THE WHITE HOUSE

WASHINGTON

June 18, 1984

MEMORANDUM FOR CONSTANCE BOWERS
LEGISLATIVE REFERENCE DIVISION
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Testimony of Carol E. Dinkins Concerning Amendments to the Coastal Zone Management Act (H.R. 4589) on June 26, 1984

Counsel's Office has reviewed the above-referenced testimony, and finds no objection to it from a legal perspective.

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 84 / 7 / 7

Name of Correspondent: Maria Walicka

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Testimony of Carol Dinkins concerning Amendments to the Coastal Zone Management Act (HR 4589) on June 26, 1984

ROUTE TO:		ACTION		DISPOSITION	
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuttle	ORIGINATOR	84/06/18			/ /
	Referral Note:				
CURT 18	R	84/06/18		S	84/06/25 COB
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

U.S. Department of Justice
Office of Legislative and
Intergovernmental Affairs

Office of the
Assistant Attorney General

Washington, D.C. 20530

June 15, 1984

To: Constance Bowers
Legislative Reference Division
Office of Management & Budget

From: Maria Walicki
Office of Legislative and
Intergovernmental Affairs

Enclosed is the statement of Carol E. Dinkins, Deputy Attorney General, before the House Merchant Marine and Fisheries Committee, concerning H.R. 4589, a bill to amend Section 307(c)(1) of the Coastal Zone Management Act, on June 26, 1984. Please contact me as soon as possible regarding clearance of this statement. I may be reached at 633-3916.

Enclosure

cc: Fred Fielding
Counsel to the President

TESTIMONY OF

CAROL E. DINKINS

DEPUTY ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

ON

AMENDMENTS TO THE
COASTAL ZONE MANAGEMENT ACT (H.R. 4589)

BEFORE

THE

HOUSE MERCHANT MARINE AND FISHERIES COMMITTEE

OF THE

UNITED STATES
HOUSE OF REPRESENTATIVES

June 26, 1984

DRAFT

JUN 14 1984

INTRODUCTION

Mr. Chairman, members of the Committee, I am pleased to be here today to testify on H.R. 4589, a bill which has been introduced to amend Section 307(c)(1) of the Coastal Zone Management Act. This particular area of federal mineral leasing has been of continuing interest to me, both in my capacity as a federal policymaker and as an attorney. Moreover, I am happy to speak for the Administration as a whole on this issue today. The importance of the OCS program can not be overstated in view of both of our continuing need for energy reserves and the substantial contribution the OCS leasing program makes in generating revenue for the federal treasury.

The Administration is strongly opposed to this legislation for four basic reasons: (1) there is no need to bring OCS lease sales under the consistency provision because the consultation process which was established by the OCSLA is sufficient and is working well; (2) the language of H.R. 4589 would not, in fact, accomplish its stated purpose, i.e., applying the consistency provision to the lease-sale itself; (3) the bill's attempt to transplant the National Environment Policy Act or NEPA standards into an entirely different process, such as the CZMA, will only encourage additional conflicts between the states and the federal government and is guaranteed to also create litigation; and (4) even though we believe the bill won't bring OCS leasing under the CZM provisions, it will unintentionally apply to affect many other federal activities -- a result not intended by the Congress or this committee.

I. CURRENT OCS LEASING PROCESS PROVIDES FOR CONSULTATION WITH THE COASTAL STATES/THE AMENDMENTS ARE UNNECESSARY

The proposed amendments to the Coastal Zone Management Act (CZMA) are not necessary to assure consultation between the Federal government and the states with respect to OCS leasing. In fact, the amendments would frustrate the consultative procedures which are already in place, and which have been successfully utilized to assure an appropriate balance of Federal and state interests in OCS leasing.

Under Section 19(a) of the Outer Continental Shelf Lands Act (OCSLA) both governors and representatives of local governments are entitled to make "recommendations" to the Secretary of the Interior concerning the "size, timing and location" of OCS leasing. The Department of Justice believes that Section 19 grants to the coastal states all the power they claim to seek—under the CZMA short of an unrestrained veto. This process has, in fact, been working as is demonstrated by the resolution of differences involving California and Alaska in recent OCS sales. Under Section 19, the Secretary must accept the governor's recommendation and may accept the recommendations of local governments, unless he determines that they do not provide for reasonable balance between national interests and the well-being of the citizens of the affected states. (OCSLA Section 19(c), 43 U.S.C. Section 1345(c).) If the Secretary of Interior does make a determination not to accept the recommendations of the local governments, he must communicate to the governor in writing the reasons for this

decision, after an opportunity for consultation to implement alternatives that would result in a reasonable balance between these interests. Section 19(d) also provides explicit procedures for judicial review of the Secretary's action upon these recommendations, making it "final" unless found to be "arbitrary or capricious."

Section 19 of OSCLA was enacted in 1978 at the urging of the states, which recognized that the CZMA was not a suitable vehicle for state/federal coordination with respect to OCS-leasing decisions. On the basis of the testimony from the states, Congress adopted this section "[to] ensure that the Secretary gives thorough consideration to the voices of responsible regional and local state officials in planning OCS leasing development." 1/ However, Congress made clear that it was adopting the specific procedures of Section 19 which give "final authority to the Secretary because it "did not believe that any state should have a veto power over the OCS oil and gas activities." 2/

We believe that the consultation process has been working effectively. For example, Governor Deukmejian of California recommended that Interior delete some of the tracts from OCS Sale 73 nearest to shore in order to protect beaches, estuaries, and other coastal resources. He also recommended that the Secretary impose stipulations on the remaining tracts related to air quality,

---

1/ S. Rept. No. 284, 95th Cong., 1st Sess. 78 (1977).

2/ Id.

fishing operations and the transport of oil by pipeline. The result of this consultation was a Memorandum of Agreement (MOA) between California and Interior providing for the deletion of 21 near-shore tracts and the adoption of lease stipulations sought by California. On signing the MOA, California stated that these modifications would "accomplish the remaining balance between production of needed oil and gas and protection of our valuable environmental resources."[3/] Similarly, Governor Sheffield of Alaska has had several discussions with Interior Secretary Clark over the lease sale schedule for Alaska and the deletion of blocks from proposed sale areas. Additionally, some of these mitigation measures were adopted for past sales in response to requests from the Governor pursuant to Section 19 of OCSLA.

