LEGISLATIVE HISTORY
P.L. 95-549

IMMIGRATION AND NATIONALITY ACT— NAZI GERMANY

P.L. 95-549, see page 92 Stat. 2065

House Report (Judiciary Committee) No. 95-1452, Aug. 8, 1978 [To accompany H.R. 12509]

Senate Report (Human Resources Committee) No. 95-1425, Sept. 27, 1978 [To acccompany S. 3309]

Cong. Record Vol. 124 (1978)

DATES OF CONSIDERATION AND PASSAGE

House September 26, October 13, 1978

Senate October 10, 1978

The House bill was passed in lieu of the Senate bill.

The House Report is set out.

HOUSE REPORT NO. 95-1452

[page 1]

The Committee on the Judiciary, to whom was referred the bill (H.R. 12509), to amend the Immigration and Nationality Act to exclude from admission into, and to deport from, the United States all aliens who persecuted any person on the basis of race, religion, national origin, or political opinion, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

Purpose of the Bill

The purpose of the bill is to exclude from admission into the United States aliens who have persecuted any person on the basis of race, religion, national origin, or political opinion, and to facilitate the deportation of such aliens who have been admitted into the United States.

History of Legislation

During the 1st session of the 95th Congress, two bills on this subject (H.R. 410 and H.R. 412) were introduced by Hon. Elizabeth Holtzman and referred to the Subcommittee on Immigration, Citizenship, and International Law.

H.R. 410 provided for the creation of additional categories of excludable and deportable aliens consisting of aliens who have engaged in persecution based on race, religion, national origin, or political opinion.

A similar bill (H.R. 412) provided for the creation of additional categories of excludable and deportable aliens who during the period beginning on March 23, 1933, and ending May 8, 1945, and under the direction or in association with the Nazi or related governments, have engaged in persecution based on race, religion, or national origin.

On April 20, 1978 the subcommittee considered the afore-mentioned bills and ordered favorably reported to the full committee a clean bill, H.R. 12509, which embodies the provisions of H.R. 410 and amendments adopted during the subcommittee markup.

Committee Vote

The full committee considered H.R. 12509 on June 27 and July 11, 1978 and on the latter date, with a quorum present, ordered the bill, without amendment, favorably reported to the House of Representatives, by a vote of 20 ayes to 5 nays.

Need for Legislation

QUALITATIVE RESTRICTIONS ON U.S. IMMIGRATION

The Immigration and Nationality Act of 1952 (INA), as amended, sets forth grounds rendering an alien excludable and/or deportable from the United States. The first such qualitative restrictions on immigration into the United States, prohibiting the admission of convicts and prostitutes, were imposed by the act of March 3, 1875. Since that time, the grounds upon which an alien applying for admission may be excluded, as well as grounds for deportation of aliens already residing in the United States, have been considerably refined.

The Immigration and Nationality Act, as amended, currently contains 32 basic categories of aliens excludable from admission into the United States and 18 basic categories of deportable aliens.

The exclusion provisions, contained in section 212 of that act, are currently administered by the Bureau of Consular Affairs of the Department of State, at U.S. Embassies and consulates abroad, and the Immigration and Naturalization Service (INS) of the Department of Justice in the United States. In general, the requirements set forth in that section are applicable to aliens applying for temporary admission as nonimmigrants, as well as to those applying for immigration to this country.

Applicants for visas must undergo a screening procedure abroad, conducted by a U.S. consular officer, to determine eligibility under the provisions of the Immigration and Nationality Act. Additionally, aliens are again screened for admissibility at U.S. ports of entry by inspectors of the Immigration and Naturalization Service.

HISTORY OF EXCLUSION FROM THE UNITED STATES OF ALIENS PARTICIPATING IN PERSECUTION

Although our permanent immigration law has never expressly excluded from admission into the United States aliens who have participated in persecution, similar provisions have appeared in special legislative enactments providing for the admission of refugees and certain other displaced persons after World War II.

For example, section 13 of the Displaced Persons Act of 1948 (Public Law 774, 80th Congress, as amended by Public Law 555, 81st Cong.) prohibited the admission of aliens under that act who advocated or assisted in the persecution of any person because of race, religion, or national origin. This prohibition paralleled the provision contained in the Constitution of the International Refugee Organization (the IRO was the organization established by the United Nations for the purpose of resettling persons displaced by World War II). More specifically, the IRO constitution stated that "the concern of the Organization", did not extend to persons who "have assisted the enemy in persecuting civil populations * * *" That provision was incorporated by reference into the original DP Act as enacted in 1948. The Refugee Relief Act of 1953, another postwar refugee statute, similarly prohibited the admission of such aliens.

Thus, enactment of H.R. 12509 would establish within the permanent U.S. immigration law a provision which has appeared previously in special refugee measures.

