Creative Commons Course Book for Course I:

Introduction to Legal Sources in U.S. Intelligence Law

COMPILED BY

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Creative Commons Course Book for Course I:

Introduction to Legal Sources in U.S. Intelligence Law

(First Edition)

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Preface

This free course book contains useful background reports on topics relevant to the subject matter of *Course I: Introduction to Legal Sources in U.S. Intelligence Law*. Each report was produced originally for members of Congress by legislative attorneys and subject matter experts at the Congressional Research Service (CRS). I compiled some of the most useful background reports into this free course book for use by United States persons completing this home study course or any of the other law school courses available on IntelligenceLaw.com.

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DAVID ALAN JORDAN

June, 2010

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Creative Commons Course Book for Course I:

Introduction to Legal Sources in U.S. Intelligence Law

(First Edition)

Creative Commons Course Book Series

INTRODUCTION TO AMERICAN GOVERNMENT

National Government

American National Government: An Overview, RS20443 (May 20, 2003)

FREDERICK M. KAISER, CONGRESSIONAL RESEARCH SERV., AMERICAN NATIONAL GOVERNMENT: AN OVERVIEW (2003), *available at* http://www.intelligencelaw.com/library/secondary/crs/pdf/RS20443_5-20-2003.pdf.

Order Code RS20443

Updated May 20, 2003

CRS Report for Congress

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Summary

Power in American national government is decentralized, divided, dispersed, and limited. This distribution of power derives in part from the Constitution, through limitations imposed on the government, the system of checks and balances among the three branches, and independent bases of support and authority for each branch. This report, which examines these characteristics, will be updated as developments require.

Introduction

> *"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself." - James Madison, Federalist No. 51*

In this passage from the Federalist Papers, James Madison, sometimes referred to as the "Father of the Constitution," offers a rationale for the form of national government operating here since 1789. Power in the national government is dispersed, divided, and decentralized; it is also limited, directly and indirectly, by the Constitution. To protect certain individual rights and political liberties, this charter places explicit restrictions on the national government, principally through the Bill of Rights and the 14th Amendment. The First Amendment, for instance, mandates that "Congress shall make no law respecting an establishment

of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Constitution also establishes checks and balances among the three branches of government — the executive, judiciary, and legislature — each of which has its own independent institutional base and its own enumerated and implied powers. The branches, moreover, share responsibility for policymaking at the national level. As a consequence of these characteristics, the Constitution issues an "invitation to struggle" over the direction of American public policy, as one of its foremost students, Edward S. Corwin, has observed.

Institutional Characteristics U.S. Constitution

The Constitution, replacing the Articles of Confederation in 1789, strengthened the national government. Article III declares that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." Despite this enhancement, the Constitution limited the power of the national government, recognizing the independence and powers of the states. It also established a new government regime that divided authorities among three branches, rather than consolidating these powers in a single entity, as existed under its short-lived predecessor.

The Constitution is a brief document, compared to many other national and state constitutions. It is not an elaborate blueprint, detailing the organization of government. Instead, it is a broad framework — sometimes referred to as a living constitution — that has allowed the national government to adapt its organizational arrangements and structures to the changing characteristics, needs, and demands of the American people over more than two centuries. The Constitution, moreover, is difficult to amend. An amendment requires a favorable two-thirds vote in the House and in the Senate, along with ratification by three-fourths of the individual states. The document can be amended in one other way: the legislatures of two-thirds of the states may call for a convention to propose amendments, which would then require ratification by three-fourths of the states. However, no national convention has been established under this approach; consequently, no constitutional amendment has been approved through this process.

Partly because of this structure, the constitutional system has achieved a high degree of stability. The U.S. Constitution is today the oldest written democratic charter for a national government. Since the Bill of Rights — the first 10 amendments — was ratified in 1791, the Constitution has been amended only 17 times, most recently in 1992. And one of these amendments canceled another (the 21st Amendment, in 1933, repealed the 18th Amendment, which in 1919 had established the prohibition of alcohol).

Separate Institutions

Congress, the President, and the Supreme Court have separate and distinct political bases under the Constitution, to foster each branch's independence and integrity. The ultimate purpose behind this separation, James Madison argued in the Federalist Papers, is to prevent a "faction" — that is, a group "adverse to the rights of other citizens, or to the permanent and aggregate interest of the community" — from gaining control over the entire government.

Restrictions on Serving in Another Branch

The institutional autonomy and integrity of the legislature is supported by a constitutional prohibition: "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil Office … which shall be created or the Emoluments [salary and fees] whereof shall have been increased during such time" (Article I, Section 6). The Constitution also prohibits any executive or judicial officer from being a Member of Congress. Two narrow caveats to this ban, however, call upon officials from other branches to participate in congressional proceedings. One allowance is for the Vice President, who, while serving in the executive branch, is also "President of the Senate"; he may also vote there, but only to break a tie. A second is for the Chief Justice of the Supreme Court, who presides over the trial in the Senate of a President who has been impeached by the House.

Independent Electoral Bases

The elected officials — President, Vice President, Senators, and Representatives — have different terms of office, constituencies, and modes of election that reinforce their independence from one another. The full election cycle for the President and all legislators requires three elections to complete, and each of the three involves a different configuration of open offices.

The President is now limited to two elected four-year terms in office (or a maximum of 10 years if he fills less than half of an unexpired term of another President). The President is chosen every four years, formally through the electoral college. These votes are now cast on a winner-take-all basis in each state (except in Maine and Nebraska, which use a system compounding statewide and congressional district returns) and the District of Columbia. All electoral college votes for each state, which equal the number of Senators and Representatives for the state, plus three electoral college votes for the District of Columbia, customarily go to the candidate who receives the most popular votes in the state or in the District of Columbia. Consequently, the possibility exists that the presidential candidate who receives a majority (or plurality) of the popular votes nationwide would not receive a majority of the electoral college votes. This has occurred only four times in U.S. history, most recently in the 2000 election.

In the event that no presidential candidate receives a majority in the electoral college, the newly elected House of Representatives, voting by state delegations

and not by individuals, decides who will become President. In the event that no vice presidential candidate receives a majority in the electoral college, the Senate chooses the Vice President, with each Senator in the new Congress having one vote.

Members of Congress — 100 Senators, two from each of the 50 states, and 435 Representatives, whose seats are apportioned among the states according to population — have electoral constituencies and schedules that differ from the President's and between House and Senate members. Senators are elected to six-year terms. These are staggered, so that only one-third of the full Senate is up for election every two years and so that no two Senate seats from the same state are up in the same election (except when a special election to fill an unexpired term coincides with the regularly scheduled election). Senators were originally selectedby their respective state legislatures, but since the ratification of the 17th Amendment in 1913, they are required to be directly elected. Representatives are elected every two years from individual districts in the states where they reside (or at-large in the seven least populous states with only one Representative).

Split or divided party government — where the President's party lacks control of one or both houses of Congress — can and does result from these different constituencies, terms of office, and modes of election. In fact, this pattern has become common in the contemporary era. Over the 34-year period from 1969 (with the beginning of 91st Congress) to 2003 (with the end of the 107th Congress), party control was divided for all but 6 years and 4½ months. Of the seven Presidents during this time, only one (Jimmy Carter, 1977-1981) had his own party as a majority in both chambers for his entire presidency; and that comprised but a single term. Only two other Presidents had a majority in both houses for a portion of their terms of office (Bill Clinton for two years, 1993-1995, and George W. Bush for the first 20 weeks of his presidency in 2001). Three of the seven Presidents (Richard Nixon, 1969-1974; Gerald Ford, 1974-1977; and George H.W. Bush, 1989-1993) lacked party control of either house during their entire incumbency. One President (Ronald Reagan) encountered opposition party control of the House during his entire two terms (1981-1989) and of the Senate for two years (1987-1989), while Bill Clinton faced opposition party control of both houses for six of his eight years in office (1995-2001). Unified party government returned — temporarily — in 2001, when George W. Bush became President on January 20. The House was under his party's leadership; and an evenly split Senate was controlled by the same party, because of Vice President Cheney's position as President of the Senate. On June 5, 2001, however, a Republican Senator left the GOP, reducing its number to 49 and giving the Democrats a 50-seat majority. Unified party government has returned again during Bush's presidency in 2003; following the previous midterm elections, Republicans regained control of the Senate and retained control of the House for the 108th Congress.

Judicial Independence

The federal judiciary has its own constitutional base of independence. Supreme Court justices and lower federal court judges — all of whom are appointed by the President by and with the advice and consent of the Senate — serve for life or "during good Behaviour" (U.S. Constitution, Article III). They can be removed from office only by Congress through the arduous process of impeachment by a majority of the House and conviction by two-thirds of the Senate.

Institutional Supports

Each branch has its own institutional supports. Among these are professional staff in each branch, who provide information and advice, conduct research and analysis, investigate perceived problems, organize meetings and briefings, and carry out various other assignments on behalf of the President, Members of Congress, and justices and judges.

Members of Congress hire their own professional staff, as does each committee, subcommittee, chamber office (such as the Speaker of the House and President pro tempore of the Senate), and political party organization of the House and Senate. In addition, the legislature is assisted in its legislative, oversight, representative, and constituent-service responsibilities by three agencies: the Congressional Budget Office, Congressional Research Service, and General Accounting Office. Congress, furthermore, can create commissions and task forces to conduct studies and make recommendations.

The presidency also has its own supporting cast. In addition to various counselors and personal aides to the President, the Executive Office of the President provides a variety of capabilities and services through a number of entities. These include the White House Office, Office of Management and Budget, Office of the Vice President, Council of Economic Advisers, Council on Environmental Quality, National Security Council, National Economic Council, Office of Homeland Security, Office of National Drug Control Policy, Office of the U.S. Trade Representative, Office of Science and Technology Policy, Office of Policy Development, and Office of Administration. Presidents, moreover, can create task forces and advisory commissions to conduct studies and make recommendations on policy matters. The chief executive can also call upon cabinet officers and agency officials to assist in policy formulation, as well as to secure support for administration programs in the public and in Congress. Separate from these formal arrangements, Presidents may consult with political colleagues and trusted friends, who might form an informal group of advisors or "kitchen cabinet."

Checks and Balances and Shared Responsibilities

Under the Constitution, the three branches have both enumerated and implied powers that reinforce their institutional independence and political power. Accompanying these, however, is shared responsibility for public policy and a system of checks and balances. These "auxiliary precautions," as Madison called them in the Federalist Papers, are designed so that the "several constituent parts

may, by their mutual relations, be the means of keeping each other in their proper places ... [and] may be a check on the other."

Lawmaking

The key function of lawmaking is shared, with the President able to veto legislation passed by both chambers of Congress; to override his veto requires a two-thirds vote in each house. Further, the Supreme Court, through its implied power of judicial review, can declare a statute or a part of it unconstitutional, as it did initially, two centuries ago, in Marbury v. Madison (5 U.S. (1 Cr.) 137 (1803)).

National Security Policy

Control of national security policy is also divided. While the President is commander in chief of the armed forces, Congress has authority to declare war, raise and support armies, and make rules governing the land, air, and naval forces. While the President holds the sword, as commander in chief, Congress holds the purse strings, through the appropriations process. The Supreme Court too can affect the military capacity of the United States, as the Court did when it overturned the President's seizure of the steel mills during the Korean War (Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952)). Treaties are also a shared responsibility. Negotiated by the President, they must be ratified by two-thirds of the Senate. Their implementation, moreover, often requires new legislation and appropriations, both of which involve the House of Representatives. Separately, public law may be used instead of a treaty to accomplish the same ends, as with the North American Free Trade Agreement.

Executive and Judicial Appointments

Civil officers, Supreme Court justices, and federal judges are nominated by the President but must be confirmed by the Senate. Under the 25th Amendment, moreover, both houses of Congress must confirm the President's nominee for Vice President, when that post is vacant, as occurred when Gerald Ford in 1973 and Nelson Rockefeller the next year were confirmed.

Investigations

The executive can investigate suspected criminal conduct by legislators, who may be prosecuted in federal court, while Congress can investigate the activities and conduct of personnel and officials in the other branches. These congressional efforts, in turn, can result in evidence that could be used in subsequent judicial proceedings. Congress, through the impeachment process, can also remove the President, Vice President, and U.S. officers for treason, bribery, and other high crimes and misdemeanors, or justices and judges for violating the "good Behaviour" standard in the Constitution. Although the President is responsible for seeing that the laws are faithfully executed, Congress oversees their implementation and the President's stewardship. The courts, moreover, can

check the legislature's or executive's investigative powers to ensure that they are not used to violate the other's constitutional prerogatives.

Dispersed and Decentralized Organization

Although "executive power is vested in a President" by the Constitution (Article II, Section 1), he shares official responsibility for enforcing, implementing, and administering public law and policy with other officers and offices. Individual agencies and subordinate officers in the executive branch and elsewhere have been delegated duties and authority directly by statute. One of the first acts of the First Congress — the 1789 act creating the Treasury Department — for instance, ordered the comptroller (and not the President or the head of the department) to direct prosecutions for all delinquencies of revenue officers and for debts due to the United States.

The Constitution does not establish specific departments or agencies; these are created and sustained by legislation. As a result, a wide range and variety of organizations administer public policy. These include not only the cabinet departments — which now number 15, with the new Department of Homeland Security — but also other executive branch agencies, such as the Environmental Protection Agency and the Central Intelligence Agency. Implementation of policy also extends to independent regulatory commissions, including the Nuclear Regulatory Commission and the Federal Trade Commission; public and quasi-public corporations, such as the U.S. Postal Service; and various foundations, boards, institutes, and government-sponsored enterprises. The Supreme Court, moreover, has upheld the constitutionality — and independence — of these entities that carry out public policy. The most important of these decisions — Humphrey's Executor v. United States, 295 U.S. 602 (1935) — applied to independent regulatory commissions, which were seen as possessing legislative (rule-making), executive (implementation), and judicial (adjudication) powers. Similarly, a 1988 ruling (Morrison v. Olson, 487 U.S. 654 (1988)) recognized the constitutionality of independent counsels; these positions, authorized under a statute that lapsed in 1999, were created to investigate and prosecute alleged wrongdoing by high-ranking officials.

Conclusion

The constitutional system — through its founding premise of limited government and an intricate system of separated institutions, checks and balances, and shared responsibilities — strives to meet two core values of democracy. One is to ensure majority rule, through, for instance, the popular election of officials who make public policy; the other is to protect individual rights and civil liberties, through specific constitutional safeguards and indirectly through restraints on and competition among the three branches.

Selected References

Hamilton, Alexander, James Madison, and John Jay. The Federalist Papers, 1787-1788. New York: Mentor Books, 1961.

de Tocqueville, Alexis. Democracy in America, ed. J. P. Mayer, trans. George Lawrence. Garden City, New York: Anchor Books, 1969.

U.S. Congress. Joint Committee on Printing. Our American Government. 106th Congress, 2nd session. H. Doc. 106-216. Washington: GPO, 2000.

STATUTORY LAW

Introduction to Federal Statutes

Federal Statutes: What They Are and Where to Find Them, RL30812 (January 30, 2009)

CASSANDRA L. FOLEY, CONGRESSIONAL RESEARCH SERV., FEDERAL STATUTES: WHAT THEY ARE AND WHERE TO FIND THEM (2009), *available at* http://www.intelligencelaw.com/library/secondary/crs/pdf/RL30812_1-30-2009.pdf.

By
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Law Librarian

January 30, 2009

Summary

This report provides a brief overview of federal statutes and where to find them, both in print and on the Internet. When Congress passes a law, it may amend or repeal earlier enactments or it may write on a clean slate. Newly enacted laws are published chronologically, first as separate statutes in "slip law" form and later cumulatively in a series of volumes known as the *Statutes at Large*. Statutes are numbered by order of enactment either as public laws or, far less frequently, private laws, depending on their scope. Most statutes are incorporated into the *United States Code*. The *United States Code* and its commercial counterparts arrange federal statutes, that are of a general and permanent nature, by subject into titles. As the statutes that underlie the *Code* are revised, superseded, or repealed, the provisions of the *Code* are updated to reflect these changes.

The slip law versions of public laws are available in official print form from the Government Printing Office. Federal Depository Libraries (e.g., university and state libraries) provide slip laws in print and/or microfiche format. The *Statutes at Large* series often is available at large libraries. The *United States Code* and its commercial counterparts are usually available at local libraries. In addition, statutes and the United States Code can be found on the Internet.

Many significant statutes (for example, the Social Security Act and the Clean Air Act) are published and updated both in the public law, as amended, version and in the *United States Code*. For some titles the public law, as amended, is the authoritative version of the statute and not the Code. In these instances, an asterisk will not appear next to the title in the Code.

After providing an overview on the basics of federal statutes, this report gives guidance on where federal statutes, in their various forms, may be located on the Internet. This report will be updated periodically.

Introduction

This report provides a brief overview of federal statutes and where to find them, both in print and electronically on the Internet. When Congress passes a law, it may amend or repeal earlier enactments or it may write on a clean slate. Newly enacted laws are published chronologically, first as separate statutes in "slip law" form and later cumulatively in the bound volumes of the Statutes at Large. Additionally, most statutes are also incorporated into the United States Code (U.S.C.). The U.S.C. and its commercial counterparts, United States Code Service (U.S.C.S.) and United States Code Annotated (U.S.C.A.) take the federal statutes that are of a general and permanent nature and arrange them by subject into fifty separate titles. As the statutes that underlie the Code are revised, superseded, or repealed, the provisions of the Code are updated to reflect these changes.

Public Laws and Private Laws

When a piece of legislation is enacted under the procedures set forth in Article 1, Section 7 of the Constitution, it is characterized as a "public law" or a "private law." Each new statute is assigned a number according to its order of enactment within a particular Congress (e.g., the 10th public law enacted in the 109th Congress was numbered as P.L. 109-10; the 10th private law was numbered Private Law 109-10). Private laws are enacted for the benefit of a named individual or entity (e.g., due to exceptional individual circumstances, Congress enacts a law providing a government reimbursement to a named person who would not otherwise be eligible under general law). In contrast, public laws are of general applicability and permanent and continuing in nature. Public laws form the basis of the Code. All other laws must be researched in the slip laws/Statutes at Large format.

The Government Printing Office (GPO) publishes the first official text of a new statute, the slip law, in pamphlet form. Individual slip laws in print format can be obtained from the GPO. Federal Depository Libraries, located throughout the United States, also provide free public access to copies of federal publications and other information. A list of Federal Depository Libraries and their locations is accessible on the Internet at http://catalog.gpo.gov/fdlpdir/FDLPdir.jsp. Some private and public libraries compile the laws in looseleaf binders or in microfiche collections.

Commercial Sources of Public Laws (Print Format)

The United States Code Congressional and Administrative News (U.S.C.C.A.N.) compiles and publishes public laws chronologically in their slip law version. U.S.C.C.A.N.'s annual bound volumes and monthly print supplements include the texts of new enactments and selected Senate, House, and/or conference reports. The U.S.C.S. and the U.S.C.A. publish new public laws chronologically as supplements.

The United States Statutes at Large

Slip laws (both public laws and private laws) are accumulated, corrected and published at the end of each session of Congress in a series of bound volumes entitled Statutes at Large. The laws are cited by volume and page number (e.g., 96 Stat. 1259 refers to page 1259 of volume 96 of the Statutes at Large). Researchers are most likely to resort to this publication when they are interested in the original language of a statute or in statutes that are not codified in the Code, such as appropriations or private laws.

Public Laws, as Amended

Most statutes do not initiate new programs. Rather, most statutes revise, repeal, or add to existing statutes. Consider the following sequence of enactments.

- In 1952, Congress passed the Immigration and Nationality Act of 1952 (P.L. 82414, 66 Stat. 163). This law generally consolidated and amended federal statutory law on the admission and stay of aliens in the U.S. and how they may become citizens. The Immigration and Nationality Act of 1952 was codified at Title 8 of the U.S.C. §§ 1 et seq.
- In 1986, Congress passed the Immigration Reform and Control Act of 1986 (P.L. 99-603, 100 Stat. 3359). Section 101 of this act amended Section 274 of the Immigration and Nationality Act of 1952 (codified at 8 U.S.C § 1324) by adding Section 274a (codified at 8 USC § 1324a). This new section (Section 274a) made it unlawful for a person to hire for employment in the United States an illegal alien.
- In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208 (Division C), 110 Stat. 3009). Section 412 of the 1996 Act amended the employer sanctions process by requiring an employer to verify that a new employee is not an illegal alien. As with the 1986 Act, the 1996 Act expressly amended the Immigration and Nationality Act of 1952 (Section 274A in this case) and Section 1324a in Title 8 of the U.S.C. (8 U.S.C. § 1324a).

As the above sequence illustrates, the canvas upon which Congress works is often an updated, stand-alone version of an earlier public law (e.g., Immigration and Nationality Act of 1952, as amended), and not the U.S. Code. On the "Titles of United States Code" page of the Code an asterisk appears next to some of the titles. The asterisks refer to a note that states: "This title has been enacted as positive law." If the title is asterisked, the Code provides the authoritative version of the public law, as amended. For example, there is no asterisk beside Title 42 of the U.S.C. Thus, the provisions codified in Title 42 are not authoritative. Should there be a discrepancy, a court will accept the language in the Statutes at Large as the authoritative source and not the Code. It should be noted that there is no substantive difference between the language of the public law as published in the Statutes at Large and that of the Code.

It is often difficult to find current, updated versions of frequently amended public laws in print. Many congressional committees periodically issue committee prints containing the major public laws within their respective jurisdictions. Alternatively, the various commercial publishers, discussed herein, print updated versions of major public laws. In addition, the amended versions of some major public laws can be found on the Internet.

United States Code

The United States Code is the official government codification of federal legislation. This resource has been printed by the United States Government Printing Office since 1926. The U.S.C. is published every six years and supplemented by annual cumulative bound volumes. The latest edition is dated 2006.

In the U.S.C., statutes are grouped by subject into fifty titles. Each title is further organized into chapters and sections. A listing of the titles is provided in each volume. Unlike the statutes, the Code is cited by title and section number (e.g., 28 U.S.C. Sec. (or §) 534 refers to Section 534 of Title 28). Notes at the end of each section provide additional information, including statutory origin of the Code provision (both by public law number and Statutes at Large citation), the effective date(s), a brief citation and discussion of any amendments, and cross references to related provisions.

Annotated Editions of the United States Code

The United States Code Annotated (U.S.C.A.) published by Thomson/West and the United States Code Service (U.S.C.S.) published by LexisNexis are unofficial, privately published editions of the Code. These publications include the text of the Code, annotations to judicial decisions interpreting the Code sections, cross references to the Code of Federal Regulations (C.F.R.) provisions and historical notes. Both also provide references to selected secondary sources. For example, the U.S.C.S. includes selected law review articles.

Bound volumes of the U.S.C.A. and the U.S.C.S. are updated by annual inserts ("pocket parts") and supplements. These updates include newly codified laws and annotations. Both U.S.C.A. and U.S.C.S. issue pamphlets containing copies of recently enacted public laws arranged in chronological order. Since there is a time lag in publishing the official U.S.C., codified versions of new enactments usually appear first in the U.S.C.A. and U.S.C.S. supplements.

General Index

Each edition of the Code has a comprehensive index which is organized by subject. For example, to locate the provision of law establishing a review committee for farm marketing quotas, search the term "farm marketing quotas," in the index. There are references to several other subject headings, including the Agricultural Adjustment Assistance Act of 1938. Turning to that heading and

looking under the subheading "farm marketing quotas," there is a reference to a "committee for review" codified at 7 U.S.C. § 1363. The index is updated in each annual supplement to the Code.

Popular Name Table

Each edition of the Code also has a table which can be used to find an act if its citation is not known. The public laws are arranged alphabetically and can be searched under their commonly known names. This reference also provides the public law number and the citations to the Statutes at Large and the U.S.C. If the original laws have been amended, the same information is provided for each amendment. For example, searching for the "Special Drawing Rights Act" in the table shows that it has been codified at 22 U.S.C. § 286q.

Statutes at Large Table

The Statutes at Large table is one of the most useful research tools because it shows the relationship between public laws, the Statutes at Large, and the U.S.C.. A researcher who has either a public law number or a Statutes at Large citation can use this table to ascertain where that law is codified and its present status. The table is particularly useful when searching in one section of a law that contains many subsections because it can be used to find where individual sections and subsections of a public law have been codified. For example, the table indicates that P.L. 99-661, Section 1403 is codified in the U.S.C. at 20 U.S.C. § 4702.

U.S.C.A. and the U.S.C.S. also have their own versions of the research tools discussed above.

Federal Statutes on the Internet

The Internet has made legal resources, including federal statutes, more widely available to both scholars and the general public. There are several considerations that should be taken into account when using Internet materials.

- Materials on Internet sites may not be up-to-date, and it may be difficult to discern how current the material is or whether it has been revised.
- It may be difficult to find current federal statutes, especially in the case of "popular name" statutes that are amended frequently. On their websites, federal agencies do not always include the current versions of the statutes they administer, however, they may provide useful summaries and discussions of the statutes.
- Websites are constantly changing. The inclusion and location of information may differ from time to time. The address or URL of a website may also change. In addition, each website has its own format and search capabilities which sometimes can result in a frustrating and time-consuming research process.

With the foregoing caveats in mind, the following are public resources for the selected statutory materials described in this report.

Public Laws:

Library of Congress - American Memory
http://memory.loc.gov/ammem/amlaw/lawhome.html
This page provides access to the Statutes At Large from 1774 to 1875.

Library of Congress: THOMAS http://thomas.loc.gov/
This page provides access to the full-text of public laws from the 104th Congress (1989 – 1990) to present.

GPO Access Public and Private Laws
http://www.gpoaccess.gov/plaws/index.html
This page provides access to private and public laws from the 104th Congress (1995 1996) to the present.

United States Code:

Office of the Law Revision Counsel U.S.C.
http://uscode.house.gov/search/criteria.shtml
This page provides access to the 2006 edition. The page also links to the previous 1988, 1994 and 2000 editions and their supplements.

GPO Access U.S.C. http://www.gpoaccess.gov/uscode/index.html
This page provides access to the 1994 through 2006 editions and their supplements.

Cornell University Law School U.S.C. http://www.law.cornell.edu/uscode/
This page provides access to the most recent official version made available by the House of Representatives.

Popular Name Index:

Cornell University Law School Popular Name Index
http://www4.law.cornell.edu/uscode/topn/
This page provides access to a popular names table that links to some of the public laws.

Other Resources:

U.S. Code Classification Tables
http://uscode.house.gov/classification/tables.shtml

This page shows where recently enacted laws will appear in the United States Code and which sections of the Code have been amended by those laws. The tables only include those provisions of law that have been classified to the Code.

How Bills Amend Statutes, RS20617 (August 4, 2003)

RICHARD S. BETH, CONGRESSIONAL RESEARCH SERV., HOW BILLS AMEND STATUTES (2003), *available at* http://www.intelligencelaw.com/library/secondary/crs/pdf/RS20617_8-4-2003.pdf.

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Order Code RS20617
Updated August 4, 2003

Introduction

Many bills proposed in Congress address subjects on which previous law already exists. This fact sheet identifies and explains some common forms in which bills may express their intended relation to existing statutes. It does not present guidance for drafting legislation; for that purpose, recourse to the Office of Legislative Counsel of the Senate or House is appropriate. For more information on legislative process, see [http://www.crs.gov/products/guides/guidehome.shtml].

Ways of Affecting Existing Law

A bill (or joint resolution) may propose to affect existing law either explicitly, by amending its provisions, or implicitly, by superseding it. Only the first method can directly alter the text of the law, and a bill often may most clearly identify its intended relation to existing law if it is formulated explicitly as amending that law. A proposed amendment to existing law may (1) insert new text, (2) strike text, or (3) strike text and insert new text in its place. (These three forms that amendments to law may take parallel the three forms that floor amendments to a bill may take.) (1) By inserting new provisions, an amendatory bill can supplement existing law. A bill that does not explicitly amend existing law may also have such an effect. (2) By striking out provisions, an amendatory bill can repeal existing law. A bill that does not explicitly strike out any text of existing statutes repeals nothing, but may still have the effect of superseding existing provisions. (3) By striking and inserting, an amendatory bill may make specific alterations or modifications in provisions of existing law. In general, this effect may be possible only through explicit amendment.

Supplementing or Superseding Existing Law

If a bill proposes to enact certain provisions, but does not explicitly amend existing law on the same subject, then the intended relation between bill and law can be ambiguous. The resolution of these ambiguities may come through juridical or administrative interpretation. In the absence of clear conflict between

an existing and a new provision, courts normally presume that the two are intended to be read together, and attempt to give both the fullest effect possible. In that case the provisions in the new law would be interpreted as additional to the previously existing ones. By contrast, an earlier enactment may always be superseded by a later one, so that, if a new enactment is interpreted as conflicting with existing provisions of statute, the new provisions may be held to supersede the earlier ones.

A bill may be able to avoid ambiguities of this sort if it is formulated as explicit amendments to existing law. Alternately, a bill may preface new provisions being added to law with such a phrase as, "notwithstanding any other provision of law." Such a phrase tends to imply that the new language is intended to supersede any conflicting provisions of previous law. This broad phrase, however, does not specify which provisions it is meant to refer to, and may therefore have unforeseen consequences for both existing and future laws.

Altering Existing Law

When a bill explicitly proposes to modify or alter provisions of existing law, it generally must identify specific statutory language to be stricken out, and set forth language to be inserted in lieu thereof. It may identify each separate point in existing statutes at which text is to be stricken out and, for each, set forth text to be inserted. Alternately, it may propose to strike out an entire provision, then set forth, to be inserted in lieu, a new text, incorporating all the changes in language desired at every point in the provision. Finally, a bill may simply provide that a specified provision "be amended so as to read" in the way specified by text that follows. These last approaches may make it easier to see the overall effect of the new version, but, at the same time, harder to see what changes would occur from previously existing law.

Whichever approach is used, House Rule XIII, clause 3(e)(1) (the "Ramseyer Rule") and Senate Rule XXVI, paragraph 12 (the "Cordon Rule") require that, when a committee reports a bill amending existing law, it must provide, in its report or otherwise, a "comparative print" showing how the bill would alter that law. This comparative print can be of great aid in ascertaining the intended effect of amendatory legislation.

Forms of Citation

Amendments to existing law must be made to the official evidence of the law, which is ordinarily a statute as set forth in the bound Statutes at Large. A bill may identify a statute by short title, public law number (e.g., P.L. 101-987), and perhaps citation in the Statutes at Large (e.g., 123 Stat. 456). However, where Congress has re-enacted a group of statutes in codified form (i.e., as a title of the United States Code), further amendments to that law must be made directly to that title (e.g., 50 U.S.C. section 234b). An act that has already been amended by previous subsequent enactments may sometimes be cited in the form, "the XYZ Act of 19 — , as amended." Specific provisions of an act are identified by section

number (or by the designations of other, smaller or larger, subdivisions of the act).

When a bill amends an existing statute, section numbers of the bill will not generally correspond to those of the statute being amended. For example, section 102 of a bill may set forth a rewritten version of section 203 of some existing act. In general, in this context, section numbers within quotation marks will refer to provisions of a cited existing law; those having none designate the sections of the bill itself.

The short title of a bill that proposes to amend existing law may sometimes identify it as such, for example, "Clean Water Act Amendments of 20 — ." Bills identified as "reauthorizations," too, generally include amendments to the previous law being reauthorized. They typically extend existing programs either (1) by amending provisions of statute that specify a fixed expiration date (including what are sometimes called "sunset provisions"), or (2) by inserting text covering additional fiscal years into provisions of statute that authorize appropriations for the programs. These "reauthorizing bills," however, frequently also include provisions making substantive alterations in the programs in question, by amending existing statutory language governing them.

Statutory Interpretation

Statutory Interpretation: General Principles and Recent Trends, 97-589 (August 31, 2008)

YULE KIM & GEORGE COSTELLO, CONGRESSIONAL RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2008), *available at* http://www.intelligencelaw.com/library/secondary/crs/pdf/97-589_8-31-2008.pdf.

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Summary

The Supreme Court has expressed an interest "that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." This report identifies and describes some of the more important rules and conventions of interpretation that the Court applies. Although this report focuses primarily on the Court's methodology in construing statutory text, the Court's approach to reliance on legislative history are also briefly described.

In analyzing a statute's text, the Court is guided by the basic principle that a statute should be read as a harmonious whole, with its separate parts being interpreted within their broader statutory context in a manner that furthers statutory purpose. The various canons of interpretation and presumptions as to substantive results are usually subordinated to interpretations that further a clearly expressed congressional purpose.

The Court frequently relies on "canons" of construction to draw inferences about the meaning of statutory language. For example, in considering the meaning of particular words and phrases, the Court distinguishes between terms of art that may have specialized meanings and other words that are ordinarily given a dictionary definition. Other canons direct that all words of a statute be given effect if possible, that a term used more than once in a statute should ordinarily be given the same meaning throughout, and that specific statutory language ordinarily trumps conflicting general language. "Ordinarily" is a necessary caveat, since any of these "canons" gives way if context reveals an evident contrary meaning.

Not infrequently the Court stacks the deck, and subordinates the general, linguistic canons of statutory construction, as well as other interpretive principles, to overriding presumptions that favor particular substantive results. The Court usually requires a "clear statement" of congressional intent to negate one of these presumptions. A commonly invoked presumption is that Congress does not intend to change judge-made law. Other presumptions disfavor preemption of state law and abrogation of state immunity from suit in federal court. Congress must also be very clear if retroactive application of a statute or repeal of an existing law is intended. The Court tries to avoid an interpretation that would raise serious doubts about a statute's constitutionality. Other presumptions that are overridden only by "clear statement" of congressional intent are also identified and described.

Introduction

This report sets forth a brief overview of the Supreme Court's approach to statutory interpretation.[1] The bulk of the report describes some of the Court's more important methods of construing statutory text, and the remainder briefly describes the Court's restraint in relying on legislative history. The Court has expressed an interest "that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."[2] In reading statutes, the Supreme Court applies various rules and conventions of interpretation, and also sometimes superimposes various presumptions favoring particular substantive results. Other conventions assist the Court in determining whether or not to consider legislative history. Although there is some overlap and inconsistency among these rules and conventions, and although the Court's pathway through the mix is often not clearly foreseeable, an understanding of interpretational possibilities may nonetheless lessen the burdens of statutory drafting and aid Congress in choosing among various drafting options.

Executive Order 12988, which provides guidance to executive agencies on preparing legislation, contains a useful checklist of considerations to keep in mind when drafting legislation.[3] Many items on the checklist are topics addressed

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[1] This report was originally prepared by George Costello. It has now been updated by Yule Kim, who is available to answer questions on these issues.

[2] Finley v. United States, 490 U.S. 545, 556 (1989).

[3] 61 Fed. Reg. 4729 (February 5, 1996), reprinted in 28 U.S.C. § 519. The Order directs agencies to "make every reasonable effort to ensure" that proposed legislation, "as appropriate . . . specifies in clear language" — (A) whether causes of action arising under the law are subject to statutes of limitations; (B) the preemptive effect; (C) the effect on existing Federal law; (D) a clear legal standard for affected conduct; (E) whether arbitration and other forms of dispute resolution are appropriate; (F) whether the provisions of the law are severable if one or more is held unconstitutional; (G) the retroactive effect, if any; (H) the applicable burdens of proof; (I) whether private parties are granted a right to sue, and, if so, what relief is available and whether attorney's fees are available; (J) whether state courts have jurisdiction; (K) whether

in this report, and many of the court decisions cited under those topics have resulted from the absence of clear statutory guidance. Consideration of the checklist may facilitate clarification of congressional intent and may thereby lessen the need for litigation as a means to resolve ambiguity in legislation.

Of course, Congress can always amend a statute to require a result different from that reached by the Court. In interpreting statutes, the Court recognizes that legislative power resides in Congress, and that Congress can legislate away interpretations with which it disagrees.[4] Congress has revisited statutory issues fairly frequently in order to override or counter the Court's interpretations.[5] Corrective amendment can be a lengthy and time-consuming process, however, and Congress in most instances will probably wish to state its intent clearly the first time around.

Statutory Text

In General — Statutory Context and Purpose

The starting point in statutory construction is the language of the statute itself. The Supreme Court often recites the "plain meaning rule," that, if the language of the statute is clear, there is no need to look outside the statute to its legislative history in order to ascertain the statute's meaning.[6] It was once axiomatic that this "rule" was honored more in the breach than in the observance. However, the Court has begun to place more emphasis on statutory text and less emphasis on legislative history and other sources "extrinsic" to that text. More often than before, statutory text is the ending point as well as the starting point for interpretation.

A cardinal rule of construction is that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory

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administrative remedies must be pursued prior to initiating court actions; (L) standards governingpersonal jurisdiction; (M) definitions of key statutory terms; (N) applicability to the Federal Government; (O) applicability to states, territories, the District of Columbia, and the Commonwealths of Puerto Rico and the Northern Mariana Islands; and (P) what remedies are available, "such as money damages, civil penalties, injunctive relief, and attorney's fees."

[4] It is because "'Congress is free to change this Court's interpretation of its legislation,'" that the Court adheres more strictly to the doctrine of stare decisis in the area of statutory construction than in the area of constitutional interpretation, where amendment is much more difficult. Neal v. United States, 516 U.S. 284, 295 (1996) (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977)); Shepard v. United States, 544 U.S. 13, 23 (2005). "Stare decisis is usually the wise policy [for statutes], because in most matters it is more important that the applicable rule of law be settled than that it be settled right." Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Justice Brandeis, dissenting).

[5] One scholar identified 187 override statutes from 1967 to 1990. William N. Eskridge, Overriding Supreme Court Statutory Interpretation Decisions, 101 YALE L.J. 331 (1991).

[6] See discussion of rule under "Legislative History," infra p. 39.

context in a manner that furthers statutory purposes. Justice Scalia, who has been in the vanguard of efforts to redirect statutory construction toward statutory text and away from legislative history, has aptly characterized this general approach. "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[7] This was not a novel approach. In 1850 Chief Justice Taney described the same process: "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[8] Thus, the meaning of a specific statutory directive may be shaped, for example, by that statute's definitions of terms, by the statute's statement of findings and purposes, by the directive's relationship to other specific directives, by purposes inferred from those directives or from the statute as a whole, and by the statute's overall structure. Courts also look to the broader context of the body of law into which the enactment fits.[9]

The Supreme Court occasionally relies on general rules or canons of construction in resolving statutory meaning. The Court, moreover, presumes "that Congress legislates with knowledge of our basic rules of statutory construction."[10] This report sets forth a number of such rules, conventions, and presumptions that the Court has relied on. It is well to keep in mind, however, that the overriding

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[7] United Savings Ass'n v. Timbers of Inwood Forest Associates, 484 U.S. 365, 371 (1988) (citations omitted).

[8] United States v. Boisdoré's Heirs, 49 U.S. (8 How.) 113, 122 (1850) (opinion of Court). For a modern instance in which the Court's reading of text was informed by statutory context and statutory purpose, see Brotherhood of Locomotove Engineers v. Atchison, T. & S.F.R.R., 516 U.S. 152, 157 (1996) (purpose of Hours of Service Act of promoting safety by ensuring that fatigued employees do not operate trains guides the determination of whether employees' time is "on duty"). As Justice Breyer explained, dissenting in FCC v. NextWave Personal Communications, Inc., 537 U.S. 293, 311 (2003), "[i]t is dangerous . . . in any case of interpretive difficulty to rely exclusively upon the literal meaning of a statute's words divorced from consideration of the statute's purpose." The Justice cited the stock example that "'no vehicles in the park' does not refer to baby strollers or even to tanks used as part of a war memorial," as well as Justice Field's opinion for the Court in United States v. Kirby, 74 U.S. (7 Wall.) 482, 486 (1869) (prohibition on obstructing mail does not apply to local sheriff's arrest of mail carrier on a murder charge; "[g]eneral terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence").

[9] Green v. Bock Laundry Machine Co., 490 U.S. 504, 528 (1990).

[10] McNary v. Haitian Refugee Center, 498 U.S. 479, 496 (1991) (referring to presumption favoring judicial review of administrative action). See also United States v. Fausto, 484 U.S. 439, 463 n.9 (1988) (Justice Stevens, dissenting) (Court presumes that "Congress is aware of this longstanding presumption [disfavoring repeals by implication] and that Congress relies on it in drafting legislation").

objective of statutory construction is to effectuate statutory purpose. As Justice Jackson put it more than 50 years ago, "[h]owever well these rules may serve at times to decipher legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy."[11]

Canons of Construction

In General

"[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: <judicial inquiry is complete.'"[12] The Court takes much the same approach when it chooses congressional intent rather than statutory text as its touchstone: a canon of construction should not be followed "when application would be tantamount to a formalistic disregard of congressional intent."[13]

Canons of construction are basically context-dependent "rules of thumb." That is to say, canons are general principles, many of them of the common-sense variety, for drawing inferences about the meaning of language. Since language derives much of its meaning from context, canons should not be treated as rules of law, but rather as "axioms of experience" that do "not preclude consideration of persuasive [contrary] evidence if it exists."[14] Context can provide that contrary evidence. Many of the difficulties that have been identified with reliance on canons of construction can be avoided if their importance is not overemphasized — if they are considered tools rather than "rules."

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[11] SEC v. Joiner, 320 U.S. 344, 350-51 (1943). Justice Jackson explained that some of the canons derived "from sources that were hostile toward the legislative process itself," and that viewed legislation as "'interference'" with the common law "'process of intelligent judicial administration.'" 320 U.S. at 350 & n.7 (quoting the first edition of SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION). A more recent instance of congressional purpose and statutory context trumping a "canon" occurred in General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581, 594-599 (2004), the Court determining that the word "age" is used in different senses in different parts of the Age Discrimination in Employment Act, and that consequently the presumption of uniform usage throughout a statute should not be followed.

[12] Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted).

[13] Rice v. Rehner, 463 U.S. 713, 732 (1983).

[14] Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (Justice Holmes for Court).

There are so many "canons" that there is apparent conflict among some of them. A 1950 article by Professor Karl Llewellyn attempted to demonstrate that many canons can be countered by equally correct but opposing canons.[15] The case was somewhat strained, since in some instances Llewellyn relied on statements in court opinions that were not so generally accepted as to constitute "canons." Nonetheless, the clear implication was that canons are useless because judges maypick and choose among them to achieve whatever result is desired. The Supreme Court had to deal with such a conflict in ruling on the retroactive effect of the Civil Rights Act of 1991; there were "seemingly contradictory statements" in earlier decisions declaring general principles that, on the one hand, "a court is to apply the law in effect at the time it renders its decision," and, on the other hand, that "retroactivity is not favored in the law."[16] The Court explained that these two principles were really not inconsistent, and held that the provisions at issue were not retroactive.[17] But even for those canons that do have equal opposites, a review of the Supreme Court's usages can reveal the preferences of the Justices in choosing between the opposites, and may prove helpful during congressional debate on legislation in the many instances in which issues of clarity and meaning are raised.

Ordinary and Specialized Meaning

Terms of art

When the meaning of specific statutory language is at issue, courts often need to consider the meaning of particular words or phrases. If the word or phrase is defined in the statute (federal statutes frequently collect definitions in a "definitions" section), or elsewhere in the United States Code,[18] then that definition governs if applicable in the context used.[19] Even if the word or phrase

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[15] Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 VAND. L. REV. 395 (1950).

[16] Landgraf v. USI Film Products, 511 U.S. 244, 263-64 (1994).

[17] Id.

[18] The Dictionary Act, ch. 388, 61 Stat. 633 (1947), as amended, 1 U.S.C. §§ 1-6, has definitions of a few common terms used in federal statutes (e.g., "person," "vessel," and "vehicle"). These definitions govern in all federal statutes "unless the context indicates otherwise." See Stewart v. Dutra Constr. Co., 543 U.S. 481, 489 (2005) (relying on Dictionary Act's definition of "vessel"); Rowland v. California Men's Colony, 506 U.S. 194 (1993) (context indicates otherwise; the term "person" as used in 28 U.S.C. § 1915(a) refers only to individuals and does not carry its Dictionary Act definition , which includes associations and artificial entities).

[19] Colautti v. Franklin, 439 U.S. 379, 392 (1979). If the context indicates otherwise, i.e., if a mechanical application of a statutory definition throughout a statute would create an "obvious incongruity" or frustrate an evident statutory purpose for a particular provision, then it is permissible to depart from the definition. Lawson v. Suwannee S.S. Co., 336 U.S. 198, 201 (1949). But, as noted below, a term appearing in several places in a statute is ordinarily interpreted as

is not defined by statute, it may have an accepted meaning in the area of law addressed by the statute,[20] it may have been borrowed from another statute under which it had an accepted meaning,[21] or it may have had an accepted and specialized meaning at common law.[22] In each of these situations the accepted meaning governs[23] and the word or phrase is considered a technical term or "term of art." Justice Jackson explained why this reliance is appropriate:[24]

> *[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such a case, absence*

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having the same meaning each time it appears. See section on "Same Phrasing in Same or Related Statutes," infra p. 13.

[20] See, e.g., Sullivan v. Stroop, 496 U.S. 478, 483 (1990) (phrase "child support" as used in Title IV AFDC provisions of Social Security Act). Note also that "where a phrase in a statute appears to have become a term of art . . . , any attempt to break down the term into its constituent words is not apt to illuminate its meaning." Id.

