THE WHITE HOUSE

WASHINGTON

September 4, 1984

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

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Testimony on H.R. 6056, "Coastal States Marine Resources Conservation Act"

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

ID # _____ CU

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Subject: DOJ testimony on H.R. 6056, "Coastal States Marine Resources Conservation Act."

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

September 4, 1984

SPECIAL

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

Department of the Interior - Norma Perry (343-6797)
Department of Commerce - Mike Levitt (377-3151)
Department of State - Cy Alba (632-0430)
Council on Environmental Quality

SUBJECT: Department of Justice testimony on H.R. 6056, "Coastal States Marine Resources Conservation Act."

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 3:00 p.m. - Tuesday, September 4. (Hearing is September 5.)

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: Mike Horowitz
Fred Fielding
Scott Gudes
Dave Allen

DRAFT

STATEMENT

OF

RALPH W. TARR
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

BEFORE

THE

SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION
AND THE ENVIRONMENT
COMMITTEE ON MERCHANT MARINE AND FISHERIES
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 6056

THE COASTAL STATES MARINE RESOURCES CONSERVATION ACT OF 1984

ON

SEPTEMBER 5, 1984

DRAFT

DRAFT

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear today at your request on behalf of the Attorney General to present the preliminary views of the Department of Justice on certain constitutional issues raised by H.R. 6056, the Coastal States Marine Resources Conservation Act of 1984. Because we have only had a brief period within which to review this bill, and because the constitutional issues raised by it are multifaceted and complex, I am not in a position today to be definitive about the constitutionality of this bill in particular, or legislation like this in general. The views expressed here today therefore can only be tentative, and are designed simply to provide the Subcommittee with some assistance in understanding how this bill might be analyzed from a constitutional perspective. I note in passing that this bill also appears to raise significant non-constitutional issues of both a legal and policy nature. Pursuant to the Department's understanding of the Subcommittee's wishes as to this hearing, I will not address those issues in my testimony this morning. Instead, the Department of Justice is considering the non-constitutional issues and will provide the Subcommittee with appropriate separate written comments on the bill discussing those matters.

I. Summary of the Bill and Constitutional Issues Raised Thereby

We understand the bill to have three primary operational effects. First, the bill establishes that the commercial

harvesting of fisheries resources 1/ within the internal waters of each coastal state shall be subject exclusively to the laws of that state. The term "internal waters" is defined by the bill to encompass "those waters that are landward of the baseline from which the territorial sea of the United States is measured . . . ." 2/ Second, the bill authorizes each coastal state, in in implementing measures it considers necessary for the conservation of any fisheries resources within its internal waters, to give preference, to the extent it considers appropriate, to its residents in the commercial harvesting of those resources. This preference is permitted by the bill if the coastal state determines that the application of equal treatment to residents and nonresidents in regard to such harvesting would require limitations of general application that would be "so stringent as to render harvesting economically unfeasible."

Third, the bill would declare that no federal law may be construed to invalidate, impair, or supersede the laws of a coastal state relating to the conservation or harvesting of fisheries resources within its internal waters, or extend to any non-citizen

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1/ The term "fisheries resources" is defined in the bill to mean "eel, shad, herring, catfish, bullheads, white perch, striped bass, black sea bass, weak fish, flounder, and edible species of mollusks, and crustaceans."

2/ We are informed that in most cases this baseline is three miles from the shoreline.

of a coastal state any right or privilege granted by that state to its citizens regarding the commercial harvesting of fisheries resources within its internal waters. In sum, the bill would grant each coastal state exclusive regulatory authority over conservation and harvesting of certain fisheries resources within roughly a three-mile maritime belt off its coast. The exercise of this exclusive regulatory authority could include, at a state's option, giving preferences to its residents over all other persons engaged in the commercial harvesting of such fisheries resources. Such preferences might, for example, take the form of reduced licensing fees for harvesting activities and equipment, higher allowable limits upon harvesting, or an exclusive right to harvest which would exclude non-residents entirely.

The Department of Justice believes that serious constitutional issues are raised by a state's granting of such preferences under the authority that would be granted by this bill. Because of the short time we have had to review the complicated constitutional issues raised by this proposal, and because of the ambiguity of the legal precedents in this area, we are unable to state definitively whether or not this bill, and state legislation promulgated thereunder, would be upheld against constitutional challenge. In any event, a more definitive determination concerning the constitutionality of H.R. 6056, or any of the subsequent state laws, would have to be based upon

a careful review of the entirety of the legislative record supporting the challenged statute including its legislative history, its factual and policy rationale, and, perhaps most important, the particular state regulatory context and factual pattern within which a constitutional challenge would arise. In the absence of such information, in my testimony this morning I shall attempt to provide the subcommittee with a brief discussion of the most important constitutional issues raised by this bill, and the manner in which those issues generally might be considered by the federal courts.

