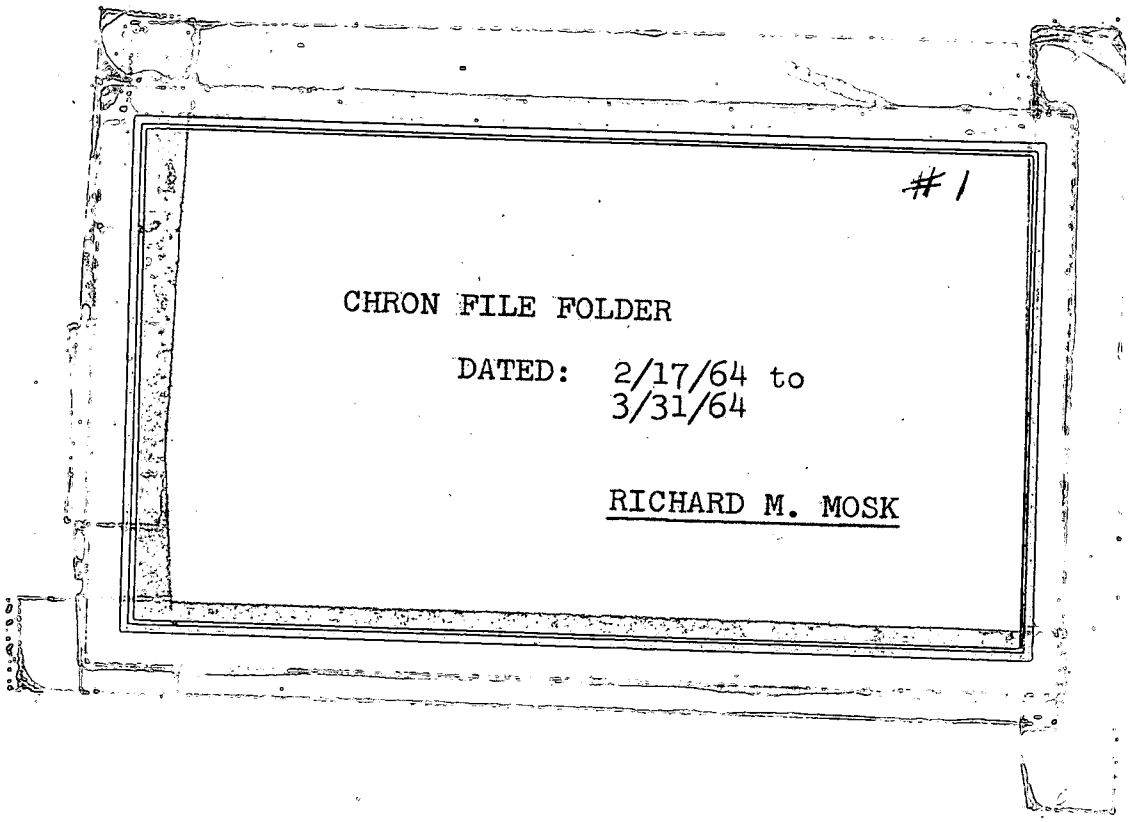

#1
CHRON FILE FOLDER
DATED: 2/17/64 to
3/31/64
RICHARD M. MOSK

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 18, 1964

Honorable Stanley Mosk,
Associate Justice of the Supreme Court
of California,
San Francisco, California.

Dear Stanley:

I have intended for ages to write you concerning your appointment to the Court. I was delighted to hear of it, and I know you will make a great contribution to the cause. You have certainly earned your advancement, and I am sure you will be happy to be back on the bench.

Richard did a good job for us on the Commission, and I hope that the experience was satisfying to him. I am sure also that he will enjoy his work with Justice Tobriner.

With best wishes for a long and happy tenure on the Supreme Court, I am

Sincerely,

Earl Warren

PRESIDENT'S COMMISSION
ON THE
ASSASSINATION OF PRESIDENT KENNEDY

200 Maryland Ave. N.E.
Washington, D.C. 20002
Telephone 543-1400

EARL WARREN, *Chairman*
RICHARD B. RUSSELL
JOHN SHERMAN COOPER
HALE BOGGS
GERALD R. FORD
JOHN J. McCLOY
ALLEN W. DULLES

J. LEE RANKIN, *General Counsel*

NOV 12 1964

Mr. Richard M. Mosk
66 Cleary Court, Apt. 708
San Francisco, California

Dear Mr. Mosk:

The work of the President's Commission on the Assassination of President Kennedy is almost completed. On November 13th, the twenty-six volumes of hearings and exhibits documenting the report filed on September 24th will be delivered to the President, and then our mission will have been accomplished.

It has been a long and arduous undertaking, but one that has been made easier because of the loyalty and devotion to duty of the members of the staff. For this, we are most grateful. When you were asked to come to help us, we had no idea it would take as long as it did, but your willingness to see the job through to the end was a source of great comfort and satisfaction to us.

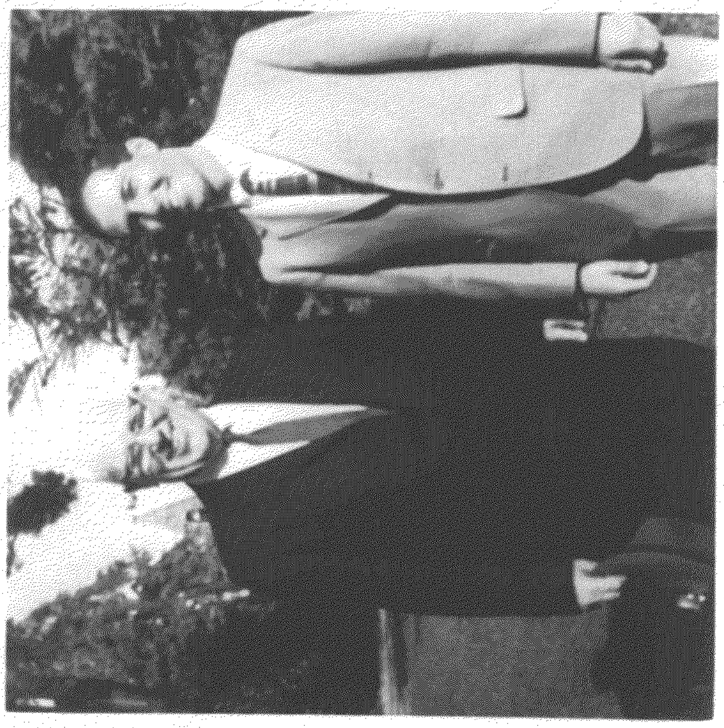
I know it involved a real sacrifice on your part, but I trust that the inconvenience was not irreparable. The service you rendered to your country in one of its darkest hours was notable, and I hope the realization of the importance of your contribution will afford you lasting satisfaction. It was a pleasure to work with you, and you have my heartfelt thanks for your cooperation.

With best wishes for your continued success and happiness, I am

Sincerely,

Earl Warren

Chairman



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J. LEE RANKIN, *General Counsel*

OCT 21 1964

Richard M. Mosk, Esquire
66 Cleary Court, Apt. 708
San Francisco, California

Dear Richard:

On behalf of the Commission and myself, I wish to thank you for all that you did on the investigation and the Report on the Assassination of President John F. Kennedy to make it a success. I trust that you are taking just pride in the favorable reception that the Report has enjoyed.

I wish to also tell you how much I appreciated your return to help us with some of the problems toward completing the Report after you had gone to California and also for your suggestions from time to time that have been most helpful.

I am enclosing a copy of the letter from the President which I consider belongs to all of us because of our common efforts. The President asked that I thank each of you for your dedicated service and this I now do.

The autographed copy of the Report and the picture of the Commission will be forthcoming in due time, although there may be considerable delay because the Congress is not now in session.

With kindest personal regards, I am

Sincerely,

J. Lee Rankin

J. Lee Rankin
General Counsel

OPTIONAL FORM NO. 10
5010-104

UNITED STATES GOVERNMENT

Memorandum

P.C. 8
Mosk, R.M.

TO : Chairman, President's Commission on the Assassination of President Kennedy

DATE: June 30, 1964

FROM : General Counsel

J.L.R.

SUBJECT: Richard Mitchell Mosk

Mr. Richard Mitchell Mosk, an employee of the Commission, is hereby granted security clearance for access to classified information and material up to and including the Top Secret level. This clearance is based upon a favorable full field investigation completed by the Civil Service Commission in March 1964.

P.C. 8
Mosk, R.M.

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SUBJECT: Richard Mitchell Mosk

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This is a memorandum giving an outline of the subject matters involved. It is not intended as a finished product, but rather is intended to be of use to Mr. Stern.

While your Histories have most of the information, these memos will help document a fuller and more literary effort. It should be noted that the cites have not been checked. This will be left until the actual writing of the report.

April 2, 1964

TO: Mr. Stern

FROM: Richard Mosk

RE: History of Presidential Protection

HISTORY OF PRESIDENTIAL PROTECTION

Presidential protection was first seriously considered during the term of President Lincoln. 1/ Due to the bitter controversies of the day, Lincoln was constantly subjected to the threats of his enemies and the warnings of his friends and advisers. 2/ During Lincoln's inauguration, unusual precautions were taken to safeguard him. In addition to military guards, army riflemen were placed on the roofs of buildings on Pennsylvania Avenue in order to watch windows on the other side of the street for possible assassination attempts. 3/ Although Lincoln received many threatening letters, only in a few cases, where there seemed to be grounds for inquiry, did the President's private secretary and the War Department make investigations. 4/

1/ President Madison apparently went unguarded even while fleeing Washington during the War of 1812. 8 Adams, History of the United States, ch. VI (1891). In 1835, a would-be assassin of President Jackson was miraculously foiled when his gun failed to discharge. Donovan, The Assassins, 1 (1955); 35 Cong. Rec. 57th Cong., 1st Sess. 6249 (June 3, 1902).

2/ 10 Nicolay and Hay, Abraham Lincoln, 286 (1890). It is alleged that Lincoln was saved from a murder plot shortly before his inauguration by the famous detective, Allan Pinkerton. Pinkerton, The Spy of Rebellion, 44-81 (1883); Thomas, Abraham Lincoln, 242-244, (1952).

3/ 3 Nicolay and Hay, Abraham Lincoln, 324 (1890).

4/ 10 Nicolay and Hay, Abraham Lincoln, 286 (1890).

Generally, Lincoln went in and out unattended, 5/ although, much to his displeasure, he was occasionally accompanied by a cavalry guard. 6/ It has been said that the War Department was responsible for his protection. 6a/ In 1864, a detail of four Metropolitan policemen was assigned to the White House and the White House property. 7/

These wartime precautions were terminated with the end of the war. 8/ For some time after 1865 soldiers assigned by the War Department protected the White House and the White House grounds, while for special events uniformed metropolitan policemen were detailed upon request to maintain order and to prevent the congregation of crowds. 9/ Metropolitan police officers were assigned to protect the White House in 1885, and they continued to do so until the White

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5/ Id. at 288.

6/ Thomas, Abraham Lincoln, 244 (1952).

6a/ Eisenschink, Why Lincoln Was Murdered 46 (1937); see also, Bryan, The Great American Myth, ch. 3 (1940) (discusses security precautions taken for Lincoln).

7/ Thomas, Abraham Lincoln 458 (1952).

8/ Newspaper quoted in Ogilvie, James A. Garfield 182 (1881).

9/ Bowen, History of the United States Secret Service, 416 (unpublished).

House Police Force was created. 10/

Following Lincoln's assassination, the "Bureau of Military Justice" investigated the assassination as did a Congressional Committee. The latter suggested legislation aimed only at bringing the guilty parties to trial. 10a/

Following the assassination of President Garfield by the frustrated office seeker, Charles Guiteau, an investigation was conducted and a report was made to the people concerning the facts of the case by the "District Attorney" of Washington, D. C. 11/ The Chief of the Secret Service seems to have taken some part in the investigation of the crime. 12/

Shortly after the assassination of President Garfield, two bills were introduced in Congress making it a federal crime to kill

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10/ Ibid. (Metropolitan Police Records cited therein); S. Rept. 760, 67th Cong., 2nd Sess. (1922).

10a/ H. Rept. 104, 39th Cong., 1st Sess. (1866).

11/ McCabe, Life of President Garfield, 586 (1881).

12/ Testimony of Chief Brooks, 2 Report of the Proceedings in the Case of United States v. Charles J. Guiteau, 727 (1882); Bouck, A Report on Legislative Action Concerning Protection of the President, 29 (unpublished) (1943).

the President, [13] but both died in committee. Up to this time, no legislation concerning the protection of the President had been considered. [14] When the Constitution was drafted, the framers used the English law on treason [15] as a basis for defining treason in the Constitution. [16] For some unknown reason, the provision of the British statute making the killing of the King or of Government officers treason was omitted. [17]

In spite of the assassination of Garfield, no perceptible protection was afforded the President. A newspaper commented, " . . . at no other time in our history has it been thought needful for a President to have any special protection against violence when inside or outside the White House. Presidents have driven about Washington like other people, and travelled over the country

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13/ S. B. 34, 47th Cong., 1st Sess. (Dec. 5, 1881); H. R. 1974, 47th Cong., 1st Sess. (Dec. 19, 1881).

14/ Legislation prohibiting the sending of obscene matter in the mails could be used to protect the President from certain types of obnoxious correspondence. 17 Stat. 302 (1871).

15/ 25 Edward III C. 2.

16/ V. Elliot's Debates 447; II Farrand, Records of the Federal Convention, 345; Warren, The Making of the Constitution, 489 (1928).

17/ See 35 Cong. Rec., 2432, 57th Cong., 1st Sess. (March 6, 1902).

as unguarded and unconstrained as any private citizen. All this, we fear, must come to an end now." 18/

During the latter part of the 19th Century, the Anarchist situation became of world-wide concern. In the United States, legislation was introduced from time to time providing for the exclusion and deportation of undesirable aliens -- in other words, anarchists. 19/ One of these bills 20/ was introduced shortly after the assassination of President Carnot of France on June 24, 1894. Apparently, it was feared that the great drive being made by all European police departments against the anarchists and recent suppressive legislation in European countries would cause many of these anarchists to flee to this country. 21/

18/ As quoted in Ogelvie, James A. Garfield, 182 (1881); it has been reported that Presidents had long been guarded at public receptions at the White House. Willets, Inside History of the White House, 186 (1908).

19/ H. R. 1291, 50th Cong., 1st Sess. (Jan. 4, 1888); S. B. 453, 50th Cong., 1st Sess. (Dec. 4, 1889); H. R. 12291, 50th Cong., 2nd Sess. (1889); H. R. 58, 51st Cong., 2nd Sess. (Dec. 18, 1889); S. B. 3786, 52nd Cong., 2nd Sess. (Feb. 22, 1893); S. B. 2314, 53rd Cong., 2nd Sess. (June 25, 1894) (The "Hill Bill").

20/ S. B. 2314, 53rd Cong., 2nd Sess. (June 25, 1894).

21/ H. Rept. 1460, 53rd Cong., 2nd Sess. (1894). See also, Vizetelly, The Anarchists, (1911), for an account of anarchist activities.

During President Cleveland's second administration, he began receiving so many threatening letters that the White House guard was increased. 22/ Secret Service agents (or "operatives" as they were then called) began protecting the Cleveland family at their summer home. 23/ Soon thereafter, Secret Service agents were protecting President Cleveland and his family wherever they travelled. 24/ For a time, two men rode in a buggy behind President Cleveland's carriage, but this attracted so much attention in the opposition newspapers that the practice was soon discontinued at Cleveland's insistence. 25/

During the Spanish-American War, a Secret Service detail was stationed at the White House. 26/ While the precautions taken

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22/ Bouck, A Report on Legislative Action Concerning Protection of the President, 29 (unpublished); New York Evening Post 1, (Sept. 7, 1901); Chicago Tribune (Oct. 17, 1895); Charleston, S. C. News Courier, (Oct. 23, 1895); Willets, Inside History of the White House, 186 (1908).

23/ New York Herald, Aug. 18, 1895.

24/ Pittsburgh Post, (June 14, 1895); Charleston, S. C. News Courier, (Oct. 23, 1895); see also, Wilkie, Hearings Before the Subcommittee of House Committee on Appropriations in Charge of Sundry Civil Appropriation Bill for 1910, 227 (1909).

25/ New York Evening Post, (Sept. 7, 1901).

26/ Wilkie, Hearings Before Subcommittee of House Committee on Appropriations in Charge of Sundry Civil Appropriation Bill for 1910, 227 (1909).

for the President's safety were relaxed following the War, extra Secret Service guards remained at the White House. 27/

President McKinley's advisors began to worry about his safety for two reasons. First, the number of crank letters and threats received at the White House had greatly increased. 28/ Secondly, the threat of anarchist plots continued. 29/ In 1894, President Carnot of France was assassinated by an anarchist; in 1897, the Premier of Spain was assassinated by an Italian anarchist; in 1898, the Empress Elizabeth of Austria was murdered by an Italian anarchist; and in 1900, King Humbert of Italy met the same fate.

During 1900, a Secret Service agent reported that he had received information that anarchists were plotting to assassinate world leaders in the following order: the Empress of Austria, the King of Italy, the Czar of Russia, the Prince of Wales or the Queen of England, the President of the United States and the Emperor of Germany. Naturally, the fact that the second named person on this

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27/ Leech, In the Days of McKinley, 559 (1959). The author ridicules the adequacy of the precautions taken; see also, Wilkie, American Secret Service Agent, 9-12 (1934).

28/ Leech, In the Days of McKinley, 231 (1959).

29/ Id. at 560.

list had recently been killed added to the apprehensions. 30/ The Secret Service did seize anarchists suspected of attempting to take McKinley's life. 31/

In spite of these threats, security arrangements were still quite lax since the President did not wish to be bothered by security precautions. 32/ However, the number of Secret Service guards was increased and a guard was supposed to accompany the President on all of his trips. 33/ The latter precautions, however, were not always taken. 34/

During McKinley's fatal visit to the Pan American Exposition at Buffalo, three Secret Service men accompanied him, and other

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30/ Id. at 559-561; Vizetelly, The Anarchists (1911); 35 Cong. Rec. 6461, 57th Cong., 1st Sess. (1902).

31/ New York Journal, 1 (Aug. 16, 1900).

32/ Leech, In the Days of McKinley, 559 (1959).

33/ Id. at 561; Dawes, A Journal of the McKinley Years, 239-240 (1950).

34/ Leech, In the Days of McKinley, 561 (1959).

precautions were taken. 35/ However, this was all to no avail since an anarchist named Czolgosz shot the President in a reception line.

One of the Secret Service men with the President commented,

> "It is incorrect, as has been stated that the least fear of an assault was entertained by the Presidential party. Since the Spanish War, the President has travelled all over the country and has met people everywhere. In Canton he walks to Church and downtown without the sign of Secret Service men of any kind as an escort. In Washington, he walks about the White House grounds, drives out freely, and has enjoyed much freedom from the presence of detectives. [At public receptions] it has been my custom to stand back of the President, and just to his left, so that I could see the right hand of every person approaching, but yesterday I was requested to stand opposite the President, so that Mr. Milburn could stand to the left and introduce people who approached . . ." 36/

The Secret Service also investigated the assassination to see if any plot was involved. 37/

After President McKinley's death, a regular Presidential detail was provided for President Roosevelt and security precautions became

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35/ Id. at 590; Chief Wilkie later testified that one secret service man was along with McKinley at the latter's request since they were friends. The Chief also said that on occasions of public functions, a detail was made of men to do guard duty. Hearings Before Subcommittee of House Committee on Appropriations in Charge of Sundry Civil Appropriations Bill for 1910, 226 (1909). Chief Wilkie's version as to the security precautions seems erroneous.

36/ Agent Ireland quoted in New York Evening Post (Sept. 7, 1901).

37/ Id.

much more systematic. 38/ The White House continued to be guarded by policemen from the regular Washington Police Force, and Secret Service agents were placed at the White House on a permanent basis. 39/ The President commented,

> "The Secret Service men are a very small but very necessary thorn in the flesh. Of course they would not be the least use in preventing any assault upon my life. I do not believe there is any danger of such an assault, and if there were, it would be simple nonsense to try to prevent it, for as Lincoln said, 'though it would be safer for a President to live in a cage, it would interfere with his business.' But it is only the Secret Service men who render life endurable, as you would realize if you saw the procession of carriages that pass through the place, the procession of people on foot who try to get into the place, not to speak of the multitude of cranks and others who are stopped in the village." 40/

The first Congress to meet after the assassination of McKinley convened on December 2, 1901. Seventeen bills were introduced

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38/ Bouck, A Report on Legislative Action Concerning Protection of the President (unpublished); The North American (Philadelphia, Sept. 4, 1902), and The Washington Times, (Sept. 4, 1902) (Accounts of President Roosevelt's carriage accident in which a Secret Service Agent was killed); Secret Service men accompanied President Roosevelt on his trip to Panama, Baughman, "Secret Service, 20 Encyclopedia Britannica 262 (1964).

39/ Wilkie, Hearings Before Subcommittee of House Committee on Appropriations in Charge of Sundry Civil Appropriations Bill for 1910, 227 (1909); Willets, Inside History of the White House, 183-189 (1908) (quotes from a magazine article describing the precautions taken during the public New Years reception).

40/ Letter to H. C. Lodge, Aug. 6, 1906, II Lodge Letters 224.

concerning the protection of the President, but none of them passed. The day that Congress opened, a joint resolution was introduced in the House of Representatives providing for an amendment to the Constitution making it treason to kill the President. 41/ The resolution died in committee. A bill proposing an amendment to the Constitution making it a federal crime to assault the President and other important federal officers was introduced, 42/ but it also died in committee.