CURRENT IMMIGRATION AND NATURALIZATION SERVICE WAR CRIMINAL ACTIVITY

In 1977 INS established, within its central office, a Special Litigation Unit, whose function is to coordinate and process all pending cases in which persons residing in the United States have been accused of having participated in war crimes and other forms of persecution. The creation of this unit was the culmination of a renewed emphasis placed on alleged Nazi war criminals beginning in the early 1970's, largely as a result of this committee's interest in these cases.

The majority of the cases in which allegations have been received, indeed all of the cases in active litigation, concern individuals who were admitted under either the Displaced Persons Act or the Refugee Relief Act, and are therefore deportable. The general ground for deportation is that they were excludable at the time of their admission for having withheld or misrepresented facts relating to atrocities in which they were allegedly engaged.

However, the Immigration and Naturalization Service does have knowledge of two cases in which substantiated allegations of Nazi war atrocities have been received, and in which the individuals concerned are not deportable since they were admitted under the 1952 act. Unless H.R. 12509 is enacted, deportation of these individuals is not possible, even if engagement in atrocities can be proven. Conversely, if H.R. 12509 were enacted, and involvement in Nazi war crimes were established at a deportation hearing, these aliens would be rendered deportable; thereby eliminating an undesirable loophole in current U.S. immigration law.

RELATED INTERNATIONAL AGREEMENTS

The United States is party to a number of multilateral agreements reaffirming the commitment of signatories thereto to the protection and maintenance of human rights. These agreements (including the Charter of the United Nations; the Universal Declaration of Human Rights, adopted in 1948; and most recently, the Final Act of the Conference on Security and Cooperation in Europe, signed in 1975) restate the moral as well as legal obligation of the civilized nations of

the world to recognize the right of every human being to live, work, and practice one's belief, free from oppressive governmental interference, and to refrain from such oppressive conduct.

Enactment of H.R. 12509 would be consistent with the principles enunciated in, and the spirit of, those agreements.

Analysis of the Bill

SECTION-BY-SECTION

Section 1(a)—Amends section 212(a) of the Immigration and Nationality Act of 1952 (INA), as amended, (relating to the general classes of aliens ineligible to receive visas and excludable from admission into the United States (by establishing an additional class of excludable aliens consisting of those who have ordered, incited, assisted or participated in the persecution of any person because of race, religion, national origin, or political opinion.

Section 1(b)—Amends section 212(d)(3) of the INA to prohibit the issuance of a visa to, and admission of, an alien applying for temporary admission as a nonimmigrant if such alien is within the class of aliens described in section 1(a) above. Currently, an alien who has applied for temporary admission into the United States as a nonimmigrant, who is otherwise inadmissible based on one or more of the grounds set forth in section 212(a) (other than those contained in paragraphs (27) and (29), relating to aliens whose admission may prejudice the public interest or endanger national security, and subversives, etc.), may nevertheless be issued a visa and admitted temporarily at the discretion of the Attorney General if he concurs with a favorable recommendation made by the Secretary of State.

Section 2—Amends section 241(a) of the INA, relating to general classes of deportable aliens, by establishing an additional class of deportable aliens consisting of aliens who have ordered, incited, assisted or otherwise participated in persecution because of race, religion, national origin, or political opinion.

Section 3—Amends section 243(h) of the INA, to prohibit the withholding of deportation of an alien deportable under section 2 of the bill. Currently, section 243(h) authorizes the Attorney General to withhold the deportation of any alien to any country in which, in the Attorney General's opinion, the alien would be subject to persecution on account of race, religion, or political opinion.

Section 4—Amends section 244(e) of the INA to prohibit the Attorney General from permitting an alien, under deportation proceedings based on grounds established by section 2 of this bill to depart from the United States voluntarily in lieu of formal deportation. Currently, the Attorney General is authorized, except with respect to certain deportable aliens (i.e., those rendered deportable for crimes involving moral turpitude, anarchists, Communists, etc.), to permit in his discretion such voluntary departure.

PERSECUTION BECAUSE OF RACE, RELIGION, NATIONAL ORIGIN, OR POLITICAL OPINION

Language similar to that contained in this bill currently appears in other sections of the Immigration and Nationality Act and has appeared in prior legislation as well as in several international agree-

ments. A substantial body of case law and other precedential material has developed under those related provisions to guide those administrators responsible for implementing H.R. 12509.

Although the terminology, in some of the other INA provisions (namely, sections 203(a)(7) and 243(h) of that act) is applied for the purpose of making determinations with respect to persons asserting refugee status or seeking other immigration benefits, it is not inappropriate to utilize the interpretations and clarifications which have developed under them in applying the language of H.R. 12509.