II. Constitutional Analysis

A. The Commerce Clause

As you know, the Commerce Clause of the Constitution, Article I, § 8, cl. 3, vests Congress with the power to "regulate commerce with foreign nations, and among the several states. . . ." While the Commerce Clause speaks in terms of powers bestowed upon Congress, the Supreme Court has long understood the clause also to limit the powers of the several states to erect barriers against interstate trade. 3/ The Commerce Clause limitation upon state laws affecting Commerce is by no means absolute, however. In the absence of superseding

3/ Lewis v. BTBT Investment Managers, Inc. 447 U.S. 27, 35 (1980) (numerous cases cited).

federal legislation, states retain wide authority under their general police powers to regulate matters of legitimate state concern, even though interstate commerce may be affected thereby. 4/ In those areas in which Congress has not exercised its commerce power, i.e., in those areas where the commerce power lies "dormant," the Supreme Court has articulated a three-part inquiry to determine whether state laws imposing burdens on interstate commerce shall be upheld:

> (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect;
>
> (2) whether the statute serves a legitimate local purpose; and, if so,
>
> (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce. 5/

We believe that in the absence of federal legislation on the subject, state laws mandating the types of preferences

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4/ Lewis at 36 (cases cited).

5/ Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

authorized by H.R. 6056 would likely be held unconstitutional under the dormant Commerce Clause. 5a/ A series of decisions of the Supreme Court establish that the Commerce Clause "circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce." 6/ Indeed, many Supreme Court cases "have held that the Commerce Clause of the Constitution. . . precludes a State from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or the products derived therefrom." 7/ In Hughes v. Oklahoma, 8/ the Supreme Court held that an Oklahoma statute which placed no limits on numbers of minnows that could be taken by licensed minnow dealers and did not limit in any way how minnows could be disposed of within the state, but which forbade transportation of any commercially significant number of minnows out of state for sale, violated the dormant Commerce

5a/ But cf., Tangier Sound Waterman's Assoc. v. Douglas, 541 F. Supp. 1287, 1301-1306 (E.D. Va. 1982) (dictum that dormant Commerce Clause is not violated by Virgina law denying non-residents the right to commercially harvest blue crabs in Virginia's waters; court holds, however, that the law violates Privileges and Immunities Clause.

6/ Hicklin v. Orbeck, 437 U.S. 518, 533 (1978) (citing cases).

7/ New England Power Co. v. New Hampshire, 102 S.Ct. 1096, 1100 (1982) (citing cases).

8/ 441 U.S. 322 (1979).

Clause. The Hughes Court recognized the Oklahoma statute as an attempt to serve its minnow population, but found that the state had chosen a way "that most overtly discriminates against interstate commerce." While conservation may qualify as a legitimate local purpose, the court observed, this legitimate purpose may be promoted "only in ways consistent with the basic principle that 'our economic unit is the Nation,' . . ." 9/ The Court concluded that when an animal "'becomes an article of commerce . . . its use cannot be limited to the citizens of one State to the exclusion of citizens of another State.'" 10/

The situation presented by this legislation, however, does not present a constitutional issue under the dormant Commerce Clause. On the contrary, this bill apparently is intended to be an explicit exercise of congressional power under the Commerce Clause to regulate the commercial harvesting of fisheries resources in state waters. 11/ Moreover, it is "clear that Congress 'may redefine the distribution of power over interstate commerce' by 'permit[ting] the states to regulate

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9/ Id. at 338-39.

10/ Id at 339. See also Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (Louisiana statute forbidding interstate transportation of in-State shrimp unless the heads and shells had been removed violated dormant Commerce Clause).

11/ There is little doubt that commercial harvesting of fish in state waters, and the movement of vessels from one state to another in search of fish, are activities which affect interstate commerce and are subject therefore to congressional regulation. See Douglas v. Seacoast Products, Inc., 431 U.S. 265, 281-82 (1977) (cases cited).

the commerce in a manner which would otherwise not be permissible.'" 12/ In White v. Massachusetts Council of Construction Employers, 13/ the Supreme Court declared flatly:

> The Commerce Clause is a grant of authority to Congress, not a restriction on the authority of that body. Congress, unlike a state legislature authorizing similar expenditures, is not limited by any negative implications of the Commerce Clause in the exercise of its spending power. Where a state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce.

