U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 24, 2003

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 2620, the "Trafficking Victims Protection Reauthorization Act of 2003." We support reauthorization of this important program, which is aimed at strengthening our efforts to combat trafficking in persons. However, we have several concerns about the bill, particularly the way it would alter the current statutory standard for certifying trafficking victims as eligible to receive benefits and services, the need for confidentiality provisions in T visa applications, and a new private right of action provision. In addition, we recommend adding the new trafficking crimes as RICO predicates and providing for the death penalty in human trafficking cases where the death of a victim results.

Subsection 3(a): Border Interdiction

Subsection 3(a) would amend section 106 of the Trafficking Victims Protection Act of 2000 ("TVPA"), Pub. L. 106-386, Div. A, to require the President to make grants to non-governmental organizations ("NGOs") to fund training for trafficking survivors who, in turn, would "educate and train border guards and officials, and other local law enforcement officials. . . ." Specifically, this subsection would establish grants to monitor "the implementation of border interdiction programs, including helping in the identification of such victims . . . ."

While we support training border and local officials in the identification of trafficking victims, we believe that subsection 3(a) is unnecessary and would potentially undermine the ability of Federal law enforcement to conduct border interdiction. We would therefore urge striking this subsection from the bill. Border security and intelligence gathering are Federal law enforcement functions. The TVPA mandated training for border officials and other Federal law enforcement officers on the identification of and assistance to trafficking victims, and the U.S.

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Government carries it out.[1] While NGOs have an important role to play in helping trafficking victims, it remains nonetheless the purview of Federal law enforcement, while carrying out their law enforcement duties, to identify victims at the border.

In addition, we do not believe that monitoring border interdiction programs is the most effective use of Federal funding. Because it is not always clear who at the border is a "trafficking victim," as a victim must be destined for an exploitative labor or commercial sexual situation in order to have been "trafficked," the money appropriated for interdiction programs would be better spent enhancing our official border control efforts and increasing our ability to investigate and prosecute human trafficking.

The provision does not clarify to what extent NGOs would monitor these programs or what authority NGOs would have to attempt to influence these programs. The lack of specificity makes it unclear as to how these functions would implicate the exercise of Federal law enforcement authority by civilians and/or local law enforcement officials. Additionally, it is not clear whether training will be provided to such organizations, and whether principles such as agency law and vicarious liability will apply to any functions performed by such organizations or local law enforcement.

We note that use of the term "transit shelter" implies that the victims are passing through the United States temporarily and will be returning to their countries of origin. This has not been the U.S. Government's experience with the majority of trafficking victims who have been identified. Most of them choose to access immigration relief available under the TVPA, rather than self-repatriation.

If Congress chooses to proceed with this provision despite our opposition, we suggest amending the section on border interdiction by inserting (in the bill, following the first occurrence of the word "interdiction" in the first sentence) ", including", thereby authorizing support to NGO programs, while not strictly limiting such programs solely to NGOs.

Subsection 3(a) also would "ensure that any program established under this subsection provides the opportunity for any trafficking victim who is freed to return to his or her previous residence if the victim so chooses." Guaranteeing immediate return could undermine law enforcement needs, which often will require the presence of the victim in the country as a material witness or for other purposes. In the event the Committee retains this subsection, we urge that it contain a mechanism to ensure that the interests of law enforcement be protected in any provision for the return of trafficking victims to their own or third countries.

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[1]The Departments of State and Justice articulated their plans for U.S. Government anti-trafficking training responsibilities in the Federal Register. *See* 66 Fed.Reg. 38514 (July 24, 2001).

Subsection 3(b): Termination of Certain Grants, Contracts and Cooperative Agreements

The State Department will be submitting a separate views letter on H.R. 2620, in which it will address concerns regarding subsection 3(b). We simply note that we defer to, and concur in, the State Department's position.

Subsections 4(a)(3) and 4(b)(1)(a): State and Local Law Enforcement

Subsection 4(a)(3) would broaden the availability of certification of trafficking victims (as would section 4(b)(1)(a) in similar ways) by permitting individuals to obtain certification as trafficking victims based on endorsements made by State and local law enforcement agencies (in addition to Federal law enforcement). We have reservations about altering the current statutory standard for the certification of victims to receive benefits and services.

