the appropriateness of a terrorist act depending upon who the terrorists happened to hit. Presumably, the murder of a policeman may be construed as more "political" than the murder of a civilian. Such a distinction may make sense in analyzing the conduct of an individual in a repressive, totalitarian regime. But these proposed factors would apply to all countries with which we have extradition relations. In a democracy such as the U.K. or the U.S., the distinction is an abomination. Inviting the murder of policemen in a democracy, by offering a possible safe haven to perpetrators with political purposes, is a notion we cannot believe this Committee would support.

Similarly, the motive of the actor is irrelevant in a democratic regime. Our own courts have repeatedly held that a crime is a crime, regardless of any purported good intentions. As the Third Circuit Court of Appeals said in United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973), "however idealistic and sincere, the motives of those who would violate federal law are

immaterial." The same principle applies on an international scale.

Moreover, the proposed legislation significantly expands the potential reach of the political offense exception. Under present law, before a court can hold an offense to be "political" it must determine that an "uprising" exists and that the crime was "incidental" to that uprising. The proposed section reduces these components from requirements to mere factors a court should consider, opening up the field for those who would justify their conduct as political. For example, if the other five factors weighed in favor of a political offense, the fugitive would presumably not need to demonstrate that an uprising exists.

A case close to home should graphically demonstrate our concern. On December 31, 1982, the FALN planted bombs in certain buildings in New York City. The explosions severely injured some of New York's "finest"; one officer was blinded. Under the proposed legislation's reworked political offense doctrine, these terrorists bombers could be found by a foreign court applying the proposed factors to have committed a "political" offense and thus be immune from extradition. Their attack was arguably not indiscriminate, since only policemen were injured and they picked their targets carefully: New York City police headquarters and three federal buildings. Thus,

since their bombing is not excluded by subsection 2, the factors of subsection 3 would have to be evaluated. The victims were "only" policemen; the offenders belonged to a political organization; and the terrorists' had a political motive. A court might well therefore find their acts "political." Similarly, PIRA terrorists could find their crimes labeled political under this proposed legislation's formulation. They often choose to attack policemen and have "political" motivations. Indeed, any terrorist can claim membership in some "political" organization, factor 3(B), and a "political" motive related to his group's goals, factors 3(D) and 3(E). All he need do is be a discriminating killer.

In sum, the political offense provisions of this Act are unacceptable. By listing factors such as the status of the victim and the motive of the actor, section 3194(e) plays into the hands of terrorists and terrorist organizations seeking to twist our laws against us and legitimize their abhorrent conduct.

Crime of International Terrorism

Title IV of the Act would create a new crime, "international terrorism." While an initiative of this sort may be helpful, we need to be careful when we seek extraterritorial application of our laws. This Title has

several serious flaws.

The most prominent defects are in the section defining the offense. Terrorism cannot be defined in any manner that is generally acceptable for a criminal statute, where precision is required. Prior efforts have led to tortured results, and the present attempt also fails. Thus, the bill has a three part definition of "international terrorism." First, the conduct must be "a crime of violence." Second, it must be intended to intimidate or coerce a civilian population, to influence a government's policy or conduct, or to retaliate against a government or government employee for the policies or conduct of that government. Third, the act must be "directed against the United States or a national of the United States."

We cannot possibly know all that is covered within the first factor, a "crime of violence." Is a threat to blow up an airplane a crime of violence? The legislation offers no guidance. Nor are we told when a crime is "directed" against the United States. Would the recent Rome and Vienna attacks meet this requirement? Several U.S. nationals were killed in the attacks, but, apparently, only because they were on the scene. Does this make the attack directed against the United States? Similarly, would a hostage-taking in which no American was involved, but in which demands are made of the U.S., be an act "directed against the United States?"

We would have great difficulty, moreover, in seeking to extradite individuals for the crime of "international terrorism." An individual can be extradited only for offenses which are crimes in both countries. This "dual criminality" requirement would be difficult to satisfy for the "international terrorism" crime, since unlike offenses which are covered by mulitlateral law enforcement treaties, such as aircraft hijacking, or traditional crimes of violence, few if any foreign countries have a similar offense on the books. H.R. 4125 is a more appropriate antiterrorist effort, addressing the same gap in our criminal laws as Title III, yet in a manner free of the defects noted above.

Conclusion

The Department of State understands and appreciates this Committee's desire to do something about terrorism. It is a problem that confronts and frustrates us all. We should enhance our laws to give them a more effective and important role in the battle. Congress has already contributed greatly to this process, and we are counting on you to support our efforts in Central America and the Inman Supplemental to increase security at diplomatic posts abroad. But the issues you have addressed in this proposed legislation are complex and the several proposed reforms in the legislation will hurt, not help, our international law enforcement efforts.