In White, plaintiffs challenged on Commerce Clause grounds an Executive order of the Mayor of Boston that required all construction projects funded with city funds to be performed by a workforce at least half of which were city residents. The Supreme Court upheld the constitutionality of the Executive order, finding, inter alia, that "federal regulations for

12/ South-Central Timber Development, Inc. v. Wunnicke, 52 U.S.L.W. 4631, 4632 (U.S., May 22, 1984) (cases cited).

13/ 103 S.Ct. 1042, 1047 (1983).

[the] program affirmatively permit the type of parochial favoritism expressed in the order." 14/

The Supreme Court does require, however, that in order for state regulation to be removed from the reach of the dormant Commerce Clause, "congressional intent must be unmistakably clear."

> The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine. It is not . . . merely a wooden formalism. The Commerce Clause was designed to "to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation.' Hughes v. Oklahoma, 441 U.S. 322, 325 (1979). Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States . . . . On the other hand, when Congress acts, all segments of the country

14/ 103 S.Ct. at 1047. Justices Blackmun and White, concurring in part and dissenting in part, observed, "Congress unquestionably has the power to authorize state or local discrimination against interstate commerce that otherwise would violate the dormant aspect of the Commerce Clause." 103 S.Ct. at 1048-49.

are represented and their is significantly less danger that one State would be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress insures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on Congress. 15/

In sum, assuming this bill and its legislative history make unmistakably clear a congressional intent to authorize discrimination in the harvesting of fisheries resources based on state residency, we believe the bill would survive constitutional scrutiny under the Commerce Clause. Our research reveals no instance in which the Supreme Court has invalidated on Commerce Clause grounds state legislation designed to give effect to an explicit and unambiguous congressional

15/ South-Central Timber Development, Inc. v. Wunnicke, 52 U.S.L.W. 4631, 4633 (May 22, 1984).

judgment authorizing a limitation or prohibition upon interstate commerce. 16/

B. The Privileges and Immunities Clause

The Privileges and Immunities Clause, Article IV, § 2 provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Writing for a unanimous Court in Paul v. Virginia, 8 Wall. 168, 180 (1869), Justice Field characterized the Privileges and Immunities Clause as a guarantee of equality for all citizens 17/ within any state:

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from

16/ See generally Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 423-24 (1946) (Court notes that in each case wherein Congress authorized state action previously held invalid under the dormant Commerce Clause, Court has subsequently given effect to congressional judgment contradicting the court's own previous one).

17/ The Privileges and Immunities Clause has been interpreted to protect citizens as individuals, but not corporations or other artificial legal entities. See, e.g., Western and Southern Life Insurance Co. v. California Board of Equalization, 451 U.S. 648, 656 (1981); Hemphill v. Orloff, 227 U.S. 537, 548-50 (1928); Asbury Hospital v. Cass County, 326 U.S. 207, 210-11 (1945); Paul v. Virginia, 8 Wall. 168, 177 (1869).

> the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it ensures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

More recently, Mr. Justice Marshall stressed the Commerce Privileges and Immunities Clause's "norm of comity" in Austin v. New Hampshire, 420 U.S. 656, 660-61 (1975): "[T]he Clause . . . establishes a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment." In interpreting the clause "the Courts have manifested the disposition . . . not to attempt to define the words, but 'rather to leave their meaning to be determined in each case upon a view of the particular rights asserted or denied therein.'" McCready v. Virginia, 94 U.S. 391, 395.

In Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 383 (1978), the Supreme Court elaborated upon the distinction

between those subjects as to which equality of treatment under the Clause was required, and those which were not, as follows:

> Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, purpose, or the development of a single Union of those States. Only with respect to those "privileges" and "immunities" bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally.

The Baldwin Court upheld a Montana licensing statute that imposed substantially higher licensing fees on nonresidents than on residents, and that required nonresidents to purchase a "combination license" in order to be able to hunt elk. Justice Blackmun, writing for the Court, emphasized the recreational, non-fundamental character of the right at issue. "Equality in access to Montana elk," the Court declared, is not basic to the maintenance or well being of the Union. Appellants do not -- and cannot -- contend that they are

deprived of a means of a livelihood by the system, or of access to any part of the State to which they may seek to travel." 18/

Consistent with the Court's reasoning in Baldwin, states constitutionally may distinguish between residents and non-residents for the purposes of suffrage, qualifications for elective office, and provision of certain services and benefits. 19/ On the other hand, the Privileges and Immunities Clause has been interpreted to prevent a state from imposing unreasonable burdens upon non-residents, for example, unequal laws respecting ownership and disposition of privately owned property within the state, 20/ and limitations upon access to the state's judiciary. 21/

The Supreme Court has been particularly reluctant to approve state-created discriminations against non-residents that impose significant burdens upon those persons' pursuit of a livelihood within the state. In Ward v. Maryland, 12 Wall. 418 (1871), the Supreme Court held unconstitutional a

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18/ Id. at 388.