In our experience, accurate certification requires some investigation to determine whether the victim actually has suffered as the result of conduct that satisfies the elements of the TVPA. This investigation is best performed by trained investigators who are familiar with the TVPA. Currently, the Attorney General is consulted on whether a trafficking victim is assisting in an investigation or prosecution of human trafficking and a Federal law enforcement agency is in charge of the investigation and prosecution. We are concerned that State and local agencies may lack the resources or expertise to conduct the necessary inquiry. Only two States (Washington and Texas) have passed anti-trafficking laws. Hence, the vast majority of State and local law enforcement officials do not have the jurisdiction to investigate human trafficking. It is unclear whether State and local officials could determine that victims were cooperating with the investigation or prosecution of human trafficking, because the investigation would most likely be Federal. Further confusion may arise due to overlapping jurisdiction in cases in which State and local officials could be investigating activity that might constitute human trafficking under the Federal definition but that under State law would violate only non-trafficking laws, such as kidnaping.

We do not believe that these changes would result in substantial benefits in enforcing the anti-trafficking laws. Moreover, we are concerned about forcing the Department of Health and Human Services, when certifying trafficking victims, to reconcile possibly conflicting factual conclusions made by various Federal, State and local law enforcement authorities. For example, an individual might be cooperating with local law enforcement in a human trafficking investigation, but the Federal prosecutors, who are investigating the underlying activities, might have information that the victim does not meet the definition of a victim of a "severe form of trafficking in persons," the statutory standard for receipt of benefits. We note that the bill would continue to require the Secretary of Health and Human Services to consult with the Attorney General in making trafficking victim certifications, which we strongly support. Continuing to limit the endorsements to Federal law enforcement is more efficient and ensures uniformity in determining whether victims are cooperating with (the likely) Federal investigation or

prosecution.

Congress may be looking to the Battered Immigrant Women Protection Act of 2000, §1512 (regarding the U visa), Pub. L. 106-386, Div. B., Tit. V, as a model for allowing Federal, State or local officials to determine victimization and cooperation. Unlike that Act, where crimes related to battery are also crimes at the State level, enforcement against human trafficking remains predominantly a Federal sphere of activity. In many cases, it may be easier for State and local law enforcement to identify a crime that also violates State law than it would be to identify human trafficking. Therefore, we do not believe the U visa to be an analogous situation or a valid model to follow in trafficking cases.

We also are wary that this subsection would create the potential for forum shopping. We already are aware of persons who claim to be victims contacting multiple Federal agencies in the hope that one of them will support that person's request for certification from the Department of Health and Human Services. Extending the authority to determine that an individual meets one of the key criteria for certification to the 17,000 State and local law enforcement agencies in the country will exacerbate this situation. Under current law, Federal law enforcement analyzes claims of victimization and cooperation with law enforcement and ensures that certification is requested for legitimate, cooperating victims, so that such victims can receive the benefits mandated by the TVPA.

We believe this provision would cause confusion and potentially place Federal law enforcement against State and local law enforcement in determinations regarding cooperation in what is likely to be a Federal preserve.

Subsection 4(a)(4): Private Right of Action

The Department of Justice opposes the private right of action that would be established by subsection 4(a)(4), because it is unnecessary and could be accomplished by amending the Racketeer Influenced and Corrupt Organizations (RICO) Act (18 U.S.C. §§ 1589 - 1594).

Creation of a private right of action is a complex undertaking that should be approached only after careful consideration of collateral consequences and the appropriate standard for establishing a civil violation. It is common for civil rights violations to give rise to both civil and criminal sanctions. While these arrangements have produced some complexity in criminal prosecutions, Congress has concluded that the additional enforcement activity resulting from private civil actions is worthwhile. However, many such statutory schemes establish different elements for civil and criminal violations. If Congress believes that a civil action for human trafficking might be appropriate, it should consider in depth the conduct that should trigger a civil violation and the processes that would be helpful in protecting criminal enforcement.

We note that the amendment to the RICO Act included in H.R. 2620 would allow civil RICO claims for human trafficking, which may cover the universe of civil proceedings Congress

is intending to extend to trafficking victims.

The creation of a federal civil remedy, one that would include treble damages, is best accomplished through the amendment to RICO. If the purpose is to establish a new Federal tort, we question the need for it. The entire range of trafficking behaviors is already captured under State tort law, under which a victim may already recover. We do not see a need to recreate such a scheme at the Federal level.

If Congress concludes that a private right of action beyond RICO is warranted in these circumstances, we suggest several improvements to this subsection. The subsection does not indicate who can be sued. For example, the class of defendants needs to be defined. Foreign governments with lax border enforcement policies could be called into court under the provision, as could anyone linked to the trafficking. Even prosecutors could face a civil suit if a trafficking victim believed that the prosecutor did not pursue the trafficking prosecution with sufficient diligence. Presumably the traffickers who knew (or ought to have known) about the victim's plight would be the intended class of defendants.