The Department of the Interior has previously testified before this committee that it is currently developing a procedure requiring direct contact between the managers of the regional OCS offices and the representatives of affected states to identify relevant issues and seek technical solutions prior to formal Section 19 consultation process.[4/] As Interior noted, increased importance has been placed on early and complete consultation at the outset of preparing Environmental Impact Statements

---

3/ Letter from G.W. Duffy, Secretary of Environmental Affairs to James Watt, Secretary of the Interior, dated October 6, 1983.

4/ Testimony of Department of the Interior Before the House Merchant Marine and Fisheries Committee, Subcommittee on Panama Canal/Outer Continental Shelf, April 25, 1984.

(EIS's), including the reinstitution of public scoping meetings. More public hearings are planned and the review period has been expanded to 60 days to allow for a more extensive and complete public review of the draft EIS. Finally, Interior has indicated that at the "Call for Information" stage, which is very early in the OCS planning process, states are being asked to identify anticipated future Section 307(c)(3) conflicts between the state CZM programs and post-lease oil and gas activities. The information provided by the states will be fully analyzed throughout the pre-lease process in an attempt to resolve any outstanding issues prior to the sale.

We believe that, given these formal and informal consultation processes, it is unnecessary to require consistency at the lease-sale stage of the OCS process. The procedures that must be followed in achieving consistency at the subsequent exploration or development/production stages are clear and adequately protect a state's coastal zone. An OCS lessee must submit a plan of exploration for approval, or later a plan of development and production which must certify to the state CZMA agency that its activities, insofar as they affect land or water uses in the coastal zone, will be conducted in a manner consistent with the state program. At that time, the state is empowered either to agree or disagree with the certification and, if it disagrees, to suggest alternative means by which consistency can be achieved. If the state decides that the operations are not consistent and cannot be made so, the lessee can appeal to the Secretary of

Commerce. The Secretary of Commerce may override the state's objection based on the finding that the plan is consistent with the objectives of the CZMA or is in the national interest. (The Committee should take note of the fact that the Section 307(c)(3) review process has been working well. For example, as of March 1984, the California Coastal Commission had received 98 Plans of Exploration (POE's) and 7 Development and Production Plans (DPP's). Concurrences were given to 89 of the 98 POE's and 6 of the 7 DPP's.

Finally, it cannot be said that these amendments are necessary to assure adequate environmental protection of the coastal zone. There is a full range of federal environmental laws, such as the National Environmental Policy Act, the Endangered Species Act, and the Clean Water Act, which apply to both state coastal waters and to activities on the federal OCS. OCS activities must meet these standards as Congress has defined in 74 sets of federal regulations in achieving an appropriate balance between industrial activity and environmental protection. As John Byrne (Administrator of the National Ocean and Atmospheric Administration (NOAA)) stated before this committee on March 27, 1984, the CZMA does not exist in a vacuum. There are ample opportunities for constructive and meaningful state/federal collaboration since the environmental and resource-management laws are administered together. NOAA itself has demonstrated its intention to assure that the state/federal consultation process works effectively. For example, NOAA is supporting a comprehensive state/federal

study of the experience gained to date in applying the federal consistency provisions. It is hoped that this study will identify and document problem areas and examples of successful implementation of the consistency review requirements, and form the basis for reasoned revisions to the CZMA or the implementing regulations. As you probably are aware, although the CZMA became law in 1972, most of the state programs were not approved by the Department of Commerce until the late 1970's and early 1980's.

Accordingly, the coastal states already have ample opportunity to protect their interests and limit OCS development off their coasts. The proposed amendment to Section 307(c)(1) is therefore not needed to protect their coastal zones.

II. THE PROPOSED AMENDMENTS TO THE CZMA WOULD NOT MAKE OCS LEASE SALES SUBJECT TO SECTION 307(c)(1) CONSISTENCY REQUIREMENTS.

As the Supreme Court stated, the legislative history of Section 307(c)(1) discloses that Congress did not intend the section to reach OCS lease sales. The "directly affecting" language was aimed primarily at activities conducted or supported by federal agencies on federal lands physically situated in the coastal zone but excluded from the zone as formally defined by the CZMA.

Section 307(c), the court noted, contains three integrated parts: Section 307(c)(1) refers to activities "conduct[ed] or support[ed]" by a federal agency. Section 307(c)(2) covers "development projects undertak[en]" by a federal agency. Section

DRAFT

307(c)(3) deals with activities by private parties authorized by a federal agency's issuance of licenses and permits. Thus, the application of the consistency provisions of the CZMA depend upon the type of federal action involved.

The proposed CZMA Amendments, however, only address changes in the terms of Section 307(c)(1) and not Section 307(c)(3), the section which the Court found pertinent to OCS lease sales. Furthermore, the proposed Amendments only propose changes of the terms "directly affecting the coastal zone" and "maximum extent practicable" in Section 307(c)(1). They do not attempt to alter the meaning of activities conducted or supported by federal agencies. The Court held, however, that OCS lease sales did not fall within that category of activity under the statute. Put simply, the Court ruled that OCS lease sales were not "activities" within the meaning of Section 307(c)(1), and because the proposed Amendments do not explicitly change that ruling, the proposed changes to Section 307(c)(1) would appear to be inapplicable to OCS lease sales.

III. THE AMENDMENTS WILL RESULT IN ADDITIONAL LITIGATION BY INCORPORATING THE NEPA "SIGNIFICANT" STANDARDS.

I would now like to turn to the specific language of the proposed amendments and explain to the Committee why we are so concerned with the present proposal. I believe that any action this committee takes regarding the CZMA should be based upon three goals: one, providing greater certainty to insure an effective program of federal consistency where consistency is required; two, minimizing the opportunities for federal/state

conflict; and, three, decreasing the likelihood of recourse to litigation with its attendant potential for disruption. Unfortunately, the proposed amendments, I believe, would not serve these goals.