19/ See Baldwin, 436 U.S. at 383.

20/ See Blake v. McClung, 172 U.S. 239 (1898).

21/ Canadian Northern R. Co. v. Eggen, 252 U.S. 553 (1920).

Maryland statute regulating the sale of goods in the City of Baltimore that discriminated against non-residents of Maryland by requiring non-resident merchants to obtain licenses without requiring the same of certain similarly situated Maryland merchants; by requiring non-residents to pay higher license fees than those Maryland residents who were required to secure licenses; and by prohibiting both resident and non-resident merchants from using non-resident salesmen, other than regular employees, to sell goods in Baltimore. In holding that the statute violated the Privileges and Immunities Clause, the Court observed that "the Clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into the other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation." Id. at 430. In another, more recent case implicating the right of non-residents to pursue their livelihood free of discriminatory burdens, the Supreme Court held the so-called "Alaska Hire" statute violative of the Privileges and Immunities Clause. 22/ That statute, enacted allegedly for the purpose of reducing unemployment in the State of Alaska, required that all oil and gas leases, easements or right-of-way permits issued by Alaska for oil or gas pipeline purposes

22/ Hicklin v. Orbeck, 437 U.S. 518 (1978).

contain a provision requiring the employment of any qualified Alaska residents in preference to all non-residents. The Court found that the state had failed to show that non-residents were "a particular source of the evil at which the statute is aimed," 23/ namely, the state's unemployment problem. Moreover, the Court was unable to find any substantial relationship between the state's unemployment problem and the statutory scheme which granted to all Alaskans, regardless of their employment status, education, or training, a flat employment preference for all jobs covered by the statute. "Even if a statute granting an employment preference to unemployed residents or to residents enrolled in job-training programs might be permissible, Alaska Hire's across-the-board grant of a job preference to all Alaskan residents clearly is not." 24/ The Hicklin Court rejected the State's contention that because the oil and gas resources that are the subject of the Alaska Hire law are owned by the State of Alaska, this ownership is sufficient justification for the law's discrimination against nonresidents and takes the law totally outside the scope of the Privileges and Immunities Clause. The Court rejected Alaska's reliance upon McCready v. Virginia, 94 U.S. 391 (1877), which upheld a Virginia law prohibiting non-citizens

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23/ Id. at 526.
24/ Id. at 528.

of Virginia from planting oysters in tidewaters within the jurisdiction of the State of Virginia:

> Although some courts, including the Court below, have read McCready as creating an "exception" to the Privileges and Immunities Clause, we have just recently confirmed that "[i]n more recent years . . . the Court has recognized that the State's interest in regulating and controlling those things that they claim to 'own' . . . is by no means absolute." Baldwin v. Montana Fish and Game Commission, 436 U.S. at 385. 25/

The two cases most relevant to the analysis of this bill under the Privileges and Immunities Clause are Toomer v. Witsell, 334 U.S. 385 (1948), and Mullaney v. Anderson, 342 U.S. 415 (1952). In both cases, the Supreme Court held that State legislation which discriminated against nonresidents with respect to commercial fishing in offshore waters violated the Privileges and Immunities Clause. In Toomer, plaintiffs challenged a South Carolina statute which required nonresidents to pay a license fee of $2,500 for each shrimp boat working in the three-mile maritime belt off the coast of South Carolina

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25/ Hicklin v. Orbeck, 437 U.S. at 528-29.

while imposing upon residents a fee of only $25.00 for the same privilege. 26/ The Supreme Court held this "severe discrimination" 27/ against non-citizens violated the Privileges and Immunities Clause. The Court declared:

26/ The Court provided the following background concerning the statute in question:

> The fishery which South Carolina attempts to regulate by statut[e] in question is part of a larger shrimp fishery extending from North Carolina to Florida. Most of the shrimp in this area are of a migratory type, swimming south in the late summer and fall and returning northward in the spring. Since there is no federal regulation of the fishery, the four States most intimately concerned have gone their separate ways in devising conservation and other regulatory measures. While action by the States has followed somewhat parallel lines, efforts to secure uniformity throughout the fishery have by and large been fruitless. Because of the integral nature of the fishery, many commercial shrimpers, including the appellants, like to start tralling off the Carolinas in the summer and then follow the shrimp down the coast to Florida. Each State has been desirous of securing for its residents the opportunity to shrimp in this way, but some have apparently been more concerned with channelling to their own residents the business derived from local waters. Restrictions on non-resident fishing in the marginal sea, and even prohibitions against it, have now invited retaliation to the point that the fishery is effectively partitioned at the State lines; bilateral bargaining on an official level has come to be the only method whereby any one of the States can obtain for its citizens the right to shrimp and waters adjacent to the other States.