The bill 43/ that received the most attention provided that whoever wilfully causes the death of or attempts to kill the President, the Vice-President or anyone upon whom the powers and duties of the President may devolve under law, or the leader of any foreign country shall be punished by death. The bill also provided for the punishment of anyone who instigated, advised, counseled or threatened the killing of the above named individuals. Finally it was provided that the Army should be in charge of protecting the President. The bill passed both the Senate and the House of Representatives but the two branches could not agree on amendments. Thus it died without becoming law.

41/ H. J. Res. 51, 57th Cong., 1st Sess. (1901).

42/ H. R. 220, 57th Cong., 1st Sess. (1901).

43/ S. B. 3653, 57th Cong., 1st Sess. (1901); H. R. 10386, 57th Cong., 1st Sess. (1901).

The House of Representatives insisted that in order for such an act to be Constitutional, it must provide that the unlawful act would be in the killing of the President and the others while they are engaged in the performance of their official duties or the killing must be because of their official acts or omissions. The House of Representatives' version also protected ambassadors of foreign governments and contained language directed specifically at anarchists. 44/

It was argued that Congress does not have the power to enact laws defining and punishing as crimes offenses against and assaults upon all officers of the United States simply because they are officers of the United States. This would infringe upon exclusive state jurisdiction. Congress can only punish offenses against officers of the United States when they are engaged in the performance of their official duties or when the assault is made because of their official character or because of an official act done or omitted. 45/ In answer to the argument that the President is always engaged in the performance of his official duties, various situations in which he might not be so engaged were hypothesized:

44/ H. Rept. 1422, 57th Cong., 1st Sess. (1902).

45/ Id. at 3.

> "They say should the President go into the State of New York, of which state he is a citizen, on private business, that while actively engaged in the transaction of that private business he would not be and could not be engaged in the performance of his official duties. They say that should a burglar (ignorant of the presence of the President and ignorant of his identity and official character) enter the chamber occupied by the President at night when so in New York on such private business, for the purpose of committing a larceny, and encountering him and meet resistance in attempting to escape, and in overcoming that resistance kill the President, it could not be said he was killed while engaged in the performance of his official duties." 46/

Thus, the House Judiciary Committee concluded,

> "If we make the act general in its terms, and the supposed case presents a time when the President is not engaged in the discharge of his official duties, the law would be unconstitutional for it takes into the net those we may constitutionally punish and those of whom we have no jurisdiction." 47/

Thus, the additional language was felt to be necessary. 48/

Even with the amendment making it a crime to kill the President because of his official character, there was some doubt as to how

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46/ Id. at 5.

47/ Id. at 10.

48/ 35 Cong. Rec. 2433, 3062, 57th Cong., 1st Sess. (1902).

this motive could be proven. 49/ Some suggested a presumption of such motive be written into the statute. 50/

There was opposition to the provision concerning a military guard. One lawmaker argued,

> "I would object on general principles that it is antagonistic to our traditions, to our habits of thought, and to our customs that the President should surround himself with a body of janizaries or a sort of pretorian guard, and never go anywhere unless he is accompanied by men in uniform and men with sabers as is done by the monarchs of the continent of Europe or as the King of Great Britain does with his household cavalry around him." 51/

There was some dispute as to the ability of the Secret Service to protect the President adequately, especially in light of the fact that McKinley was shot while three Secret Service men looked on. 52/

There were many arguments about the precise language and coverage of the bill, but there were some who objected to any kind of law in this area. Some felt that there was no reason to single out the President for special treatment and, moreover, such legislation would be undemocratic. "The murder of the humblest citizen in

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49/ Id. at 2954.

50/ Id. at 2491.

51/ Id. at 3049.

52/ Id. at 3050.

our land is just as heinous, just as felonious as that of the greatest or most distinguished." 53/ A states rights argument was invoked since it was felt not only that the states were perfectly competent to handle such crimes, but also that this law would involve a federal encroachment into areas previously left to the states. The opponents of the bill contended that it would not have any deterrent value because of existing state laws. 54/ Also mentioned were the usual problems involved in any matter subject to both federal and state jurisdiction. 55/

The bill was challenged also on constitutional grounds. Some suggested that the bill was an effort to create, in effect, a form of treason which the Constitution declares shall not be treason. 56/ It was argued that since the English statute, 57/ was considered and adopted only in part, 58/ the founding fathers, by leaving out the section making the murder of the king and his officers treason, meant to say that "when Congress come to enact laws prescribing a

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53/ Lanham, H. Rept. 433, 57th Cong., 1st Sess. (1902) (dissenting view); see "Views of the Minority," Sen. Rept. 1916, 58th Cong., 2nd Sess. (1904).

54/ Id.

55/ 35 Cong. Rec. 6357, 57th Cong., 1st Sess. (1902).

56/ 35 Cong. Rec. 2432, 57th Cong., 1st Sess. (1902).

57/ 25 Edward III C. 2.

58/ U. S. Const. Art. III § 3; V. Elliot's Debates 447.

punishment against any attempted overthrow of the Government, or any attempted destruction of any part of the governmental function, they should be confined to those particular acts and should not go beyond them." 59/

The main argument in favor of the bill was that it was necessary in order that there be uniformity of criminal procedure and uniformity and certainty of punishment. 60/ In other words, it was felt that such matters should not be left in the hands of the states. Additional bills along the same lines were introduced in the following few years, but none was successful. 61/

In 1903, a stringent immigration law aimed at excluding anarchists was finally passed. 62/ The Secret Service, as well as a number of other government agencies made investigations of

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59/ 35 Cong. Rec. 22, 2483, 57th Cong., 1st Sess. (1902).

60/ Id. at 2435.

61/ E. g., H. R. 3, 58th Cong., 1st Sess. (Nov. 9, 1903); S. B. 5093, 58th Cong., 2nd Sess. (March 16, 1904); S. B. 41, 59th Cong., 1st Sess. (Dec. 6, 1905); H. R. 4773, 60th Cong., 1st Sess. (Dec. 5, 1907).

62/ 32 Stat. 1213 (1903).

anarchist activities. During 1903, the Chief of the Secret Service toured Europe conferring with European police and national authorities in an effort to curb the anarchist threat. 63/

Since the 1890's, the Secret Service had been protecting the President without any statutory authority. The Chief of the Secret Service once stated that in order that men detailed to protect the President could be compensated, he had to falsely certify the payroll by stating that they were employed in activities authorized by law. 64/ The Chief urged the Congress to give the Secret Service authority to protect the President in order to relieve him of the necessity of committing perjury. 65/ In 1906, Congress finally authorized the Secret Service to protect the President in the Sundry Civil Expenses Act for 1907. 66/ Following the 1908 election, the Secret Service began protecting the President-elect, 67/ a practice

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63/ Bouck, A Report on Legislative Action Concerning Protection of the President, 427 (unpublished); Brooklyn Eagle, June 6, 1906.

64/ Unrecorded testimony of Chief Wilkie before the Subcommittee on the Sundry Civil Appropriation Bill as paraphrased in a letter from Rep. Tawney to Rep. Smith, 1908, in Bouck, A Report on Legislative Action Concerning the President, 419 (unpublished).

65/ Id.

66/ 34 Stat. 708 (1906).

67/ Wilkie, Hearings Before Subcommittee of House Committee on Appropriations in Charge of Sundry Civil Appropriations Bill for 1910, 225-226 (1909).

which received statutory authorization in 1913. 68/ Also in 1913, Congress permanently authorized protection for the President. 68a/

In the 1910 appropriation for the Justice Department, one item included under "Miscellaneous Objects" was "for the protection of the person of the President of the United States." 69/ In 1912, a representative from the Department of Justice was asked if the appropriation was used for the protection of the President of the United States; he answered, "We do not use it that way." 70/ This unexplained item has been included in every appropriation for the Justice Department (now in the appropriation for the Federal Bureau of Investigation). 71/ Apparently, neither the Federal Bureau of Investigation nor any other Justice Department agency has ever been directly involved in the protection of "the person of the President." 72/

68/ 38 Stat. 23 (1913).

68a/ 38 Stat. 23

69/ 36 Stat. 748 (1910).

70/ Hearings Before the Subcommittee of the House Committee on Appropriations - Sundry Civil Appropriation Bill for 1913, 1491 (1912).

71/ E. g., 76 Stat. 1086 (1962).

72/ But see Transcript of President Johnson's news conference, New York Times, 44 (March 1, 1964) in which it was reported that he said that the FBI and the Secret Service work closely together in connection with the President's security. According to the Secret Service, he actually said that the FBI turns over tips to the Secret Service, which is responsible for the President's security. Secret Service officials are also mystified by this FBI appropriation.

But see J. Edgar Hoover - in Wash Post - May 12

The protection of the President's immediate family was authorized in 1917. 73/ Also in 1917, a statute was enacted which made it a crime to threaten the President by mail or in any other manner. 74/ In 1918, Congress amended Immigration and Naturalization laws so as to provide for the expulsion of aliens who are members of anarchistic and similar classes (including "aliens who advocate or teach the assassination of public officials"). 75/ Thus, conduct after, as well as before, the admission was made significant. In 1952, Communists were also made excludable and deportable, as were those who advocated, or were members of an organization which advocated, the duty, necessity or propriety of unlawfully assaulting or killing any officer (either specific individuals or officers generally) of the Government of the United States because of his or their official character. 76/

73/ 40 Stat. 120.

74/ 39 Stat. 919, now Title 18, § 871; a similar bill died in Committee in 1916. S. B. 5120, H. R. 14425, 64th Cong., 1st Sess. A statute had been enacted in 1908 making it a crime to threaten murder or assassination by use of the mails. 35 Stat. 416.

75/ 40 Stat. 1012 (1918).

76/ 66 Stat. 184, 205 (1952); Title 8, § 1181, 1251; see generally Kessler v. Strecker, 307 U. S. 221, 3; 228 (1938) (history of earlier acts); note, 66 Harv. L. Rev. 643, 657, 687 (1953).

In 1919, the Secret Service spent a great deal of time and took many precautions in connection with Wilson's trip to Europe, which was the first time an American President had left the Hemisphere. 77/

The White House Police Force was created by an Act of Congress in 1922 78/ for the protection of the Executive Mansion and grounds. The Force was under the sole control of the President. The Executive Mansion had theretofore been policed by the Metropolitan Police. 79/ In 1930, supervision of the White House Police was assigned to the Secret Service. 80/ In 1962, Congress transferred the control and supervision of the White House Police from the Chief of the Secret Service Division to the Secretary of the Treasury and required the

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77/ See Tucker, Hearings Before the Subcommittee of the House Committee on Appropriations - Sundry Civil Appropriations Bill for 1920, (1919); Sterling and Sugrue, Starling of the White House C. 8, (1946). Previously, Secret Service men guarded Presidents in their travels throughout the hemisphere; e. g., President Roosevelt was protected on his trip to Panama. He was the first President to set foot on foreign soil while in office. Baughman, "Secret Service," 20 Encyclopedia Britannica 262 (1964); Taft was protected on his trip to Panama. Wilkie, Hearings Before Subcommittee of House Committee on Appropriations in Charge of Sundry Civil Appropriation Bill for 1910, 225 (1909).

78/ 42 Stat. 841.

79/ S. Rept. 760, 67th Cong., 2nd Sess. (1922).

80/ 46 Stat. 328.

Force to perform duties in connection with the protection of the White House and any building in which White House offices are located, and the protection of the President and his immediate family. 80a/ However, in the same year the Secretary of the Treasury delegated the function of supervising the White House Police Force to the Chief of the Secret Service. 80b/

In 1933, a bill was introduced in Congress making it a federal crime to assassinate or attempt to assassinate the President, Vice-President, President-elect, Vice-President-elect, and the candidates for President and Vice-President. 81/ The bill was

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80a/ 76 Stat. 95 (1962); the White House Police Force had performed protective duties in the White House areas of the Executive Office Building since 1959 under the authority of language appearing in annual appropriations acts. Letter from Secretary of Treasury Dillon to House Speaker McCormack, March 23, 1962, 1962 U. S. Code Cong. and Admin. News, 1672. Under previous law, the protective functions of the White House Force in the Executive Office Building was limited to the "White House area." Thus, only certain areas of the Executive Office Building were protected by White House Police. The remaining area was under the protection of guards of the General Services Administration. This act "further broadens the duties of the White House Police Force so as to increase its jurisdiction beyond the confines of a specific building in order to provide the necessary flexibility to meet future situations without amendment to the statute." H. Rept. 1626, 87th Cong., 2nd Sess. (1962). It should be noted that the White House Police also protect the President's other residences when the President is there. Ibid.

80b/ Treasury Order No. 177-21, "Delegation of Functions," July 5, 1962.

81/ H. R. 3896, 73rd Cong., 1st Sess. (1933).

introduced because of the attack upon President-elect Roosevelt in Miami in 1933. The bill died in committee.

The Smith Act of 1940, made it a crime, by word of mouth or in writing, to advocate, advise or teach the duty, necessity, desirability or propriety of overthrowing the Government of the United States or of any state of the United States by force or violence or by the assassination of any officer of any such government. 82/

Naturally, during World War II, added precautions were taken in protecting the White House. 83/ The Secret Service was also faced with unprecedented problems in protecting the President during his wartime trips to foreign countries. 84/ Also during this period, the Secret Service established the Protective Research Section, which investigates threatening letters sent to the White House. 85/

82/ 54 Stat. 670, now Title 18, U. S. Code, § 2385.

83/ Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ending in 1942, 199.

84/ Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ending in 1943, 277; 1944, 260; 1945, 244; Reilly and Slocum, Reilly of the White House (1947).

85/ Holverstott, Preliminary Inventory of the Records of the United States Secret Service 2 (1949) found in National Archives, Preliminary Inventory.

The security work of the Secret Service was intensified with the opening of the White House to the public on November 14, 1946. 86/

In 1951, Secret Service protection of the President was finally permanently authorized. 87/ Theretofore the function was carried out by virtue of the authority contained in the annual appropriation acts. The statute, in addition to providing for the protection of the President, his immediate family, and the President-elect, also provided for protection of the Vice-President upon his request. The protection of the Vice-President is believed to have been undertaken for the first time in January of 1945. 88/

In 1962, Congress authorized the protection of the Vice-President without requiring his request therefor, (or other officer next in the order of succession to the office of President); of the Vice-President-elect; and of a former President at his request, for

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86/ Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ending in 1947, 142. See 67 Time 23 (April 16, 1956) for the story of a woman who set fires in the White House. When questioned, she explained that she had a lot of trash and wanted to burn it.

87/ 65 Stat. 122, Title 18, U. S. C. A. § 3056.

88/ Holverstott, Preliminary Inventory of the Records of the United States Secret Service, 2 (1949) found in National Archives, Preliminary Inventory.

a reasonable period after he leaves office. 89/ As for the former President, a "reasonable period" has been thought to be six months after he leaves office. 90/ The Senate Judiciary Committee suggested that the protection of the former President be limited to protection of his person and not of his property. 91/

With the increase in the number of people to be protected, the threat statute was amended so that it is now a crime to threaten to harm the President, the President-elect, the Vice-President or other officers next in the order of succession to the office of President, or the Vide-President-elect. 92/ The threat statute does not include members of the President's immediate family.

The recent travels of the President abroad have created a number of security problems. The Secretary of the Treasury reported,

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89/ 76 Stat. 956, 18 U. S. C. A. 2056.

90/ Testimony of Chief of the Secret Service before Subcommittee of the House Committee on the Judiciary as quoted in S. Rept. 836, 87th Cong., 2nd Sess. (Aug. 30, 1961).

91/ S. Rept. 836, 87th Cong., 2nd Sess. (Aug. 30, 1961).

92/ 18 U. S. C. A. § 871.

> "The extensive travel within the period of one year to farflung lands with varying customs and traditions, language barriers, and in some instances unrest among segments of the populace, entail unprecedented problems of security." 93/

Following President Kennedy's assassination, 36 bills were introduced at the current session of Congress involving the protection of the President and the making of the assassination of the President a federal crime. 94/

There are several autobiographies of Secret Service men who have protected Presidents 95/ and many magazine articles on the subject. These all provide interesting accounts of the actual mechanics of Presidential protection. 96/

It is interesting to note that the Secret Service is having great difficulty with Speaker McCormack. He refuses to be protected. As to what steps the Secret Service is now taking in this connection, I do not know.

93/ Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ending in 1960, 162.

94/ Commission Document 456.

95/ E. g., Baughman and Robinson, Secret Service Chief (1961); Reilly and Slocum, Reilly of the White House (1947); Starling and Sugrue, Starling of the White House (1946).

96/ See also, Secret Service School, Principles of Protection of the President and Other Political Dignitaries (1954) for a discussion of the whole area.

April 2, 1964

TO: Mr. Stern

FROM: Richard Mosk

RE: History of the Secret Service

HISTORY OF THE SECRET SERVICE

The Secret Service Division of the Treasury Department officially began in 1865. 1/ In 1860, Congress appropriated $10,000 to be spent under the direction of the Secretary of the Treasury "for the detection and bringing to trial of persons engaged in counterfeiting the coin of the United States." 2/ Before 1860, United States Marshals and United States District Attorneys (as they

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1/ Holverstott, Preliminary Inventory of the Records of the United States Secret Service (1949) contained in U. S. National Archives, Preliminary Inventory 4-19. [hereinafter cited as Holverstott]; the name "secret service" is usually associated with espionage and related subjects. See e.g., Rowan, The Story of the Secret Service (1937). Our Government always had some organization which could be termed a "secret service." Poore, "Government Secret Service," 7 Chautauqua 210, 213 (1886); Report of the Chief of the Secret Service for the Year 1889, 3. Several organizations existed during the Civil War under the State Department and the War Department which were called "the Secret Service," but they were concerned mainly with espionage. See Milton, Abraham Lincoln and the Fifth Column, 48 (1942); Pinkerton, The Spy of Rebellion 245-247 (1883); Pinkerton, Rochester N.Y. Post Express (July 1, 1898); Baker, History of the United States Secret Service (1867). It has been said, however, that the "Secret Service" in the War Department at that time did deal with counterfeiting and frauds. Id. at 253-307, 378-383. Apparently there was no connection between these wartime organizations and the organization established under the Treasury Department. Bowen, United States Secret Service, a Chronicle, 4 (unpublished).

2/ 12 Stat. 102 (1860). In 1857 Congress passed a joint resolution appropriating some money for the Treasury Department to look into a device to prevent counterfeiting 11 Stat. 254. In 1860, an appropriation of $5,000 was made by Congress to be expended under the resolution. 12 Stat. 83 (1860).

were then called) were apparently the only Federal officials authorized to arrest violators of the counterfeiting laws. 3/ Much of the money appropriated was doled out as rewards to private detectives, municipal officers and others instrumental in the apprehension of counterfeiters. 4/ However, there was an "Acting Agent for United States Treasury in Detecting Frauds of Government Securities" who supervised the operations of agents employed under the appropriation. 5/

In 1864, Congress appropriated $100,000 for the following fiscal year to be applied "in detecting and bringing to trial and punishment persons engaged in counterfeiting treasury notes, bonds, or other securities of the United States, as well as the coin of the United States." 6/ Under this increased appropriation, a staff of agents was employed and a Secret Service Division headed by a chief was organized in the Solicitor's Office. 7/ The headquarters was

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3/ Holverstott at 1.

4/ Moran, "The Secret Service," 27 New England Magazine 753 (1902).

5/ Holverstott at 1.

6/ 13 Stat. 351.

7/ Holverstott at 1; Report of the Chief of the Secret Service for the Year 1889, 8. In his 1864 Report the Solicitor said that he was put in charge of the Suppression of Counterfeiting, Report of the Secretary of Treasury on State of the Finances for the Year 1864, 87. It was not until the report of 1866 that the Solicitor actually mentioned the Secret Service Division. Report of the Secretary of Treasury on State of the Finances for the Year 1866, 183.

established in Washington and field offices were soon established in other cities. 8/

Apparently the agents (known as "operatives") at that time were, for the most part, appointed to look after special cases, and they were dropped from the rolls when such cases were finished. Much of the appropriation continued to be paid to informers as rewards. 9/

The Secret Service Division remained in the Solicitor's Office even after the transfer of that office from the Treasury to the newly created Department of Justice in 1870. 10/ This strange situation of a Treasury Department agency being under an officer of the Department of Justice was clarified in 1879 when the Solicitor became a legal adviser to the Chief of the Secret Service Division and the Assistant Secretary of the Treasury became the supervisor. 11/ The Annual Report of the Chief of the Secret Service continued to

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8/ Baughman, "Secret Service," 20 Encyclopedia Britannica 262 (1964).

9/ Report of the Chief of the Secret Service for the Year 1889, 8. For a different and more colorful account of the operations of the newly organized Secret Service see Bowen and Neal, The United States Secret Service Ch 2 (1960).

10/ 16 Stat. 162 (1870); Report of Solicitor of the Treasury, Report of the Secretary of Treasury on State of the Finances for the Year 1870, 283; Holverstott at 1.

11/ Holverstott at 1.

be submitted to the Solicitor through the fiscal year 1883, but only as a formality and for transmittal to the Secretary of the Treasury. 12/

From 1869 to 1874, the Chief of the Secret Service maintained his headquarters in New York City. This was probably due to the investigations at the New York Custom House. 13/ The office was then re-established in Washington, D. C. 14/

Statutory recognition was finally accorded the Secret Service Division in the Appropriation Act for the fiscal year 1883. 15/ This was probably due to the fact that a statute enacted in 1882 16/ required specific appropriations to be made for the salaries of all persons employed in the executive departments in Washington. 17/

12/ Holverstott at 1; see e.g. Report of the Secretary of the Treasury on State of the Finances for the Year 1875, 601-602.

13/ Holverstott at 1; see letters sent from Headquarters of the Chief, New York City, Records of Secret Service, National Archives, Record Group 87; Report of the Secretary of Treasury on State of the Finances for the Year 1875, 602.

14/ Holverstott at 1.

15/ 22 Stat. 230.

16/ 22 Stat. 255.