Specifically, let us examine the proposal to substitute the term "significantly" for the term "directly" as the criterion for what types of effects will trigger the federal consistency requirement.

To the extent that the use of the term "significantly" is intended to incorporate NEPA standards into the CZMA, our experience in litigating both NEPA and CZMA cases leads to the firm conclusion that this approach is extremely unwise. Contrary to the views of some, the definition of "significantly" is not at all clear cut. The CEQ regulations provide no firm guidance. And although NEPA has been in the statute books for over a decade, the issue of significance has been and continues to be the most frequently litigated issue in NEPA. Thus, no greater certainty in the application of the program is achieved by use of this term. Indeed, the interpretation of "significant effects" under NEPA would differ from that under the CZMA amendments since NEPA effects are considered in the context of the "quality of the human environment", while under the CZMA amendments they would be considered in the context of the "natural resources of, land or water uses in, the coastal zone." As a result, greater uncertainty should be expected.

To the extent that adoption of the term "significantly" is an attempt to broaden the existing threshold standard of

"directly", in order to reach indirect, remote and speculative consequences of federal action, the actual result will be a greater degree of uncertainty and a far higher potential for federal/state conflict. Let me explain why.

In 1972, Congress sought to avoid conflict by having federal agencies review state management programs before they became effective. Requiring federal agencies to achieve consistency with state management plans could only work if the federal agencies knew what was required of them, and when those requirements were applied in advance of plan approval.

In introducing the current measure, the Chairman of the Subcommittee suggested that use of the term "significantly" would allow "case-by-case decisions, based upon the context and intensity of impacts." However, any scheme that does not provide clear guidance for when consistency is required and results in case-by-case determinations fosters uncertainty, threatens federal/state cooperation and virtually guarantees litigation.

Nor will court decisions from the inevitable litigation provide the direction and guidance that is absent in this proposed measure. Many of the state coastal management programs are extremely general and vague. The courts will lack the standards necessary to decide consistency issues unless they simply defer to whatever the coastal agency says that its plan requires.

For those reasons, based especially upon our years of struggling with those issues in court, I offer no optimism to the committee that the proposed amendments will even come close to

their hoped-for potential. Because of the inherent difficulty in assuring what the indirect, remote or speculative impacts of federal activities may be, this amendment, by requiring all agencies to guarantee full consistency for all such activities, may spawn a generation of divisive litigation that could cripple federal/state relationships.

IV. THE PROPOSED CZMA AMENDMENTS WILL AFFECT MANY OTHER FEDERAL ACTIVITIES OTHER THAN THE OCS LEASING PROGRAM.

The proposed amendments are not narrowly circumscribed to only OCS lease sales but rather would affect a broad range of federal activities. As we have indicated, our understanding is that this language is intended to incorporate the standard of significance developed under NEPA. The committee should realize that the term "significantly affecting" has no universal meaning or application and has been interpreted broadly by many courts. Incorporation of NEPA standards into the CZMA will be destructive of both statutory schemes.

As we interpret the bill, any activity which is identified in an EIS as one which could significantly affect "the natural resources of, or land or water uses in, the coastal zone" would require a consistency determination under Section 307(c)(1). In the absence of any universal meaning for the term "significantly," and in view of the fact that this term will be interpreted by 28 different states with 28 different CZMA programs, it is obvious that these amendments could have far-reaching consequences not intended by the Congress.

The amendments have the potential for adversely impacting a wide variety of programs. By incorporating the definitions in the proposed bill together with the existing regulatory language, the following result is obtained: any function performed by or on behalf of the federal agency which significantly affects the natural resources of, or land or water uses in, the coastal zone shall be conducted or supported in a manner which is fully consistent with an approved state CZM program. The federal function affected would not necessarily be limited to those having a primary or an intended effect only in state coastal zones. In addition, the committee should note that many approved state CZM programs contain general statements of policy which are administered on a case-by-case basis by state agencies which "interpret" these programs. As a result, the proposed bill may effect a transfer of discretionary authority over federal functions to state coastal zone agencies which would exercise control through interpretation of general policy statements contained in an approved state CZM program.

For example, consider the following circumstances under which opponents of various federal actions could interpose a demand for a consistency determination by relying on this committee's efforts to encompass remote indirect and speculative impacts within a consistency determination. They include: coal leasing programs by the Department of the Interior if the coal may possibly be transported by coal slurry pipeline to a coastal port (discharge of coal wastewater affects the coastal zone);

federal approval of rate changes for bulk commodities potentially affording one mode of transportation a competitive edge over another (favorable barge rates may shift traffic from railroads causing growth in coastal maritime facilities); resolution by the Department of State of the North Atlantic Boundary Dispute with Canada (relinquishment of United States' possessive claims to a portion of its disputed seabed which would allow Canadian authorities to institute all manner of activity in that area, including OCS leasing, with potential effects on Maine's coastal zone); FAA regulations governing planning grants for airport improvement or extension projects (potential construction in a coastal zone arising from changes in the airport operation in places such as Boston, J.F. Kennedy, La Guardia, Philadelphia, Norfolk, San Francisco, etc.). The number of such activites, which are unrelated to OCS leasing but which could be affected by the CZMA amendments is unlimited.

Congress should realize that states, or others opposed to certain federal activities, are likely to insist that virtually any impact identified in an EIS can be interpreted as a significant one, and therefore would fall within the consistency requirements of Section 307(c)(1). As we have indicated, it will take years of litigation to define the term "significantly" as it applies to the CZMA. Similarly, it has taken years of litigation to define the term in the NEPA context. (For example, since fiscal year 1976, the average number of NEPA cases has been 323 per year.) Such litigation within the context of the CZMA could have an even greater

impact on federal decisionmaking including the orderly development of the OCS, and of course, our nation's energy security.