The subsection should stay all pending civil actions in the wake of a criminal prosecution. Notably, in the context of 18 USC § 2255 ("civil remedy for personal injuries"), all civil actions are stayed pending the completion of a criminal action. *See also* 18 USC § 3509(k) ("child victims' and child witnesses' rights") ("If, at any time that a cause of action for recovery of compensation for damage or injury to . . . a child exists, a criminal action is pending which arises out of the same occurrence and in which the child is the victim, the civil action shall be stayed until the end of all phases of the criminal action. . . .").

Without delineating who can be sued and whether the suit would be stayed until a prosecution was complete, this provision would provide unbridled discretion to trafficking victims to sue whomever they feel has victimized them and could hinder prosecutors' abilities to try a case unfettered by the complications of civil discovery. While perhaps unlikely, this provision could become an incentive for victims to skip criminal prosecution and go directly to Federal court to sue their traffickers for damages. We believe that prosecutions should take priority over civil redress and that prosecutions should be complete prior to going forward with civil suits.

Subsection 4(c): Waiver of Public Charge Ground for Inadmissibility

It is not clear what benefits would accrue from the amendments subsection 4(c) would make to § 214(n) of the Immigration and Nationality Act (INA) to disallow consideration of the "public charge" grounds for inadmissibility to the United States based on an approved T visa. The TVPA allows the Attorney General (now the Secretary of Homeland Security) to grant waivers generously for the public charge grounds of inadmissibility under § 212(d) of the INA and does not require that the public charge activity be linked to the trafficking victimization (as it did with regard to the criminal grounds, *see* § 212(d)(13)(B)(ii)). That having been said, we

believe the drafters probably intended to amend § 212(d)(13)(B)(i) to require DHS to waive the public charge ground in determining whether to grant the T visa application, rather than subsection 214(n).

Subsection 4(c): Penalties for Unlawful Disclosure of Information

We strongly oppose the new provisions governing confidentiality of T visa applications, and consequent penalties for unlawful disclosure of information, as unnecessary and inappropriate. Section 222(f) of the Immigration and Nationality Act already deems as confidential (with certain exceptions) information related to the issuance or denial of visas.

We are unaware of any inappropriate disclosures of information during the T visa process. That said, this provision does appear to preclude Federal law enforcement officials from reviewing T visa applications for the purpose of investigating or prosecuting human trafficking crimes. Proposed INA subsection 214(n)(5) states that "in no case" may DHS or Department of State officials "permit use by, or disclosure to, anyone, other than a sworn officer or employee of one of such Departments for legitimate Department purposes, of any information that relates to an alien" who has filed a T visa application.

This provision has the potential to derail our prosecutions when T visa applicants are prosecution witnesses, given prosecutors' discovery responsibilities. There is language in subparagraph (n)(5)(D) that may cover prosecutors' discovery obligations ("may each provide, in each Secretary's discretion, for the disclosure of information described in subparagraph (A) to law enforcement officials to be used solely for a legitimate law enforcement purpose" [followed by a series of examples unrelated to prosecutors' discovery obligations]). However, it is not clear that this would allow for disclosure to defense counsel. And if it does not, then it might result in dismissal of the indictment because prosecutors could not comply with disclosure obligations. Moreover, it is unclear whether such a provision would require regulations to be issued by DHS or the State Department, that could potentially affect prosecutors' abilities to meet discovery obligations.

This provision does not appear to permit compliance with a judge's order to produce certain "confidential" information. Subparagraph (E) states "Subparagraph (A) shall not be construed as preventing disclosure of information in connection with judicial review of a determination in a manner that protects the confidentiality of such information." This language appears to provide for review of records in the case of judicial review of the applications, but not with regard to other forms of judicial requests.

Finally, these confidentiality provisions allow a penalty of $5,000 for each disclosure. We believe it unwise to subject prosecutors (or DHS or State Department personnel who allow them access) to these sanctions if they legitimately disclose information in the course of a prosecution that is not deemed to be a "law enforcement purpose."

If this provision is to remain, in carrying out the certification responsibilities in section 107(b)(1)(E) of the TVPA, the Department of Health and Human Services must be able to receive information from DHS regarding a person's bona fide application for a T visa. We recommend that a new subparagraph (I) be added to section 214(n)(5) of the Immigration and Nationality Act, as added by the bill. The new subparagraph would read as follows:

> "(I) The Secretary of Homeland Security may disclose information described in subparagraph (A) to the Department of Health and Human Services for the purposes of implementing section 107(b)(1)(E) of the Trafficking Victims Protection Act of 2000.".

In summary, provisions and safeguards exist for sharing visa information for routine law enforcement activity. The provisions of this subsection would impede domestic and international criminal investigations to identify and gather evidence against traffickers.