Section 203(a)(7) of the act (8 U.S.C. 1153(a)(7)) accords a preference to, and authorizes the Attorney General to admit, certain aliens into the United States conditionally, as refugees, upon a showing that such aliens have fled their country, and are unable or unwilling to return, because of fear of "persecution * * * on account of race, religion, or political opinion * * *" Section 243(h) of the act, authorizes the withholding of deportation of an alien to any country where such alien would be subject to "persecution on account of race, religion, or political opinion."

Both of those sections parallel similar provisions contained in the U.N. Protocol and Convention Relating to the Status of Refugees. In this regard, the Board of Immigration Appeals has held that the protection afforded by section 33 of the U.N. Convention, prohibiting expulsion of refugees to a territorial frontier which would threaten his life or freedom, is coextensive with that provided by section 243(h) of the INA.

Although the INA does not define the terminology contained in sections 203(a)(7) and 243(h), reflecting an intent to permit maximum flexibility with respect to each individual determination, their application has been adequately guided by the case law which has developed thereunder.

Generally this case law has described persecution as the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g. race, religion, political opinion, etc.), in a manner condemned by civilized governments. The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.

The committee does not intend that the persecution language of H.R. 12509 include general prosecutions for criminal offenses, unless for an offense which is "purely political" in nature. Nor is it intended that a national system of compulsory military service, acceptable to civilized nations and not discriminatory or defective in some other respect, constitute persecution under H.R. 12509.

Section 13 of the Displaced Persons Act of 1948, as amended, and section 14(a) of the Refugee Relief Act of 1953 prohibited the admission of aliens under those statutes who had "advocated or assisted in the persecution of any person or group of persons because of race, religion or national origin."

Regulations promulgated under the Displaced Persons Act described victims of persecution, for purposes of eligibility thereunder, as persons or groups of persons who have been deprived of liberty, property or equal protection of the laws, or have "been denied the full

rights of citizenship on account of race, religion or political belief as a direct or indirect consequence of the effect, or the fear of the effect of laws enacted by the Nazi government discriminating against him or any of such groups."

Both the "Agreement for the Prosecution and Punishment of War Criminals (59 Stat. 1544), also known as the "London Agreement", and the Allied Control Council Law No. 10 (See "Trials of War Criminals Before the Nuremberg Military Tribunals," volume 1, page xvi, Government Printing Office, 1949) under which 161 individuals were convicted at Nuremberg, Germany, made punishable "crimes against humanity", including "persecution on political, racial or religious grounds * * *"

The tribunals before which the Nuremberg prosecutions were held discussed the concept of "crimes against humanity" and "persecution" in great detail.

One such tribunal characterized the former as "acts committed in the course of wholesale and systematic violations of human life and liberty * * *." In support of its exercise of international jurisdiction the court continued:

> It is to be observed that insofar as international jurisdiction is concerned the concept of crimes against humanity do not apply to offenses for which the Criminal Code of a well-ordered state makes adequate provision. They can only come within the purview of this basic code of humanity because the state involved, owing to indifference, impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals. (See transcript of proceedings, p. 6767, "Einsatzgruppen Case" (Case No. 9) Tribunal No. II.)

The first Nuremberg trial, conducted under the "London Agreement", in which Hermann Wilhelm Goering and Rudolf Hess, among others, were named as defendants, in discussing the persecution inflicted upon the Jews in Nazi Germany, referred to the "discriminatory laws * * * limit(ing) the offices and professions permitted to Jews; and restrictions * * * placed on their family life and their rights of citizenship."

The tribunal recognized, also, the economic aspect of persecution, citing the wholesale seizure by the Nazi government of Jewish assets and financial holdings, the imposition of extraordinarily burdensome fines and the creation of Jewish "ghettos."

The committee explored thoroughly the possibility of including in the bill a definition of the phrase "persecution because of race, religion, national origin or political opinion." Such inclusion was deemed unnecessary in light of the substantial body of precedence already discussed and the success achieved in administering current INA provisions, such as section 203(a)(7) and 243(h), without the benefit of an express definition.

Additionally, any such definition would necesarily limit application of the provision to particular, presently foreseeable situations. Persecution, however, has and will continue to take many forms and it is the intention of the committee in recommending this legislation to allow the maximum amount of flexibility possible in its administration. The inclusion of a necessarily limited and rigid definition would

be inconsistent with such an intent. In a hearing before the Subcommittee on Immigration, Citizenship, and International Law in 1977, INS witnesses agreed with this view.

At that hearing, INS discussed the concept of persecution in terms of "threats of physical harm, or deprivation of opportunities to obtain housing or employment * * * deliberate and severe economic disadvantages imposed by a government upon an individual because of his race, religion, or political opinion * * *" and concluded that "(s)ince persecution can take many forms, a more specific definition may be difficult to achieve."