CONCLUSION

The Congress and the committee must remember that the benefits derived by the United Sates from OCS mineral leasing activities are national in scope. For example, revenues generated from the OCS leasing program are the second largest source of income after the federal income tax. The federal government has received more than $59 billion in direct revenues from OCS leasing, production and rentals. Moreover, the amount of petroleum reserves produced so far has not been slight -- more than 58 trillion cubic feet of natural gas and more than six billion barrels of crude oil have been produced.

The continued production of offshore oil and gas is essential to the future security of our nation. Offshore oil and gas is widely distributed, not only to the coastal states, but to commercial, residental, and industrial consumers across the country. Thus, residents of the inland states also have an interest in the production of OCS oil and gas just as those do who live in the coastal states.

Vesting effective decisional authority in coastal states, as these amendments would do, would lead to the striking of a balance between national and state interests different than that originally envisioned by the Congress when it passed OCSLA. These

lmendments could effectively delay U.S. energy production for years to come, by increasing our economy's vulnerability if imported oil supplies are disrupted and delaying the orderly development of our frontier regions. Moreover, these amendments will affect and disrupt many other federal activities unrelated to the OCS leasing program. This is contrary to the congressional intent of five years ago, when Congress passed the 1978 OCSLA to permit "expedited exploration and development of the [OCS] in order to achieve national economic and energy policy goals, ensure national security, reduce dependence on foreign resources, and maintain a favorable balance of payments in world trade" (43 U.S.C. §1802(1)). The adoption of the proposed amendments would certainly negate the intent of this important congressional policy.

THE WHITE HOUSE

WASHINGTON

June 27, 1984

MEMORANDUM FOR CONSTANCE J. BOWERS
LEGISLATIVE ANALYST
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Draft Reports From the Department of the Navy and the Department of Energy on H.R. 4589 and S. 2324 -- Coastal Zone Management

Counsel's Office has reviewed the above-referenced draft reports, and finds no objection to them from a legal perspective.

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

SPECIAL

June 26, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

Department of Commerce
Department of Justice
Environmental Protection Agency
Department of Energy
Department of Agriculture
Department of the Interior
Council on Environmental Quality
Department of Transportation
Department of Defense

SUBJECT: Draft reports from the Department of the Navy and the Department of Energy on H.R. 4589 and S. 2324 -- Coastal Zone Management.

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

A response to this request for your views is needed no later than

COB -- June 28, 1984

Questions should be referred to Constance J. Bowers (395-3890), the legislative analyst in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc:

Scott Gudes	Dave Allen	Randy Davis
Norm Hartness	Margaret Carpenter	Ken Allen
Charlie Kolb	Ken Glozer	Jim Mietus
John Roberts	Sherry Fox	Dave Gibbons

DEPARTMENT OF THE NAVY
OFFICE OF LEGISLATIVE AFFAIRS
WASHINGTON, D. C. 20350

IN REPLY REFER TO
LA-63:lrs

Dear Mr. Chairman:

The Department of the Navy, on behalf of the Department of the Defense, opposes H.R. 4589, 98th Congress, a bill "To amend the Coastal Zone Management Act of 1972 regarding Federal activities that are subject to the Federal consistency provisions of the Act, and for other purposes," and S. 2324, 98th Congress, a bill "To amend the Coastal Zone Management Act of 1972 regarding activities directly affecting the coastal zone," as presently drafted. Both bills attempt to overcome recent Supreme Court pronouncements concerning the limits of state authority under the Coastal Zone Management Act (CZMA) of 1972 to influence the Department of Interior's oil and gas lease sales on the Outer Continental Shelf.

As a major user and principal resident of this nation's coastal region, the United States Navy cooperates conscientiously with state and local officials and other federal agencies to protect and enhance the resources of the coastal zone. In the vast majority of instances the Navy has found that acceptable agreements can be reached which recognize the importance of the Navy mission and the significance of a state's coastal zone. These agreements are based on a recognition by all parties that under the existing statute and regulations, the Navy has the responsibility to make the initial threshold determination as to what activities "directly affect" the coastal zone. In addition, the CZMA, 16 U.S.C. § 1451 et seq., specifically excludes federal lands from the impact of the Act's structure.

The Navy's experience to date with the existing statute and regulations has been generally positive. Most states have recognized the Navy's need to operate in the coastal zone, while the Navy has worked to assure compliance with state coastal management plans to the fullest extent practicable. H.R. 4589 and S. 2324 would destroy this inter-governmental cooperation by undermining the delicate, but fair and effective, balance of state and federal interests found in Section 307(c)(1) of the CZMA for managing federal activities directly affecting state coastal zones.

H.R. 4589 and S. 2324 are worded and structured differently, but both undermine the balanced approach found in the CZMA. That approach requires federally supported activity directly affecting the coastal zone be conducted consistent, to the maximum extent practicable, with state plans for managing the coastal zone. H.R. 4589 and S. 2324 requires instead that federal activities, with certain exceptions, must be fully consistent with state management plans.

This proposed standard of full consistency fully subordinates federal interests to state interests. The complete subordination of federal interests fundamentally restructures the ordering of state and federal interests under the CZMA to the extent that the proposed legislation is inconsistent with the

Congressional finding that the key to coastal zone management is the full use of state authority in cooperation with federal and other interests (Section 302(i) of the CZMA). Further, without directly repealing the existing provision of law, the proposed amendments would render meaningless the Act's present exclusion of federal lands.

Under H.R. 4589 such elemental Navy activities as port visits, training in operation areas, amphibious landings on federal reserves, and weapons testing could be subject to the control of state authorities if these officials determined the activities produced identifiable physical, biological, social or economic consequences in the coastal zone or initiated a chain of events likely to result in such consequences. S. 2324 would require these activities be consistent only to the maximum extent practicable if necessary for national security, but even that formulation raises the real possibility that Navy activities would be suspended while litigating whether the activity was one that was "necessary for reasons of national security." Clearly, the enactment of H.R. 4589 or S. 2324 would have an unacceptable impact on Navy operations.

