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THE WHITE HOUSE
WASHINGTON

5/13/76

Jim Louder -

Agree with

OMB

Recommendation

Jim

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: May 4, 1976

Time:

FOR ACTION:

cc (for information):

Jim Cannon
Max Friedersdorf
Jack Marsh

FROM THE STAFF SECRETARY

DUE: Date: Wednesday, May 5

Time: 2 P.M.

SUBJECT:

Jim Lynn memo 5/1/76 re Status Report on
S. 2422, A Bill to Extend the Jones Act to the
Virgin Islands for Oil Products

ACTION REQUESTED:

- For Necessary Action
- For Your Recommendations
- Prepare Agenda and Brief
- Draft Reply
- For Your Comments
- Draft Remarks

REMARKS:

JPH. ok on
"Wait and see"
Recommend careful
monitoring in case issue gets hot,
however.

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor
For the President

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

MAY 1 - 1976

INFORMATION

MEMORANDUM FOR: THE PRESIDENT
FROM: JAMES F. LYNN
SUBJECT: Status Report on S. 2422, A Bill to
Extend the Jones Act to the Virgin
Islands for Oil Products

PURPOSE

This memorandum is to acquaint you with an issue on which you may receive questions and on which a decision may be required in the future.

BACKGROUND

U.S. cabotage laws (the Jones Act) require all U.S. domestic ocean shipping to be reserved for vessels built and registered in the United States and owned, operated and manned by U.S. citizens. Traditionally, U.S.-flag ship operators have been high cost carriers. The exclusion of lower cost foreign-flag ship operators from the domestic ocean trades has been estimated to increase U.S. shipping costs by about \$150-200 million annually.

The cabotage laws do not currently encompass the U.S. Virgin Islands. S. 2422 would extend the cabotage laws to the Islands for the transportation of oil products only. This has importance because an Amerada Hess oil refinery, the world's largest, is located in the Virgin Islands. This refinery produces residual fuel oil (used for industrial power and generation of commercial electric power) which represents a high proportion of consumption in the U.S. East Coast.

As a domestic refiner, Amerada Hess has benefited from the oil "entitlements" program. Although it purchased its crude oil from abroad, Amerada Hess received entitlements to oil at "old" domestic prices, which it then sold to other domestic refiners. As a consequence, Amerada Hess' crude oil purchase costs have been significantly below those of foreign refiners who are not eligible for entitlements. Amerada Hess primarily competes with foreign refiners located in the Caribbean area for the East Coast residual fuel oil market. Most domestic refiners do not produce this kind of fuel. The market situation has posed immediate problems for these Caribbean refiners, as well as for independent U.S. oil marketers reliant on supplies from these refiners.



FEA believes that it is necessary to keep these Caribbean refineries operating because, at least for the next 3-4 years, there will not be sufficient domestic refining capacity to replace the capacity in the Caribbean. Recognizing the market distortions, FEA announced the implementation of two correcting mechanisms in a March 29, 1976, rulemaking--one to reduce Amerada Hess' entitlements allotment, and the other to grant entitlements to importers of residual fuel oil refined abroad.

Additionally, domestic U.S. refiners in the Gulf area who are developing residual fuel oil refining capacity may be disadvantaged relative to Amerada Hess. While these refiners must use U.S. tankers, Amerada Hess is able to use the lower-priced foreign tankers.

The situation, therefore, has generated support for S. 2422 among two groups:

- Amerada Hess' oil industry competitors. Because the bill would increase Amerada Hess' shipping costs from the Virgin Islands to the U.S. mainland, these competitors have been supporting efforts to reduce Hess' cost advantage and benefit themselves.
- U.S. maritime interests. Because U.S.-flag tankers would be required to serve the Virgin Islands trades, additional U.S. tankers and seamen would be employed.

Those who might be hurt by the legislation include:

- U.S. consumers, particularly those in East Coast states, who would end up paying the costs of higher-priced U.S.-flag transportation of Virgin Islands' refined oil to the U.S. mainland.
- The Virgin Islands, which would have a more difficult time attracting the oil industry to locate in the Islands and might suffer from a reduction in Amerada Hess' operations, thereby reducing employment in the Islands.
- Amerada Hess, who would have to pay higher transportation costs to the U.S. mainland.

DISCUSSION

The bill is discussed below in reference to: (a) the U.S. maritime industry; (b) oil industry competitors of Amerada Hess; (c) the Virgin Islands economy; and (d) the U.S. consumer.



The U.S. Maritime Industry. The Commerce Department indicates that to transport Virgin Islands refined oil in U.S.-flag tankers would require 750,000 total deadweight tons of tanker capacity. Currently there are about 17 U.S. tankers in lay-up equaling 740,000 deadweight tons capacity. The number of tankers in lay-up, however, fluctuates widely from week to week. The figure will probably increase in the next year or two unless Soviet grain purchases are sustained at the current high levels. The situation is much improved compared with six months ago when there were 33 tankers in lay-up, accounting for 1,500,000 deadweight tons.

If S. 2422 were enacted, essentially all unemployed U.S. tankers (many of which are antiquated and are approaching scrap condition) would be required for service. In fact, with no margin of tankers available for alternative service, orders would probably be placed for new U.S.-built tankers. This would be done despite the fact that: (a) there is currently a worldwide oversupply of tankers, and (b) U.S. shipyards build tankers (with Federal subsidies) at twice the cost of Japanese shipyards.