Section 5: Enhancing Prosecutions of Traffickers (18 USC Amendments)

Subsection 5(a) would extend the jurisdictional nexus of 18 U.S.C. § 1591 to include foreign commerce and the special maritime jurisdiction of the United States; these changes are technical fixes to the original TVPA. We welcome these jurisdictional changes that will enhance prosecutors' ability to bring human trafficking cases.

Trafficking Crimes as RICO Predicates

We support the inclusion of human trafficking crimes as RICO predicates. These crimes occasionally are perpetrated by organized groups that RICO was intended to target. Indeed, the RICO predicate list in 18 U.S.C. § 1961(1) includes various offenses that overlap with human trafficking offenses, including the substantive offenses in the peonage and slavery chapter of the criminal code (18 U.S.C. §§ 1581-88) and the main prostitution offenses (18 U.S.C. §§ 2421-24). This existing offense coverage under RICO is useful. Furthermore, we believe adding human trafficking offenses to RICO's coverage would prove to be beneficial.

We would suggest two changes to the RICO section as currently drafted. In section 5(b), which amends 18 U.S.C. § 1961(1) (definition of "racketeering activity") by adding the three criminal offenses related to trafficking in persons, we suggest that the amendatory language be inserted in section 1961(1) after "sections 1581-1588 (relating to peonage and slavery)," instead of after "murder-for-hire)," as proposed. The offenses that define "racketeering activity" should be placed in numerical order and with offenses in the same chapter of title 18 for easy reference. As proposed, the three offenses found in Chapter 77 (peonage and slavery) of title 18 have been inexplicably inserted in the list of statutes without consideration of their subject matter. Instead of being inserted to follow other offenses in Chapter 77, they have been inserted after "section 18 U.S.C. 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire)," an offense in Chapter 95 of title 18. We would also suggest that the Chapter 77 offenses be listed together. Therefore section 5(b) would now read:

"(b) DEFINITION OF RACKETEERING ACTIVITY.—Section 1961(1) of title 18, United States Code, is amended by striking 'sections 1581-1588 (relating to peonage and slavery)' and by inserting after 'section 1546 (relating to fraud and misuse of visas, permits, and other documents)' the following: "section 1581-1591 (relating to peonage, slavery, and trafficking in persons.".

Title of Chapter 77

As a final edit to Chapter 77, we would suggest adding "trafficking in persons" to its title, which would now read "CHAPTER 77—PEONAGE, SLAVERY, AND TRAFFICKING IN PERSONS". Parallel edits would also have to be made to the "Title 18 CRIMES AND CRIMINAL PROCEDURE" list of "PART 1—CRIMES".

Death Penalty for Trafficking Crimes

Questions also have arisen regarding the justification for the discrepancy between alien smuggling crimes and human trafficking crimes with regard to death penalty eligibility. Because we do not see a logical justification for the discrepancy, we support equalizing the penalties between the two. Therefore, we would suggest that this bill include amended criminal provisions extending death penalty eligibility to the relevant human trafficking crimes that result in the deaths of trafficking victims, namely 18 U.S.C. §§ 1581, 1583, 1584, 1587, 1589, 1590, and 1591. We recognize that these provisions would have to interact with 18 U.S.C. § 3591 ("sentence of death").

Subsection 7(7): Restriction on Organizations

While we are not prepared to take the position that subsection 7(7) (proposed section 113(g)(2) of the TVPA) is unconstitutional, we do think that it raises serious First Amendment concerns and may not withstand judicial scrutiny. We therefore recommend that this provision be struck from the bill.

The Federal Government may, consistent with the First Amendment, prohibit private organizations from using Federal funds to promote, support, or advocate the legalization or practice of prostitution. *See Rust v. Sullivan*, 500 U.S. 173, 196-198 (1991). There is substantial doubt, however, as to whether the Federal Government may restrict a domestic grant recipient participating in a Federal anti-trafficking program from using its own private, segregated funds to promote, support, or advocate the legalization or practice of prostitution, even if such a restriction applies only to those grant recipients providing assistance to victims of severe forms of trafficking. *See Rust*, 500 U.S. at 197; *FCC v. League of Women Voters*, 468 U.S. 364, 399-401 (1984). As a result, because this provision of H.R. 2620 would, in effect, prevent any organization receiving Federal funds to implement a program targeting victims of severe forms of trafficking from using its own private funds to promote, support, or advocate the legalization or practice of prostitution, we believe that there is serious doubt as to whether that provision

would survive judicial scrutiny if challenged in court. In particular, we note that the prohibition on grant recipients using their own private, segregated funds to promote the legalization of prostitution, as opposed to the practice of prostitution, would be particularly vulnerable to legal challenge.

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Thank you for the opportunity to comment on this matter. If we may be of additional assistance, we trust that you will not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member