The Navy has reviewed the recent Supreme Court decision in Secretary of the Interior v. California, and has concluded that the opinion does not significantly modify the existing relationship between states and the Navy. On the contrary, it appears that the decision adds clarification to existing regulations which have, to date, not been fully understood by states and federal agencies, such as the right of federal agencies to establish the threshold of a significant direct affect on the coastal zone. The Supreme Court decision may indeed substantially modify oil and gas leasing requirements under the Coastal Zone Management Act; however, if Congress intends to correct a perceived error on the part of the Court regarding OCS oil and gas leasing, it is Navy's position that H.R. 4589 goes far beyond accomplishing this intended purpose. In fact, rather than support H.R. 4589, which Navy believes to be premature and far reaching in scope, we would recommend that any changes in the CZMA consistency provisions await an analysis based on experience with the existing statute and the NOAA regulations, which may be amended in light of the Supreme Court decision. This could be accomplished with a view toward CZMA re-authorization in 1985.

Not only do current regulations provide adequate safeguards to states in the area of oil and gas leases, such as Section 307(c)(3)(b), relating to the need for a consistency determination for exploration, development and production of OCS areas subsequent to lease sales, but the Navy believes that Congress has passed numerous other pieces of legislation which also provides states protection against uncontrolled federal development. The Federal Water Pollution Control Act, Federal Air Pollution Control Act, Resource Conservation and Recovery Act all have waivers of sovereign immunity requiring the federal agency to comply with state and local laws relating to those particular areas of concern. The Federal Endangered Species Act and National Environmental Policy Act are further examples of federal statutes that provide a viable handle to states that believe a federal agency is proposing an action which will significantly impact a valuable state resource, regardless of its location.

Another problem arises with the expansion of the term coastal zone to include activities "whether within, or landward or seaward of, the coastal zone." This expansion of the area which potentially is directly affected by an activity of a

federal agency is simply too broad. It would allow states to become planning partners with the Navy for proposals inland and seaward of the coastal zone without any limit on distance. This becomes even more possible if we consider the bills' proposed definition of directly affects: "produces identifiable physical, biological, social, or economic consequences in the coastal zone." Almost any activity that any federal agency undertakes will produce a social or economic consequence in a states coastal zone, especially when the coastal zone is expanded to include areas landward and seaward of the coastal zone for an undefined range.

It is virtually impossible to predict the increased cost of operations in the event that either of these proposed amendments become law, though it can be anticipated to be great in terms of administrative effort, manpower, time, and dollars. Most importantly, the proposed amendments' broad scope would provide a fertile breeding ground for endless and costly litigation over virtually every detail of Navy operations in coastal areas.

The Department of the Army has requested that this legislative report present a paragraph reflecting the specific views of the Army concerning H.R. 4589 and S. 2324, with respect to the Army's military activities nationwide. The potential impact of these bills on the Department of the Army's civil works responsibilities will be addressed in separate Army legislative reports. The Department of the Army operates numerous military bases, reservations, and activities located in the coastal zone and elsewhere within states with approved CZMA plans. The Army believes that enactment of either of the subject bills could prove extremely disruptive to those facilities and to important Army missions, could be extremely expensive, and would constitute an unacceptable administrative burden. The Department of the Army agrees with the criticisms of the subject bills presented in the Navy's report, and joins the Navy in opposing enactment of each bill.

For the Secretary of the Navy.

Sincerely,

The Honorable Walter B. Jones
Chairman, Committee on Merchant
Marine and Fisheries
House of Representatives
Washington, D. C. 20515

Department of Energy
Washington, D.C. 20585

DRAFT

Honorable Walter B. Jones
Chairman, Committee on Merchant
Marine and Fisheries
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On May 3, 1984 the Oceanography Subcommittee marked up and referred for full Committee action H.R. 4589, a bill to amend the Coastal Zone Management Act's federal consistency provisions. The apparent intent of H.R. 4589 as amended is to include the sale of federal leases on the Outer Continental Shelf (OCS) within the activities that must be "fully consistent" with the Coastal Zone Management (CZM) plans of affected states.

The Department of the Interior (DOI) has principal responsibility for managing the leasing of energy minerals on the Outer Continental Shelf, including the holding of lease sales and the issuance of leases. DOI's previous correspondence has detailed the ways in which H.R. 4589 will affect adversely that responsibility. In a recent letter to your Committee, DOI opposed this legislation stating "the legislation ... would be an unwise, overly broad interference with the Federal Government's pursuit of important national objectives." We concur.

The Department of Energy also is concerned with the production of oil and gas on the OCS. Accordingly, this report addresses that issue. It deals also with the possible adverse impacts of H.R. 4589 on the Strategic Petroleum Reserve (SPR) program. More generally, it discusses our concerns about the potential serious adverse impact of the legislation on our national energy policy goals.

H.R. 4589 would impose regulatory burdens on the OCS lease sale process without enhancing the ability to ensure environmentally sound development of the Coastal Zone; it would disrupt the operation of the SPR, frustrating our efforts to achieve our energy policy goals and increasing the vulnerability of the United States in the event of an energy supply disruption. These impacts are explained below.

The central goal of the National Energy Policy, as expressed in the President's 1983 National Energy Policy Plan, is to foster an adequate supply of energy at reasonable costs. Two basic strategies to achieve that goal are to promote a balanced and mixed energy resource system, and to minimize federal control and involvement in energy markets while maintaining public health, safety, and environmental quality. The Federal Government is implementing these strategies in a variety of ways, including several programs to encourage the development of domestic energy resources on public lands, among them the Outer Continental Shelf.

Domestic production currently satisfies only two-thirds of the annual oil demand in this country. Currently we import about 5 million barrels of oil a day at a cost of $50 million. A major oil supply disruption could present a significant threat to this Nation's energy security. One of our richest sources of domestic energy is the Outer Continental Shelf, estimated to contain over 25% of this country's future petroleum resources. Since current domestic sources of oil are being depleted rapidly, the timely exploration for and production of oil and gas resources on the OCS are vital to achievement of the national energy goal. Congress recognized this when it enacted the Coastal Zone Management Act Amendments of 1978, directing the Secretary of the Interior to "...establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf ... [to expedite] exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in the world trade...."