Employment of the 17 currently laid-up tankers would create about 1,400 seafaring jobs.

Oil Industry Competitors of Amerada Hess. FEA indicates that the intent of its March 29 rulemaking was to reduce Amerada Hess' competitive cost advantage over foreign refineries from roughly \$3 per barrel to about \$.60 per barrel. Accordingly, Hess would continue to enjoy a competitive advantage over foreign refineries in the Caribbean, although of greatly reduced proportions.

The cost advantage of using foreign-flag tankers instead of U.S.-flag tankers is approximately \$.50 per barrel for refined oil at current "spot charter" rates. Proponents of S. 2422 point out that the application of the cabotage laws to the Virgin Islands for oil transport would thereby further reduce Amerada Hess' cost advantage over foreign refiners from \$.60 to \$.10 per barrel.

Although it may be possible for FEA to readjust entitlements to retain a \$.60 cost advantage for Amerada Hess, FEA reports that this would be technically and politically difficult to achieve because of the impacts of such readjustments on other refiners. FEA indicates that it wants to avoid modifying entitlements if it can possibly do so.

The bill would also assist domestic refiners who are engaged in residual fuel oil production and who would like to expand sales to the East Coast market. Enactment of S. 2422 would put them on a cost par with Amerada Hess because it would require Virgin Islands' refineries to use U.S. tankers, like other domestic refineries. For example, tanker rates



between the Gulf and New England would closely approximate rates between the Virgin Islands and New England.

Virgin Islands Economy. According to Virgin Islands' officials, S. 2422 could potentially seriously affect the overall economic health of the Virgin Islands. Currently the Islands are suffering from a 10% official unemployment rate. Specific problems foreseen by Islands' officials include the following:

- Other refiners are considering locating in the Virgin Islands. One, the Virgin Islands Refinery Corporation, has already invested in real estate in preparation for construction. Enactment of S. 2422, with its attendant higher shipping costs, would discourage this.
- This bill, in conjunction with other pending legislation, could undermine the area's trade and development. For example, there is currently underway an effort (H.R. 9124) to limit Virgin Islands' wool exports to the U.S. mainland. Also, there is a fear that the cabotage laws would be extended to other products.
- If Amerada Hess' transportation cost advantage relative to other U.S. refiners is eliminated, the refinery might have to cut back operations, requiring employment reductions. Currently, the refinery employs approximately 6% of the Virgin Islands entire labor force.

U.S. Consumers. Enactment of S. 2422 would have the impact of shifting the increased shipping costs onto East Coast U.S. oil consumers. The annual cost is estimated to be about \$75 million (150 million barrels of oil shipped by Amerada Hess times \$.50 per barrel increased costs for using U.S. tankers). The direct beneficiaries of the \$75 million would be the maritime industry. With about 1,400 seafaring jobs created, this equates to a public cost of about \$50,000 annually for each maritime job. However, depending on court action on oil import license fees, part of the cost burden might be shifted to the Government in terms of reduced license fee revenues.

Additionally, because of the increased demand placed on available U.S. tankers, there would be a tendency for domestic tanker carriage rates to rise, increasing costs to U.S. consumers.

AGENCY VIEWS

Federal agencies have expressed the following views relative to S. 2422.



For the Bill

- Commerce believes that S. 2422 would be desirable for the following reasons: (a) enactment of the bill would constitute a logical extension of U.S. cabotage laws in accord with congressional intent in passing the original legislation; (b) it would eliminate the tanker lay-up problem, reduce the possibility of default on Government-guaranteed loans on these vessels, increase jobs for U.S. seamen, and improve the U.S. balance of payments; (c) because it would eliminate tanker lay-ups, it would help the Administration oppose a subsequent congressional effort to enact oil cargo preference legislation (oil cargo preference is not expected to be acted upon this year); and (d) costs associated with the bill would not be high.
- Council on International Economic Policy would support the bill only if FEA is instructed, upon enactment, to readjust oil entitlements to retain Amerada Hess' \$.60 per barrel cost advantage. With this qualification, CIEP believes the bill is desirable for reasons similar to those cited by Commerce and including the following additional points: (a) it would help equate transportation costs to the East Coast among all domestic residual fuel oil producers; and (b) increased shipping costs would be shifted from the East Coast alone to the nation as a whole, and as a result would be diluted.

Against the Bill

- Transportation, Treasury, Justice and Council of Economic Advisers oppose the bill. Principal arguments are that: (a) the economic impact would be to insulate maritime transportation from world-wide competitive factors which can only result in premium freight rates; (b) it would lead to the employment of outmoded, high cost U.S. tankers in a period in which modern foreign "super tankers" are being laid up for lack of business; (c) it would raise oil costs to consumers because of the higher rates of U.S. tankers; (d) there is no national defense rationale for the employment of additional U.S. tankers; and (e) the Administration has taken a consistent position against actions which restrain trade.
- Interior, in its stewardship role for the Virgin Islands, believes that the bill would be detrimental to the economic health of the Islands for reasons previously cited. It therefore strongly opposes the bill.