The committee considered the desirability of including a specific definition of the term "persecution based on race, religion, national origin or political opinion." Alternatively, it was suggested that the bill identify particular individuals, organizations, groups, governmental officials or others as falling within the scope of coverage of this legislation.

The committee rejected both approaches; preferring instead to require individual determination based on the facts in each case.

Administrability of H.R. 12509

Concern has been expressed regarding the administrability of the provisions of H.R. 12509. The committee has considered these concerns and believes that the provisions in their present form can be properly and efficiently administered.

Both the Departments of Justice (Immigration and Naturalization Service) and State (Bureau of Consular Affairs) have assured the committee that regulations, borrowing from related domestic and international law, and setting forth specific and clearly identifiable standards to be applied by the consular and immigration officers, will be developed.

In applying the "persecution" provisions of the bill, it is the intention of the committee that determinations be made on a case-by-case basis in accordance with the case law that has developed under the INA sections heretofore cited, as well as international material on the subject such as the opinions of the Nuremberg tribunals.

In making a "persecution" determination, emphasis should be placed on the governmental nature of the conduct involved. Isolated instances of mistreatment on the part of one individual against another, without Government support or complicity, would clearly not meet that criterion. Further, it is important to stress that the conduct envisioned must be of a deliberate and severe nature and such that is condemned by civilized governments, precluding invocation of the "persecution" language in situations, for example, where governmental action is taken pursuant to a statute or rule which has been properly enacted or established but which later is invalidated as being inconsistent with a national constitution or charter. Such Government action would not constitute "persecution" for purposes of this bill unless it could be established that the objective of such statute or rule was to deliberately inflict severe harm or suffering on a particular person or group of persons based on race, religion, national origin, or political opinion.

Although the committee recognizes that there will be instances where the consular or immigration officer will be required to make difficult and very delicate determinations regarding the eligibility of an applicant for admission under H.R. 12509, it nevertheless maintains that the existence of the possibility of such instances should not deter enactment of this legislation. It is an accepted precept of international law that "persecution" is a "crime against humanity", condemned by all civilized nations. Invocation of U.S. domestic law in furtherance of such an accepted international law principle should not be precluded because it may in some instances necessitate difficult determinations.

Administration Position

Reports of the Departments of State and Justice were received on the bills H.R. 410 and H.R. 412 which are very similar to H.R. 12509. Those agencies strongly supported both bills. Moreover, the Justice Department indicated a preference for the language contained in H.R. 410 which was included in H.R. 12509. The Department of State, in testimony prepared for the subcommittee, dated February 23, 1978, indicated support for even broader language, stating:

> While the Department favors both of these bills (H.R. 412 and H.R. 410), we would prefer enactment of an even broader provision which would be applicable to an alien who had engaged in, assisted, ordered or incited the persecution of others on the basis of race, religion, nationality, membership of a particular group, or political opinion. A broader provision of this kind would thus reflect more fully our commitments as to human rights generally.

Following are the departmental reports submitted on H.R. 410 and H.R. 412:

Department of Justice,
Washington, D.C., May 12, 1977.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, D.C.

Dear Mr. Chairman: You have requested the views of the Department of Justice on HR. 410, a bill to amend the Immigration and Nationality Act to exclude from admission into and to deport from the United States all aliens who persecuted others on the basis of religion, race, national origin, or political opinion.

The proposed bill establishes a new ground for exclusion and a new ground for deportation. Both grounds are aimed at the same class of undesirable alien—aliens who engaged or assisted in the persecution of others on account of religion, race, national origin, or political opinion.

Presently, aliens who have committed war crimes or who have engaged in persecution are not excludable or deportable under the Immigration and Nationality Act unless they admit the commission of a crime involving moral turpitude prior to admission to the United States, or unless they have been convicted of a crime involving moral turpitude or have obtained a visa or other documentation by fraud or willful misrepresentation of a material fact.

We note that the term "persecution" is defined neither in H.R. 410 nor in any of the existing enactments which it amends. Respondents in deportation proceedings under the provisions of the bill may object that they are deprived of their rights to due process of law under the U.S. Constitution if deportation orders are issued on the basis of so broad an undefined term, which has no clear meaning in American jurisprudence. Consequently, the Department recommends that H.R. 410 be amended to define the term "persecution" with some precision.

The Department favors the proposed legislation which would fill a gap in the present exclusion and deportation provisions of the act if amended as suggested above. As a technical matter, it is noted that section 601(a) of the Health Professions Educational Assistance Act of 1976, Public Law 94-484, 90 Stat. 2300, added a new ground of exclusion as section 212(a)(32) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(32)). Therefore, the new ground of exclusion specified in this act should be numbered as section 212(a)(33).