[21] In appropriate circumstances, courts will assume that "adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording." Carolene Products Co. v. United States, 323 U.S. 18, 26 (1944) (finding, however, that circumstances were inappropriate for reliance on the principle). For the presumption to operate, the previous judicial interpretations must have been "known and settled." Capital Traction Co. v. Hof, 174 U.S. 1, 36 (1899). See also Yates v. United States, 354 U.S. 298, 310 (1957) (in the absence of legislative history indicating that decisions of lower state courts were called to Congress' attention, Court "should not assume that Congress was aware of them"). Variations in statutory wording may also refute the suggestion that Congress borrowed an interpretation. Shannon v. United States, 512 U.S. 573, 581 (1994) (Congress did not borrow the terms of the Insanity Defense Reform Act of 1984 from the District of Columbia Code).

[22] See, e.g., Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989) (relying on traditional common law agency principles for meaning of term "employee" as used without definition in the Copyright Act). See also Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (following the same course after finding ERISA's "circular" definition of "employee" to be useless); Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 444 (2003) (same construction of similarly "circular" definition of "employee" in ADA).

[23] "[W]here a common law principle is well established, . . . the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)). No clear statement rule is required, however, in order to establish an "evident" contrary purpose. 501 U.S. at 108.

[24] Morissette v. United States, 342 U.S. 246, 263 (1952). See also Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation").

of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them.

Ordinary meaning and dictionary definitions

Words that are not terms of art and that are not statutorily defined are customarily given their ordinary meanings, often derived from the dictionary.[25] Thus, the Court has relied on regular dictionary definitions to interpret the word "marketing" as used in the Plant Variety Protection Act,[26] and the word "principal" as used to modify a taxpayer's place of business for purposes of an income tax deduction,[27] and relied on Black's Law Dictionary for the more specialized meaning of the word "cognizable" as used in the Federal Tort Claims Act to identify certain causes of action.[28]

Of course application of dictionary definitions is not always a clear course; many words have several alternative meanings, and context must guide choice among them.[29] "Ambiguity is a creature not of definitional possibilities but of statutory context."[30] Witness the Supreme Court's conclusion that "use" of a firearm in commission of a drug offense or crime of violence includes trading a gun for drugs.[31] And sometimes dictionary meanings can cause confusion even if there

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[25] In the absence of a statutory definition, "we construe a statutory term in accordance with its ordinary or natural meaning." FDIC v. Meyer, 510 U.S. 471, 476 (1994).

[26] Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995).

[27] Commissioner v. Soliman, 506 U.S. 168, 174 (1993).

[28] FDIC v. Meyer, 510 U.S. 471, 476 (1994).

[29] See, e.g., MCI Tel. Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 226-28 (1994) (FCC's authority to "modify" requirements does not include the authority to make tariff filing optional; aberrant dictionary meaning "to make a basic or important change" is antithetical to the principal meaning of incremental change and is more than the statute can bear); and Nixon v. Missouri Municipal League, 541 U.S. 125 (2004) (preemption of state laws that prohibit "any entity" from providing telecommunications service means, in context, "any private entity," and does not preempt a state law prohibiting local governments from providing such services). If the court views the issue as one of deference to an administrative interpretation, then the agency's choice of one alternative dictionary definition over another may indicate sufficient "reasonableness." Smiley v. Citibank (South Dakota), 517 U.S. 735, 744-47 (1996).

[30] Brown v. Gardner, 513 U.S. 115, 118 (1994).

[31] Smith v. United States, 508 U.S. 223 (1993). Dissenting Justice Scalia cut to the core: "[to] use an instrumentality normally means to use it for its intended purpose. When someone asks 'Do you use a cane?' he is not inquiring whether you have your grandfather's silver-handled walking-stick on display in the hall; he wants to know whether you walk with a cane. Similarly, to speak of 'using a firearm' is to speak of using it for its distinctive purpose, i.e., as a weapon." Id. at 242. The Court had less difficulty with the provision in 1995, overruling a lower court's holding that

are not multiple choices. As Judge Learned Hand observed, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[32]

And/or

Similar principles govern use of the words "and" and "or." Ordinarily, as in everyday English, use of the conjunctive "and" in a list means that all of the listed requirements must be satisfied,[33] while use of the disjunctive "or" means that only one of the listed requirements need be satisfied.[34] Courts do not apply these meanings "inexorably," however; if a "strict grammatical construction" will frustrate evident legislative intent, a court may read "and" as "or," or "or" as "and."[35] Moreover, statutory context can render the distinction secondary.[36]

Definite/indefinite article

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proximity and accessibility of a firearm are alone sufficient to establish "use." Bailey v. United States, 516 U.S. 137 (1995) (driving car with gun located in bag in car's trunk does not constitute "use" of gun; person who sold drugs after retrieving them from room in which gun was found in a locked trunk in a closet did not "use" that gun in sale). The Bailey Court, however, defined "use" in such a way ("active employment") as to leave the Smith holding intact. See also Muscarello v. United States, 524 U.S. 125 (1998) (the companion phrase "carries a firearm," found in the same statutory provision, is a broader category that includes transporting drugs with a handgun locked in the glove compartment of a vehicle).

[32] Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945). Justice Stevens has expressed a preference for established interpretation over dictionary definitions. "In a contest between the dictionary and the doctrine of stare decisis, the latter clearly wins." Hibbs v. Winn, 542 U.S. 88, 113 (2004) (J. Stevens, concurring).

[33] See, e.g., Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1292 (D. N. Mex. 1996).

[34] See, e.g., Zorich v. Long Beach Fire and Ambulance Serv., 118 F.3d 682, 684 (9th Cir. 1997); United States v. O'Driscoll, 761 F.2d 589, 597-98 (10th Cir. 1985). A corollary is that use of the disjunctive "or" creates "mutually exclusive"conditions that can rule out mixing and matching. United States v. Williams, 326 F.3d 535, 541 (4th Cir. 2003) ("a crime may qualify as a serious drug offense by meeting all the requirements of (i) or all the requirements of (ii), but not some of the requirements of (i) and some of (ii)").

[35] See, e.g., United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1979); De Sylva v. Ballentine, 351 U.S. 570, 573 (1956) ("the word 'or' is often used as a careless substitute for the word 'and'"). Both "and" and "or" are context-dependent, and each word "is itself semantically ambiguous, and can be used in two quite different senses." LAWRENCE E. FILSON, THE LEGISLATIVE DRAFTER'S DESK REFERENCE, § 21.10 (1992).

[36] See, e.g., United States v. 141st St. Corp., 911 F.2d 870 (2d Cir. 1990) (holding that an affirmative defense to forfeiture of real property used in a drug offense, applicable if the offense was committed "without the knowledge or consent" of the property owner, applies if the property owner had knowledge of the crime, did not consent, and took all reasonable steps to prevent illicit use of his property).

As in common usage, a drafter's choice between the definite and indefinite article can affect meaning. "The definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'"[37]

Shall/may

Use of "shall" and "may" in statutes also mirrors common usage; ordinarily "shall" is mandatory and "may" is permissive.[38] These words[39] must be read in their broader statutory context, however, the issue often being whether the statutory directive itself is mandatory or permissive.[40] Use of both words in the same provision can underscore their different meanings,[41] and often the context will confirm that the ordinary meaning of one or the other was intended.[42] Occasionally, however, context will trump ordinary meaning.[43]

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[37] American Bus Ass'n v. Slater, 231 F.3d 1, 4-5 (D.C. Cir. 2000). See also Reid v. Angelone, 369 F.3d 363, 367 (4th Cir. 2004) ("because Congress used the definite article 'the,' we conclude that . . . there is only one order subject to the requirements"); Warner-Lambert Corp. v. Apotex Corp., 316 F.3d 1348, 1356 (Fed. Cir. 2003) (reference to "the" use of a drug is a reference to an FDA-approved use, not to "a" use or "any" use); Freytag v. Commissioner, 501 U.S. 868, 902 (1991) (concurring opinion of Justice Scalia) (contending that use of the definite article in the Constitution's conferral of appointment authority on "the Courts of Law" "obviously narrows the class of eligible 'Courts of Law' to those courts of law envisioned by the Constitution"). But cf. Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2002) (reference in a preemption clause to "a law or regulation" "implies a discreteness — which is embodied in statutes and regulations — that is not present in the common law").

[38] "The mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion." Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998). "The use of a permissive verb — 'may review' instead of 'shall review' — suggests a discretionary rather than mandatory review process." Rastelli v. Warden, Metro. Correctional Center, 782 F.2d 17, 23 (2d Cir. 1986).

[39] "Should" sometimes is substituted for "may" as a permissive word. Union Elec. Co. v. Consolidation Coal Co., 188 F.3d 998, 1001 (8th Cir. 1999). "Will" and "must" can be additional mandatory words. Bankers Ins. Co. v. Florida Res. Prop. & Cas. Jt. Underwriting Ass'n, 137 F.3d 1293, 1298 (11th Cir. 1998).

[40] See IA SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 25:4 (Norman J. Singer ed., 6th ed. 2002 rev.).

[41] See, e.g., Lopez v. Davis, 531 U.S. 230, 241 (2001) ("Congress' use of the permissive 'may' . . . contrasts with the legislators' use of a mandatory 'shall' in the very same section"); and United States ex rel. Siegel v. Thoman, 156 U.S. 353, 359-60 (1895) ("in the law to be construed here it is evident that the word 'may' is used in special contradistinction to the word 'shall'").

[42] See, e.g., Escoe v. Zerbst, 295 U.S. 490, 493 (1935) ("doubt . . . is dispelled when we pass from the words alone to a view of [the statute's] ends and aims").

[43] See, e.g., Moore v. Illinois Cent R.R., 312 U.S. 630, 635 (1941) (substitution of "may" for "shall" "was not, we think, an indication of a change in policy, but was instead a clarification of the

Singular/plural

An elementary rule of statutory construction is that the singular includes the plural, and vice-versa.[44] Thus, a statutory directive that the Secretary of Transportation require automakers to install a warning system in new cars to alert drivers "when a tire is significantly under-inflated" is not satisfied by a system that fails to warn when two tires on the same side, or all four tires, are significantly under-inflated.[45]

General, Specific, and Associated Words

Ordinarily, the specific terms of a statute override the general terms. "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment."[46] As with other canons, context can dictate a contrary result.[47]

Another interpretational guide used from time to time is the principle *noscitur a sociis*, that "words grouped in a list should be given related meaning."[48] A corollary, *ejusdem generis*, instructs that, "where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated."[49] These principles are

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[Railway Labor Act's] original purpose [of establishing] a system for peaceful adjustment and mediation voluntary in its nature"). See also discussion in Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 432 n.9 (1995) ("shall" sometimes means "may").

[44] The Dictionary Act provides that "unless the context indicates otherwise," "words importing the singular include and apply to several persons, parties, or things; words importing the plural include the singular." 1 U.S.C. § 1.

[45] Public Citizen, Inc. v. Mineta, 340 F.3d 39, 54 (2d Cir. 2003).

[46] Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228 (1957) (citations omitted). The same principle is used to resolve conflict between two statutes. See, e.g., United States v. Estate of Romani, 523 U.S. 517, 532 (1998) (later, more specific statute governs). See also Morton v. Mancari, 417 U.S. 535, 550-51 (1974) (a general statute will not be held to have repealed by implication a more specific one unless there is "clear intention otherwise").

[47] See, e.g., Adams v. Woods, 6 U.S. (2 Cranch) 336, 341 (1805).

[48] Dole v. United Steelworkers of America, 494 U.S. 26, 36 (1990); Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) (reading a statutory definition as limited by the first of several grouped words).

[49] Harrison v. PPG Industries, Inc., 446 U.S. 578, 588 (1980); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-15 (2001); Washington Dep't of Social Servs. v. Keffeler, 537 U.S. 371, 384 (2003) (relying on both noscitur a sociis and ejusdem generis). The principle cannot be applied if the enumerated categories are too "disparate." Arcadia v. Ohio Power Co., 498 U.S. 73, 78 (1990). And, of course, context may reveal that application is inappropriate. Norfolk & Western Ry. v. Train Dispatchers, 499 U.S. 117, 129 (1991) (exemption of carriers from "the antitrust laws and all

probably honored more in the breach than in the acceptance, however. The Court explained on one occasion that they are only "instrumentalit[ies] for ascertaining the correct meaning of words when there is uncertainty."[50] A less charitable assessment is that the maxims do not aid in ascertaining meaning or deciding cases, but rather serve only to "classify and label results reached by other means."[51]

Grammatical Rules, Punctuation

The old rule, borrowed from English law, was that "[p]unctuation is no part of the statute," and that "[c]ourts will . . . disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute."[52] The modern Court recognizes that grammar and punctuation often clarify meaning, and that skilled drafters can be expected to apply good grammar.[53] The Court has also found plain meaning resulting from verb tense.[54]

The Court remains reluctant, however, to place primary importance on punctuation. "A statute's plain meaning must be enforced . . . , and the meaning of a statute will typically heed the commands of its punctuation."[55] So said the Court — not, however, in applying a plain meaning consistent with punctuation, but instead while justifying a departure from that meaning. The Court went on to explain that "a purported plain meaning analysis based only on punctuation is

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other law, including State and municipal law," is "clear, broad and unqualified," and obviously applies outside of antitrust and similar laws).

[50] Id. See also Norfolk & Western Ry. v. Train Dispatchers, 499 U.S. 117, 129 (1991) ("the canon does not control . . . when the whole context dictates a different conclusion"); United States v. Turkette, 452 U.S. 576, 580-82 (1981) (appeals court erred in finding that a second category was merely a more general description of the first; context and language instead reveal two contrasting categories).

[51] REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES, 234 (1975).

[52] Hammock v. Loan and Trust Co., 105 U.S. (15 Otto) 77, 84-85 (1881) (disregarding a comma). See also United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 82-83 (1932) (also disregarding a comma).

[53] See, e.g., Arcadia v. Ohio Power Co., 498 U.S. 73, 78 (1990) ("In casual conversation, perhaps, such absent-minded duplication and omission are possible, but Congress is not presumed to draft its laws that way.").

[54] Ingalls Shipbuilding v. Director, OWCP, 519 U.S. 248, 255 (1997) (present tense of verb is an element of plain meaning); Dole Food Co. v. Patrickson, 538 U.S. 468, 478 (2003) (interpretation required by "plain text" derived from present tense).

[55] United States Nat'l Bank of Oregon v. Independent Ins. Agents, 508 U.S. 439, 454 (1993).

necessarily incomplete and runs the risk of distorting a statute's true meaning."[56] "Overwhelming evidence from the structure, language, and subject matter" of the law led the Court to conclude that "in this unusual case" the punctuation at issue was the result of "a simple scrivener's error."[57] While the Court has relied on comma placement to find that a plain meaning was "mandated by the grammatical structure of the statute," the Court in that case also found other support for its reading.[58]

Perhaps more typical was the Court's refusal to apply the rule that a modifying clause modifies the last antecedent, even though it could easily have concluded on the basis of the statutory language that application of the last antecedent rule was "mandated by the [statute's] grammatical structure." The rule "is quite sensible as a matter of grammar," the Court explained, but it "is not compelled."[59] So too, in another case the Court shied away from "the most natural grammatical reading" of a statute in order to avoid an interpretation that would have raised a serious issue of constitutionality.[60]

Refusal to be bound by the rules of punctuation and grammar, it seems, gives the Court some flexibility in construing statutes. This is not to say, however, that grammatical rules should be disregarded in statutory drafting, since such rules are ordinarily strong guides to meaning.

Statutory Language Not to be Construed as "Mere Surplusage"

A basic principle of statutory interpretation is that courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of

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[56] Id. See also Costanzo v. Tillinghast, 287 U.S. 341, 344 (1932) ("It has often been said that punctuation is not decisive of the construction of a statute. . . . Upon like principle we should not apply the rules of syntax to defeat the evident legislative intent.").

[57] Independent Ins. Agents, supra n.55, 508 U.S. at 462. This "unusual case" held that Congress did not in 1918 repeal a statutory provision enacted in 1916 allowing national banks located in small communities to sell insurance. The "scrivener's error" had erroneously credited the 1916 enactment with having amended a provision that was repealed by the 1918 enactment.

[58] United States v. Ron Pair Enterprises, 489 U.S. 235, 241 (1989).

[59] Nobelman v. American Savings Bank, 508 U.S. 324, 330-31 (1993). See also Lamie v. United States Trustee, 540 U.S. 526, 534 (2004) ("The statute is awkward, and even ungrammatical; but that does not make it ambiguous").

[60] United States v. X-Citement Video, Inc., 513 U.S. 64, 68 (1994). Justice Scalia, dissenting, insisted that the language was perfectly clear, and that the rejected interpretation was "the only grammatical reading." Id. at 81.

the language it employed."[61] The modern variant is that statutes should be construed "so as to avoid rendering superfluous" any statutory language.[62] A related principle applies to statutory amendments: there is a "general presumption" that, "when Congress alters the words of a statute, it must intend to change the statute's meaning."[63] Resistance to treating statutory words as mere surplusage "should be heightened when the words describe an element of a criminal offense."[64] There can be differences of opinion, of course, as to when it is "possible" to give effect to all statutory language and when the general rule should give way in the face of evident contrary meaning.[65]

A converse of the rule that courts should not read statutory language as surplusage is that courts should not add language that Congress has not included. Thus, in a situation where Congress subjected specific categories of ticket sales to taxation but failed to cover another category, either by specific or by general language, the Court refused to extend the coverage. To do so, given the

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[61] Montclair v. Ramsdell, 107 U.S. 147, 152 (1883).

[62] Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991); Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2003) (interpreting word "law" broadly could render word "regulation" superfluous in preemption clause applicable to a state "law or regulation"). See also Bailey v. United States, 516 U.S. 137, 146 (1995) ("we assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning") (rejecting interpretation that would have made "uses" and "carries" redundant in statute penalizing using or carrying a firearm in commission of offense). The presumption also guides interpretation of "redundancies across statutes." Two overlapping statutes may be given effect so long as there is no "positive repugnance" between them. Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) (finding that, in spite of considerable overlap between two provisions, each addressed matters that the other did not).

[63] United States v. Wilson, 503 U.S. 333, 336 (1992) (nonetheless attributing no significance to deletion of a reference to the Attorney General; the reference "was simply lost in the shuffle" of a comprehensive statutory revision that had various unrelated purposes); Stone v. INS, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). There is an exception for minor, unexplained changes in phraseology made during recodification — changes that courts generally assume are "not intended to alter the statute's scope." Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 318 (1985).

[64] Ratzlaf v. United States, 510 U.S. 135, 140-41 (1994).

[65] See, e.g., Moskal v. United States, 498 U.S. 103 (1990). Dissenting Justice Scalia objected to the Court's straining to avoid holding that "falsely made" is redundant in the federal forgery statute, which prohibits receipt of "falsely made, forged, altered, or counterfeited securities." "The principle [against mere surplusage] is sound, but its limitation ('if possible') should be observed. It should not be used to distort ordinary meaning. Nor should it be applied to obvious instances of iteration to which lawyers, alas, are particularly addicted . . . ." Id. at 120.

"particularization and detail" with which Congress had set out the categories, would amount to "enlargement" of the statute rather than "construction" of it.[66]

Same Phrasing in Same or Related Statutes

"A term appearing in several places in a statutory text is generally read the same way each time it appears."[67] This presumption is "at its most vigorous when a term is repeated within a given sentence."[68] The general presumption is not rigid, however, and "readily yields when there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent."[69] In other words, context can override the presumption.

Different Phrasings in Same Statute

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[66] Iselin v. United States, 270 U.S. 245, 250 (1926). See also Lamie v. United States Trustee, 540 U.S. 526, 537 (2004) (courts should not add an "absent word" to a statute; "there is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted"). Obviously, the line between the permissible filling in of statutory gaps and the impermissible adding of statutory content may be indistinct in some instances, and statutory context, congressional purpose, and overriding presumptions may tip the scales. For example, the Court made no mention of the "absent word" rule in holding that a reference to "any entity" actually meant "any private entity" in the context of preemption. Nixon v. Missouri Municipal League, 541 U.S. 125 (2004) (preemption of state laws that prohibit "any entity" from providing telecommunications service does not preempt a state law prohibiting local governments from providing such service).

[67] Ratzlaf v. United States, 510 U.S. 135, 143 (1994). See also Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995); and Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214, 225 (1992). The Court cited this passage of Wrigley to invoke a quite different principle, described as "the established canon" that "similar [rather than identical] language" in the same section of a statute "must be accorded a consistent [rather than the same] meaning." National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 501(1998).

[68] Brown v. Gardner, 513 U.S. 115, 118 (1994); Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 329-30 (2000).

[69] Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1933). See also Robinson v. Shell Oil Co., 519 U.S. 337, 342-43 (1997) (term "employees" means current employees only in some sections of Title VII of Civil Rights Act, but in other sections includes former employees); United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001) (different statutory contexts of worker eligibility for Social Security benefits and "administrability" of tax rules justify different interpretations); General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581, 594-595 (2004) (word "age" means "old age" when included in the term "age discrimination" in the Age Discrimination in Employment Act even though it is used in its primary sense elsewhere in the act). For disagreement about the appropriateness of applying this limitation, contrast the Court's opinion in Gustafson v. Alloyd Co., supra n.67, 513 U.S. at 573, with the dissenting opinion of Justice Thomas in the same case, id. at 590 (interpreting a definition that, by its terms, was applicable "unless the context otherwise requires").

The other side of the coin is that "where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[70] "[N]egative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted."[71] This maxim has been applied by the Court — or at least cited as a justification — in distinguishing among different categories of veterans benefits[72] and among different categories of drug offenses.[73] A court can only go so far with the maxim, of course; establishing that language does not mean one thing does not necessarily establish what the language does mean.[74]

"Congress Knows How to Say ..."

Occasionally the Court draws a contrast between the language at issue and other statutory language that clearly and directly requires the interpretation being pressed by one of the parties. There are some instances — e.g., failure to employ terms of art or other language normally used for such purposes — in which this can be a fairly persuasive argument. For example, the Court reasoned that, although "Congress knew how to impose aiding and abetting liability when it chose to do so," it did not use the words "aid" and "abet" in the statute, and hence did not impose aiding and abetting liability.[75] To say that Congress did not use

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[70] Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)). See also Bailey v. United States. 516 U.S. 137, 146 (1995) (distinction in one provision between "used" and "intended to be used" creates implication that related provision's reliance on "use" alone refers to actual and not intended use); and Bates v. United States, 522 U.S. 23, 29 (1997) (inclusion of "intent to defraud" language in one provision and exclusion in a parallel provision).

[71] Lindh v. Murphy, 521 U.S. 320, 330 (1997) (statute was explicit in making one section applicable to habeas cases pending on date of enactment, but was silent as to parallel provision).

[72] King v. St. Vincent's Hospital, 502 U.S. 215, 220-21 (1991) ("given the examples of affirmative limitations on reemployment benefits conferred by neighboring provisions, we infer that the simplicity of subsection (d) was deliberate, consistent with a plain meaning to provide its benefit without conditions on length of service").

[73] Chapman v. United States, 500 U.S. 453, 459 (1991) (fact that, with respect to some drugs, Congress distinguished between a "mixture or substance" containing the drug and a "pure" drug refutes the argument that Congress' failure to so distinguish with respect to LSD was inadvertent).

[74] See Field v. Mans, 516 U.S. 59, 67 (1995) ("without more, the ['negative pregnant'] inference might be a helpful one," but other interpretive guides prove more useful).

[75] Central Bank of Denver v. First Interstate Bank, 511 U.S. 164, 176-77 (1994). See also Franklin Nat'l Bank v. New York, 347 U.S. 373, 378 (1954) (finding "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express

the clearest language, however, does not necessarily aid the court in determining what the less precise language means in its statutory context.[76] Some statutes are not well drafted,[77] and others represent conscious choices, born of political compromise, to leave issues for the courts to resolve.[78] It may not always be safe to assume, therefore, that "[i]f Congress had intended such an irrational result, surely it would have expressed it in straightforward English."[79]

Statutory Silence

Nor is it safe to assume that Congress can or will address directly and explicitly all issues that may arise. "As one court has aptly put it, '[n]ot every silence is pregnant.' In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress' silence signifies merely an expectation that nothing more need be said in order to effectuate the relevant legislative objective. In still other instances, silence may reflect the fact that Congress has not considered an issue at all. An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other

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language in several other instances"); Meghrig v. KFC Western, Inc., 516 U.S. 479, 485 (1996) ("Congress . . . demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and . . . the language used to define the remedies under RCRA does not provide that remedy"); FCC v. NextWave Personal Communications, Inc., 537 U.S. 293, 302 (2003) (when Congress has intended to create exceptions to bankruptcy law requirements, "it has done so clearly and expressly"); Dole Food Co. v. Patrickson, 538 U.S. 468, 476 (2003) (Congress knows how to refer to an "owner" "in other than the formal sense," and did not do so in the Foreign Sovereign Immunities Act's definition of foreign state "instrumentality"); Whitfield v. United States, 543 U.S. 209, 216 (2005) (Congress has imposed an explicit overt act requirement in 22 conspiracy statutes, yet has not done so in the provision governing conspiracy to commit money laundering).

[76] See, e.g., Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (Title IX's prohibition on sex discrimination encompasses retaliation despite absence of an explicit prohibition on retaliation such as those contained in Title VII, the ADA, and the Age Discrimination in Employment Act).

[77] See, e.g., the provisions of the Plant Variety Protection Act at issue in Asgrow Seed Co. v. Winterboer, 513 U.S. 179 (1995). Justice Scalia in his opinion for the Court in Asgrow called 7 U.S.C. § 2543 a "verbal maze," and conceded that "it is quite impossible to make complete sense of the provision." Id. at 185-86. In another case, the Court found statutory language "incoherent" due to use of three different and conflicting standards identifying an evidentiary burden. Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 627 (1993). The Court resolved the issue by treating the "incoherence" as ambiguity, and by applying the one possible construction that did not raise constitutional issues. Id. at 628-30.

[78] See, e.g., Landgraf v. USI Film Products, 511 U.S. 244, 263 (1994) ("the history of the 1991 [Civil Rights] Act conveys the impression that the legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct").

[79] FMC Corp. v. Holliday, 498 U.S. 52, 66 (1990) (Justice Stevens, dissenting, objecting to Court's interpretation of convoluted preemption language in ERISA).

textual and contextual evidence of congressional intent."[80] Occasionally, however, the Court identifies a pregnant statutory silence, as, for example, when that silence contrasts with a consistent pattern in federal statutes under which departures from a general rule had been expressly authorized.[81]

While Congress cannot be expected to anticipate and address all issues that may arise, the Court does sometimes assume that Congress will address major issues, at least in the context of amendment. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not . . . hide elephants in mouseholes."[82] This premise underlay the Court's reasoning in concluding that the FDA lacked authority to regulate tobacco. "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[83]

A variation on the statutory silence theme is the negative inference: *expressio unius est exclusio alterius* (the inclusion of one is the exclusion of others). "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent."[84] The Court applied the principle, albeit without express recognition, in holding that a statute requiring payment of an attendance

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[80] Burns v. United States, 501 U.S. 129, 136 (1991) (quoting Illinois Dep't of Public Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1983)).

[81] Director, OWCP v. Newport News Shipbuilding Co., 514 U.S. 122 (1995) (agency in its governmental capacity is not a "person adversely affected or aggrieved" for purposes of judicial review). See also United States v. Bestfoods, 524 U.S. 51, 62 (1998) ("against this venerable common-law backdrop, the congressional silence is audible"); Elkins v. Moreno, 435 U.S. 647, 666 (1978) (absence of reference to an immigrant's intent to remain citizen of foreign country is "pregnant" when contrasted with other provisions of "comprehensive and complete" immigration code); Meyer v. Holley, 537 U.S. 280 (2003) (ordinary rules of vicarious liability apply to tort actions under the Fair Housing Act; statutory silence as to vicarious liability contrasts with explicit departures in other laws).

[82] Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001). See also MCI Telecommunications Corp. v. AT&T, 512 U.S. 218, 231 (1994) (conferral of authority to "modify" rates was not a cryptic conferral of authority to make filing of rates voluntary); Director of Revenue of Mo. v. CoBank, ACB, 531 U.S. 316, 323 (2001) ("it would be surprising, indeed," if Congress had effected a "radical" change in the law "sub silentio" via "technical and conforming amendments").

[83] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000). Ordinarily the Court does not require reference to specific applications of general authority, but in this instance ("hardly an ordinary case") the Court majority attached importance to the FDA's longstanding disavowal of regulatory authority, and to subsequently enacted tobacco-specific legislation that stopped short of conferring authority to ban sale of the product.

[84] Andrus v. Glover Const. Co., 446 U.S. 608, 616-17 (1980) (citing Continental Casualty Co. v. United States, 314 U.S. 527, 533 (1942)).

fee to "a witness" applies to an incarcerated state prisoner who testifies at a federal trial. Because Congress had expressly excepted another category (detained aliens) from eligibility for these fees, and had expressly excepted any "incarcerated" witness from eligibility for a different category of fees, "the conclusion is virtually inescapable . . . that the general language 'witness in attendance' . . . includes prisoners . . . ."[85] But here again, context may render the principle inapplicable. A statutory listing may be "exemplary, not exclusive," the Court once concluded.[86]

De Minimis Principle

"The venerable maxim *de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept. . . . Whether a particular activity is a *de minimis* deviation from a prescribed standard must . . . be determined with reference to the purpose of the standard."[87]

Overriding Presumptions

There are a number of instances in which the Court stacks the deck, and subordinates the general, linguistic canons of statutory construction, as well as other interpretive principles, to overriding presumptions that favor particular substantive results. Some of the "weighty and constant values" protected by these presumptions are derived from the Constitution, and some are not.[88] Application of a presumption results in some form of "clear statement" rule, requiring that Congress, if it wishes to achieve a particular result inconsistent with the Court's view of legal traditions, must state such an intent with

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[85] Demarest v. Manspeaker, 498 U.S. 184, 188 (1991). Congress quickly acted to override this result and prohibit payment of witness fees to prisoners, P.L. 102-417, 106 Stat. 2138 (1992), the House Judiciary Committee expressing the belief that "Congress never intended" that prisoners be paid witness fees. H.Rept. 102-194, 102d Cong., 1st Sess. 2 (1991).

[86] NationsBank v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995) (endorsing Comptroller of the Currency's interpretation).

[87] Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214, 231-32 (1992) (company's activities within the state clearly exceeded de minimis, so company was subject to state franchise tax). See also Abbott Laboratories v. Portland Retail Druggists, 425 U.S. 1, 18 (1976) (occasional emergency dispensation of drugs to walk-in patients is de minimis deviation from Robinson-Patman Act's exemption for hospitals' purchase of supplies "for their own use"); Industrial Ass'n v. United States, 268 U.S. 64, 68 (1925) (3 or 4 "sporadic and doubtful instances" of interference with interstate commerce in what was in essence an intrastate matter were insufficient to establish a violation of the Sherman Act).

[88] Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 108-09 (1991).

unmistakable clarity.[89] Legislative drafters need to be especially careful whenever overriding presumptions may be implicated. To that end, a number are briefly described below.

Departure from Common Law or Established Interpretation

There is a presumption favoring continuation of judge-made law. "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."[90] In another case the Court declared that "[w]e will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."[91] This principle is thus closely akin to the principle noted above that, when Congress employs legal terms of art, it normally adopts the meanings associated with those terms.

Displacing State Law, Impinging on State Operations

The Supremacy Clause of the Constitution, Article VI, cl. 2, provides that valid federal law supersedes inconsistent state law. Courts encounter difficulty in applying this simple principle, however, especially when federal law is silent as to preemptive effect. The Court usually begins preemption analysis "with the assumption that the historic police powers of the States were not to be superseded by [a federal law] unless that was the clear and manifest purpose of Congress."[92] If the statute in question contains an explicit statement of preemptive scope, therefore, either preempting state law or disclaiming intent to do so, that is usually the end of the matter.[93] The Court also, however, recognizes

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[89] Judge Wald described one such presumption as requiring that Congress "signal[ ] its intention in neon lights." Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 IOWA L. REV. 195, 208 (1983). See generally pp. 206-14 of the article. See also William N. Eskridge, Jr. and Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 VAND.L.REV. 593 (1992).

[90] Midlantic Nat'l Bank v. New Jersey Dep't of Envt'l Protection, 474 U.S. 494, 501 (1986) (quoting Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-67 (1979)).

[91] Pennsylvania Pub. Welfare Dep't v. Davenport, 495 U.S. 552, 563 (1990) (nonetheless finding that the statutory language plainly evidenced an intent to depart from past practice).

[92] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 605 (1991).

[93] A statement asserting preemption or disclaiming intent to preempt must be clear not only as to preemptive intent, but also as to scope. In International Paper Co. v. Ouellette, 479 U.S. 481 (1987), for example, the Court ruled that some aspects of state law were preempted in spite of a savings clause in the citizens suit provision of the Clean Water Act declaring that "nothing in this section" should be read as affecting an injured party's right to seek relief under any statute or common law. Other parts of the act outside of the citizens suit section were read as implying preemption. "Because we do not believe Congress intended to undermine this carefully drawn

several categories of implied preemption of state law, various formulations of which are that state law must give way to federal law if there is a direct conflict between them, if implementation of state law would "frustrate congressional purpose," or if federal law has "occupied the field" of regulation. These latter two categories lack precision, and, almost always, the surer course of legislative drafting is to spell out intended preemptive effect.

In the same vein, the Court will not lightly infer that Congress has enacted legislation that restricts how states may constitute their own governments. In ruling that state judges are not "employees" for purposes of the Age Discrimination in Employment Act, the Court required a plain statement rule applicable to laws limiting the authority of the States to determine the qualifications of their most important government officials — an authority protected by the Tenth Amendment and by the Guarantee Clause.[94] "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."[95]

Abrogation of States' Eleventh Amendment Immunity

Also protective of state sovereignty is the rule that, in order to abrogate the states' Eleventh Amendment immunity from suit in federal court, "Congress must make its intention 'unmistakably clear in the language of the statute.'"[96] Congress, of course, has limited authority to abrogate states' Eleventh Amendment immunity; the Court held in Seminole Tribe of Florida v. Florida, that Article I powers may not be used to "circumvent the constitutional limitations placed upon federal jurisdiction [by the Eleventh Amendment]."[97] This leaves Section 5 of the Fourteenth Amendment as the principal source of power to abrogate state immunity.

Nationwide Application of Federal Law

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statute [leaving a source state responsible for control of point-source discharges within its boundaries] through a general savings clause, we conclude that the CWA precludes a court from applying the law of an affected state against an out-of-state source." Id. at 484.

[94] Gregory v. Ashcroft, 501 U.S. 452 (1991).

[95] Id. at 461. See also Nixon v. Missouri Municipal League, 541 U.S. 125 (2004) (indicating that the plain statement rule is also appropriate for laws "interposing federal authority between a State and its municipal subdivisions").

[96] Hoffman v. Connecticut Income Maint. Dep't, 492 U.S. 96, 101 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

[97] 517 U.S. 44, 73 (1996).

Congress may, if it chooses, incorporate state law as federal law.[98] Federal law usually applies uniformly nationwide,[99] however, and there is a presumption that, "when Congress enacts a statute . . . it does not intend to make its application dependent on state law."[100]

Waiver of Sovereign Immunity

"[T]he Government's consent to be sued 'must be construed strictly in favor of the sovereign.'"[101] Waiver of sovereign immunity must be effected by unequivocal expression in the statutory text itself; legislative history "has no bearing" on the issue.[102] As a consequence, "statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect."[103]

Non-retroactivity / Effective Date

"[A]bsent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment."[104] There is a general rule, based on the unfairness of

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[98] See, e.g., the Assimilative Crimes Statute, 18 U.S.C. § 13, governing crimes within the special maritime and territorial jurisdiction of the United States.

[99] Jerome v. United States, 318 U.S. 101, 104 (1943). Arguably, the Jerome Court actually overstated the case, citing United States v. Pelzer, 312 U.S. 399, 402 (1941), for the proposition that "the application of federal legislation is nationwide." Pelzer was far less sweeping, holding only that "in light of their general purpose to establish a nationwide scheme of taxation uniform in its application," provisions of the revenue laws "should not be taken as subject to state control or limitation unless the language or necessary implication of the section involved makes its application dependent on state law." 312 U.S. at 402-03.

[100] Dickerson v. New Banner Inst., 460 U.S. 103, 119 (1983) (quoting NLRB v. Randolph Elec. Membership Corp., 343 F.2d 60, 62-63 (4th Cir. 1965)).

[101] United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992); Ardestani v. INS, 502 U.S. 129, 137 (1991) (partial waiver).

[102] United States v. Nordic Village, supra n.101, 503 U.S. at 37. For criticism of the rule, see John Copeland Nagle, Waiving Sovereign Immunity in an Age of Clear Statement Rules, 1995 WISC. L. REV. 771, 836.

[103] UMW v. United States, 330 U.S. 258, 272 (1947) (United States is not an "employer" for purposes of the Norris-LaGuardia Act); Vermont Agency of Nat. Resources v. United States ex rel. Stevens, 529 U.S. 765, 780-81 (2000) (state is not a "person" for purposes of qui tam liability under the False Claims Act).

[104] Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991). Ordinarily, and in the absence of special circumstances, the law does not recognize fractions of the day, so a law becomes effective "from the first moment" of the effective date. Lapeyre v. United States, 17 Wall. 191, 198 (1872). However, "whenever it becomes important to the ends of justice . . . the law will look into fractions of a day." Louisville v. Savings Bank, 104 U.S. 469, 474 (1881). See Burgess v. Salmon,

attaching new legal consequences to already-completed events, disfavoring retroactive application of civil statutes. Statutory provisions do not apply to events antedating enactment unless there is clear congressional intent that they so apply. "Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."[105] The prohibitions on ex post facto laws, of course, impose a constitutional bar to retroactive application of penal laws.[106]

Avoidance of Constitutional Issues

The doctrine of "constitutional doubt" requires courts to construe statutes, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."[107] "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. . . . 'The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution."[108] "Grave doubt" as to constitutionality does not arise simply because a Court minority — even a minority of four Justices — believes a statute

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97 U.S. 381 (1878) (a law signed in the afternoon could not be applied to fine a person for actions he had completed on the morning of the same day); United States v. Will, 449 U.S. 200, 225 n.29 (1980) (a judicial salary increase had taken effect at the beginning of the day, and was already in effect when the President later in the day signed legislation reducing cost-of-living increases).

[105] Landgraf v. USI Film Products, 511 U.S. 244, 272-73 (1994) (finding no such clearly expressed congressional intent with respect to the civil rights law's new compensatory and punitive damages remedies and the associated right to a jury trial).

[106] Art. I, § 9, cl. 3 prohibits Congress from enacting ex post facto laws; Art. I, § 10 applies the prohibition to the states. See Lynce v. Mathis, 519 U.S. 433, 439 (1997); and Johnson v. United States, 529 U.S. 694, 701 (2000), for general discussion.

[107] United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916); Almendarez-Torres v. United States, 523 U.S. 224, 237-38 (1998); Jones v. United States, 529 U.S. 848, 857 (2000). See also Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (J. Brandeis, concurring) ("The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. [...] Thus, if a case can be decided upon two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

[108] DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988) (quoting Hooper v. California, 155 U.S. 648, 657 (1895)). Accord, Burns v. United States, 501 U.S. 129, 138 (1991); Gollust v. Mendell, 501 U.S. 115, 126 (1991).

is unconstitutional; rather, a Court majority must "gravely . . . doubt that the statute is constitutional."[109]

Extraterritorial Application Disfavored

"It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' This 'canon of construction' . . . serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[110]

Judicial Review of Administrative Action

As a general matter, there is a "strong presumption that Congress intends judicial review of administrative action."[111] This presumption is embodied in the Administrative Procedure Act, which provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review."[112] The Administrative Procedure Act applies "except to the extent that . . . statutes preclude judicial review,"[113] and issues relating to application of the presumption usually arise in determining whether there is "clear and convincing evidence"[114]

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[109] Almendarez-Torres v. United States, 523 U.S. 224, 239 (1998) (citing Rust v. Sullivan, 500 U.S. 173, 191 (1991), in which the Court concluded, over the dissent of four Justices, that abortion counseling regulations "do not raise the sort of 'grave and doubtful constitutional questions,'. . . that would lead us to assume Congress did not intend to authorize their issuance").

[110] EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (quoting Foley Bros, Inc. v. Filardo, 336 U.S. 281, 285 (1949)). See also Smith v. United States, 507 U.S. 197, 203-04 (1993) (interpretation of Federal Tort Claims Act as inapplicable in Antarctica is reinforced by presumption against extraterritorial application). Cf. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) (Sherman Act applies to foreign conduct producing, and intended to produce, substantial effects in United States).

[111] Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986). See also McNary v. Haitian Refugee Center, 498 U.S. 479, 496 (1991) ("it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review," given the presumption "that Congress legislates with knowledge of our basic rules of statutory construction").

[112] 5 U.S.C. § 704.

[113] 5 U.S.C. § 701(a).

[114] Lindahl v. OPM, 470 U.S. 768, 778 (1985) (provision in Civil Service Retirement Act stating that OPM's "decisions . . . concerning these matters are final and conclusive and are not subject to review" interpreted as precluding review only of OPM's factual determinations, but as not precluding review of legal interpretations). The Lindahl Court contrasted other statutory language said to be "far more unambiguous and comprehensive" in precluding review. Id. at 779-80 & n.13 (citing 5 U.S.C. § 8128(b) ("action of the Secretary . . . is final and conclusive for all purposes and with respect to all questions of law and fact"); and 38 U.S.C. § 211(a) ("decisions of the Administrator on any question of law or fact . . . shall be final and conclusive and no other

or "persuasive reason to believe"[115] that Congress intended to preclude judicial review. The presumption may be overcome by specific statutory language, but it also "may be overcome by inferences of intent drawn from the statutory scheme as a whole."[116]

Deference to Administrative Interpretation

When a court reviews an agency's formal interpretation of a statute that the agency administers, and when the statute has not removed agency discretion by compelling a particular disposition of the matter at issue, courts defer to any reasonable agency interpretation. This is the *Chevron* rule announced in 1984.[117] In two decisions, one in 2000[118] and one in 2001,[119] the Court clarified and narrowed *Chevron*'s application, ruling that *Chevron* deference applies only if an agency's interpretation is the product of a formal agency process, such as adjudication or notice-and-comment rulemaking, through which Congress has authorized the agency "to speak with the force of law."[120] Other agency interpretations that are made without the protections of a formal and public process are reviewed under pre-*Chevron* principles set forth in *Skidmore v. Swift & Co.*[121]

If *Chevron* applies, the first question is "whether Congress has directly spoken to the precise question at issue."[122] If the court, "employing the traditional tools of statutory construction," determines that Congress has addressed the precise issue, then that is the end of the matter, because the "law must be given effect."[123]

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official or any court of the United States shall have power or jurisdiction to review any such decision").

[115] Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) (pre-enforcement review of regulations under Federal Food, Drug, and Cosmetic Act is not precluded as a result of negative inference arising from fact that act has explicit authorization for review of other kinds of regulations).

[116] Block v. Community Nutrition Inst., 467 U.S. 340, 349 (1984) (judicial review of milk marketing orders not available to consumers). Accord, United States v. Fausto, 484 U.S. 439, 452 (1988) (congressional intent to preclude judicial review is clear from the purposes of the Civil Service Reform Act, from the entirety of its text, and from the structure of the statutory scheme).

[117] Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[118] Christensen v. Harris County, 529 U.S. 576 (2000).

[119] United States v. Mead Corp., 533 U.S. 218 (2001).

[120] Mead Corp., 533 U.S. at 229.

[121] 323 U.S. 134 (1944).

[122] Chevron, 467 U.S. at 842.

[123] 467 U.S. at 843 n.9.

But if the statute does not directly address the issue, "the court does not simply impose its own construction of the statute," but rather determines "whether the agency's answer is based on a permissible construction of the statute."[124]

On its face, the *Chevron* rule is quite deferential, and was perceived as a significant break from the multi-factored approach that preceded it. One would expect that a court's conclusion as to whether Congress has "directly spoken" to the issue would be decisive in most cases, that most of the myriad of issues that can arise in the administrative setting would not be directly addressed by statute, and that, consequently, courts would most often defer to what are found to be "reasonable" agency interpretations.[125] Surprisingly, however, *Chevron* did not usher in an era of increased deference by the Supreme Court. The Court has frequently determined that in fact Congress has settled the matter, and that consequently there is no need to proceed to the second, more deferential step of the inquiry.[126] The Court has also found that, even though Congress has left the matter for agency resolution, the agency's interpretation is unreasonable.[127]

How the Court determines whether Congress has "directly addressed" an issue takes on critical importance. Chevron is not a strong "clear statement" rule, since the Court has considered legislative history as well as text in assessing the controlling weight of statute.[128] And even when relying solely on text, the Court has not adhered strictly to the original *Chevron* step-one formulation, sometimes instead employing a broad textualist approach that emphasizes "plain meaning" and abandons inquiry into whether Congress has addressed the "precise

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[124] Id. at 843.

[125] See, e.g., Sullivan v. Everhart, 494 U.S. 83 (1990) (regulations are a reasonable interpretation of Social Security Act); Smiley v. Citibank (South Dakota), 517 U.S. 735 (1996) (upholding Comptroller of the Currency's interpretation of 1864 Bank Act); and Lopez v. Davis, 531 U.S. 230, 240 (2001) (Bureau of Prisons regulation denying early release is reasonable interpretation of discretionary authority).