- State opposes the bill on the ground that the extension of the cabotage laws to the Virgin Islands would be inconsistent with overall U.S. policy regarding the international carriage of trade.
- Federal Energy Administration reports that it opposes the interjection of the S. 2422 issue while it is handling questions and criticisms regarding its March 29 rulemaking on Amerada Hess' entitlements and prior to completion of action on FEA's March 29 residual fuel oil decontrol proposal. FEA believes that argument over S. 2422 only confuses these more important, very sensitive issues. FEA requested the Commerce Committee to delay hearings until May to avoid this problem, but the Committee rejected FEA's request. On the merits and demerits of S. 2422, FEA defers to other agencies.

Neutral Positions

- Labor reports that it does not oppose the bill because it sees a balance between benefits (more jobs for U.S. seamen) and costs (increased oil prices).

OMB Comments

OMB believes that the bill is undesirable because:

- It is costly to the U.S. consumer;
- It would interfere with separate FEA regulatory actions;
- It may be detrimental to the Virgin Islands' economy;
- It would further insulate the U.S. tanker industry from competitive forces and may stimulate new tanker construction in U.S. yards at a time when excess world tanker capacity exists;
- There is not now a serious U.S. tanker lay-up problem; and
- Because the House is not expected to pursue general oil cargo preference legislation this session, there is no immediate need to support this bill in an attempt to forestall enactment of a broad cargo preference bill.

In spite of these problems with the bill, OMB believes that the Administration may wish to support such legislation later if circumstances should change, such as:



- If Congress begins to pursue general oil cargo preference legislation, support for S. 2422 may be desirable as an alternative which is less costly and which avoids the major foreign policy problems; or
- If the number of tankers in lay-up expands substantially.

ANTICIPATED CONGRESSIONAL ACTION

The Merchant Marine Subcommittee of the Senate Commerce Committee held hearings on S. 2422 on February 18 and March 30. On February 18, the Governor and the congressional delegate from the Virgin Islands opposed the bill. On March 30, the maritime and oil industries supported it. Also, the Departments of Commerce and Interior were requested to testify on March 30. Commerce, in its maritime promotional role, favored the bill, while Interior, in its Virgin Islands stewardship role, opposed it.

Only two Senators, both from Louisiana, attended the March 30 hearing-- Senator Long, the Subcommittee Chairman, and Senator Johnston, who introduced S. 2422 but who is not a member of the Committee. Both Senators indicated strong support for the bill. Reportedly, the active interest of the two Senators is prompted by the support of the bill by the Energy Corporation of Louisiana which is building a large refinery operation in the Gulf area that is intended to compete with Amerada Hess.

Senate Committee staff indicate that Committee mark-up is anticipated in May. With Chairman Long's support, the bill is expected to be favorably reported out by the Committee. Disposition in the Rules Committee and on the Senate floor is uncertain, however, because of potential opposition to the bill by East Coast Senators.

No House action has yet been scheduled, and none is anticipated until Senate action is complete.

CONCLUSION

This issue has been considered by the Economic Policy Board and it was concluded that the Administration should not take a position on the bill now because:

- FEA objects to having the Administration comment on S. 2422 while it is handling related, sensitive regulatory and legislative issues; and
- There is a strong possibility that S. 2422 will not move beyond the Senate Commerce Committee.

Consensus of opinion is that a "wait and see" approach is preferable.



THE WHITE HOUSE
WASHINGTON
July 30, 1976

Rle

Transp.

MEMORANDUM FOR: JIM CANNON
FROM: JUDITH RICHARDS HOPE
SUBJECT: Navigability

JRH

On July 22, 1976 Bill Coleman responded to your request of May 27 concerning the definition of navigability. He agrees with you that the way these determinations are made often does not make common sense. He points out, however, that statutes using this term are administered by a number of Federal agencies as well as the Departments of Defense, Justice, Interior and Agriculture. Further, the definition of navigable waters has been developed through 200 years of judicial decision and Federal agencies cannot change judicial definitions by administrative actions.

He recommends the establishment of an inter-agency group composed of representatives from these departments and agencies, as well as State governments, and chaired by the Department of Justice. He offers DOT resources to aid in a thorough and expeditious review.

I recommend that we ask DOT to prepare the necessary papers to set up this group. We can then circulate the idea for comment before making our final decision. I could do this immediately and we could establish the group by mid-September if it seems advisable.

Agree

Disagree

on file



THE WHITE HOUSE

WASHINGTON

August 3, 1976

Handwritten initials and scribbles, possibly "Cannon" and "Coleman".

MEMORANDUM FOR THE HONORABLE WILLIAM T. COLEMAN, JR.
Secretary of Transportation

SUBJECT: Navigability

Pursuant to your memorandum of July 22, 1976, concerning Jim Cannon's May 27 request for a study of "navigability," Jim was interested in your proposed inter-agency group. He asked that DOT prepare whatever papers you believe necessary to establish this group, and submit these papers for a quick review by the senior staff here so that we can incorporate their views.

We would appreciate it if the papers could be available for review and comment by Monday, August 23. Thank you for your helpful suggestions and your willingness to allocate DOT resources to the study and resolution of this issue.

Handwritten signature of Judith Richards Hope.