The precise budgetary impact of this bill cannot be estimated at this time.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

PATRICIA M. WALD,
Assistant Attorney General.

DEPARTMENT OF STATE,
Washington, D.C., October 17, 1977.

Hon. PETER W. RODINO, JR.,
Chairman, Committee on the Judiciary,
House of Representatives,

DEAR MR. CHAIRMAN: The Secretary has asked me to reply to your letter of March 1, 1977, enclosing for the Department's study and report a copy of H.R. 410, a bill to amend the Immigration and Nationality Act to exclude from admission into and to report from the United States all aliens who persecuted others on the basis of religion, race, national origin, or political opinion.

If enacted, section 1 of the bill would add to section 212(a) of the act a new paragraph (32) to render ineligible to receive a visa and inadmissible to the United States any alien who incited or participated in the persecution of any person because of his religion, race, or national origin and was acting under the direction of or in association with any government.

Public Law 94-484 (90 Stat. 2300) amended section 212(a) of the act to add a new paragraph (32). Section 1 of the bill would therefore have to be amended to read "(32)" in place of "(31)" and "(33)" in place of "(32)".

Section 2 of the bill would amend section 241(a) of the act by adding a new paragraph (19) to provide for the deportation from the United States of the identical classes of aliens.

The Department supports the objectives of this bill. We note that an indirect effect of the bill would be permanently to bar the admission

to the United States as immigrants any persons disqualified under its provisions. No relief is provided for such persons. Nonimmigrants would be eligible for relief, however.

Absent a conviction for crimes coming under the purview of this bill, the consular or immigration officer would be called upon to make decisions of the highest delicacy. The Department therefore believes that the bill should contain a precise definition of those acts which would render an alien ineligible according to the provisions of this bill.

The Office of Management and Budget advises that from the standpoint of the administration's program there is no objection to the submission of this report.

Sincerely,

DOUGLAS J. BENNET, Jr.,
Assistant Secretary
for Congressional Relations.

DEPARTMENT OF JUSTICE,
Washington, D.C., May 12, 1978.

HON. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on H.R. 412, a bill to amend the Immigration and Nationality Act to exclude from admission into and to deport from the United States all aliens who persecuted others on the basis of religion, race, or national origin under the direction of the Nazi government of Germany.

The proposed bill establishes a new ground for exclusion and a new ground for deportation. Both grounds are aimed at a single class of undesirable alien—Nazi war criminals. Presently, war criminals who entered under the Immigration and Nationality Act of 1952 are not deportable unless they were actually convicted of crimes or made material misrepresentations in securing a visa or other documentation.

It should be noted that the bill is very limited in scope. It does not apply to those who engaged in persecution on the basis of race, religion, or national origin under regimes other than that of Nazi Germany. As a technical matter, it is noted that section 601(a) of the Health Professions Educational Assistance Act of 1976, P.L. 94-484, 90 Stat. 2300, added a new ground of exclusion as section 212(a)(32) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(32)). Therefore, the new ground of exclusion specified in this Act should be numbered as section 212(a)(33).

We note that the term "persecution" is defined neither in H.R. 412 nor in any of the existing enactments which it amends. Respondents in deportation proceedings under the provisions of the bill may object that they are deprived of their rights to due process of law under the U.S. Constitution if deportation orders are issued on the basis of so broad an undefined term, which has no clear meaning in American jurisprudence. Consequently, the Department recommends that H.R. 412 be amended to define the term "persecution" with some precision.

While the Department would prefer enactment of broader legislation which would be applicable to any alien who had engaged in persecution of others, we have no objection to the enactment of this bill if amended as suggested above.

The precise budgetary impact of this bill cannot be estimated at this time.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

PATRICIA M. WALD,
Assistant Attorney General.

DEPARTMENT OF STATE,
Washington, D.C., November 9, 1977.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: The Secretary has asked me to reply to your letter of March 1, 1977, enclosing for the Department's study and report a copy of H.R. 412, a bill to amend the Immigration and Nationality Act to exclude from admission into and to deport from the United States all aliens who persecuted others on the basis of religion, race, or national origin under the direction of the Nazi Government of Germany.

If enacted, section 1 of the bill would add to section 212(a) of the act a new paragraph (32) to render ineligible to receive a visa and inadmissible to the United States any alien who, during the period March 23, 1933 to May 8, 1945, incited or participated in the persecution of any person because of his religion, race, or national origin and was acting under the direction of or in association with the Nazi Government of Germany, a government in any area occupied by Nazi military forces, or a government allied with, or established with the cooperation or assistance of the Nazi Government of Germany.

Public Law 94-484 (90 Stat 2300) amended section 212(a) of the act to add a new paragraph (32). Section 1 of the bill would therefore have to be amended to read "(32)" in place of "(31)" and "(33)" in place of "(32)".