334 U.S. at 387-88.

27/ 334 U.S. at 385.

[The Clause] was designed to ensure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation . . . .

In line with this underlying purpose, it was long ago decided that one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.

Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be

conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures. 28/

In analyzing South Carolina law, the Court found that the discrimination against nonresidents was so great that "its practical effect is virtually exclusionary." 29/ Returning to the South Carolina's justification for the statute, the Court expressed some skepticism concerning its alleged purpose of conservation of shrimp. The Court noted, for example, that South Carolina imposed no limitation on the number of resident boats which may be licensed, and cited State reports which revealed the state's concern for increasing the market for shrimp. More importantly, however, the Court found that there was no reasonable relationship between the danger presented by non-citizens of South Carolina, as a class, and the discriminatory provisions imposed upon them. While there would be little question as to the State's authority to restrict the shrimp harvest in general, or to restrict the type of equipment used in its fisheries, or to graduate

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28/ 334 U.S. at 395-96.

29/ Id. at 396-97.

license fees according to the size of boats, or to charge non-residents, a fee to compensate the State for any added enforcement burden they may impose, or for any conservation expenditures otherwise paid by residents through their taxes, South Carolina could not adopt a remedy "so drastic as to be a near equivalent of total exclusion." 30/ Finally, the Court rejected the State's argument, based upon McCready v. Virginia, 94 U.S. 391 (1896), that wild fish and game are the common property of the State, as trustee for the benefit of its citizens, and that the State may discriminate as it sees fit against persons lacking any beneficial interest in the trust. The Court expressed serious reservations with respect to extending McCready beyond its particular facts, 31/ and quoted with approval Justice Holmes' statement that "'[w]ild birds are not in the possession of anyone; and possession is the beginning of ownership.'" 32/

30/ 334 U.S. at 398.

31/ The Court noted, for example, that the rule in McCready may not apply to "free-swimming fish." 334 U.S. at 402 (citing Manchester v. Massachusetts, 139 U.S. 240, 265 (1891)).

32/ 334 U.S. at 401 (quoting Missouri v. Holland, 252 U.S. 416, 434 (1920).

The Court's decision in Toomer was expressly reaffirmed in Mullaney v. Anderson, 342 U.S. 415 (1952). In Mullaney, the territorial legislature of Alaska imposed a $5.00 licensing fee on resident commercial fishing in territorial waters, but a $50.00 fee upon non-residents. The Court found that the fee did not fall within the principles discussed in Toomer that might make discrimination against non-residents permissible under the Privileges and Immunities Clause. 33/

State laws implementing H.R. 6056 undoubtedly would be analyzed under the Toomer-Mullaney standard. A preference authorized by H.R. 6056 and implemented by state law might be approved by a court if such preference were based on something more than the mere fact of residency. When there are "valid independent reasons" for disparity of treatment among residents and nonresidents, and where the degree of discrimination bears a "close relation" to those reasons, the Privileges and Immunities Clause is not violated. 34/ We understand that H.R. 6056 would authorize preferences for residents only upon a finding by the state that application of equal treatment to residents and non-residents in regard to fisheries harvesting would require implementation of harvesting limitations "so

33/ 342 U.S. at 417 (citing Toomer, 344 U.S. at 398-99).

34/ Toomer v. Witsell, 334 U.S. at 396.

stringent as to render harvesting economically unfeasible." This rationale for discrimination between residents and non-residents appears to be based upon conservation and commercial considerations. Although we certainly can make no definitive prediction at this time as to how a court might view this justification and its factual basis, we believe such a rationale could well satisfy a court employing the Toomer-Mullaney standard. It would be up to the several states, of course, to assure that their implementing laws and regulations conform closely to this rationale. Additionally, as previously noted, the constitutionality of this legislation and of state implementing laws and regulations will depend in large part upon the legislative history of this bill, including especially the Congressional findings contained therein. We caution, however, that regardless of the contents of this legislation and its legislative history, 35/ state legislation

35/ Unlike the case law concerning the dormant Commerce Clause, the Supreme Court has not, to our knowledge, determined whether Congress may, through affirmative legislation, authorize a state to enact legislation which in the absence of Congressional authorization would violate the Privileges and Immunities Clause. See generally White v. Massachusetts Council of Construction Employers, 103 S.Ct. 1042, 1049 n.1 (1983)(Blackmun & White JJ. concurring in part and dissenting in part). At least one leading constitutional scholar as stated:

> [It cannot be assumed] that Congress has limitless power to authorize state discrimination against out-of-state citizens. The privileges and immunities clause . . . . confers a personal right against state

(Cont. on p. 24)

discriminating against non-residents will be closely scrutinized by the courts under the Privileges and Immunities Clause, and those who would defend such legislation must be prepared to present persuasive reasons for such discrimination "beyond the mere fact that [those discriminated against] are citizens of other States." 36/ Toomer v. Witsell, 334 U.S. at 396.