Judith Richards Hope
Associate Director
Domestic Council

cc: Jim Cannon

**COMMITTEE ON MERCHANT MARINE
AND FISHERIES**

HOUSE OF REPRESENTATIVES

MEMORANDUM

Jim-

The enclosed is for your
information and possible assistance.

Thanks,

CAM

LEONOR K. (MRS. JOHN B.) SULLIVAN, MO., CHAIRMAN

THOMAS L. ASHLEY, OHIO
JOHN D. DINGELL, MICH.
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MATTHEW J. RINALDO, N.J.
DAVID F. EMERY, MAINE

U.S. House of Representatives
Committee on
Merchant Marine and Fisheries
Room 1334, Longworth House Office Building
Washington, D.C. 20515

August 10, 1976

Transp.

Waterways

Mr. Nelson A. Rockefeller
Vice President of the United States
The White House
Washington, D.C.

Dear Mr. Vice President:

The Oceanography Subcommittee, on which I am Ranking Minority Member, is planning to conduct some lengthy and intensive oversight hearings on the subject of national ocean policy. We are hoping to begin these hearings during the early part of September with presentations by Secretary Kissinger, Secretary Richardson, and Secretary Kleppe. Knowing of your many contributions to our national policy with respect to science and technology, we would very much like to have you make some brief remarks to officially open our series of hearings.

The subject is one in which you have shown great interest and leadership over the past decade, and I personally believe that your observations and suggestions would be very valuable to us in our upcoming deliberations. In addition, the formulation and implementation of a wise and comprehensive national ocean policy for the future is a task which should not be left to one branch of government. By necessity, it will take the cooperative wisdom and efforts of as many persons as possible from the Executive departments, the Congress, and the public.

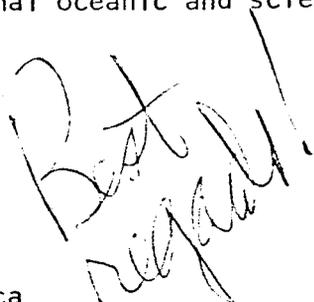
A formal letter of invitation will be sent to you shortly outlining the specific subject areas under consideration. We are hoping to begin our hearings on September 9, but we will adjust that date according to your schedule. I would appreciate it if you could let me know whether you would agree to make a presentation before our subcommittee, and to indicate which dates in September would be preferable to you.

If your staff would like any further information concerning these hearings, they can contact Wayne Smith of my staff at 225-3521.

Mr. Nelson A. Rockefeller
Vice President of the United States

-2-

I greatly appreciate your continued support of our important national oceanic and scientific programs.



Sincerely,



Charles A. Mosher
Representative to Congress

CAM:Sca
bcc: Mr. James M. Cannon

THE WHITE HOUSE
WASHINGTON

8/14/74

Judy —

When does

this stand?

Jr

Pending -
sent J. H. on
8/18/76
Navigability





THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

JUL 22 1976

976 JUL 27 10 10 07

MEMORANDUM FOR JAMES M. CANNON
The White House

SUBJECT: Navigability

Although I have instituted review of the issues raised in your memorandum of May 27 concerning the definition of "navigability," it is important to point out that these issues extend beyond the scope of the Department of Transportation's activities. The statutory term "navigable waters of the United States" is used to define Federal jurisdiction for a variety of purposes. Statutes using this term are administered by the Departments of Defense, Justice, the Interior, and Agriculture, among other Federal agencies. In addition, the term is used in statutes concerned solely with private rights.

When the status of a water body is not defined by statute or determined by adjudication, the agency administering a statute must decide if the water is "navigable." As development of formerly remote areas is undertaken, an increasing number of bodies of water become subject to formal navigability determinations. Despite efforts to achieve uniformity, agencies have differed in decisions as to whether a body of water is navigable, and one agency's determination cannot bind another. Moreover, the definition of navigable waters has been developed by case law, and Federal agencies cannot change the judicial definition by administrative action.

Because of an expanding view of society's needs, the collateral consequences of these determinations are greater than in the past. I agree that an agency's determination that waters are navigable under the statute conferring jurisdiction may not always appear to make common sense when viewed in light of collateral social considerations. Differing interpretations of navigability by Federal agencies, as well as interpretations that appear to require measures beyond a statute's original intent, often confuse the public and frustrate Federal, State and local officials by delaying government and private projects.

Without prejudging the results of any review, I am of the opinion that the present state of affairs is unsatisfactory. The administrative burden upon the agencies that have to make these jurisdictional determinations is increasing. However, I do not believe that the vantage point of my Department is adequate to provide the complete analysis the subject warrants. I believe that any recommendations on this matter, whether involving legislative or administrative measures, should be broadly based. Accordingly, I suggest the establishment of an interagency group composed of representatives from the interested departments, for the purpose of addressing the issues raised in your memorandum. In my view, the Department of Justice should chair this group, and I believe consideration should be given to representation from State governments as well as the interested private sectors. This interagency approach, recently used successfully in developing the Administration's Deepwater Port and Superfund legislation, and, perhaps even more relevant, used by the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States which reported in 1956 and 1957, will provide the President with the kind of answers that are needed. The Department of Transportation is prepared to devote whatever resources are needed for a thorough and expeditious interagency review.