The OCS contains some of the most fertile potential sources of petroleum reserves in the United States today. The U.S. Geological Survey estimates that 28 billion barrels of oil remain to be discovered in the offshore U.S., over one-third of the remaining domestic undiscovered recoverable oil resources. A soon-to-be published study, completed recently by the Department of Energy on the replacement cost of U.S. crude oil, highlights the importance of that offshore oil. DOE's study shows that our offshore oil may be the lowest cost oil yet to be found in this country. Even though offshore oil fields are more expensive to find than conventional onshore fields, much of the offshore oil is likely to be found in large accumulations, which are relatively inexpensive on a per-barrel basis to develop and produce.

DRAFT

If access to offshore oil resources is withdrawn, only less attractive alternative sources for domestic oil production will be available. Domestic oil production would be forced to move toward increasingly hostile arctic environments, to smaller on-shore fields (of which several hundred may be needed to equal the reserves of one large offshore field), or to alternative fuels. In many cases having to extract oil from these sources involves longer lead times due to geological, climatological and/or technological factors. These factors and the added time required to produce these resources make them more expensive and less desirable domestic substitutes for OCS oil.

The key to the OCS picture is timing. We have identified a need for greatly increased offshore production by the end of the century but the lead times needed to achieve that production are on the order of 10 to 15 years and more. That means leasing decisions must be made soon if the necessary activity, i.e., the cycle of exploration, development and production, is to get underway in time. H.R. 4589 not only would delay leasing decisions unnecessarily, but might preclude development of these resources altogether.

Not only would H.R. 4589 impede the Nation's ability to locate and develop its OCS resources, but it also could obstruct the Department of Energy's efforts to comply with its statutory mandate to fill expeditiously and drawdown as needed the Strategic Petroleum Reserve. The proposed legislation would greatly extend the scope of State review over the development and operation of the Reserve. H.R. 4589 is so broadly worded that it could be read to permit a State to review the activities of the Department not only on the Coastal Zone but at SPR sites. Even more significantly, the bill could permit State interference with the operation of those sites. This could result in significant limitations on the drawdown of the Reserve in an energy emergency.

To ensure our Nation's energy security, we must allow private industry access to the oil and gas resources of the Outer Continental Shelf, and we must be able to draw upon the SPR to respond rapidly in an emergency. Current safeguards are working effectively to protect the coastlines of states affected by OCS leasing. This legislation would merely add layers of unnecessary regulation, thereby disrupting effective systems in the Coastal Zone Management Act and other statutes that balance state and federal objectives and promote environmentally benign energy activities in the coastal zone. H.R. 4589 would hinder these activities, resulting in potentially

DRAFT

disastrous energy consequences, both in terms of our long-term oil supply capabilities and our short-term emergency response capabilities. Moreover, all of the Reserve storage sites have received permits from the relevant State agencies and the managers of those sites coordinate extensively with the States.

For the reasons stated the Department of Energy opposes enactment of H.R. 4589. The Office of Management and Budget has advised that from the standpoint of the Administration's program, there is no objection to the submission of this report for the Committee's consideration.

Sincerely,

cc: Honorable Gene Snyder
Ranking Minority Member

THE WHITE HOUSE

WASHINGTON

June 22, 1984

MEMORANDUM FOR CONSTANCE J. BOWERS
LEGISLATIVE ANALYST
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Testimony of Robert J. McManus and Revised Testimony of Carol E. Dinkins Concerning the Coastal Zone Management Act (H.R. 4589) on June 26, 1984

Counsel's Office has reviewed the above-referenced statements, and finds no objection to them from a legal perspective.

OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SPECIAL

June 22, 1984

2 PIECES OF TESTIMONY - TOTAL PAGES = 25

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

Department of Commerce - Mike Levitt (377-4264
Environmental Protection Agency - Stead Overman (382-5414)
Department of Defense. - Werner Windus (697-1305)
Army Corps of Engineers - Gabe Rozsa (272-0032)
Department of Energy - Bob Rabben (252-6718)
Department of Agriculture - Rob Wilkins (382-1272)
Department of the Interior - Norma Perry (343-6797)
Council on Environmental Quality
Department of Transportation - John Collins (426-4694)
Department of Justice - Jack Perkins (633-2113)

SUBJECT: Department of Justice and NOAA testimony, as revised to reflect comments on earlier drafts, on H.R. 4589, Coastal Zone Management.

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

A response to this request for your views is needed no later than 4:00 p.m. - Friday, June 22, 1984 (no extension possible).

Questions should be referred to Constance J. Bowers (395-3890), the legislative analyst in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: Scott Gudes
Norm Hartness
Charlie Kolb
John Roberts
Dave Allen
Margaret Carpenter
Ken Glozer
Sherry Fox
Randy Davis
Ken Allen
Jim Mietus
Dave Gibbons

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Richard Darman

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Testimony of Carol Dinkins concerning the Coastal Zone Management ACA (H.R. 4589) on June 26, 1984

ROUTE TO: Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Date Code	Completion Date YY/MM/DD
CUTHOL	ORIGINATOR	84/06/21			/ /
	Referral Note:				
CURT 18	R	84/06/21		S	84/06/25
	Referral Note:			CUTB	
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

THE WHITE HOUSE

WASHINGTON

June 26, 1984

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS JGR
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Justice Draft Testimony Concerning S. 52 and H.R. 1647, Providing Mandatory Sentences for Armed Career Criminals

Counsel's Office has reviewed the above-referenced testimony, and finds no objection to it from a legal perspective. The Department of Justice may want to consider adding a reference to Lewis v. United States, 445 U.S. 55, 61 n. 5 (1980) to footnote 2 on page 6. The proposition that a pending appeal of a predicate conviction does not offset the usability of the conviction, even if the appeal is successful, may seem extreme at first blush. The concept was, however, specifically sanctioned by the Supreme Court in the analogous area of possession of firearms by a convict in the above-referenced footnote from the recent Lewis case.