17/ See Sen. Rept. 970, 60th Cong., 2d Sess. 4 (1909). The Division was placed under Civil Service rule upon the President's order in 1876. Report of the Secret Service for the Year 1896, 11.

Unlike other investigative forces in the government at that time, the Secret Service did not confine itself to one particular area, but took cognizance of any fraud upon the government. 18/ As early as 1873, the Secret Service was described as "a gigantic machine, having its ramifications everywhere." 19/

The appropriation statutes defining Secret Service activities varied. In 1880, the appropriation was "for detecting and bringing to trial and punishment of persons engaged in counterfeiting treasury notes, bonds, national bank notes and other securities of the United States and other crimes against the Government, and for no other purpose whatsoever . . ." 20/ In 1882, it read " . . . and other felonies committed against the law of the United States relating to the pay and bounty laws, and for no other purpose whatever." 21/ The appropriation acts for many years thereafter were similar to the one of 1882. 22/ That the Chiefs of the Secret Service disapproved

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18/ Bagger, "The 'Secret Service' of the United States," 10 Appleton's Journal 360-1 Sept. 20, 1873; Report of the Chief of the Secret Service for the Year 1889, 8.

19/ Ibid.

20/ 20 Stat. 384

21/ 22 Stat. 313

22/ See Sen. Rept. 970, 60th Cong., 2nd Sess. 4 (1909).

of this restrictive language was indicated by their attempts to include in the appropriation acts the language, "and other felonies committed against the laws of the United States. . . " 23/

In spite of this restriction, Secret Service activities continued to proliferate. The Chief of the Secret Service declared in 1889:

> "Restricted as we are by the form in which the appropriations are made, if agents were content to abide merely by the letter of the law, they would never be able to bring a criminal to justice. To their honor be it said, however, that they interpret their duty by the spirit and not the letter, and often in the pursuit of frauds spend money from their own slender purses to protect the Government from robbery, when they realize that the statute of appropriation cannot be stretched to embrace the outlay, and have no hope of reimbursement." 24/

In view of this attitude, the Secret Service dealt with a multitude of crimes including counterfeiting, smuggling, bribery, perjury, robbing the mails, larceny of government property, obtaining money by false pretenses, having possession of unstamped securities, cutting and removing timber from United States lands, using cancelled revenue stamps, assault on the high seas, selling liquor without a United States license, illicit distilling, illegal voting, impersonating an officer, embezzlement of Government money, violations of

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23/ Report of the Chief of the Secret Service for the Year 1888, 10.

24/ Report of the Chief of the Secret Service for the Year 1889, 8.

naturalization laws, unlawful acts of bank officers, presenting fraudulent claims, illegal activities of Ku Klux Klan members, and the conspiracy to steal the remains of Abraham Lincoln from the tomb in Springfield, Illinois. 25/

In 1898, a special fund was placed at the disposal of the Secretary of the Treasury by the President to be used to augment the Secret Service for counter-espionage activities during the war. 26/ "Hundreds of cases referred by the War Department were investigated, and, as a result of careful and conscientious work of the operatives, the spy system inaugurated by Spanish agents was disorganized, emissaries in this country arrested, and the principals, who had been sheltering themselves in Canada, were ordered to leave the country." 27/

From an early date, the Secret Service detailed agents to make special investigations for other departments of the Government, the pay and expenses of the agent being defrayed by the department

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25/ Bowen, History of the Secret Service, 193 (unpublished) and Reports of the Chiefs of the Secret Service quoted therein; Reports of the Chiefs of the Secret Service 1888-1900; Ottenberg, The Federal Investigators 275 (1962); Whitley, In It (1894); Burnham, Memoirs of the Secret Service (1872); Bowen and Neal, The United States Secret Service 27-35 (1960) (account of the plot to steal Lincoln's body).

26/ Report of the Chief of the Secret Service for the Year 1898, 8.

27/ Annual Report of the Secretary of the Treasury on the State of Finances for the Year 1898, 866.

requesting the service. [28] This practice increased markedly after the turn of the century. [29] Apparently the Secret Service was the only Government Agency equipped to do criminal investigation work at that time. [30] Some of the more important special investigations concerned the "Whiskey Ring" and the "Louisiana Lottery" in the 1870's; other lottery and liquor violations; irregularities in the navy-yards; filibustering expeditions against friendly nations; sugar, naturalization, and Western land frauds. [31]

This practice somehow alienated Congress. Whether this was due to the repercussions of the "Beef Trust" investigation that involved Chicago packing houses [32] or to the investigation of land

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28/ Report of the Chief of the Secret Service for the Year 1898, 6.

29/ Hearings Before the Subcommittee of the House Committee on Appropriations in Charge of Sundry Civil Appropriations Bill for 1909, 185-94 (1908).

30/ Hearings Before the Subcommittee of the House Committee on Appropriations in Charge of Sundry Civil Appropriations Bill for 1922, 290 (1921).

31/ Holverstott at 2; Hearings Before the Subcommittee of the House Committee on Appropriations in Charge of Sundry Civil Appropriations Bill for 1909, 185-94 (1908); Special Message of the President of the United States on January 4, 1909, House Doc. 1255, 60th Cong., 2nd Sess. (1909). The latter reports many other instances in which Secret Service Agents were detailed to other Departments. See Id. at 29-30.

32/ Holverstott at 2.

frauds which resulted in the prosecution of some Congressmen [33] is not certain. Congress apparently felt that the Secret Service was being improperly used and thus they enacted an amendment to the appropriation bill for the fiscal year ending in 1909 which provided:

> "No part of any money appropriated by this act shall be used in the payment of compensation or expense of any person detailed or transferred from the Secret Service of the Treasury Department or (and) who may at any time during the fiscal year nineteen hundred and nine have been employed by or under said Secret Service division." [34]

Some Congressmen had argued that it was against their traditional policy to provide for a general secret service, and that they did not want the Secret Service to investigate other Government officers for private and political matters. [35] President Roosevelt delivered a scathing speech to Congress in 1908 in which he said, "It is not too much to say that this amendment has been of benefit only, and could be of benefit only, to the criminal classes . . . The chief argument in favor of the provision was that the Congressmen did not themselves wish to be investigated by Secret Service men." [36]

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[33] Bowen and Neal, The United States Secret Service, 76-83 (1960).

[34] 35 Stat. 328.

[35] 42 Cong. Rec. 5553-60, 60th Cong., 1st Sess. (1908); 91 Outlook 57, 513-15 (1909).

[36] 43 Cong. Rec. 24, 60th Cong., 2nd Sess. (1908).

Members of Congress were disturbed by what they considered to be an attack on their integrity. 37/ The President responded 38/ that while Congress had misinterpreted him, he did not favor the retention of the restriction. Congress, however, again enacted the restriction. 39/ In the following year, Congress provided that the Secretary of the Treasury could only use four agents from the Secret Service in connection with the enforcement of laws relating to the Treasury Department. 40/ It should be noted that these limitations on the activities of the Secret Service were responsible for the creation of the Federal Bureau of Investigation. 41/

The Secret Service was not again permitted to lend agents to other departments until World War I when it was allowed to detail

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37/ See e. g. H. Res. 459, 60th Cong., 2nd Sess. (1909); 43 Cong. Rec. 373, 645, 60th Cong., 1st Sess. (1909).

38/ Special Message of the President of the United States Communicated to the House of Representatives on January 4, 1909, House Doc. 1255, 60th Cong., 2nd Sess. (1909).

39/ 35 Stat. 968; See scrapbook of newspaper clippings for 1905-8 covering the controversy between Roosevelt and Congress over the Secret Service in Newspaper Clippings for Secret Service, National Archives, Record Group 87.

40/ 36 Stat. 713 (1910).

41/ Whitehead, The F. B. I. Story, 19 (1956); Moran, Hearings Before Subcommittee of House Committee on Appropriations in Charge of the Sundry Civil Appropriations Bill for 1922, 291 (1921).

agents to the State Department. The President was also "authorized to direct, without reference to existing limitations, the use of the persons employed hereunder if, in his judgment, an emergency exists which requires such action." 42/ Agents then conducted investigations for the War Trade Board, the Food Administration and other departments. 43/ The Secret Service was specifically authorized by Congress to detect and arrest violators of the Farm Loan Act 44/ and of the War Finance Corporation Act. 45/ As early as 1915, President Wilson had ordered the Secret Service to engage in counter-espionage activities and in other State Department matters. 46/

After the War, the President was no longer authorized to use the Secret Service, and again the Secret Service was forbidden to detail agents to other departments with the exception of the State Department. 47/

42/ 40 Stat. 120 (1917); 40 Stat. 643 (1918).

43/ Holverstott at 2.

44/ 39 Stat. 384 (1916).

45/ 40 Stat. 512 (1917).

46/ Bowen and Neal, The United States Secret Service, 83-92 (1960); Also to uncouver violations of neutrality laws, see also Baughman, "Secret Service," 20 Encyclopedia Britannica 262 (1964).

47/ 41 Stat. 174 (1919).

In 1922, the specific language preventing the detailing of agents was removed; however, the appropriation statute was narrowly drawn. It provided that the appropriation was for,

> " . . . detecting, arresting, and delivering into the custody of the United States Marshal having jurisdiction dealers and pretended dealers in counterfeit money and persons engaged in counterfeiting, forging, and altering United States notes, bonds, national-bank notes, Federal Reserve notes, Federal Reserve Bank notes, and other obligations and securities of the United States and of foreign Governments, as well as the coins of the United States and of foreign Governments, and other crimes against the laws of the United States relating to the Treasury Department and the several branches of the public services under its control . . . and for no other purpose whatever except in the protection of the person of the President and the members of his immediate family and of the person chosen to be President of the United States." 48/

This was generally the way Secret Service jurisdiction was defined in the appropriation acts until the 1951 act. 49/ The probable reason for the removal of the restriction was to allow Secret Service men to investigate irregularities within the Treasury Department. 50/

48/ 42 Stat. 379 (1922).

49/ E. g., 63 Stat. 362 (1949).

50/ Hearings Before Subcommittee of House Committee on Appropriations in Charge of the Sundry Civil Appropriations Bill for 1922, 290-91 (1921); also the clause deprived a Secret Service man the right of being employed anywhere in the Government service where the payment of his salary came from an appropriation carried in the Sundry Civil Act. Id. at 297.

As has been pointed out, prior to this date, the Secret Service was authorized to detail only four men to enforce the laws relating to the Treasury Department. 51/

The Secret Service was called upon to take part in investigations connected with the Teapot Dome Scandal of the 1920's. 52/ During the 1930's, pursuant to legislation, the Secret Service investigated violations of the World War Adjusted Compensation Act, the Farm Loan Act, the Gold Reserve Act, the Adjusted Compensation Act, the Federal Reserve Act, and also cases involving the Work Progress Administration. 53/

During World War II, Secret Service activities spread. 54/ For example, agents cooperated with investigators of the Office of Price Administration in detecting and arresting persons who manufactured, used, or distributed counterfeit ration stamps. 55/

51/ See, e. g., 41 Stat. 1374 (1921).

52/ Bowen and Neal, The United States Secret Service, ch. 11 (1960).

53/ Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ending 1936, 207; 1939, 219.

54/ Holverstott at 2.

55/ Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ending in 1944, 258.

Also, President Roosevelt unofficially asked Secret Service men to obtain information on various matters for him. 56/

Following the attack on Pearl Harbor, the Secret Service and other Treasury agents cooperated with the Foreign Funds Control Unit of the Treasury Department in handling improper activities and in freezing and guarding the assets of the enemy. 57/

In December of 1941, Secret Service Agents were detailed to protect the originals of the Constitution of the United States, the Declaration of Independence, the Articles of Confederation, the Lincoln Cathedral copy of the Magna Carta, the Gutenberg Bible, the first and second autographed drafts of Lincoln's Gettysburg Address and his Second Inaugural address during their transportation to Fort Knox. 58/ Agents were detailed for the protection of such items as the United Nations Charter when it was flown to Washington, 59/ the diamond-studded ivory baton of Goering, and the original German surrender documents, which, with other valuables, were exhibited in

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56/ Interview with Agent Moore, March 19, 1964.

57/ Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ending in 1942, 199.

58/ Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ending in 1945, 244.

59/ Ibid.

various cities of the country by the War Finance Division. [60] Shortly after the War, a uniformed detail was assigned to the Tudor Press in Boston to protect currency being produced there for the Government of Siam. [61] Just last year at the request of President Kennedy, the Secret Service protected the "Mona Lisa," which was on loan from the French Government for exhibition in this country.

Finally, in 1951, Congress enacted a permanent legislation defining the duties of the Secret Service. [62] For the most part, the statute was a restatement of existing Secret Service authority. Previously, the Secret Service had derived its authority from annual appropriation acts. Thus, prior to 1951, the Secret Service's legal authority was subject to a point of order. The statute authorized such activities as the protection of the President and others, detection and arrest of any person violating offenses related to Treasury Department activities, and the apprehension of violators of a number of specified provisions. [63]

60/ Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ending in 1946, 252.

61/ Ibid.

62/ 65 Stat. 122 (1951).

63/ See appendix.

The statute also provided the Secret Service with the authority to execute arrest warrants and the authority to carry firearms. Prior to this provision agents did not have the power to serve arrest warrants and it was necessary for them to rely upon United States Marshals for this purpose. Agents had always carried firearms; it was believed that the authority to do so was necessarily implied from their general arrest and enforcement powers. 64/

There was apparently a great deal of difficulty in defining the jurisdictional scope of Secret Service investigatorial power so as not to infringe upon that of the Federal Bureau of Investigation. 65/ Finally, it was decided to provide that the Secret Service would "detect and arrest any person violating laws of the United States directly concerning official matters administered by and under the direct control of the Treasury Department." 66/

In 1954, the statute was amended to strike out the language "detect and arrest . . . under the direct control of the Treasury

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64/ H. Rept. 465, 82nd Cong., 1st Sess., 2 (1951).

65/ Statement of E. H. Foley, Under Secretary of the Treasury, Testimony Before Subcommittee Number 3 of the House Committee on the Judiciary on H. R. 2395 (1951) (unpublished).

66/ 60 Stat. 122 (1951).

Department." 67/ This amendment was to further clarify the jurisdictions of the Secret Service and the Federal Bureau of Investigation. Apparently the actual scope of Secret Service investigations remained the same. 68/ The Department of Justice and the Department of the Treasury then drafted a "Memorandum of Understanding" relating to the investigation of alleged irregularities involving personnel of the Department of the Treasury. 69/

The Memorandum provided that the Federal Bureau of Investigation has the authority to investigate any offense involving officers or employees of the Treasury Department or its constituent agencies. However, the Treasury Department was still left with the jurisdiction to handle character investigations of its employees or to investigate the conduct of its employees where there is no information furnishing reasonable grounds for believing that an offense against the United States has been committed or where the offense is

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67/ 68 Stat. 999 (1954).

68/ Directive from Secretary of the Treasury Humphrey to Heads of Treasury Bureau, September 13, 1954.

69/ Memorandum of Understanding Between the Department of Justice and the Department of the Treasury in Connection With Public Law 725, 83rd Congress, Approved August 31, 1954, and Relating to the Investigation of Alleged Irregularities Involving Personnel of the Department of the Treasury (1955) (unpublished).

of such a relatively minor nature that internal administrative investigation and action are normally indicated. Any doubt as to whether a particular matter may be within the investigative responsibility of the Federal Bureau of Investigation would be resolved by the Attorney General. Thus, if the Secret Service learns that a Government employee has committed an offense such as fraud, bribery, or theft of Treasury Department property, no investigation will be made by the Service, except in cases of Secret Service personnel, and such offenses are to be reported to the Attorney General. 70/

If the Secret Service receives an allegation that a Secret Service employee has committed fraud, bribery, or theft of Treasury Department property, the Secret Service investigates to see whether the charge is true or not, but the allegation must still be reported to the Attorney General. If the Secret Service learns that a Government employee violated the Government Losses on Shipment Act, the Gold Reserve Act, or the Silver Purchase Act, the Service will make a prompt investigation and also make a report to the Attorney General. Offenses specified in Title 18, Section 3056, even though committed by Government employees, need not be reported to the Attorney General. 71/

70/ Instructions (Revised) to Secret Service Personnel Incident to Public Law 725, 83rd Congress (1955).

71/ Directive from Secretary of the Treasury Humphrey to Heads of Treasury Bureau, September 13, 1954.

It has been argued that the legislative history of the amendment "leaves no doubt that each agency has authority to investigate misconduct by its employees." While one purpose of that law was to confirm the authority of the Federal Bureau of Investigation (although apparently no one questioned it) to investigate allegations of violations by employees of any agency of provisions codified in Title 18 of the United States Code, "the real and affirmative purpose of the law was to provide a reporting requirement which would enable the Federal Bureau of Investigation to use its authority." 72/

Following the amendment, investigations of thefts and shortages at the Bureau of Engraving and Printing have been made by the Federal Bureau of Investigation, although this duty had previously been performed by the Secret Service. 73/

It is interesting to note that it remains unclear who would investigate if bribery or corruption took place in the Justice Department. 74/ (E. g., Agent Hosty?) It has been suggested that a solution might be to call in the Secret Service. In 1954, the Secretary of the Treasury transferred to the Secret Service the function of making any investigation required to carry out the

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72/ Letter from Mr. David Kendall, Acting Secretary of the Treasury to Assistant Attorney General J. Lee Rankin, May 9, 1956.

73/ Bowen and Neal, The United States Secret Service 193 (1960).

74/ Testimony before Subcommittee Number 3 of the House Committee on the Judiciary, 82nd Congress, 1st Session (1951).

responsibility of any bureau, office or division of the Treasury Department which does not regularly make investigations, including investigations required in the administration of the Government Losses in Shipment Act, the Gold Reserve Act and the Silver Purchase Act, except where the responsibility for performing an investigation has been specifically assigned to some other office. 75/

Additional responsibilities of the Secret Service Division have been dependent upon the bodies under its control. In 1930, the White House Police Force came under Secret Service supervision. 76/ In 1962, Congress transferred the control and supervision of the White House Police to the Secretary of the Treasury, 77/ but the Secretary then delegated this duty back to the Secret Service. 78/ In 1937, the jurisdiction and responsibility for the activities of the entire guard force of the Treasury Department, operating in Washington, D. C., were vested in the Chief of the Secret Service. 79/ In 1953, the

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75/ Treasury Department Order No. 173-1, September 14, 1954.

76/ 46 Stat. 328.

77/ 76 Stat. 95 (1962).

78/ Treasury Order No. 177-21, "Delegation of Functions," July 5, 1962.

79/ Treasury Department Order No. 15, April 13, 1937.

uniformed guard force which protects the Bureau of Engraving and Printing which had theretofore been operated under the supervision of the Chief of the Secret Service, was transferred to exclusive jurisdiction of the Director of the Bureau of Engraving and Printing. By direction of the Secretary of the Treasury, the Secret Service makes periodic inspections of the guards at the Bureau of Engraving and Printing and also at the United States mints and assay office. 80/

Thus, in addition to the duties proscribed in Title 18, Section 3056, the Secret Service has supervision over the uniformed White House Police Force, responsible for protection of the White House and the Executive Office Building, and it has supervision over the uniformed Treasury Guard Force, responsible for protection of the Treasury Building, in which is stored large quantities of currency and securities.

The Secret Service investigates Treasury Department personnel, tort claims involving Treasury Department personnel, and other non-criminal cases as directed by the Secretary of the Treasury. 81/

80/ Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ending in 1953.

81/ Hearings Before the Subcommittee of the Committee on Appropriations, United States Senate, 88th Cong., 1st Sess. on H. R. 5366, Treasury - Post Departments and Executive Office Appropriation for 1964, 369 (1963).

It also performs a number of services aimed at the prevention of counterfeiting and forgery of currency, checks, bonds and other obligations of the Government. These measures include lectures by special agents, exhibits, pamphlets, circulars and educational films and books. 82/

We have discussed Secret Service protective activities in connection with United States officials elsewhere. At an early date, the Secret Service protected foreign dignitaries who visited the United States. 83/ For example, in 1906, the Secret Service provided protection to representatives of foreign governments who were here to conclude a treaty of peace between Russia and Japan. 84/ From time to time, protection also has been accorded to certain ambassadors while travelling through this country. 85/

The Secret Service protected such visitors as the King and Queen of Great Britain, 86/ President Osmena of the Philippines,

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82/ Baughman, "Secret Service," 20 Encyclopedia Britannica 263 (1964).

83/ Newark News, September 4, 1906; Report of the Chief of the Secret Service for the Year 1911, 70.

84/ Holverstott at 3.

85/ Ibid.

86/ Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ending in 1939, 220.

Madame Chiang Kai Shek, Princess Juliana of Holland, Crown Prince Olaf and his family, Winston Churchill and many others. 87/

The Secret Service had no authority to protect foreign visitors. Apparently the State Department has always been considered responsible for this activity because it was the federal agency concerned with maintaining relations with foreign governments. 88/ However, since the State Department was not equipped to handle such protective activity, local police and the Secret Service had to be relied upon. 89/

In 1955, Congress authorized certain officers and employees of the Department of State and the foreign service to carry firearms, "for the purpose of protecting heads of foreign states, high officials of foreign governments and other distinguished visitors to the United States, the Secretary of State and the Under Secretary of State, and official representatives of foreign governments and of the United States attending international conferences or performing special missions." 90/

87/ Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ending in 1945, 244; The United States Secret Service, What It Is, What It Does, 2 (1956).

88/ H. Rept. 468, 84th Cong., 1st Sess., (1955).

89/ H. Rept. 552, 84th Cong., 1st Sess., (1955).

90/ 69 Stat. 188 (1955).