I would appreciate your reaction to this proposal so that I can direct my departmental review process accordingly.



William T. Coleman, Jr.

THE WHITE HOUSE

WASHINGTON

May 27, 1976

MEMORANDUM FOR: THE HONORABLE WILLIAM COLEMAN
SECRETARY OF TRANSPORTATION

FROM: JAMES CANNON *JCC*

SUBJECT: Navigability

Since the issue of the navigability of Lake Winnepesaukee received wide public attention, other states have raised questions about whether certain lakes and streams should be regarded as navigable.

Although Article I, Section 8 of the Constitution grants Congress the authority to regulate commerce among the states, the original definition of navigability has been built upon so extensively that its application in some areas does not make common sense.

I discussed this with the President, and he has directed me to ask you to review the definition of navigability with the objective of giving him your views and recommendations on whether a more precise and practical definition of navigability is needed.

Your review should include an examination of the Constitutional and other legal implications of any change, and the advantages and disadvantages of amending the current definition of navigability.

THE WHITE HOUSE

WASHINGTON

April 15, 1976

MEMORANDUM FOR: THE HONORABLE WILLIAM T. COLEMAN
Secretary of Transportation

SUBJECT: Navigability

In recent months a number of questions about which waters are navigable have been brought to our attention. The historical and constitutional definition of navigability may have evolved to the point where its application does not always make common sense.

Will you please prepare a memorandum for the President reviewing the historical and constitutionally-based concept of navigability and analyzing alternative Administration actions, including a possible recommendation to Congress of a more precise and practical interpretation.

The memorandum to the President should be submitted to me by Monday, May 3.

James M. Cannon
Assistant to the President
for Domestic Affairs

Handwritten notes:
any
policy
In connection w/ N.A., Fed
govt
N. Coast
complex
what issues & lakes
are - what are systems



2. Busing

I have had two good discussions with Secretary Mathews about an attempt to find a better approach to this problem. I talked briefly with Ed Levi and will meet with him tomorrow.

At this point, we believe we must develop a concept based on these premises:

- (a) Communities should find solutions on their own rather than have them imposed by the Federal government;
- (b) Remedies can best be reached before any court action begins;
- (c) Any approach must be in accord with Federal law enforcement responsibilities.

If this meets with your approval, I will continue meeting with both Mathews and Levi to develop specific proposals for you.

Approve

RAH

Disapprove _____

3. Navigability of Waterways

In the wake of Lake Winnepesaukee, other questions about which waters are navigable have been brought to our attention.

Since the Constitution was written, the definition of navigability has evolved to the point where its application often does not make common sense.

As a result, we believe we should ask Secretary Coleman to review the definition with the possible objective of recommending to Congress a more precise and practical interpretation. This review should include an examination of the Constitutional implications, and the advantages and disadvantages of making any changes in the definition of navigability.

Approve

RAH

Disapprove _____

THE WHITE HOUSE
WASHINGTON
April 12, 1976

Judy
Hanny
Trish
Jan

MEMORANDUM FOR: JIM CANNON
FROM: JUDITH RICHARDS HOPE
SUBJECT: Navigability

Article I, Section 8, Clause 3 of the Constitution of the United States provides that "Congress shall have the power . . . to regulate commerce . . . among the several states."

The Congressional power to regulate navigable waters, while not expressly granted in the Constitution, has for more than 150 years been construed as a power incidental to the expressed Constitutional Commerce power. See e.g., Leony v.s. U.S., 177 U.S. 632 (1900).

The power of Congress to regulate "commerce" comprehends control, of all navigable waters in the United States which are accessible from a state other than those in which they lie. For that purpose, such navigable waters are "public property" of the nation and are subject to all requisite legislation by Congress. U.S. v.s. Chicago, Minneapolis and St. Paul Railroad Company, 312 U.S. 592 (1941).

Historically, the commerce power has expanded to encompass a broad and diverse spectrum of activities and issues. Window washers on office buildings which contain business engaged in interstate commerce have been held to federal minimum wage and occupational safety and health standards because they too are held to be in interstate commerce. Movement of air pollutants across state lines have been held to be in interstate commerce.

Thus, it is not surprising that the development of the concept of navigability has historically been very broad as well. Case law has developed 3 tests by which to determine navigability: (1) if the water in question is navigable in fact and crosses state lines, then it is a "navigable waterway of the United States." The Daniel Ball, 10 Wall 557 (1870). (2) If a waterway has ever been navigable historically, then it is considered navigable forever. Thus the "once navigable, always navigable" test. Economy Light and Power Company v.s. U.S., 256 U.S. 113 (1920). (3) Even if a waterway

is not in fact navigable, if it can be improved to make it navigable, and if the cost of improvements is found to be less than the benefits which would be derived from such improvement, then that waterway is "navigable". U.S. v. Appalachian Electric Power Company, 311 U.S. 377 (1940).

The operation of something seemingly as crude as a log raft may be evidence of susceptibility to substantial commercial navigation. Moreover, the presence of obstructions such as waterfalls, rapids, or sandbars will not affect such a determination if the cost-benefit ratio test of the Appalachian Electric Power Company case noted above has been met.