ID # [redacted] CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 84 / 1 / 1

Name of Correspondent: Greg Jones

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Justice Draft Testimony concerning S. 52 and H.R. 1647, providing mandatory sentences for armed career criminals

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUTHOL	ORIGINATOR	84/06/22			84/1/1
CURT 18	Referral Note: R	84/06/22		S	84/06/27 COB
	Referral Note:	/ /			/ /
	Referral Note:	/ /			/ /
	Referral Note:	/ /			/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

U.S. Department of Justice
Office of Legislative and
Intergovernmental Affairs

Office of the
Assistant Attorney General

Washington, D.C. 20530

6/22/84

Greg Jones --

Attached is our draft testimony for the June 28 hearing of the House Subcommittee on Crime re career criminal legislation. AAG Steve Trott of the Criminal Division will be our witness.

CHC

Cary Copeland

cc: Fred Fielding
Counsel to the President

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to present the views of the Department of Justice on two bills which provide lengthy mandatory sentences for armed career criminals. These bills are S. 52 as passed by the Senate on February 23, 1984, and H.R. 1647, a bill identical to S. 52 as it was originally introduced.

The subject of federal prosecution of persons with two or more robbery or burglary convictions who commit another one of these offenses while armed with a firearm is a familiar one both to the Department and to this Subcommittee. In the last Congress, then Deputy Assistant Attorney General Roger M. Olsen testified before you concerning H.R. 6386, a bill quite similar to H.R. 1627. We took the position that the federal government can lend some degree of assistance to the states in combatting career robbers and burglars, provided that the problems inherent in establishing concurrent federal-state jurisdiction in this area can be resolved. That remains our position today. We are not opposed to legislation creating federal jurisdiction over armed robberies and burglaries committed by recidivist offenders, although we think that the problems associated with concurrent jurisdiction over these crimes are real and must be carefully addressed.

In addition, I would emphasize that while we are willing to accept some share of the load in prosecuting career robbers and burglars, we do not regard legislation allowing us to do this as

having a particularly high priority. In our view, such legislation does not approach the same importance in the fight against crime as most of the provisions in S. 1762 and other bills that have passed the Senate as part of the Administration's anti-crime package. We think that what is most urgently needed is comprehensive, effective reform of such major areas of the criminal justice system as the sentencing, labor racketeering, bank secrecy, bail and forfeiture laws, rather than the sort of piecemeal tinkering with specific statutes that is done in S. 52 and H.R. 1627. Moreover, it bears mention that, of the fifteen violent crime proposals in Title X of S. 1762, of which S. 52 is not one, the Congress has thus far completed action on only one, the proposal aimed at pharmacy robberies and burglaries. We believe several of the remaining proposals contained in Title X -- many of which we know are not within the purview of this Subcommittee's jurisdiction -- are more important than the matters addressed in S. 52 and H.R. 1627.

Turning to H.R. 1627, this bill sets out a new section 2118 in title 18 providing that any person who has already been convicted of two felony robberies or burglaries and who commits a third such offense in violation of either federal or state law while armed with a firearm may be prosecuted in federal court. If found guilty, he must be sentenced to imprisonment for at least fifteen years or to life imprisonment. Regardless of the length of the sentence, it may not be suspended or made probationary, and the defendant would not be eligible for parole.

Our major difficulty with this bill is with proposed subsection 2118(e) addressing the exercise of federal jurisdiction which, because of its unusual wording, I have quoted below.[1] This subsection is apparently an attempt to overcome the Administration's chief problem with the version of this bill that was passed in H.R. 3963 and S. 1688 in the last Congress. Those bills would have allowed a state or local prosecutor to veto any federal prosecution in his district even if the Attorney General had approved prosecution. Such a restraint on federal prosecutorial discretion and delegation of executive responsibility would have raised serious difficulties as well as possible constitutional concerns. Although it is somewhat imprecisely drafted, subsection (e) would apparently overcome any constitutional difficulties by leaving the ultimate decision on whether to seek a federal indictment to federal prosecutors. However, since a case "lodged" in a state prosecutor's office may only be considered for a federal indictment on the request or concurrence

---

[1] Subsection 2118(e) provides:

> "(e) Ordinarily, armed robbery and armed burglary cases against career criminals should be prosecuted in State court. However, in some circumstances such prosecutions by state authorities may face undue obstacles. Therefore, any such case lodged in the office of the local prosecutor may be received and considered for Federal indictment by the Federal prosecuting authority, but only upon request or with the concurrence of the local prosecuting authority. Any such case presented by a Federal investigative agency to the Federal prosecuting authority, however, may be received at the sole discretion of the Federal prosecuting authority. Regardless of the origin of the case, the decision whether to seek a grand jury indictment shall be in the sole discretion of the Federal prosecuting authority."

of the local prosecutor, it is not clear how the United States Attorney's office would ever officially be made aware of such a case if the state prosecutor did not request its consideration. If federal authorities found out about such a case unofficially they could still seek an indictment in spite of what the state prosecutor might want, but the assertion of federal power in such a manner is hardly conducive to good federal-state relations. Moreover, there is, we submit, no rational basis for making even an initial determination of whether the state (which nearly always has jurisdiction over robbery and burglary) or the federal government (which would be given jurisdiction over a limited number of such cases under the proposed statute) should prosecute turn on whether a state or federal agency investigated and presented the case. The only justification for any federal involvement in this area of traditional state responsibility is to aid the states in certain unique situations. This necessitates close coordination and cooperation between state and federal investigators and prosecutors which can often best be obtained by consultations and decisions on a case-by-case basis.

Accordingly, we recommend that subsection 2118(e) be deleted and that a new provision be inserted in section four of the bill expressing the intent of Congress that ordinarily no prosecutions should be brought under this provision unless the appropriate state or local prosecutor requests or concurs in federal prosecution. Since section four is non-jurisdictional in nature, this language would not raise any of the constitutional problems

regarding a local prosecutor vetoing federal prosecution which I have previously mentioned, and at the same time it would minimize the risk of disrupting important federal-local law enforcement relationships when prosecutions are brought under this statute.