[126] See, e.g., Sullivan v. Zebley, 493 U.S. 521 (1990) (regulations "are simply inconsistent with the statutory standard"); and Dole v. Steelworkers, 494 U.S. 26 (1990) (deference to OMB interpretation of Paperwork Reduction Act is foreclosed by Court's finding of clear congressional intent to contrary).

[127] Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457 (2001).

[128] See, e.g., Dunn v. CFTC, 519 U.S. 465, 473-74 (1997) (legislative history supports Court's conclusion that statute is clear and agency's interpretation is untenable). See also Babbitt v. Sweet Home Chapter, 515 U.S. 687, 708 (1995) (Court concludes, "based on the text, structure, and legislative history of the ESA, that the Secretary reasonably construed the intent of Congress" in defining "harm").

question" at issue.[129] This "plain meaning" alternative has the effect of expanding the circumstances under which the Court can resolve a case on statutory grounds rather than proceeding to stage two and deferring to an agency's interpretation.

The Court has recognized that there are some circumstances in which it is less likely that Congress intended to leave resolution of statutory ambiguity to the administering agency.[130] Thus, in holding that the FDA lacked authority to regulate tobacco products, the Court concluded that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[131] Rather than finding *Chevron* analysis inapplicable, however, the Court ruled that Congress had "directly spoken" to the regulatory issue — not through the FDCA itself, but rather through subsequently enacted tobacco-specific legislation and through rejection of legislative proposals to confer jurisdiction on the FDA.[132] In another case, the Court deemed deference to be inappropriate where the agency interpretation "invokes the outer limits of Congress' power," and there is no "clear indication" that Congress intended that result.[133]

A logical consequence of applying Chevron is to render irrelevant whether an agency interpretation was "contemporaneous" with a statute's enactment, or whether an agency's position has been consistent over the years. "Neither

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[129] See, e.g., K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (courts should look "to the particular statutory language at issue, as well as the language and design of the statute as a whole" in order to ascertain statute's "plain meaning"); Ohio Pub. Employees Retirement System v. Betts, 492 U.S. 158, 171 (1989) ("no deference is due to agency interpretations at odds with the plain language of the statute itself").

[130] See, e.g., MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218, 231 (1994) ("it is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion").

[131] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

[132] The subsequent legislation created "a distinct regulatory scheme for tobacco products." 529 U.S. at 159. As Justice Breyer's dissent pointed out, tobacco products clearly fell within the generally worded jurisdictional definitions of the Food, Drug, and Cosmetic Act, and it was also clear that Congress had not spoken directly to the issue anywhere else in that act. 529 U.S. at 162. The Court's different resolution of a similar issue concerning patent protection for plant breeding illustrates that a subsequently enacted "distinct regulatory scheme" does not always trump general authority. The Court ruled in 1980 and again in 2001 that neither the Plant Patent Act of 1930 nor the Plant Variety Protection Act — both premised on the understanding that the Patent and Trademark Office lacked authority to issue plant patents under its general utility patent authority — deprived the Office of authority to issue plant patents pursuant to that general authority. Diamond v. Chakrabarty, 447 U.S. 318 (1980); J.E.M. Ag Supply, Inc. v. Farm Advantage, Inc., 534 U.S. 124 (2001).

[133] Solid Waste Agency v. Army Corps of Engineers, 531 U.S. 159, 172 (2001).

antiquity nor contemporaneity with the statute is a condition of validity."[134] The fact that an agency has changed its position over the years "is not fatal," because "the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency."[135]

The Supreme Court has also ruled in *National Cable & Telecommunications Assn. v. Brand X Internet Services (Brand X)* that a federal court must defer to a reasonable agency interpretation of an ambiguous statute even if, prior to the agency interpretation, the circuit has adopted a differing interpretation in an opinion.[136] The only time a prior judicial interpretation of a statute trumps an agency interpretation is when the federal court's interpretation flows from an unambiguous reading of the statute.[137]

Agency interpretations that take place in the many less formal contexts where Chevron deference is inapplicable (e.g., opinion letters, policy statements, agency manuals, and enforcement guidelines, "all of which lack the force of law"[138]) can still be "entitled to respect" under the Skidmore decision,[139] "but only to the extent that [they] have the power to persuade."[140] To make this determination, courts look to such factors as whether an interpretation dealt with technical and complex matters that fell within an area of agency expertise,[141] whether an agency's decision was well-reasoned,[142] whether the agency's interpretation was

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[134] Smiley v. Citibank (South Dakota), 517 U.S. 735, 740 (1996) (upholding regulation issued more than 100 years after statute's enactment).

[135] Id. at 742. In other words, the Court presumes "that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency . . . ." Id. at 740-41.

[136] 545 U.S. 967 (2005).

[137] Id. at 982.

[138] Christensen v. Harris County, 529 U.S. 576, 587 (2000).

[139] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[140] Christensen v. Harris County, 529 U.S. at 587. As the Court put it in Skidmore, agency interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort . . . . The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140.

[141] See, e.g., Aluminum Co. v. Central Lincoln Util. Dist., 467 U.S. 380, 390 (1984).

[142] See, e.g., Investment Co. Inst. v. Camp, 401 U.S. 617, 626-27 (1971).

contemporaneous with the statute's enactment,[143] and whether the agency's interpretation was longstanding or consistent.[144]

Repeals by Implication

If Congress intends one statute to repeal an earlier statute or section of a statute *in toto*, it usually says so directly in the repealing act. There are other occasions when Congress intends one statute to supersede an earlier statute to the extent of conflict, but intends the earlier statute to remain in effect for other purposes. This too is often spelled out, usually in a section captioned "effect on existing law," "construction with other laws," or the like. "[It] can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change."[145] Not infrequently, however, conflicts arise between the operation of two federal statutes that are silent as to their relationship. In such a case, courts will try to harmonize the two so that both can be given effect. A court "must read [two allegedly conflicting] statutes to give effect to each if [it] can do so while preserving their sense and purpose."[146] Only if provisions of two different federal statutes are "irreconcilably conflicting,"[147] or "if the later act covers the whole subject of the earlier one and is clearly intended as a substitute,"[148] will courts apply the rule that the later of the two prevails. "[R]epeals by implication are not favored, . . . and will not be found unless an intent to repeal is clear and

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[143] See, e.g., Udall v. Tallman, 380 U.S. 1, 16 (1965).

[144] See, e.g., General Electric Co. v. Gilbert, 429 U.S. 125, 142-43 (1976).

[145] United States v. Fausto, 484 U.S. 439, 453 (1988).

[146] Watt v. Alaska, 451 U.S. 259, 267 (1981). See also Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438 (2001) (reconciling "tension" between the saving to suitors clause and the Limitation of Liability Act); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1017-18 (1984) (rejecting a contention that the Federal Insecticide, Fungicide, and Rodenticide Act repealed by implication a Tucker Act remedy for governmental taking of property without just compensation, and reconciling the two statutes by implying a requirement that remedies under FIFRA must be exhausted before relief under the Tucker Act could be obtained). But see Stewart v. Smith, 673 F.2d 485, 492 (D.C. Cir. 1982) (interpreting a statute authorizing agency heads to set maximum age limits for law enforcement officers as an exception to the Age Discrimination in Employment Act). Even though the laws might have been harmonized through a "strained reading," the court concluded that doing so would thwart the maximum age law's sense and purpose. The Stewart court relied on legislative history to find a "clear" congressional intent "to employ maximum entry ages as a means towards securing a 'young and vigorous' work force of law enforcement officers," and concluded that furtherance of this policy required "consideration of factors not ordinarily accounted for" under ADEA procedures.

[147] Watt v. Alaska, supra n.146, at 266.

[148] Posadas v. National City Bank, 296 U.S. 497, 503 (1936).

manifest."[149] And in fact, the Court rarely finds repeal by implication.[150] As Judge Posner has pointed out, this canon is "a mixed bag. It protects some old statutes from . . . inadvertent destruction, but it threatens to impale new statutes on the concealed stakes planted by old ones."[151]

Laws of the same session

The presumption against implied repeals "is all the stronger" if both laws were passed by the same session of Congress.[152] But, in the case of an irreconcilable conflict between two laws of the same session, the later enactment will be deemed to have repealed the earlier one to the extent of the conflict.[153] Because the focus here is on legislative intent (or presumed legislative intent), time of legislative consideration, rather than effective dates of the statutes, is the key to determining which enactment was the "later" one.[154]

Appropriations laws

The doctrine disfavoring repeals by implication also "applies with even greater force when the claimed repeal rests solely on an Appropriations Act," since it is presumed that appropriations laws do not normally change substantive law.[155]

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[149] Rodriguez v. United States, 480 U.S. 522, 524 (1987) (citations omitted). See also Morton v. Mancari, 417 U.S. 535, 550-51 (1974).

[150] For an instance in which the Court arguably found repeal by implication, see Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438 (1989) (concluding that Congress had intended to "deal comprehensively with the subject of foreign sovereign immunity in the [Foreign Sovereign Immunities Act of 1976]," and that consequently suit against the Argentine Republic could not be brought under the Alien Tort Statute). But see Branch v. Smith, 538 U.S. 254, 293 (2003), in which Justice O'Connor asserted that the Court last found a repeal by implication in 1975, in Gordon v. New York Stock Exchange, 422 U.S. 659 (antitrust laws impliedly repealed (in part) by Securities Exchange Act).

[151] Friedrich v. City of Chicago, 888 F.2d 511, 516 (7th Cir. 1989). Judge Posner describes the assumption on which the canon rests — that Congress surveys and envisions the whole body of law before legislating — as "unrealistic": how could Congress do so, he has questioned, "given the vast expanse of legislation that has never been repealed and the even vaster expanse of judicial and administrative rulings glossing that legislation." In re Doctors' Hospital of Hyde Park, 337 F.3d 951, 960 (7th Cir. 2003). On the plus side, the rule serves the "superior values of harmonizing different statutes and constraining judicial discretion in the interpretation of the laws." Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 109 (1991).

[152] Pullen v. Morgenthau, 73 F.2d 281 (2d Cir. 1934).

[153] SUTHERLAND,STATUTES AND STATUTORY CONSTRUCTION § 23:18 (Norman J. Singer ed., 6th ed. 2002 rev.).

[154] Id.

[155] TVA v. Hill, 437 U.S. 153, 190 (1978) (emphasis added).

Nevertheless, Congress can repeal substantive law through appropriations measures if intent to do so is clearly expressed.[156]

Rule of Lenity

The "rule of lenity" requires that "before a man can be punished as a criminal . . . his case must be plainly and unmistakably within the provisions of some statute."[157] Lenity principles "demand resolution of ambiguities in criminal statutes in favor of the defendant."[158] The reasons for the rule are that "'fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed'" and that "'legislatures and not courts should define criminal activity.'"[159] If statutory language is unambiguous, the rule of lenity is inapplicable.[160]

Scienter

Intent is generally a required element of a criminal offense, and consequently there is a presumption in favor of a scienter or *mens rea* requirement in a criminal statute. The presumption applies "to each of the statutory elements which criminalize otherwise innocent conduct."[161] The Court may read an express scienter requirement more broadly than syntax would require or normally permit,[162] and may read into a criminal prohibition a scienter requirement that is

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[156] United States v. Will, 449 U.S. 200, 222 (1980).

[157] United States v. Gradwell, 243 U.S. 476, 485 (1917).

[158] Hughey v. United States, 495 U.S. 411, 422 (1990). See also United States v. Granderson, 511 U.S. 39, 54 (1994) ("In these circumstances — where text, structure, and [legislative] history fail to establish that the Government's position is unambiguously correct — we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor"); Cleveland v. United States, 531 U.S. 12, 25 (2000) (before choosing a "harsher alternative" interpretation of the mail fraud statute, "it is appropriate . . . to require that Congress should have spoken in language that is clear and definite").

[159] Ratzlaf v. United States, 510 U.S. 135, 148-49 (1994) (quoting Boyle v. United States, 283 U.S. 25, 27 (1931) (Justice Holmes for Court)).

[160] Beecham v. United States, 511 U.S. 368, 374 (1994) (quoting Chapman v. United States, 500 U.S. 453, 463-64 (1991)). Accord, National Org. for Women v. Scheidler, 510 U.S. 249, 262 (1994).

[161] United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994).

[162] "Our reluctance to simply follow the most grammatical reading of the statute is heightened by our cases interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." X-Citement Video, 513 U.S. at 70. See also Staples v. United States, 511 U.S. 600 (1994) (National Firearms Act interpreted to require that defendant knew that the weapon he possessed was a "firearm" subject to the act's registration

not expressed.[163] The Court recognizes some "strict liability" exceptions, especially for "public welfare" statutes regulating conduct that is inherently harmful or injurious and that is therefore unlikely to be perceived as lawful and innocent.[164] Determining whether such an exception applies can be difficult.[165] However, if the statute does not preclude a holding that scienter is required, and if the public welfare exception is deemed inapplicable, "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."[166]

Remedial Statutes

One can search in vain for recent Supreme Court reliance on the canon that "remedial statutes" should be "liberally" or "broadly" construed.[167] This is probably due to a variety of factors, including recognition that the principle is difficult to apply and almost hopelessly general.[168] This is because many statutes

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requirements); and Liparota v. United States, 471 U.S. 419 (1985) ("knowingly" read as modifying not only operative verbs "uses . . . or possesses," but also "in a manner not authorized").

[163] Posters <N' Things, Ltd. v. United States, 511 U.S. 513 (1994) (interpreting drug paraphernalia law as requiring that merchant knew that customers in general are likely to use the merchandise with drugs).

[164] See, e.g., United States v. Dotterweich, 320 U.S. 277 (1943) (upholding punishment of corporate officer whose company shipped misbranded and adulterated drugs in violation of Food and Drug laws); United States v. Freed, 401 U.S. 601 (1971) (upholding conviction under National Firearms Act for possession of unregistered hand grenades; Act does not and need not require proof of knowledge that weapons were not registered).

[165] Compare United States v. Freed, 401 U.S. 601 (1971) (knowledge of unregistered status of hand grenades not required for conviction under National Firearms Act) with Staples v. United States, 511 U.S. 600 (1994) (conviction under the Firearms Act must be predicated on defendant's knowledge of the particular characteristics making a semi-automatic rifle convertible to a machine gun and hence subject to registration requirement). The Staples Court distinguished Freed, partly on the basis that, given the "long tradition of widespread lawful gun ownership by private individuals in this country," possession of a semi-automatic rifle should not be equated with possession of hand grenades. See 511 U.S. at 610-12.

[166] United States v. United States Gypsum Co., 438 U.S. 422, 438 (1978) (applying principle to Sherman Act violation).

[167] For not-so-recent reliance on the canon, see Peyton v. Rowe, 391 U.S. 54, 65 (1968) (petitioner is "in custody" in violation of Constitution for purposes of federal habeas corpus statute if any of consecutive sentences he is scheduled to serve was imposed as a result of deprivation of his rights); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (term "security" should be construed broadly, in part because "Securities Exchange Act quite clearly falls into the category of remedial legislation"); and Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 475 (1793) (opinion of Chief Justice Jay) (Constitution's extension of judicial power over controversies between a state and citizens of another state is "remedial, [and] therefore, to be construed liberally").

[168] The Court once referred to a variant of the canon (a statute should be liberally construed to achieve its purposes) as "that last redoubt of losing causes," explaining that "[e]very statute

are arguably "remedial," and consequently courts have wide discretion in determining scope of application. There may also be uncertainty over what "liberal" or "broad" construction means.[169] But if the principle is reformulated as merely requiring that ambiguities in a remedial statute be resolved in favor of persons for whose benefit the statute was enacted,[170] the principle should be no more difficult to apply (once a "remedial" statute has been identified) than the rule of lenity, which counsels resolution of ambiguities in penal statutes in favor of defendants.[171] Absence of this principle from the current Court's lexicon, therefore, may reflect substantive preferences of the Justices as well as recognition of its limitations. Then too, the Court may employ more specific or limited presumptions in circumstances in which earlier Courts might have cited the liberal-remedial maxim,[172] or may instead prefer in such circumstances to analyze a statute without reliance on canonical crutches. Categorizing a statute as "remedial," or even as a "civil rights statute," is no substitute for more refined analysis of the purposes of the particular statute at issue.[173]

Statutes Benefitting Indian Tribes

Another subcategory of the "remedial" statutes canon is the proposition that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally

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proposes, not only to achieve certain ends, but also to achieve them by particular means — and there is often a considerable legislative battle over what those means ought to be." Director, OWCP v. Newport News Shipbuilding, 514 U.S. 122, 135-36 (1995).

[169] Justice Scalia has inveighed against the maxim in a lecture reprinted as a law review article, calling it a "prime example[ ] of lego-babble." The rule, Justice Scalia concluded, "is both of indeterminate coverage (since no one knows what a 'remedial statute' is) and of indeterminate effect (since no one knows how liberal is a liberal construction)." Antonin Scalia, Assorted Canards of Legal Analysis, 40 CASE W. RES. L. REV. 581, 586 (1989-90).

[170] See, e.g., Smith v. Heckler, 820 F.2d 1093, 1095 (9th Cir. 1987) (Social Security Act "is remedial, to be construed liberally . . . and not so as to withhold benefits in marginal cases").

[171] This is not to say, however, that the same fairness considerations that underlie the rule of lenity justify application of the "remedial statute" rule.

[172] See, e.g., King v. St. Vincent's Hosp., 502 U.S. 215, 220 n.9 (1991) ("provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); FDIC v. Meyer, 510 U.S. 471, 480 (1994) ("sue-and-be-sued" waivers of sovereign immunity should be liberally construed).

[173] See, e.g., Felder v. Casey, 487 U.S. 131, 149 (1988) ("the Congress which enacted [42 U.S.C.] § 1983 over 100 years ago would have rejected [a requirement of exhaustion of state remedies] as inconsistent with the remedial purposes of its broad statute"); Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969) ("A narrow construction of § 1982 would be inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866"); Northeast Marine Terminal v. Caputo, 432 U.S. 249, 268 (1977) ("The language of the 1972 Amendments [to the LHWCA] is broad and suggests that we should take an expansive view of the extended coverage. Indeed such a construction is appropriate for this remedial legislation.").

construed to favor Indians."[174] Most cases resolving issues relating to tribal matters implicate some variation of this proposition,[175] but frequently there are also statute-specific considerations that amplify[176] or outweigh[177] any such generalities.

Miscellany

Titles of Acts or Sections

Although "it has long been established that the title of an Act 'cannot enlarge or confer powers,'"[178] the title of a statute or section "can aid in resolving an ambiguity in the legislation's text."[179] As Chief Justice Marshall explained, "[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived."[180] A title or heading, however, being only "a short-hand reference to the general subject matter involved" and "not meant to take the place of the detailed provisions of the text,"[181] can provide only limited interpretive aid. Thus, a heading may shed light on the section's basic

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[174] Bryan v. Itasca County, 426 U.S. 373, 392 (1976) (quoting Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918)). An even less restrictive statement is the following: "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985).

[175] See, e.g., Washington v. Confederated Tribes, 447 U.S. 134, 154 (1980) (tribal sovereignty is subordinate only to the federal government, not to the states); Bryan v. Itasca County, 426 U.S. 373, 393 (1976) (states may tax reservation Indians only if Congress has indicated its consent); Hagen v. Utah, 510 U.S. 399, 411-12 (1994) (mild presumption against statutory diminishment of reservation land).

[176] See, e.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214-22 (1987) (federal policy promoting tribal self-government and self-sufficiency, reflected in numerous statutes, is frustrated by state and county restrictions on operation of bingo and card games, profits from which were Tribes' sole source of income).

[177] See, e.g., Negonsott v. Samuels, 507 U.S. 99, 110 (1993) (fact that Kansas Act unambiguously confers jurisdiction on Kansas courts over crimes on reservations makes resort to canon inappropriate).

[178] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 19 n.14 (1981) (quoting United States v. Oregon & California R.R., 164 U.S. 526, 541 (1896) and Cornell v. Coyne, 192 U.S. 418, 430 (1904), and citing United States v. Fisher, 2 Cranch 358, 386 (1805) and Yazoo & Mississippi Valley R.R. v. Thomas, 132 U.S. 174, 188 (1889)).

[179] INS v. National Center for Immigrants' Rights, 502 U.S. 183, 189-90 (1991) (citing Mead Corp. v. Tilley, 490 U.S. 714, 723 (1989); and FTC v. Mandel Bros., Inc., 359 U.S. 385, 388-89 (1959)).

[180] United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805).

[181] Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 528 (1947).

thrust,[182] or on ambiguous language in the text, but it "cannot limit the plain meaning of the text,"[183] and "has no power to give what the text of the statute takes away."[184]

Preambles ("Whereas Clauses")

Preambles, or "whereas clauses," precede the enacted language, "are not part of the act," and consequently "cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous."[185] Nonetheless, "whereas clauses" sometimes serve the same purpose as findings and purposes sections, and can provide useful insight into congressional concerns and objectives.[186] As with titles, preambles can sometimes help resolve ambiguity in enacted language.[187]

Findings and Purposes Sections

In applying the general principle that statutory language should be interpreted in a manner consistent with statutory purpose, courts naturally look to the stated purposes of legislation in order to resolve ambiguities in the more specific language of operative sections. For example, the Court relied in part on the Racketeer Influenced and Corrupt Organizations (RICO) statute's broad purpose of seeking "the eradication of organized crime in the United States," to conclude that the term "enterprise" as used in the act includes criminal conspiracies

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[182] See, e.g., Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) (words "criminal penalties" in section heading relied on as one indication that the section does not define a separate crime, but instead sets out penalties for recidivists); INS v. National Center for Immigrants' Rights, 502 U.S. 183, 189 (1991) ("text's generic reference to 'employment' should be read as a reference to the 'unauthorized employment' identified in the paragraph's title).

[183] Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 529 (1947); Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 256 (2004) (quoting Trainmen).

[184] Demore v. Kim, 538 U.S. 510, 535 (2003) (O'Connor, J., concurring) (citing INS v. St. Cyr, 533 U.S. 289, 308-09 (2001)).

[185] Yazoo and Mississippi Valley R.R. v. Thomas, 132 U.S. 174, 188 (1889).

[186] See, e.g., Donovan v. Dewey, 452 U.S. 594, 602 n.7 (1981) (citing the preamble to the Mine Safety and Health Act as evidence of congressional awareness of the hazardous nature of the mining industry); Gray v. Powell, 314 U.S. 402, 418 (Justice Roberts, dissenting) (citing the preamble of the Bituminous Coal Act as evidence of congressional purpose).

[187] "[T]he preamble may be referred to in order to assist in ascertaining the intent and meaning of a statute fairly susceptible of different constructions." Price v. Forrest, 173 U.S. 410, 427 (1899).

organized solely for illegitimate purposes, and is not limited to legitimate businesses that are infiltrated by organized crime.[188]

It is easy, however, to place too much reliance on general statutory purposes in resolving narrow issues of statutory interpretation. Legislation seldom if ever authorizes each and every means that can be said to further a general purpose,[189] and there is also the possibility that stated or inferred purposes may in some instances conflict with one another.[190]

"Sense of Congress" Provisions

"Sense of Congress" language is appropriate if Congress wishes to make a statement without making enforceable law. Ordinarily, a statement that it is the "sense of Congress" that something "should" be done is merely precatory, and creates no legal rights.[191] In the appropriate context "sense of Congress" language can have the same effect as statements of congressional purpose — that of resolving ambiguities in more specific language of operative sections of a law — but if that is the intent the more straightforward approach is to declare a "purpose" rather than a "sense."[192]

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[188] United States v. Turkette, 452 U.S. 576, 588-90 (1981) (relying on RICO statement of findings and purpose, 18 U.S.C. § 1961 nt.). See also Knebel v. Hein, 429 U.S. 288, 292 n.9 (1977) (rejecting, in view of Secretary of Agriculture's broad discretion to administer the Food Stamp Program, and in view of broad purpose of Act to "increase [households'] food purchasing power" (7 U.S.C. § 2011), a holding that the Secretary lacked authority to determine that receipt of commuting expenses to attend a training program should be counted as household "income" determining eligibility for food stamps).

[189] "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (per curiam).

[190] Compare Justice Brennan's opinion of the Court in Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 50-51 (1989) (Congress used undefined term "domicile" so as to protect tribal jurisdiction in child custody cases), with Justice Stevens' dissent, id. at 54 (Congress intended to protect the parents as well as the tribe).

[191] Monahan v. Dorchester Counseling Ctr., Inc., 961 F.2d 987, 994-95 (1st. Cir. 1992) ("sense of Congress" that each state "should" review and revise its laws to ensure services for mental health patients); Yang v. California Dep't of Social Services, 183 F.3d 953, 958-61 (9th Cir. 1999) ("sense of Congress" that Hmong and other Lao refugees who fought in Vietnam war "should" be considered veterans for purposes of receiving certain welfare benefits).

[192] See Accardi v. Pennsylvania R.R., 383 U.S. 225, 229 (1966) ("sense of Congress" that reemployed veterans should not lose seniority as a result of military service evidenced "continuing purpose" already established by existing law); State Highway Comm'n v. Volpe, 479 F.2d 1099, 1116 (8th Cir. 1973) ("sense of Congress" language "can be useful in resolving ambiguities in statutory construction," and in reinforcing the meaning of earlier law).

Savings Clauses

Savings (or "saving") clauses are designed to preserve remedies under existing law. "The purpose of a savings clause is merely to nix an inference that the statute in which it appears is intended to be the exclusive remedy for harms caused by the violation of the statute."[193] A corollary is that a savings clause typically does not create a cause of action.[194]

Inclusion of a savings clause, however, does not make all pre-existing remedies compatible with the newly enacted law. If there is a conflict, the savings clause gives way.[195] Courts will attempt to give the savings language some effect, but may have to narrow that effect to avoid eviscerating the new law. A reference to specific remedies to be preserved can ease interpretation.[196] In some cases, the legislative history of the savings provision can reveal its purpose.[197] In other cases courts must reason from the scope and purpose of the new statute. For example, when the Carmack Amendment to the Interstate Commerce Act imposed comprehensive federal regulation governing the liability of interstate carriers, the Court held that savings language preserving "any remedy or right of action . . . under existing law" applied only to federal, not state remedies. To allow resort to state law remedies that were inconsistent with the federal regulation would negate the Amendment's effect. "[T]he act cannot be said to destroy itself," the

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[193] PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 618 (7th Cir. 1998).

[194] The "sole function" of a saving clause in CERCLA, the Superfund law, is to clarify that the provision authorizing a limited right of contribution "does nothing to 'diminish' any cause(s) of action for contribution that may exist independently . . . ." Cooper Industries v. Aviall Servs., 543 U.S. 157, 165-68 (2004).

[195] Even if there is no conflict, courts may construe a savings clause narrowly. See, e.g., City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 125 (2005) (relief is not available under 42 U.S.C. § 1983 as an alternative to a new statutory cause of action to enforce a new statutory right; a savings clause providing that the amendments do not "impair" existing law has "no effect" on the availability of section 1983 actions because no such relief was available prior to creation of the new right).

[196] See, e.g., 30 U.S.C. § 189, which provides that nothing in the Mineral Leasing Act shall be construed to affect the rights of state and local governments to levy and collect taxes on improvements and "output of mines." The Supreme Court relied on this language in holding that states may impose severance taxes on coal extracted from federal lands. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 631-33 (1981).

[197] See, e.g., Merrill, Lynch, Pierce, Fenner, & Smith v. Curran, 456 U.S. 353, 386-87 (1982) ("saving clause" stating that an amendment to the Commodity Exchange Act was not intended to "supersede or limit the jurisdiction" of state or federal courts, placed in the bill to alleviate fears that the new remedies would be deemed exclusive, was an indication of congressional intent not to eliminate an implied private right of action under the act).

Court concluded.[198] Even very clear savings language will not be allowed to thwart what the Court views as the objective of the federal enactment.[199]

"Notwithstanding Any Other Provision of Law"

Congress sometimes underscores statutory directives by requiring that they be undertaken "notwithstanding any other provision of law." This phrase seldom aids interpretation. It is the statutory equivalent of a parent telling a child "I'm serious," or "I really mean it." Despite the admonition, courts and administrators still must determine what the underlying directive means. And, ordinarily, there will still be other provisions of law that apply; the trick is to determine which ones.[200] Courts have recognized these difficulties. One court, for example, ruled that a directive to proceed with offering and awarding of timber sale contracts "notwithstanding any other provision of law" meant only "notwithstanding any provision of environmental law," and did not relieve the Forest Service from complying with federal contracting law requirements governing such matters as non-discrimination, small business set-asides, and export restrictions.[201] "We have repeatedly held that the phrase 'notwithstanding any other law' is not always construed literally . . . and does not require the agency to disregard all otherwise applicable laws."[202] In the few instances in which the

[198] Adams Express Co. v. Croninger, 226 U.S. 491, 507 (1913). Accord, AT&T v. Central Office Tel., Inc., 524 U.S. 214, 227 (1998). In City of Milwaukee v. Illinois, 451 U.S. 304, 328-29 (1981), the Court held that the Federal Water Pollution Control Act of 1972 created a comprehensive regulatory program that eliminated previously available federal common law remedies. Savings language in the citizen suit section providing that "nothing in this section shall restrict any right which any person . . . may have under . . . common law" was irrelevant, since it was the act's standards-setting and permitting provisions, not the citizen suit section, that ousted federal common law.

[199] See, e.g., Geier v. American Honda Motor Co., 529 U.S. 861 (2000) (state common law negligence action against auto manufacturer is preempted by a federal motor vehicle safety standard in spite of statute's savings clause providing that "compliance with" a safety standard "does not exempt any person from any liability under common law"). But see Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2003) (finding no such conflict preemption, and concluding that the Federal Boat Safety Act's savings clause, providing that compliance with federal standards "does not relieve a person from liability at common law," "buttresses" the conclusion that the act's preemption language does not encompass common-law claims).

[200] In this sense, the statutory phrase is analogous to a parent telling a child "don't under any circumstances leave the house until I return." The parent doesn't really mean for the child to remain under any and all circumstances, but instead assumes that the child will try to get out if the house catches on fire or some other emergency occurs.

[201] Oregon Natural Resources Council v. Thomas, 92 F.3d 792 (9th Cir. 1996). The court harmonized the "notwithstanding" phrase with other provisions of the act that pointed to the limiting construction.

[202] Id. at 796. The Three-Sisters Bridge saga offers another example. After a court decision had ordered a halt to construction of the bridge pending compliance with various requirements in

"notwithstanding" phrase may be marginally helpful to interpretation, it still must play second fiddle to a clear and unambiguous statement of the underlying directive,[203] and it is not as helpful as spelling out which other laws are to be disregarded.[204]

Implied Private Right of Action

From time to time courts have held that a federal statute that does not explicitly create a private cause of action nonetheless implicitly creates one.[205] This notion

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D.C. law for public hearings, etc., the project was abandoned. Congress then directed that construction proceed on the bridge project and related highway projects "notwithstanding any other provision of law, or any court decision or administrative action to the contrary." The same section, however, directed that "such construction . . . shall be carried out in accordance with all applicable provisions of title 23 of the United States Code." The federal appeals court held that, notwithstanding the "notwithstanding" language, compliance with federal highway law in title 23 (including requirements for an evidentiary hearing, and for a finding of no feasible and prudent alternative to use of parkland) was still mandated. D.C. Fed'n of Civic Ass'ns v. Volpe, 434 F.2d 436 (D.C. Cir. 1970). Then, following remand, the same court ruled that compliance with 16 U.S.C. § 470f, which requires consultation and consideration of effects of such federally funded projects on historic sites, was also still mandated. 459 F. 2d 1231, 1265 (1972).

[203] See, e.g., Schneider v. United States, 27 F.3d 1327, 1331 (8th Cir. 1994). The court there rejected an argument that language in the Military Claims Act ("[n]otwithstanding any other provision of law, the settlement of a claim under section 2733 . . . of this title is final and conclusive") does not preclude judicial review, but merely cuts off other administrative remedies. Noting different possible interpretations of "final," "final and conclusive," and the provision's actual language, the court concluded that "[t]o interpret the section as precluding only further administrative review would be to render meaningless the phrase <notwithstanding any other provision of law.'"

[204] To be sure, not every potential roadblock can be anticipated and averted by narrowly tailored language, and broad language may be necessary to ensure that statutory purposes are not frustrated. But, in spite of the interpretation in Schneider, supra n.203, the "notwithstanding" phrase is a blunt instrument. The Trans-Alaska Pipeline Authorization Act is a better model for such situations. That act directed that the Pipeline "be constructed promptly without further administrative or judicial delay or impediment," specified that construction was to proceed generally in accordance with plans set forth in the already-prepared Final Environmental Impact Statement, declared that no further action was to be required under the National Environmental Policy Act, specified which subsections of the law governing rights-of-way across federal land (a law that had been relied upon in earlier litigation to enjoin the project) were to apply, and severely limited judicial review. See 43 U.S.C. § 1652. For a less complete identification of laws to be disregarded, and some concomitant interpretational problems, see Norfolk & Western Ry. v. Train Dispatchers, 499 U.S. 117, 138-39 (1991) (two dissenting Justices disputed the Court's conclusion that the exemption of a carrier in a rail consolidation from "the antitrust laws and all other law, including State and municipal law," comprehended an exemption from the terms of a collective bargaining agreement).

[205] What is usually at issue in these cases is whether a federal statute creates a right in a private individual to sue another private entity. Persons alleging that federal statutory rights have been violated by state or local governmental action may be able to sue state officials under 42 U.S.C. § 1983.

traces to the old view that every right must have a remedy.[206] As the Supreme Court put it in an early implication case, where "disregard of the command of a statute . . . results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied."[207] The Court has gradually retreated from that position,[208] and now is willing to find an implied private right of action only if it concludes that Congress intended to create one. This raises an obvious question: if Congress intended to create a cause of action, why did it not do so explicitly?[209] While the Court has attempted to explain that it does not mean actual intent,[210] the test now seems weighted against finding an implied private cause of action.[211] Legislative drafters wishing to create a private right of action should therefore do so explicitly.

Incorporation by Reference

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[206] Marbury v. Madison, 5 U.S. (1 Cranch) 163 (1803) (citing Blackstone's Commentaries).

[207] Texas & Pacific Ry. v. Rigsby, 241 U.S. 39-40 (1916).

[208] See, e.g., Cort v. Ash, 422 U.S. 66 (1975) (creating a four-part test to determine whether a private right of action was implied, one part of which was congressional intent); and Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979) (calling congressional intent the "central inquiry").

[209] There may be plausible answers for some older statutes. Congress may have enacted the law at a time when the old rule held sway favoring remedies for statutory rights, or Congress may have patterned the language after language in another law that had been interpreted as creating a private right of action. See, e.g., Cannon v. University of Chicago, 441 U.S. 677, 710-11 (1979) (Congress patterned Title IX of the Civil Rights Act after Title VI, and believed that Title VI was enforceable by private action).

[210] "Our focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private right of action. The implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting error when Congress simply forgot to codify its evident intention . . . ." This "intention," the Court went on, "can be inferred from the language of the statute, the statutory structure, or some other source." Thompson v. Thompson, 484 U.S. 174, 179 (1988). Concurring in the same case, Justice Scalia found himself "at a loss to imagine what congressional intent to create a private right of action might mean, if it does not mean that Congress had in mind the creation of a private right of action." Id. at 188. Justice Scalia instead advocated "[a] flat rule that private rights of action will not be implied in statutes hereafter enacted," explaining that "[a] legislative act so significant, and so separable from the remainder of the statute, as the creation of a private right of action seems to me so implausibly left to implication that the risk should not be endured." Id. at 192.

[211] See, e.g., Alexander v. Sandoval, 532 U.S. 275, 285 (2001) (there is no private right of action to enforce disparate-impact regulations issued under the general regulation-issuing authority of section 602 of Title VI of the Civil Rights Act; even though a private right of action does exist to enforce the anti-discrimination prohibition of section 601, the disparate-impact regulations "do not simply apply § 601," but go beyond it). For analysis of the whole topic, including the changing approach by the Court, see Susan J. Stabile, The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action, 71 NOTRE DAME L. REV. 861 (1996).

Interpretational difficulties may also arise if one statute incorporates by reference provisions of an existing statute. A leading treatise declares that incorporations by "general reference" normally include subsequent amendments, but that incorporations by "specific reference" normally do not.[212] A general reference "refers to the law on the subject generally," while a specific reference "refers specifically to a particular statute by its title or section number."[213]

Severability

When one section of a law is held unconstitutional, courts are faced with determining whether the remainder of the statute remains valid, or whether the whole statute is nullified. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."[214] Congress frequently includes a pro forma severability clause in a statute,[215] and this reinforces a "presumption" of severability by removing much of the doubt about congressional intent.[216] A severability clause does not guarantee, however, that what remains of a statute after a portion has been invalidated is "fully operative"; courts sometimes find that valid portions of a statute cannot stand on their own even though Congress has included a severability clause.[217] Far less frequently, Congress includes non-severability language providing that remaining sections of a law shall be null and void if a part (sometimes a specified part) is

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[212] 2B SUTHERLAND, STATUTES AND STATUTORY INTERPRETATION, § 51.07 (Norman J. Singer ed., 6th ed. 2000 revision).

[213] Id. A clear example of a general incorporation was afforded by § 20 of the Jones Act, providing that in an action for wrongful death of a seaman, "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable." As the Court explained in Panama R.R. Co. v. Johnson, 264 U.S. 375, 391-92 (1924), this "generic reference" was "readily understood" as a reference to the Federal Employer Liability Act and its amendments.

[214] Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976)).

[215] See, e.g., 2 U.S.C. § 1438 (§ 509 of the Congressional Accountability Act of 1995): "If any provision of this Act or the application of such provision to any person or circumstance is held to be invalid, the remainder of this Act and the application of the provisions of the remainder to any person or circumstance shall not be affected thereby." These provisions are also sometimes called "separability" clauses. See, e.g., 29 U.S.C. § 114.

[216] Alaska Airlines, 480 U.S. at 486. Absence of a severability clause does not raise a presumption against severability. New York v. United States, 505 U.S. 144, 186 (1992).

[217] "A severability clause requires textual provisions that can be severed." Reno v. ACLU, 521 U.S. 844, 882 (1997). See also Hill v. Wallace, 259 U.S. 44 (1922); and Carter v. Carter Coal Co., 298 U.S. 238, 312-16 (1936).

held unconstitutional.[218] Case law is sparse,[219] but there is no apparent reason why courts should refuse to honor a clearly expressed non-severability directive.[220]

Deadlines for Administrative Action

"If a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."[221] Absent specified consequences, such deadlines "are at best precatory rather than mandatory,"[222] and are read "as a spur to prompt action, not as a bar to tardy completion."[223] "A statute directing official action needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire when the job is supposed to be done."[224] Thus, agency actions taken after a deadline are ordinarily upheld as valid.[225] Although courts are loath to impose "coercive" sanctions that would defeat the purpose of the underlying agency duty, courts sometimes will lend their authority, backed by the possibility

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[218] See, e.g., 25 U.S.C. § 941m(a) (§ 15(a) of the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993): "If any provision of section 941b(a), 941c, or 941d of this title is rendered invalid by the final action of a court, then all of this subchapter is invalid."

[219] But see, e.g., Zobel v. Williams, 457 U.S. 55, 65 (1982) (observing in dictum that, due to inclusion of non-severability language in an Alaska law, "we need not speculate as to the intent of the Alaska Legislature").

[220] See Israel E. Friedman, Comment, Inseverability Clauses in Statutes, 64 U. CHI. L. REV. 903 (1997). Friedman contends that "inseverability clauses are fundamentally different from severability clauses and should be shown greater deference." Id. at 904. Inseverability clauses, he points out, "are anything but boilerplate," usually are included only after extensive debate, and are often designed to preserve a legislative compromise. Id. at 911-13.

[221] United States v. James Daniel Good Real Property, 510 U.S. 43, 63 (1993) (failure of customs agent to "report immediately" a customs seizure should not result in dismissal of a forfeiture action).

[222] Liesegang v. Secretary of Veterans Affairs, 312 F.3d 1328, 1377 (Fed. Cir. 2002).

[223] Barnhart v. Peabody Coal Co., 537 U.S. 149, 172 (2003).

[224] Barnhart v. Peabody Coal Co., 537 U.S. at 161.

[225] In Peabody Coal, the Court held that a deadline in the Coal Industry Retiree Health Benefit Act for assignment of retired beneficiaries to coal companies did not prevent assignment after the deadline. See also United States v. Montalvo-Murillo, 495 U.S. 711 (1990) (failure to comply with the Bail Reform Act's requirement of an "immediate" hearing does not mandate release pending trial); Brock v. Pierce County, 476 U.S. 253 (1986) (Secretary of Labor's failure to comply with the statutory deadline for beginning an investigation about misuse of federal funds does not divest the Secretary of authority to launch a tardy investigation).

of contempt for recalcitrant agency officials, by ordering compliance with statutory directives after a missed deadline.[226]

Legislative History

Plain Meaning Rule

Although over the years the plain meaning rule, which purports to bar courts from relying on legislative history when statutory language is plain, may have been more honored in the breach than the observance,[227] that trend has reversed. And even when breached, the "rule" is usually paid lip service, and becomes the semantic bridge to a court's consideration of legislative history. That is to say, a court that actually relies on legislative history will usually do so only after expressing a belief that the statutory language is not plain, but instead is unclear or "ambiguous."[228]

Significant differences arise, however, in the willingness of courts to label particular statutory language as "ambiguous" and thereby legitimize resort to legislative history. Some judges are more confident than others in their ability to interpret statutory text, and some are more convinced than others of the propriety of attempting to do so without resort to the "extrinsic" aid of legislative

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[226] See, e.g., NRDC v. Train, 510 F.2d 692 (D.C. Cir. 1975) (setting general guidelines, based on equitable principles, for courts to follow in mandating agency compliance following missed deadlines); Sierra Club v. Thomas, 658 F. Supp. 165 (N.D. Cal. 1987) (using the length of time initially set by Congress as the measure of how much additional time to allow EPA after the agency missed a deadline for promulgating regulations).

[227] The classic extremes are represented by Caminetti v. United States, 242 U.S. 470 (1917), and Church of the Holy Trinity v. United States, 143 U.S. 457 (1892). In Caminetti, the Court applied the plain meaning rule to hold that the Mann Act, or "White Slave Traffic Act," which prohibits transportation of women across state lines for purposes of "prostitution, debauchery, or any other immoral purpose," clearly applies to noncommercial immorality, in spite of legislative history showing that the purpose was to prohibit the commercial "white slave trade." In Holy Trinity, the Court held that a church's contract with a foreigner to come to this country to serve as its minister was not covered by a statutory prohibition on inducements for importation of aliens "to perform labor or service of any kind." The Court brushed aside the fact that the statute made no exception for ministers, although it did so for professional actors, artists, lecturers, singers, and domestic servants, and declared the law's purpose to be to prevent importation of cheap manual labor. "A thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers," the Court explained. 143 U.S. at 459.

[228] "In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress." United States v. Great Northern Ry., 287 U.S. 144 (1932). On the other hand, "we do not resort to legislative history to cloud a statutory text that is clear." Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994).

history.[229] Correspondingly, there are basic differences in approach, from narrow focus on the clarity or ambiguity of the particular statutory phrase at issue, to recognition that phrases that may seem ambiguous in isolation may be clarified by statutory context.[230] And, inevitably, there are real differences in the clarity of statutory language.[231]

Agreement on the basic meaning of the plain meaning rule — if it occurs — does not guarantee agreement over the rule's application. There have been cases in which Justices of the Supreme Court have agreed that the statutory provision at issue is plain, but have split 5-4 over what that plain meaning is.[232] There are other cases in which strict application is simply ignored; courts, after concluding that the statutory language is plain, nonetheless look to legislative history, either to confirm that plain meaning,[233] or to refute arguments that a contrary interpretation was "intended."[234] The one generally recognized exception to the rule is that a plain meaning is rejected if it would produce an "absurd result."[235]

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[229] "When aid to the construction of the meaning of words, as used in the statute, is available, there certainly can be no <rule of law' which forbids its use, however clear the words may appear on <superficial examination.'" United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940). Justice Frankfurter, dissenting in United States v. Monia, 317 U.S. 424 (1943), made much the same point: "[t]he notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." Justice Scalia explains why he opposes ready resort to legislative history: "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent." INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (concurring).

[230] United Savings Ass'n v. Timbers of Inwood Forest Associates, 484 U.S. 365, 371 (1988) ("only one of the permissible meanings [of an ambiguous phrase] produces a substantive effect that is compatible with the rest of the law").

[231] Compare United States v. Locke, 471 U.S. 84, 92 (1985) (a requirement that a filing be made "prior to December 31" could not be stretched to permit a filing on December 31) with Davis v. United States, 495 U.S. 472, 479 (1990) (phrase "for the use of" — a phrase which "on its face . . . could support any number of different meanings," is narrowed by reference to legislative history). In Locke the Court explained that "the plain language of the statute simply cannot sustain the gloss appellees would put on it. . . . [W]ith respect to filing deadlines a literal reading of Congress' words is generally the only proper reading of those words. To attempt to decide whether some date other than the one set out in the statute is the date actually 'intended' by Congress is to set sail on an aimless journey." 471 U.S. at 93. Despite the evident clarity of this language, three Justices dissented.

[232] See, e.g., Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) (disagreement over the scope of civil RICO).

[233] Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 209 (1994) ("The legislative history of the Mine Act confirms this interpretation").