The purpose of the commerce clause is to assure that commercial enterprises in every state have substantial equality of access to a free national market. It is not to usurp the police power of the states, reserved under the 10th amendment. American Can Company v. s. Oregon Liquid Control Commission, 517 P. 2d 691 (Ore. app. (1973)). However, Congressional power in this area is plenary and the practical result of such broad power is that there is very little "police power" reserved where questions of navigability are involved.

Hold until after
election

File

THE WHITE HOUSE
WASHINGTON

September 7, 1976

Post
Nov 2

MEMORANDUM FOR: JIM CANNON
FROM: ART QUERN
SUBJECT: Navigability

Attached is Secretary Coleman's response to your May 27 memorandum requesting him "to review the definition of navigability with the objective of giving him (the President) your views on whether a more precise and practical definition of navigability is needed."

The Secretary's response is to offer the alternatives of:

- a) an interdepartmental committee of Federal agencies
or
- b) an Advisory Committee which included the Federal agencies and also state and local government and the private sector.

Given these two choices I would not take any action at this time. I base this primarily on your guidance that we should not create new groups to "study" things at this time.

[Handwritten signature]

010708

THE WHITE HOUSE

WASHINGTON

August 30, 1976

MEMORANDUM FOR: ART QUERN

FROM: JUDITH RICHARDS HOPE

SUBJECT: NAVIGABILITY

Full forward

Per Jim Cannon's request, attached is Bill Coleman's response to the review of the navigability question.

As you can see, there are two approaches; one for an Advisory Committee, comprised of representatives of the Federal Government, State Governments, and the private sector (which Secretary Coleman prefers), and another for an Interagency Committee made up exclusively of representatives of Federal departments and agencies.

At Tab A, I have also attached the Secretary's Draft Executive Order establishing the committees and at Tab B and C respectively, the proposed membership lists for the Advisory Committee and the Interagency Committee.

If you feel that these should be staffed, please let me know.

Thanks.

Attachments



THE SECRETARY OF TRANSPORTATION

WASHINGTON, D.C. 20590

AUG 28 1968

MEMORANDUM FOR JAMES CANNON
THE WHITE HOUSE

Subject: Navigability

In response to the White House memorandum of August 3, enclosed is a draft memorandum directing the Attorney General to establish "The Interdepartmental Committee on Federal Jurisdiction over Navigable Waters of the United States." This Committee would be comprised exclusively of representatives of Federal departments and agencies.

As an alternative, also enclosed is a draft Executive Order directing the Attorney General to establish the "Advisory Committee on Federal Jurisdiction Over Navigable Waters of the United States." This Advisory Committee would be comprised of representatives of the Federal Government, State governments, and the private sector.

Although the Advisory Committee probably would require more time to make its recommendations, I believe that it would produce recommendations having broader support than those of a federal interdepartmental committee. Since much of the criticism of the present system arises from state and private dissatisfaction, I prefer the Advisory Committee approach. However, either group should be able to develop sound recommendations for the President's consideration.

The Department of Transportation remains prepared to devote whatever resources are needed for a thorough and expeditious interagency review.


William T. Coleman, Jr.

Enclosures

A



D R A F T

EXECUTIVE ORDER _____

ADVISORY COMMITTEE ON FEDERAL JURISDICTION OVER NAVIGABLE
WATERS OF THE UNITED STATES

The large number of federal laws applicable to navigable waters of the United States have increased public and governmental (both State and Federal) concern over the manner in which those laws are administered. Because most of the laws concerned with navigable waters do not contain a statutory definition of that term, federal agencies must rely upon the judicially developed definition to determine the extent of their respective jurisdictions. Application of the judicial definitions has often led to different treatment of particular bodies of water by federal agencies. I have concluded that an advisory committee should be established to recommend a method of simplifying and making more uniform the exercise of federal jurisdiction over waters located in the United States.

NOW THEREFORE, by virtue of the authority vested in me as President of the United States, it is ordered as follows:

- SECTION 1. The Attorney General of the United States is directed to constitute and chair an advisory committee for the purpose outlined above. Compliance with the Federal Advisory Committee Act (P.L. 92-463), 5 U.S.C. APP. I, is required.
- SECTION 2. The Committee shall be known as "The Advisory Committee on Federal Jurisdiction Over Navigable Waters of the United States."
- SECTION 3. The Committee shall be comprised of interested Federal departments and agencies, among which shall be those named in the attached list, and representatives of State governments and the private sector, all to be appointed by the Attorney General. The views of those Federal departments and agencies substantially involved in navigable waters jurisdiction shall be given emphasis.

- SECTION 4. The Committee shall consider the broad spectrum of navigable waters jurisdiction, including, but not limited to, jurisdiction over navigable waters, navigable waters of the United States, waters subject to the jurisdiction of the United States, waters of the United States, and navigable rivers, streams, and harbors. The Committee shall analyze the relationship between the Commerce Clause jurisdiction, the admiralty and maritime jurisdiction, and the general welfare power under the Constitution. The Committee shall consider the purpose of particular statutes in relation to their jurisdictional bases. The goal of the Committee should be to recommend a uniform concept of federal jurisdiction over bodies of water. Differences in the application of that concept should be based upon the specific public purpose to be served.
- SECTION 5. The Committee may request any executive department or agency to furnish any information or assistance deemed necessary to carry out its duties under this order. All executive departments and agencies of the Federal Government are authorized and directed to cooperate with the Committee and to furnish whatever information, personnel, and assistance, not inconsistent with law, as the Committee may require in the performance of its duties.
- SECTION 6. The Attorney General shall submit the Committee's recommendations, together with the comments thereon of participating Federal departments and agencies to me within [one year] from this date.