From this authorization, it has been assumed that the State Department has full responsibility for the protection of foreign dignitaries. 21/ Thus, the Secret Service is no longer involved. However, whenever the President and the foreign dignitary are to be together, the Secret Service and the State Department Security Division work closely together in protecting both visitor and host. 22/

With variations in its duties and due to attempts at greater efficiency, the Secret Service has undergone administrative changes. During the 1930's, Secretary of the Treasury Morgenthau sought to consolidate all Treasury enforcement agencies (the Secret Service, the Bureau of Narcotics, the Customs Bureau, the Alcohol and Tobacco Tax Division and the Intelligence Division of the Internal Revenue Service) into one big enforcement group. 23/

21/ H. Rept. 468, 84th Cong., 1st Sess., (1955).

22/ Bowen and Neal, The United States Secret Service, 127 (1960); A bill has been introduced in both Houses of Congress this session to make it a federal crime to assault certain foreign diplomatic and other official personnel. It also provides that Security Officers of the Department of State and the foreign service are empowered to make arrests of persons suspected of committing or having committed such a violation. H. R. 7651 and Sen. 1917, 88th Cong., 1st Sess., 1963.

23/ Bowen and Neal, The United States Secret Service, 171 (1960); Hearings Before the House of Representatives Committee on Ways and Means on H. R. 11452, 74th Cong., 2nd Sess., February 28, 1936.

Apparently Congress was not convinced that such a consolidation would be any more efficient or economical than the existing set-up. Thus, the Secretary's plan was not enacted. 24/ Morgenthau did realign the district boundaries of the various agencies in the field so that each agency covered the same territory. Furthermore, a "coordinator" for all Treasury enforcement agencies was established. 25/ This coordinator is not "over" the Chief of the Secret Service. His job is to coordinate the activities of the various enforcement agencies in areas where there might be some overlapping.

The operations of the Secret Service are directed by the Chief of the Service who is appointed by the Secretary of the Treasury. The post of Chief is a career position. The Chief is immediately responsible to an Assistant Secretary of the Treasury.

The activities of the Service are administered through four divisions: Investigations Division, Inspection Division, Administrative Division, and Security Division. An Assistant Chief is responsible for the direction of all security activities of the Secret Service. The Security Division also supervises the White House Police Force and the Treasury Guard Force. There is a Special

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24/ Bowen and Neal, The United States Secret Service, 171 (1960).

25/ Ibid.

Agent in Charge of the White House Detail who directs activities in connection with the protection of the President.

The Secret Service now has about sixty-five field offices in various cities throughout the country. Each field office is under the direction of a Special Agent in Charge who reports directly to the Chief. For administrative purposes, these field offices are divided into four regions, each supervised by an Inspector with headquarters in Washington.

APPENDIX

18 U.S.C. 3056

Subject to the direction of the Secretary of the Treasury, the United States Secret Service, Treasury Department, is authorized to protect the person of the President of the United States, the members of his immediate family, the President-elect, the Vice President or other officer next in the order of succession to the office of President, and the Vice President-elect; protect a former President, at his request, for a reasonable period after he leaves office; detect and arrest any person committing any offense against the laws of the United States relating to coins, obligations, and securities of the United States and of foreign governments; detect and arrest any person violating any of the provisions of sections 508 and 509 of this title and, insofar as the Federal Deposit Insurance Corporation, Federal land banks, joint-stock land banks and Federal land bank associations are concerned, of sections 218, 221, 433, 493, 657, 706, 1006, 1007, 1011, 1013, 1014, 1907, and 1909 of this title; execute warrants issued under the authority of the United States; carry firearms; offer and pay rewards for services or information looking toward the apprehension of criminals; and perform such other functions and duties as are authorized by law. Moneys expended from Secret Service appropriations for the purchase of counterfeits and subsequently recovered shall be reimbursed to the appropriation current at the time of deposit.

Here are brief descriptions of the Federal offenses covered by the statutes listed by number in Section 3056:

508. Falsely making, forging, altering, or counterfeiting Government transportation requests, or passing or selling such false, forged, altered, or counterfeited transportation requests.

509. Making or selling prints, photographs, or impressions in the likeness of Government transportation requests; making or possessing plates in the likeness of plates for printing transportation requests.

The following sections of Title 18 are enforced by the Secret Service only so far as the Federal Deposit Insurance Corporation, Federal land banks, joint-stock land banks and national farm loan associations are concerned:

218. Acceptance of loan or gratuity by farm credit examiner or by examiner of Federal Reserve member banks insured by Federal Deposit Insurance Corporation.

221. Acceptance of unauthorized fees or gifts by Federal land banks, joint-stock land banks or national farm loan associations or by their employees.

433. This section provides that sections 431 and 432, relating to contracts with the Government by members of

Congress, shall not apply to contracts under the Federal Farm Loan Act and certain other laws.

493. Falsely making, forging, counterfeiting, or altering obligations of the Federal Deposit Insurance Corporation, land banks, or certain other lending agencies.

657. Embezzlement by employees of the Federal Deposit Insurance Corporation, or certain other credit and insurance agencies.

709. Use of words "Federal Deposit Insurance Corporation" as business name; falsely representing that deposit liabilities are insured by the Federal Deposit Insurance Corporation; falsely representing making Federal farm loans or issuing Federal farm loan bonds; and certain other false advertising to indicate Federal agency.

1006. Employees of Federal Deposit Insurance Corporation, land banks, and certain other agencies making false entries, drawing or issuing credit instruments without authority, and receiving profit or benefit with intent to defraud.

1007. Making false statements or willfully overvaluing securities in connection with Federal Deposit Insurance Corporation transactions.

1011. False statements relating to sale of mortgage by mortgagee to Federal land bank; willful overvaluation by appraiser of land securing such mortgage.

1013. False representations concerning character, security, or terms of farm loan bonds issued by Federal land bank or joint-stock land bank.

1014. Making false statements, or overvaluing property or security, to influence action of Federal land bank, joint-stock land bank, national farm loan association, or certain other credit and insurance agencies in connection with applications, purchases and loans.

1907. Unauthorized disclosure by farm credit examiner of names of borrowers from national farm loan association, Federal land bank, or joint stock land bank.

1909. National Bank, FDIC, or farm credit examiner performing any other compensated service for any bank or banking or loan association.

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MEMORANDUM

TO: Mr. Samuel A. Stern

DATE: APR 7 1964

FROM: Mr. Richard M. Monk

RE: Legislation Making the Assaulting or Murdering of the President and Others a Federal Crime.

Present Legislation

18 U.S.C. § 871. Threats against President and successors to the Presidency

(a) Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(b) The terms "President-elect" and "Vice President-elect" as used in this section shall mean such persons as are the apparent successful candidates for the offices of President and Vice President, respectively, as ascertained from the results of the general elections held to determine the electors of President and Vice President in accordance with title 3, United States Code, sections 1 and 2. The phrase "other officer next in the order of succession to the office of President" as used in this section shall mean the person next in the order of succession to act as President in accordance with title 3, United States Code, sections 19 and 20.

18 U.S.C. § 111. Assaulting, resisting, or impeding certain officers or employees

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114

of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 1114. Protection of officers and employees of the United States

Whoever kills any judge of the United States, any United States Attorney, any Assistant United States Attorney, or any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, any post-office inspector, any officer or enlisted man of the Coast Guard, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his duties, any immigration officer, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any employee of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands of the United States, or the District of Columbia, for the control or eradication or prevention of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any officer or employee of, or assigned to duty in, the field service of the Bureau of Land Management, any employee of the Bureau of Animal Industry of the Department of Agriculture, or any officer or employee of the Indian field service of the United States, or any officer or employee of the National Aeronautics and Space Administration directed to guard and protect property of the United States under the administration and control of the National Aeronautics and Space Administration, while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under sections 1111 and 1112 of this title.

Also Conspiracy Section

Summary of Bills Proposed During the Current Session of Congress

The various bills fall into four general classes as to persons protected. The first class makes a federal crime only attacks on the President and Vice-President. The second class provides penalties in addition for violence against the heads of Executive departments or persons eligible for succession to the Presidency under 3 U.S.C. § 19. The third class includes members of Congress (in some cases defined to include the Resident Commissioner of Puerto Rico). The fourth class would protect any officer appointed by the President with the advice and consent of the Senate. A couple of bills would specifically include members of the Supreme Court or the Chief Justice. Presumably, they are already protected under the existing statutes.

The bills can be distinguished on other points. Most of them merely add the protected officials to 18 U.S.C. § 1114 (some add them to 18 U.S.C. § 111) while a few add a separate section to Title 18. Those which utilize § 1114 relate only to violence done to officers while engaged in, or on account of, their performance of official duties. By contrast, those which do not rely on that section are not limited to the area of official duties.

Constitutional Questions

The major question is how far the Congress can go in punishing violence against Federal Officers. It seems quite clear that Congress

may provide that it is a crime to assault a Federal Officer while he is engaged in or on account of the performance of his official duties. An important case in this area is In Re Neagle, 135 U. S. 1 (1899). In this case, because of the threats against the life of Justice Field by one Terry, a resident of California, the Attorney General had detailed Neagle, a United States Marshal, to act as Field's bodyguard while Field was travelling on circuit in that state. In the discharge of his duty, Neagle shot and killed Terry and was taken into custody by the California authorities for so doing. The question before the Supreme Court was whether Neagle was entitled to his release on a writ of habeas corpus under a statute which authorized the writ in the case of prisoners in jail "for acts done or committed in pursuance of a law of the United States." While Neagle's assignment was not traceable to any definite statutory provision, the Court held that the order had an adequate basis in the duty of the President to "take care that the laws be faithfully executed." U. S. Const. Art. II § 3. The Court said that there was no doubt that the United States had the power to protect federal officers while in the discharge of the duties of their office. In Re Neagle, supra. at 72.

In Ex Parte Siebold, 100 U.S. 371 (1879) the defendant was convicted for violating a Federal election law. The Court held that Congress could make it a penal offense to violate election laws during a federal election. The Court said that in protecting an

admitted federal interest, Congress may exercise either exclusively or concurrently, the power to keep the peace normally exercised by the state. See also Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304, 363 (1816) where it was said that "the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." In Tennessee v. Davis, 100 U.S. 257, 280 (1879) (held constitutional a federal statute allowing removal to a federal court a prosecution against a federal official for a matter which arose because of his actions pursuant to federal law), the Court said, " . . . it is not doubted that Congress may pass laws for . . . [officer's] protection, and for that purpose may define the offense of killing such an officer when in discharge of his duties."

In Re Farrow Yarbrough, 110 U.S. 651, 659, 660 (1884), the history of laws protecting federal officers and making it a crime to assault or obstruct them while on the performance of their duties was discussed, and the Court stated that in earlier cases "it was not doubted for a moment by court or counsel that Congress had the power to pass these statutes." For a history of these early statutes, see 35 Cong. Rec. 6707, 57th Cong., 1st Sess. (1902).

In Barrett v. United States, 82 F.2d. 528 (7th Cir., 1936), it was held that a statute (now 18 U.S.C. § 1114) punishing the killing of a special agent of the Department of Justice was not beyond the power of Congress. It was contended that such a crime was exclusively within the jurisdiction of the state. The court summarily dismissed this argument as having no merit.

Whether Congress may punish attacks on federal officers not related to their official duties is less clear. It has long been held that Congress cannot punish crimes which are in no way connected with the Federal Government, U. S. Const. Amend. 10. United States v. Cruikshank, 92 U.S. 542 (1876); United States v. Harris, 106 U.S. 629 (1883); Civil Rights Cases, 109 U.S. 3 (1883). These cases all held Federal Civil Rights legislation unconstitutional because it went beyond the authority of Congress to enforce the Fourteenth Amendment in that it was directed against action by private persons.

In In Re Neagle, 135 U.S. 1, 54-57 (1889), the Court felt obligated to make a thorough examination of whether a Justice, when going from place to place within his circuit, was engaged in his official duties. See also quote from Tennessee v. Davis, supra. Also, in every case in which Congress has enacted a law for the protection of Government officers, it has provided that the officer must be engaged in the execution of his duties. See 35 Cong. Rec. 6286, 6407, 57th Cong., 1st Sess. (1902) (Quotes all of the early statutes in this area). In Bray v. United States, 289 Fed. 329, 332 (4th Cir., 1923), the court said, "There is, of course, no constitutional power in Congress to prohibit or to punish assaults committed in the territorial limits of the State of South Carolina, unless they in some way interfere with the operations of the federal government."

Thus, it would be argued that the Federal Government has no power to punish an assault on a federal officer when it is in no way connected with his official duties. It might be argued, however, that any assault upon certain federal officers "would interfere with the operations of the federal government." Bray v. United States, supra.; see also infra. Furthermore, it has been stated by the Supreme Court that "when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented [Congress] may do so." Westfall v. United States, 247 U.S. 256, 259 (1927) (held Congress may punish a misapplication of funds of a state bank which was a member of the Federal Reserve System in order to guard against a possible weakening of the Federal Reserve System). In James Everold Brewerius v. Day, 265 U.S. 545 (1924), it was held that in order to enforce the prohibition of the Eighteenth Amendment against dealings in intoxicating liquors "for beverage purpose," Congress could prohibit physicians from prescribing intoxicating malt liquors for medicinal purposes. The Court reaffirmed the proposition that the "necessary and proper" clause of the Constitution, Art. 1 § 8 Cl. 18, does not limit Congress "to such measures as are indispensably necessary to give effect to its express powers, but [Congress] in the exercise of its discretion as to the means of carrying them into execution may adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit

of the constitution." See also McCulloch v. Maryland, 4 Wheat. 316 (1819). The Court in the Everard Recruiter case, supra, at 539, also stated, "It is likewise well settled that where the means adopted by Congress are not prohibited and are calculated to effect the object intrusted to it, this Court may not inquire into the degree of their necessity." See also Borough and Comack v. United States, 290 U.S. 534, 547 (1933). The Tenth Amendment does not deprive "the national government of authority to resort to all means for the exercise of granted power which are appropriate and plainly adapted to the permitted end." United States v. Darby, 312 U.S. 100, 124 (1941); see United States v. Manning, 215 F. Supp. 272 (W.D. La., 1963) (upholding the constitutionality of the voting registration provision of the 1960 Civil Rights Act for a long discourse on the Tenth Amendment).

Another example of Congressional action in state matters is where Congress has regulated wholly intra-state transactions in order to protect and make effective its regulation of interstate transportation, Shreveport Rate Cases, 234 U.S. 342 (1914); Wickard v. Filburn, 317 U.S. 111 (1942).

Thus, it would seem that Congress could reasonably conclude that violence beyond upon certain high government officials, whether connected with their official duties or not, so affects the federal government that federal jurisdiction to investigate and punish the act is necessary. Congress might also conclude that in order to

protect against "violence" on "official" grounds it would have to protect against all violence to officials, since it would be difficult to separate the man from his office for purposes of investigation and protection. Thus, even if the statute embraces "more than the precise thing to be prevented," Westfall v. United States, 274 U.S. 256, 259 (1927), it would seem that it could be upheld.

As to the President, the Vice President, the President-elect and Vice President-elect, the proposition is much clearer. First of all, assuming there can be a time when these officers are not acting officially, it would seem that any assault upon them would have a disruptive effect on federal government. 35 Cong. Rec. 2431, 57th Cong., 1st Sess. (1902). Should these officers be prevented from carrying out their duties, government activity would be hampered. In Burroughs and Cannon v. United States, 290 U.S. 534, 545 (1933) (upheld constitutionality of the Federal Corrupt Practices Act) it was said, "the President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to an effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self

protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction whether threatened by force or by corruption."

In the arguments over proposed legislation in 1902, Senator Hoar argued persuasively (in vain) that "what this bill means to punish is the crime of interruption of the Government of the United States and the destruction of its security by striking down the life of the person who is actually in the exercise of the executive power, or of such persons as have been constitutionally and lawfully provided to succeed thereto in case of a vacancy. It is important to this country that the interruption shall not take place for an hour." 35 Cong. Rec. 2431, 57th Cong., 1st Sess. (1902).

In United States v. Metsker, 252 Fed. 933 (D. Mont., 1918), an indictment under the threat statute, (now) 18 U.S.C. 871, was held defective for failing to allege that the threat in question had been made against the President in his official capacity. The court reasoned that Congress could not punish action taken against a federal officer, including the President, unless it dealt with his public as opposed to his private character. However, other cases involving this statute have not required that it be alleged that the threat was made to the President in his public capacity. In United States v. Kozich, 252 Fed. 931 (D.C.E.D. Mich., 1918) the

court held that whether the threat was communicated to the President or not, it constituted "a menace to the peace and safety of the country" and "a breach of the peace and incitement to disorder and violence . . ." In United States v. Stickrath, 242 Fed. 151, 155 (D.C.E.D. Ohio, 1917), it was held that the motive which prompts the threat is immaterial. The court said, "The probabilities that there will be at once set in motion the evil consequences resulting to the public from its promulgation (aside from those attendant on its actual execution) are vastly greater than the probabilities that the threat will be carried out." In United States v. Axel, 44 F. Supp. 592 (D.C.E.D. Ill., 1942), it was held that the indictment need not allege that the threat was made against the President in his official capacity.

Even if we were to say that the statute could not be applied to assaults unconnected with the President's official duties, it would seem that the President and Vice President are always on duty. Various situations have been dreamed up hypothesizing a case in which the President would be murdered while not in the course of his official duties and not because of his official position. H. Rept. 1422, 57th Cong., 1st Sess. (1902). (An example might be the murder of the President at night by his wife or by a burglar not knowing the victim to be the President.) However, the President is constantly on call by national security agencies. (Also, the so-called "Hot Line" has been established in the White House and thus

be in subject to calls on it.) The fact that the Government supplies the President with a house and transportation to wherever he goes indicates that he is always acting in an official manner. See H. Rept. 433, 57th Cong., 1st Sess. 25 (1902).

While it has been argued that the Vice President is acting in an official capacity only while presiding over the Senate, H. Rept. 433, 57th Cong., 1st Sess. 15 (1902), we have witnessed a proliferation of his duties. Furthermore, his function is to be ready at anytime to discharge the powers and duties of the President, in case of Presidential disability, U. S. Const. Art. II: Sec. 1, p. 6, or to take over the Presidency in case the President dies. Thus, if he were incapacitated, our security might well be endangered. This same reasoning might very well apply to anyone in the line of succession. 35 Cong. Rec. 2431, 3052, 57th Cong., 1st Sess. (1902).

The extent to which any employee in a standby capacity is on duty depends upon the circumstances. Armour & Co. v. Wantock, 323 U. S. 126, 133 (1944). His period of duty may include hours of relaxation and amusement, Id. at 128, 132-134, (Firemen were compensable under the Fair Labor Standards Act for overtime when relaxing on employer's premises) or even the time when he is asleep. Farley v. United States, 127 F. Supp. 562 (Ct. Cl. 1955) (correctional officer at reformatory should be compensated for overtime for nights spent there).

As for the President-elect and Vice President-elect, it would seem that since the Federal Government can protect the electoral process, Burroughs and Cannon v. United States, supra., it can protect these officials, since the death of or injury to them would seriously affect the orderly processes of our government, as well as the electoral system. The same proposition might hold true for Presidential and Vice Presidential candidates.

Protection for ex-Presidents is less justifiable. It might be argued since Congress protects them, 18 U.S.C. § 3056, this would be a means of implementing this protection. Also, it might be argued that whether the President is guaranteed full protection after his term is up, might affect the performance of his duties during the term.

Assuming there is a private sphere to the President's life, it has been felt that if the statute, by covering every assault against the President, should exceed the power of Congress, the Supreme Court might well strike it down in its entirety, thus refusing to apply it even as to those situations in which Congressional power unquestionably existed. H. Rept. 1422, 57th Cong., 1st Sess. 6-10 (1902). This fear was based on such cases as United States v. Reese, 92 U.S. 214 (1875); United States v. Harris, 106 U.S. 629 (1879); and Baldwin v. Frank, 120 U.S. 678 (1886). These cases said that if the statute covered unconstitutional phases

of action it could not be constitutionally applied in any case. See also, United States v. Fox, 95 U.S. 670 (1877). However, in more recent years, it appears that this proposition has been reserved, if at all, only for civil liberties cases. Thornhill v. Alabama, 310 U.S. 88 (1940); note, "Severability in application of Statutes Impairing Civil Liberties," 61 Harv. L. Rev. 1208 (1948). In United States v. Raines, 362 U.S. 17, 22 (1959), the Court said, "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined." The Court listed the following exceptions: where the application of this rule might have an inhibiting effect on freedom of speech, where a situation would be created in which the statute no longer gave an intelligible warning of the conduct it prohibited, where the statute had already been declared unconstitutional and it can be said that it was not intended to stand as valid in a fraction of the cases it was originally designed to cover, or where the Court can discern that Congress would not have desired its legislation to stand at all unless it could validly stand on its every application. None of these situations appear relevant in the case under consideration. See also, Ashwander v. T.V.A., 297 U.S. 288, 347-348 (1936) (Brandeis, J. concurring).

Also, the courts will often construe a statute so as to restrict its applicability to the constitutionally permitted area.

United States v. National Dairy Corp., 372 U.S. 29 (1962); United States v. Purely, 345 U.S. 41, 47 (1952); United States v. Five Gambling Devices, 346 U.S. 441 (1953). However, it might be well not to rely on this possibility since the legislative history would probably indicate how Congress wanted the statute applied. See Id. at 450.

