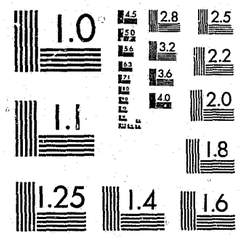

National Institute of Justice
United States Department of Justice
Washington, D.C. 20531

Department of Justice

STATEMENT

OF

JAMES KNAPP
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

S. 52
The Armed Career Criminal Act of 1983

ON

MAY 26, 1983

Mr. Chairman and Members of the Committee:

I am pleased to appear before the Committee today to express the views of the Department of Justice on S. 52, The Armed Career Criminal Act of 1983. The bill provides for the federal prosecution of persons who have already been convicted of two felony robberies or burglaries under state or federal law and who commit a third such offense while armed with a firearm. If found guilty, a defendant so prosecuted would have to be sentenced to imprisonment for at least fifteen years or to life imprisonment. He could not be given a suspended or concurrent sentence and would not be eligible for parole.

Initially, let me emphasize that the Department of Justice supports the concept of this bill just as we supported the thrust of its predecessor in the 97th Congress, S. 1688, which was passed by the Senate on September 30, 1982 by a margin of 93-1. We view this bill as a vehicle to allow the federal government to assist the states in dealing with the major problems of hard core recidivist robbers and burglars who prey on innocent persons in all parts of this country. Local police, prosecutors, and court systems in most instances would be able to deal with this threat. In some cases there may be a genuine need, however, for federal assistance. For example, court congestion, prison overcrowding, inadequate state sentencing statutes or any number of other factors may render state prosecution and punishment of a particular career robber or burglar inadequate or ineffective. We anticipate that the provisions contained in S. 52 would be used

principally to help the states in a limited number of cases reflecting these types of special situations. We believe we share with the sponsors of this legislation an understanding that its enactment is not intended to signal a general intervention by the federal government into areas of law enforcement traditionally the responsibility of state and local governments.

Having expressed the Department's general support for the goals of this measure, let me now turn to some specific suggestions we have for improving the legislation. The heart of S. 52 is section two which sets out the offense in a new section 2118 of title 18. We strongly believe, initially, that subsection 2118(e) should be deleted. The question of federal intervention into cases where our involvement is not deemed necessary by the local prosecutor, should be handled as a statement of Congressional intent in a revised section four of the bill.

As presently drafted, subsection 2118(e) 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 grave constitutional and practical concerns.

Subsection (e) does appear to overcome these constitutional difficulties by leaving the ultimate decision on whether to seek a federal indictment to federal prosecutors. However, the subsection provides that a case "lodged" in the office of a local prosecutor -- apparently because it has been presented by the local police -- may be received and considered for federal prosecution only on the request of the local prosecuting authority. 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. There is no rational basis for making even the initial determination whether the state or the federal government should prosecute turn on whether a state or federal agency investigated and presented the case. The justification for any federal involvement in this area of traditional state responsibility is to aid the states in certain unique cases. This aid 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.[1/]

1/ It should be noted that the FBI would be the federal agency with investigative jurisdiction over the new offense. The FBI's resources are limited, as are those of local jurisdictions. We would emphasize the FBI jurisdiction would be exercised very selectively under the new section.

We recommend that the proposed subsection 2118(e) be deleted and that a new clause be inserted in Section 4 expressing forcefully the intent of Congress that no prosecutions should normally be brought under this provision unless the state or local prosecutor requests or concurs in federal prosecution. Since Section 4 is non-jurisdictional in nature, this language would be consistent with our previously expressed concerns regarding the constitutionality of a local veto provision while at the same time it would minimize the risk of disrupting important federal-local law enforcement relationships when prosecutions are brought under this statute.

We have three other concerns with section 2118 as set out in the bill. First, and of most significance, we believe that the prior felony convictions which provide the federal jurisdictional basis should be established prior to the attachment of jeopardy. If verification of this jurisdictional element is left until sentencing, a "defective" prior conviction, e.g., 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 suggest the inclusion of language which requires 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 on the underlying offense.

Moreover, section 2118(a) is silent on the question of how the possession of the firearm, which is also a requirement for federal jurisdiction, 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 to firearm-carrying recidivists, but the prior convictions requirement is explicitly not made an element. Thus, it appears 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 suggest that this point be specifically confirmed in the legislative history.2/

Finally, 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 cover 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

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2/ Since the terms "robbery" and "burglary" are not defined in the proposed statute, we recommend that the legislative history also make it clear that the terms are not limited to their 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. See United States v. Nardello, 393 U.S. 286 (1969).

reach of the new section simply by having his confederates carry all the firearms. As the Committee knows, in certain types of robberies, like bank robberies, 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 would be covered by the new statute.

We also suggest that the bill would be strengthened and needless problems avoided if it were amended to include Congressional findings. The proposed statute obviously relies on the commerce power of Congress, but the elements of the offense itself do not require a showing that the crime involved interstate commerce. However, under the Commerce Clause, Congress has the power to regulate even purely intrastate activity where that activity, combined with like conduct by others similarly situated, affects commerce among the states, See, e.g., National League of Cities v. Usery 426 U.S. 833, 840 (1976). Congressional findings on the effect of armed robbery and burglary on interstate commerce, like those made with respect to the effect on commerce of extortionate credit transactions, 18 U.S.C. 891-896, would facilitate the bill's withstanding a constitutional challenge. See Perez v. United States, 402 U.S. 146 (1971). It is anticipated that the bill's heavy mandatory sentence provision, while fully justified by the nature of the offense, will cause it to undergo detailed judicial scrutiny.

Mr. Chairman, that concludes my prepared testimony and I would be happy to try to answer any questions the committee may have.

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