Section 2 of the bill would amend section 241(a) of the act by adding a new paragraph (19) to provide for the deportation from the United States of the identical classes of aliens.

The Department supports the objectives of this bill. We note that an indirect effect of the bill would be permanently to bar the admission to the United States as immigrants any persons disqualified under its provisions. No relief is provided for such persons. Nonimmigrants would be eligible for relief, however.

Absent a conviction for crimes coming under the purview of this bill, the consular or immigration officer would be called upon to make decisions of the highest delicacy. The Department therefore believes that the bill should contain a precise definition of those acts which would render an alien ineligible according to the provisions of this bill.

It should also be noted that with the passage of time, this bill will be applicable to an ever-decreasing number of aliens.

The Office of Management and Budget advises that from the standpoint of the administration's program there is no objection to the submission of this report.

Sincerely,

DOUGLAS J. BENNET, Jr.,
Assistant Secretary
for Congressional Relations.

CONSTITUTIONALITY OF H.R. 12509

The committee is of the opinion that H.R. 12509 is constitutionally valid.

EX POST FACTO CLAUSE

The Supreme Court of the United States has consistently held that deportation proceedings are civil rather than criminal in nature, and that for purposes of the ex post facto prohibition of the U.S. Constitution, deportation is not punishment so that creation of retroactively applicable grounds for deportation is constitutional.

The Supreme Court has upheld such enactments on three occasions. In *Galvan* v. *Press*, 347 U.S. 522 (1954)[1], section 22 of the Internal Security Act of 1950, which made deportable any alien who, at any time after entry into the United States, had been a member of the Communist Party, withstood a constitutional attack based on the ex post facto clause. Similar challenges were overcome in *Marcello* v. *Bonds*, 349 U.S. 302 (1955)[2] and *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952)[3], upholding provisions of the Immigration and Nationality Act and the Alien Registration Act of 1940, respectively.

PROHIBITION AGAINST BILLS OF ATTAINDER

The committee, after having thoroughly considered the issue, is of the opinion that H.R. 12509 is not a bill of attainder prohibited by the U.S. Constitution.

Although the Supreme Court has not directly considered the applicability of the bill of attainder clause to acts of Congress in exercise of its express, constitutionally mandated authority to regulate immigration, an examination of the history behind the bill of attainder clause does not support a successful challenge on that ground.

In *U.S.* v. *Brown*, 381 U.S. 437 (1965)[4], the Court, in striking down a statute as constituting a bill of attainder, enunciated its interpretation of the intent of the drafters of the bill of attainders clause of the U.S. Constituton as an attempt "to implement the separation of powers among the three branches of government and to guard against legislative exercise of judicial power" and to prevent "legislative punishmen," and "trial by legislature."

This is clearly not the effect of H.R. 12509. With respect to section 2 of the bill establishing the additional ground for deportation, any alien who is in the United States and is charged with having engaged in

persecution based on race, religion, national origin, or political opinion, would be entitled to avail himself of all the procedural safeguards

1. 74 S.Ct. 737, 98 L.Ed. 911.
2. 75 S.Ct. 757, 99 L.Ed. 1107.
3. 72 S.Ct. 512, 96 L.Ed. 586.
4. 85 S.Ct. 1707, 14 L.Ed.2d 484.

which are presently available to any alien who is believed to be deportable on any other ground, i.e., a full evidentiary, administrative hearing on the issue of deportability, with right to judicial review.

With respect to the ground of exclusion established by the bill, it clearly cannot be maintained that H.R. 12509 usurps the role of the judiciary in the area since the courts themselves have consistently recognized that they have no role with respect to who is or is not excluded from entering the United States.

The Constitution grants to the U.S. Congress, plenary and absolute authority to regulate immigration. Inherent in that power is the authority to formulate the conditions for entry of aliens including what categories of aliens shall be excluded, and the restrictions under which aliens, once admitted, are permitted to remain.

Justice Frankfurter, in *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1951)[5] commenting on Congress' inherent power in the field, stated:

> [conditions for entry of aliens] have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this court to control.

Given this jurisdictional framework, it is the conclusion of the committee that the bill of attainder clause clearly does not prohibit enactment of H.R. 12509.

Unavailability of Discretionary Withholding of Deportation to Aliens Covered by H.R. 12509

Concern was expressed regarding the provision of H.R. 12509 which prohibit the withholding of deportation under section 243(h) in behalf of aliens who are found deportable under this bill.

Section 243(h), as already noted, authorizes the Attorney General, in his discretion, to withhold the deportation of any alien within the United States to any country in which, in the Attorney General's opinion, the alien would be subject to persecution on account of race, religion or political opinion.