[234] See Darby v. Cisneros, 509 U.S. 137, 147 (1993) ("Recourse to the legislative history of § 10(c) is unnecessary in light of the plain meaning of the statutory text. Nevertheless, we consider that history briefly because both sides have spent much of their time arguing about its implications.");

There is scholarly debate over the merits of the plain meaning rule.[236] There is probably general consensus, however, that the plain meaning rule aptly characterizes interpretational priorities (statutory language is primary, legislative history secondary), but that its usage often merely announces rather than determines results.

Uses of Legislative History

Once a court has decided to look to legislative history, there is a question of how legislative history should be used. Possibilities range from background information about the general problems Congress sought to address in the legislation, to explanation of the specific statutory language at issue, to specific instructions about how to deal with the particular factual situation giving rise to the litigation. The first of these uses is generally considered legitimate, the second may or may not be, and the third is generally considered to be improper.

Reference to legislative history for background and historical context is commonplace. A "proper construction frequently requires consideration of [a statute's] wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve."[237]

Toibb v. Radloff, 501 U.S. 157, 162 (1991) ("even were we to consider the sundry legislative comments urged [upon us] . . . , the scant legislative history does not suggest a 'clearly expressed legislative intent [to the] contrary'"); Arcadia v. Ohio Power Co., 498 U.S. 73, 84 n.2 (1990) (rejecting reliance on legislative history said to be "overborne" by the statutory text). The Court has declared that it will not allow a literal reading of the statute to produce a result "demonstrably at odds with the intentions of its drafters," but in the same breath has indicated that it is only "the exceptional case" in which that can occur. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982).

[235] See, e.g., United States v. Granderson, 511 U.S. 39, 47 n.5 (1994) (dismissing an interpretation said to lead to an absurd result); Dewsnup v. Timm, 502 U.S. 410, 427 (1992) (Justice Scalia, dissenting) ("[i]f possible, we should avoid construing the statute in a way that produces such absurd results"); Public Citizen v. Department of Justice, 491 U.S. 440, 454 (1989) ("[w]here the literal reading of a statutory term would compel 'an odd result,' . . . we must search for other evidence of congressional intent to lend the term its proper scope").

[236] See, e.g., Frederick Schauer, Statutory Construction and the Coordinating Function of Plain Meaning, 1990 SUP. CT. REV. 231; Arthur W. Murphy, Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 COLUM L. REV. 1299 (1975); Clark Cunningham, Judith Levi, Georgia Green, and Jeffrey Kaplan, Plain Meaning and Hard Cases, 103 YALE L.J. 1561 (1994).

[237] Wirtz v. Bottle Blowers Ass'n, 389 U.S. 463, 468 (1968). For examples of reliance on legislative history for guidance on broad congressional purposes, see Shell Oil Co. v. Iowa Dep't of Revenue, 488 U.S. 19, 26 (1988) (purposes of OCSLA, as evidenced in legislative history, confirm a textual reading of the statute and refute the oil company's reading); Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 515 (1990) (reference to Senate report for evidence of "the primary objective" of the Boren amendment to the Medicaid law).

A distinct but related inquiry focuses not on the explanations that accompanied committee or floor consideration, but rather on the sequence of changes in bill language. Consideration of the "specific history of the legislative process that culminated in the [statute at issue] affords . . . solid ground for giving it appropriate meaning" and for resolving ambiguity present in statutory text.[238] Selection of one House's version over that of the other House may be significant.[239] In some circumstances rejection of an amendment can be important. While courts are naturally reluctant to attribute significance to the failure of Congress to act,[240] that reluctance may be overcome if it can be shown that Congress considered and rejected bill language that would have adopted the very position being urged upon the court.[241]

Explanatory legislative history is also consulted on occasion for more narrowly focused explanation of the meaning of specific statutory language that a court believes is unclear.[242] Reliance on legislative history for such purposes may be more controversial, either because contrary indications may be present in other

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[238] United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 222 (1952). "Statutory history" as well as bill history can also be important. See, e.g., United States v. Wells, 519 U.S. 482, 492-93 (1997) (consolidation of a number of separate provisions supports the "natural reading" of the current law); Booth v. Churner, 532 U.S. 731, 740 (2001) (elimination of "the very term" relied on by the Court in an earlier case suggests that Congress desired to preclude that result in future cases).

[239] See, e.g., United States v. Riverside Bayview Homes, 474 U.S. 121, 136-37 (1985) (attaching significance to the conference committee's choice of the Senate version, retaining the broad definition of "navigable waters" then in current law, over a House version that would have narrowed the definition).

[240] "This Court generally is reluctant to draw inferences from Congress' failure to act. Indeed, those members of Congress who did not support these bills may have been as convinced by testimony that the NGA already provided 'broad and complete . . . jurisdiction and control over the issuance of securities' as by arguments that the matter was best left to the States." Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988).

[241] Pacific Gas & Elec. Co. v. Energy Resources Conserv. & Dev. Comm'n, 461 U.S. 190, 220 (1983) (noting that language had been deleted to insure that there be no preemption); INS v. Cardoza-Fonseca, 480 U.S. 421, 441-42 (1987) (rejection of Senate language limiting the Attorney General's discretion in granting asylum in favor of House language authorizing grant of asylum to any refugee); Doe v. Chao, 540 U.S. 614, 622 (2004) ("drafting history show[s] that Congress cut the very language in the bill that would have authorized any presumed damages").

[242] See, e.g., Reves v. Ernst & Young, 507 U.S. 170, 179-83 (1993) (RICO section proscribing "conduct" of racketeering activity is limited to persons who participate in the operation or management of the enterprise); Gustafson v. Alloyd Co., 513 U.S. 561, 581-82 (1995) (legislative history supports reading of "prospectus" in Securities Act as being limited to initial public offerings); Babbitt v. Sweet Home Chapter, 515 U.S. 687, 704-06 (1995) (relying on committee explanations of word "take" in Endangered Species Act).

passages of legislative history,[243] or because the degree of direction or detail may be an unwarranted narrowing of a more general statutory text.[244] The concern in the latter instances is whether the legislative history is a plausible explanation of language actually contained in the statutory text, or whether instead explanatory language (e.g., report language containing committee directives or "understandings") outpaces that text. As the Court observed in rejecting reliance on legislative history "excerpts" said to reflect congressional intent to preempt state law, "we have never [looked for] congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text. . . . [U]nenacted approvals, beliefs, and desires are not laws."[245]

Statutory silence is not always "pregnant,"[246] and silence of legislative history is seldom significant.[247] There is no requirement that "every permissible application of a statute be expressly referred to in its legislative history."[248] The Court does,

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[243] The dissent in Babbitt v. Sweet Home found legislative history that suggested a narrower use of the word "take," reflecting a consistent distinction between habitat conservation measures and restrictions on "taking" of endangered species. 515 U.S. at 726-30 (Justice Scalia).

[244] "The language of a statute — particularly language expressly granting an agency broad authority — is not to be regarded as modified by examples set forth in the legislative history." Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 649 (1990).

[245] Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 501 (1988). The Court explained further that, "without a text that can, in light of those [legislative history] statements, plausibly be interpreted as prescribing federal pre-emption it is impossible to find that a free market was mandated by federal law." See also Secretary of the Interior v. California, 464 U.S. 312, 323 n.9 (1984) (a committee report directive purporting to require coordination with state planning is dismissed as purely "precatory" when the accompanying bill plainly exempted federal activities from such coordination); Shannon v. United States, 512 U.S. 573, 583 (1994) (Court will not give "authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute"); and Roeder v. Islamic Republic of Iran, 333 F.3d 228, 237-38 (D.C. Cir. 2003) (explanatory statement accompanying conference report purported to explain a previous enactment rather than the current one, and could not operate to abrogate an executive agreement). For what is arguably a departure from the general principle, see Wisconsin Project on Nuclear Arms Control v. United States Dep't of Commerce, 317 F.3d 275 (D.C. Cir. 2003) (relying on "congressional intent" relating to a lapsed statute). As dissenting Judge Randolph characterized the majority's approach, "the statute has expired but its legislative history is good law." Id. at 285.

[246] See "Statutory Silence," supra, p. 16.

[247] "[A] statute is not to be confined to the 'particular application[s] . . . contemplated by the legislators.'" Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980) (ruling that inventions not contemplated when Congress enacted the patent law are still patentable if they fall within the law's general language) (quoting Barr v. United States, 324 U.S. 83, 90 (1945)).

[248] Moskal v. United States, 498 U.S. 103, 111 (1990). Accord, Pittston Coal Group v. Sebben, 488 U.S. 105, 115 (1988) ("it is not the law that a statute can have no effects which are not mentioned in its legislative history"); PBGC v. LTV Corp., 496 U.S. 633, 649 (1990) ("the language of a statute — particularly language expressly granting an agency broad authority — is not to be

however, occasionally attach import to the absence of any indication in a statute or its legislative history of an intent to effect a "major change" in well-established law.[249] And sometimes the Justices disagree over the significance of congressional silence.[250]

Post-Enactment or "Subsequent" Legislative History

"The legislative history of a statute is the history of its consideration and enactment. 'Subsequent legislative history' — which presumably means the post-enactment history of a statute's consideration and enactment — is a contradiction in terms."[251] The Court frequently observes that "'[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'"[252] Actually, however, "post-enactment history" and "subsequent legislative history" are terms sometimes used as loose descriptions of several different kinds of congressional actions and inactions, and it is helpful to distinguish among them. The interpretational value — if any — of the views of a subsequent Congress depends upon how those views are expressed.

Subsequent legislation

If the views of a later Congress are expressed in a duly enacted statute, then the views embodied in that statute must be interpreted and applied. Occasionally a later enactment declares congressional intent about interpretation of an earlier enactment rather than directly amending or clarifying the earlier law. Such

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regarded as modified by examples set forth in the legislative history"). See also Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998) (male-on-male sexual harassment is covered by Title VII although it "was assuredly not the principal evil Congress was concerned with"); and Cook County v. United States ex rel. Chandler, 538 U.S. 119, 128-29 (2003) (local governments are subject to qui tam actions under the expansive language of the False Claims Act even though the enacting Congress was primarily concerned with fraud by Civil War contractors).

[249] Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-27 (1979) (silence of legislative history "is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely"); United Savings Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 380 (1988) (major change "would not likely have been made without specific provision in the text of the statute," and it is "most improbable that it would have been made without even any mention in the legislative history"); Dewsnup v. Timm, 502 U.S. 410, 419 (1992) (Court reluctant to interpret the Bankruptcy Code as effecting "a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history").

[250] Compare Justice Stevens' opinion for the Court in Chisom v. Roemer, 501 U.S. 380, 396 n.23 (1991) ("Congress' silence in this regard can be likened to the dog that did not bark") with Justice Scalia's dissenting rejoinder, id. at 406 ("apart from the questionable wisdom of assuming that dogs will bark when something important is happening, we have forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the past").

[251] Sullivan v. Finkelstein, 496 U.S. 617, 631 (Justice Scalia, concurring in part).

[252] Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 840 (1988) (quoting United States v. Price, 361 U.S. 304, 313 (1960)).

action can be given prospective effect because, "however inartistic, it . . . stands on its own feet as a valid enactment."[253] "Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."[254] Other statutes may be premised on a particular interpretation of an earlier statute; this interpretation may be given effect, especially if a contrary interpretation would render the amendments pointless or ineffectual.[255]

Reenactment

If Congress reenacts a statute and leaves unchanged a provision that had received a definitive administrative or judicial interpretation, the Court sometimes holds that Congress has ratified that interpretation.[256] The stated rationale is that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."[257] Similarly, if Congress in enacting a new statute incorporates sections of an earlier one, "Congress normally can be presumed to have had knowledge of

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[253] REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 179 (1975).

[254] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969). By contrast, a "mere statement in a conference report . . . as to what the Committee believes an earlier statute meant is obviously less weighty" because Congress has not "proceeded formallythrough the legislative process." South Carolina v. Regan, 465 U.S. 367, 379 n.17 (1984).

[255] Mount Sinai Hosp. v. Weinberger, 517 F.2d 329, 343 (5th Cir. 1975), quoted with approval in Bell v. New Jersey, 461 U.S. 773, 785 n.12 (1983). See also Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 343, 382-87 (1982), relying on congressional intent to preserve an implied private right of action as the reason for a "savings clause" on court jurisdiction. In FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 156 (2000), the Court ruled that, because legislation restricting the advertising and labeling of tobacco products had been premised on an understanding that the FDA lacked jurisdiction over tobacco, Congress had "effectively ratified" that interpretation of FDA authority. The labeling statutes were "incompatible" with FDA jurisdiction in one "important respect" — although supervision of product labeling is a "substantial component" of the FDA's regulatory authority, the tobacco labeling laws "explicitly prohibit any federal agency from imposing any health-related labeling requirements on . . . tobacco products."

[256] Pierce v. Underwood, 487 U.S. 552, 567 (1988) (reenactment of "a statute that had in fact been given a consistent judicial interpretation . . . generally includes the settled judicial interpretation"). In Pierce, however, a committee report's approving reference to a minority viewpoint was dismissed as not representing a "settled judicial interpretation," since 12 of the 13 appellate circuits had ruled to the contrary. See also Metropolitan Stevedore Co. v. Rambo, 515 U.S. 291, 299 (1995) (reenactment carried with it no endorsement of appellate court decisions that were not uniform and some of which misread precedent); Jama v. Immigration and Customs Enforcement, 543 U.S. 335, 349 (2005) (neither of the two requirements for ratification by reenactment are present: the law was not reenacted without change, and the presumed judicial consensus was not "so broad that we must presume Congress knew of and endorsed it").

[257] Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 343, 382 n.66 (1982), quoting Lorillard v. Pons, 434 U.S. 575, 580 (1978).

the interpretation given to the incorporated law, at least insofar as it affects the new statute."[258] The reenactment presumption is usually indulged only if the history of enactment shows that Congress conducted a comprehensive review of the reenacted or incorporated statute, and changed those aspects deemed undesirable.[259] Note, however, that the presumption comes into play in the absence of direct evidence that Congress actually considered the issue at hand. Under these circumstances, other inferences as to the significance of congressional silence seem equally strong. Congress may have simply overlooked the matter, or may have intended to leave it "for authoritative resolution in the courts."[260]

Acquiescence

Congressional inaction is sometimes construed as approving or "acquiescing" in an administrative or judicial interpretation even if unaccompanied by the positive act of reenactment of the statute as a whole.[261] There is no general presumption that congressional inaction in the face of interpretation bespeaks acquiescence, and there is no consistent pattern of application by the Court. But when the Court does infer acquiescence, the most important factor (other than the Court's agreement that the administrative or judicial interpretation is the correct one) seems to be congressional awareness that the interpretation has generated controversy.[262] As with reenactment, however, there are other inferences that can be drawn from congressional silence.[263]

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[258] Lorillard v. Pons, 434 U.S. 575, 581 (1978).

[259] Id. at 582. The Court "bluntly" rejects ratification arguments if Congress "has not comprehensively revised a statutory scheme but has made only isolated amendments." Alexander v. Sandoval, 532 U.S. 275, 292 (2001) (also expressing more general misgivings about the ratification doctrine's reliance on congressional inaction).

[260] Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 336 n.7 (1971). "[C]ongressional inaction is perhaps the weakest of all tools for ascertaining legislative intent, and courts are loath to presume congressional endorsement unless the issue plainly has been the subject of congressional attention. Extensive hearings, repeated efforts at legislative correction, and public controversy may be indicia of Congress's attention to the subject." Butterbaugh v. Department of Justice, 336 F.3d 1332, 1342 (Fed. Cir. 2003) (citations omitted).

[261] Although acquiescence and reenactment are similar in that each involves an inference that Congress has chosen to leave an interpretation unchanged, there is a fundamental difference: reenactment purports to involve interpretation of duly enacted legislation, while acquiescence attributes significance to Congress' failure to act. Cf. INS v. Chadha, 462 U.S. 919 (1983) (Congress may legislate only in conformity with the bicameralism and presentment requirements of Art. I, § 7).

[262] In Bob Jones Univ. v. United States, 461 U.S. 574, 601 (1983), for example, the Court, in finding congressional acquiescence in a revenue ruling that denied tax-exempt status to educational institutions with racially discriminatory policies, pointed to inaction on a number of bills introduced to overturn the ruling as evidencing Congress' "prolonged and acute awareness of so important an issue." See also United States v. Rutherford, 442 U.S. 544 (1979) (finding

"Isolated statements"

Although congressional inaction or silence is sometimes accorded importance in interpreting an earlier enactment, post-enactment explanations or expressions of opinion by committees or members are often dismissed as "isolated statements" or "subsequent legislative history" not entitled to much if any weight. As the Court has noted, statements as to what a committee believes an earlier enactment meant are "obviously entitled to less weight" than is subsequent legislation declaring such intent, because in the case of the committee statement Congress had not "proceeded formally through the legislation process."[264] The Court has also explained that "isolated statements by individual Members of Congress or its committees, all made after enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment."[265] "It is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means."[266] The disfavor in which post-enactment explanations are held is sometimes expressed more strongly when the views are those of a single member. The Court has declared that "post hoc observations by a single member carry little if any weight."[267]

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acquiescence, and pointing to congressional hearings as evidencing congressional awareness of FDA policy). On the other hand, failure to include in an amendment language addressing an interpretation described as then-prevailing in a memo placed in the Congressional Record is "too slender a reed" on which to base an inference of congressional acquiescence. McLaughlin v. Richland Shoe Co., 486 U.S. 128, 132 n.8 (1988).

[263] "The 'complicated check on legislation' . . . erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." Johnson v. Transportation Agency, 480 U.S. 616, 672 (1987) (Justice Scalia, dissenting).

[264] Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 118 n.13 (1980) (dismissing as not "entitled to much weight here" a statement at hearings made by the bill's sponsor four years after enactment, and language in a conference report on amendments, also four years after enactment).

[265] Southeastern Community College v. Davis, 442 U.S. 397, 411 n.11 (1979) (dismissing 1974 committee report language and 1978 floor statements purporting to explain 1973 enactment). See also Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 714 (1978) (one member's "isolated comment on the Senate floor" a year after enactment "cannot change the effect of the plain language of the statute itself").

[266] NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 582 (1994) ("isolated statement" in 1974 committee report accompanying amendments to other sections of act is not "authoritative interpretation" of language enacted in 1947).

[267] Bread Political Action Comm. v. FEC, 455 U.S. 577, 582 n.3 (1982) (1977 litigation affidavit of a Senator and his aide as to intent in drafting a 1974 floor amendment cannot be given "probative

Signing Statements

Judicial reliance on presidential signing statements to interpret statutes[268] poses problems above and beyond those presented by reliance on legislative materials, and there is no consensus as to whether courts should rely at all on signing statements.[269] Presidents' routine use of signing statements to try to influence statutory interpretation by courts is a relatively recent development,[270] there has been no definitive ruling by the Supreme Court, and even lower courts have seldom had to resolve cases that require a choice between conflicting presidential and congressional interpretations. Courts cite signing statements from time to time, but usually in situations where the interpretation is not critical to case outcome.[271]

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weight" because such statements, made after enactment, represent only the "personal views" of the legislator). But see North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 530-31 (1982), citing a bill summary placed in the Congressional Record by the bill's sponsor after passage, and explanatory remarks made two years later by the same sponsor; and Pacific Gas & Elec. Co. v. Energy Resources Conserv. & Dev. Comm'n, 461 U.S. 190, 220 n.23 (1983) (relying on a 1965 explanation by "an important figure in the drafting of the 1954 [Atomic Energy] Act").

[268] Other controversial uses of signing statements, e.g., to allege the unconstitutionality of provisions or to direct administrators how to implement statutory directives, are beyond the scope of this analysis. For analysis, see CRS Report RL33667, Presidential Signing Statements: Constitutional and Institutional Implications, by T.J. Halstead.

[269] See, e.g., William D. Popkin, Judicial Use of Presidential Legislative History: A Critique, 66 IND. L.J. 699 (1991); Brad Waites, Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements, 21 GEORGIA L. REV. 755 (1987); Marc N. Garber and Kurt A. Wimmer, Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power, 24 HARV. J. ON LEGIS. 363 (1987); Frank B. Cross, The Constitutional Legitimacy and Significance of Presidential "Signing Statements," 40 ADMIN. L. REV. 209 (1988); Kristy L. Carroll, Comment, Whose Statute Is It Anyway?: Why and How Courts Should Use Presidential Signing Statements When Interpreting Federal Statutes, 46 CATH U.L.REV. 475 (1997); The Legal Significance of Presidential Signing Statements, 17 Op. Off. Legal Counsel 131 (1993).

[270] President Andrew Jackson used a signing statement in 1830, and in 1842 an ad hoc congressional committee strongly condemned President Tyler for having filed a statement of his reasons for signing a bill (See 4 Hinds' Precedents § 3492), but routine use of signing statements began during the Reagan Administration, when Attorney General Meese persuaded West Publishing Company to include the President's signing statements with legislative histories published in United States Code Congressional and Administrative News. The Attorney General explained this as facilitating availability of signing statements to courts "for future construction of what the statute actually means." Address by Attorney General Ewin Meese, III, National Press Club (February 25, 1986). Presidents since Reagan have continued this practice.

[271] See, e.g., Berry v. Department of Justice, 733 F.2d 1343, 1349 (9th Cir. 1984) (citing signing statement as well as congressional committee reports as affirming one of the broad goals of the Freedom of Information Act); Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658, 661-62 (4th Cir. 1969) (cited as elaborating on floor manager's explanation of good-faith defense in Portal-to-Portal Act); United States v. Yacoubian, 24 F.3d 1, 8 (9th Cir. 1994) (cited along with conference

The nature of the President's role in vetoing or approving legislation suggests that little interpretational weight should be given to signing statements. Article I, section 7, clause 2 of the U.S. Constitution provides that, after Congress passes a bill and presents it to the President, "if he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." Several observations about this language are possible.

First, the President is required to set forth "objections" to a bill he vetoes, but there is no parallel requirement that he set forth his reasons for approving a bill. Correspondingly, there is a procedure for congressional consideration of the President's objections and for reconsideration of the bill following a veto, but no procedure for congressional response following a signing. Of course, absence of a constitutionally recognized procedure does not require that the President's views be discounted; after all, the Constitution is also silent about committee reports, floor debates, and other components of legislative history. But such absence does suggest that the President's views should be discounted when they conflict with congressional explanations otherwise entitled to weight. A rule for resolving conflicts in legislative history provides guidance here. When the two Houses have disagreed on the meaning of identical language in a bill that did not go to conference, the explanation that was before both Houses (i.e., the explanation of the originating House) prevails if the court relies on legislative history at all. The rationale is that congressional intent should depend upon the actions of both Houses. "By unanimously passing the Senate Bill without amendment, the House denied the entire Senate an opportunity to object (or concur) to [its] interpretation."[272] Similarly, because Congress has no opportunity to respond to interpretations set forth in signing statements, courts should not use those interpretations to change meaning.[273]

A second observation about the Constitutional text is that the President has a choice of approving or disapproving a "bill" in its entirety, and may not disapprove some portions while approving others. Not only does the President lack a line-item veto, but Congress can't grant the President such authority by

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report to establish rational purpose of statute); Taylor v. Heckler, 835 F.2d 1037, 1044 n.17 (3d Cir. 1987) (refusing to consider a signing statement that was "largely inconsistent" with legislative history on which the court had previously relied); Caruth v. United States, 688 F. Supp. 1129, 1146 n.11(N.D. Tex. 1987) (relying extensively on legislative history but refusing to give "any weight" to signing statements).

[272] Department of the Air Force v. Rose, 425 U.S. 352, 366 (1976) (quoting Vaughn v. Rosen, 523 F.2d 1136, 1142 (D.C. Cir. 1975)).

[273] A related analogy can be drawn from post-enactment or "subsequent" legislative history in the form of "isolated statements," discussed above, usually dismissed by courts as entitled to little or no weight.

statute.[274] Giving effect to a signing statement that would negate a statutory provision[275] can be considered analogous to a line item veto.[276]

The President's signing statement explanations of bill language may be entitled to more weight if the President or his Administration worked closely with Congress in developing the legislation, and if the approved version incorporated the President's recommendations.[277] This principle can be applied not only to bills introduced at the Administration's behest, but also to bills the final content of which resulted from compromise negotiations between the Administration and Congress.[278] In such circumstances, of course, signing statements are used to explain rather than negate congressional action, and are most valuable as lending support to congressional explanations.

Even if presidential signing statements should not be treated as a significant part of legislative history, they may still affect interpretation as directives to administering agencies. As explained above under "Deference to Administrative Interpretations,"[279] courts are highly deferential to interpretations of agencies charged with implementing statutes. Such deference, however, is premised on the conclusion that Congress has authorized the agency to "speak with the force of law" through a rulemaking or other formal process. Congress has not authorized the President to speak with the force of law through signing statements. So, although signing statements may influence or even control agency implementation of statutes, it is the implementation, and not the signing

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[274] Clinton v. City of New York, 524 U.S. 417 (1998) (invalidating the Line Item Veto Act as inconsistent with the Presentment Clause of Art. I, § 7, cl.2).

[275] Signing statements allegedly have been used for this purpose. "[T]he president had used the . . . signing statement . . . to effectively nullify a wide range of statutory provisions even as he signed the legislation that contained them into law." Phillip J. Cooper, George W. Bush, Edgar Allen Poe, and the Use and Abuse of Presidential Signing Statements, 35 PRESIDENTIAL STUDIES QUARTERLY 515 (2005).

[276] Garber and Wimmer, supra n.269, at 376.

[277] "It may . . . be appropriate for the President, when signing legislation, to explain what his (and Congress's) intention was in making the legislation law, particularly if the Administration has played a significant part in moving the legislation through Congress." 17 Op. Off. Legal Counsel supra, at 136.

[278] "[T]hough in some circumstances there is room for doubt as to the weight to be accorded a presidential signing statement in illuminating congressional intent . . . , President Reagan's views are significant here because the Executive Branch participated in the negotiation of the compromise legislation." United States v. Story, 891 F.2d 988, 994 (2d Cir. 1989).

[279] Supra, p. 23.

statement itself, that would be measured against the statute's requirements.[280] At most, signing statements might be considered analogous to informal agency actions, entitled to respect only to the extent that they have the power to persuade.[281]

[280] If Congress has directed that the President rather than an agency implement a statute, then, by analogy, it can be argued that Congress has implicitly delegated to the President whatever policymaking authority is necessary to fill in gaps and implement the statutory rule. But here again, the signing statement would not usually constitute an act of implementation.

[281] The Constitution's vesting in the President of the executive power and of the duty to "take care that the laws be faithfully executed" implies authority to interpret the law in order to determine how to execute it, but this implicit authority would not appear to require change to the Chevron/Skidmore deference approaches.

Territorial Reach of American Statutes

Extraterritorial Application of American Criminal Law, 94-166 (March 26, 2010).

CHARLES DOYLE, CONGRESSIONAL RESEARCH SERV., EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW, (2010), *available at* http://www.intelligencelaw.com/library/secondary/crs/pdf/94-166_3-26-2010.pdf.

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Summary

Crime is usually territorial. It is a matter of the law of the place where it occurs. Nevertheless, a surprising number of American criminal laws apply outside of the United States. Application is generally a question of legislative intent, expressed or implied. In either case, it most often involves crimes committed aboard a ship or airplane, crimes condemned by international treaty, crimes committed against government employees or property, or crimes that have an impact in this country even if planned or committed in part elsewhere.

Although the crimes over which the United States has extraterritorial jurisdiction may be many, so are the obstacles to their enforcement. For both practical and diplomatic reasons, criminal investigations within another country require the acquiescence, consent, or preferably the assistance, of the authorities of the host country. The United States has mutual legal assistance treaties with several countries designed to formalize such cooperative law enforcement assistance. Searches and interrogations carried out jointly with foreign officials, certainly if they involve Americans, must be conducted within the confines of the Fourth and Fifth Amendments. And the Sixth Amendment imposes limits upon the use in American criminal trials of depositions taken abroad.

The nation's recently negotiated extradition treaties address some of the features of the nation's earlier agreements which complicate extradition for extraterritorial offenses, i.e., dual criminality requirements, reluctance to recognize extraterritorial jurisdiction, and exemptions on the basis of nationality or political offenses. To further facilitate the prosecution of federal crimes with extraterritorial application Congress has enacted special venue, statute of limitations, and evidentiary statutes. To further cooperative efforts, it recently enacted the Foreign Evidence Request Efficiency Act, P.L. 111-79 (S. 1289) which

authorizes federal courts to issue search warrants, subpoenas and other orders to facilitate criminal investigations in this country on behalf of foreign law enforcement officials.

This report is available in an abridged version, stripped of its attachments, bibliography, footnotes, and most of its citations to authority, as CRS Report RS22497, Extraterritorial Application of American Criminal Law: An Abbreviated Sketch.

Introduction

Crime is ordinarily proscribed, tried, and punished according to the laws of the place where it occurs.[282] American criminal law applies beyond the geographical confines of the United States, however, under certain limited circumstances. State prosecution for overseas misconduct is limited almost exclusively to multi-jurisdictional crimes, i.e., crimes where some elements of the offense are committed within the state and others are committed beyond its boundaries. A surprising number of federal criminal statutes have extraterritorial application, but prosecutions have been few. This may be because when extraterritorial criminal jurisdiction does exist, practical and legal complications, and sometimes diplomatic considerations, may counsel against its exercise.

Constitutional Considerations

Legislative Powers

The Constitution does not forbid either Congressional or state enactment of laws which apply outside the United States. Nor does it prohibit either the federal government or the states from enforcing American law abroad. Several passages suggest that the Constitution contemplates the application of American law beyond the geographical confines of the United States. It speaks, for example, of "felonies committed on the high seas," "offences against the law of nations," "commerce with foreign nations," and of the impact of treaties.

More specifically, it grants Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[283] Although logic might point to international law or some other embodiment of "the law of nations" as a source of the dimensions of Congress's authority to define and punish crimes against the law of nations, in reality the

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[282] "The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done," American Banana Co v. United Fruit Co., 213 U.S. 347, 356 (1909).

[283] U.S. Const. Art.I, §8, cl. 10; see generally, The Offences Clause After Sosa v. Alvarez-Machain, 118 HARVARD LAW REV. 2378 (2005); Stephens, Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations," 42 WILLIAM & MARY LAW REVIEW 447 (2000).

courts have done little to identify such boundaries, and until recently Congress seems to have relied exclusively on the law of nations clause only upon rare occasions.

In instances when the law of nations might have been thought to suffice, Congress has, instead, often relied upon a high seas component which, when coupled with its authority to define the admiralty and maritime jurisdictions of the federal courts, permits the application of federal criminal law even to an American vessel at anchor well within the territory of another nation.[284]

The enactment of maritime statutes is reinforced by Congress's power "[t]o regulate Commerce with foreign Nations."[285] The same prerogative supports legislation regulating activities in the air when they involve commerce with foreign nations. The commerce power includes the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." It is a power of exceptional breadth domestically.[286] Its reach may be even more extraordinary in an international context,[287] although there is certainly support for a contrary view.[288] In one of few recent cases to address the

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[284] United States v. Flores, 289 U.S. 137, 159 (1933)(Flores, an American seaman, was convicted of murdering another American aboard an American ship moored 250 miles up the Congo River (well within the territorial jurisdiction of the then Belgian Congo) under the federal statute proscribing murder committed within the special maritime jurisdiction of the United States).

[285] U.S. Const. Art. I, §8, cl.3.

[286] See e.g., Perez v. United States, 402 U.S. 146, 156-57 (1971); Heart of Atlanta Motel v. United States, 379 U.S. 241, 255-58 (1964).

[287] California Bankers Ass'n v. Shultz, 416 U.S. 21, 46 (1974)("the plenary authority of Congress over both interstate and foreign commerce is not open to dispute"); United States v. 12,200-Ft. Reels of Film, 413 U.S. 123, 125 (1973)("The Constitution gives Congress broad, comprehensive powers 'to regulate Commerce with foreign Nations'").

[288] United States v. Yunis, 681 F.Supp. 896, 907 n.24 (D.D.C. 1988)("Rather than relying on Congress's direct authority under Art. I Section 8 to define and punish offenses against the law of nations, the government contends that Congress has authority to regulate global air commerce under the commerce clause. U.S. Const. art. I, § 8, c. 3. The government's arguments based on the commerce clause are unpersuasive. Certainly Congress has plenary power to regulate the flow of commerce within the boundaries of United States territory. But it is not empowered to regulate foreign commerce which has no connection to the United States. Unlike the states, foreign nations have never submitted to the sovereignty of the United States government nor ceded their regulatory powers to the United States"). See also, Colangelo, Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law, 48 HARVARD INTERNATIONAL LAW JOURNAL 121, 149-50 (2007)(emphasis in the original) ("Furthermore, as a matter of original intent, the idea that the Foreign Commerce Clause might license Congress with the broad ability to extend U.S. laws extraterritorially into the jurisdictions of other nations would have been anathema to the founders given their driving belief in the sovereign equality of states and its accompanying rigid concept of territoriality – which to borrow yet again from Chief Justice Marshall held that 'no [state] can rightfully impose a rule on

issue directly, the court opted for a middle ground. It found that Congress did indeed have the legislative power to proscribe illicit overseas commercial sexual activity by an American who had traveled from the United States to the scene for the crime.[289] Confronted with a vigorous dissent, the panel's majority expressly chose to avoid the issue of whether it would have reached the same result if the defendant had not agreed to pay for his sexual misconduct.[290]

In any event, it does not necessarily mean that every statute enacted in the exercise of Congress' power to regulate commerce with foreign nations is intended to have extraterritorial scope. Some do; [291] others do not.[292]

Congress has resorted on countless occasions to its authority to enact extraterritorial legislation not only in reliance on its own enumerated powers but also, through the necessary and proper clause on the powers vested in one of the other branches or on powers it shares with one of the other branches.[293] It has, for instance, regularly called upon the authority deposited with the President and

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another[,] [each] legislates for itself, but its legislation can operate on itself alone.' Recall the reason why Congress was allowed to legislate extraterritorially over piracy absent a U.S. connection even though the act technically occurred within another state's territory: the conduct was prohibited as a matter of the law of nations, not of U.S. law, and thus the United States was not imposing its own rule on other nations, but merely enforcing (on their behalf) a universal norm when it prosecuted pirates. No such analysis applies to extraterritorial projections of Congress' Foreign Commerce Clause power").

[289] United States v. Clark, 435 F.3d 1100, 1103 (9th Cir. 2006)("Instead of slavishly marching down the path of grafting the interstate commerce framework onto foreign commerce, we step back and take a global, commonsense approach to the circumstances presented here: The illicit sexual conduct reached by the state expressly includes commercial sex acts performed by a U.S. citizen on foreign soil. This conduct might be immoral and criminal, but it is also commercial. Where, as in this appeal, the defendant travels in foreign commerce to a foreign country and offers to pay a child to engage in sex acts, his conduct falls under the broad umbrella of foreign commerce and consequently within congressional authority under the Foreign Commerce Clause").

[290] Id. at 1109-110 ("At the outset, we highlight that §2423(c) contemplates two types of 'illicit sexual conduct': noncommercial and commercial. Clark's conduct falls squarely under the second prong of the definition, which criminalizes 'any commercial sex act . . . with a person under 18 years of age.' §2423(f)(2). In view of this factual posture, we abide by the rule that courts have a 'strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration, and limit our holding to §2423(c)'s regulation of commercial sex acts").

[291] Steele v. Bulova Watch Co., 344 U.S. 280, 285-87 (1952).

[292] EEOC v. Arabian American Oil Co., 499 U.S. 244, 259 (1991).

[293] U.S.Const. Art.I, §8, cl.18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

the Congress in the fields of foreign affairs and military activities,[294] powers which the courts have described in particularly sweeping terms.[295]

Constitutional Limitations

Nevertheless, the powers granted by the Constitution are not without limit. The clauses enumerating Congress's powers carry specific and implicit limits which govern the extent to which the power may be exercised overseas.[296] Other

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[294] See e.g., "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . . . He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . . He . . . shall receive Ambassadors and other public Ministers; [and] he shall take Care that the Laws be faithfully executed . . . ." U.S. Const. Art.II, §§2, 3.

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . ; To establish an uniform Rule of Naturalization . . . ; To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies . . .; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; . . . [and] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. Art.I, §8, cls.1, 4, 11-14, 18.

[295] United States v. Curtiss-Wright Corp., 299 U.S. 304, 315-18 (1936); Ex parte Quirin, 317 U.S. 1, 28-9 (1942); Parker v. Levy, 417 U.S. 733, 756-57 (1974).Some judicial authorities have suggested that in the area of foreign affairs the Constitution's establishment of the federal government as a sovereign entity vested it with authority, defined by standards recognized by the law of nations, beyond its constitutionally enumerated powers. United States v. Rodriguez, 182 F.Supp. 479, 490-91 (S.D.Cal. 1960), aff'd sub nom., Rocha v. United States, 288 F.2d 545 (9th Cir. 1961)("The powers of the government and the Congress in regard to sovereignty are broader than the powers possessed in relation to internal matters, United States v. Curtiss-Wright Export Corp., 1936, 299 U.S. 304: 'The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect to our internal affairs.' Id., 299 U.S. at page 315. . . . 'It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. Id. 299 U.S. at page 318.' . . . To put it in more general terms, the concept of essential sovereignty of a free nation clearly requires the existence and recognition of an inherent power in the state to protect itself from destruction. This power exists in the United States government absent express provision in the Constitution and arises from the very nature of the government which was created by the Constitution").

[296] Toth v. Quarles, 350 U.S. 11, 13-4 (1955) (court martial trial of a civilian for crimes he allegedly committed in Korea while in the military exceeded the authority granted Congress by Art.I, §8, cl.14 and Art.III, §2); Kinsella v. Singleton, 361 U.S. 234, 247-48 (1960)(holding that Congressional authority under Art.I, §8, cl.14 to make rules and regulations governing the land and naval forces did not include authority for the court martial trial of civilian dependents for offenses committed overseas); consider, Lowenfeld, U.S. Law Enforcement Abroad: The Constitution and International Law, 83 AMERICAN JOURNAL OF INTERNATIONAL LAW 880,

limitations appear elsewhere in the Constitution, most notably in the due process clauses of the Fifth and Fourteenth Amendments. Some limitations are a product of the need to harmonize potentially conflicting grants of authority. For example, although the Constitution reserves to the states the residue of governmental powers which it does not vest elsewhere, the primacy it affords the federal government in the area of foreign affairs limits the authority of the states in the field principally to those areas where they are acting with federal authority or acquiescence.[297]

In the area of extraterritorial jurisdiction, the most often cited limitation resides in the due process clauses of the Fifth and Fourteenth Amendments. While the enumerated powers may carry specific limits which govern the extent to which the power may be exercised overseas, the general restrictions of the due process clauses, particularly the Fifth Amendment due process clause, have traditionally been mentioned as the most likely to define the outer reaches of the power to enact and enforce legislation with extraterritorial application.[298]

Unfortunately, most of the cases do little more than note that due process restrictions mark the frontier of the authority to enact and enforce American law abroad.[299] Even the value of this scant illumination is dimmed by the realization that the circumstances most likely to warrant such due process analysis are the very ones for which the least process is due. Although American courts that try aliens for overseas violations of American law must operate within the confines of

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891-92 (1989) (asserting that the creation of subject matter and personal jurisdiction over an alien defendant for an offense committed overseas and not otherwise connected to the United States by forcibly bringing him into the United States is "not clearly within any constitution grant of power to Congress, and in particular, . . . does not, as written, come within the power to define and punish offenses against the law of nations").

[297] Cf., Skiriotes v. Florida, 313 U.S. 69, 77 (1941)("[W]e see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress"); American Insurance Ass'n v. Garamendi, 539 U.S. 396, 413 (2003)("There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the concern for uniformity in this country's dealing with foreign nations that animated the Constitution's allocation of the foreign relations power to the National Government in the first place").

[298] "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. Amend.V. ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. Amend.XIV, §1.

[299] See e.g., United States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2003); United States v. Thomas, 893 F.2d 1066, 1068 (9th Cir. 1990); United States v. Quemener, 789 F.2d 145, 156 (2d Cir. 1986); United States v. Henriquez, 731 F.2d 131, 134-35 n.4, 5(2d Cir. 1984); United States v. Pinto-Mejia, 720 F.2d 248, 259 (2d Cir. 1983); United States v. Howard-Arias, 679 F.2d 363, 371 (4th Cir. 1982).

due process,[300] the Supreme Court has observed that the Constitution's due process commands do not protect aliens who lack any "significant voluntary connection[s] with the United States."[301]

Moreover, the Court's more recent decisions often begin with the assumption that the issues of extraterritorial jurisdiction come without constitutional implications.[302]

The handful of lower courts to consider due process issues take one of two tracks. Some describe a due process requirement that demands some nexus between the United States and the circumstances of the offense.[303] In some instances they

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[300] United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) ("I do not mean to imply, and the Court has not decided, that persons in the position of the respondent have no constitutional protection. The United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. All would agree, for instance that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant").

[301] "The global view . . . of the Constitution is also contrary to this Court's decisions in the Insular Cases, which held that not every constitutional provision applies to governmental activity even where the United States has sovereign power. . . . [I]t is not open to us in light of the Insular Cases to endorse the view that every constitutional provision applies wherever the United States Government exercises its power. Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." United States v. Verdugo-Urquidez, 494 U.S. at 268-71.

[302] EEOC v. Arabian American Oil Co., 499 U.S. at 248 ("Both parties concede, as they must that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. Whether Congress has in fact exercised that authority in this case is a matter of statutory construction").

[303] United States v. Medjuck, 156 F.3d 916, 918 (9th Cir. 1998)("to satisfy the strictures of due process, the Government [must] demonstrate that there exists a sufficient nexus between the conduct condemned and the United States such that the application of the statute [to the overseas conduct of an alien defendant] would not be arbitrary or fundamentally unfair to the defendant"), citing, United States v. Davis, 905 F.2d at 248-49; see also, United States v. Perlaza, 439 F.3d 1149, 1160-161 (9th Cir. 2006); United States v. Moreno-Morillo, 334 F.3d 819, 828 (9th Cir. 2003); United States v. Klimavicius-Viloria, 144 F.3d 1249, 1256 (9th Cir. 1998); United States v. Greer, 956 F.Supp. 531, 534-36 (D.Vt. 1997); United States v. Aikens, 946 F.2d 608, 613-14 (9th Cir. 1990); United States v. Robinson, 843 F.2d 1, 5-6 (1st Cir. 1988); United States v. Peterson, 812 F.2d 486, 493 (9th Cir. 1987); United States v. Gonzalez, 776 F.2d 931, 938-41 (11th Cir. 1985).

These "subject matter" or "legislative" jurisdiction due process questions have arisen more often from attempts to impose civil liability or regulatory obligations, particularly at the state level, see e.g., Gerling Global Reinsurance Corp. v. Gallagher, 267 F.3d 1228, 1234-238 (11th Cir. 2001)(due process precludes application of Florida's Holocaust Victims Insurance Act to insurance policies issued outside the state, to persons outside the state, and covering individuals outside the state); see also, Gerling Global Reinsurance Corp. v. Low, 240 F.3d 739, 753 (9th Cir. 2001); Watson v. Employers Liability Assurance Corp., 348 U.S. 66, 70-1 (1954)("because the policy was bought,

look to international law principles to provide a useful measure to determine whether the nexus requirement has been met;[304] in others they consider principles at work in the minimum contacts test for personal jurisdiction.[305] At the heart of these cases is the notion that due process expects that a defendant's conduct must have some past, present, or anticipated locus or impact within the United States before he can fairly be held criminal liable for it in an American court. The commentators have greeted this analysis with hesitancy at best,[306] and other courts have simply rejected it.[307]

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issued and delivered outside of Louisiana, Employers invokes the due process principle that a state is without power to exercise 'extra territorial jurisdiction' that is, to regulate and control activities wholly beyond its boundaries").

[304] United States v. Davis, 905 F.2d 245, 249 n.2 (9th Cir. 1990) ("International law principles may be useful as a rough guide of whether a sufficient nexus exists between the defendant and the United States so that application of the statute in question would not violate due process. However, danger exists that emphasis on international law principles will cause us to lose sight of the ultimate question: would application of the statute to the defendant be arbitrary or fundamentally unfair?"); cf., United States v. Caicedo, 47 F.3d 370, 372-73 (9th Cir. 1995).

[305] United Sates v. Clark, 435 F.3d 1100, 1108 (9th Cir. 2006)("Although Clark's citizenship alone is sufficient to satisfy due process concerns, his U.S. investments, ongoing receipt of federal retirement benefits and use of U.S. military flights also underscore his multiple and continuing ties with this country"); United States v. Zakharov, 468 F.3d 1171, 1177 (9th Cir. 2006)("Nexus is a constitutional requirement analogous to 'minimum contacts' in personal jurisdiction analysis"); United States v. Klimavicius-Viloria, 144 F.3d at 1257 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)); United States v. Aikens, 946 F.2d 608, 613-14 (9th Cir. 1990); United States v. Robinson, 843 F.2d 1, 5-6 (1st Cir. 1988); United States v. Peterson, 812 F.2d 486, 493 (9th Cir. 1987); United States v. Gonzalez, 776 F.2d 931, 938-41 (11th Cir. 1985).

[306] Brilmayer & Norchi, Federal Extraterritoriality and Fifth Amendment Due Process, 105 HARVARD LAW REVIEW 1217 (1992); Weisburd, Due Process Limits on Federal Extraterritorial Legislation? 35 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 379 (1997); Due Process and True Conflicts: The Constitutional Limits on Extraterritorial Federal Legislation and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 46 CATHOLIC UNIVERSITY LAW REVIEW 907 (1997); Colangelo, Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law, 48 HARVARD INTERNATIONAL LAW JOURNAL 121 (2007).