A statute making it a federal crime to murder the President has also been challenged on another constitutional ground. 35 Cong. Rec. 2432, 2473, 2995, 57th Cong., 1st Sess. (1902). The argument went as follows: the framers of the Constitution, while drafting the Treason Section, Art. 3, Sec. 3, Cl. 1, copied two sections out of the English Treason Statute, 25 Edw. 3 Stat. 5 c. 2 1351 (in 5 Halsbury's Statutes of England 452); V Elliot's Debates 447. Thus, they left out the sections of the English statute which provided that treason would include the situations, "when a man doth compass or imagine the death of our Lord the king, of our lady his queen, or of their eldest son and heir . . . [and] If a man slay the Chancellor, Treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices." 25 Edw. 3 Stat. 5c2. From this omission it was deduced that the framers meant to say "that when Congress came to enact laws prescribing a punishment against any attempted overthrow of the Government, or any attempted destruction of any part of the

governmental function, they should be confined to those particular acts and should not go beyond them . . . " 35 Cong. Rec. 2432, 57th Cong., 1st Sess. (1902). Thus, since killing the President is in effect treason, Congress is prohibited from punishing the crime. (There has been Constitutional amendment introduced in Congress amending the Treason Clause so as to include the killing of the President. H. J. Res. 51, 57th Cong., 1st Sess. (1901). One bill provided that any assassination or attempted assassination of the President would be treason. H. R. 1974, 47th Cong., 1st Sess. (1881).) In answer to the point that there is now legislation in the United States on a number of matters considered treason in England in the Eighteenth Century, it was argued that ~~there~~ must be some line of demarcation, and there must have been in the minds of the framers of the Constitution a line of distinction between the classes of offenses which were in their nature treasonable, which of themselves under the general definition of treason would be treason, and another and a minor class which were not in their nature treasonable, but were in the act of Edward III simply made treason by the arbitrary enactment of the statute. For instance, the killing of the king is, in itself -- in its very nature -- treason, because it is an assault on that which constitutes either in whole or in part the sovereignty of the country." 35 Cong. Rec. 2434, 57th Cong., 1st Sess. (1902). (It is interesting to note that counterfeiting which was treason in England, was specifically made subject to Congressional action by the Constitution Art. I § 8 Cl. 6.)

The absence of these provisions in the Constitution is explainable on several grounds. One is that the King was the sovereign, whereas the President was not. Thus "in a republic there was no proper place for an analogous offense, . . . the state alone and not the head of the state was to be given the protection of this dread penalty . . . ." Hurst, "Treason in the United States," 58 Harv. L. Rev. 226, 252 (1944); 35 Cong. Rec. 2936, 57th Cong., 1st Sess. (1902). It is also possible that the offense of compassing the death of the King was eliminated simply because there was no longer a King. Hurst, supra.

Hurst offers a rather elaborate explanation. Apparently the treason law had been used very broadly in England, and thus it is probable that the framers sought to prevent its use in such a large number of cases. Hurst, supra at 398, et seq. The charge of compassing the King's death had been a major instrument by which the treason law had been used to suppress a wide range of political activities. Id. at 429. It was even extended to cover the expression and advocacy of beliefs and ideas. Thus, Hurst argues that the treason clause in the Constitution was limited in order to protect nonviolent political activity from any suppression by resort to criminal prosecution. Id. at 428.

Hurst then states that "it might be argued that 'treason' is a generic term for efforts to subvert the government, and that therefore there can be no crimes, the gravamen of which is such a subversive intent, outside the bounds of the constitutional definition. Id. at 425.

This argument, while interesting, is not very persuasive. We have hardly any evidence as to what the framers of the Constitution intended by their omission of this section. Burst seems to indicate that they sought to protect speech and other nonviolent means of dissent. Such activity would not include homicide. Id. at 429, 442. Furthermore, cases have held that Congress can enact statutes punishing crimes which really amount to treason, although the statute itself does not provide the procedural safeguards that the treason section contains. Ex Parte Quirin, 317 U.S. 1 (1942) (Defendant was convicted under a statute punishing activity which would have also constituted treason but was more specific. It was held that the procedural requirements of the Treason Clause did not have to be satisfied); United States v. Rosenberg, 195 F. 2d 583, 610 (2nd Cir., 1952); Cramer v. United States, 325 U.S. 1, 45 (1944); see also dictum in Ex Parte Bollman, 4 Cranch 75, 125, 127 (1807) (Marshall, C. J. said, "It is therefore more safe as well as more consonant to the principles of our constitution that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide."). If the court will allow Congress to punish activity which would fall within the Treason Clause without providing the procedural safeguards (a position Burst finds contrary to the Founding

Fathers' intentions, Hurst, supra at 421) it seems very unlikely that it would prevent Congress from enacting legislation which does not even fall within our treason section, just because of some guesses as to the framers' intent.

Other Considerations

Various non-legal arguments have been raised in opposition to bills providing for the punishment of those who assault or murder the President. It has been argued that this is undemocratic, since the President should not be treated differently than anyone else. "With us there are no artificial distinctions, and one good man is as good as another, and as much sanctity surrounds the life of one as it does that of another. The murder of the humblest citizen in our land is just as heinous, just as felonious as that of the greatest or most distinguished" Views of Mr. Latham, H. Rept. 433, 57th Cong., 1st Sess. (1902); 35 Cong. Rec. 2490, 57th Cong., 1st Sess. (1902). I doubt that the argument will be raised today. It is clear that we are protecting whoever occupies certain high offices for the well being of the country. See H. Rept. 1422, 57th Cong., 1st Sess. (1902).

States rights arguments are plentiful. In 1901, a Senator from Tennessee remarked, "Sir, whenever the President comes as an honored guest into the State of Tennessee, when he comes to visit the home of Polk and Johnson or to stand by the tomb of Old Hickory,

I want him to feel that he is under the protection of Tennessee law and of Tennessee justice, and that he does not need to bring with him the shield of a Federal statute to protect him against the citizens of Tennessee." 35 Cong. Rec. 3056, 57th Cong., 1st Sess. (1902). Many contended that the states could adequately handle such contingencies and that federal encroachments in this area would be undesirable. Id. at 2930, 2869, 3056. (It was pointed out that the Federal Government had mishandled previous trials of those who assassinated or attempted to assassinate Presidents while the state did a credible job in the Czolgosz case. Id. at 6343, 6397.) Furthermore, it was argued that this added legislation would have no deterrent effect. Id. at 2691. Testimony before the House Committee on the Judiciary in December, 1963, indicated that there will still be concern with this federal "encroachment."

However, as many have contended, this is a national problem, and it should be handled by federal authorities. Federal officials should not have to rely on the whim of the states in order to take part in the investigations. Id. at 6393. Furthermore, federal intervention would result in uniformity of criminal procedure and certainty of punishment.

A major question is whether the protected officials should be added to 18 U.S.C. § 1114, in which case the crime would only

conduct of violence done to officers while engaged in, or on account of, their performance of official duties. In 1902, it was argued that this restriction be contained in the bill. A House Committee stated, "No constitutional or other well founded objection in this regard can be urged to the bill as drawn . . . but it would be open to serious doubt and give rise to much contention if these words were omitted . . . If the President is always engaged in and about the discharge of his official duties the words do no harm. If he is not always so engaged, and if Congress has no constitutional power to enact a law that will punish the assassin for killing the President when done to gratify a purely personal spite (not because of his official character, acts or omissions), and when the President is not so engaged and the act is committed within a State, then these words are necessary." H. Rept. 423, 57th Cong., 1st Sess. (1902). However, as I pointed earlier, those words are not necessary since the whole statute would not be considered unconstitutional. As to the problem of the difficulty of proving motive and duty [illegible] (35 Cong. Rec. 1954, 57th Cong., 1st Sess. (1902)), a Committee amendment added a section establishing a rebuttable presumption that the official was "at the time of the alleged offense engaged in the performance of his official duties." It also provided that "Nothing in this act . . . shall be construed as an admission or declaration that there is a time when either of such officers, during the tenure of his office, is not engaged in the performance of his official duties." H. Rept. 1422, 57th Cong. 1st Sess. (1902).

The Justice Department has expressed its belief that no such restrictive language should be included in a bill in order to avoid opportunity for argument. Furthermore 18 U.S.C. § 1114 and 18 U.S.C. § 111 contain certain ambiguities. Thus, under these statutes, there is some doubt as to whether the one committing the assault on or the murder of the officer must know that the victim was an officer and was engaged in the performance of his official duties. In Kemble v. United States, 123 F. 2d. 843 (6th Cir., 1941) (rev'd. on other grounds), it was held that the killer need not know that he is killing an officer, agent, or employee of the United States since there is no such provision in the statute. See also, Bennett v. United States, 285 F. 2d. 567, 570 (5th Cir., 1960) (18 U.S.C. § 111 and § 1114); United States v. Combs, 73 F. Supp. 813 (1947). There are cases going the other way and requiring that the defendant at least know that it is a federal officer he is assaulting. Hall v. United States, 235 F. 2d. 249 (5th Cir., 1956) (dictum - 18 U.S.C. § 111); United States v. Miller, 17 F. R. D. 486 (D.Vt., 1955) (18 U.S.C. § 111); Pettibone v. United States, 148 U.S. 197 (1892) (held that indictment under statute similar to § 111 must charge that defendant knew that the victim was an officer). This conflict is discussed briefly in the recent case of Portney v. United States, 316 F. 2d. 426 (1st Cir., 1963), although the court did not have to resolve it.

Also under those statutes, there is the problem of determining whether or not the officer was engaged in the performance of his official duties. See Lhlop v. United States, 47 F. 2d. 495 (6th Cir., 1931).

Thus, in view of the problems that would be created by simply adding the President and others to 18 U.S.C.§§ 111 and 111b, it would seem wise to add a separate section to Title 18 without mentioning "while engaged in . . . or on account of the performance of his official duties."

Another issue concerns who should be covered by the statute. The bills cover a variety of federal officials ranging from the President to anyone appointed by the President with the advice and consent of the Senate. Naturally, the greater the coverage, the more difficult it would be to sustain the legislation without some limitation as is contained in 18 U.S.C. § 111b. We both agree that the Constitution has no duty to consider the protection of Congressmen and many of the other federal officers.

It has been argued that officers in the line of Presidential succession, 3 U.S.C. § 19, should be covered. Thus, a Department of Justice official stated, "We are suggesting the protection of [cabinet officers] because there may be one explosion which will wipe out the Chief Executive and make . . . [them] President." Hearings before a Subcommittee of the House Committee on the Judiciary, December 12, 1963, p. 30. (This is not so far-fetched. Apparently

the plot surrounding the assassination of Lincoln included the murder of a Cabinet officer who was assaulted, and the Vice President.) See also, 35 Cong. Rec. 2952, 3052, 3123, 57th Cong., 1st Sess. (1902). However, Congressmen will most likely feel indignant if Cabinet officers are covered while they are not. ("I will not hesitate to say for five seconds that I think the activities and operations of certain chairmen of Committees in the House and Senate are infinitely more important, for example, than the daily activities of the Postmaster General in terms of the operation of the government." Rep. Bennett, Hearings Before Subcommittee of House Committee on the Judiciary, December 12, 1963, p. 29.) Also, there are some ambiguities in the succession statute. As far as the Commission is concerned, I think we should just recommend that this legislation cover "the President . . ., the President-elect, the Vice-President or other officer next in the order of succession to the office of President . . ., or the Vice President-elect." 18 U.S.C. § 871. (Threat Statute). There would be the same officers as are contained in the threat statute and are protected by the Secret Service under 18 U.S.C. § 3056. Thus, enforcement might be more efficient. Presumably, the Secret Service plays a large role in the enforcement of § 871. If more officers were added, there might be friction between the Secret Service and the F.B.I. The Secret Service people I talked to suggested this difficulty. While the point is not perfectly clear to me, you will be hearing from the Secret Service on this matter.

It might not be a bad idea to include the Presidential candidates, since the electoral process would certainly be disrupted if anything happened. However, this would create such problems as what to do about third party candidates and at what point a candidate should come under the coverage of the statute. Also, we are concerned with the office of the President, not the electoral process. Former presidents are protected by the Secret Service for about six months after their term ends upon request. I think we agree that former presidents ought not be covered.

Another major problem in this area is Federal-State relations. Only two of the proposed bills specifically deal with this question. H. R. 9260 provides, "Nothing contained in any section of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which such sections operate, to the exclusion of any State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating a provision of State law which would be valid in the absence of such Act, except to the extent that there is a direct and positive conflict between such provisions so that the two cannot be reconciled or consistently stand together." H. R. 9299 provides "Whenever a State has in its custody any person for whose arrest for violations of section 1114(a) or section 111(a) [the bill adds the President and the Vice President to these sections] of this title or Federal

warrant has been issued, such State shall forthwith deliver such person into the custody of the United States for prosecution."

In 1902, there was concern in connection with this problem. The author of a bill at that time felt that everything connected with the offense should be in the hands of the federal government. 35 Cong. Rec. 2961, 57th Cong., 1st Sess. (1902). However, the House Judiciary Committee guaranteed that the federal legislation would not take any power away from the state to punish criminal offenses. H. Rept. 433, 57th Cong., 1st Sess. 5 (1902). See also, 35 Cong. Rec., supra at 6302. This question was raised at the Hearings before the House Judiciary Committee in December of last year. See supra at 18.

Since delegated powers have been more and more broadly construed in recent years, the area of concurrent powers has been expanding. Thus who enters a post-office with intent to commit a larceny therein, 18 U.S.C. 1703, 2115, or who steals or receives property stolen from the United States, 18 U.S.C. 641, violates both a state and a federal law and may be punished under both. Note, "Pre Emption by Federal Criminal Statute," 55 Col. L. Rev. 83, 93 (1955). States have even punished counterfeiting. Fontana v. Aderhold, 201 Ga. 237, 39 SE 2d. 403 (1946). The Supreme Court has held that the Constitution does not prohibit several sovereigns from punishing the same conduct. United States v. Lanza, 260 U.S. 377 (1923). Presumably concurrent jurisdiction would exist in any case where the Federal Government punishes assaults on federal officers. 55 Col. L. Rev., supra, at 85.

It had been argued that "the nature of the federal system implied from the Constitution may require that a sovereign state cannot be deprived of the right to protect itself and its citizens from serious deprivations. Admittedly, to deny the state the right to legislate in a traditional criminal area is to make it dependent on federal enforcement." Id. at 92.

However, in Pennsylvania v. Nelson, 350 U.S. 497 (1956), the Court held that federal legislation regulating Communist activity had superseded the Pennsylvania statute on the same matter. The court rendered nugatory 18 U.S.C. § 3231 which provided that "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." Nothing in the Nelson Case precluded the state from prosecuting crimes against the state even though it is a federal crime. Upshaw v. Dyman, 360 U.S. 72 (1959). Because of the supremacy clause, Art. VI, Congress may constitutionally pre-empt almost any segment of concurrent power. It has been held that Congress has the power to bar state prosecutions if there is a legitimate federal interest. Ullmann v. United States, 350 U.S. 422 (1956) (held that a federal immunity statute precluded state criminal prosecutions).

There are certain advantages in providing for federal pre-emption. Limiting the trials to federal courts removes the trial somewhat from local pressures and makes applicable all of the Bill of Rights. This is particularly important in the case

of an assassination of the President, since the trial would be carefully scrutinized around the world. Such a provision would solve the problems of double punishment and multiple trials. Also, federal pre-emption would prevent any conflict between federal and local authorities. See Hearings before a Subcommittee of the House Committee on the Judiciary, December 12, 1963, 29, in which there is discussion about the conflict between the Los Angeles police and the F.B.I. in the Sinatra kidnapping case. Furthermore, events in Dallas indicate that these matters should not be handled by local authorities.

On the other hand, it might be desirable to rely on local agencies to supplement federal enforcement efforts. Furthermore, it will be more difficult to pass any legislation if the states are excluded from this area. As for multiple trial problems, they can be solved in a number of ways. Congress might use its pre-emption power to prevent state prosecutions after a federal acquittal or conviction. A clause might be inserted making a state acquittal a plea in bar and allowing a federal prosecution after a state conviction, but it should provide that the sentence imposed by the state be deducted from the federally prescribed penalty. This latter suggestion is not desirable since the federal government would be unable to re-try cases which might be mishandled by less adequately staffed state prosecuting agencies.

In summary, the following alternative steps can be taken with reference to the pre-emption problem:

(a) Make no reference to pre-emption or specifically provide that Congress did not intend that the federal government occupy the field. In either case, concurrent jurisdiction would exist. This would allow the Federal agencies to come into the picture without an invitation from the state which is one of the main purposes of the bill. Furthermore, chances of passage would be greater without any provision for pre-emption;

(b) Prevent state prosecutions after a federal acquittal or conviction. This merely prevents multiple trials. Also, it would prevent federal-state conflicts after the defendant is indicted by a federal grand jury. (We have already indicated that precluding federal action after a state trial would not be wise.);

(c) Provide that whenever a state has in custody any person for whom arrest for violation of the federal statute a warrant has been issued, such state must immediately deliver the person into the custody of the United States for prosecution. This would take much of the case out of state hands, but would not preclude them from investigating and helping to apprehend the guilty person. However, states might not be too eager to take part since the case will be taken from them;

(d) Finally, the Federal Government could occupy the field. Presumably, state officials would not even investigate,

although it seems likely that state agencies would help if so requested by federal authorities.

I take it you have already requested views on possible legislation from the Justice Department (their report is at the Bureau of the Budget) and the Secret Service. It might be a good idea to obtain the views of state and local law enforcement agencies. Chief of Police Parker in Los Angeles, who is a lawyer, would, I'm sure, provide a typical parochial view. The views of these law enforcement people might be enlightening.

RMM:ej

MEMORANDUM

TO : W. David Slawson May 14, 1964

FROM : Richard M. Mosk

RE : PASSPORT

The applicable State Department Regulation provides:

> "In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States shall be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) Violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States." 22 C.F.R. 51. 136.

I could find no cases under this regulation except several which indicate that a hearing and full disclosure of confidential information are required by the dictates of procedural due process.

Right now, all of the State Department regulations are being tested as to their constitutionality in the pending cases of Aptheker v. Secretary of State and Mayer v. Secretary of State.

In Kent v. Dulles, 357 U.S. 116 (1958), the Supreme Court invalidated regulations of the State Department, 22 C.F.R. 51. 135, denying to communists the right to travel. The Court did this on the narrow ground that Congress had not delegated the authority to the Executive to deny passports on this ground.

cc: ~~Mr. Rankin~~
~~Mr. Willens~~
Mr. Mosk ✓+ (Slawson only)

Under the reasoning of the Court, it would seem that 22 C.F.R. 51. 136 would also fall, although Kent v. Dulles merely held that the Secretary was not authorized to refuse passports because of the beliefs and associations of the applicants. Also in Worthy v. Hecter, 270 F. 2d. 905 (1959), it was held that the Secretary of State had the authority to deny a passport to prevent travel in certain countries.

After Kent v. Dulles, 22 C.F.R. 51. 135 was amended so as to provide that passports should not be issued to those who are members of organizations which must be registered under the Communist Control Act. This provision is required by the Communist Control Act. / 22 C.F.R. 51. 136 was re-enacted along with the new/ 22 C.F.R. 51. 135 in 1962; so it would seem that the State Department regarded the Regulation as valid.

There are no published decisions of the State Department regarding passport applications.

In the light of opinions which indicate that the courts will retain close supervision over the Secretary in this matter, it would seem that in order to deny a passport under 22 C.F.R. 51. 136, the applicant must be an extreme risk. I do not think that Oswald presented any such problem at the time of his passport renewal.

As for the "lookout file," I had no way of finding out what the 22 separate categories are. The State Department memo lists only five. (p. 3) This information one would have to get at the State Department.

Mr. Mosk

M E M O R A N D U M

TO : W. David Slawson June 1, 1964

FROM : Richard M. Mosk

SUBJECT: Addition to Memo concerning the Legality of State Department Action

The fact that Oswald was employed by the Government does not result in his expatriation. Title 8 U.S.C.A. § 1481 (4) provides that one shall lose his American nationality by:

> (a) Accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, if he has or acquires the nationality of such foreign state; or (b) accepting, serving in, or performing the duties of any office, post or employment under the government of a foreign state or a political subdivision thereof, for which office, post, or employment, an oath, affirmation, or declaration of allegiance is required, . . ."

(A)(a)(1) 349 (a)(4)(a) (a)(4)

I assume that Oswald was not required to take an oath of allegiance, although you might ask the State Department about this. If he did take such an oath, then I will have to research the question more fully. See e.g. Fletes - Mora v. Rogers, 160 F. Supp. 215 (1958) (Held under prior law that an oath required of plaintiff entering the employ of the Post Office Department of the Republic of Mexico was not an "Oath of allegiance" sufficient to effect the expatriation of plaintiff since the oath referred to the alien's duty to obey all laws of a country

so long as he remained there and was not related to citizenship; also the employment did not result in an expatriation since it did not appear that Post Office employment was open only to Mexican nationals); Kenzi Kamada v. Dulles, 145 F. Supp. 457 (1956) (Held under prior law teaching in public school system operated by a foreign government or political subdivision thereof was not type of employment by foreign government contemplated by statute); See generally 99 U. of Pa. L. Rev. 25, 51 (1951).

M E M O R A N D U M

TO : William T. Coleman
W. David Slawson

May 29, 1964

FROM : John Hart Ely
Richard M. Mosk

Attached is our draft of the section of the report dealing with the legality of actions taken by the State Department. It is of course subject to alteration by expected memoranda from the State Department and testimony by State Department officials.

We are unable to read the handwritten addition to the final footnote in your draft. If it indicates that the CIA report to State also included a statement that Oswald visited the Cuban embassy, that is a factor which arguably should have been considered, because: (1) Cuba was a proscribed place (?), & (2) Cuba was not on Oswald's application.

Attachment

JHE:RMM:ej

PART II

Legal Basis for the Decisions of the State Department and the Immigration and Naturalization Service in Connection with the Oswalds.

In the course of the Commission's investigation, there were called to its attention various decisions concerning Marina and Lee Oswald made by the State Department and the Immigration and Naturalization Service. These decisions included: (1) Whether Lee Oswald had expatriated himself by any act performed between October 16, 1959, and October 31, 1961; (2) Whether Marina Oswald was eligible for entry into the United States; (3) Whether the provisions of Section 243(g) of the Immigration and Nationality Act prohibiting the issuance of a visa to an alien from a country which is designated by the Attorney General as one refusing to accept the return of aliens deported from the United States should have been waived in the case of Marina Oswald; (4) Whether Lee Oswald should have been issued a passport on June 25, 1963, and (5) Whether that passport should have been revoked when the State Department received information that Lee Oswald was making inquiries about returning to Russia at the Russian Embassy in Mexico City in late September and early October 1963.