C. Equal Protection and Due Process Clauses

It is clear that a state or federal law which infringes upon a class of persons' rights to employment in a major sector

35/ (Cont.)

> action unjustifiably discriminating against out-of-state citizens whether or not such discrimination is congressionally authorized.

L. Tribe, American Constitutional Law §§ 6-31, at 403 n.18 (1978) (original emphasis).

36/ We recognize that some earlier cases have held that the states have virtually unlimited authority to grant preferences to their citizens concerning fishing in their waters. See, e.g., McCready v. Virginia, 94 U.S. 391 (1876); Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823) (Bushrod Washington, J. on circuit) (non-citizens have no right to gather shellfish in New Jersey waters); see also Geer v. Connecticut, 161 U.S. 519 (1896). We believe the property right principles underlying these cases have been effectively abandoned by the Supreme Court in its more recent analysis of state discriminations against non-residents with respect to fish and game resources. See, e.g., Hughes v. Oklahoma, 441 U.S. 322 (1979); Hicklin v. Orbeck, 437 U.S. 518 (1978); Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284 (1977); Toomer v. Witsell, 334 U.S. 385 (1948).

of the economy implicates potentially serious issues under the Due Process and Equal Protection components 37/ of the Fifth and Fourteenth Amendments. See, e.g., Truax v. Raich, 239 U.S. 33, 41 (1915) ("it requires no argument to show that The right to work for a living in the common occupations in the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure"). In cases in which a class of persons is disadvantaged -- but not absolutely barred -- from a significant employment or business opportunity for solely reasons of non-residency in a particular state, we believe a court more likely than not would choose to analyze the constitutional issues under the Privileges and Immunities Clause, rather than under the Equal Protection or Due Process Clauses. 38/ It is possible, however, that if non-residents were barred entirely from commercial fishing pursuant to state legislation or regulation promulgated under the aegis of H.R. 6056 that the court might consider the claims of such persons under the Due Process and Equal Protection Clauses.

For example, in Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948), the Supreme Court held that a California statute barring issuance of commercial fishing licenses to

37/ See generally Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

38/ See e.g., Hicklin; Tooner; Mullaney cases.

resident aliens was unconstitutional. The Court assumed for purposes of decision that the object of the statute was to conserve fish in the ocean waters off the coast of California and to protect California citizens from outside competition in the commercial fishing industry. 39/ The State of California argued, first, that it was simply following federal legislation in the immigration and naturalization area which adopted classifications based in part upon nationality and other factors. The Court, however, found that a state has "no power to single out and ban its lawful alien inhabitants . . . from following a vocation simply because Congress has put some such groups in special classifications in exercise of its broad and wholly distinguishable powers over immigration and naturalization." 40/ Second, the Court rejected California's argument that its "ownership" of fish within its boundaries entitled it to establish an exclusionary rule against aliens as a conservation measure:

> To whatever extent the fish in the three-mile belt off California may be "capable of ownership" by California, we think that "ownership" is inadequate to justify California in excluding

39/ 334 U.S. at 418.

40/ Id. at 420.

any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so. 41/

More recently, in Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), the Supreme Court held federal regulations which excluded all persons except American citizens (and natives of Samoa) from employment in most positions in the federal civil service to be unconstitutional. The Court began with the observation that depriving aliens of "employment in a major sector of the economy is of sufficient significance to be characterized as a deprivation of an interest in liberty" protected by the Due Process Clause. 42/ Based upon the Court's decisions in Sugarman v. Dougall, 413 U.S. 634 (1973) and In re Griffiths, 413 U.S. 717 (1973), 43/ the Court observed that the discriminatory rule at issue would violate the Equal Protection Clause if adopted by a state. The Court

41/ Id. at 421.

42/ 26 U.S. at 102.

43/ Sugarman held that a New York law which provided that only United States citizens could hold permanent positions in the competitive class of the state's civil service violated the Equal Protection Clause. In Griffiths, the Court, on the same day, held that Connecticut's exclusion of aliens from the practice of law was unconstitutional under the same Clause.

went on to find that the Federal Government had failed to establish "an overriding national interest as justification" for a rule excluding non-citizens from such an important sector of employment. 44/

In sum, we believe there is some risk that a court may decide to review this bill and implementing state laws and regulations under the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments. Should it do so, it would be important -- just as it is in the Privileges and Immunities Clause context -- to be able to demonstrate an important state or national interest which would be directly furthered by a preference or privilege based on state residency. Of course, if analyzed under the Equal Protection and Due Process Clauses, there would not be any issue, as under Privilege and Immunities Clause analysis, as to whether Congress could authorize the states to discriminate in a manner in which they could not if acting solely under their own authority.