[307] United States v. Suerte, 291 F.3d 366, 375 (5th Cir. 2002)("[T]o the extent the Due Process Clause may constrain the MDLEA's extraterritorial reach, that clause does not impose a nexus requirement, in that Congress has acted pursuant to the Piracies and Felonies Clause"); United States v. Perez-Oviedo, 281 F.3d 400, 403 (3d Cir. 2002)(internal citations omitted)("[N]o due process violation occurs in an extraterritorial prosecution under MDLEA when there is no nexus between the defendant's conduct and the United States. Since drug trafficking is condemned universally by law-abiding nations . . . there is no reason for us to conclude that it is 'fundamentally unfair' for Congress to provide for the punishment of a person apprehended with narcotics on the high seas. . . Perez-Oviedo's state of facts presents an even stronger case for concluding that no due process violation occurred. The Panamanian government expressly consented to the application of the MDLEA. . . Such consent from the flag nation eliminates a concern that the application of the MDLEA may be arbitrary or fundamentally unfair"); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999) ("[D]ue process does not require the government to prove a nexus between a defendant's criminal conduct and the United States in a

The second, less traveled track sees the due process component at issue as one of notice. It is akin to the proscriptions against secret laws and vague statutes, the exception to the maxim that ignorance of the law is no defense.[308] Under this view, indicia of knowledge, of reason to know, of an obligation to know, or of reasonable ignorance of the law's requirements – some of which are reflected in international standards – seem to be the most relevant factors. Citizens, for instance, might be expected to know the laws of their own nation; seafarers to know the law of the sea and consequently the laws of the nation under which they sail; everyone should be aware of the laws of the land in which they find themselves and of the wrongs condemned by the laws of all nations.[309] On the other hand, the application of American criminal statute to an alien in a foreign country under whose laws the conduct is lawful would seem to evidence a lack of notice sufficient to raise due process concerns.[310]

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prosecution under the MDLEA when the flag nation has consented to the application of United States law to the defendants").

[308] "The rule that ignorance of the law will not excuse is deep in our law, as is the principle that of all the powers of local government, the police power is one of the least limitable. On the other hand, due process places some limits on its exercise. Ingrained in our concept of due process is the requirement of notice. . . . As Holmes wrote in the Common Law, 'A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.' Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it. Where [as here] a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." Lambert v. California, 355 U.S. 225, 228-30(1957)(emphasis added)(citations omitted); accord, United States v. Vasarajs, 908 F.2d 443, 448-49 (9th Cir. 1990); Griffin v. Wisconsin, 483 U.S. 868, 875 n.3 (1987); United States v. Shi, 525 F.3d 709, 722 (9th Cir. 2008)("The Due Process Clause requires that a defendant prosecuted in the United States should reasonably anticipate being haled into court in this country").

[309] United States v. Bin Laden, 92 F.Supp.2d 189, 218 (S.D.N.Y. 2000)("Odeh argues that application of Sections 844(f), (h), and (n); 924(c); 930(c); and 2155 to the extraterritorial conduct he is alleged to have engaged in would violate his due process right to a fair warning. . . .The Government responds that while Odeh may not have known that breadth of the statutory framework that would serve as the basis for the charges against him . . . there is no room for him to suggest that he has suddenly learned that mass murder was illegal in the United States or anywhere else. . . . The Government also argues that Odeh cannot be surprised to learn that his conduct was criminal under the laws of every civilized nation, and thus he has no right to complain about the particular forum in which he is brought to trial. We likewise find this argument persuasive").

[310] Consider e.g., United States v. Henriquez, 731 F.2d 131, 134 n.5 (2d Cir. 1984) ("It is also argued that 21 U.S.C. §955a(a) as applied [possession of marijuana with intent to distribute by Colombian nationals aboard a non-American vessel in international waters] violates the notice requirement of the due process clause of the Fifth Amendment. See Lambert v. California . . . . The argument is based not only on the claim that the statute is unprecedented in international law and the proposition that marijuana trafficking itself is not universally condemned, but also on the alleged vagueness of the definition of 'vessel without nationality' in 21 U.S.C. §955b(d) [upon

Conceding this outer boundary, however, the courts fairly uniformly have held that questions of extraterritoriality are almost exclusively within the discretion of Congress; a determination to grant a statutory provision extraterritorial application – regardless of its policy consequences – introduces no new constitutional infirmities.

Statutory Construction

For this reason, the question of the extent to which a particular statute applies outside the United States has generally been considered a matter of statutory, rather than constitutional, construction.[311] General rules of statutory construction have emerged which can explain, if not presage, the result in a given case. The first of these holds that a statute will be construed to have only territorial application unless there is a clear indication of some broader intent.[312]

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which federal jurisdiction was based]. On this point, however, we agree with the Eleventh Circuit . . . that the term 'vessel without nationality' clearly encompasses vessels not operating under the authority of any sovereign nation"); United States v. Alvarez-Mena, 765 F.2d 1259, 1267 n.11 (5th Cir. 1985) ("[n]evertheless, we observe that we are not faced with a situation where the interests of the United States are not even arguably potentially implicated. The present case is not remotely comparable to, for example, the case of an unregistered small ship owned and manned by Tanzanians sailing from that nation to Kenya on which a crew member carries a pound of marihuana to give to a relative for his personal consumption in the latter country")(example offered in discussion of presumption of Congressional intent).

[311] EEOC v. Arabian American Oil Co., 499 U.S. at 248; Foley Brothers v. Filardo, 336 U.S. 281, 284-85 (1949)("The question before us is not the power of Congress to extend the eight hour law to work performed in foreign countries. Petitioners concede that such power exists. The question is rather whether Congress intended to make the law applicable to such work"); United States v. Yousef, 327 F.3d 56, 86 (2d. Cir. 2003)("It is beyond doubt that, as a general proposition, Congress has the authority to enforce its laws beyond the territorial boundaries of the United States"); United States v. Gatlin, 216 F.3d 207, 211 (2d Cir. 2000); United States v. Martinez, 599 F.Supp.2d 784, 79697 (W.D.Tex. 2009).

[312] "It is a long-standing principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." EEOC. v. Arabian American Oil Co., 499

U.S. at 248 (1991); Argentine Republic v. Amerada Hess Shipping, 488 U.S. 428, 440 (1989); Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 173 (1993); Smith v. United States, 507 U.S. 197, 203 (1993); Small v. United States, 544 U.S. 385, 388-89 (2005); cf., The Antelope, 23 U.S. 30, 53-4 (10 Wheat. 66, 123) (1825)("The courts of no country will execute the penal laws of another"). The principle has a corollary, the so-called revenue rule, which precludes judicial enforcement of a foreign tax laws, Pasquantino v. United States, 544 U.S. 349, 360-61 (2005). The rule, however, does not preclude enforcement of a federal criminal statute which proscribes defrauding a foreign country of its tax revenues, id. at 354-55 ("the common-law revenue rule, rather than barring any recognition of foreign revenue law, simply allow[s] courts to refuse to enforce the tax judgments of foreign nations, and therefore [does] not preclude the Government from prosecuting. . .").

A second rule of construction states that the nature and purpose of a statute may provide an indication of whether Congress intended a statute to apply beyond the confines of the United States. Although hints of it can be found earlier,[313] the rule was first clearly announced in United States v. Bowman, 260 U.S. 94, 97-98, 102 (1922).[314]

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[313] See e.g., American Banana Co. v. United Fruit Co., 213 U.S. at 355-56, "It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress.

"No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive. They go further at times and declare that they will punish any one, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas. In cases immediately affecting national interests they may go further still and may make, and, if they get the chance, execute similar threat as to acts done within another recognized jurisdiction. An illustration from our statutes is found with regard to criminal correspondence with foreign governments. . ."

[314] "We have in this case a question of statutory construction. The necessary locus, when not specifically defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negate the purpose of Congress in this regard. We have an example of this in the attempted application of the prohibitions of the Anti-Trust Law to acts done by citizens of the United States against other such citizens in a foreign country. American Banana Co. v. United Fruit Co., 213 U.S. 347. That was a civil case, but as the statute is criminal as well as civil, it presents an analogy.

"But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense. . . . Clearly it is no offense to the dignity or right of sovereignty of Brazil [– where the fraud of which the United States government was the target occurred –] to hold [these American defendants] for this crime against the government to which they owe allegiance." See also, United States v. Delgado-Garcia, 374 F.3d 1337, 1344-350 (D.C. Cir. 2004); United States v. Villanueva, 408 F.3d 193, 197-98 (5th Cir. 2005); United States v. Lopez-Vanegas, 493 F.3d 1305, 1311-312 (11th Cir. 2007).

The final rule declares that unless a contrary intent is clear, Congress is assumed to have acted so as not to invite action inconsistent with international law.[315] At one time, the cases seemed to imply the existence of another rule, that is that, unless Congress declared that it intended a statute to apply overseas to both aliens and American nationals, it would be presumed to apply only to Americans.[316] In the eyes of the community of nations, a jurisdictional claim over misconduct based solely on the nationality of the victim continues to be among the more tenuous. Yet as discussed below, the challenge seems less compelling in light of the generous reading of the internationally recognized grounds upon which to stake a claim.[317]

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[315] "It has been a maxim of statutory construction since the decision in Murray v. The Charming Betsy, 2 Cranch [6 U.S.] 64, 118 (1804), that an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains," Weinberger v. Rossi, 456 U.S. 25, 32 (1982); The Apollon, 22 U.S. (9 Wheat.) 362, 370-71 (1824)("It cannot be presumed, that Congress would voluntarily justify . . . a clear violation of the law of nations").

[316] E.g., The Apollon, 22 U.S. (9 Wheat.) at 370 ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens")(emphasis added); American Banana Co. v. United Fruit Co., 213 U.S. at 355-6 ("No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive. . . . And the notion that English statutes bind British subjects everywhere has found expression in modern times and has had some startling applications"); United States v. Bowman, 260 U.S. at 102 ("Section 41 of the Judicial Code provides that 'the trial of all offenses committed on the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.' The three defendants who were found in New York were citizens of the United States and were certainly subject to such laws as it might pass to protect itself and its property. Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance. The other defendant is a subject of Great Britain. He has never been apprehended, and it will be time enough to consider what, if any, jurisdiction the District Court below has to punish him when he is brought to trial"); United States v. Columba-Colella, 604 F.2d 356, 360 (5th Cir. 1979) ("Congress [is] not competent to attach criminal sanctions to the murder of an American by a foreign national in a foreign country. . .").

[317] E.g., United States v. Vasquez-Velasco, 15 F.3d 833, 839-41 (9th Cir. 1994)(prosecution under 18 U.S.C. 1959 for the murder of two American tourists in Mexico by Mexican nationals acting under the mistaken belief that the Americans were DEA agents came within the principle recognized in international law as permitting the exercise of extraterritorial jurisdiction in the name of a nation's security); United States v. Yunis, 924 F.2d 1086, 1091 (D.C.Cir. 1991); United States v. Felix-Gutierrez, 940 F.2d 1200, 1205-206 (9th Cir. 1991)(murder of an American agent overseas); United States v. Benitez, 741 F.2d 1312, 1316-317 (11th Cir. 1986); see also, United States v. Bin Laden, 92 F.Supp.2d 189, 194-95 (S.D.N.Y.2000) (concluding that Bowman applies regardless of the nationality of the offender).

International Law

International law supports rather than dictates decisions in the area of the overseas application of American law. Neither Congress nor the courts are bound to the dictates of international law when enacting or interpreting statutes with extraterritorial application.[318]

Yet Congress looks to international law when it evaluates the policy considerations associated with legislation that may have international consequences. For this reason, the courts interpret legislation with the presumption that Congress or the state legislature intends its laws to be applied within the bounds of international law, unless it indicates otherwise.

To what extent does international law permit a nation to exercise extraterritorial criminal jurisdiction? The question is essentially one of national interests. What national interest is served by extraterritorial application and what interests of other nations suffer by an extraterritorial application?

The most common classification of these interests dates to a 1935 Harvard Law School study which divided them into five categories or principles corresponding to the circumstances under which the nations of the world had declared their criminal laws applicable: (1) the territorial principle which involves crimes occurring or having an impact within the territory of a country; (2) the nationality principle which involves crimes committed by its nationals; (3) the passive personality principle which involves crimes committed against its nationals; (4) the protection principle which involves the crimes which have an impact on its interests as a nation; and (5) the universal principle which involves crimes which are universally condemned.[319]

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[318] "Yunis seeks to portray international law as a self-executing code that trumps domestic law whenever the two conflict. That effort misconceives the role of judges as appliers of international law and as participants in the federal system. Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law," United States v. Yunis, 924 F.2d 1086, 1091 (D.C.Cir. 1991); United States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2003)("In determining whether Congress intended a federal statute to apply to overseas conduct, an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. Nonetheless, in fashioning the reach of our criminal law, Congress is not bound by international law. If it chooses to do so, it may legislate with respect to conduct outside the United States in excess of the limits posed by international law"); United States v. Felix-Gutierrez, 940 F.2d 1200, 1203 (9th Cir. 1991); United States v. Henriquez, 731 F.2d 131, 134 (2d Cir. 1984).

[319] "An analysis . . . discloses five general principles on which a more or less extensive penal jurisdiction is claimed by States at the present time. These five general principles are: first, the territorial principle, determining jurisdiction by reference to the place where the offence is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the custody of the

The American Law Institute's Third Restatement of the Foreign Relations Law of the United States contains perhaps the most comprehensive, contemporary statement of international law in the area. It indicates that the latitude international law affords a country to enact, try, and punish violations of its law extraterritorially is a matter of reasonableness, and its assessment of reasonableness mirrors a balancing of the interests represented in the principles.[320]

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person committing the offence; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offence. Of these five principles, the first is everywhere regarded as of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the extent to which it is used in different national systems. The third is claimed by most States, regarded with misgivings in a few, and generally ranked as the basis for an auxiliary competence. The fourth is widely though by no means universally accepted as the basis of an auxiliary competence, except for the offence of piracy, with respect to which it is the generally recognized principle of jurisdiction. The fifth, asserted in some form by a considerable number of States and contested by others, is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles." Harvard Research in International Law, Jurisdiction with Respect to Crime, 29 AMERICAN JOURNAL OF INTERNATIONAL LAW (Supp.)(Harvard Study) 439, 445 (1935) (emphasis added).

[320] "The rules in this Restatement governing jurisdiction to prescribe, as well as those governing jurisdiction to adjudicate and to enforce, reflect development in the law as given effect by United States courts. The courts appear to have considered these rules as a blend of international law and domestic law, including international 'comity' as part of that law. Increasingly, however, these rules, notably the principle of reasonableness (§§403, 421, 431), have been followed by other states and their courts and by international tribunals, and have emerged as principles of customary law." American Law Institute, 1 RESTATEMENT OF THE LAW THIRD: THE FOREIGN RELATIONS LAW OF THE UNITED STATES, 231 (1985).

Section 403 of the Restatement provides:

"(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate: (a) the link of the activity to the territory of the regulated state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.

"(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's

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While the Restatement's views carry considerable weight with both Congress and the courts,[321] the courts have traditionally ascertained the extent to which international law would recognize extraterritorial application of a particular law by citing the Harvard study principles, read expansively.[322]

Even by international standards, however, the territorial principle applies more widely than its title might suggest. It covers conduct within a nation's geographical borders. Yet, it also encompasses laws governing conduct on its territorial waters, conduct on its vessels on the high seas, conduct committed only in part within its geographical boundaries, and conduct elsewhere that has an impact within its territory.[323] Congress often indicates within the text of a statute when it intends a provision to apply within its territorial waters and upon its vessels.[324] Although rarely mentioned in the body of a statute, the courts have long and regularly acknowledged the "impact" basis for a claim of extraterritorial application.[325] This is particularly so, when the facts in a case suggest other principles of international law in addition to the territorial principle.[326]

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interest is clearly greater." Id. at 244-45. The remainder of section 403 and other portions of the RESTATEMENT appear as an attachment to this report.

[321] E.g., United States v. MacAllister, 160 F.3d 1304, 1308 (11th Cir. 1998).

[322] Gibney, The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles, 19 BOSTON COLLEGE INTERNATIONAL & COMPARATIVE LAW REVIEW 297 (1996); Abramovsky, Extraterritorial Jurisdiction: The United States Unwarranted Attempt to Alter International Law in United States v Yunis, 15 YALE JOURNAL OF INTERNATIONAL LAW 121 (1990); Exporting United States Drug Law: An Example of the International Legal Ramifications of the "War on Drugs," 1992 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 165.

[323] Harvard Study at 480-509.

[324] E.g., 18 U.S.C. 81 (arson within the maritime and territorial jurisdiction of the United States), 113 (assaults within the maritime and territorial jurisdiction of the United States).

[325] Ford v. United States, 273 U.S. 593, 623 (1927)("a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done"); United States v. Yousef, 327 F.3d 56, 96-7 (2d Cir. 2003)("Moreover, assertion of jurisdiction is appropriate under the 'objective territorial principle' because the purpose of the attack was to influence United States foreign policy and the defendants intended their actions to have an effect – in this case, a devastating effect – on and within the United States"); United States v. Neil, 312 F.3d 419, 422 (9th Cir. 2002); United States v. MacAllister, 160 F.3d 1304, 1308 (11th Cir. 1998); United States v. Goldberg, 830 F.2d 459, 463-64 (3d Cir. 1987).

[326] United States v. Felix-Gutierrez, 940 F.2d 1200, 1205 (9th Cir. 1991)("Felix's actions created a significant detrimental effect in the United States and adversely affected the national interest. In helping to prevent the United States from apprehending Caro-Quintero, Felix directly hindered United States efforts to prosecute an alleged murderer of a government agent. Furthermore that agent was a United States citizen. We need not decide whether any one of these facts or principles, standing alone, would be sufficient. Rather, we hold that cumulatively applied they

If the territorial principle is more expansive than its caption might imply, the protective principle is less so. It is confined to crimes committed outside a nation's territory against its "security, territorial integrity or political independence."[327] As construed by the courts, however, it is understood to permit the application abroad of statutes which protect the federal government and its functions.[328] And so, it covers the overseas murder or attempted murder of federal officers or those thought to be federal officers;[329] acts of terrorism calculated to influence American foreign policy;[330] conduct which Congress has characterized as a threat to U.S. national security;[331] or false statements or forgery designed to frustrate the administration of U.S. our immigration laws.[332]

The nationality principle rests the exercise of extraterritorial criminal jurisdiction on the citizenship of accused.[333] It is the principle mirrored in the Supreme Court's statements in Blackmer, following the contempt conviction of an American living in Paris who ignored a federal court subpoena.[334] As in the case

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require the conclusion that giving extraterritorial effect to the accessory after the act statute in Felix's case does not violate international law principles"); United States v. Suerte, 291 F.3d 366, 370 (5th Cir. 2002); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999); United States v. Benitez, 741 F.2d 1312, 1316 (11th Cir. 1984).

[327] Harvard Study at 543.

[328] United States v. Vilches-Navarrete, 523 F.3d 1, 21-2 (1st Cir. 2008)("Under the protective principle of international law, Congress can punish crimes committed on the high seas regardless of whether a vessel is subject to the jurisdiction of the United States. Under the protective principle, a state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems").

[329] United States v. Vasquez-Velasco, 15 F.3d 833, 841 (9th Cir. 1994); United States v. Felix-Gutierrez, 940 F.2d 1200, 1206 (9th Cir. 1991); United States v. Benitez, 741 F.2d 1312, 1316 (11th Cir. 1984).

[330] United States v. Yousef, 327 F.3d 56, 97 (2d Cir. 2003) ("Finally, there is no doubt that jurisdiction is proper under the protective principle because the planned attacks were intended to affect the United States and to alter its foreign policy").

[331] United States v. Romero-Galue, 757 F.2d 1147, 1154 (11th Cir. 1985).

[332] United States v. Marino-Garcia, 679 F.2d 1373, 1381 fn. 14 (11th Cir. 1982) (citing cases in accord).

[333] Harvard Study at 519; United States v. Clark, 435 F.3d 1100, 1106 (9th Cir. 2006); United States v. Martinez, 599 F.Supp.2d 784, 797 (W.D.Tex. 2009).

[334] Blackmer v. United States, 284 U.S. 421, 437 (1932)("With respect to such exercise of authority, there is no question of international law, but solely of the purport of municipal law which establishes the duties of the citizen in relation to his own government. While the legislation

of Blackmer, which evidenced both the nationality and the protective principles, cases involving the nationality principle often involve other principles as well.[335]

The passive personality principle recognizes extraterritorial criminal jurisdiction based on the nationality of the victim of the offense.[336] It, too, has been asserted most often in the presence of facts suggesting other principles.[337]

The universal principle is based on the premise that offenses against all nations may be punished by any nation where the offender is found.[338] At a minimum, it applies to piracy and offenses committed on the high seas on "stateless" vessels.[339]

Current Extent of American Extraterritorial Criminal Jurisdiction

Federal Law

Express

Congress' declaration that a particular statute is to apply outside of the United States is the most obvious evidence of an intent to create extraterritorial jurisdiction.[340] Congress has expressly provided for the extraterritorial application of federal criminal law most often by outlawing various forms of misconduct when they occur "within the special maritime and territorial

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of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application so far as citizens of the United States in foreign countries are concerned is one of construction, not of legislative power").

[335] United States v. Plummer, 221 F.3d 1298, 1305-307(11th Cir. 2000)(nationality and territorial principles); Chua Han Mow v. United States, 730 F.2d 1308, 1312 (9th Cir. 1984)(territorial, protective and nationality principles); United States v. Smith, 680 F.2d 255, 257-58 (1st Cir. 1982)(territorial and nationality principles); United States v. Martinez, 599 F.Supp.2d 784, 800 (W.D.Tex. 2009)(nationality, passive personality, and territorial principles).

[336] Harvard Study at 445.

[337] United States v. Yousef, 327 F.3d 56, 96 (2d Cir. 2003)(passive personality and territorial principles)("consistent with the passive personality principle of customary international jurisdiction because each of these counts involved a plot to bomb United States-flag aircraft that would have been carrying United States citizens and crews and that were destined for cities in the United States"); United States v. Hill, 279 F.3d 731, 739 (9th Cir. 2002)("In the instance case, the territorial, national, and passive personality theories combine to sanction extraterritorial jurisdiction"); United States v. Rezaq, 134 F.3d 1121, 1133 (D.C.Cir. 1998)(protective and passive personality principles).

[338] United States v. Shi, 525 F.3d 709, 722 (9th Cir. 2008); Harvard Study at 445.

[339] United States v. Caicedo, 47 F.3d 370, 372 (9th Cir. 1995).

[340] A list of the citations to such federal statutes is attached.

jurisdiction of the United States."[341] The concept of special maritime and territorial jurisdiction, if not the phrase, dates from the First Congress,[342] and encompasses navigable waters and federal enclaves within the United States as well as areas beyond the territorial confines of the United States. Although the concept of the special maritime and territorial jurisdiction of the United States once embraced little more than places over which the United States enjoyed state-like legislative jurisdiction, U.S. navigable territorial waters, and vessels of the United States, its application has been statutorily expanded. It now supplies an explicit basis for the extraterritorial application of various federal criminal laws relating to:

- air travel (special aircraft jurisdiction of the United States);[343]
- customs matters (customs waters of the U.S.);[344]

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[341] The text of 18 U.S.C. 7 which defines the term "special maritime and territorial jurisdiction of the United States" is attached.

[342] 1 Stat. 113 (1790)(outlawing manslaughter committed in a place "under the sole and exclusive jurisdiction of the United States" and murder committed "upon the high seas").

[343] "In this chapter –

"(1) 'aircraft in flight' means an aircraft from the moment all external doors are closed following boarding—(A) through the moment when one external door is opened to allow passengers to leave the aircraft; or (B) until, if a forced landing, competent authorities take over responsibility for the aircraft and individuals and property on the aircraft.

"(2) 'special aircraft jurisdiction of the United States' includes any of the following aircraft in flight: (A) a civil aircraft of the United States. (B) an aircraft of the armed forces of the United States. (C) another aircraft in the United States. (D) another aircraft outside the United States—(i) that has its next scheduled destination or last place of departure in the United States, if the aircraft next lands in the United States; (ii) on which an individual commits an offense (as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft) if the aircraft lands in the United States with the individual still on the aircraft; or (iii) against which an individual commits an offense (as defined in subsection (d) or (e) of article I, section I of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation) if the aircraft lands in the United States with the individual still on the aircraft. (E) any other aircraft leased without crew to a lessee whose principal place of business is in the United States or, if the lessee does not have a principal place of business, whose permanent residence is in the United States.

"(3) an individual commits an offense (as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft) when the individual, when on an aircraft in flight—(A) by any form of intimidation, unlawfully seizes, exercises control of, or attempts to seize or exercise control of, the aircraft; or (B) is an accomplice of an individual referred to in subclause (A) of this clause," 49 U.S.C. 46501.

[344] "The term 'customs waters' means, [1] in the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon such vessel upon the high seas the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by

- U.S. spacecraft in flight; [345]
- overseas federal facilities and overseas residences of federal employees;[346]
- members of U.S. armed forces overseas and those accompanying them;[347]
- overseas human trafficking and sex offenses by federal employees, U.S. military personnel, or those accompanying them.[348]

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such treaty or arrangement and, [2] in the case of every other vessel, the waters within four leagues of the coast of the United States," 19 U.S.C. 1709(c).

[345] 18 U.S.C. 7(6)("Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard").

[346] "With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act – (A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and (B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities," 18 U.S.C. 7(9).

[347] "(a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States – (1) while employed by or accompanying the Armed Forces outside the United States; or (2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice), shall be punished as provided for that offense.

"(b) No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.

"(c) Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.

"(d) No prosecution may be commenced against a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice) under this section unless – (1) such member ceases to be subject to such chapter; or

(2) an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to such chapter," 18 U.S.C. 3261.

[348] "(a) Whoever, while employed by or accompanying the Federal Government outside the United States, engages in conduct outside the United States that

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The obligations and principles of various international treaties, conventions, or agreements to which the United States is a party supply the theme for a second category of federal criminal statutes with explicit extraterritorial application.[349] The range of these treaty-based federal crimes differs. Some have extraterritorial application only when the offender is an American.[350] Some address misconduct so universally condemned that they fall within federal jurisdiction regardless of any other jurisdictional considerations as long as the offender flees to the United States, is brought here for prosecution, or is otherwise "found in the United States" after the commission of the offense.[351] Some enjoy extraterritorial application under any of a number of these and other explicit jurisdictional circumstances.[352]

Members of a final category of explicit extraterritorial federal criminal statutes either cryptically declare that their provisions are to apply overseas[353] or describe a series of jurisdictional circumstances under which their provisions have

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would constitute an offense under chapter 77 [relating to peonage, slavery and trafficking] or 117 [relating to transportation for illegal sexual activity] of this title if the conduct had been engaged in within the United States or within the special maritime and territorial jurisdiction of the United States shall be punished as provided for that offense.

"(b) No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated," 18 U.S.C. 3271.

[349] E.g., 18 U.S.C. 1203 (hostage taking); 18 U.S.C. 175 (biological weapons); 18 U.S.C. 1091 (genocide); 18 U.S.C. ch.113C (torture).

[350] E.g.,18 U.S.C. 1091(d)(2)("the alleged offender is a national of the United States. . .").

[351] E.g., 18 U.S.C. 2340A(b)(2)("There is jurisdiction over the activity prohibited in subsection(a) if . . .(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender").

[352] E.g., 18 U.S.C. 1203 (It is not an offense under this section [relating to hostage taking] if the conduct required for the offense occurred outside the United States unless – (A) the offender or the person seized or detained is a national of the United States; (B) the offender is found in the United States; or (C) the governmental organization sought to be compelled is the Government of the United States").

[353] E.g., 18 U.S.C. 351(i)(relating to crimes of violence committed against Members of Congress, Supreme Court justices, and certain senior executive officials) ("There is extraterritorial jurisdiction over the conduct prohibited by this section").

extraterritorial application, not infrequently involving the foreign commerce of the United States in conjunction with other factors.[354]

Implied

The natural implications of Bowman[355] and Ford[356] are that a substantial number of other federal crimes operate overseas by virtue of the implicit intent of Congress. In fact, the lower federal courts have read Bowman and Ford to suggest that American extraterritorial criminal jurisdiction includes a wide range of statutes designed to protect federal officers, employees and property, to prevent smuggling and to deter the obstruction or corruption of the overseas activities of federal departments and agencies.[357] They have held, for instance, that the statute outlawing the assassination of Members of Congress may be applied against an American for a murder committed in a foreign country,[358] and that statutes prohibiting the murder or kidnaping of federal law enforcement officials apply in other countries even if the offenders are not Americans,[359] and even if the offenders incorrectly believed the victims were federal law enforcement officers.[360] They have also considered extraterritorial jurisdiction appropriate to (1) cases where aliens have attempted to defraud the United States in order to

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[354] E.g., 18 U.S.C. 175c (variola virus)(committed by or against a U.S. national; committed in or affecting interstate or foreign commerce; committed against federal property).

[355] United States v. Bowman, 260 U.S. 94 (1922)(the nature and purpose of a statute indicate whether Congress intended it to apply outside of the United States).

[356] Ford v. United States, 273 U.S. 593, 623 (1927)("a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done").

[357] United States v. MacAllister, 160 F.3d 1304, 1308 n.8 (11th Cir. 1998)("On authority of Bowman, courts have routinely inferred congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm").

[358] United States v. Layton, 855 F.2d 1388, 1395-397 (9th Cir. 1988) (At the time of the murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)).

[359] United States v. Felix-Guiterrez, 940 F.2d 1200, 1204-206 (9th Cir. 1991); United States v. Benitez, 741 F.2d 1312, 1316-317 (11th Cir. 1984).

Attached is a list of citations to statutes that condemn acts of violence against officers and officials of the United States, that contain no express provisions concerning their geographical application but that apply overseas, if the same logic evidenced in the cases noted above is followed.

[360] United States v. Vasquez-Velasco, 15 F.3d 833, 839 (9th Cir. 1994).

gain admission into the United States;[361] (2) false statements made by Americans overseas;[362] (3) the theft of federal property by Americans abroad;[363] and (4) counterfeiting, forging or otherwise misusing federal documents or checks overseas by either Americans or aliens.[364]

A logical extension would be to conclude that statutes enacted to prevent and punish the theft of federal property apply world-wide. And there seems to be no obvious reason why statutes protecting the United States from intentional deprivation of its property by destruction should be treated differently than those where the loss is attributable to theft.[365]

Finally, there are the "piggyback statutes" whose provisions are necessarily related to some other crime. An individual may be guilty of conspiracy to violate a federal law within the United States notwithstanding the fact he never enters the United States; it is sufficient that he is a member of a conspiracy to violate the American law.[366] The rationale should apply with equal force to the case of any accessory to the violation of any federal crime.[367] Nevertheless, a few recent statutes make the coverage of piggyback offenses explicit.[368]

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[361] United States v. Pizzarusso, 388 F.2d 8, 9-10 (2d Cir. 1968); Rocha v. United States, 288 F.2d 545, 549 (9th Cir. 1961); United States v. Khale, 658 F.2d 90, 92 (2d Cir. 1981); United States v. Castillo-Felix, 539 F.2d 9, 12-3 (9th Cir. 1976).

[362] United States v. Walczak, 783 F.2d 852, 854-55 (9th Cir. 1986).

[363] United States v. Cotten, 471 F.2d. 744, 749 (9th Cir. 1973).

[364] United States v. Birch, 470 F.2d 808, 810-11 (4th Cir. 1972); United States v. Fernandez, 496 F.2d 1294, 1296 (5th Cir. 1954); United States v. Aguilar, 756 F.2d 1418, 1425 (9th Cir. 1985); United States v. Castillo-Felix, 539 F.2d 9, 12-3 (9th Cir. 1976).

[365] Attached are lists of the citations to the theft of federal property statutes, the destruction of federal property statutes, the federal false statement statutes, and the federal counterfeiting statutes.

[366] United States v. MacAllister, 160 F.3d 1304, 1307-308 (11th Cir. 1998); Ford v. United States, 273 U.S. 593, 620-24 (1927); United States v. Inco Bank & Trust Corp., 845 F.2d 919, 920 (11th Cir. 1988); United States v. Manuel, 371 F.Supp.2d 404, 409 (S.D.N.Y. 2005).

[367] United States v. Felix-Gutierrez, 940 F.2d 1200, 1204-207 (9th Cir. 1991)(accessory after the fact violation committed overseas). A list of citations to the piggyback offense statutes is attached.

[368] E.g., 18 U.S.C. 2339D(b)(6) (relating to receipt of military training from a foreign terrorist organization)("(b) Extraterritorial jurisdiction – there is extraterritorial federal jurisdiction over an offense under this section. There is jurisdiction over an offense under subsection (a) if . . . (6) an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or conspires with any person over whom jurisdiction exist under this paragraph to commit an offense under subjection (a)").

A number of statutes condemn both a substantive offense and the piggy-back crimes (conspiracy or attempt) associated with the substantive offense. A statute which applies overseas carries with it the application of provisions which prohibit attempts or conspiracies to violate the underlying statute.[369]

Maritime Drug Law Enforcement Act

The Maritime Drug Law Enforcement Act (MDLEA) is somewhat unusual in that it expressly authorizes extraterritorial coverage of federal criminal law predicated on nothing more than the consent of the nation with primary criminal jurisdiction.[370] MDLEA outlaws the manufacture, distribution, or possession with intent to manufacture or distribute controlled substances aboard vessels within the jurisdiction of the United States.[371] It defines vessels within the jurisdiction of the United States not only in terms of ordinary U.S. maritime jurisdiction, but envelops the maritime jurisdiction of other countries as long as they have consented to the application of the U.S. law aboard the vessel.[372] The definition also encompasses "vessels without nationality" sometimes referred to as "stateless" vessels, that is, vessels for which no national registry is effectively claimed.[373]

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[369] United States v. Davis, 905 F.2d 245, 249 (9th Cir. 1990); United States v. Villanueva, 408 F.3d 193, 197-99 (5th Cir. 2005).

[370] 46 U.S.C. 70501-70507.

[371] 46 U.S.C. 70503.

[372] "In this chapter, the term 'vessel subject to the jurisdiction of the United States' includes – (A) a vessel without nationality; (B) a vessel assimilated to a vessel without nationality, in accordance with paragraph (2) of article 6 of the 1958 Convention on the High Seas; (C) a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States; (D) a vessel located within the customs waters of the United States; (E) a vessel located in the territorial waters of another nation, where the nation consents to the enforcement of United States law by the United States; and (F) a vessel located in the contiguous zone of the United States, as defined in Presidential Proclamation 7219 of September 2, 1999, and (i) is entering the United States, (ii) has departed the United States, or (iii) is a hovering vessel as defined in section 491 of the Tariff Act of 1930 (19 U.S.C. 1401)," 46 U.S.C. 70502(c)(1).

[373] "In this chapter, the term, "vessel without nationality" includes – (A) a vessel aboard which the master or person in charge makes a claim of registry, which claim is denied by the flag nation whose registry is claimed; (B) any vessel aboard which the master or person in charge fails, upon request of an officer of the United States empowered to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel; and (C) a vessel aboard which the master or person in charge makes a claim of registry and the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality," 46 U.S.C. 70502(d)(1).

MDLEA provides the basis for Coast Guard drug interdiction efforts in the Caribbean and in the eastern Pacific off the coast of Central and South America.[374] The courts have concluded that MDLEA constitutes a valid exercise of Congress' constitutional authority to define and punish offenses against the law of nations, U.S. Const. Art.I, §8, cl.10.[375] They are divided over whether the prosecution must show some nexus between the United States and the offense[376] and over the application of the subsection of the Act that assigns jurisdictional determinations to the court rather than to the jury, 46 U.S.C. 70504(a).[377]

State Law

State criminal laws are less likely to apply overseas than federal laws.[378] State law produces fewer instances where a statute was clearly enacted with an eye to its application overseas and fewer examples where frustration of legislative purpose is the logical consequence of purely territorial application. The Constitution seems to have preordained this result when it vested responsibility for protecting

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[374] E.g., United States v. Olave-Valencia, 371 F.Supp.2d 1224, 1226 (S.D. Cal. 2005)(Coast Guard interdiction 250 miles from the Honduras/Costa Rica border); United States v. Valencia-Aguirre, 409 F.Supp.2d 1358, 1360 (M.D.Fla. 2006)(Coast Guard interdiction from a Navy frigate off the Coast of Colombia); United States v. Perlaza, 439 F.3d 1149, 1152 (9th Cir. 2006) (Navy and Coast Guard ships engaged in drug interdiction in Pacific off the coasts of Ecuador, Colombia and Peru).

[375] United States v. Ledesma-Cuesta, 347 F.3d 527, 532 (3d Cir. 2003); United States v. Moreno-Morillo, 334 F.3d 819, 824 (9th Cir. 2003).

[376] United States v. Suerte, 291 F.3d 366, 375 (5th Cir. 2002); United States v. Cardales, 168 F.3d 548, 552-53 (1st Cir. 1999); United States v. Perez Oviedo, 281 F.3d 400, 402-3 (3d Cir. 2002); contra, United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998).

[377] United States v. Perlaza, 439 F.3d 1149, 1165-166 (9th Cir. 2006)("After hearing all the evidence as to its status at a pretrial hearing, the district court determined that the Go-Fast was a stateless vessel. We find that by not submitting this issue to the jury, the district court erred. The evidence relating to the Go-Fast's statelessness presents precisely the kind of disputed factual question that Smith [United States v. Smith, 282 F.3d 758 (9th Cir. 2002)] requires a jury to resolve"); contra, United States v. Tinoco, 304 F.3d 1088, 1110-111 and n.22 (11th Cir. 2002)("Hence, although fact-bound determinations may be involved, that does not automatically mean that the 46 U.S.C.App. 1903 jurisdictional issue has to be decided by the jury. . . Consequently, even if questions under the 46 U.S.C.App. 1903 jurisdictional requirement may have a factual component, that component does not have to be resolved by the jury, given that, as we have explained, the jurisdictional requirement goes only to the court's subject matter jurisdiction and does not have to be treated as an element of a MDLEA substantive offense. . . We also note that our rejection of the appellant's argument concerning the fact-bound nature of 46 U.S.C.App. 1903 jurisdictional determinations appears to put us in conflict with one of our sister circuits. . . In United States v. Smith . . . [t]he Ninth Circuit concluded that the district court erred by taking the issue of whether the §1903 jurisdictional requirement had been met completely away from the jury").

[378] The comparable question under state law is the extent to which a state's criminal law applies to activities occurring in another state.

American interests and fulfilling American responsibilities overseas in the federal government.[379]

The primacy of the federal government in foreign affairs might suggest that the Constitution precludes the application of state law in other countries, but courts and commentators have recognized a limited power of the states to enact law governing conduct outside the United States.[380] Obviously, Congress may, by preemptive action, extinguish the legislative authority of a state in any area over which Congress has plenary powers. And the Supremacy Clause also renders treaties to which the United States is a party binding upon the states and therefore beyond their legislative reach.[381] Beyond the constitutional limitations, however, "the question . . . is one of whether the state actually intended to legislate extraterritorially, not whether it has the power to do so."[382]

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[379] See e.g., U.S. Const. Art.II, §2, cl.2 ("[t]he President . . . shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, [and] other public ministers and consuls . . . ."); U.S. Const. Art.II, §3, cl.3 (". . . he shall receive Ambassadors and other public ministers. . . ."); U.S. Const. Art.II, §2, cl.1 ("[he] shall be commander in chief of the Army and Navy of the United States . . . ."); U.S. Const. Art.I, §8, cl.18 ("[t]he Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution [its] powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"); U.S. Const. Art.I, §8, cl.10 ("[t]he Congress shall have power . . . to define and punish piracies and felonies committed on the high seas, and offences against the law of nations"); U.S. Const. Art.I, §8, cl.3 ("[t]he Congress shall have power . . . to regulate commerce with foreign nations . . . ."); U.S. Const. Art.I, §8, cl.1 ("[t]he Congress shall have power to lay and collect . . . duties, imposts and excises, to pay the debts and provide for the common defence and general welfare . . . ."); U.S. Const. Art.I, §8, cls.11, 12, 13, 14 ("[t]he Congress shall have power . . . to declare war. . . ; to raise and support armies . . . ; to provide and maintain a navy . . . ; [and] to make rules for the government and regulation of the land and naval forces. . . .").

[380] Skiriotes v. Florida, 313 U.S. 69, 77 (1941)("If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress"); State v. Flores, 218 Ariz. 407, 413-16, 188 P.3d 706, 712-15 (Ariz.App. 2009); State v. Jack, 125 P.3d 311, 318-19 (Alaska 2005); Colangelo, Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law, 48 HARVARD INTERNATIONAL LAW JOURNAL 121, 128 (2007).

[381] "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; any thing in the constitution or laws of any state to the contrary notwithstanding," U.S. Const. Art.VI, cl.2.

[382] George, Extraterritorial Application of Penal Legislation, 64 MICHIGAN LAW REVIEW 609, 617 (1966); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §402 comment k, n.5 (1987).

The states have chosen to make their laws applicable beyond their boundaries in only a limited set of circumstances and ordinarily only in cases where there is some clear nexus to the state.[383] Perhaps the most common state statutory provision claiming state extraterritorial criminal jurisdiction is one which asserts jurisdiction in cases where some of the elements of the offense are committed within the state or others are committed outside it.[384] Another common claim is where an individual outside the state attempts or conspires to commit a crime within the state;[385] or one within the state attempts or conspires to commit a crime beyond its boundaries.[386] Still others define the state's extraterritorial

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[383] The Model Penal Code section (attached) exemplifies the standards found in most state extraterritorial criminal jurisdiction provisions. Several states have no general extraterritorial statute, but instead have statutory venue provisions indicating where criminal offenses with extraterritorial components may be tried, e.g., Ala.Code §15-2-3 ("When the commission of an offense commenced in the State of Alabama is consummated without the boundaries of the state, the offender is liable to punishment therefor in Alabama; and venue in such case is in the county in which the offense was commenced, unless otherwise provided by law").

[384] *Ala.Code §§15-2-3, 15-2-4; *Alaska Stat. §12.05.010; Ariz.Rev.Stat.Ann. §13-108(A)(1); Ark.Code Ann. §5-1104(a)(1); Cal.Penal Code §27(a)(1); Colo.Rev. Stat. §18-1-201(1)(a); Del.Code tit.11 §204(a)(1); Fla.Stat.Ann. §910.005(1)(a); Ga.Code §17-2-1(b)(1); Hawaii Rev.Stat. §701-106(1)(a); Idaho Code §18-202(1); Ill.Comp.Stat.Ann. ch.720, §5/1-5(a)(1); Ind. Code Ann. §35-41-1-1(b)(1); Iowa Code Ann. §803.1(1)(a); Kan.Stat.Ann. §21-3104; Ky.Rev.Stat. §500.060(1)(a); La.Code Crim.Pro. art. 611; Me.Rev.Stat.Ann. tit.17-A §7(1)(A); Minn.Stat.Ann. §609.025(1); *Miss.Code §§99-11-15, 99-11-17; Mo.Ann. Stat. §541.191(1)(1); Mont.Code Ann. §46-2-101; *Nev.Rev. Stat. §§170. 015, 170.020; N.H. Rev.Stat.Ann. §625:4(I)(a); N.J.Stat.Ann. §2C:1-3(a)(1); N.Y.Crim. Pro.Law §20.20(1)(a); *N.C.Gen.Stat. §15A-134; *N.D.Cent.Code §29-03-01; Ohio Rev.Code §2901.11(A)(1); Okla. Stat.Ann. tit.21 §151(1); Ore.Rev.Stat. §131.215(1); Pa.Stat.Ann. tit. 18 §102(a)(1); *S.D.Codified Laws §23A-16-2; *Tenn.Code Ann. §39-11-103(b); Tex. Penal Code §1.04 (a)(1); Utah Code Ann. §76-1-201(1)(a); Vt.Stat.Ann. tit.13 §2; Wash.Rev. Code Ann. §9A.04.030; Wis.Stat.Ann. §939.03 (1)(a).*Statutes which phrase the extraterritorial jurisdiction statement in terms of offenses commenced in one state and consummated in another state, rather than in terms of elements.

[385] Ariz.Rev.Stat.Ann. §13-108(A)(2)(attempt and conspiracy); Ark.Code Ann.§5-1-104(a)(2),(3)(attempt and conspiracy); Colo. Rev.Stat. §18-1-201(1)(b),(c)(attempt and conspiracy); Del.Code tit.11 §204(a)(2)(conspiracy); Fla.Stat.Ann. §910.005 (1)(b),(c) (attempt and conspiracy); Ga.Code §17-2-1(b)(2)(attempt); Hawaii Rev.Stat. §701106(1)(b),(c)(attempt and conspiracy); Ill.Comp.Stat.Ann. ch.720 §5/1-5(a)(2),(3) (attempt and conspiracy); Ind.Code Ann. §35-41-1-1(b)(2),(3)(attempt and conspiracy); Iowa Code Ann. §803.1(1)(b),(c)(attempt and conspiracy); Kan.Stat.Ann. §21-3104(1)(b),(c) (attempt and conspiracy); Ky.Rev.Stat. §500.060(1)(b),(c) (attempt and conspiracy); Me.Rev.Stat. Ann. tit.17-A, §7(1)(B), (C) (attempt and conspiracy); Mo.Ann.Stat. §541.191(1)(2) (attempt and conspiracy); Mont.Code Ann. §46-2-101(b)(attempt); N.H.Rev.Stat.Ann. §625:4(I)(b), (c) (attempt and conspiracy); N.J.Stat.Ann. §2C:1-3(a)(2),(3) (attempt and conspiracy); Ohio Rev.Code §2901.11 (A)(3) (attempt and conspiracy); Ore.Rev.Stat. §131.215(2), (3) (attempt and conspiracy); Pa. Stat.Ann. tit.18 §102(a)(2), (3) (attempt and conspiracy); Tex.Penal Code §1.04(a)(2), (3) (attempt and conspiracy); Utah Code Ann. §76-1-201(1)(b), (c) (attempt and conspiracy); Wis.Stat.Ann. §939.03(1)(b)(conspiracy).