The appropriateness of the resolution of these issues has been evaluated in terms of the relevant statutes, regulations and practices, and their application to the facts which were available to the State Department and the Immigration and Naturalization Service at the time the decisions were made.

(1) Whether Lee Oswald had expatriated himself by any act performed between October 16, 1959, and October 31, 1961.

Since Lee Oswald was born in the United States, he was of course an American citizen. Congress has, however, enacted statutes setting forth acts which serve to expatriate the person performing them. It might be argued that Oswald lost his citizenship by virtue of the operation of three such statutory sections: Section 349 (a) (1) of the Immigration and Nationality Act. /obtaining naturalization in a foreign state,/ Section 349 (a) (6) /formal renunciation of American nationality,/ and Section 349 (a) (2) /taking an oath to a foreign state./

a. Section 349 (a) (1)

Section 349 (a) (1) of the Immigration and Nationality Act provides that a United States citizen shall lose his nationality by:

> /O/btaining naturalization in a foreign state upon his own application, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody of such person.

In 1961, when the State Department and the Embassy were considering whether Lee Oswald's passport should be reissued to him, they of necessity made a decision as to whether he had naturalized himself in Russia. At that time Oswald demonstrated to them that he had been issued a stateless passport by the Soviet Union which was good for only one year and which had to be reissued annualy. There was, therefore, no basis for a determination that Oswald had become a Russian citizen by naturalization. Oswald

did not expatriate himself under Section 349 (a) (1).

b. Section 349 (a) (6)

Section 349 (a) (6) provides that a United States citizen shall lose his citizenship by:

> /M/aking a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State.

In his letter of October 31, 1959, Oswald wrote:

> I, Lee Harvey Oswald, do hereby request that my present citizenship in the United States of America, be revoked.
>
> * * *
>
> My request for the revoking of my American citizenship is made only after the longest and most serious considerations.

In his letter of November 3, 1959, he wrote:

> I, Lee Harvey Oswald, do hereby request that my present United States citizenship be revoked.
>
> I appered (sic) in person, at the Consulate Office of the United States Embassy, Moscow, on Oct 31st, for the purpose of signing the formal papers to this effect. This legal right I was refused at that time.

At the time he authored both of these letters, Oswald was 20 years old. However, 8 U.S.C. § 1483 provides, with several exceptions not here relevant, that persons under 18 years of age are presumptively incompetent to perform acts expatriating themselves. The fact that Oswald was at this time under 21 years of age is therefore not to be considered in determining his competency to expatriate himself.

However, Section 349 (a) (6) requires the expatriating renunciation to be in "such form as may be prescribed by the Secretary of State." In accordance with this statute, the Secretary set forth the requisite form and procedure in 22 Code of Federal Regulations §§ 50.1 - 50.2 and 8 Foreign Affairs Manual § 225.6. These regulations provide, inter alia, that four copies of the renunciation form are to be executed, and the original and one copy sent to the Department. After the Department has approved the form it advises the appropriate consular official who may then furnish a copy of the form to the person to whom it relates.

Oswald's renunciation of course came close to neither these nor other relevant regulations. It is true that in filling out the application for renewal of his passport in July, 1961, Oswald replied "I have" to the alternative and disjunctive questions of whether he had been naturalized as a citizen of a foreign state; taken an oath to a foreign state; served in the Armed Forces of foreign state; been employed by a foreign state; voted in a foreign state's elections; made a formal renunciation of United States nationality; been convicted of desertion, treason, or attempting to overthrow the United States Government; or left the United States in order to avoid the draft. (Ex. 22.) He therefore was required to fill out a questionaire. (Ex. 23.) He clearly had not been naturalized a Soviet citizen, voted in Soviet election, been convicted of desertion, treason or overthrow, or left the United States in order to avoid the draft. Moreover, in filling out the questionaire he specifically denied having taken an oath

to a foreign state, served in the Armed Forces of a foreign state, or been employed by a foreign state. It therefore seems likely that he answered "I have" because he was under the impression that he had "made a formal renunciation of nationality either in the United States or before a diplomatic or consular of the United States in a foreign state." However, the fact that Oswald thought that he had effected such a renunciation is irrelevant. Although he almost certainly intended to do do, his noncompliance with the regulations caused his attempt to fail.

Because 349 (a) (6) in terms requires compliance with the form prescribed by the Secretary of State, and because Oswald quite clearly stopped far short of achieving even substantial compliance, it is evident that he did not expatriate himself under that Section.

c. Section 349 (a) (2)

Section 349 (a) (2) of the Immigration and Nationality Act provides that a United States citizen shall lose his nationality by:

> /T/aking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof.

In his letter of October 31, 1959 Oswald wrote:

> I affirm that my allegiance is to the Union of Soviet Socialist Republics.

And in his letter of November 3, 1959, he stated that his application for citizenship in the Soviet Union was then pending before the Supreme Soviet of the U.S.S.R.

Many cases and articles have quoted Secretary of State Charles Evans Hughes to the effect that in order for an oath, declaration, or affirmation of allegiance to a foreign state to effect an expatriation, it must place "the person taking it in complete subjection to the State to which

it is taken, at least for the period of the contract, so that it is impossible for him to perform the obligations of citizenship to this country." III Hackworth, Digest of International Law 219-20 (1942). However, this "complete subjection" test seems inapposite in the case of Lee Harvey Oswald. The test is one by which the wording of an oath in question is tested in order to determine whether its purpose is to swear an allegiance inconsistent with the individuals allegiance to the United States; it is often invoked in cases involving dual citizenship. See Jalbuena v. Dulles, 254 F. 2d 379, 381 n. 2(3d Cir. 1958); Roche, The Loss of American Nationality - The Development of Statutory Expatriation, 99 U. Pa. L. Rev. 25 (1950). Oswald's letters, however, clearly intended to evidence an allegiance to the Soviet Union inconsistent with continued allegiance to the United States. Indeed, they so explicitly state. If Oswald's oath to the Soviet Union is to be found not to have worked an expatriation, therefore, the imperfection must lie in the circumstances under which it was taken rather than in its wording.

An earlier version of Section 349 (a) (2) provided:

> That any American citizen shall be deemed to have expatriated himself . . . when he has taken an oath of allegiance to any foreign state. Act of March 2, 1907, § 2, 34 Stat. 1228.

In 1940 the language of the Section that was changed so as to demand "an oath or . . . affirmation or other formal declaration of allegiance." Nationality Act of 1940, § 401 (b), 54 Stat. 1169.

The language of the 1940 Act has been retained in the present 1952 Act. The shift in language from the 1907 Act to the 1940 Act might be taken

to indicate a demand for greater formality in expatriating oaths. Whether or not this was the legislative intent, since 1940 it has been well established that in order for an oath of allegiance to a foreign state to work an expatriation from the United States, it must be given to an official of the foreign state, and not to a party unconnected with the foreign state. This requirement, can be viewed as a necessary corollary of the broader, but less clearly established, principle that the oath must be taken in accord with the requirements of the foreign state.

> The Department of State holds that for loss of nationality to result from taking an oath of allegiance to a foreign state, the oath must be one "which is prescribed by law or by regulations having the force of law" and must be taken before a competent official of the government concerned. III Hackworth, Digest of International Law 218 (1942).

In Re Bautista's Petition, 183 F. Supp. 271 (D. C. Guam, 1960), a case construing the 1952 Act, the court held that an oath of allegiance to the Philippines taken before an official of the Philippine Government did not work an expatriation because the individual had desired to become a Philippine citizen only in order to obtain a passport to travel to Guam. (The Court here relied on the "complete subjection" test.) However, the Court also failed to consider as an expatriating act the taking of another oath of allegiance to the Philippines before a notary public. The Court dismissed this oath with the simple statement: "It was not done before an official of the Philippines." Id. at 274. See also Dep't of State to Consul at Guadalajara, May 27, 1939, at 218.

Similarly, the Board of Immigration Appeals held in The Matter of L., 1 I. & N. Dec. 317 (B.I.A. 1942), was faced with the following affirmation:

> I do swear that I will be faithful and bear truly just to His Majesty, King George VI, his heirs and successors, according to law. So help me God.

The Board held that the declarant did not expatriate himself:

> An oath or formal declaration mentioned by the statute must mean not only the giving of the oath by the individual but the acceptance of the oath by the foreign state. An oath of allegiance has no real significance unless the oath be made to the state and accepted by the state. Such acceptance on the part of the state must be made in accordance with the laws of that state. In the case before us an oath of allegiance was not made to the British Crown in accordance with any law or regulation of the British Government. On the contrary, the obligation is between the appellant on the one hand and a private employer on the other. Id. at 320.

Other administrative bodies have decided that an oath taken before a notary public in Great Britain, /Dep't of State to Consular Official in charge at Birmingham, May 10, 1938/, an oath taken by a priest on ordination into the Church of England, /Director of Consular Service to Counsel Glazebrooke, Oct. 30, 1914/, and an oath sworn by a lawyer to obtain admission to the German Bar /Dep't of State to Counsel Gen'l in Berlin, Mar. 21, 1934/ did not expatriate an American citizen. See generally Roche, The Loss of American Nationality - The Development of Statutory Expatriation, 99 U. Pa. 25, 33 (1950).

In those cases where an individual has been held to have expatriated himself by virtue of an oath to a foreign state, although the courts have not always stressed the fact that the oath was taken before an official of the foreign state, it is the case that the oath in fact was so taken. See, e.g., McCampbell v. McCampbell, 13 F. Supp. 847 (W. D. Ky. 1936); Reaume v. United States, 124 F. Supp. 851, 852 (E. D. Mich. 1954). In Savorgnan v. United States, 338 U.S. 491 (1950), the Supreme Court held that Mrs. Savorgnan had expatriated herself. Although the holding was based upon other grounds, the Court "recognized the force of the alternative ground" that she had signed an oath swearing allegiance to the King of Italy as part of an application for Italian citizenship filled out at the Italian Consulate in Chicago. Id. at 503. The Court, in detailing the factors supporting the argument that the oath expatriated Mrs. Savorgnan, did not explicitly mention that it was signed in an office of the foreign government in question and in accord with their requirements. Id. at 502. However, both these requirements in fact were met. Moreover, in the statement of facts, the Court noted: "No ceremony or formal administration of the oath accompanied her signature and apparently none was required." Id. at 494.

Lee Oswald's declaration of allegiance to the Soviet Union was not taken before an official of the Soviet Government. He therefore did not expatriate himself under Section 349 (a) (2). The Commission therefore concludes that the decision that Lee Oswald had not expatriated himself by any acts performed between October 16, 1959 and October 13, 1961, was correct.

(2) Whether Marina Oswald was eligible for entry into the United States.

As the wife of an American citizen, Marina Oswald was entitled to non-quota status under Section 205 of the Immigration and Nationality Act. However, under Section 212 (a) (28) of the Act, an alien is excluded from admission to the United States if he is a member of or affiliated with a Communist organization. Nevertheless, the Act provided that an alien who is a member of or affiliated with a Communist organization:

> /M/ay, if not otherwise ineligible, be issued a visa if such alien establishes to the satisfaction of the consular officer when applying for a visa and the consular officer finds that (1) such membership or application is or was involuntary, or is or was solely when under sixteen years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and where necessary for such purposes. Section 212 (a) (28) (I) (i).

Marina Oswald was at the time she applied for a visa, a member of the Soviet Trade Union for Medical Workers. Membership in this organization apparently was required for her employment in a hospital as a laboratory assistant. Thus the Embassy, with the concurrence of the State Department, determined that membership was involuntary and therefore the exemption in Section 212 (a) (28) (I) (i) was applicable. This finding was consistent with "a long-standing interpretation concurred in by the State and Justice Departments that membership in a professional organization or trade union behind the Iron Curtain is considered involuntary unless the membership is accompanied by some indication of voluntariness, such as active participation in the organization's activities or holding an office in the organization." Report of the Department of State's on Lee Harvey Oswald to the Commission, PT. IV., p. 3.

(3) Whether the provisions of Section 243 (g) of the Immigration and Nationality Act prohibiting the issuance of a visa to an alien from a country which is designated by the Attorney General as one refusing to accept the return of aliens deported from the United States should have been waived in the case of Marina Oswald?

Section 243 (g) of the Immigration and Naturalization Act, provides that upon notification by the Attorney General that any country which, when requested, denies or unduly delays the acceptance of a deportable alien who is a national, citizen, subject, or resident of that country, consular officers in such countries are not to issue visas to citizens thereof. On May 26, 1953, the Department of State notified the United States Mission in Moscow that the Attorney General had invoked Section 243 (g) as a result of the failure of the Soviet Union to accept the return of aliens deported or sought to be deported from the United States. Consequently, consular officials were instructed to discontinue the issuance of immigrant visas until advised by the Department of State to the contrary.

It should be noted that Section 243 (g), when invoked by the Attorney General, does not make any particular alien or class of aliens ineligible to immigrate to the United States. It applies to a country, or more specifically, to United States Consular Officers stationed in such countries, and it was designed to exert pressure on countries which fail to receive deportees from the United States. Any person precluded from receiving an immigrant visa because of the application of Section 243 (g) may proceed to a United States Consulate in another country where the sanctions are not in effect, and receive an immigrant visa if otherwise qualified.

Section 243 (g) does not contain any provision for waiver. However, the Justice Department has concluded that such waiver powers exist under the general powers granted the Attorney General by the Act. The waiver procedures followed in 1962 when Marina Oswald was granted a waiver of Section 243 (g) were prescribed by the Immigration and Naturalization Service. The relevant provision read:

> Before adjudicating a petition for an eligible beneficiary residing in the USSR, Czechoslovakia or Hungary, against which sanctions have been imposed, the district director shall obtain a report of investigation regarding the petitioner which shall include any affiliations of a subversive nature disclosed by neighborhood investigation, local agancy records and responses to Form G-135a. . . . If no substantial derogatory security information is developed, the district director may waive the sanctions in an individual meritorious case for a beneficiary of a petition filed by a reputable relative to accord status under Section 101 (a) (27) (A) or Section 203 (a) (2), (3) or (4). . . . If substantial adverse security information relating to the petitioner is developed, the visa petition shall be processed on its merits and certified to the regional commissioner for determination whether the sanctions should be waived. The assistant commissioner shall endorse the petition to show whether the Waiver is granted or denied, and forward it and notify the appropriate field office of the action taken. . . . Operations Instructions of the Immigration and Naturalization Service, 205.3. [This instruction revised effective February 15, 1962 - June 30, 1962. Other versions which may have been considered during Oswald's case were different only in irrelevant ways.]

State Department regulations are much less explicit. 22 C.F.R. 42.120. The State Department's visa instructions for the guidance of consular officers [Note 2 to 22 C.F.R. 42.120, Vol. 9, Foreign Affairs Manual] provide, "The sanctions will be waived only in individual meritorious cases

in behalf of a beneficiary of a petition filed by a reputable relative pursuant to Section 101 (a) (27) (A) or paragraph (2) (3) or (4) of Section 203 (a) of the act."

The character of Lee as well as Marina Oswald is relevant to the decision because he is the relative who signed the petition on Marina's behalf. Whether he is "reputable" therefore must be determined. His character may also have a bearing on whether "substantial derogatory security information" had been developed. Thus all of the facts bearing on the issue of Oswald's attempted expatriation were also pertinent to the issue of waiver of the sanction pursuant to Section 243 (g) of the Immigration and Naturalization Act for Marina Oswald.

The statutory procedure for handling petitioners for non-quota or preference status by reason of relationship calls for a determination of eligibility for such status by the Attorney General. The responsibility for making such determinations has been delegated by the Attorney General to the District Directors of the Immigration and Naturalization Service. Marina Oswald's petition was forwarded by the Embassy in Moscow through the State Department to the District Director in San Antonio, Texas, the office having jurisdiction over Oswald's domicile in the United States. In accordance with the procedure worked out between the State and Justice Departments, the District Director was to note his determination as to a waiver of Section 243 (g) at the same time as he made his determination of eligibility for non-quota status under Section 205 (a).

On February 28, 1962, the District Director of the Immigration and Naturalization Service informed the Visa Office of the State Department that while the petition for non-quota status had been approved, the waiver of Section 243 (g) was not authorized. No reason for disapproval of the waiver was stated, but it was "clear from the internal order of the Immigration and Naturalization Service that the refusal to authorize the waiver was based on Oswald's statements and attitude while in the Soviet Union." Report of the Department of State on Lee Harvey Oswald to the Commission, PT. 4, p. 7.

On March 16, the Soviet Affairs Office of the State Department advised the Visa Office of the Department as follows:

> SOV believes it is in the interest of the U.S. to get Lee Harvey Oswald and his family out of the Soviet Union and on their way to this country as soon as possible. An unstable character, whose actions are entirely unpredictable, Oswald may well refuse to leave the USSR or subsequently attempt to return there if we should make it impossible for him to be accompanied from Moscow by his wife and child.
>
> Such action on our part also would permit the Soviet Government to argue that, although it had issued an exit visa to Mrs. Oswald to prevent the separation of a family, the United States Government had imposed a forced separation by refusing to issue her a visa. Obviously, this would weaken our Embassy's position in encouraging positive Soviet action in other cases involving Soviet citizen relatives of U.S. citizens.

On March 27, the Acting Administrator of the Bureau of Security and Consular Affairs, addressed a letter to the Commissioner of the Immigration and Naturalization Service, Department of Justice, requesting reconsideration of the decision not to waive the provisions of Section 243 (g) in the case of Marina Oswald. The State Department expressed concern about

the propriety of punishing Marina and the Oswalds' baby for Lee Oswald's earlier errors. Furthermore, it was feared that refusing to permit Marina to accompany Lee out of Russia to the United States would put the Soviet Government in a position to claim that it had done all it could to prevent the separation of the family, but that our government had split the husband from his wife and child. The Department felt that this would seriously weaken our government's attempts to encourage the Soviet Government to permit other Russian wives and children to accompany their American husbands and parents back to the United States. The letter concluded that it was in the best interest of the United States to have Oswald depart from the Soviet Union as soon as possible.

On May 9, 1962 the Immigration and Naturalization Service agreed to waive the sanction of Section 243 (g) "in view of strong representations made" by the State Department. Thus, the Embassy was informed that the Section 243 (g) sanction had been waived by the Immigration and Naturalization Service.

Waivers of Section 243 (g) are not unusual. Thus, in spite of Section 243(g), 661 immigrant visas were issued in Moscow in the ten-year period ending June 30, 1963. In 1962, 97 immigrant visas were issued in Moscow. Moreover, prevention of the separation of famlies nubers among the policiesmost frequently underlying waiver of Section 243 (g). Report of the Department of State on Lee Harvey Oswald to Commission, PT 4, pp. 4-5. The Commission therefore concludes that the Immigration and Naturalization Service did not misuse its discretion in responding in accord with the State Department's recommendation that they waive Section 243 (g) for Marina Oswald.

(4) Whether Lee Oswald should have been issued a passport on June 25, 1963.

On June 25, 1963, the State Department issued Lee Oswald a passport. In his application he had said that he wished to visit France, Germany, Holland, Finland, Italy, Poland, and the Soviet Union. Travel to none of these countries was then or is now proscribed. The passport apparently was issued routinely; since Oswald had repaid his repatriation loan, there was no longer a "look-out card in the passport office's files to warn against granting him a passport. Report of the Department of State on Lee Harvey Oswald to the Commission, PT. 2, pp. 7-8.

Unless an applicant comes within one of the statutory sections authorizing the Secretary of State under certain circumstances to refuse to issue a passport, the Secretary has no authority to refuse a passport. Kent v. Dulles, 357 U.S. 116 (1958).

Section 6 of the Subversive Activities Control Act of 1950 provides:

> /It shall be unlawful for any member of /an organization required to register/, with knowledge or notice that such organization is so registered and that such order has become final - (1) to make application for passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or (2) to use or attempt to use any such passport.

Pursuant to Section 6, the State Department promulgated a regulation which denied passports to members of communist organizations:

> /A/ passport shall not be issued to or renewed for any individual who the issuing office knows or has reason to believe is a member of a Communist Organization registered or required to be registered under Section 7 of the Subversive Activities Control Act of 1950 as amended. 22 C.F.R. § 51.135.

The Department had no information that Lee Oswald was a member of the Communist Party or any other organization which had been required to register under Section 7 of the Subversive Activities Control Act. A passport therefore could not have been denied him under Section 6.

8 U.S.C. § 1185b provides that, while a presidential proclamation of national emergency is in force, "/I/t shall, except as otherwise prescribed by the President, . . . be unlawful for any citizen of the United States to depart or enter . . . the United States unless he bears a valid passport." This provision, originally enacted in 1918, was reenacted as Section 215 of the Immigration and Nationality Act of 1952. The amendment specified that the provisions of the section were subject to invocation only during "any national emergency proclaimed by the President . . ." 66 Stat. 190 (1952). Because a proclamation of national emergency issued by President Truman during the Korean War has never been revoked, the statute remains in force. Proclamation No. 2915 (Dec. 16, 1950), 60 Stat. A 454; Proclamation No. 2974 (Apr. 18, 1952), set out preceding 50 U.S.C. Appendix 1; Proclamation No. 3084 (Jan. 17, 1953), 18 Fed. Reg. 489.

Pursuant to 8 U.S.C. 1185b, the State Department had issued regulations setting forth the circumstances under which it would refuse a passport:

> In order to promote and safeguard the interests of the United States' passport facilities, except for direct and immediate return to the United States, shall be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activity abroad would (a) violate the laws of the United States, (b) be prejudicial to the orderly contact of foreign affairs; or (c) otherwise be prejudicial to the interests of the United States. 22 C.F.R. § 51.136.