In addition to our overriding concern with H.R. 1627 over the way it allocates jurisdiction between the federal and state prosecutors, we have several suggestions with respect to the new armed robbery and burglary offense itself. First, subsection 2118(b) provides that the two prior felony convictions need not be alleged in the indictment or proven at trial to establish an element of the offense or the jurisdiction of the court. Rather, subsection 2118(a)(2) provides that the prior convictions are to be proven to the court at or before sentencing. We think that the two prior felony convictions which provide the basis for federal jurisdiction should be established prior to the attachment of jeopardy. If verification of this jurisdictional element is left until sentencing, a defective prior conviction, for example, one in which the defendant did not have counsel at the entry of a prior plea, could nullify the entire prosecution because double jeopardy considerations would prevent retrial. We would suggest the inclusion of language which would require the prosecution to notify the court and the defendant prior to the attachment of jeopardy of the prior convictions relied upon to

establish jurisdiction and mandate that the defendant contest the validity of any such conviction prior to the attachment of jeopardy.[2]

Second, we think that the requirement that the firearm be in the actual possession of the robber or burglar who has already been convicted twice is too narrow. We believe that the statute should reach such a recidivist robber or burglar while he or any other participant in the offense is in possession of or has readily available to him a firearm or an imitation thereof. Under the provisions of the bill as drafted, a recidivist who planned and organized a particularly life-endangering armed robbery or burglary involving several persons could remove himself from the reach of the new section simply by having his confederates carry all the firearms. In certain types of robberies, such as of banks, it is not uncommon for one or two persons to actually hold the weapons while others remove the money. Since there is no meaningful difference in their degree of culpability, all participants who have the two prior convictions should be covered by the new statute.

Third, section 2118(a) is silent on the question of how federal jurisdiction, which is based on the possession of a firearm, is to be shown. Presumably, it is intended as an element of the offense which must be proven to the trier of fact, inasmuch as the section's application is intended to be limited

---

[2] The bill should make clear that the pendency of an appeal does not affect the usability of the conviction, regardless of the outcome of the appeal.

to firearm-carrying recidivists, but the recidivism requirement is explicitly not made an element. Thus, it would appear that a conviction under section 2118(a) would require proof of possession of a firearm plus proof of all the elements of the state or federal statute that the defendant is charged with having violated. We would suggest that this point be specifically addressed in the legislative history.

In addition, since the terms "robbery" and "burglary" are not defined in the proposed statute, we would recommend that either the bill or the legislative history make it clear that the terms are to be given a generic rather than common law meaning and include state offenses that do not use the words "robbery" or "burglary," such as a statute that proscribes criminal entry with different gradations for the types of structures entered and the act committed therein.

Finally, as we pointed out when we testified before the Subcommittee on H.R. 6386 in the 97th Congress, we think that any legislation in this area would benefit from Congressional findings that armed robberies and burglaries have an adverse effect on interstate commerce. See Perez v. United States, 402 U.S. 146(1971). While we think the Commerce Clause provides a sustainable basis for asserting federal jurisdiction over the traditionally state crimes of robbery and burglary, Congressional findings would facilitate the bill's passing constitutional muster.

S. 52

Turning to S. 52 as passed by the Senate, this bill eliminates most of the problems I have noted with respect to H.R. 1627. It provides that the two prior felony convictions necessary to establish federal jurisdiction shall be proven to the court before jeopardy attaches. It reaches the situation in which a twice convicted robbery or burglary participates in another armed robbery or burglary but does not himself handled the gun. And it contains appropriately broad definitions of the terms "robbery" and "burglary."

Most significantly, S. 52 solves the problems associated with concurrent federal-state jurisdiction over third-time robbers and burglars by making the new section 2118 applicable only where the charged third-time robbery or burglary offense can itself be prosecuted in a court of the United States. In effect, while section 2118 does set out a new offense, it would actually operate as an enhanced sentencing statute for persons who have two prior state or federal robbery or burglary convictions and who are involved in another armed robbery or burglary that is a violation of a federal statute such as robbery in the special maritime and territorial jurisdiction (18 U.S.C. 2111), robbery of federal property (18 U.S.C. 2112), robbery or burglary in the Indian country (18 U.S.C. 1153), or bank or postal robbery or burglary (18 U.S.C. 2113-2115). Thus, the coverage of S. 52 as passed is considerably narrower than as introduced. It would not

nate, this bill elimin-
ith respect to H.R. 1627.
convictions necessary to
be proven to the court
s the situation in which a
participates in another armed
himself handled the gun. And it
initions of the terms "robbery"

2 solves the problems associated
e jurisdiction over third-time
ing the new section 2118 applicable
ird-time robbery or burglary offense can
a court of the United States. In effect,
set out a new offense, it would actually
sentencing statute for persons who have two
al robbery or burglary convictions and who
ther armed robbery or burglary that is a
deral statute such as robbery in the special
ritorial jurisdiction (18 U.S.C. 2111), robbery
erty (18 U.S.C. 2112), robbery or burglary in the
(18 U.S.C. 1153), or bank or postal robbery or
U.S.C. 2113-2115). Thus, the coverage of S. 52 as
considerably narrower than as introduced. It would not

on over third-time state robberies and
ls of the sponsors of S. 52 and

rt of my testimony, the Department
ch an expansion, although we
s directly concerned with law
ch as the National District
to the concept of extending
ries and burglaries. Indeed,
ice, prosecutors, and the
by even the most
his obvious fact is the
of federal jurisdic-
great significance
ed with other, more
justice system.
y be a need for
here, for
dequate state
may render
uate or
Congres-
not be

of

st the states

and at the same time would serve to avoid any constitutional problems associated with allowing a federal prosecution only with the concurrence of or lack of objection from a non-federal official. We strongly urge the Subcommittee to include such a provision if it decides to report out legislation in this area.

Mr. Chairman, that concludes my prepared remarks and I would be happy to respond to any questions at this time.