The committee felt that the equitable relief afforded by 243(h) should not be made available to aliens falling within the category created by the bill.

Any alien with respect to whom it has been established at deportation proceedings by "clear, convincing, and unequivocable" evidence participated in persecution of others because of race, religion, national origin or political opinion, should not, in the view of the committee, be afforded the very privileges which he or she sought to destroy.

Support for this provision can additionally be found in a parallel provision contained in the U.N. Convention Relating to the Status of Refugees which has the effect of withholding the benefits, otherwise made available to refugees by that document, from persons who, it is suspected, have committed "crimes against humanity."

NONAPPLICABILITY OF PROVISIONS OF H.R. 12509, TO CERTAIN OFFICIALS OF FOREIGN GOVERNMENTS

Section 102 of the Immigration and Nationality Act (8 U.S.C. 1102) exempts certain aliens from the application of most of the exclusion and deportation provisions of the INA. For example, diplomats, other

5. 72 S.Ct. 512, 96 L.Ed. 586.

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foreign officials, and foreign government representatives to international organizations (as well as their families and personal employees) are not covered by this bill. Consequently, H.R. 12509 does not affect the operation of section 102 and therefore that exemption would be available to diplomats and other official government representatives, who would otherwise be excludable under the bill.

ESTIMATE OF COST

The Congressional Budget Office has estimated that enactment of this bill will result in no additional federal cost over the next 5 fiscal years. Pursuant to clause 7 of rule XIII of the Rules of the House of Representatives, the committee states that it concurs with the estimate submitted by the Congressional Budget Office and set forth below.

BUDGETARY INFORMATION

Clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives is inapplicable because the instant legislation does not create new budget authority. Pursuit to clause 2(l)(3)(C) of rule XI, the following estimate and comparison was prepared by the Congressional Budget Office and submitted to the Committee:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., July 6, 1978.

Hon. JOSHUA EILBERG,
Chairman, Subcommittee on Immigration, Citizenship, and International Law, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 12509, a bill to amend the Immigration and Nationality Act to exclude from admission into, and to deport from, the United States all aliens who persecuted any person on the basis of race, religion, national origin, or political opinion, and for other purposes, as ordered reported by the Subcommittee on Immigration, Citizenship and International Law of the House Committee on the Judiciary, April 20, 1978.

Based on this review, it appears that no additional cost to the Government would be incurred as a result of enactment of this bill.

Sincerely,

ALICE M. RIVLIN, *Director.*

OVERSIGHT STATEMENT

Pursuant to clause 2(1)(3)A of rule XI of the Rules of the House of Representatives, the committee states that it has exercised close

oversight with regard to the administration of the Immigration and Nationality Act by both the Departments of State and Justice. During the 95th Congress, the Subcommittee on Immigration, Citizenship, and International law which has been charged by the committee with oversight responsibility in this area, has held 14 days of hearings to review the implementation of the Immigration and Nationality Act by these

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departments. This committee and that subcommittee will continue that close oversight and will carefully monitor the implementation of H.R. 12509.

Clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives is inapplicable since no oversight findings and recommendations have been received from the Committee on Government Operations.

Inflationary Impact Statement

Pursuant to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the committee estimates that this bill will have no significant inflationary effect on prices and costs in the operation of the national economy.

Committee Recommendation

The committee, after careful and detailed consideration of all the facts and circumstances involved in this legislation, is of the opinion that this bill should be enacted and accordingly recommends that H.R. 12509, do pass.

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DISSENTING VIEWS OF MR. WIGGINS, MR. KASTENMEIER, MR. BUTLER, MR. HYDE, AND MR. ERTEL

The bill, H.R. 12509 makes excludable, or deportable, persons who engaged in the persecution of others because of race, religion, national origin, or political opinion. It prohibits the Attorney General from using his discretion to (1) waive the grounds for exclusion (as he can now for most such grounds, section 212(d)(3), Immigration and Nationality Act), or (2) withhold deportation if a deportee proves that he or she will be subjected to persecution upon arrival in the country of deportation (now possible under section 243(h), Immigration and Nationality Act).

While we agree with the objectives of this bill—to deny the privilege of being present in the United States to persons who have engaged in conduct condemned by many, if not most nations, we must conclude that the bill as reported is not a sound approach to achieve that objective. There are several reasons for that conclusion.

(1) The record shows no need for this bill. The Immigration Service is proceding against 11 alleged Nazi war criminals—the objects of the predecessors of this bill, and are actively investigating allegations in 169 other cases. These cases are proceeding based on alleged misrepresentations made by persons admitted to the United States under the Displaced Persons Act of 1948 (Public Law 80–744) or the Refugee Relief Act of 1953 (Public Law 83–203). The record does not indicate the Immigration and Naturalization Service has had any difficulty in establishing its legal authority to proceed against such persons. We know of no alleged Nazis now in the United States known to the Immigration and Naturalization Service that would be subject to possible deportation under this bill at this time who are not now deportable under existing law. Therefore, we question whether there is any need for enactment of this inflexible and rigid bill.