[386] Ariz.Rev.Stat.Ann. §13-108(A)(3)(attempt and conspiracy); Ark.Code Ann.§5-1-104 (a)(4)(attempt and conspiracy); Colo. Rev.Stat. §18-1-201(1)(d)(attempt and conspiracy);

jurisdiction to include instances where the victim of homicide, fatally wounded outside of the state, dies within it;[387] where property stolen elsewhere is brought into the state;[388] or where conduct outside the state constitutes the failure to comply with a legal duty imposed by state law.[389]

Investigation and Prosecution

Although a substantial number of federal criminal statutes have undisputed extraterritorial scope and a great many more have apparent extraterritorial range, prosecutions are few. Investigators and prosecutors face legal, practical, and often diplomatic obstacles that can be daunting. Some of these are depicted in the description that follows of some of procedural aspects of the American investigation and prosecution of a crime committed abroad.

With respect to diplomatic concerns, the Restatement observes:

Del.Code tit.11 §204(a)(3)(attempt and conspiracy); Fla.Stat.Ann. §910.005 (1)(d)(attempt and conspiracy); Ga.Code §17-2-1(b)(3)(attempt); Hawaii Rev.Stat. §701-106(1)(d) (attempt and conspiracy); Ill.Comp.Stat.Ann. ch.720 §5/1-5(1)(d)(attempt and conspiracy); Ind.Code Ann. §35-41-1-1(b)(4)(attempt and conspiracy); Iowa Code Ann. §803.1(1)(e) (attempt and conspiracy); Ky.Rev.Stat. §500.060(1)(d)(attempt and conspiracy); Me.Rev.Stat.Ann. tit.17-A, §7(1)(D) (attempt and conspiracy); Mo.Ann.Stat. §541.191(1)(3)(attempt and conspiracy); Mont.Code Ann. §46-2-101(c)(attempt and conspiracy); N.H.Rev. Stat.Ann. §625:4(I) (c); N.J.Stat.Ann. §2C:1-3(a)(4) (attempt and conspiracy); Ohio Rev.Code §2901.11(A)(2) (attempt and conspiracy); Ore.Rev.Stat. §131.215(4) (attempt and conspiracy); Pa. Stat.Ann. tit.18 §102(a)(4)(attempt and conspiracy); R.I.Gen.Laws §11-1-7 (conspiracy); Tex.Penal Code §1.04(a) (3); Utah Code Ann. §76-1201(1)(d)(attempt and conspiracy).

[387] Ariz.Rev.Stat.Ann. §13-108(B); Ark.Code Ann. §5-1-104(b); Colo.Rev.Stat. §18-1-201(2); Del.Code tit.11 §204(c); Fla.Stat.Ann. §910.005(2); Ga.Code §17-2-1(c); Hawaii Rev.Stat. §701-106(4); Ill.Comp.Stat.Ann. ch.720 §5/1-5(b); Ind.Code Ann. §35-41-1-1(c); Iowa Code Ann. §803.1(2); Kan.Stat.Ann. §21-3104(2); Ky.Rev.Stat. §500.060(3); La.Code Crim.Pro. art. 611; Me. Rev.Stat.Ann. tit.17-A §7(3); Miss.Code §99-11-21; Mo. Ann.Stat. §541.191(2); Mont.Code Ann. §46-2-101(2); N.H.Rev.Stat.Ann. §625:4 (III); N.J.Stat. Ann.§2C:1-3(d); N.Y.Crim. Pro.Law §20.20(2)(a); Ohio Rev.Code §2901.11 (B); Ore.Rev. Stat. §131.235; Pa.Stat. Ann. tit.18 §102(c); Tex.Penal Code §1.04(b); Utah Code Ann. §76-1-201(3).

[388] Ala.Code §15-2-5; Cal.Penal Code §27(a)(2); Idaho Code §18-202(2); Miss.Code §99-11-23; N.D.Cent.Code. §2903-01.1; Ohio Rev.Code §2901.11(A)(5); Okla.Stat.Ann. tit.21 §151(2); R.I.Gen.Laws §12-3-7; Wash.Rev.Code Ann. §9A.04.030(2); Wis.Stat.Ann. §939.03(1)(d).

[389] Ariz.Rev.Stat.Ann. §13-108(A)(4); Ark.Code Ann. §5-1-104(a)(5); Colo. Rev.Stat. §18-1-201(3); Del.Code tit.11 §204(4); Fla.Stat.Ann. §910.005(3); Ga. Code §17-2-1(d); Hawaii Rev.Stat. §701-106(1)(e); Ill.Comp.Stat.Ann. ch.720 §5/1-5(c); Ind. Code Ann. §35-41-1-1(b)(5); Iowa Code Ann. §803.1(3); Kan.Stat.Ann. §21-3104 (3); Ky.Rev.Stat. §500.060(1) (e); Me.Rev.Stat.Ann. tit.17-A §7(1)(E); Mo.Ann.Stat. §541.191(1)(4); Mont.Code Ann. §46-2-101(3); N.H.Rev.Stat.Ann. §625:4(I) (e); N.J.Stat.Ann. §2C:1-3(a)(5); Ohio Rev. Code §2901.11(A)(4); Ore.Rev.Stat. §131.215(5); Pa.Stat.Ann. tit.18 §102(a)(5); Tex.Penal Code §1.04(c); Utah Code Ann. §76-1-201(4).

> *It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent. Thus, while a state may take certain measures of nonjudicial enforcement against a person in another state, . . . its law enforcement officers cannot arrest him in another state, and can engage in criminal investigation in that state only with that state's consent. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §432 cmt. b (1986).*

Failure to comply can result in strong diplomatic protests, liability for reparations, and other remedial repercussions, to say nothing of the possible criminal prosecution of offending foreign investigators.[390] Consequently, investigations within another country of extraterritorial federal crimes without the consent or at least acquiescence of the host country are extremely rare.

Mutual Legal Assistance Treaties and Agreements

Congress has endorsed diplomatic efforts to increase multinational cooperative law enforcement activities. The United States has over fifty mutual legal assistance treaties in force.[391] Their benefits are typically available to state and federal law enforcement investigators though the Department of Justice's Office of International Affairs.[392] Initially negotiated to overcome impediments posed

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[390] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §432 cmt. c and rptrs.' n.1 (1986) ("In a case that received wide attention, two French customs officials traveled to Switzerland on several occasions in 1980 to interrogate a former official of a Swiss bank, with a view to gaining information about French citizens believed to be hiding funds from the French tax and exchange control authorities. The person interrogated informed the Swiss federal prosecutor's office, which caused the Swiss police to arrest the French officials on their next visit. The officials were convicted of committing prohibited acts in favor of a foreign state, as well as of violation of the Swiss banking and economic intelligence laws. Even though the two French defendants were engaged in official business on behalf of the government of a friendly foreign state, they were given substantial sentences").

[391] See generally, Abbell, OBTAINING EVIDENCE ABROAD IN CRIMINAL CASES, ch.4 (2004 & 2008 Supp.). Jurisdictions with whom the United States has a bilateral mutual legal assistance treaty in force include Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Barbados, Belize, Belgium, Brazil, Canada, China, Cyprus, the Czech Republic, Dominica, Egypt, Estonia, France, Greece, Grenada, Hong Kong, Hungary, Israel, Italy, India, Jamaica, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Mexico, Morocco, the Netherlands, Nigeria, Panama, the Philippines, Poland, Romania, Russia, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, South Africa, Spain, Switzerland, Thailand, Trinidad and Tobago, Turkey, the United Kingdom, the Cayman Islands, Anguilla, the British Virgin Islands, Montserrat, the Turks and Caicos Islands, Ukraine, Uruguay, and Venezuela, United States Department of State, TREATIES IN FORCE. (Jan. 1, 2009).

[392] 28 C.F.R. §0.64-1; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Egypt, Arts. 1(3), S.Treaty Doc. 106-19 ("Assistance shall be provided in connection with any conduct that is the subject of the investigation, prosecution, or proceeding under the laws of the Requesting

by foreign bank secrecy laws,[393] the treaties generally offer more than the collection and delivery of documents. They ordinarily provide similar clauses, with some variations, for locating and identifying persons and items;[394] service of process;[395] executing search warrants;[396] taking witness depositions;[397]

State"); Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Greece, Arts. 1(3), S.Treaty Doc. 106-18; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.Cyprus, Arts. 1(3), S.Treaty Doc. 106-20; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Cyprus, Arts. 1(3),S.Treaty Doc. 106-35; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-S.Afr., Arts. 1(3), S.Treaty Doc. 106-36. Under a few agreements, treaty benefits may not be available during preliminary investigations or for want of dual criminality, e.g., Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Fr., Art. 1, S.Treaty Doc. 106-7 (". . . mutual assistance in investigations and proceedings in respect of criminal offenses the punishment of which, at the time of the request for assistance, is a matter for the judicial authorities of the Requesting State"); Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Liech., Arts. 1, S.Treaty Doc. 107-16 ("Assistance shall be provided without regard to whether the conduct that is the subject of the investigation, prosecution, or proceeding in the Requesting State would constitute an offense under the laws of the Requested State, except that the Requested State may refuse to comply in whole or in part with a request for assistance to the extent that the conduct would not constitute an offense under its laws and the execution of the request would require a court order for search and seizure or other coercive measures").

[393] Ellis & Pisani, The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis, 19 INTERNATIONAL LAWYER 189, 196-98 (1985); Nadelmann, Negotiations in Criminal Law Assistance Treaties, 33 AMERICAN JOURNAL OF COMPARATIVE LAW 467, 470-74 (1985).

[394] E.g., Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Liech., Art. 13, S. Treaty Doc. 106-16 ("If the Requesting State seeks the location or identity of persons or items in the Requested State, the Requested State shall use its best efforts to ascertain the location or identity"); Treaty on Mutual Legal Assistance in Criminal Matters, U.S.Greece, Art. 13, S.Treaty Doc. 106-18; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Egypt, Art. 12, S.Treaty Doc. 106-19; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Rom., Art. 13, S.Treaty Doc. 10620; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Cyprus, Art. 13, S.Treaty Doc. 106-35; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-S.Afr., Art. 14, S.Treaty Doc. 106-36.

[395] E.g., Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Fr., Art. 15, S. Treaty Doc. 106-17 ("The Requested State shall serve procedural documents and judicial decisions sent to it for this purpose by the Requesting State. . . ."); Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Liech., Art. 14, S.Treaty Doc. 106-16; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Greece, Art. 14, S.Treaty Doc. 106-18; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Egypt, Art. 13, S.Treaty Doc. 106-19; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Rom., Art. 14, S.Treaty Doc. 106-20; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Cyprus, Art. 14, S.Treaty Doc. 106-35; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-S.Afr., Art. 15, S.Treaty Doc. 106-36.

[396] E.g., Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Greece, Art. 15, S.Treaty Doc. 106-18 (2000); ("The Requested State shall execute a request that it search for, seize, and transfer any item to the Requesting State if the request justifies such action under the laws of the Requested State. . . ."); Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Liech., Art. 15, S.Treaty Doc. 106-16; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Fr., Art. 10, S. Treaty Doc. 106-17; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Egypt, Art. 14, S.Treaty Doc. 106-19; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Rom., Art. 15,

persuading foreign nationals to come to the United States voluntarily to present evidence here;[398] and forfeiture related seizures.[399]

Letters Rogatory

Witness depositions may be taken in a foreign country cooperatively using letters rogatory in the case of nations with whom the United States has no MLAT or similar agreement. Letters rogatory involve the formal request from the courts of one country to those of another asking that a witness' statement be taken. The procedure is governed by statute and rule.[400] It is often a resource of last resort. The process, through diplomatic channels, is time consuming, cumbersome, and lies within the discretion of the foreign court to which it is addressed.[401]

S.Treaty Doc. 10620 (2000); Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Cyprus, Art. 15, S.Treaty Doc. 106-35; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-S.Afr., Art. 16, S.Treaty Doc. 106-36.

[397] E.g., Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Egypt, Art. 8, S.Treaty Doc. 106-19;("A person in the Requested State from whom testimony or evidence is requested pursuant to this Treaty shall be compelled, if necessary, under the laws of the Requested State to appear and testify or produce items, including documents, records, and articles of evidence . . ."); Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Liech., Art. 8, S.Treaty Doc. 106-16; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Fr., Art. 9(2), S. Treaty Doc. 106-17; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Greece, Art. 8, S.Treaty Doc. 106-18; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Rom., Art. 8, S.Treaty Doc. 106-20; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Cyprus, Art. 8, S.Treaty Doc. 106-35; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-S.Afr., Art. 9, S.Treaty Doc. 106-36.

[398] E.g., Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Belize, Art. 10, S.Treaty Doc. 106-19 ("1. When the Requesting State requests the appearance of a person in that State, the Requested State shall invite the person to appear before the appropriate authority in the Requesting State . . ."); see also, Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Liech., Art. 10, S.Treaty Doc. 107-16 (person may be served or detained except as stated in the request); Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Venez., Art. X, S.Treaty Doc. 105-38.

[399] E.g., Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Cyprus, Art. 17(2), S.Treaty Doc. 106-35 (2000) ("The Parties shall assist each other to the extent permitted by their respective laws in proceedings relating to the forfeiture of the proceeds and instrumentalities of offense, restitution to the victims of crime, and the collection of fines imposed as sentences in criminal prosecutions. This may include action to temporarily immobilize the proceeds or instrumentalities pending further proceedings"); Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Greece, Art. 17, S.Treaty Doc. 106-18 ; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Liech., Art. 17, S.Treaty Doc. 106-16; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Fr., Art. 11, S. Treaty Doc. 106-17; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Egypt, Art. 16, S.Treaty Doc. 106-19; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Rom., Art. 17, S.Treaty Doc. 106-20; Treaty onMutual Legal Assistance in Criminal Matters, U.S.-S.Afr., Art. 18, S.Treaty Doc. 106-36.

[400] 28 U.S.C. 1781, 1782; F.R.Civ.P. 28(b).

[401] See generally, Abbell, OBTAINING EVIDENCE ABROAD IN CRIMINAL CASES §3-3 (2004 & 2008 Supp.); United States Department of State, Preparation of Letters Rogatory, available on

Cooperative Efforts

American law enforcement officials have historically used other, often less formal, cooperative methods overseas to investigate and prosecute extraterritorial offenses. In the last few decades the United States has taken steps to facilitate cooperative efforts. Federal law enforcement agencies have assigned an increasing number of personnel overseas. For example, the Justice Department's Criminal Division has resident legal advisors in 37 countries abroad;[402] and the Federal Bureau of Investigation now operates legal attache offices in 75 foreign cities;[403] the Drug Enforcement Administration has offices in 87;[404] the U.S. Immigration and Customs Enforcement agency in 54;[405] the Secret Service in 20.[406]

A few regulatory agencies with law enforcement responsibilities have working arrangements with their foreign counterparts. The Securities and Exchange Commission, for instance, has bilateral enforcement memoranda of understanding with 20 foreign securities commissions and, with 62 others, is a signatory of the International Organization of Securities Commissions' multilateral memorandum of understanding (IOSCO MMOU).[407]

December 7, 2009 at http://www.travel.state.gov/ law/info/judicial/judicial_683.html. One commentator has observed that, "parties utilizing letters rogatory must simply cross their fingers and hope that the foreign nation will provide the evidence in a timely fashion and in an admissible form. Historically, the absence of a reliable evidence-gathering mechanism often stymied prosecutorial efforts, making it not unusual for the U.S. government to simply forgo transnational prosecutions," Richardson, Due Process for the Global Crime Age: A Proposal, 41 CORNELL INTERNATIONAL LAW JOURNAL 347 (2008); Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 247 (2004).

[402] Ass't Att'y Gen. Lanny A. Breuer, The Global Case for Justice: Protecting Human Rights and Promoting the Rule of Law at http://www.justice.gov/criminal/pr/speeches/2009/10/10-07-09/breuer-speech.pdf.

[403] Federal Bureau of Investigation, Legal Attache Offices at http://www.fbi.gov/contact/legat/legat.htm.

[404] Drug Enforcement Administration, DEA Office Locations at http://www.justice.gov/dea/agency/domestic.htm.

[405] U.S. Immigration and Customs Enforcement, The ICE International Presence at http://www.ice.gov/internationalaffairs/presence.htm.

[406] U.S. Secret Service, U.S. Secret Service Field Offices at http://www.secretservice.gov/field_offices.shtml.

[407] U.S. Securities and Exchange Commission, International Enforcement Assistance at http://www.sec.gov/about/offices/oia/oia_crossborder.htm#mechanisms. See also, http://www.iosco.org/library/index.cfm?section=mou_siglist.

Congress has enacted several measures to assign foreign law enforcement efforts in this country in anticipation of reciprocal treatment. For instance, the Foreign Evidence Request Efficiency Act of 2009 authorizes Justice Department attorneys to petition federal judges for any of a series of orders to facilitate investigations in this country by foreign law enforcement authorities.[408] The authorization extends to the issuance of:

- search warrants;
- court orders for access to stored electronic communications and to communications records;
- pen register or trap and trace orders; and
- subpoena authority, both testimonial and for the production of documents and other material.[409]

Search and Seizure Abroad

Overseas cooperative law enforcement assistance occasionally has either Fourth or Fifth Amendment implications. In the case of the Fourth Amendment, the relatively limited lower federal court case law has remained fairly uniform, although the diversity of views reflected in the Supreme Court's Verdugo-Urquidez decision in 1990[410] lends an air of uncertainty to the matter. Prior to Verdugo-Urquidez, it seems to have been generally agreed that the Fourth Amendment governed the overseas search and seizure of the person or property of Americans by American law enforcement officials.[411] On the other hand, neither the Fourth Amendment[412] nor its exclusionary rule[413] were considered applicable to overseas searches and seizures conducted by foreign law

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[408] P.L. 111-79, 123 Stat. 2086 (2009), 18 U.S.C. 3512.

[409] 18 U.S.C. 3512(a)(2). In the absence of a treaty nexus, the reach of the authority may be subject to constitutional limitations, see U.S. Const. Art. III, §2.

[410] United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

[411] United States v. Conroy, 589 F.2d 1258, 1264 (5th Cir. 1979); Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144, 157 (D.D.C. 1976).

[412] Birdsell v. United States, 346 F.2d 775, 782 (5th Cir. 1965).

[413] United States v. Janis, 428 U.S. 433, 455-56 n.31 (1976)(". . . It is well established, of course, that the exclusionary rule, as a deterrent sanction, is not applicable where a private party or foreign government commits the offending act"); United States v. Callaway, 446 F.2d 753, 755 (3d Cir. 1971); United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976); Stowe v. Devoy, 588 F.2d 336, 341 (2d Cir. 1978); United States v. Marzano, 537 F.2d 257, 269-71 (7th Cir. 1976); United States v. Rose, 570 F.2d 1358, 1361-362 (9th Cir. 1978); United States v. Hensel, 699 F.2d 18, 25 (1st Cir. 1983); United States v. Mount, 757 F.2d 1315, 1317-318 (D.C.Cir. 1985); United States v. Delaplane, 778 F.2d 570, 573 (10th Cir. 1985); United States v. Rosenthal, 793 F.2d 1214, 1231 (11th Cir. 1986).

enforcement officials,[414] except under two circumstances. The first exception covered foreign conduct which "shocked the conscience of the court."[415] The second reached foreign searches or seizures in which American law enforcement officials were so deeply involved as to constitute "joint ventures" or some equivalent level of participation.[416] The cases seldom explained whether these exceptions operated under all circumstances or only when searches or seizures involved the person or property of Americans. In the days when MLATs were scarce, however, the courts rarely, if ever, encountered circumstances sufficient to activate either exception.

Verdugo-Urquidez may suggest a more narrow application of the Fourth Amendment than was previously contemplated. It holds that "the Fourth Amendment [does not] appl[y] to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country," 494 U.S. at 261. The majority opinion is grounded not in the principles previously announced by the lower courts but in its reading of the history of the Amendment and of the Court's earlier treatment of the Constitution's application overseas and to aliens.[417] Earlier lower court jurisprudence is neither mentioned nor cited. Moreover, one of the Justices in the five member majority and a sixth Justice authored concurrences in which they indicated that Fourth Amendment reasonableness abroad may be very different from the Amendment's demands domestically.[418]

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[414] Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1969)("Neither the Fourth Amendment to the United States Constitution nor the exclusionary rule of evidence, designed to deter federal officers from violating the Fourth Amendment, is applicable to the acts of foreign officials").

[415] United States v. Callaway, 446 F.2d 753, 755 (3d Cir. 1971); United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976); Stowe v. Devoy, 588 F.2d 336, 341 (2d Cir. 1978); United States v. Rose, 570 F.2d 1358, 1362 (9th Cir. 1978); United States v. Hensel, 699 F.2d 18, 25 (1st Cir. 1983); United States v. Delaplane, 778 F.2d 570, 573-74 (10th Cir. 1985); United States v. Rosenthal, 793 F.2d 1214, 1231-232 (11th Cir. 1986).

[416] Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1969); United States v. Callaway, 446 F.2d 753, 755 (3d Cir. 1971); United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976); United States v. Rose, 570 F.2d 1358, 1362 (9th Cir. 1978); United States v. Hensel, 699 F.2d 18, 25 (1st Cir. 1983); United States v. Mount, 757 F.2d 1315, 1317-318 (D.C.Cir. 1985); United States v. Delaplane, 778 F.2d 570, 573-74 (10th Cir. 1985); United States v. Rosenthal, 793 F.2d 1214, 1231-232 (11th Cir. 1986).

[417] "We think that the text of the Fourth Amendment, its history, and our cases discussing the application of the Constitution to aliens and extraterritorially require rejection of respondent's claim. At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application," 494 U.S. 274-75.

[418] 494 U.S. at 278 (Kennedy, J., concurring)("The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the

One commentator argues that the concurrences should be read as confining rather than expanding the impact of the majority decision:

> *Given Verdugo-Urquidez, it might understandably be thought that the issue discussed herein – when, if ever, a United States connection with a search in a foreign country is substantial enough to make the Fourth Amendment and its exclusionary rule applicable – is of no relevance whenever that search is directed at an alien not then in the United States. But, an examination of the positions of the two concurring and three dissenting Justices suggests otherwise. The dissenters. . . are of the view that if the foreign search is properly characterized as United States activity . . . then the Fourth Amendment applies if the defendant is being subjected to a U.S. criminal prosecution. . . . Thus, the most that can be definitely concluded from Verdugo-Urquidez is that the Fourth Amendment's warrant clause is inapplicable to a search conducted under the circumstances present in that case. Beyond that, much depends upon the exact positions of the two [cryptic] concurring Justices. 1 LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 325-26 (4th ed. 2004)(emphasis in the original).*

Subsequent case law in the lower federal courts acknowledges Verdugo-Urquidez and molds the principles of the opinion for the Court into the body of pre-existing law. Although limited, it indicates that the Fourth Amendment does not apply to a search conducted overseas of the property of a foreign national with no voluntary connection to the United States.[419] As for overseas searches of the property of Americans or aliens permanently resident in the United States, the Fourth Amendment is said not to apply to a search by foreign officials unless conducted as a "joint venture" with American authorities or unless the conduct of the foreign officials "shocks the conscience of the court."[420] Nevertheless, "the

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Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country"); id. at 279 (Stevens, J., concurring in the judgment)("I do agree, however, with the Government's submission that the search conducted by the United States agents with the approval and cooperation of the Mexican authorities was not 'unreasonable' as that term is used in the first Clause of the Amendment. I do not believe the Warrant Clause has any application to searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches").

[419] United States v. Valencia-Trujillo, 573 F.3d 1171, 1183 (11th Cir. 2009); United States v. Bravo, 489 U.S. 1, 8-9 (1st Cir. 2007); United States v. Zakharov, 468 F.3d 1171, 1179-180 (9th Cir. 2006); United States v. Inigo, 925 F.3d 641, 656 (3d Cir. 1991); United States v. Suchit, 480 F.Supp. 39, 51 n.18 (D.C.Cir. 2007).

[420] United States v. Emmanuel, 565 F.3d 1324, 1330 (11th Cir. 2009); United States v. Barona, 56 F.3d 1087, 1090-93 (9th Cir. 1995); United States v. Behety, 32 F.3d 503, 510-11 (11th Cir.

Fourth Amendment's reasonableness standard applies to United States officials conducting a search affecting a United States citizen in a foreign country."[421] On the other hand, even under such circumstances, "a foreign search is reasonable if it conforms to the requirements of foreign law," and "such a search will be upheld under the good faith exception to the exclusionary rule when United States officials reasonably rely on foreign officials' representations of foreign law."[422]

Self-Incrimination Overseas

Like the Fourth Amendment protection against unreasonable searches and seizures, the Fifth Amendment self-incrimination clause and its attendant Miranda warning requirements do not apply to statements made overseas to foreign officials[423] subject to the same "joint venture"[424] and "shocked conscience" exceptions.[425] The Fifth Amendment and Miranda requirements do apply to custodial interrogations conducted overseas by American officials regardless of the nationality of the defendant.[426] Of course as a general rule to be admissible at trial in this country, any confession must have been freely made.[427]

1994)(the Fourth Amendment does not apply to the search and seizure of alien property abroad by foreign officials subject to conscience shocking and joint venture exceptions); United States v. Castro, 175 F.Supp.2d 129, 132-33 (D.P.R. 2001); United States v. Marzook, 435 F.Supp.2d 708, 774 (N.D. Ill. 2006).

[421] In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 157, 167-72 (2d Cir. 2008); United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995).

[422] United States v. Juda 46 F.3d 961, 968 (9th Cir. 1995); United States v. Castro, 175 F.3d 129, 133-34 (D.P.R. 2001).

[423] United States v. Abu Ali, 528 F.3d 210, 227-28 (4th Cir. 2008); United States v. Yousef, 327 F.3d 56, 145 (2d Cir. 2003); United States v. Martindale, 790 F.2d 1129, 1131-132 (4th Cir. 1986); United States v. Heller, 625 F.2d 594, 599 (5th Cir. 1980); United States v. Mundt, 508 F.2d 904, 906 (10th Cir. 1974); United States v. Karake, 443 F.Supp.2d 8, 49 (D.D.C. 2006).

[424] United States v. Abu Ali, 528 F.3d 210, 227-28 (4th Cir. 2008); United States v. Yousef, 327 F.3d 56, 145-46 (2d Cir. 2003); United States v. Heller, 625 F.2d 594, 599 (5th Cir. 1980); United States v. Covington, 783 F.2d 1052, 1056 (9th Cir. 1986); United States v. Mundt, 508 F.2d 904, 906-907 (10th Cir. 1974); United States v. Karake, 443 F.Supp.2d 8, 49 (D.D.C. 2006); United States v. Hensel, 509 F.Supp. 1364, 1375 (D. Me. 1981).

[425] United States v. Abu Ali, 528 F.3d 210, 227-28 (4th Cir. 2008); United States v. Yousef, 327 F.3d 56, 145-46 (2d Cir. 2003), citing, United States v. Cotroni, 527 F.2d 708, 712 n.10 (2d Cir. 1975); United States v. Heller, 625 F.2d 594, 599 (5th Cir. 1980).

[426] In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 177, 201-2 (2d Cir. 2008); United States v. Clarke, 611 F.Supp.2d 12, 28-9 (D.D.C. 2009); United States v. Yousef, 327 F.3d 56, 145-46 (2d Cir. 2003).

[427] Schneckloth v. Bustamonte, 412 U.S. 218, 225-26 (1973)("the ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has will to confess, it may be used against him. If it is not, if his will has

Statute of Limitations: 18 U.S.C. 3292 and Related Matters

As a general rule, prosecution of federal crimes must begin within 5 years.[428] Federal capital offenses and certain federal terrorist offenses, however, may be prosecuted at any time,[429] and prosecution of nonviolent federal terrorism offenses must begin within 8 years.[430] Moreover, the statute of limitations is suspended or tolled during any period in which the accused is a fugitive.[431] Whatever the applicable statute of limitations, section 3292 authorizes the federal courts to suspend it in order to await the arrival of evidence requested of a foreign government:

> *Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country. 18 U.S.C. 3292(a)(1).*

Section 3292 suspensions may run for no more than six months if the requested foreign assistance is provided before the time the statute of limitations would

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been overborne and his capacity for self-determination critically impaired, the use of confession offends due process"); United States v. Abu Ali, 528 F.3d 210, 232 (4th Cir. 2008); United States v. Lopez, 437 F.3d 1059, 1063-64 (10th Cir. 2006); United States v. Jacobs, 431 F.3d 99, 108 (3d Cir. 2005); United States v. Thompson, 422 F.3d 1285, 1295-296 (11th Cir. 2005); United States v. Garcia Abrego, 141 F.3d 142, 170-71 (5th Cir. 1998); United States v. Karake, 443 F.Supp.2d 8, 85-6 (D.D.C. 2006); United States v. Marzook, 435 F.Supp.2d 708, 741 (N.D.Ill. 2006)("interrogation accompanied by physical violence is presumptively involuntary").

[428] 18 U.S.C. 3282.

[429] 18 U.S.C. 3281 (capital offenses); 18 U.S.C. 3286(b)(prosecution of any of the offenses listed in 18 U.S.C. 2332b(g)(5)(B) whose commission created a foreseeable risk of serious injury or resulted in such injury). Section 2332b(g)(5)(B) lists more than 40 federal criminal offenses including crimes such as violence in international airports (18 U.S.C. 37), assassination of the President (18 U.S.C. 1751), providing material support to terrorist organizations (18 U.S.C. 2339B).

[430] 18 U.S.C. 3286(a)(violation of an offense listed in 18 U.S.C. 2332b(g)(5)(B) whose commission does not create a foreseeable risk of serious injury or result in such injury).

[431] 18 U.S.C. 3290. Most courts construe section 3290 to require flight with an intent to avoid prosecution or a departure from the place where the offense occurred with the knowledge that an investigation is pending or being conducted, United States v. Florez, 447 F.3d 145, 150-52 (2d Cir. 2006)(citing authority in accord). Thus, a suspect in the case of an federal extraterritorial offense is not likely to be considered a fugitive if he simply remains in the country were of the offense was committed.

otherwise have expired and for no more than three years in other instances.[432] The suspension period begins with the filing of the request for foreign assistance and ends with final action by the foreign government upon the request.[433] Because of the built-in time limits, the government need not show that it acted diligently in its attempts to gather overseas evidence.[434] The circuits are divided over whether the section may be used to revive a statute of limitations by filing a request after the statute has run,[435] and over whether the section can be used to extend the statute of limitations with respect to evidence that the government has already received at the time it filed the request.[436] At least one circuit has held that the statutory reference to "the district court before which a grand jury is impaneled to investigate the offense" is intended to identify the court that may issue the suspension order and does not limit the statute to requests filed in aid of a pending grand jury investigation.[437]

Extradition

Extradition is perhaps the oldest form of international law enforcement assistance. It is a creature of treaty by which one country surrenders a fugitive to another for prosecution or service of sentence.[438] The United States has bilateral extradition treaties with roughly two-thirds of the nations of the world.[439] Treaties negotiated before 1960 and still in effect reflect the view then held by the United States and other common law countries that criminal jurisdiction was territorial and consequently extradition could not be had for extraterritorial

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[432] 18 U.S.C. 3292(c)("The total of all periods of suspension under this section with respect to an offense – (1) shall not exceed three years; and (2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section"); United States v. Baldwin, 414 F.3d 791, 795 (7th Cir. 2005); United States v. Grenoble, 413 F.3d 569, 574-75 (6th Cir. 2005).

[433] 18 U.S.C. 3292(b).

[434] United States v. Hagege, 437 F.3d 943, 955 (9th Cir. 2006).

[435] An application for suspension must be filed before the statute has run, United States v. Brody, 621 F.Supp.2d 1196, 1199-1200 (D.Utah 2009); United States v. Kozeny, 541 F.3d 166, 170-71 (2d Cir. 2008), citing to the contrary United States v. Bischel, 61 F.3d 1429 (9th Cir. 1995).

[436] United States v. Atiyeh, 402 F.3d 354, 362-66 (3d Cir. 2005)(holding that the statute of limitations may not be suspended under section 3292 when the request for foreign assistance is submitted after the evidence has in fact been received); contra, United States v. Miller, 830 F.2d 1073, 1076 (9th Cir. 1987); United States v. DeGeorge, 380 F.3d 1203, 1213 (9th Cir. 2004).

[437] United States v. DeGeorge, 380 F.3d 1203, 1214 (9th Cir. 2004).

[438] See generally, CRS Report 98-958, Extradition To and From the United States: Overview of the Law and Recent Treaties, by Charles Doyle.

[439] 18 U.S.C. 3181 note (list the countries with whom we have extradition treaties).

crimes.[440] Subsequently negotiated agreements either require extradition regardless of where the offense occurs,[441] permit extradition regardless of where the offense occurs,[442] or require extradition where the extraterritorial laws of the two nations are compatible.[443]

More recent extradition treaties address other traditional features of the nation's earlier agreements that complicate extradition, most notable the nationality exception, the political offense exception, and the practice of limiting extradition to a list of specifically designated offenses.

Federal crimes committed within other countries are more likely to be the work of foreign nationals than is otherwise the case. Yet, the "most common type of treaty provision provides that neither of the contracting parties shall be bound to deliver up its own citizens or subjects."[444] Most treaties negotiated of late, however, contain either an article declaring that extradition may not be denied on the basis of nationality[445] or one declaring that if extradition is denied on the basis of nationality the case must be referred to local authorities for prosecution.[446]

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[440] Abbell, EXTRADITION TO AND FROM THE UNITED STATES, §§3-2(5), 6-2(5) (2004 & 2007 Supp.).

[441] E.g., Extradition Treaty, U.S.-Jordan, Art.2(4), S.Treaty Doc. 104-3 ("An offense described in this Article shall be an extraditable offense regardless of where the act or acts constituting the offense were committed"); Extradition Treaty, U.S.-Austria, Art.2(6), S.Treaty Doc. 105-50; Extradition Treaty, U.S.-Lux., Art.2(1), S.Treaty Doc. 105-10.

[442] Extradition Treaty, U.S.-Hung., Art.2(4), S.Treaty Doc. 104-5 ("If the offense has been committed outside the territory of the Requesting State, extradition shall be granted if the laws of the Requested State provide for the punishment of an offense committed outside of its territory in similar circumstances. If the laws of the Requested State do not so provide, the executive authority of the Requested State may, in its discretion grant extradition"); Extradition Treaty, U.S.-Bah., Art.2(4), S.Treaty Doc. 102-17.

[443] Extradition Treaty, U.S.-Fr., Art.2(4), S.Treaty Doc. 105-13 ("Extradition shall be granted for an extraditable offense committed outside the territory of the Requesting State, when the laws of the Requested State authorize the prosecution or provide the punishment for that offense in similar circumstances").

[444] Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 683 (4th ed. 2002).

[445] E.g., Extradition Treaty, U.S.-Peru, Art. III, S.Treaty Doc. 107-6 ("Extradition shall not be refused on the ground that the person sought is a national of the Requested State"); Extradition Treaty, U.S.-Belize, Art. 3, S.Treaty Doc. 10638; Extradition Treaty, U.S.-Para., Art. III, S.Treaty Doc. 106-4.

[446] Extradition Treaty, U.S.-Kor., Art. 3, S.Treaty Doc. 106-2 ("1. Neither Contracting State shall be bound to extradite its own nationals, but the Requested State shall have the power to extradite such person if, in its discretion, it be deemed proper to do so. 2. If extradition is refused solely on

"The political offense exception is now a standard clause in almost all extradition treaties of the world."[447] Originally designed to protect unsuccessful insurgents in flight,[448] it is often construed to include both the purely political offense such as treason and sedition and related political offenses such as an act of violence committed during the course of, and in furtherance of, a political upheaval.[449] The exception is somewhat at odds with contemporary desires to prevent, prosecute, and punish acts of terrorism. Consequently, treaties forged over the last several years frequently include some form of limitation on the exception, often accompanied by a discretionary right to refuse politically or otherwise discriminatorily motivated extradition requests.[450]

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the basis of the nationality of the person sought, the Requested State shall, at the request of the Requesting State, submit the case to its authorities for prosecution. 3. Nationality shall be determined at the time of the commission of the offense for which extradition is requested"); Extradition Treaty, U.S.-Pol., Art. 4, S.Treaty Doc. 105-14; Extradition Treaty, U.S.-Fr., Art. 3, S.Treaty Doc. 105-13.

[447] Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 595 (4th ed. 2002).

[448] Quinn v. Robinson, 783 F.2d 776, 792-93 (9th Cir. 1986)("The political offense exception is premised on a number of justifications. First, its historical development suggests that it is grounded on the belief that individuals have a right to resort to political activism to foster political change. This justification is consistent with the modern consensus that political crimes have greater legitimacy than common crimes. Second, the exception reflects a concern that individuals – particularly unsuccessful rebels – should not be returned to countries where they may be subjected to unfair trials and punishments because of their political opinions. Third, the exception comports with the notion that governments – and certainly their non-political branches – should not intervene in the internal political struggles of other nations").

[449] Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 594-673 (4th ed. 2002).

[450] E.g., Extradition Treaty, U.S.-S.Afr., Art. 4, S.Treaty Doc. 106-24 ("1. Extradition shall not be granted if the offense for which extradition is requested is a political offence. 2. For the purpose of this Treaty, the following offenses shall not be considered political offenses: (a) a murder or other violent crime against a Head of State or Deputy Head of State of the Requesting or Requested State, or against a member of such person's family; (b) an offence for which both the Requesting and Requested States have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their respective competent authorities for decision as to prosecution; (c) murder; (d) an offense involving kidnaping, abduction, or any form of unlawful detention, including the taking of a hostage; and (e) attempting or conspiring to commit, aiding, abetting, inducing, counseling or procuring the commission of, or being an accessory before or after the fact of such offences. 3. Notwithstanding the terms of sub-article 2, extradition shall not be granted if the executive authority of the Requested State determines that there are substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's gender, race, religion, nationality, or political opinion"); Extradition Treaty, U.S.-Pol., Art. 5, S.Treaty Doc. 105-14 (motivation clause is limited to politically motivated); Extradition Treaty, U.S.-Sri Lanka, Art. 4, S.Treaty Doc. 106-34 (only Heads of State clause, clauses identifying particular international obligations, and a

Current U.S. extradition treaties signed prior to the 1980's list specific crimes to which the treaty is limited.[451] In the nation's first extradition treaty the list was limited to murder and forgery;[452] towards the end of the twentieth century the standard lists had grown to close to or more than thirty crimes.[453] Treaties agreed to more recently opt for a generic description.[454]

As an alternative to extradition, particularly if the suspect is not a citizen of the country of refuge, foreign authorities may be willing to expel or deport him under circumstances that allow the United States to take him into custody.[455] In the absence of a specific treaty provision, the fact that the defendant was abducted overseas and brought to the United States for trial rather than pursuant to a request under the applicable extradition treaty does not deprive the federal court of jurisdiction to try him.[456]

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conspiracy-attempt-accessory clause)(motivation clause is limited to politically motivated requests).

[451] Abbell, EXTRADITION TO AND FROM THE UNITED STATES, §3-2(2)(2004 & 2007 Supp.).

[452] 8 Stat. 116, 129 (1794).

[453] Extradition Treaty, U.S.-U.K., 28 U.S.T. 227, 235(1977)(29 crimes); Extradition Treaty, U.S.-Nor., 31 U.S.T. 5619, 5634 (1980)(33 crimes); Extradition Treaty, U.S.-F.R.G., 32 U.S.T. 1485, 1515 (1980)(33 crimes).

[454] E.g., Extradition Treaty, U.S.-Austria, Art. 2(1), S.Treaty Doc. 105-50 ("Extradition shall be granted for offenses which are subject under the laws in both Contracting Parties by deprivation of liberty for a period of more than one year or by a more severe penalty"); Extradition Treaty, U.S.-Malay., Art. 2(1), S.Treaty Doc. 104-26; Extradition Treaty, U.S.-Zimb., Art. 2(1), S.Treaty Doc. 105-33.

[455] United States v. Mejia, 448 F.3d 436, 439 (D.C.Cir. 2006)(Panamaian authorities arrested the defendants and turned them over to U.S. Drug Enforcement Administration (DEA) officers in Panama who flew them to the U.S.); United States v. Arbane, 446 F.3d 1223, 1225 (11th Cir. 2006)(Ecuadorian officials deported the defendant to Iran on a plane scheduled to stop in the U.S. where the defendant was arrested); United States v. Matta-Ballesteros, 71 F.3d 754, 761 (9th Cir. 1995)(Honduran military and U.S. Marshals seized the defendant in Honduras and the Marshals flew him to the U.S. by way of the Dominican Republic); United States v. Chapa-Garza, 62 F.3d 118, 120 (5th Cir. 1995)(Mexican authorities deported the defendant to the United States); United States v. Pomeroy, 822 F.2d 718, 720 (8th Cir. 1987) (Canadian authorities deported the defendant to the United States); United States v. Valot, 625 F.2d 308, 309 (9th Cir. 1980)(Thai immigration authorities handed the defendant over to DEA agents in the Bangkok airport who flew him to the United States "over his protest").

[456] United States v. Alvarez-Machain, 504 U.S. 655, 669-70 (1992)(portions of the footnote 16 of the Court's opinion in brackets)("Mexico has protested the abduction of respondent through diplomatic notes, and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch. [The Mexican Government has also requested from the United States the extradition of two individuals it suspects of having abducted respondent in Mexico on charges of kidnaping. . . .] . . .The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the

Venue

Federal crimes committed within the United States must be tried where they occur.[457] Venue over extraterritorial crimes is a matter of statute, 18 U.S.C. 3238. Section 3238 permits the trial of extraterritorial crimes either (1) in the district into which the offender is "first brought" or in which he is arrested for the offense; or (2) prior to that time, by indictment or information in the district of the offender's last known residence, or if none is known, in the District of Columbia.[458] The phrase "first brought" as used in section 3238 means "first brought while in custody."[459] As the language of the section suggests, venue for all joint offenders is proper wherever venue for one of their number is proper.[460]

Testimony of Overseas Witnesses

A federal court may subpoena a United States resident or national found abroad to appear before it or the grand jury.[461] Federal courts ordinarily have no

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criminal laws of the United States"); see also, United States v. Mejia, 448 F.3d 436, 442-43 (D.C.Cir. 2006); United States v. Arbane, 446 F.3d 1223, 1225 (11th Cir. 2006); United States v. Best, 304 F.3d 308, 311-16 (3d Cir. 2002); Kasi v. Angelone, 300 F.3d 487, 493-98 (4th Cir. 2002); United States v. Torres Gonzalez, 240 F.3d 14, 16 (1st Cir. 2001).

[457] U.S. Const. Art. III, §2, cl.3; Amend.VI.

[458] "The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia," 18 U.S.C. 3238. United States v. Hisin-Yung, 97 F.Supp.2d 24, 28 (D.C.Cir. 2000)("The two clauses provide alternative proper venues. Therefore, if the latter provision is relied on, and defendant is indicted before he is brought into the United States, he may be tried in the district in which he was indicted regardless of whether it is the district in which he is first brought into the United States"); see also, United States v. Gurr, 471 F.3d 144, 155 (D.C. Cir. 2007); United States v. Hilger, 867 F.2d 566, 568 (9th Cir. 1989); United States v. Fraser, 709 F.2d 1556, 1558 (6th Cir. 1983); United States v. McRary, 616 F.2d 181, 185 (5th Cir. 1980).

[459] United States v. Feng, 277 F.3d 1151, 1155 (9th Cir. 2002)("The word 'brought' under the statute means first brought into a jurisdiction from outside the United States jurisdiction while in custody"); United States v. Catino, 735 F.2d 718, 724 (2d Cir. 1984).

[460] 18 U.S.C. 3238 (". . . or any one of two or more joint offenders. . .". United States v. Stickle, 454 F.3d 1265, 1272273 (11th Cir. 2006); United States v. Yousef, 327 F.3d. 56, 115 (2d Cir. 2003).

[461] 28 U.S.C. 1783 ("A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the

authority to subpoena foreign nationals located in a foreign country.[462] Mutual legal assistance treaties and similar agreements generally contain provisions to facilitate a transfer of custody for foreign witnesses who are imprisoned overseas[463] and in other instances to elicit assistance to encourage foreign nationals to come to this country and testify voluntarily.[464]

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document or other thing in any other manner"); Blackmer v. United States, 284 U.S. 421, 436-38 (1932).