This concludes my prepared remarks, Mr. Chairman. Again, the Department appreciates this opportunity to assist the Subcommittee in its consideration of this legislation. I would be glad to answer any questions you or Members of your Subcommittee might have.

44/ 426 U.S. at 103, 116.

THE WHITE HOUSE

WASHINGTON

May 15, 1985

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Testimony of Victoria Toensing Regarding H.R. 613, H.R. 665, and H.R. 775

Counsel's Office has reviewed the above-referenced draft testimony. Although I will defer to the Department, I would suggest deletion of the carryover paragraph between pages 5 and 6. In my view, it is not even arguable that a law directed against vandalism at places of worship would violate the Establishment Clause. The law has a clear secular purpose -- to prevent vandalism -- and is directed at places of worship not to promote religion but because places of worship are peculiarly subject to a certain type of vandalism. In short, the argument is so weak that it is not a compelling reason to oppose the legislation, and should be deleted.

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OFFICE OF MANAGEMENT AND BUDGET

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Adrian Curtis	Approval or signature ☐
Karen Wilson	Comment ☐
	Prepare reply ☐
	Discuss with me ☐
	For your information ☐
	See remarks below ☐
FROM Greg Jones (x3454)	DATE 5/14/85

REMARKS

Please give me your comments on the attached by noon tomorrow, 5/15.

Thanks.

cc: Jim Murr

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Cary
Kathleen
Greg Jones

STATEMENT

OF

VICTORIA TOENSING
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

SUBCOMMITTEE ON CRIMINAL JUSTICE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 613, H.R. 665 and H.R. 775

ON

MAY 16, 1985

Thank you for the opportunity of appearing before the Subcommittee to discuss H.R. 613, H.R. 665, and H.R. 775, all of which would make it a federal crime for private individuals to engage in certain violent acts directed at religious property, or which are intended to interfere with the free exercise of religion by any person or group. Religious freedom is one of our most cherished liberties. Interference with the right to worship in peace is intolerable. Any effort to deter and punish such disgraceful conduct should merit our support and praise. It is, therefore, with a sense of acute discomfort, that I must express to you the objections of the Department of Justice to these three well-intentioned bills.

Although the bills are similar in many respects, there are some differences:

H.R. 613 [1/] would make it a federal felony to vandalize, set fire to, or in any other way damage or destroy a religious house of worship, any religious object contained therein, or a consecrated cemetery, or religious school, with intent to intimidate or otherwise interfere with any person freely exercising his religion.

H.R. 665 would make it a federal felony to willfully vandalize, deface, set fire to, or in any other way damage or

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1/ The bill purports to add a new 18 U.S.C. 246. Because there is an existing section 246, page 1, line 6 of the bill should be changed to read "Sec. 247."

destroy any cemetery, any building or other real property used for religious purposes, or any religious articles contained in any cemetery, building, or real property used for religious purposes. In addition, the bill would make it a federal felony to injure or intimidate any person or class of persons in the free exercise of religious beliefs. Attempts would be covered and enhanced penalties would be provided for if injury or death results.

H.R. 775 would add a new 18 U.S.C. 247 which would make it a federal felony to willfully damage or destroy (1) a cemetery; (2) a building or other real property used for religious purposes; or (3) a religious article contained in a cemetery or such building or real property. The proposed new section 247 covers attempts and provides for enhanced punishment if injury or death results. H.R. 775 also would add a new 18 U.S.C. 248 which would make it a federal felony to injure, intimidate, or interfere with any person in the free exercise of religious beliefs. Enhanced penalties are provided if injury or death results. In addition, the bill would require the FBI to collect and include in its Uniform Crime Reports information relating to certain crimes motivated by racial, ethnic, or religious prejudice. In this regard, I understand that the Department furnished its views to the Subcommittee on similar legislation, H.R. 1171, the proposed "Hate Crimes Statistics Act."

In our view, this legislation would be an ineffective law enforcement response to the problem of vandalism and other forms of violence directed at religious groups. Moreover, the legislation may suffer from constitutional infirmities and, in any event, will present difficult prosecutive problems.