(2) The bill makes excludable or deportable those who have engaged in "persecution" without defining that term. It is argued that the word "persecution" appears in two other places in the Immigration and Nationality Act (Section 203(a)(7) and section 243(h)), and has sufficient legal interpretation to avoid vagueness; it also appears in the United Nations Convention on Refugees and other international agreements, and is, therefore, well understood throughout the world.

However, both the Departments of State and Justice, in letters dated October 17, 1977, and May 12, 1977, respectively dealing with H.R. 410, a predecessor to this legislation, specifically suggested that the term "persecution" be defined with precision to guide consular officers in their determinations whether to issue visas, and to overcome the possibility of due process objections by respondents in deportation proceedings.

While the original object of this legislation was to deal with alleged Nazis in this country, the bill as reported applies to anyone, who persecutes others based on race, religion, national origin, or political opinion.

Would this apply to Vietnamese who "persecuted" Communists because of their political opinion, as did many of our allies during the Vietnam war? Would this apply to British soldiers who "persecuted" Catholics in northern Ireland because of their religion? Would this apply to white South Africans or Rhodesians who are members of or support the present governments that have allegedly persecuted blacks because of their race? What future situations will arise where persons working for our friends and allies allegedly persecuted others who are our political adversaries or enemies in war and thereby are ineligible to enter the United States?

(3) The bill is inflexible, and provides no opportunity for discretionary relief. At the present time, a person excludable from the United States may, in the discretion of the Attorney General, obtain a waiver of most grounds of excludability and be allowed to come temporarily to the United States (section 212(d)(3), Immigration and Nationality Act). Waivers are routinely granted now for participation in business conferences, scientific and cultural meetings, and the like. Such discretion is granted to the Attorney General to admit, temporarily, the mentally retarded, psychopaths, beggars and vagrants, criminals, prostitutes, and narcotics dealers. In Public Law 95–105, the Foreign Relations Authorization Act for fiscal year

1978, the McGovern amendment to that act liberalized the effect of this provision by requiring the Secretary of State to recommend to the Attorney General that he approve waiver of grounds for excludability relating to membership in or affiliation with proscribed organizations unless the Secretary determines that such action would be contrary to the security interests of the United States (now appearing at 22 U.S.C. 2691).

However, this bill removes that discretion from the Attorney General and would permanently bar a "persecutor" from ever coming to the United States, regardless of the nature or extent of the person's participation, the length of time since such participation, or the purpose of the proposed visit.

The Attorney General can now withhold deportation of anyone who, in his opinion, would be subject to persecution (section 243(h), Immigration and Nationality Act), and there is no justification for removing the Attorney General's discretion to do likewise in the case of alleged "persecutors". It is easy to conceive of the situation where a deportee would be subject to persecution to a degree significantly worse than the actions in which he or she participated as a persecutor. Discretionary authority to waive the provisions of this bill should be restored to the Attorney General.

(4) The bill is akin to an ex post facto law, and may be a bill of attainder as well. While a line of Supreme Court cases states that deportation is a civil, rather than a criminal matter, and therefore this bill might not legally be held to be ex post facto, it would represent, in fact, such a situation and be a bad policy. If enacted, a person legally admitted and present in the United States could be forcibly removed from our country for his actions prior to his admission based on a law enacted subsequent to his admission.

It is difficult to distinguish, particularly by a deportee, between criminal incarceration in the United States and forceable removal from the United States, particularly if a person faces persecution or prosecution in the country to which he is deported. Whether or not this would be held by the courts to be an ex post facto law, it certainly enacts that policy into law, and we believe that is a bad policy.

It can also be argued that if this bill would only apply to a few alleged Nazis, it could be a bill of attainder—as applying to an easily identifiable number of a group. Again, if not legally so, it still represents that policy which should not be enacted.

In summary then, there has been no showing of a present need for this bill; it is vague, overbroad, and inflexible, and could represent a policy of application ex post facto and a bill of attainder as a fact, if not legally so construed.

We urge that this bill be recommitted to the committee for resolution of these issues. We have no doubt that a bill can be written which defines the operative phrase, "persecution" with sufficient precision, and retains the Attorney General's authority to waive the terms in appropriate cases.

C. E. WIGGINS.
M. CALDWELL BUTLER.
HENRY J. HYDE.
ALLEN E. ERTEL.
BOB KASTENMEIER.

LEGISLATIVE HISTORY CONTINUED IN VOLUME 5
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