The State Department takes the position that its authority under Section 51.136 is severely limited. In a report submitted to the Commission dated May 8, 1964, it concluded that "there were no grounds consenant with the passport regulations to take adverse passport action against Oswald prior to November 22, 1963."

There has apparently been no judicial evaluation or interpretation of Section 51. 136. However, in 1957 the State Department described to the Senate Foreign Relations Committee one category of persons to whom it denied passports under Section 51. 136:

> Persons whose previous conduct abroad has been such as to bring discredit on the United States and cause difficulty for other Americans (gave bad checks, left unpaid debts, had difficulties with police, etc.) Hearings Before the Sen. For. Rel. Comm. on Dep't State Passport Policies, 85th Cong., 1st Sess., pp. 338-39 (1957).

Since Oswald's prior attempt to defect to the Soviet Union had caused the United States a certain amount of adverse publicity, it is at least arguable that he was a person "whose previous conduct abroad had been such as to bring discredit on the United States."

However, it might be argued that the list of reasons for passport denial given the Senate Foreign Relations Committee by the State Department in 1957 was rendered moot in 1958 by the Supreme Court's decision in Kent v. Dulles, 357 U.S. 116 (1958) /Expected testimony of Dean Rusk./ In Kent the Court invalidated a regulation of the State Department denying passports to Communists, on the ground that the regulation exceeded the authority Congress had granted the Secretary. The opinion suggests that the Court did not intend to restrict its pronouncement to this narrow issue. After noting that historically "cases of refusal generally fell into two categories": (a) citizenship and allegiance, and (b) illegal conduct, the Court stated

that the "grounds for refusal asserted here do not relate to citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other. Yet, so far as relevant here, those two are the only ones which it could fairly be argued were adopted by Congress in light of prior administrative practice." Id. at 127-28. On the other hand, there is language which might be read to suggest that the Court was concerning itself only with denials rooted in political beliefs: "We deal with beliefs, with associations, with ideological matters." Id. at 130.

Despite the fact that the Kent opinion could easily have been read to restrict the power to deny passports to instances of only either non-citizenship or illegal conduct, the State Department took the position that the case reached only non-Communist affidavits.

The Department made no moves to take 22 C.F.R. § 51. 136 off the books; indeed, it was reissued in 1962.

Loftus Becker, Legal Adviser to the Department of State, told a Congressional Committee conducting hearings on passport legislation in 1958:

> The Supreme Court decision does not pass on anything beyond the specific issue there that we did not have the power to require a non-Communist affidavit on the past of the applicant. It does not give us any guidance as to where we go from there. . . Hearings before the Senate Committee on Foreign Relations on S. 2770, et al., 85th Cong. 2d Sess. p. 35 (1958).

And in 1958, following the Kent decision, another State Department official stated before the Congressional Committee conducting hearings on proposed passport legislation:

> As a result of the recent Supreme Court decision, we have not been able to process for the purpose of holding up any passports with information available that the applicant would fall under the so-called Communist part of our regulations. If he fell under some other portions of the regulations we would process him as we have in the past, but if he falls under the Communist part of the regulations, we must go ahead as though that information did not exist.

> Roderic O'Connor, Administrator, Bureau of Security and Consular Affairs of the Department of State, Hearings before the Senate Committee on Foreign Relations on S. 2770, 85th Cong., 2d Sess., p. 41 (1958).

At the same hearing, Robert Murphy, Under Secretary of State, when commenting on the proposed legislation stated:

> /T/here are two additional categories of the bill before you . . . under those provisions, the Secretary of State is authorized not to issue passports to persons as to when it is determined upon substantial grounds that their activities or presence abroad, or their possession if a passport, first, seriously impairs the conduct of foreign relations of the United States, or second, be inimical to the security of the United States. These two provisions clearly allow to the Secretary broad discretionary powers. It is our belief, however, that they do not allow him as the principal delegate of the President in the field of foreign affairs any broader discretionary power than the Secretary already had by virtue of existing Congressional enactments and the President's constitutional prerogative to conduct our foreign relations and to protect our national security. We are in fact maintaining that position in the courts today. Id. at 22.

In 1959 Murphy stated before a Congressional Committee:

> Since commenting on S. 2770 in the 85th Congress, there have been no developments that have in any way lessened the Department's conviction that the Secretary of State may deny passports on the basis of anticipated harm to the foreign relations of the United States . . . in fact, the United States Court of Appeals for the District of Columbia in the case of Worthy v. Herter recently upheld the Secretary of State's denial of a passport to an individual on the basis of the belief that he would travel to areas for which his passport was not valid and thereby prejudice the conduct of our foreign relations. Hearings before the Sen. Committee on For. Rel. on S. 806, et. al., 86th Cong., 1st Sess., p. 58 (1959). See also testimony of John W. Hanes Jr., Administrator, Bureau of Security and Consular Affairs Department of State, Hearings before a Special Subcommittee on the Senate Committee on Government Operations on S. 2095, 86th Cong., 1st Sess. 157 (1959).

Subsequent cases in the Court of Appeals have held that the right to impose area restrictions reasonably related to the control of foreign relations is inherent in the President's plenary power over foreign affairs. Alternatively, it was held that the same statute at issue in Kent had by implication authorized the restrictions. E. g., Worthy v. Herter, 270 F. 2d 905 (D. C. Cir.), cert. den. 361 U.S. 918 (1959). Such cases seem to adopt the State Department position that Kent applies only to cases involving personal beliefs and internal security.

Moreover, a report issued by the New York City Bar Association in 1958, after the Kent decision, cited the State Department's 1957 statement concerning persons whose previous conduct abroad had discredited the United States as indictative of the Department's policy under 22 C.F.R. Section 51.136 even after the Kent decision. Ass'n of the Bar of the City of New York Spec. Committee to Study Passport Procedures, Freedom to Travel, pp. 45-46 (1958.)

However, even though the Department continued to act in accord with the 1957 statement after the Kent decision, a reading of the last section of the statement given the Foreign Relations Committee ["and caused difficulty for other Americans (gave bad checks, left unpaid debts, had difficulties with police, etc.")] suggests that it was used by the Department to exclude persons who annoyed the foreign citizenry and thereby made life difficult for those Americans who came later. It does not seem primarily aimed at persons, like would-be defectors, whose activity is such as to embarrass the United States in the international press. However, even if it be admitted that the 1957 statement would not cover Oswald, that does not prove that Oswald should not have been considered within the reach of 22 C.F.R. Section 51.136. On March 16, 1962, the Soviet Affairs Office of the State

Department advised the Visa Office of the Department as follows:

> SOV believes that it is in the interest of the U.S. to get Lee Harvey Oswald and his family out of the Soviet Union and on their way to this country as soon as possible. An unstable character, whose actions are entirely unpredictable, Oswald may well refuse to leave the USSR or subsequently attempt to return there if we should make it impossible for him to be accompanied from Moscow by his wife and child. Report of the Department of State on Lee Harvey Oswald to the Commission, PT. 4, p. 7.

In his application for the June 25, 1963, passport, one of the countries Oswald indicated he wanted to visit was the Soviet Union. Although it may not have been in abuse of discretion to grant Oswald a passport, it was within the Department's discretion to deny him one. The Department's statements and actions since 1958 reveal that it does not ordinarily take the position that Kent v. Dulles trimmed away the Secretary's discretion in all but one or two narrowly restricted fields. The March 16 report of the Soviet Affairs Office should have been filed in such a way that it would come to the attention of persons later asked to rule upon the grant or denial of a passport for Oswald. (The State Department's "Look-Out File Code List" of February 14, 1964, includes among its reasons for preparation of a look-out card: "Individual's actions do not reflect the credit of U.S. abroad.") Moreover, this report, and Oswald's attempted defection, should have been taken into account in the making of this decision. Perhaps the passport should have been granted anyway, but the Department should have exercised rather than avoided its discretion. The fact that Oswald had repaid his repatriation loan should not have insured that his passport application would automatically be approved.

(5) Whether the passport should have been revoked when the State Department received information that Lee Oswald was making inquiries about returning to Russia at the Russian Embassy in Mexico City in late September and early October 1963.

On October 16, 1963, the passport office of the State Department received a report from the Central Intelligence Agency to the effect that an American male, who identified himself as Lee Oswald, had on October 1, 1963, contacted the Soviet Embassy in Mexico City inquiring whether the Embassy had received any news concerning a telegram which had been sent to Washington. The report went on to state that it was believed that this man was identical to Lee "Henry" Oswald, who had been born on October 18, 1939 in New Orleans, and was a former U.S. Marine who had defected to the Soviet Union on October 1959.

Travel to Russia was not proscribed in 1963. Moreover, the Soviet Union was one of the countries Oswald had listed on his passport application. Once the passport was granted, there would be no reason to revoke it simply because Oswald had begun to take steps to get to the Soviet Union.

RMM:ej

Richard M. Mosk

M E M O R A N D U M

TO : Messrs. Coleman & Slawson June 19, 1964

FROM : Richard M. Mosk

Attached is a revision of the earlier draft dealing with the legality of actions taken by the State Department.

Frankly I am still not satisfied with the section dealing with passports. Also, be sure to note the section concerning the granting of a visa to Marina. While this is an invitation to have her deported, if we are going to set forth the facts concerning her entry, I think all of the facts and the legal conclusions that result therefrom should be mentioned.

Attachment

add testimony concerning pass of passport to person who departed

Part II

Legal Bases for the Decisions made by the Department of State and the Immigration and Naturalization Service in Connection with the Oswalds.

In the course of the Commission's investigation, there were called to its attention various decisions concerning Marina and Lee Harvey Oswald made by the State Department and the Immigration and Naturalization Service of the Department of Justice. These decisions included: (1) whether Lee Harvey Oswald had expatriated himself by any act performed between October 16, 1959, the day he entered the Soviet Union, and August 18, 1961, the day it was determined by the Department of State that he was still a United States citizen; (2) whether Marina Oswald was eligible for entry into the United States; (3) whether the provisions of Section 243(g) of the Immigration and Nationality Act should have been waived in the case of Marina Oswald; (4) whether Lee Harvey Oswald should have been issued a passport on June 25, 1963; and (5) whether that passport should have been revoked when the Department of State received information that Oswald was making inquiries about returning to Russia at the Russian Embassy in Mexico City in late September and early October 1963.

The appropriateness of the resolution of these issues has been evaluated by the Commission in terms of the relevant statutes, regulations and practices, and their application to the facts which were available to the Department of State and the Immigration and Naturalization Service at the times the respective decisions were made.

(1) Did Lee Harvey Oswald expatriate himself by any act performed between October 16, 1959 and August 18, 1961?

Since Oswald was born in the United States, he was of course an American citizen (Fourteenth Amendment; United States v. Wong Kim Ark, 169 U.S. 649). Congress, however, has enacted statutes setting forth certain actions which serve to expatriate the person performing them. It might be suggested that Oswald lost his citizenship by virtue of the operation of any one of four sections of the Immigration and Nationality Act of 1952; Section 349 (a) (1), (obtaining naturalization in a foreign state); Section 349 (a) (6), formal renunciation of American nationality); Section 349 (a) (2), (taking an oath of allegiance to a foreign state), or Section 349 (a) (4), (working for the government of a foreign state). It should be noted that, in expatriation cases, the courts generally resolve factual and legal questions in favor of the citizen. Nishikawa v. Dulles, 356 U.S. 129, 134 (1958); Stipa v. Dulles, 233 F. 2d 551, 556 (1956); Fletes-Mora v. Rogers, 160 F. Supp. 215, ____ (1958). Also a legislative policy favorable to citizens in expatriation cases is indicated by a recent amendment to the Immigration and Nationality Act which provides,

> "Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after September 26, 1961 under, or by virtue of, the provisions of this or any other act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence." 75 Stat. 656 (1961)

a. Section 349 (a) (1) - Obtaining Naturalization in a foreign state

Section 349 (a) (1) of the Immigration and Nationality Act of 1952 provides that a United States citizen shall lose his nationality by:

> /O/btaining naturalization in a foreign state upon his own application, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody of such person.

Although Oswald applied for Soviet citizenship, see pp. , it is clear that he never received it. See pp. . Thus, Oswald did not expatriate himself under Section 349 (a) (1).

b. Section 349 (a) (6) - Making formal renunciation of United States nationality

Section 349 (a) (6) of the Act provides that a United States citizen shall lose his citizenship by:

> /M/aking a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State.

In his letter of October 31, 1959, Oswald wrote:

> I, Lee Harvey Oswald, do hereby request that my presnet citizenship in the United States of America, be revoked.
>
> * * *
>
> My request for the revoking of my American citizenship is made only after the longest and most serious considerations.

In his letter of November 3, 1959, he wrote:

> I, Lee Harvey Oswald, do hereby request that my present United States citizenship be revoked.

> I appered (sic) in person, at the Consulate Office of the United States Embassy, Moscow, on Oct 31st, for the purpose of signing the formal papers to this effect. This legal right I was refused at that time.

And he clearly stated in an interview at the American Embassy that he had come to the Embassy to renounce his United States citizenship. See pp._____ supra.

At the time he authored these letters and made the oral statement, Oswald was not yet 21 years old. However, Section 351 of the Immigration and Nationality Act provides, with several exceptions not here relevant, that persons under 18 years of age are presumptively incompetent to perform acts expatriating themselves, thus inferring that no disability exists when one is over eighteen.

Section 349 (a) (6), however, requires the expatriating renunciation to be in "such form as may be prescribed by the Secretary of State." In accordance with this statute, the Secretary set forth the requisite form and procedure in 22 Code of Federal Regulations §§ 50.1 - 50.2 and 8 Foreign Affairs Manual § 225.6. The regulations provide, inter alia, that four copies of the renunciation form are to be executed, and the original and one copy sent to the Department. After the Department has approved the form, it advises the appropriate consular official who may then furnish a copy of the form to the person to whom it relates. The form itself requires the person to subscribe it in the presence of a consular official, and it must be signed by this official. See Comm'n Exh. 955.

Oswald did not execute the proper form; and therefore he failed to comply with the appropriate procedures prescribed by the Secretary of State. Because Section 349 (9) (6) in terms requires compliance with the form prescribed by the Secretary of State, it is evident that Oswald did not

expatriate himself under that Section.

c. Section 349 (a) (2) - Oath of allegiance to a foreign state

Section 349 (a) (2) of the Act provides that a United States citizen shall lose his nationality by:

> /T/aking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof.

In his letter of October 31, 1959 Oswald wrote:

> I affirm that my allegiance is to the Union of Soviet Socialist Republics.

And both in this letter and in his letter of November 3, 1959, he stated that his application for citizenship in the Soviet Union was pending before the Supreme Soviet of the U.S.S.R.238/

Many cases and articles have quoted Secretary of State Charles Evans Hughes to the effect that in order for an oath, declaration, or affirmation of allegiance to a foreign state to effect an expatriation, it must place "the person taking it in complete subjection to the State to which it is taken, at least for the period of the contract, so that it is impossible for him to perform the obligations of citizenship to this country." III Hackworth, Digest of International Law, 219-220 (1942). However, this "complete subjection" test involves just one step in determining whether an expatriation has been effectuated. This test is one by which the wording of an oath in question is tested in order to determine whether its purpose is to swear an allegiance inconsistent with the individuals allegiance to the United States; it is often invoked in cases involving dual citizenship.

See Jalbuena v. Dulles, 254 F. 2d 379, 381 n. 2(3d Cir. 1958): Roche, "The Loss of American Nationality - The Development of Statutory Expatriation," 99 U. Pa. L. Rev. 25 (1950). Oswald's letters clearly did intend to evidence an allegiance to the Soviet Union inconsistent with continued allegiance to the United States. Indeed, they explicitly so state. If Oswald's oath to the Soviet Union is to be found not to have worked an expatriation, therefore, the imperfection must lie in the circumstances under which it was taken rather than in its wording.

An earlier version of Section 349 (a) (2) provided:

> That any American citizen shall be deemed to have expatriated himself . . . when he has taken an oath of allegiance to any foreign state. Act of March 2, 1907, § 2, 34 Stat. 1228.

In 1940 the language of the Section that was changed so as to demand "an oath or . . . affirmation or other formal declaration of allegiance. Nationality Act of 1940, § 401 (b), 54 Stat. 1169.

The language of the 1940 Act has been retained in the present 1952 Act. The shift in language from the 1907 Act to the 1940 Act might be taken to indicate a demand for greater formality in expatriating oaths. Whether or not this was the legislative intent, since 1940 it has been well established that in order for an oath of allegiance to a foreign state to work an expatriation from the United States, it must be given to an official of the foreign state, and not to a party unconnected with the foreign state. See Roche, "The Loss of American Nationality - The Development of Statutory Expatriation," 99 U. of Pa. L. Rev. 25, 33 (1950). This requirement can be viewed as a necessary corollary of the broader, but less clearly established principle that the oath must be taken in accord with the requirements of

the foreign state.

> "The Department of State holds that for loss of nationality to result from taking an oath of allegiance to a foreign state, the oath must be one 'which is prescribed by law or by regulations having the force of law' and must be taken before a competent official of the government concerned." III Hackworth, Digest of International Law 218 (1942).

In Re Bautista's Petition, 183 F. Supp. 271 (D. C. Guam, 1960), a case construing the 1952 Act, the court held that an oath of allegiance to the Philippines taken before an official of the Philippine Government did not work an expatriation because the individual had desired to become a Philippine citizen only in order to obtain a passport to travel to Guam. (The court relied on the "complete subjection" test.) However, the court also failed to consider as an expatriating act the taking of another oath of allegiance to the Philippines before a notary public. The court dismissed this oath with the simple statement: "It was not done before an official of the Philippines." Id. at 274. See also Dep't of State to Consul at Guadalajara, May 27, 1939, at 218.

Similarly, the Board of Immigration Appeals in The Matter of L., 1 I. & N. Dec. 317 (B.I.A. 1942), was faced with the following affirmation:

> "I do swear that I will be faithful and bear truly just to His Majesty, King George VI, his heirs and successors, according to law. So help me God."

The Board held that the declarant did not expatriate himself:

> "An oath or formal declaration mentioned by the statute must mean not only the giving of the oath by the individual but the acceptance of the oath by the foreign state. An oath of allegiance has no real significance unless the oath be made to the state and accepted by the state. Such acceptance on the part of the state must be made in accordance with the laws of that state. In the case before us an oath of allegiance was not made to the British Crown in accordance with any law or regulation of the British Government. On the contrary, the obligation is between the appellant on the one hand and a private employer on the other." Id. at 320.

Other administrative bodies have decided that an oath taken before a notary public in Great Britain [Dep't of State Consular Official in charge at Birmingham, May 10, 1938], an oath taken by a priest on ordination into the Church of England [Director of Consular Service to Counsel Glazebrooke, Oct. 30. 1947], and an oath sworn by a lawyer to obtain admission to the German Bar [Dep't of State to Counsel Gen'l in Berlin, Mar. 21, 1934] did not expatriate an American citizen. See generally Roche, The Loss of American Nationality - The Development of Statutory Expatriation, 99 U. Pa. L.Rev. 25, 33 (1950).

In all cases found by the Commission in which an individual has been held to have expatriated himself by virtue of an oath to a foreign state, although the courts have not always stressed the fact that the oath was taken before an official of the foreign state as being of determinative importance, it is the case that the oath in fact was so taken. See e.g., McCampbell v. McCampbell, 13 F. Supp. 847 (W. D. Ky. 1936); Reaume v. United States, 124 F. Supp. 851, 852 (E. D. Mich. 1954). In Savorgnan v. United States, 338 U. S. 491 (1950), the Court held that Mrs. Savorgnan had expatriated herself. Although the holding was based upon other grounds, the Court "recognized the force of the alternative ground" that she had signed an oath swearing allegiance to the King of Italy as part of an application for Italian citizenship filled out at the Italian Consulate in Chicago. Id. at 503. The Court, in detailing the factors supporting the argument that the oath expatriated Mrs. Savorgnan, did not explicitly mention that it was signed in an office of the foreign government in question and in accord with their requirements. Id. at 502. However,

both these requirements in fact were met. Moreover, in the statement of facts, the Court noted: "No ceremony or formal administration of the oath accompanied her signature and apparently none was required." Id. at 494.

Lee Harvey Oswald's declaration of allegiance to the Soviet Union was not taken before an official of the Soviet Government. He therefore did not expatriate himself under Section 349 (a) (2).

d. Section 349 (a) (4).

Section 349 (a) (4) of the Immigration and Nationality Act provides that a United States citizen shall lose his nationality by:

> (a) Accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, if he has or acquires the nationality of such foreign state; or (b) accepting, serving in, or performing the duties of any office, post or employment under the government of a foreign state or a political subdivision thereof, for which office, post, or employment an oath, affirmation, or declaration of allegiance is required. . . .

While Oswald was employed in a state owned factory in Minsk, see pp. _____, he did not acquire Russian nationality, see pp. _____ and there is no indication that he had to take any oath when he obtained this employment. Chayes 7107. Furthermore cases would indicate that merely working in a Government-owned factory does not result in expatriation even if an oath was required to be taken in connection with such employment. Cf. Flete-Mora v. Rogers, 160 F. Supp. 215 (1958); Kenzi Kamada v. Dulles, 145 F. Supp. 457 (1956); Roche, "The Loss of American Nationality - The Development of Statutory Expatriation," 99 U. Pa. L. Rev, 25.51 (1951). Thus, Oswald did not expatriate himself under Section 349 (a) (4).

The Commission therefore concludes that the Department and Embassy decision that Lee Harvey Oswald had not expatriated himself by any acts performed between October 16, 1959 and August 18, 1961 was correct.

(2) Was Marina Oswald eligible for entry into the United States?