Traditionally, state and local law enforcement agencies have investigated and prosecuted crimes of vandalism, malicious destruction of property and related criminal activity. We are aware of no information indicating an unwillingness or inability on the part of local authorities to pursue such matters when they occur on property occupied by religious organizations. Moreover, creation of concurrent federal jurisdiction over offenses traditionally dealt with by the states often encourages state law enforcement agencies to shift their attention and resources away from the area of concern.

From a law enforcement perspective, state prosecutions of such matters would be more certain and more effective. Under the proposed legislation, the Government would have the burden of proving the "religious" character of the vandalized property, and that the accused had the specific intent to interfere with the free exercise of religion by another person or group. In a state prosecution, however, proof that the accused merely vandalized property or assaulted or threatened another would be sufficient.

In addition, a significant amount of the vandalism of religious buildings and cemeteries is committed by juvenile

offenders. The Anti-Defamation League of B'nai B'rith indicates that the overwhelming majority - more than 85% - of those arrested for anti-Semitic vandalism in recent years "have been age 20 or younger, mostly teenagers and juveniles." (Testimony of Jerome H. Bakst, Director of Research and Evaluation, Anti-Defamation League of B'nai B'rith before The Subcommittee on Criminal Justice, House Judiciary Committee, March 21, 1985.)

Juvenile matters, as you may be aware, are rarely prosecuted in federal court. When such proceedings are initiated federally the Attorney General or his designee must certify to the court that the state does not or will not assume jurisdiction, or does not have adequate juvenile programs or services, or that the offense charge is a violent felony or serious drug violation and that there is a substantial federal interest in the case, 18 U.S.C. 5032.

The intent of this legislation is to protect the free exercise of religion by individuals and groups. The First Amendment's guarantee that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," has been held applicable to the states through the Fourteenth Amendment. Section 5 of the Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation, the provisions of this article."

Taken together, these constitutional provisions undoubtedly give Congress the power to legislate against the efforts of any state government to interfere with the free exercise of religion. However, it has never been suggested that the Religion Clauses of the First Amendment, of their own force, prohibit purely private interference with religious freedom.

The extent to which Congress is empowered to enact legislation punishing purely private interference with the various rights secured against federal and state governmental action by the First and Fourteenth Amendments is an issue unlikely to be quickly and easily resolved. See, e.g., the several opinions in United States v. Guest, 383 U.S. 745 (1966). Unless and until this issue is resolved in the Government's favor, the enforcement of this legislation will proceed with some uncertainty.

While it is constitutionally permissible for the state to extend the protection of its police power in a neutral fashion to religions institutions, the specific focusing of this legislation upon protection of only religious property and activities may be constitutionally improper under the Establishment Clause of the First Amendment. In prosecutions under these proposals statutes, we could expect to encounter the argument that Congress is affording a greater degree of protection to religious property and activity than is afforded to property and activity in the secular realm. The argument

will be made that the proposed statutes advance the cause of religion, and are devoid of any secular purpose. Moreover, this legislation will involve the courts in making determinations as to whether beliefs are "religious" and as to the sincerity with which such beliefs are held. This kind of "excessive government entanglement with religion" should be avoided. Lemon v. Kurtzman, 403 U.S. 602 (1971).

It is important to note that the conduct prohibited by this legislation is covered, in part, by existing federal law. Title 18 U.S.C. 1074 provides criminal penalties for one who "travels in interstate or foreign commerce with intent . . . to avoid prosecution . . . under the laws of the place from which he flees, for willfully attempting to or damaging or destroying by fire or explosive any . . . synagogue, church, religious center . . ." Unlike the legislation under consideration, the constitutional basis for 18 U.S.C. 1074 in the Commerce Clause is clearly articulated. While its constitutionality under the Religion Clauses has not been tested, inasmuch as it simply places these institutions on a par with secular entities ("building, structure, facility, vehicle, dwelling house . . . or educational institution, public or private . . ."), it should pass muster.

Similarly, there are two civil rights statutes (18 U.S.C. 241 and 242) which, in the event of state action, could be used to punish interference with religious practices and the destruction or theft of property used for religious purposes.

Moreover, some serious acts of violence directed at religious property, such as bombings and arson, may be federally prosecuted under 26 U.S.C. 5861, which, among other things, prohibits the receipt or possession of unregistered explosive or incendiary destructive devices, or under 18 U.S.C. 844(i), which prohibits the malicious destruction by fire or explosives of any property used in or affecting interstate or foreign commerce.

CONCLUSION

In conclusion, let me state that the Administration and Department of Justice are dedicated to the preservation of religious liberty. Nevertheless, for the reasons outlined above, the Department is constrained to recommend against enactment of this legislation and does so most reluctantly.

THE WHITE HOUSE

WASHINGTON

July 24, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Testimony: Court Reform Legislation

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

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