[462] United States v. Abu Ali, 528 F.3d 210, 239 (4th Cir. 2008); United States v. Yates, 345 F.3d 1280, 1283 (11th Cir. 2003); United States v. Olafson, 213 F.3d 435, 441 (9th Cir. 2000); United States v. Groos, 616 F.Supp.2d 777, 791 (N.D.Ill. 2008); United States v. Ozsusamlar, 428 F.Supp.2d 161, 177 (S.D.N.Y. 2006); cf., United States v. Liner, 435 F.3d 920, 924 (8th Cir. 2006). Cases where the witness is in federal custody overseas may prove an exception to the rule, but they may also come with their own special complications, see e.g., United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004)(foreign nationals held in military custody overseas whom the government, in the interest of national security, declined to make available for depositions or to appear as witnesses in a criminal trial).

[463] E.g., Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Leich., Art. 11, S.Treaty Doc. 107-16 ("1. A person in the custody of the Requested State whose presence outside of the Requested State is sought for purposes of assistance under this Treaty shall be transferred form the Requested State for that purpose if the person consents and if the Central Authorities of both States agree. . . 3. For purposes of this Article: a) the receiving State shall have the authority and the obligation to keep the person transferred in custody unless otherwise authorized by the sending State; b) the receiving State shall return the person transferred to the custody of the sending State as soon as circumstances permit or as otherwise agreed by both Central Authorities; c) the receiving state shall not require the sending State to initiate extradition proceedings for the return of the person transferred; d) the person transferred shall receive credit for service of the sentence imposed in the sending State for time served in the custody of the receiving State; and e) where the receiving State is a third State the Requesting State shall be responsible for all arrangements necessary to meet the requirements of this paragraph"); see also, Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Ukr., Art. 11, S.Treaty Doc. 106-16; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Fr., Art. 18, S.Treaty Doc. 10617; Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Greece, Art. 11, S.Treaty Doc. 106-18.

[464] E.g., Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Belize, Art. 10, S.Treaty Doc. 106-19 ("1. When the Requesting State requests the appearance of a person in that State, the Requested State shall invite the person to appear before the appropriate authority in the Requesting State. The Requesting State shall indicate the extent to which the expenses will be paid. The Central Authority of the Requested State shall promptly inform the Central Authority of the Requesting State of the response of the person. 2. The Central Authority of the Requesting state shall inform the Central Authority of the requested State whether a decision has been made by the competent authorities of the Requesting State that a person appearing in the Requesting State pursuant to this article shall not be subject to service of process, or be detained or subject to any restriction of personal liberty, by reason of any acts or convictions which preceded his departure from the Requested State"); see also, Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Liech., Art. 10, S.Treaty Doc. 107-16 (person may not be served or detained except as stated in the request); Treaty on Mutual Legal Assistance in Criminal Matters, U.S.-Venez., Arts. X, S.Treaty Doc. 105-38. When a witness is found in a country with whom the United Statesd has no such treaty, officials have used U.S. immigration parole authority in an effort to accomplish the same results, see e.g., Wang v. Reno, 81 F.3d 808, 811-12 (9th Cir. 1996).

Unable to secure the presence of overseas witnesses, federal courts may authorize depositions to be taken abroad, under "exceptional circumstances and in the interests of justice"[465] under even more limited circumstances, they may admit such depositions into evidence in a criminal trial.

Originally, only a defendant might request that depositions be taken under Rule 15 of the Federal Rules of Criminal Procedure, [466] but they have been available to prosecutors since the 1970s.[467] The Rule offers depositions as an alternative to long term incarceration of material witnesses.[468] Otherwise, depositions may be ordered only under exceptional circumstances. Some courts have said that to "establish exceptional circumstances the moving party must show the witness's unavailability and the materiality of the witness's testimony."[469] Others would add to these that "the testimony is necessary to prevent a failure of justice" or additional considerations.[470] In any event, once a deposition has been taken the impediments to its use at trial, especially by the prosecution, are much more formidable.

"Compliance with Rule 15 is a necessary but not sufficient condition for use of a deposition at trial."[471] Admissibility at trial requires compliance with Rule 15, the

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[465] F.R.Crim.P. 15(a)(1)("A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data").

[466] F.R.Crim.P. 15(a), 18 U.S.C.App. (1964 ed.). For a history of the evolution of Rule 15 see, 2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE §251 (Crim. 3d 2000).

[467] F.R.Crim.P. 15(a), 18 U.S.C.App. (1976 ed.); see also 18 U.S.C. 3503 (1970 ed.).

[468] "A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript," F.R.Crim.P. 15(a)(2).

[469] United States v. Liner, 435 F.3d 920, 924 (8th Cir. 2006); see also, United States v. Kelley, 36 F.3d 1118, 1125 (D.C. Cir. 1994)(identifying the two as "critical factors"); United States v. Jefferson, 594 F.Supp.2d 655, 664 (E.D.Va. 2009).

[470] United States v. Cohen, 260 F.3d 68, 78 (2d Cir. 2001); see also, United States v. Ruiz-Castro, 92 F.3d 1519, 1533 (10th Cir. 1996)(identifying the three factors as among those a court should consider before authorizing depositions); United States v. Thomas, 62 F.3d 1332, 1341 (11th Cir. 1995)(listing consideration of unavailability, materiality, and "countervailing factors [that] would make the deposition unjust to the nonmoving party"); United States v. Aggarwal, 17 F.3d 737, 742 (5th Cir. 1994)(denial of the motion may be based entirely upon the fact it is untimely); United States v. Jefferson, 594 F.Supp.2d at 664-65 (failure of justice and all the circumstances).

[471] United States v. McKeeve, 131 F.3d 1, 8 (1st Cir. 1997).

Federal Rules of Evidence, and the Constitution's confrontation clause. As general matter, depositions are to be taken in the same manner as depositions in civil cases.[472] Moreover, the Rule requires that the defendant be afforded an opportunity to attend depositions taken at the government's request.[473] The requirement reflects the demands of the Constitution's confrontation clause: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him," U.S. Const. Amend. VI. The right embodies not only the prerogative of a literal face to face confrontation, but also the right to cross examine and to have the witness's testimonial demeanor exposed to the jury.[474]

In the case of depositions taken overseas, the courts have observed that the right to confrontation is not absolute.[475] When a deposition is taken abroad, the courts

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[472] "(e) Unless these rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that (1) A defendant may not be deposed without that defendant's consent. (2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial. (3) The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

"(f) A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

"(g) A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition, F.R.Crim.P. 15(e),(f),(g)(captions omitted).

[473] "(1) The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant: (A) waives in writing the right to be present; or (B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion. (2) A defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant – absent good cause – waives both the right to appear and any objection to the taking and use of the deposition based on that right," F.R.Crim.P. 15(c)(captions omitted).

"If the deposition was requested by the government, the court may – or if the defendant is unable to bear the deposition expenses, the court must – order the government to pay: (1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and (2) the costs of the deposition transcript,"F.R.Crim.P. 15(d)(captions omitted).

[474] Barber v. Page, 390 U.S. 719, 725 (1968)("The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness").

[475] United States v. McKeeve, 131 U.S. 1, 8 (1st Cir. 1997); United States v. Medjuck, 156 F.3d 916, 920 (9th Cir. 1998); United States v. Abu Ali, 528 F.3d 210, 240 (4th Cir. 2008).

prefer that the defendant be present,[476] that his counsel be allowed to cross-examine the witness,[477] that the deposition be taken under oath,[478] that a verbatim transcript be taken, and that the deposition be captured on videotape;[479] but they have permitted depositions to be admitted into evidence at subsequent criminal trials in this country, notwithstanding the fact that one or

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[476] United States v. McKeeve, 131 U.S. 1, 8 (1st Cir. 1997)("the confrontation clause requires, at a minimum, that the government undertake diligent efforts to facilitate the defendant's presence. We caution, however, that although such efforts must be undertaken in good faith, they need not be heroic); United States v. Kelly, 892 F.2d 255, 262 (3d Cir. 1989); United States v. Salim, 855 F.2d 944, 950 (2d Cir. 1988).

[477] United States v. Johnpoll, 739 F.2d 702, 710 (2d Cir. 1984)("The confrontation clause does not preclude admission of prior testimony of an unavailable witness, provided his unavailability is shown and the defendant had an opportunity to cross-examine. In the present case, Johnpoll had the full opportunity, at government expense, with his attorney to confront and cross-examine the Swiss witness, which he waived when he and his attorney decided not to attend the taking of the depositions").

[478] United States v. Sines, 761 F.2d 1434, 1441 (9th Cir. 1985)("The Supreme Court has identified the major purposes of the confrontation clause as: (1) ensuring that witnesses will testify under oath; (2) forcing witnesses to undergo cross-examination; and (3) permitting the jury to observe the demeanor of witnesses. All three of these purposes were fulfilled when Steneman's videotaped deposition was taken [in Thailand] with Sine's attorney present").

[479] United States v. Medjuck, 156 F.3d 916, 920 (9th Cir. 1998)("When the government is unable to secure a witness's presence at trial, Rule 15 is not violated by admission of videotaped testimony so long as the government makes diligent efforts to secure the defendant's physical presence at the deposition, and failing this, employs procedures that are adequate to allow the defendant to take an active role in the deposition proceedings. . . The government was unable to secure Medjuck's presence at the Canadian depositions because there was no mechanism in place to allow United States officials to transfer Medjuck to Canadian authorities. . . and secure his return to the United States in a timely fashion after the depositions. Finally, the government set up an elaborate system to allow Medjuck to witness the depositions live by video feed and to participate with his attorneys by private telephone connection during the depositions taken in Canada. . . .[A]n exception to the confrontation requirements] has been recognized for admission of deposition testimony where a witness is unavailable to testify at trial . . . First, the deposition testimony must fall within an established exception to the hearsay rule. Second the deposition must be taken in compliance with law. Finally, the defendant must have had an opportunity to cross-examine the deposed witness "); United States v. Kelly, 892 F.2d 255, 260-62 (3d Cir. 1980); United States v. Walker, 1 F.3d 423, 429 (6th Cir. 1993); United States v. Mueller, 74 F.3d 1152, 1156-157 (11th Cir. 1996); see also, United States v. Salim, 855 F.2d 944, 950 (2d Cir. 1988)("In the context of the taking of a foreign deposition, we believe that so long as the prosecution makes diligent efforts . . . to attempt to secure the defendant's presence, preferably in person, but if necessary via some form of live broadcast, the refusal of the host government to permit the defendant to be present should not preclude the district court from ordering that the witness' testimony be preserved anyway. However, the district court should satisfy itself that defense counsel will be given an opportunity to cross-examine the witness in order to fulfill the mandate of Rule 15(b) to ensure a likelihood that the deposition will not violate the confrontation clause").

more of these optimal conditions are not present.[480] In some of those nations whose laws might not otherwise require or even permit depositions under conditions considered preferable under U.S. law, a treaty provision addresses the issue.[481]

The Federal Rules of Evidence govern the admissibility of evidence in federal criminal trials. A deposition taken overseas that has survived Rule 15 and confrontation clause scrutiny is likely to be found admissible. The hearsay rule, Rule 802 which reflects the law's preference for evidence that is exposed to the adversarial process, poses the most obvious obstacle.[482] The Rules, however, provide an explicit exception for depositions,[483] one that has been applied to depositions taken overseas under the authority of Rule 15.[484]

Yet the question of admissibility of overseas depositions rests ultimately upon whether the confrontation clause demands can be satisfied. The cases thus far

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[480] United States v. Sturman, 951 F.2d 1466, 1480-481(6th Cir. 1992)("Swiss law forbids verbatim transcription so the summary method of establishing the record was the most effective legal method. All defense questions, with just one exception, were submitted to the witnesses so that objections and determinations on admissibility could be litigated later. Although the witnesses were not given an oath, defense conceded that each witness was told the penalties for giving false testimony. . . Depositions taken in foreign countries cannot at all times completely emulate the United States methods of obtaining testimony. Here all steps were taken to ensure the defendants' rights while respecting the legal rules established in a different country").

[481] E.g., Treaty on Mutual Legal Assistance on Criminal Matters, U.S.-Fr., Art. 9(2), S.Treaty Doc. 106-17 ("The procedures specified in this paragraph and outlined in the request shall be carried out insofar as they are not contrary to the fundamental principles of a judicial proceeding in the Requested State. The Requested State, if the Requesting State requests, shall: (a) take the testimony of witnesses or experts under oath . . .; (b) allow a confrontation between a defendant, together with counsel, and a witness or expert whose testimony or evidence is taken for use against the defendant in a criminal prosecution in the Requesting State; (c) ask questions submitted by the Requesting State, including questions proposed by authorities of the Requesting State present at the execution of the request; (d) record or allow to be recorded the testimony, questioning, or confrontation; and (e) produce or allow to be produced a verbatim transcript of the proceeding in which the testimony, questioning, or confrontation occurs").

[482] "Hearsay is not admissible except as provided by these rules and by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress," F.R.Evid. Rule 802. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," F.R.Evid. Rule 801(c).

[483] "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (1) Testimony given as a witness . . . in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered. . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination," F.R.Evid. Rule 804(b)(2).

[484] United States v. Medjuck, 156 F.3d 916, 921 (9th Cir. 1998); United States v. McKeeve, 131 F.3d 1, 10 (1st Cir. 1997); United States v. Kelly, 892 F.2d 255, 261-62 (3d Cir. 1990).

have relied upon the Supreme Court's decisions either in Ohio v. Roberts[485] or in Maryland v. Craig.[486] Faced with the question of whether trial witnesses might testify remotely via a two-way video conference, Craig held that he confrontation clause's requirement of physical face-to-face confrontation between witness and defendant at trial can be excused under limited circumstances in light of "considerations of public policy and necessities of the case."[487] Roberts dealt with the question of whether the admission of hearsay evidence violated the confrontation clause, and declared that as long as the hearsay evidence came within a "firmly rooted hearsay exception" its admission into evidence in a criminal trial constituted no breach of the clause.[488]

More recent decisions might be thought to call into question any continued reliance on Roberts and Craig. At a minimum, the Supreme Court's Crawford v. Washington opinion repudiates the suggestion that Roberts permits anything less than actual confrontation in the case of "testimonial" hearsay, e.g., a formal statement to a government official, such as an affidavit or other pretrial statement.[489] At least one appellate panel has concluded that the prosecution's need for critical evidence does not alone supply the kind of public policy considerations necessary to qualify for a Craig exception;[490] but another has held that national security interests may suffice.[491]

Since the pre-Crawford cases required a good faith effort to assure the defendant's attendance at overseas depositions, it might be argued that Crawford requires no adjustment in the area's jurisprudence. Moreover, the Eleventh Circuit en banc Craig analysis implied that it thought the use of overseas depositions at trial more compatible with the confrontation clause than the use of

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[485] United States v. McKeeve, 131 F.3d 1, 9 (1st Cir. 1997); United States v. Drogoul, 1 F.3d 1546, 1552 (11th Cir. 1993); United States v. Kelly, 892 F.2d 255, 261 (3d Cir. 1989); United States v. Salim, 855 F.2d 944, 954-55 (2d Cir. 1988).

[486] United States v. Medjuck, 156 F.3d 916, 920-21 (9th Cir. 1998).

[487] 497 U.S. 836, 848 (1990).

[488] 448 U.S. 56, 66 (1980).

[489] 541 U.S. 36, 68 (2004) ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the states flexibility in their development of hearsay law – as does Roberts, and as would an approach that exempted such statements from confrontation clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination").

[490] United States v. Yates, 438 F.3d 1307, 1316 (11th Cir. 2006).

[491] United States v. Abu Ali, 528 F.3d 210, 240-42 (4th Cir. 2008).

video trial testimony.[492] In addition, the Fourth Circuit rejected a confrontation clause challenge where the circumstances satisfied the dual demands for a Craig exception: (1) denial of a face to face confrontation made necessary by important policy considerations, and (2) assurance of reliability in the form of an "oath, cross-examination, and observation of the witness' demeanor."[493]

Admissibility of Foreign Documents

There is a statutory procedure designed to ease the evidentiary admission of foreign business records in federal courts, 18 U.S.C. 3505.[494] The section covers "foreign record[s] of regularly conducted activity" in virtually any form, i.e., any "memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country," 18 U.S.C. 3505(c)(1). It exempts qualified business records from the operation of the hearsay rule in federal criminal proceedings[495] and permits their authentication upon foreign certification.[496] Finally, it establishes a procedure under which the

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[492] United States v. Yates, 438 F.3d 1307, 1316 (11th Cir. 2006) (emphasis added) ("The government's interest in presenting the fact-finding with crucial evidence is, of course, an important public policy. We hold , however, that, under the circumstances of this case (which include the availability of a Rule 15 deposition) , the prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the defendants' rights to confront their accusers face-to-face").

[493] United States v. Abu Ali, 528 F.3d at 240-42. The Fourth Circuit distinguished Yates on the grounds that there the lower court had not considered alternative procedures under which face to face confrontation might have been possible and that there the crimes of conviction were different in kind and degree ("Whatever the merits in Yates, the defendants there were charged with mail fraud, conspiracy to commit money laundering, and drug-related offenses, crimes different in both kind and degree from those implicating the national security interests here [(conspiracy commit terrorist attacks on the United States)]," id. at 242 n.12.

[494] "Under §3505, a foreign certification serves to authenticate the foreign records, and thus dispenses with the necessity of calling a live witness to establish authentication," United States v. Hagege, 437 F.3d 943, 957 (9th Cir. 2006).

[495] "In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that – (A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters; (B) such record was kept in the course of a regularly conducted business activity; (C) the business activity made such a record as a regular practice; and (D) if such record is not the original, such record is a duplicate of the original [–] unless the source of information or the method or circumstances of preparation indicate [a] lack of trustworthiness," 18 U.S.C. 3505(a)(1).

[496] "A foreign certification under this section shall authenticate such record or duplicate," 18 U.S.C. 3505(a)(2). "Foreign certification" is "a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country," 18 U.S.C. 3505(c)(2).

reliability of the documents can be challenged in conjunction with other pre-trial motions.[497] While the prosecution's failure to provide timely notice of its intent to rely upon section 3505 does not necessarily bar admission,[498] its failure to supply a foreign certification of authenticity precludes admission under the section.[499]

Early appellate decisions upheld section 3505 in the face of confrontation clause challenges, as in the case of depositions drawing support from Ohio v. Roberts.[500] As noted above, Crawford cast doubt upon the continued vitality of the Roberts rule (hearsay poses no confrontation problems as long as it falls within a "firmly rooted hearsay exception") when it held that only actual confrontation will suffice in the case of "testimonial" hearsay.[501] Although it left for another day a more complete definition of testimonial hearsay, Crawford did note in passing that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial – for example business records."[502] At least one later appellate panel has rejected a confrontation clause challenge to section 3505 on the basis of this distinction.[503]

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[497] "At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver," 18 U.S.C. 3505(b).

[498] United States v. Newell, 239 F.3d 917, 921 (7th Cir. 2001); United States v. Garcia Abrego, 141 F.3d 142, 176-78 (5th Cir. 1998). The court expressed "no opinion as to whether a showing of prejudice resulting from untimely notice of an intent to offer foreign records could eliminate §3505 as a potential pathway for admissibility of foreign business records," 141 F.3d at 178 n. 26.

[499] United States v. Doyle, 130 F.3d 523, 546 (2d Cir. 1997).

[500] United States v. Garcia Abrego, 141 F.3d 142, 178-79 (5th Cir. 1998); United States v. Ross, 33 F.3d 1507, 1517 (11th Cir. 1994); United States v. Sturman, 951 F.2d 1466, 1490 (6th Cir. 1991); United States v. Miller, 830 F.2d 1073, 1078 (9th Cir. 1987).

[501] 541 U.S. 36, 68 (2004) ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the states flexibility in their development of hearsay law – as does Roberts, and as would an approach that exempted such statements from confrontation clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination").

[502] 541 U.S. at 56.

[503] United States v. Hagege, 437 F.3d 943, 957-58 (9th Cir. 2006); accord United States v. Qualls, 553 F.Supp.2d 241, 244-45 (E.D.N.Y. 2008).

Conclusion

The Constitution grants Congress broad powers to enact laws of extraterritorial scope and imposes few limitations on the exercise of that power. The states enjoy only residual authority, but they too may and have enacted criminal laws which apply beyond the territorial confines of the United States. Prosecutions are relatively few, however, perhaps because of the practical, legal, and diplomatic obstacles that may attend such an endeavor.

Attachments

Federal Criminal Laws Which Enjoy Express Extraterritorial Application

Special Maritime & Territorial Jurisdiction

8 U.S.C. 1375a(d)(3) (informed consent violations by international marriage brokers)

15 U.S.C. 1175 (manufacture or possession of gambling devices)

15 U.S.C. 1243 (manufacture or possession of switchblade knives)

15 U.S.C. 1245 (manufacture or possession of ballistic knives)

16 U.S.C. 3372(a)(3) (possession of illegally taken fish or wildlife)

18 U.S.C. 81 (arson)

18 U.S.C. 113 (assault)

18 U.S.C. 114 (maiming)

18 U.S.C. 117 (domestic assault by an habitual offender)

18 U.S.C. 546 (smuggling goods into a foreign country from an American vessel)

18 U.S.C. 661 (theft)

18 U.S.C. 662 (receipt of stolen property)

18 U.S.C. 831 (threats, theft, or unlawful possession of nuclear material or attempting or conspiring to do so)

18 U.S.C. 1025 (false pretenses)

18 U.S.C. 1081 - 1083 (gambling ships)

18 U.S.C. 1111 (murder)

18 U.S.C. 1112 (manslaughter)

18 U.S.C. 1113 (attempted murder or manslaughter)

18 U.S.C. 1115 (misconduct or neglect by ship officers)

18 U.S.C. 1201 (kidnaping)

18 U.S.C. 1363 (malicious mischief)

18 U.S.C. 1460 (sale or possession with intent to sell obscene material)

18 U.S.C. 1466A (obscene visual representation of sexual abuse of children)

18 U.S.C. 1587 (captain of a slave vessel with slaves aboard)

18 U.S.C. 1591(sex trafficking of children)

18 U.S.C. 1656 (piratical conversion of vessel by captain, officer or crew member)

18 U.S.C. 1658 (plundering a ship in distress)

18 U.S.C. 1659 (attack upon a vessel with intent to plunder)

18 U.S.C. 1654 (Americans arming or serving on privateers outside the United States to be used against the United States or Americans)

18 U.S.C. 1801 (video voyeurism)

18 U.S.C. 1957 (prohibited monetary transactions)

18 U.S.C. 2111 (robbery)

18 U.S.C. 2191 (cruelty to seamen)

18 U.S.C. 2192 (incite to revolt or mutiny)

18 U.S.C. 2193 (revolt or mutiny by seamen)

18 U.S.C. 2194 (shanghaiing sailors)

18 U.S.C. 2195 (abandonment of sailors overseas)

18 U.S.C. 2196 (drunkenness of seamen)

18 U.S.C. 2197 (misuse of documents associated vessels)

18 U.S.C. 2198 (seduction of a female passenger)

18 U.S.C. 2199 (stowaways)

18 U.S.C. 2241 (aggravated sexual abuse)

18 U.S.C. 2242 (sexual abuse)

18 U.S.C. 2243 (sexual abuse of a minor or ward)

18 U.S.C. 2244 (abusive sexual contact)

18 U.S.C. 2252(a) (sale or possession of material involving sexual exploitation of children)

18 U.S.C. 2252A(a) (sale or possession of child pornography)

18 U.S.C. 2261A (stalking)

18 U.S.C. 2271-2279 (destruction of ships)

18 U.S.C. 2283 (transportation of explosives, biological, chemical, radioactive or nuclear materials for terrorist purposes on the high seas or aboard a U.S. vessel or in U.S. waters)

18 U.S.C. 2284 (transportation of a terrorist on the high seas or aboard a U.S. vessel or in U.S. waters)

18 U.S.C. 2318 (transporting counterfeit phonorecord labels, copies of computer programs or documentation, or copies of motion pictures or other audio visual works)

18 U.S.C. 2332b (acts of terrorism transcending national boundaries)

18 U.S.C. 2388 (war-time activities affecting armed forces)

18 U.S.C. 2422(b) (causing a minor to engage in prostitution or other sexual acts)

18 U.S.C. 2425 (transmission of information about a minor)

18 U.S.C. 3261(offenses committed by members of the United States armed forces or individuals accompanying or employed by the United States armed forces overseas)

46 U.S.C. App. 1903 (maritime drug law enforcement)

48 U.S.C. 1912 (offenses committed on United States defense sites in the Marshall Islands or Federated States of Micronesia)

48 U.S.C.1934 (offenses committed on United States defense sites in Palau)

Special Aircraft Jurisdiction

18 U.S.C. 32 (destruction of aircraft)

18 U.S.C. 831 (threats, theft, or unlawful possession of nuclear material or attempting or conspiring to do so)

18 U.S.C. 1201 (kidnaping)

18 U.S.C. 2318 (transporting counterfeit phonorecord labels, copies of computer programs or documentation, or copies of motion pictures or other audio visual works)

49 U.S.C. 46502(a) (air piracy or attempted air piracy)

49 U.S.C. 46504 (interference with flight crew or attendants within the special aircraft jurisdiction of the United States)

49 U.S.C. 46506 (assaults, maiming, theft, receipt of stolen property, murder, manslaughter, attempted murder or manslaughter, robbery, or sexual abuse)

Treaty-Related

18 U.S.C. 32(b)
Offenses:
- violence aboard a foreign civil aircraft (likely to endanger the safety of the aircraft) while in flight;
- destruction of or incapacitating or endangering damage to foreign civil aircraft;
- placing a bomb aboard a foreign civil aircraft; or
- attempting or conspiring to do so

Jurisdictional factors:
- a United States national was on board;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. 37

Offenses:

- violence causing or likely to cause serious bodily injury or death at an international airport;
- destruction of or serious damage to aircraft or facilities at an international airport; or
- attempting or conspiring to do so

Jurisdictional factors:

- a victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. 112

Offenses:

- assaulting an internationally protected person;
- threatening an internationally protected person; or
- attempting to threaten an internationally protected person

Jurisdictional factors:

- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. 175

Offenses:

- develop, produce, stockpile, transfer, acquire, retain, or possess biological weapons or delivery systems, misuse of biological weapons;
- assisting a foreign power to do so; or
- attempting, threatening or conspiring to do so
- Jurisdictional factor:
- "there is extraterritorial Federal jurisdiction over an offense under this section committed by or against a national of the United States," 18 U.S.C. 175(a)

18 U.S.C. 229

Offenses:

- using chemical weapons outside the United States; or
- attempting, or conspiring to do so

Jurisdictional factors:

- the victim or offender was a United States national; or
- the offense was committed against federal property

18 U.S.C. 831

Offenses:

- threats, theft, or unlawful possession of nuclear material; or
- attempting or conspiring to do so

Jurisdictional factors:

- a United States national or an American legal entity was the victim of the offense;
- the offender was a United States national or an American legal entity; or
- the offender is afterwards found in the United States;
- the offense involved a transfer to or from the United States; or
- the offense was a threat directed against the United States

18 U.S.C. 878

Offenses:

- threatening to assault, kill or kidnap an internationally protected person

Jurisdictional factors:

- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. 1091

Offense: genocide

- killing members of a national, ethnic, racial or religious group
- assaulting members of a national, ethnic, racial or religious group
- imposing reproductive and other group destructive measures on a national, ethnic, racial or religious group
- forcibly transferring children of a national, ethnic, racial or religious group

Jurisdictional factors:

- the offender was a United States national
- the offender is a stateless person habitually residing in the United States
- the offender is present in the United States
- the offense occurred in part in the United States

18 U.S.C. 1116

Offense: killing an internationally protected person

Jurisdictional factors:

- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. 1117

Offense: conspiracy to kill an internationally protected person

Jurisdictional factors:

- the victim was a United States national;

- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. 1201
Offense:
- kidnaping an internationally protected person; or
- attempting or conspiring to do so

Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. 1203
Offense:
- -hostage taking; or
- attempting or conspiring to do so

Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. 2280
Offenses:
- violence committed against maritime navigation; or
- attempting or conspiracy to commit violence against maritime navigation

Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. 2281
Offenses:
- violence committed against a maritime platform; or
- attempting or conspiracy to commit violence against a maritime platform

Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. 2332a

Offenses:

- using a weapon of mass destruction outside the United States; or
- threatening, attempting, or conspiring to do so

Jurisdictional factors:

- the victim was a United States national;
- the offender was a United States national; or
- the offense was committed against federal property

18 U.S.C. 2332f (effective upon the terrorist bombing convention entering into force for the U.S.)

Offenses:

- bombing public places, government facilities, or public utilities outside the United States; or
- threatening, attempting, or conspiring to do so

Jurisdictional factors:

- the victim was a United States national;
- the offender was a United States national;
- the offense was committed against federal property;
- the offender is present in the United States;
- the offense was committed on United States registered vessel or aircraft; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. 2339C

Offenses:

- financing terrorism outside the U.S.; or
- attempting or conspiring to do so

Jurisdictional factors:

- predicate act of terrorism was directed against
    - United States property,
    - United States nationals or their property, or
    - property of entities organized under United States law;
- offense was committed on United States registered vessel or aircraft operated by the United States.;
- the offense was intended to compel action or abstention by the United States;
- the offender was a United States national; or
- (effective upon the terrorism financing convention entering into force for the U.S.) the offender is present in the United States

18 U.S.C. 2340A

Offenses:

- torture under color of law outside the United States; or
- attempted torture

Jurisdictional factors:

- the offender was a United States national; or
- the offender is present in the United States

18 U.S.C. 2441

Offense:

- war crimes

Jurisdictional factors:

- an American or member of the American armed forces was the victim of the offense; or
- the offender was an American or member of the American armed forces

49 U.S.C. 46502(b)

Offenses:

- air piracy outside the special aircraft jurisdiction of the United States; or
- attempted air piracy outside the special aircraft jurisdiction of the United States

Jurisdictional factors:

- a United States national was aboard;
- the offender was a United States national; or
- the offender is afterwards found in the United States

Others

18 U.S.C. 175c (variola virus (small pox))

Jurisdictional factors:

- the offender or victim was a United States national;
- the offense occurred in or affected interstate or foreign commerce
- the offense was committed against U.S. property; or
- the offender aided or abetted the commission of an offense under the section for which there was extraterritorial jurisdiction

Attempt/conspiracy

- includes attempts and conspiracies

18 U.S.C. 351

Offenses:

- killing, kidnaping, attempting or conspiring to kill or kidnap, or assaulting a Member of Congress, a Supreme Court Justice, or senior executive branch official

- Jurisdictional factors:
- "[t]here is extraterritorial jurisdiction over an offense prohibited by this section," 18 U.S.C. 351(i)

18 U.S.C. 877 (mailing threatening communications to the United States from foreign countries)

18 U.S.C. 956 (conspiracy and overt act within the United States to commit murder, kidnaping, maiming or the destruction of certain property overseas)

18 U.S.C. 1029
Offenses:
- fraud related to access devices; or
- attempting or conspiring to commit the offense

Jurisdictional factors:
- involves a device issued, managed or controlled by an entity within the jurisdiction of the United States and
- item used in the offense or proceeds are transported or transmitted to or through the United States or deposited here, 18 U.S.C. 1029(h)

18 U.S.C. 1119 (killing of American by an American in a foreign country)

18 U.S.C. 1204 (parental kidnaping by retaining a child outside the United States)

18 U.S.C. 1512
Offenses:
- tampering with a federal witness or informant; or
- attempting to tamper with a federal witness or informant

Jurisdictional factors:
- "[t]here is extraterritorial Federal jurisdiction over an offense under this section," 18 U.S.C. 1512(g)

18 U.S.C. 1513
Offenses:
- -retaliating against a federal witness or informant; or
- attempting to retaliate against a federal witness or informant

Jurisdictional factors:
- "[t]here is extraterritorial Federal jurisdiction over an offense under this section," 18 U.S.C. 1513(d)

18 U.S.C. 1585 (service aboard a slave vessel by an American or American resident)

18 U.S.C. 1586 (service aboard a vessel transporting slaves from one foreign country to another by an American or American resident)

18 U.S.C. 1587 (captain of a slave vessel hovering off the coast of the United States)

18 U.S.C. 1651 (piracy upon the high seas where the offender is afterwards brought into or found in the United States)

18 U.S.C. 1652 (Americans acting as privateers against the United States or Americans on the high seas)

18 U.S.C. 1653 (acts of piracy upon the high seas committed against the United States or Americans by aliens)

18 U.S.C. 1654 (Americans arming or serving on privateers outside the United States to be used against the United States or Americans)

18 U.S.C. 1751
Offenses:
- killing, kidnaping, attempting or conspiring to kill or kidnap, or assaulting the President, Vice President, or a senior White House official

Jurisdictional factors:
- "[t]here is extraterritorial jurisdiction over an offense prohibited by this section," 18 U.S.C. 1751(k)

18 U.S.C. 1831-1839
Offenses:
- economic espionage;
- theft of trade secrets

Jurisdictional factors:
- "[t]his chapter also applies to conduct occurring outside the United States if"
    - (1) the offender was a United States national or entity organized under United States law; or
    - (2) an act in furtherance was committed here, 18 U.S.C. 1837

18 U.S.C. 1956
Offense:

- money laundering

Jurisdictional factors:

- "[t]here is extraterritorial jurisdiction over the conduct prohibited by this section if
    - the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and
    - the transaction or series of related transactions involves funds. . . of a value exceeding $10,000," 18 U.S.C. 1956(f)

18 U.S.C. 1957

Offense:

- prohibited monetary transactions

Jurisdictional factors:

- the offense under this section takes place outside the United States, but the defendant is a United States person [other than a federal employee or contractor who is the victim of terrorism]," 18 U.S.C. 1957(d)

18 U.S.C. 1992 (attacks on railroad and mass transit systems engaged in interstate or foreign commerce)

18 U.S.C. 2151 - 2157 (sabotage) (definitions afford protection for armed forces of the United States and "any associate nation" and for things transported "either within the limits of the United States or upon the high seas or elsewhere," 18 U.S.C. 2151)

18 U.S.C. 2260 (production of sexually explicit depictions of children outside the United States with the intent to import into the United States)

18 U.S.C. 2290

Offenses:

- destruction of vessels or maritime facilities (18 U.S.C. 2291);
- attempting or conspiring to do so (18 U.S.C. 2291); or
- imparting or conveying false information (18 U.S.C. 2292)

Jurisdictional factors:

- victim or offender was a U.S. national;
- U.S. national was aboard victim vessel;
- victim vessel was a U.S. vessel

Attempt/conspiracy

- includes attempts and conspiracies

18 U.S.C. 2332 (killing, attempting or conspiring to kill, or assaulting Americans overseas) (prosecution upon Department of Justice certification of terrorist intent)

18 U.S.C. 2332b
Offenses:
- -terrorist acts transcending national boundaries; or
- attempting or conspiring to do so

Jurisdictional factors:
- use of U.S. mail or other facility of United States foreign commerce;
- affects foreign commerce of the United States;
- victim was federal officer or employee or United States government; or
- the offenses was committed within the special maritime or territorial jurisdiction of the United States

18 U.S.C. 2339B
Offenses:
- providing material support or resources to designated terrorist organizations by one "subject to the jurisdiction of the United States;" or
- attempting or conspiring to do so

Jurisdictional factors:
- "[t]here is extraterritorial jurisdiction over an offense under this section," 18 U.S.C. 2339B(d)

18 U.S.C. 2339D (receipt of military training from a foreign terrorist organization)
Jurisdictional factors:
- the offender was a United States national;
- the offender was habitual resident of the United States;
- the offender is present in the United States;
- the offense was committed in part in the United States;
- the offense occurred in or affected interstate or foreign commerce; or
- the offender aided or abetted a violation of the section over which extraterritorial jurisdiction exists

18 U.S.C. 2381 (treason) ("within the United States or elsewhere")

18 U.S.C. 2423 (U.S. citizen or resident alien traveling overseas with the intent to commit illicit sexual activity or traveling overseas and thereafter engaging in illicit sexual activity)

18 U.S.C. 2442 (recruitment or use of child soldiers)
Jurisdictional factors:
- the offender was a United States national

- the offender was a stateless person habitually residing in the United States
- the offender is present in the United States
- the offense occurred in part in the United States

18 U.S.C. 3271 (overseas trafficking in persons by those employed by or accompanying the United States)

21 U.S.C. 959
Offenses:
- manufacture, distribution or possession of illicit drugs for importation into the United States

Jurisdictional factors:
- "this section is intended to reach acts of manufacture or distribution committed outside the territorial
- jurisdiction of the United States. . . ." 21 U.S.C. 959(c)

21 U.S.C. 960A (narco-terrorism)
Jurisdictional factors:
- the offense was a U.S. drug or terrorism offense;
- the offender provided pecuniary value for terrorist offense to injure a U.S. national or damage U.S. property outside the United States;
- the offense was committed in part in the United States and the offender is a U.S. national; or
- the offense occurred in or affected interstate or foreign commerce

46 U.S.C. App. 1903
Offenses:
- manufacture, distribution or possession of controlled substances on various vessels outside United States maritime jurisdiction

Jurisdictional factors:
- the vessel is a "vessel without nationality"; or
- the vessel is of foreign registry or located within foreign territorial waters and the foreign nation has consented to application of the United States law

Federal Crimes Subject to Federal Prosecution When Committed Overseas

Homicide

7 U.S.C. 2146 (killing federal animal transportation inspectors)*

8 U.S.C. 1324 (death resulting from smuggling aliens into the U.S.)*

15 U.S.C. 1825(a)(2)(C) (killing those enforcing the Horse Protection Act)*

18 U.S.C. 32 (death resulting from destruction of aircraft or their facilities)
Jurisdictional factors:
- aircraft was in the special aircraft jurisdiction of the United States;
- the victim or offender was a United States national; or
- the offender is found in the United States

Attempt/Conspiracy
- attempt and conspiracy are included

18 U.S.C. 33 (death resulting from destruction of motor vehicles or their facilities used in United States foreign commerce)

18 U.S.C. 37 (death resulting from violence at international airports)
Jurisdictional factors:
- a victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. 38 (death resulting from fraud involving aircraft or space vehicle parts)
Jurisdictional factors:
- the victim or offender was an entity organized under United States law;
- the victim or offender was a United States national; or
- an act in furtherance of the offense was committed in the United States)

18 U.S.C. 43
Offense (where death results):
- travel to disrupt an animal enterprise;
- causing damages of over $10,000 to an animal enterprise; or
- conspiring to cause damages of over $10,000 to an animal enterprise

Jurisdictional factors:
- the offense involved travel in the foreign commerce of the United States; or
- the offense involved use of the mails or other facility in the foreign commerce of the United States

18 U.S.C. 115(a)(1)(A) (murder, attempted murder or conspiracy to murder of a family member of a United States officer, employee or judge with intent to impede or retaliate for performance of federal duties)*

18 U.S.C. 115(a)(1)(B) (murder, attempted murder or conspiracy to murder of a former United States officer, employee or judge or any member of their families in retaliation for performance of federal duties)*

18 U.S.C. 175 (death resulting from biological weapons offenses)
Jurisdictional factors:
- a victim was a United States national; or
- the offender was a United States national

18 U.S.C. 175c (variola virus (small pox))
Jurisdictional factors:
- the offender or victim was a United States national;
- the offense occurred in or affected interstate or foreign commerce;
- the offense was committed against U.S. property; or
- the offender aided or abetted the commission of an offense under the section for which there was extraterritorial jurisdiction

18 U.S.C. 229 (death resulting from chemical weapons offenses)
Jurisdictional factors:
- a victim was a United States national;
- the offender was a United States national; or
- committed against United States property

18 U.S.C. 351 (killing a Member of Congress, cabinet officer, or Supreme Court justice)
Attempt/conspiracy
- attempt and conspiracy are included

18 U.S.C. 794 (death resulting from disclosing the identify of an American agent to foreign powers)

18 U.S.C. 831
Offenses:
- unlawful possession of nuclear material where the offender causes the death of another; or
- attempting or conspiring to do so

Jurisdictional factors:

- the offense is committed within the special aircraft or special maritime and territorial jurisdiction of the United States;
- a United States national or an American legal entity was the victim of the offense;
- the offender was a United States national or an American legal entity;
- the offender is afterwards found in the United States;
- the offense involved a transfer to or from the United States; or
- the offense was a threat directed against the United States

18 U.S.C. 844(d) (death resulting from the unlawful transportation of explosives in United States foreign commerce)
Attempt/conspiracy
- attempt and conspiracy are included

18 U.S.C. 844(f) (death resulting from bombing federal property)*
Attempt/conspiracy
- attempt and conspiracy are included

18 U.S.C. 844(i) (death resulting from bombing property used in or used in an activity which affects United States foreign commerce)
Attempt/conspiracy
- attempt and conspiracy are included

18 U.S.C. 930 (killing or attempting to kill another during the course of possessing, introducing, or attempting to possess or introduce a firearm or other dangerous weapon in a federal facility)*

18 U.S.C. 956 (conspiracy and overt act within the United States to commit murder, kidnaping, maiming or the destruction of certain property overseas)

18 U.S.C. 1091 (genocide)
Jurisdictional factors:
- -the offender was a United States national
- the offender is a stateless person habitually residing in the United States
- the offender is present in the United States
- the offense occurred in part in the United States

18 U.S.C. 1111 (murder within the special maritime jurisdiction of the United States)

18 U.S.C. 1112 (manslaughter within the special maritime jurisdiction of the United States)

18 U.S.C. 1113 (attempted murder or manslaughter within the special maritime jurisdiction of the United States)

18 U.S.C. 1114 (murder of a federal employee, including a member of the United States military, or anyone assisting a federal employee or member of the United States military during the performance of (or on account of the performance of) official duties*

18 U.S.C. 1116 (killing an internationally protected person)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. 1117 (conspiracy to kill an internationally protected person)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. 1119 (a United States national killing or attempting to kill a United States national outside the United States)

18 U.S.C. 1120 (murder by a person who has previously escaped from a federal prison)*

18 U.S.C. 1121(a) (killing another who is assisting or because of the other's assistance in a federal criminal investigation or killing (because of official status) a state law enforcement officer assisting in a federal criminal investigation)*

18 U.S.C. 1201 (kidnaping where death results)
Jurisdictional factors:
- the victim is removed from the United States;
- the offense occurs within the special aircraft or special maritime and territorial jurisdiction of the United States;
- the victim is a federal officer or employee; or
- the victim is an internationally protected person and
    - the victim was a United States national;

- the offender was a United States national; or
- the offender is afterwards found in the United States

Attempt/conspiracy
- attempt and conspiracy are included

18 U.S.C. 1203 (hostage taking where death results)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States
- Attempt/conspiracy attempt and conspiracy are included

18 U.S.C. 1347 (defrauding U.S. health care program where death results)*

18 U.S.C. 1365 (tampering with consumer products where death results (in the United States))*

18 U.S.C. 1503 (killing another to obstruct federal judicial proceedings)*
Attempt/conspiracy
- attempt is included

18 U.S.C. 1512 (tampering with a federal witness or informant where death results)
Jurisdictional factors:
- "[t]here is extraterritorial Federal jurisdiction over an offense under this section," 18 U.S.C.1512(g)

Attempt/conspiracy
- attempt is included

18 U.S.C. 1513 (retaliating against a federal witness or informant)
Jurisdictional factors:
- "[t]here is extraterritorial Federal jurisdiction over an offense under this section," 18 U.S.C.1513(d))

Attempt/conspiracy
- attempt is included

18 U.S.C. 1652 (murder of an American by an American on the high seas in the name of a foreign state or person)

18 U.S.C. 1751 (killing the President, Vice President, or a senior White House official)
Jurisdictional factors:

- "[t]here is extraterritorial jurisdiction over an offense prohibited by this section," 18 U.S.C.1751(k)

Attempt/conspiracy

- attempt and conspiracy are included

18 U.S.C. 1952 (U.S.-foreign travel or use of the mails or of a facility of U.S. foreign commerce in furtherance of a violation of federal arson laws)

18 U.S.C. 1958 (commission of murder for hire in violation of U.S. law where death results)

Jurisdictional factor

- use U.S. foreign travel facilities, or
- use of mails or U.S. foreign commerce facilities

Attempt/conspiracy

- includes conspiracy

18 U.S.C. 1992 (attacks on railroad and mass transit systems engaged in interstate or foreign commerce)

Attempt/conspiracy

- includes attempts and conspiracy

18 U.S.C. 2118 (killing resulting from a robbery or burglary involving controlled substances)

Jurisdictional factors

- offense involved
- travel in U.S. foreign commerce, or
- use of a facility in U.S. foreign commerce

Attempt/Conspiracy

- attempt and conspiracy prohibitions are included

18 U.S.C. 2119 (death resulting from carjacking)

Jurisdictional factors

- car transported, shipped or received in U.S. foreign commerce in the course of the offense

18 U.S.C. 2241, 2245 (aggravated sexual abuse within the special maritime and territorial jurisdiction of the United States where death results)

18 U.S.C. 2242, 2245 (sexual abuse within the special maritime and territorial jurisdiction of the United States where death results)

18 U.S.C. 2243, 2245 (sexual abuse of a minor or ward within the special maritime and territorial jurisdiction of the United States where death results)

18 U.S.C. 2244, 2245 (abusive sexual contact within the special maritime and territorial jurisdiction of the United States where death results)

18 U.S.C. 2261A (death resulting from interstate stalking violation involving use of the mails or a facility in U.S. foreign commerce)
Jurisdictional factors
- travel in U.S. maritime jurisdiction; or
- travel in U.S. foreign commerce

18 U.S.C. 2280 (a killing resulting from violence against maritime navigation)
Jurisdictional factors
- aboard a ship of American registry;
- committed by an American national aboard a ship of foreign registry or outside the U.S.;
- victim was an American;
- committed in the territorial waters of another country and the offender is subsequently found in the U.S.; or
- committed in an effort to compel federal action or abstention

18 U.S.C. 2281 (resulting from violence against fixed maritime platforms)
Jurisdictional factors
- aboard a platform on the U.S. continental shelf;
- committed by an American national aboard a platform on the continental shelf of another nation
- victim was an American;
- committed aboard a platform on the continental shelf of another nation and the offender is subsequently found in the U.S.; or
- committed in an effort to compel federal action or abstention

18 U.S.C. 2283 (transportation of explosives, biological, chemical, radioactive or nuclear materials for terrorist purposes on the high seas or aboard a U.S. vessel or in U.S. waters)

18 U.S.C. 2290
Offenses:
- destruction of vessels or maritime facilities (18 U.S.C. 2291); or
- attempting or conspiring to do so (18 U.S.C. 2291)

Jurisdictional factors:
- victim or offender was a U.S. national;

- U.S. national was aboard victim vessel; or
- victim vessel was a U.S. vessel

Attempt/conspiracy
- includes attempts and conspiracies

18 U.S.C. 2332 (killing an American overseas)

Jurisdictional factors
- prosecution only on DoJ certification "to coerce, intimidate, or retaliate against a government or civilian population"

Attempt/conspiracy
- includes attempts and conspiracies

18 U.S.C. 2332a (resulting from use of weapons of mass destruction)

Jurisdictional factors
- victim or offender is American; or
- against federal property

Attempt/conspiracy
- includes attempts and conspiracies

18 U.S.C. 2332f (resulting from bombing of public places, government facilities, public transportation systems or infrastructure facilities)(effective when the terrorist bombing treaty enters into force for the U.S.)