D R A F T

MEMORANDUM FOR THE HONORABLE EDWARD H. LEVI
ATTORNEY GENERAL

Subject: Formation of Interagency Study Group on
Navigable Waters Jurisdiction

There has been significant public and governmental (both state and federal) concern over the myriad federal laws applicable to "navigable waters of the United States." Since most of the laws concerned with navigable waters do not contain statutory definitions of that term, federal agencies must rely upon the judicially developed definition to determine the extent of their respective jurisdictions. Application of the judicially developed definition has often led to differing treatment of particular waters by federal agencies.

Thus, in response to an inquiry by my staff, the Department of Transportation recommended that the Department of Justice chair an interagency study group composed of representatives of interested federal agencies to analyze navigable waters jurisdiction and make appropriate recommendations. The goal of this group would be to reduce the administrative problems caused by the current state of affairs.

Therefore, I direct that the Department of Justice constitute and chair an interagency study group for the purpose outlined above.

This group shall be known as "The Interdepartmental Committee on Federal Jurisdiction over Navigable Waters of the United States."

A list of other federal agencies that shall, as a minimum, comprise this Committee is provided in enclosure (1). The views of those federal agencies substantially involved in navigable waters jurisdiction shall be given emphasis. You are authorized to solicit the views of interested state governments and members of the private sector.

The Committee shall consider the broad spectrum of navigable waters jurisdiction, including, but not limited to, jurisdiction over navigable waters, navigable waters of the United States, waters subject to the jurisdiction of the United States, waters of the United States, and navigable rivers, streams, and harbors. The Committee shall analyze the relationship between the constitutional commerce clause jurisdiction, the admiralty and maritime jurisdiction, and the general welfare power under the Constitution. The Committee shall consider the purpose of particular statutes in relation to their jurisdictional bases. The goal of the Committee should be to recommend a uniform concept of federal jurisdiction over bodies of water. Differences in the application of that concept should be based upon the specific public interest to be served.

All executive departments and agencies of the Federal Government are authorized and directed to cooperate with the Committee and to furnish whatever information, personnel, and assistance as the Committee may require in the performance of its duties.

You are directed to submit the Committee's recommendations, together with the comments of participating Federal departments and agencies thereon to me within [one year] from this date.

Enclosure

Copy to:
All Agencies in Enclosure

B



FEDERAL AGENCIES TO BE REPRESENTED ON THE ADVISORY COMMITTEE
ON FEDERAL JURISDICTION OVER NAVIGABLE WATERS OF THE UNITED
STATES

1. DEPARTMENT OF JUSTICE
Suggested Divisions
Land and Natural Resources Division
Admiralty and Shipping of Civil Division
2. DEPARTMENT OF TRANSPORTATION
U.S. Coast Guard Office of the Chief Counsel
3. DEPARTMENT OF THE ARMY
Corps of Engineers Office of the General Counsel
4. DEPARTMENT OF THE INTERIOR
Solicitor's Office
5. DEPARTMENT OF AGRICULTURE
Office of the General Counsel
6. DEPARTMENT OF THE TREASURY
Division of Carriers, Drawbacks and Bonds
7. DEPARTMENT OF COMMERCE
Office of the General Counsel
8. ENVIRONMENTAL PROTECTION AGENCY
Office of the General Counsel
9. COUNCIL ON ENVIRONMENTAL QUALITY
Executive Office of the President
10. OFFICE OF MANAGEMENT AND BUDGET
Executive Office of the President

ATTACHMENT

C



FEDERAL AGENCIES TO BE REPRESENTED ON THE INTERDEPARTMENTAL
COMMITTEE FOR THE STUDY OF FEDERAL JURISDICTION OVER
NAVIGABLE WATERS OF THE UNITED STATES

1. DEPARTMENT OF JUSTICE
Suggested Divisions
Land and Natural Resources Division
Admiralty and Shipping of Civil Division
2. DEPARTMENT OF TRANSPORTATION
U.S. Coast Guard Office of the Chief Counsel
3. DEPARTMENT OF THE ARMY
Corps of Engineers Office of the General Counsel
4. DEPARTMENT OF THE INTERIOR
Solicitor's Office
5. DEPARTMENT OF AGRICULTURE
Office of the General Counsel
6. DEPARTMENT OF THE TREASURY
Division of Carriers, Drawbacks and Bonds
7. DEPARTMENT OF COMMERCE
Office of the General Counsel
8. ENVIRONMENTAL PROTECTION AGENCY
Office of the General Counsel
9. COUNCIL ON ENVIRONMENTAL QUALITY
Executive Office of the President
10. OFFICE OF MANAGEMENT AND BUDGET
Executive Office of the President

ENCLOSURE (1)

W. Conway

THE WHITE HOUSE
WASHINGTON

ACTION
Last Day: October 18, 1976
Monday

October 13, 1976

MEMORANDUM FOR: JIM CANNON
FROM: JUDITH RICHARDS HOPE *JRH*
SUBJECT: Enrolled Bill H.R. 13326 - Exempting
the Steam Boat "Delta Queen" from
Certain Vessel Inspection Laws
Sponsor: Representative Sullivan
(D) Missouri

*Judy -
Good
job
Jim*

I attach for your consideration, a memorandum from you to the President urging him to sign the private bill which would save the historic steam boat "Delta Queen." Although both OMB and DOT have recommended veto of this bill, I feel strongly that the President should sign it. The issue is whether the exemptions from the fire laws which have been made for the "Delta Queen" in recent years should be discontinued as of 1978.