As the wife of an American citizen, Marina Oswald was entitled to non-quota immigrant status under Section 205 of the Immigration and Nationality Act of 1952. However, under Section 212 (a) (28) of the Act, an alien will nevertheless be excluded from admission to the United States if she is a member of or affiliated with a Communist organization unless:

> " . . . such alien establishes to the satisfaction of the consular officer when applying for a visa and the consular officer finds that (1) such membership or application is or was involuntary, or is or was solely when under sixteen years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and where necessary for such purposes. Section 212 (a) (28) (I) (1)."

At the time Marina Oswald applied for a visa she was a member of the Soviet Trade Union for Medical Workers. Comm'n Exh. 944; McVicar 7140. She said she was not nor ever had been a member of any other Communist organization. pp._____. Membership in the Medical Workers Union was deemed by the Department to have been necessary for obtaining employment in a hospital as a laboratory assistant. Comm'n _____. Thus, the State Department determined that her membership was involuntary, and therefore the exemption in Section 212 (a) (28) (I) (i) was applicable. This finding was consistent with "a long-standing interpretation concurred

in by the State and Justice Departments that membership in a professional organization or trade union behind the Iron Curtain is considered involuntary unless the membership is accompanied by some indication of voluntariness, such as active participation in the organization's activities or holding an office in the organization." Report of the Department of State's on Lee Harvey Oswald to the Commission, PT. IV., p. 3. 240/ See also McVicar 7147.

In spite of the fact that Marina Oswald declared that she was not a member of any Communist organization, she was in fact a member of Comsomol, the Communist Youth Organization. Marina Oswald 470-471. This fact was not known to the State Department. If it had been, Marina would not necessarily have been denied a passport, although a careful investigation into the nature of the membership would have been undertaken McVickar 7142. The Supreme Court has indicated that the three types of situations ennumerated in Section 212 (a) (28) (I) (i) are not the only instances where membership in a Communist organization is so nominal as to preclude the issuance of a visa. Galvan v. Press, 347 U.S. 522, 527 (1954).

Had the fact concerning Marina's membership in Comsomol been known to the Department it is conceivable that she would have been excluded from the United States on the ground of having wilfully misrepresented a material fact by having denied membership in any Communist organization. Immigration and Nationality Act, Section 212 (a) (19). In Langhammer v. Hamilton, 295 F. 2d 642, 648 (1961, the court held that a misrepresentation in an application for a visa involves a material fact even if the alien would not definitely have been excluded on true facts. In this case, the

court said that a determination made after admission to the United States that membership in a Communist organization was involuntary would not operate nunc pro tunc to render omission to reveal such fact nonmaterial; semble but see Cavillo v. Robinson, 271 F. 2d 249 (1959) (court said to be material, a misstatement must refer to such facts as would have justified a consul in refusing a visa had they been disclosed).

(3) Should the provisions of Section 243 (a) of the Immigration and Nationality Act have been waived in the case of Marina Oswald?

Section 243 (g) of the Immigration and Nationality Act of 1952 provides that upon notification of the Secretary of State by the Attorney General that a country has refused or unduly delayed the acceptance of a deportable alien from the United States who is a national, citizen, subject, or resident of that country, consular officers in such country are not to issue visas to citizens thereof. On May 26, 1953, the Department of State notified the United States Mission in Moscow that the Attorney General had invoked Section 243 (g) as a result of the failure of the Soviet Union to accept the return of aliens deported or sought to be deported from the United States. Consequently, consular officials were instructed to discontinue the issuance of immigrant visas until advised by the Department of State to the contrary.

It should be noted that Section 243 (g), when invoked by the Attorney General, does not make any particular alien or class of aliens ineligible to immigrate to the United States. It applies to a country, or more specifically, to United States Consular Officers stationed in such countries, and it was designed to exert pressure on countries which fail to receive deportees from the United States. Any person precluded from

receiving an immigrant visa solely because of the application of Section 243 (g) may merely proceed to a United States Consulate in another country where the sanctions are not in effect and there receive an immigrant visa, if he or she is otherwise qualified.

Section 243 (g) does not contain any express provision for waiver. However, the Justice Department has concluded that such waiver powers were granted the Attorney General by the Act and, pursuant to their decision, has granted waiver in over 600 cases since 1953. The waiver procedures followed in 1962 when Marina Oswald was granted a waiver of Section 243 (g) were prescribed by the Immigration and Naturalization Service. The relevant provision read:

> Before adjudicating a petition for an eligible beneficiary residing in the USSR, Czechoslovakia or Hungary, against which sanctions have been imposed, the district director shall obtain a report of investigation regarding the petitioner which shall include any affiliations of a subversive nature disclosed by neighborhood investigation, local agency records and responses to Form G-135a. . . . If no substantial derogatory security information is developed, the district director may waive the sanctions in an individual meritorious case for a beneficiary of a petition filed by a reputable relative to accord status under Section 101 (a) (27) (A) or Section 203 (a) (2), (3) or (4). . . . If substantial adverse security information relating to the petitioner is developed, the visa petition shall be processed on its merits and certified to the regional commissioner for determination whether the sanctions should be waived. The assistant commissioner shall endorse the petition to show whether the Waiver is granted or denied, and forward it and notify the appropriate field office of the action taken. . . . Operations Instructions of the Immigration and Naturalization Service, 205.3. [This revised instruction was effective February 15, 1962 - June 30, 1962. Other versions which may have been considered during Oswald's case were different only in irrelevant ways.]

State Department regulations are much less explicit. 22 C.F.R. 42.120. The State Department's visa instructions for the guidance of consular officers [Note 2 to 22 C.F.R. 42.120, Vol. 9, Foreign Affairs Manual] provide, "The sanctions will be waived only in individual meritorious cases in behalf of a beneficiary of a petition filed by a reputable relative pursuant to Section 101 (a) (27) (A) or paragraph (2) (3) or (4) of Section 203 (a) of the act."

The character of Lee as well as Marina Oswald is relevant to the decision because he is the relative who signed the petition on Marina's behalf. Whether he is "reputable" therefore must be determined. His character may also have a bearing on whether "substantial derogatory security information" had been developed. Thus all of the facts bearing on the issue of Oswald's attempted expatriation were also pertinent to the issue of waiver of the sanction pursuant to Section 243 (g) of the Immigration and Nationality Act for Marina Oswald. These facts were made available to the Immigration and Naturalization Service when it was considering whether to permit the waiver. 241/

The statutory procedure for handling petitioners for non-quota or preference status by reason of relationship calls for a determination of eligibility for such status by the Attorney General. The responsibility for making such determinations has been delegated by the Attorney General to the District Directors of the Immigration and Naturalization Service. Marina Oswald's petition was forwarded by the Embassy in Moscow through the State Department to the District Director in San Antonio, Texas, the office having jurisdiction over Oswald's domicile in the United States.

In accordance with the procedure worked out between the State and Justice Departments, the District Director was to note his determination as to a waiver of Section 243 (g) at the same time as he made his determination of eligibility for non-quota status under Section 205 (a).

On February 28, 1962, the District Director of the Immigration and Naturalization Service informed the Visa Office of the State Department that while the petition for non-quota status had been approved, the waiver of Section 243 (g) was not authorized by the Service. No reason for disapproval of the waiver was stated, but it was "clear from the internal order of the Immigration and Naturalization Service that the refusal to authorize the waiver was based on Oswald's statements and attitude while in the Soviet Union." Reports of the Department of State on Lee Harvey Oswald to the Commission, PT. 4, p. 7. 242/

On March 16, the Soviet Affairs Office of the State Department advised the Visa Office of the Department as follows:

> SOV believes it is in the interest of the U.S. to get Lee Harvey Oswald and his family out of the Soviet Union and on their way to this country as soon as possible. An unstable character, whose actions are entirely unpredictable, Oswald may well refuse to leave the USSR or subsequently attempt to return there if we should make it impossible for him to be accompanied from Moscow by his wife and child.
>
> Such action on our part also would permit the Soviet Government to argue that, although it had issued an exit visa to Mrs. Oswald to prevent the separation of a family, the United States Government had imposed a forced separation by refusing to issue her a visa. Obviously, this would weaken our Embassy's position in encouraging positive Soviet action in other cases involving Soviet citizen relatives of U. S. citizens. 243/

On March 27, the Acting Administrator of the Bureau of Security and Consular Affairs addressed a letter to the Commissioner of the Immigration and Naturalization Service, Department of Justice, requesting reconsideration

of the decision not to waive the provisions of Section 243 (g) in the case of Marina Oswald.[243a] The State Department expressed concern about the propriety of punishing Marina and the Oswalds' baby for Lee Harvey Oswald's earlier errors. Furthermore, it was feared that refusing to permit Marina to accompany Lee out of Russia to the United States would put the Soviet Governement in a position to claim that it had done all it could to prevent the separation of the family, but that our government had split the husband from his wife and child. The Department felt that this would seriously weaken our government's attempts to encourage the Soviet Government to permit other Russian wives and children to accompany their American husbands and parents back to the United States. The letter concluded that it was in the best interest of the United States to have Oswald depart from the Soviet Union as soon as possible.

On May 8, 1962, the Immigration and Naturalization Service agreed to waive the sanction of Section 243 (g) "in view of strong representations made" by the State Department.[244] Consequently, the Embassy was informed that the Section 243 (g) sanction had been waived by the Immigration and Naturalization Service.[245] Thus, while derogatory information was in the file, the ultimate decision was made by the official designated by the Regulation to act in such a case.

Waivers of Section 243 (g) are not unusual. Thus, in spite of Section 243 (g), 661 Immigrant visas were issued in Moscow in the ten-year period ending June 30, 1963. In 1962, 97 immigrant visas were issued in Moscow. Moreover, prevention of the separation of families numbers among the policies most frequently underlying waiver of Section 243 (g). Report of the Department of State on Lee Harvey Oswald to Commission, PT. 4, pp. 4-5.[246] The Commission therefore concludes that the Immigration and Naturalization

Service did not misuse its discretion in responding in accord with the State Department's recommendation that they waive Section 243 (g) for Marina Oswald.

(4) Should Lee Harvey Oswald have been issued a passport on June 25, 1963?

On June 25, 1963, the State Department issued Lee Harvey Oswald a passport. In his application he had said that he intended to visit France, Germany, Holland, Finland, Italy, Poland, and the Soviet Union. Travel to none of these countries was then or is now proscribed by statute or State Department regulations. The passport was issued routinely. pp._____. Since it had previously been determined that Oswald had not expatriated himself and he had repaid his repatriation loan, there was no reason why a "look-out" card should have been in the passport office's files to warn against granting him a passport. See Report of the Department of State on Lee Harvey Oswald to the Commission. PT. 2, pp. 7-8. 247/ While the State Department has informed the Commission that in June, 1963, it had no category of previous defections in the look-out card system, 247a/ the question that remains is whether a passport could have been refused Oswald on the ground that when he was abroad in 1959, he had attempted to expatriate himself and had threatened to give the Russians radar information he had acquired while a Marine.

Unless an applicant comes within one of the statutory sections authorizing the Secretary of State under certain circumstances to refuse to issue a passport, the Secretary has no authority to refuse a passport.

Kent v. Dulles, 357 U.S. 116 (1958).

Section 6 of the Subversive Activities Control Act of 1950 provides:

> /I/t shall be unlawful for any member of /an organization required to register/, with knowledge or notice that such organization is so registered and that such order has become final - (1) to make application for passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; (2) to use or attempt to use any such passport.

Pursuant to Section 6, the State Department promulgated a regulation which denied passports to members of communist organizations:

> /A/ passport shall not be issued to or renewed for any individual who the issuing office knows or has reason to believe is a member of a Communist Organization registered or required to be registered under Section 7 of the Subversive Activities Control Act of 1950 as amended. 22 C.F.R. 51. 135.

The Department had no information that Lee Harvey Oswald was a member of the American Communist Party or any other organization which had been required to register under Section 7 of the Subversive Activities Control Act. A passport therefore could not have been denied him under Section 6.

8 U.S.C. § 1185b provides that, while a presidential proclamation of national emergency is in force, "/I/t shall, except as otherwise prescribed by the President, . . . be unlawful for any citizen of the United States to depart or enter . . . the United States unless he bears a valid passport." This provision, originally enacted in 1918, was reenacted as Section 215 of the Immigration and Nationality Act of 1952. The amendment specified that the provisions of the section were subject to invocation only during "any national emergency proclaimed by the President. . . ." 66 Stat. 190 (1952). Because a proclamation of national emergency issued by President Truman during the Korean War has never been revoked, the government

has taken the position that the statute remains in force. Proclamation No. 2915 (Dec. 16, 1950), 60 Stat. A 454; Proclamation No. 2974 (Apr. 18, 1952), set out preceding 50 U.S.C. Appendix 1; Proclamation No. 3084 (Jan 17, 1953), 18 Fed. Reg. 489.

Pursuant to 8 U.S.C. 1185b, the State Department had issued regulations setting forth the circumstances under which it would refuse a passport:

> In order to promote and safeguard the interests of the United States' passport facilities, except for direct and immediate return to the United States, shall be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activity abroad would (a) violate the laws of the United States, (b) be prejudicial to the orderly conduct of foreign affairs; or (c) otherwise be prejudicial to the interests of the United States. 22 C.F.R. § 51.136.

There has apparently been no judicial evaluation or interpretation of Section 51.136. However, the State Department takes the position that its authority under Section 51.136 is severely limited. In a report submitted to the Commission dated May 8, 1964, it concluded that "there were no grounds consonant with the passport regulations to take adverse passport action against Oswald prior to November 22, 1963. 248/

In 1957 the State Department described to the Senate Foreign Relations Committee one category of persons to whom it denied passports under Section 51.136:

> Persons whose previous conduct abroad has been such as to bring discredit on the United States and cause difficulty for other Americans (gave bad checks, left unpaid debts, had difficulties with police, etc.) Hearings before the Sen. For. Rel. Comm. on Dep't State Passport Policies, 85th Cong., 1st Sess., pp. 338-39 (1957).

Since Oswald's prior attempt to defect to the Soviet Union had caused the United States a certain amount of adverse publicity, it is at least arguable that he was a person "whose previous conduct abroad had been such as to bring discredit on the United States." See Comment, "Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review," 61 Yale L. J. 171, 174-178 for examples of passport refusals prior to Kent v. Dulles.

However, the decision in Kent v. Dulles, 357 U.S. 116 (1958) may be read to have greatly restricted the Secretary of State's authority to deny passports. In the Kent Case, the Supreme Court invalidated a State Department regulation denying passports to Communists, on the ground that the regulation exceeded the authority Congress had granted the Secretary. The opinion suggests that the Court did not intend to restrict its pronouncement to this narrow issue. The Court stated.

> "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." Id. at 125-26.

After noting that historically "cases of refusal generally fell into two categories": (a) citizenship and allegiance, and (b) illegal conduct, the Court stated that the "grounds for refusal asserted here do not relate to citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other. Yet, so far as relevant here, those two are the only ones which it could fairly be argued were adopted by Congress in light of prior administrative practice." Id. at 127-28.

On the other hand, it might be possible to read the case much more narrowly. In 1958, immediately after the Kent case, State Department officials indicated to Congressional Committees conducting hearings on proposed passport legislation that the Kent case was limited to prohibiting denial of passports because of Communist belief and that it was not a decision which restricted the power to deny passports to instances of only either non-citizenship or illegal conduct. Loftus Becker, Legal Adviser to the Department of State, stated:

> "The Supreme Court decision /Kent/ does not pass on anything beyond the specific issue there that we did not have the power to require a non-Communist affidavit on the part of the applicant. It does not give us any guidance as to where we go from there . . . ." Hearings before the Senate Committee on Foreign Relations on S. 2770, et al., 85th Cong., 2d Sess. p. 35 (1958).

Another State Department official stated:

> "As a result of the recent Supreme Court decision, we have not been able to process for the purpose of holding up any passports with information available that the applicant would fall under the so-called Communist part of our regulations. If he fell under some other portions of the regulations we would process him as we have in the past, but if he falls under the Communist part of the regulations, we must go ahead as though that information did not exist." Roderic O'Connor, Administrator, Bureau of Security and Consular Affairs of the Department of State, Hearings before the Senate Committee on Foreign Relations on S. 2770, 85th Cong. 2d Sess., p. 41 (1958).

At the same hearing, Robert Murphy, then Under Secretary of State, when commenting on the proposed legislation stated:

> /T/here are two additional categories of the bill before you . . . under those provisions, the Secretary of State is authorized not to issue passports to persons as to when it is determined upon substantial grounds that their activities or presence abroad, or their possession of a passport, first, seriously impairs the conduct of foreign relations of the United States, or second, be inimical to the security of the United States. These two provisions clearly allow to the Secretary broad discretionary powers. It is our belief, however, that they do not allow him as the principal delegate of the President in the field of foreign affairs any broader discretionary power than the Secretary already had by virtue of existing Congressional enactments and the President's constitutional prerogative to conduct our foreign relations and to protect our national security. We are in fact maintaining that position in the courts today. Id. at 22.

In 1959 Mr. Murphy stated before a Congressional Committee:

> Since commenting on S. 2770 in the 85th Congress, there have been no developments that have in any way lessened the Department's conviction that the Secretary of State may deny passports on the basis of anticipated harm to the foreign relations of the United States. . . . in fact, the United States Court of Appeals for the District of Columbia in the case of Worthy v. Herter, recently upheld the Secretary of State's denial of a passport to an individual on the basis of the belief that he would travel to areas for which his passport was not valid and thereby prejudice the conduct of our foreign relations. Hearings before the Sen. Committee on For. Rel. on S. 806, et al., 86th Cong., 1st Sess., p. 58 (1959). See also testimony of John W. Hanes, Jr., Administrator, Bureau of Security and Consular Affairs, Department of State, Hearings before a Special Subcommittee of the Senate Committee on Government Operations on S. 2095, 86th Cong., 1st Sess. 157 (1959).

Furthermore, the Department made no moves to take 22 C.F.R. § 51.136 off the book; in fact, it was reissued in 1962. Subsequent cases in the Court of Appeals have held that the right to impose area restrictions reasonably related to the control of foreign relations is inherent in the President's plenary power over foreign affairs. Alternatively, it was held that the same statute at issue in Kent had by implication authorized the restrictions. See Worthy v. Herter, 270 F. 2d 905 (D. C. Cir.), cert. den. 361 U.S. 918 (1959).

Moreover, a report issued by the New York City Bar Association in 1958, after the Kent decision, cited the State Department's 1957 statement concerning persons whose previous conduct abroad had discredited the United States as indicative of the Department's policy under 22 C.F.R. Section 51.136 even after the Kent decision. Ass'n of the Bar of the City of New York Spec. Committee to Study Passport Procedures, Freedom to Travel, pp. 45-46 (1958).

On March 16, 1962, only one year prior to the issuance of Oswald's passport, the Soviet Affairs Office of the State Department had advised the Visa Office of the Department as follows:

> SOV believes that it is in the interest of the U.S. to get Lee Harvey Oswald and his family out of the Soviet Union and on their way to this country as soon as possible. An unstable character, whose actions are entirely unpredictable, Oswald may well refuse to leave the USSR or subsequently attempt to return there if we should make it impossible for him to be accompanied from Moscow by his wife and child. Report of the Department of State on Lee Harvey Oswald to the Commission, PT. 4, p. 7. 249/

This statement would indicate that the issuance of a passport to Oswald should be questioned under 22 C.F.R. Section 51.136.

However, even though the Department in 1958 continued to act in accord with the 1957 statement after the Kent decision, a reading of the last section of the statement given the Foreign Relations Committee /"and caused difficulty for other Americans (gave bad checks, left unpaid debts, had difficulties with police, etc.")/ suggests that it was used by the Department to exclude persons who annoyed the foreign citizenry and thereby made life difficult for those Americans who came later. It does not seem primarily aimed at persons, like would-be defectors, whose activity is such as to embarrass the United States in the international press.

Also, in spite of some of the above-mentioned statements by State Department officials, in recent years passports have been denied only to those who violate the Department's travel restrictions, fugitives from justice, those who are involved in using a passport fraudulently and to a few individuals engaged in illegal activity abroad or in conduct affecting our relations with a particular country. Comm'n Exh. 949; Chayes 7158-7163.

In practice, therefore, the State Department has indicated that the Kent decision precludes the denial of passports on the ground of political activities and political associations. They have not refused to issue passports to people who go abroad and denounce the United States or engage in political activity that is directed against United States policy. Chayes 7132. The State Department was certainly justified in so construing the Kent decision since in that case the Supreme Court said that serious

constitutional doubts were raised by the imposition of restrictions on personal liberty that were based upon criteria of political belief and association. See Kent v. Dulles at p. _____. /Here will be mentioned the correctness of the State Department interpretation in view of the Aptheker case coming down Monday, which will undoubtedly come out against the Government's position./

Since the only grounds upon which a passport might have been denied Oswald would fall within this area of personal belief and association and political activity, the State Department, in following its practice, was not unjustified in issuing Oswald a passport. The Commission concludes that the Department was within the area of judgment in concluding that it had no authority to deny a passport to Oswald based upon the evidence in the file as of June 25, 1963.

(5) Should Lee Harvey Oswald's passport have been revoked when the State Department received information that he was making inquiries about returning to Russia at the Russian Embassy in Mexico City in late September and early October 1963?

On October 16, 1963, the passport office of the State Department received a report from an intelligence source to the effect that an American male, who identified himself as Lee Oswald, had on October 1, 1963, contacted the Soviet Embassy in Mexico City with respect to whether the Russian Embassy had received a telegram from Washington with respect to him. The report went on to state that it was believed that this man was identical to Lee "Henry" Oswald, who had been born on October 18, 1939, in New Orleans, and was a former U.S. Marine who had defected to the Soviet Union in October 1959. The report, however, said nothing about a Russian visa or that Oswald had also visited the Cuban Embassy in Mexico City.

Travel to Russia was not proscribed in 1963. Moreover, the Soviet Union was one of the countries Oswald had listed on his passport application. Once the passport was granted, there would be no reason to revoke it simply because Oswald had begun to take steps to get to the Soviet Union.