In view of the President's demonstrated love for travel on the Mississippi River, the historic significance of the steamship "Delta Queen," and the nostalgic loyalty which many Americans have for this grand lady of the Mississippi, I feel that it would be a great mistake to veto this bill.

Recommendation:

Sign _____ Veto _____

Jim

*Jim!
This is not an easy one.
There is a real fire danger & get
a veto will be enormously unpopular
& believe that a veto would be
protection in the eyes of many people.
I recommend sign
HRS*



THE WHITE HOUSE
WASHINGTON

ACTION

Last Day: October 18, 1976

October 13, 1976

MEMORANDUM FOR: THE PRESIDENT
FROM: JIM CANNON *J. Cannon*
SUBJECT: Enrolled Bill H.R. 13326 - Exempting
the Steamboat Delta Queen from
Certain Vessel Inspection Laws

This is to present for your action H.R. 13326, a private bill which would exempt from certain statutory fire safety standards, the historic Mississippi River steamboat Delta Queen.

BACKGROUND

The Delta Queen was built in 1928 and has stateroom accommodations for about 190 passengers. It was entered on the national register of historical vessels in 1970. Many people in the country, and particularly residents of States bordering the Mississippi River, have a strong interest in its preservation as the last remaining survivor of the historical and colorful Mississippi Riverboat Era.

The Delta Queen does not meet the fire safety standards enacted by Congress in 1966 (Public Law 89-777).

The owners of the Delta Queen have voluntarily undertaken certain alterations of the boat to improve her fire safety. Moreover, the Coast Guard has increased the number of inspections it regularly conducts on this boat. The publicity used by Delta Queen owners states that the boat operates under an exemption from Federal boat safety fire laws.

Representative Sullivan of Missouri, in her swan song from Congress, introduced this private bill to extend the Delta Queen's exemption from 1978 to 1983. The bill was overwhelmingly supported in Congress, and has the strong support of a number of Senators and Congressmen in the Ohio and Mississippi River area.

ARGUMENTS FOR APPROVAL

1. There are strong historical and sentimental motivations to preserve the Delta Queen.
2. School children have, for a number of years, raised nickels and pennies to save this boat, and it draws huge crowds along the Mississippi wherever it docks. It is one of the last remaining paddle wheel vessels in America.
3. Your clear interest in the enjoyment of Mississippi Riverboat travel is consistent with signing this bill.
4. Admiral Siler, Commandant of the Coast Guard, indicates that although the Coast Guard is, as a matter of institutional policy, opposed to this bill, he feels that the Delta Queen's historic significance coupled with more frequent Coast Guard safety inspections could justify signing the measure.

ARGUMENTS FOR DISAPPROVAL

1. The original exemptions for the Delta Queen were to remain only until the new vessel, the Mississippi Queen, was ready. That boat is now in operation on the Mississippi, and has been successful. Some Coast Guard officials conjecture that the owners of the Delta Queen will, if the boat's exemption is extended, move the vessel's operations to a different area so that it will not be competing with the new Mississippi Queen.
2. The Delta Queen is constructed primarily of wood, and, operating in the overnight passenger trade, presents in the minds of some DOT officials an unacceptable fire safety risk. The Delta Queen is the only U.S. passenger ship that does not meet the 1966 Act fire safety standards.
3. The Delta Queen would still be entitled to operate in daylight hours; only overnight passenger service would be prohibited under the 1965 Act.

Additional background information, including letters from Secretary Coleman and the General Counsel of the Department of Commerce, is provided in OMB's enrolled bill report at Tab A.

AGENCY RECOMMENDATIONS

DOT and OMB recommend disapproval. The Department of Commerce defers to DOT.

STAFF RECOMMENDATIONS

Max Friedersdorf	"Strongly recommend approval"
Counsel's Office (Lazarus)	"Disapproval"

RECOMMENDATION

I recommend approval of H.R. 13326. The historic and nostalgic significance of this boat cannot be overestimated. Moreover, the additional Coast Guard inspections, the publicity noting that the boat operates with a fire safety exemption, and the commitment by Admiral Siler to continue extra inspections indicate that the safety issue is not as severe as some believe.

I also recommend that you issue the attached signing statement which has been approved by Max Friedersdorf, Counsel's Office (Lazarus) and the White House Editorial Office (Smith). OMB recommends that if you decide to sign the bill you do not issue a signing statement.

DECISION

Sign H.R. 13326 at Tab B

Issue signing statement at Tab C

Approve _____ Disapprove _____

Disapprove H.R. 13326 and sign Memorandum of Disapproval at Tab D which has been cleared by Doug Smith.