Jurisdictional factors
- victim or offender is American;
- aboard aircraft operated by the U.S.;
- aboard vessel of aircraft of U.S. registry;
- offender is found in the U.S.;
- committed to coerce U.S. action; or
- against federal property

Attempt/conspiracy
- includes attempts and conspiracies

18 U.S.C. 2340A (resulting from torture committed outside the U.S. (physical or mental pain inflicted under color of law upon a prisoner))

Jurisdictional factors
- American offender; or
- offender subsequently found within the U.S.

Attempt/conspiracy
- includes attempts

18 U.S.C. 2441 (war crimes)

Jurisdictional factors
- victim or offender is an American; or

- victim or offender is a member of U.S. armed forces

18 U.S.C. 3261 (offenses committed by members of the United States armed forces or individuals accompanying or employed by the United States armed forces overseas)

21 U.S.C. 461(c) (murder of federal poultry inspectors during or because of official duties)*

21 U.S.C. 675 (murder of federal meat inspectors during or because of official duties)*

21 U.S.C. 848(e)(1)(B) (killing a federal or state law enforcement official in furtherance of a federal drug felony)*

21 U.S.C. 1041(c) (murder of an egg inspector during or because of official duties)*

42 U.S.C. 2000e-13 (murder, manslaughter or attempted murder or manslaughter of EEOC personnel)*

42 U.S.C. 2283 (killing federal nuclear inspectors during or because of official duties)*

49 U.S.C. 46502 (air piracy where death results)

49 U.S.C. 46506 (murder, manslaughter, or attempted murder or manslaughter within the special aircraft jurisdiction of the United States)

Kidnaping

18 U.S.C. 115(a)(1)(A) (kidnaping, attempted kidnaping or conspiracy to kidnap a family member of a United States officer, employee or judge with intent to impede or retaliate for performance of federal duties)*

18 U.S.C. 115(a)(1)(B) (kidnaping, attempted kidnaping or conspiracy to kidnap a former United States officer, employee or judge or any member of their families in retaliation for performance of federal duties)*

18 U.S.C. 351 (kidnaping a Member of Congress, a Supreme Court Justice, or senior executive branch official)

Jurisdictional factors:

- "[t]here is extraterritorial jurisdiction over an offense prohibited by this section," 18 U.S.C.351(i)

Attempt/conspiracy

- includes attempts and conspiracies

18 U.S.C. 956 (conspiracy and overt act within the United States to commit murder, kidnaping, maiming or the destruction of certain property overseas)

18 U.S.C. 1091 (genocide)

- forcibly transferring children of a national, ethnic, racial or religious group

Jurisdictional factors:

- -the offender was a United States national
- the offender is a stateless person habitually residing in the United States
- the offender is present in the United States
- the offense occurred in part in the United States

18 U.S.C. 1201 (kidnaping)

Jurisdictional factors:

- the victim is removed from the United States;
- the offense occurs within the special aircraft or special maritime and territorial jurisdiction of the United States;
- the victim is a federal officer or employee; or
- the victim is an internationally protected person and
- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. 1203 (hostage taking)

Jurisdictional factors:

- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

Attempt/conspiracy

- includes attempts and conspiracies

18 U.S.C. 1204 (international parental kidnaping detaining a child outside of the United States in violation of parental custody rights)

18 U.S.C. 3261 (offenses committed by members of the United States armed forces or individuals accompanying or employed by the United States armed forces overseas)

Assault

7 U.S.C. 60 (assault designed to influence administration of federal cotton standards program)*

7 U.S.C. 87b (assault designed to influence administration of federal grain standards program)*

7 U.S.C. 473c-1 (assaults on cotton samplers to influence administration of federal cotton standards program)*

7 U.S.C. 511i (assaults designed to influence administration of federal tobacco inspection program)*

7 U.S.C. 2146 (assault of United States animal transportation inspectors)*
Jurisdictional factors:

- use of U.S. mail or other facility of United States foreign commerce;
- affects foreign commerce of the United States;
- victim was federal officer or employee or United States government; or
- the offenses was committed within the special maritime or territorial jurisdiction of the United States

15 U.S.C. 1825(a)(2)(C) (assaults on those enforcing the Horse Protection Act))*

16 U.S.C. 773e (assaults on officials responsible for enforcing the Northern Pacific Halibut Act)*

16 U.S.C. 973c (assaults on officials responsible for enforcing the South Pacific tuna conversation provisions)*

16 U.S.C. 1417 (assaults on officials conducting searches or inspections with respect to the global moratorium on tuna harvesting practices)*

16 U.S.C. 1436 (assaults on officials conducting searches or inspections with respect to the marine sanctuaries)*

16 U.S.C. 1857, 1859 (assaults on officials conducting searches or inspections with respect to the federal fisheries management and conservation program)*

16 U.S.C. 2403, 2408 (assaults on federal officials conducting searches or inspections on vessels subject to the jurisdiction of the United States with respect Antarctic conservation)*

16 U.S.C. 2435 (assaults on federal officials conducting searches or inspections on vessels subject to the jurisdiction of the United States in enforcement of the Antarctic Marine Living Resources Convention)*

16 U.S.C. 3637 (assaults on federal officials conducting searches or inspections on vessels subject to the jurisdiction of the United States with respect Pacific salmon conservation)*

16 U.S.C. 5009 (assaults on federal officials conducting searches or inspections on vessels subject to the jurisdiction of the United States with respect North Pacific anadromous stock conservation)*

16 U.S.C. 5505 (assaults on federal officials conducting searches or inspections on vessels subject to the jurisdiction of the United States with respect high seas fishing compliance)*

16 U.S.C. 5606 (assaults on federal officials conducting searches or inspections on vessels subject to the jurisdiction of the United States with respect Northwest Atlantic Fisheries Convention compliance)*

18 U.S.C. 37 (violence at international airports)
Jurisdictional factors:
- a victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

Attempt/conspiracy
- includes attempts and conspiracies

18 U.S.C. 111 (assault on a federal officer or employee)*

18 U.S.C. 112 (assaulting an internationally protected person)
Jurisdictional factors:

- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. 113 (assault within the special maritime and territorial jurisdiction of the United States)

18 U.S.C. 114 (maiming within the special maritime and territorial jurisdiction of the United States)

18 U.S.C. 115(a)(1)(A) (assaults a family member of a United States officer, employee or judge with intent to impede or retaliate for performance of federal duties)*

18 U.S.C. 115(a)(1)(B) (assaults a former United States officer, employee or judge or any member of their families in retaliation for performance of federal duties)*

18 U.S.C. 351 (assaulting a Member of Congress, a Supreme Court Justice, or senior executive branch official)
Jurisdictional factor:
- "[t]here is extraterritorial jurisdiction over an offense prohibited by this section," 18 U.S.C. 351(i)

18 U.S.C. 831
Offenses:
- unlawful use of nuclear material where the offender causes the serious injury to another; or
- attempting or conspiring to do so

Jurisdictional factors:
- the offense is committed within the special aircraft or special maritime and territorial jurisdiction of the United States;
- a United States national or an American legal entity was the victim of the offense;
- the offender was a United States national or an American legal entity;
- the offender is afterwards found in the United States;
- the offense involved a transfer to or from the United States; or
- the offense was a threat directed against the United States

18 U.S.C. 844(f) (burning or bombing federal property where serious injury results)*

18 U.S.C. 844(i) (burning or bombing property used in or used in activities affecting United States foreign commerce where serious injury results)

18 U.S.C. 956 (conspiracy and overt act within the United States to commit murder, kidnaping, maiming or the destruction of certain property overseas)

18 U.S.C. 1091 (genocide)

- assaulting members of a national, ethnic, racial or religious group
- forcibly transferring children of a national, ethnic, racial or religious group

Jurisdictional factors:

- -the offender was a United States national
- the offender is a stateless person habitually residing in the United States
- the offender is present in the United States
- the offense occurred in part in the United States

18 U.S.C. 1365 (tampering with consumer products resulting in injury (in the United States))*

18 U.S.C. 1501 (assault on a server of federal process)*

18 U.S.C. 1502 (assaulting a federal extradition agent)*

18 U.S.C. 1503 (assaulting another to obstruct federal judicial proceedings)*

18 U.S.C. 1512 (tampering with a federal witness or informant through the use of physical force)

Jurisdictional factors:

- "[t]here is extraterritorial Federal jurisdiction over an offense under this section," 18 U.S.C.1512(g)

Attempt/conspiracy

- attempt is included

*18 U.S.C. 1513**

Offenses (causing physical injury):

- -retaliating against a federal witness or informant; or
- attempting to retaliate against a federal witness or informant

Jurisdictional factors:

- "[t]here is extraterritorial Federal jurisdiction over an offense under this section," 18 U.S.C.1513(d))

18 U.S.C. 1655 (assaulting the commander of a vessel is piracy)

18 U.S.C. 1751 (assaulting the President, Vice President, or a senior White House official; "[t]here is extraterritorial jurisdiction over an offense prohibited by this section," 18 U.S.C. 1751(k))

*18 U.S.C. 2114 * (assault upon one in possession of the property of the United States)*

18 U.S.C. 2191 (cruelty to seamen within the special maritime jurisdiction of the United States)

18 U.S.C. 2194 (shanghaiing sailors for employment within the foreign commerce of the United States)

18 U.S.C. 2241 (aggravated sexual abuse within the special maritime and territorial jurisdiction of the United States)

18 U.S.C. 2242 (sexual abuse within the special maritime and territorial jurisdiction of the United States)

18 U.S.C. 2243 (sexual abuse of a minor or ward within the special maritime and territorial jurisdiction of the United States)

18 U.S.C. 2244 (abusive sexual contact within the special maritime and territorial jurisdiction of the United States)

18 U.S.C. 2261 (traveling or causing a spouse to travel in foreign commerce of the United States for purposes of domestic violence)

18 U.S.C. 2261A (stalking within the special maritime and territorial jurisdiction of the United States)

18 U.S.C. 2262 (traveling or causing a spouse to travel in foreign commerce of the United States for purposes violating protective order)

18 U.S.C. 2280
Offenses:

- violence committed against maritime navigation; or
- attempting or conspiracy to commit violence against maritime navigation

Jurisdictional factors:

- the victim was a United States national;
- the offender was a United States national;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. 2281

Offenses:

- violence committed against a maritime platform; or
- attempting or conspiracy to commit violence against a maritime platform

Jurisdictional factors:

- the victim was a United States national;
- the offender was a United States national;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. 2332 (assaulting a United States national outside the United States) (prosecution upon Department of Justice certification of terrorist intent)

18 U.S.C. 2332a

Offenses:

- using a weapon of mass destruction outside the United States resulting physical injury; or
- attempting or conspiring to do so

Jurisdictional factors:

- the victim was a United States national;
- the offender was a United States national; or
- the offense was committed against federal property

18 U.S.C. 2332b

Offenses:

- -terrorist assaults transcending national boundaries; or
- attempt or conspiracy

Jurisdictional factors:

- use of U.S. mail or other facility of United States foreign commerce;
- affects foreign commerce of the United States;
- victim was federal officer or employee or United States government; or
- the offenses was committed within the special maritime or territorial jurisdiction of the United States

18 U.S.C. 2340A
Offenses:
- torture under color of law outside the United States; or
- attempted torture

Jurisdictional factors:
- the offender was a United States national; or
- the offender is present in the United States

18 U.S.C. 3261 (offenses committed by members of the United States armed forces or individuals accompanying or employed by the United States armed forces overseas)

21 U.S.C. 461(c) (assaulting federal poultry inspectors)*

21 U.S.C. 675 (assaulting federal meat inspectors)*

21 U.S.C. 1041(c) (assaulting federal egg inspector)*

30 U.S.C. 1461 (assaults on officials conducting searches or inspections with respect to the Deep Seabed Hard Mineral Resources Act)*

42 U.S.C. 2000e-13 (assaulting EEOC personnel)*

42 U.S.C. 2283 (assaulting federal nuclear inspectors)*

46 U.S.C. 11501 (seaman's assault upon officers within the special maritime jurisdiction of the United States)

46 U.S.C. App. 46504 (assaulting officers enforcing regulations of vessels in domestic commerce)

49 U.S.C. 46504 (assaulting a flight crew member within the special aircraft jurisdiction of the United States)

49 U.S.C. 46506 (assaults within the special aircraft jurisdiction of the United States)

Property Destruction

18 U.S.C. 32 (destruction of aircraft or their facilities)
Jurisdictional factors:
- aircraft was in the special aircraft jurisdiction of the United States;
- the victim or offender was a United States national; or
- the offender is found in the United States

Attempt/Conspiracy
- attempt and conspiracy are included

18 U.S.C. 33 (destruction of motor vehicles or their facilities used in United States foreign commerce)

18 U.S.C. 37 (violence at international airports)
Jurisdictional factors:
- a victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. 43
Offense:
- travel to disrupt an animal enterprise;
- causing damages of over $10,000 to an animal enterprise; or
- conspiring to cause damages of over $10,000 to an animal enterprise

Jurisdictional factors:
- the offense involved travel in the foreign commerce of the United States; or
- the offense involved use of the mails or other facility in the foreign commerce of the United States

18 U.S.C. 81 (arson within the special maritime and territorial jurisdiction of the United States)

18 U.S.C. 229 (chemical weapons damage)
Jurisdictional factors:
- a victim was a United States national;
- the offender was a United States national; or
- committed against United States property

18 U.S.C. 831 (use nuclear material of damage or destroy)
Jurisdictional factors:
- committed within the special aircraft or special maritime and territorial jurisdiction of the United States

- a United States national or an American legal entity was the victim of the offense;
- the offender was a United States national or an American legal entity;
- the offender is afterwards found in the United States; or
- the offense involved a transfer to or from the United States

18 U.S.C. 844(f) (burning or bombing federal property)*
Attempt/conspiracy
- attempt and conspiracy are included

18 U.S.C. 844(i) (burning or bombing property used in or used in an activity which affects United States foreign commerce)
Attempt/conspiracy
- attempt and conspiracy are included

18 U.S.C. 956 (conspiracy and overt act within the United States to commit murder, kidnaping, maiming or the destruction of certain property overseas)

18 U.S.C. 1030 (computer abuse involving damage to federal or U.S. financial systems or systems used in the foreign commerce or communications of the United States)

18 U.S.C. 1361 (destruction of federal property)*

18 U.S.C. 1362 (destruction of federal communications lines, stations or related property)*

18 U.S.C. 1363 (destruction of property within the special maritime and territorial jurisdiction of the United States)

18 U.S.C. 1992 (attacks on railroad and mass transit systems engaged in interstate or foreign commerce)

18 U.S.C. 2071 (destruction of federal records)*

18 U.S.C. 2153 (war-time destruction of defense materials of the United States or its allies)*

18 U.S.C. 2155 (destruction of federal national defense materials)*

18 U.S.C. 2272 (destruction of a vessel within the maritime jurisdiction of the United States by its owner)

18 U.S.C. 2273 (destruction of a vessel within the maritime jurisdiction of the United States by others)

18 U.S.C. 2275 (burning or tampering with a vessel within the maritime jurisdiction of the United States)

18 U.S.C. 2280 (destruction of maritime navigational facilities)
Jurisdictional factors:
- the offender was a United States national;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. 2281 (damage to a maritime platform)
Jurisdictional factors:
- the offender was a United States national;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. 2290
Offenses:
- destruction of vessels or maritime facilities (18 U.S.C. 2291); or
- attempting or conspiring to do so (18 U.S.C. 2291)

Jurisdictional factors:
- victim or offender was a U.S. national;
- U.S. national was aboard victim vessel;
- victim vessel was a U.S. vessel

18 U.S.C. 2332a (using a weapon of mass destruction)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offense was committed against federal property

18 U.S.C. 2332f (effective upon the terrorist bombing convention entering into force for the U.S.) (bombing public places, government facilities, or public utilities outside the United States)

Jurisdictional factors:

- the victim was a United States national;
- the offender was a United States national;
- the offense was committed against federal property;
- the offender is present in the United States;
- the offense was committed on United States registered vessel or aircraft; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. 3261 (offenses committed by members of the United States armed forces or individuals accompanying or employed by the United States armed forces overseas)

Threats

18 U.S.C. 32 (threats to destroy foreign civil aircraft, or aircraft in the special aircraft jurisdiction of the United States, or aircraft or aircraft facilities in the special maritime and territorial jurisdiction of the United States)

18 U.S.C. 112 (threatening internationally protected person)

Jurisdictional factors:

- the victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. 115(a)(1)(A) (threats to assault, murder or kidnap a family member of a United States officer, employee or judge with intent to impede or retaliate for performance of federal duties)*

18 U.S.C. 115(a)(1)(B) (threats to assault, murder or kidnap a former United States officer, employee or judge or any member of their families in retaliation for performance of federal duties)*

18 U.S.C. 175 (threatening to develop, produce, stockpile, transfer, acquire, retain, or possess biological weapons or delivery systems, misuse of biological weapons; or threatening to assisting a foreign power to do so;)

- "there is extraterritorial Federal jurisdiction over an offense under this section committed by or against a national of the United States," 18 U.S.C.175(a)

18 U.S.C. 229 (threatening to use chemical weapons)

Jurisdictional factors:

- the victim or offender was a United States national; or
- the offense was committed against federal property

18 U.S.C. 831 (threaten to use nuclear material of injury or destroy)

Jurisdictional factors:

- committed within the special aircraft or special maritime and territorial jurisdiction of the United States;
- a United States national or an American legal entity was the victim of the offense;
- the offender was a United States national or an American legal entity; or
- the offender is afterwards found in the United States;
- the offense involved a transfer to or from the United States; or
- the offense was a threat directed against the United States

18 U.S.C. 871 (threatening the President)*

18 U.S.C. 875 (transmission of a threat in the foreign commerce of the United States)

18 U.S.C. 877 (mailing a threat to kidnap or injure from a foreign country to the United States)

18 U.S.C. 878 (threatening to kill, kidnap or assault an internationally protected person)

Jurisdictional factors:

- a victim was a United States national;
- the offender was a United States national; or
- the offender is afterwards found in the United States

18 U.S.C. 879 (threatening former Presidents)*

18 U.S.C. 1203 (threaten to kill or injure a hostage outside the United States)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. 1503 (obstruction of federal judicial proceedings by threat)*

18 U.S.C. 1505 (obstruction of administrative or Congressional proceedings by threat)*

18 U.S.C. 1512 (threatening a federal witness or informant)
Jurisdictional factors:
- "[t]here is extraterritorial Federal jurisdiction over an offense under this section," 18 U.S.C. 1512(g)

18 U.S.C. 1513 (threatening to retaliate against a federal witness or informant)
Jurisdictional factors:
- "[t]here is extraterritorial Federal jurisdiction over an offense under this section," 18 U.S.C. 1513(d))

18 U.S.C. 1992 (threatening a terrorist attack on mass transit)
Jurisdictional factor
- the victim was mass transit in or affecting U.S. foreign commerce, or
- the offender travels or communicates across a state line

18 U.S.C. 2280 (threats of violence against maritime navigation)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national;
- the offender is afterwards found in the United States; or
- the offense was intended to compel action or abstention by the United States

18 U.S.C. 2281 (threatens injury or destruction aboard a fixed maritime platform)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national;
- the offender is afterwards found in the United States; or

- the offense was intended to compel action or abstention by the United States

18 U.S.C. 2290
Offenses:
- destruction of vessels or maritime facilities (18 U.S.C. 2291); or
- attempting or conspiring to do so (18 U.S.C. 2291)

Jurisdictional factors:
- victim or offender was a U.S. national;
- U.S. national was aboard victim vessel;
- victim vessel was a U.S. vessel

18 U.S.C. 2332a (threatening to use a weapon of mass destruction)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national; or
- the offense was committed against federal property

18 U.S.C. 2332f (effective upon the terrorist bombing convention entering into force for the U.S.) (threatening to bomb public places, government facilities, or public utilities outside the United States)
Jurisdictional factors:
- the victim was a United States national;
- the offender was a United States national;
- the offense was committed against federal property;
- the offender is present in the United States;
- the offense was committed on United States registered vessel or aircraft; or
- the offense was intended to compel action or abstention by the United States

49 U.S.C. 46507 (threats or scares concerning air piracy or bombing aircraft in the special aircraft jurisdiction of the United States)

False Statements

8 U.S.C. 1160(b)(7)(A) (falsification of an application for immigration status)*

15 U.S.C. 158 (false or fraudulent statements by China Trade Act corporate personnel)*

15 U.S.C. 645 (false statements associated with the Small Business Administration)*

15 U.S.C. 714m (false statements associated with the Commodity Credit Corporation)*

16 U.S.C. 831t (false statements associated with TVA)*

*18 U.S.C. 152 * (false statements in bankruptcy)*

18 U.S.C. 287 (false or fraudulent claims against the United States)*

18 U.S.C. 288 (false claims for postal losses)*

18 U.S.C. 289 (false claims for pensions)*

18 U.S.C. 541 (entry of goods falsely classified)

18 U.S.C. 542 (entry of goods by means of false statements)

18 U.S.C. 550 (false claim for refund of duties)

18 U.S.C. 1001 (false statement on a matter within the jurisdiction of a federal agency)*

18 U.S.C. 1002 (possession of false papers to defraud the United States)*

18 U.S.C. 1003 (fraudulent claims against the United States)*

18 U.S.C. 1007 (false statements in an FDIC transaction)*

18 U.S.C. 1011 (false statements in federal land bank mortgage transactions)*

18 U.S.C. 1014 (false statements in loan or credit applications in which the United States has an interest)*

18 U.S.C. 1015 (false statements concerning naturalization, citizenship or alien registry)

18 U.S.C. 1019 (false certification by consular officer)

18 U.S.C. 1020 (false statements concerning highway projects)*

18 U.S.C. 1022 (false certification concerning material for the military)

18 U.S.C. 1027 (false statements to facilitate a theft concerning ERISA)*

18 U.S.C. 1039 (obtaining confidential communications information by fraud)

18 U.S.C. 1542 (false statement in application for a passport)

18 U.S.C. 1546 (fraud in connection with visas, permits and other documents)

18 U.S.C. 1621 (perjury)*

18 U.S.C. 1622 (subornation of perjury)*

22 U.S.C. 1980 (false statement to obtain compensation for loss of commercial fishing vessel or gear)*

22 U.S.C. 4221 (perjury or false swearing before American diplomatic personnel)

22 U.S.C. 4222 (presentation of forged documents to United States foreign service personnel)

42 U.S.C. 408 (false statement in old age claims)*

42 U.S.C. 1320a-7b (false statements concerning Medicare)*

Theft

7 U.S.C. 2024(b) (food stamp fraud)*

15 U.S.C. 645 (embezzlement or fraud associated with the Small Business Administration)*

15 U.S.C. 714m (embezzlement or fraud associated with the Commodity Credit Corporation)*

16 U.S.C. 831t (theft associated with TVA)*

18 U.S.C. 371 (conspiracy to defraud the United States)

18 U.S.C. 641 (theft of federal property)*

18 U.S.C. 645 (theft by federal court officers)*

18 U.S.C. 648 (theft of federal property by custodians)*

18 U.S.C. 656 (embezzlement from a federally insured bank)*

18 U.S.C. 657 (embezzlement from a federally insured credit union)*

18 U.S.C. 658 (theft of property mortgaged or pledged to federal farm credit agencies)*

18 U.S.C. 661 (theft within the special maritime and territorial jurisdiction of the United States)

18 U.S.C. 662 (receipt of stolen property within the special maritime and territorial jurisdiction of the United States)

18 U.S.C. 831 (theft of nuclear materials)
Jurisdictional factors:

- within the special aircraft or special maritime and territorial jurisdiction of the United States;
- the victim was a United States national or an American legal entity;
- the offender was a United States national or an American legal entity;
- the offender is afterwards found in the United States; or
- the offense involved a transfer to or from the United States

18 U.S.C. 1025 (theft by false pretenses or fraud within the special maritime and territorial jurisdiction of the United States)

18 U.S.C. 793-798 (espionage)*

18 U.S.C. 1010 (fraud to secure loan or credit advance from HUD)*

18 U.S.C. 1013 (fraud in connection with farm loan bonds or credit bank debentures)*

18 U.S.C. 1023 (fraud in connection with deliveries for military services)*

18 U.S.C. 1024 (receipt of stolen military property)*

18 U.S.C. 1026 (fraudulently securing the cancellation of farm debt to the United States)*

18 U.S.C. 1030 (fraud in connection with computers)*

18 U.S.C. 1031 (major fraud against the United States)*

18 U.S.C. 1506 (theft or alteration of court records)*

18 U.S.C. 1707 (theft of postal service property)*

18 U.S.C. 1711 (theft of postal funds)*

18 U.S.C. 2071 (destruction of United States records)*

18 U.S.C. 2112 (robbery of the personal property of the United States)*

18 U.S.C. 2115 (robbery of a post office)*

18 U.S.C. 3261 (offenses committed by members of the United States armed forces or individuals accompanying or employed by the United States armed forces overseas)

20 U.S.C. 1097 (fraud in connection with financial aid to students)*

22 U.S.C. 4217 (embezzlement by American diplomatic personnel)*

25 U.S.C. 450d (theft involving the Indian Self-Determination and Education Assistance Act)*

38 U.S.C. 787 (fraud concerning veterans' life insurance)*

42 U.S.C. 1307 (social security fraud)*

42 U.S.C. 1383a (fraud in connection with supplemental security income for the blind, aged and disabled)*

42 U.S.C. 1713 (fraud in connection in connection with claims for injuries overseas associated with contracts for the United States)*

42 U.S.C. 1760(g) (theft in connection with the school lunch program)*

42 U.S.C. 1761(o) (fraud in connection with summer food programs)*

42 U.S.C. 3220 (fraud and theft concerning public works and economic development)*

42 U.S.C. 3795 (fraud or theft of funds associated with the Office of Justice Programs)*

45 U.S.C. 359 (fraud in connection with railroad unemployment insurance)*

46 U.S.C. App. 1276 (fraud in connection with federal ship mortgage insurance)*

Counterfeiting

18 U.S.C. 470-474 (counterfeiting United States obligations outside the United States)

18 U.S.C. 484 (connecting parts of different notes of the United States)*

18 U.S.C. 486 (uttering United States coins of gold, silver or other metal)*

18 U.S.C. 487 (making or possessing counterfeit dies for United States coins)*

18 U.S.C. 490 (counterfeiting minor United States coins)*

18 U.S.C. 491 (counterfeiting tokens or paper used as money of the United States)*

18 U.S.C. 493 (counterfeiting bonds and obligations of certain federal lending agencies)*

18 U.S.C. 494 (forging contractors bonds, bids or public records in order to defraud the United States)*

18 U.S.C. 495 (forging contracts, deeds or powers of attorney in order to defraud the United States)*

18 U.S.C. 496 (counterfeiting United States customs entry certificates)*

18 U.S.C. 497 (counterfeiting United States letters patent)*

18 U.S.C. 498 (counterfeiting United States military or naval discharge certificates)*

18 U.S.C. 499 (counterfeiting United States military, naval or official passes)*

*18 U.S.C. 500 *(counterfeiting United States postal money orders)*

18 U.S.C. 501 (counterfeiting United States postal stamps)*

18 U.S.C. 503 (counterfeiting postmarking stamps)*

18 U.S.C. 505 (counterfeiting federal judicial documents)*

18 U.S.C. 506 (counterfeiting federal agency seals)*

18 U.S.C. 507 (forging or counterfeiting ships papers)*

18 U.S.C. 508 (forging or counterfeiting government transportation requests)*

18 U.S.C. 509 (possession of plates to counterfeiting government transportation requests)*

18 U.S.C. 510 (forging endorsements on Treasury checks)*

18 U.S.C. 513 (counterfeiting state securities)*

18 U.S.C. 514 (transmitting, transporting, or sending a fictitious U.S. financial instrument in the foreign commerce of the United States)*

Piggyback Statutes

18 U.S.C. 2 (principals)

18 U.S.C. 3 (accessories after the fact)

18 U.S.C. 4 (misprision)

18 U.S.C. 371 (conspiracy)

18 U.S.C. 924(c), (j) (using or carrying a firearm during the course of a federal crime of violence or drug trafficking crime)

18 U.S.C. 1952 (Travel Act)

18 U.S.C. 1956-1957 (money laundering)

18 U.S.C. 1959 (violence in aid of racketeering)

18 U.S.C. 1961-1965 (RICO)

21 U.S.C. 846 (conspiracy or attempt to violate the Controlled Substances Act)

21 U.S.C. 963 (conspiracy or attempt to violate the Controlled Substances Import and Export Act)

Model Penal Code

§1.03 Territorial Applicability

(1) Except as otherwise provided in this Section, a person may be convicted under the law of this State of an offense committed by his own conduct or the conduct of another for which he is legally accountable if:

(a) either the conduct that is an element of the offense or the result that is such an element occurs within this State; or

(b) conduct occurring outside the State is sufficient under the law of this State to constitute an attempt to commit an offense within the State; or

(c) conduct occurring outside the State is sufficient under the law of this State to constitute a conspiracy to commit an offense within the state and an overt act in furtherance of such conspiracy occurs within the state; or

(d) conduct occurring within the State establishes complicity in the commission of, or an attempt, solicitation or conspiracy to commit , an offense in another jurisdiction that also is an offense under the law of this State; or

(e) the offense consists of the omission to perform a legal duty imposed by the law of this State with respect to domicile, residence or a relationship to a person, thing or transaction in the State; or

(f) the offense is based on a statute of this State that expressly prohibits conduct outside the State, when the conduct bears a reasonable relation to a legitimate interest of this State and the actor knows or should know that his conduct is likely to affect that interest.

(2) Subsection (1)(a) does not apply when either causing a specified result or a purpose to cause or danger of causing such a result is an element of an offense and the result occurs or is designed or likely to occur only in another jurisdiction where the conduct charged would not constitute an offense, unless a legislative purpose plainly appears to declare the conduct criminal regardless of the place of the result.

(3) Subsection (1)(a) does not apply when causing a particular result is an element of an offense and the result is caused by conduct occurring outside the State that would not constitute an offense if the result had occurred there, unless the actor purposely or knowingly caused the result within the State.

(4) When the offense is homicide, either the death of the victim or the bodily impact causing death constitutes a result within the meaning of Subsection (a)(1), and if the body of a homicide victim is found within the State, it is presumed that such result occurred within the State.

(5) This State includes the land and water and the air space above such land and water with respect to which the State has legislative jurisdiction.

Restatement of the Law Third: Foreign Relations Law of the United States

§401. Categories of Jurisdiction

Under international law, a state is subject to limitations on

(a) jurisdiction to prescribe, i.e., to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court;

(b) jurisdiction to adjudicate, i.e., to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings;

(c) jurisdiction to enforce, i.e., to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action.

§402. Bases of Jurisdiction to Prescribe

Subject to §403, a state has jurisdiction to prescribe law with respect to

(1)

(a) conduct that, wholly or in substantial part, takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory that has or is intended to have substantial effect within its territory;

(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and

(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

§403. Limitations on Jurisdiction to Prescribe

(1) Even when one of the bases for jurisdiction under §402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the

activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

§404. Universal Jurisdiction to Define and Punish Certain Offenses

A state has jurisdiction to define and prescribe punishment for certain Offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the jurisdiction indicated in §402 is present.

§421. Jurisdiction to Adjudicate

(1) A state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable.

(2) In general, a state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time jurisdiction is asserted:

(a) the person or thing is present in the territory of the state, other than transitorily;

(b) the person, if a natural person, is domiciled in the state;

(c) the person, if a natural person, is resident in the state;

(d) the person, if a natural person, is a national of the state;

(e) the person, if a corporation or comparable juridical person, is organized pursuant to the law of the state;

(f) a ship, aircraft, or other vehicle to which the adjudication relates is registered under the laws of the state;

(g) the person, whether natural or juridical, has consented to the exercise of jurisdiction;

(h) the person, whether natural or juridical, regularly carries on business in the state;
(i) the person, whether natural or juridical, had carried on activity in the state, but only in respect to such activity;
(j) the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect to such activity;
or
(k) the thing that is the subject of adjudication is owned, possessed, or used in the state, but only in respect to a claim reasonably connected with that thing.

(3) A defense of lack of jurisdiction is generally waived by any appearance by or on behalf of a person or thing (whether as plaintiff, defendant, or third party), if the appearance is for a purpose that does not include a challenge to the exercise of jurisdiction.

§431. Jurisdiction to Enforce

(1) A state may employ judicial or nonjudicial measures to induce or compel compliance or punish noncompliance with its laws or regulations, provided it has jurisdiction to prescribe in accordance with §§402 and 403.
(2) Enforcement measures must be reasonably related to the laws or regulations to which they are directed; punishment for noncompliance must be preceded by an appropriate determination of violation and must be proportional to the gravity of the violation.
(3) A state may employ enforcement measures against a person located outside the territory
(a) if the person is given notice of the claims or charges against him that is reasonable in the circumstances;
(b) if the person is given an opportunity to be heard, ordinarily in advance of enforcement, whether in person or by counsel or other representative; and
(c) when enforcement is through the courts, if the state has jurisdiction to adjudicate.

<u>18 U.S.C. 7. Special Maritime and Territorial Jurisdiction of the United States (text)</u>

The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:
(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime

jurisdiction of the United States and out of the jurisdiction of any particular State.
(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.
(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.
(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.
(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, District, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.
(6) Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.
(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.
(8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.
(9) With respect to Offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act—

> (A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and
> (B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of

those missions or entities or used by United States personnel assigned to those missions or entities.

Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts. This paragraph does not apply with respect to an offense committed by a person described in section 3261(a) of this title.

18 U.S.C. 3261. Military Extraterritorial Jurisdiction (text)

(a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States –

(1) while employed by or accompanying the Armed Forces outside the United States; or

(2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice), shall be punished as provided for that offense.

(b) No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.

(c) Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.

(d) No prosecution may be commenced against a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice) under this section unless –

(1) such member ceases to be subject to such chapter; or

(2) an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to such chapter.

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Summary

From the earliest days of the federal government, Presidents, exercising magisterial or executive power not unlike that of a monarch, from time to time have issued directives establishing new policy, decreeing the commencement or cessation of some action, or ordaining that notice be given to some declaration. The instruments used by Presidents in these regards have come to be known by various names, and some have prescribed forms and purposes. Executive orders and proclamations are probably two of the best-known types, largely because of their long-standing use and publication in the Federal Register and the Code of Federal Regulations. Others are less familiar, some because they are cloaked in official secrecy. There is, as well, the oral presidential directive, the sense of which is captured in an announcement that records what the President has prescribed or instructed. This report provides an overview of the different kinds of directives that have primarily been utilized by 20th century Presidents. Presenting background on the historical development, accounting, use, and effect of such directives, it will be updated as events suggest.

Responding to the request of a duly constituted joint committee of the two Houses of Congress "to recommend to the people of the United States a day of public thanksgiving ...,[504] President George Washington assigned Thursday, November 26, using an October 3, 1789, instrument of proclamation.[505] It was

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[504] Annals of Congress, vol. 1, September 25, 1789, pp. 88, 914-915; Ibid., September 26, 1790, p. 90.

[505] James D. Richardson, comp., A Compilation of the Messages and Papers of the Presidents, vol. 1 (New York: Bureau of National Literature, 1897), p. 56.

the first proclamation issued by a President under the federal government established by the Constitution.

Four months earlier, on June 8, 1789, President Washington sent a communique to the acting holdover officers of the Confederation government, directing the preparation of a report "to impress me with a full, precise, and distinct general idea of the affairs of the United States" handled by each official.[506] The forerunner or prototype of a body of presidential directives which would subsequently come to be denominated "executive orders," the communique was issued, of course, before the creation of the great federal departments.

Various proclamations and orders would be issued by Presidents during the nineteenth century. A number had accumulated by the time efforts were begun, during the latter half of the century, to account better for them through a numbering process and to standardize their forms. Consequently, an examination of published collections of presidential papers, such as James D. Richardson's A Compilation of the Messages and Papers of the Presidents, prepared under the direction of the congressional Joint Committee on Printing, reveals that, prior to the Lincoln Administration, a number of documents denominated as proclamations and other presidential instruments of no particular designation directed certain actions to be taken.[507] These latter types of documents were what came to be officially called executive orders, largely because the first of them to be selected to begin the numbered series had been captioned "Executive Order Establishing a Provisional Court in Louisiana" by Richardson in his compilation of presidential papers. Signed by President Abraham Lincoln, it was dated October 20, 1862. However, another contender for the position of first executive order, dated March 10, 1863, and concerning soldiers absent without leave, appeared in the United States Statutes at Large.[508] Furthermore, the instrument selected as the second executive order, dated April 4, 1865, and concerning rewards for the arrest of felons from foreign countries committing felonies in the United States, was signed by Secretary of State William H. Seward rather than the President.[509] The sixth executive order, dated July 20, 1868, and concerning the ratification of the Fourteenth Amendment to the Constitution, was also signed by Secretary Seward and has the form of a proclamation. The same was

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[506] John C. Fitzpatrick, ed., The Writings of George Washington, vol. 30 (Washington: GPO, 1939), pp. 343-344. James D. Richardson (see footnote 2, above), who had compiled and published the first thorough collection of presidential papers in 1895, overlooked this directive and similar such orders of President Washington.

[507] See Robert D. Stevens and Helen C. Stevens, "Documents in the Gilded Age: Richardson's Messages and Papers of the Presidents," Government Publications Review, vol. 1, 1974, pp. 233-240.

[508] See 13 Stat. 775.

[509] See 13 Stat. 776.

true of the seventh executive order, dated July 28, 1868, certifying the ratification of the Fourteenth Amendment and ordering its publication. Indeed, both of these last two instruments appeared in the Statutes at Large as proclamations.[510] Such were the confused beginnings of bringing order out of the chaos surrounding the issuance of presidential directives.

As happened during the years prior to the Lincoln Administration, a President might inscribe upon a sheet of paper words establishing new policy, decreeing the commencement or cessation of some action, or ordaining that notice be given to some declaration. Dated and signed by the Chief Executive, the result was a presidential directive. Such instruments have come to be known by various names, and some have prescribed forms and purposes. Executive orders and proclamations are probably two of the best known types, largely because of their long-standing use and publication in the Federal Register and the Code of Federal Regulations (CFR). Others are less familiar, some because they are cloaked in official secrecy. There is, as well, the oral presidential directive, the sense of which is captured in an announcement which records what the President has prescribed or instructed.

Introduction

This report provides an overview of the different kinds of directives that have been utilized primarily by twentieth century Presidents. It presents background on their historical development, accounting, use, and effect. Turning to the last of these considerations before discussing each type of presidential directive, it may be generally said that most of these instruments establish policy, and many have the force of law. Policy, in this context, is understood as a statement of goals or objectives which a President sets and pursues. Whether these directives have the force of law depends upon such factors as the President's authority to issue them, their conflict with constitutional or statutory provisions, and their promulgation in accordance with prescribed procedure. Indeed, as history has shown, presidential directives may be challenged in court or through congressional action. In the latter case, however, difficulties may arise if Congress, through legislative action, attempts to supersede or nullify a presidential directive issued, in whole or in part, pursuant to the Executive's constitutional authority, the result being a possible infringement by one constitutional branch upon the powers of another. Congress has been more successful in overturning or modifying executive orders based solely upon or authorized by a statute, which, of course, was the creation of the legislature.

Exercising its power of the purse, Congress has provided that appropriated funds may not be made available to pay the expenses of any executive agency, including agencies established by executive order, after such agency has been in existence for one year, unless Congress appropriates money specifically for it or authorizes

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[510] See 15 Stat. 706, 708.

the expenditure of funds by it.[511] In some situations, where Congress has delegated authority to the President, it has legislated requirements that executive orders exercising this authority be subject to either congressional review and possible cancellation before becoming effective, or modification, including cancellation, after being issued.[512]

Finally, Congress has legislated procedures concerning the issuance of presidential proclamations and executive orders. With the Federal Register Act of 1935, Congress mandated the publication of the Federal Register, an executive branch gazette that is produced each working day by the National Archives and Records Administration. That statute also requires the Federal Register publication of all "Presidential proclamations and Executive orders, except those not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof." In effect, the vast majority of presidential proclamations and executive orders must be published, particularly those prescribing a penalty. The statute also indicates that (1) "documents or classes of documents that the President may determine from time to time have general applicability and legal effect" and (2) "documents or classes of documents that may be required so to be published by Act of Congress" shall also be reproduced in the Federal Register.[513] In fact, Presidents have elected to publish some other kinds of directives, which are discussed below. All such presidential instruments published in the Federal Register are collected in annual volumes of Title 3 of the Code of Federal Regulations for ready reference.

Administrative Orders

The first administrative order, so denominated, was issued May 25, 1940. It established the Office for Emergency Management in the Executive Office of the President.[514] The directive appeared to be issued pursuant to and as an extension of an executive order (E.O. 8248) of September 8, 1939, which organized the Executive Office of the President and made generic reference to an office for emergency management which might be subsequently established in the event of a national emergency or the threat of a national emergency. The second administrative order, dated January 7, 1941, further defined the status and functions of the Office for Emergency Management and was also issued pursuant

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[511] See 58 Stat. 361, at 387; 31 U.S.C. 3147.

[512] See 47 Stat. 382, at 413; 48 Stat. 8, at 16; 90 Stat. 1255; 50 U.S.C. 1621-1622; also see U.S. Congress, House Committee on Government Operations, Security Classification Policy and Executive Order 12356, 97th Cong., 2nd sess., H.Rept. 97-731 (Washington: GPO, 1982), p. 35.

[513] See 44 U.S.C. 1505.

[514] See 3 C.F.R., 1938-1943 Comp., p. 1320.

to E.O. 8248.[515] Thus, the impression was left that administrative orders might be a subset of directives used to detail further policy primarily established by executive orders. However, this soon proved not to be the case.

The third administrative order, so designated, was a July 29, 1943, letter transferring certain functions of the Office for Emergency Management. The next two orders, issued April 13, 1945, concerned keeping flags at half-staff on all federal buildings and temporarily closing federal departments and agencies in conjunction with ceremonies on the occasion of President Franklin D. Roosevelt's death. Both were signed by Secretary of State Edward R. Stettinius, Jr. A September 10, 1945, administrative order, signed by Secretary of War Henry L. Stimson, indicated how the term "World War II" was to be officially used. The next order, dated August 15, 1945, and signed by President Harry S. Truman, terminated the Office of Censorship and voluntary censorship of the domestic press and radio.[516]

These and subsequent instruments denominated as administrative orders took a variety of forms—delegations of authority, determinations, directives, findings, letters, memoranda, and orders—on a wide array of administrative matters. In fact, some items appeared to overlap other types of presidential directives. For example, some international trade instruments, sometimes in letter form, were considered to be administrative orders,[517] as were designations of officials.[518] In 1972, certain instruments, identified as presidential determinations, but appearing in CFR Title 3 compilations in the administrative orders category, began to have hyphenated identification numbers, the first figure indicating the year of issuance and the second marking the sequence of promulgation.[519] Presidential determinations, as a particular type of administrative order, first appeared in the Federal Register and CFR in 1964.[520] In general, indications are that, during at least the past 40 years, presidential directives published in the Federal Register in forms other than those of executive orders, or proclamations, have been denominated as administrative orders when reproduced in CFR Title 3 compilations.

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[515] Ibid., pp. 1320-1321.

[516] See Ibid., 1943-1948 Comp., pp. 1078-1079.

[517] See Ibid., 1964-1965 Comp., pp. 372-374; Ibid., 1966-1970 Comp., pp. 997-1005.

[518] See Ibid., 1966-1970 Comp., p. 1005.

[519] See Ibid., 1971-1975 Comp., p. 1082.

[520] See Ibid., 1964-1965 Comp., pp. 372-374.

Certificates

Apparently only one presidential certificate, as such, was published in the Federal Register and subsequently included in a CFR Title 3 compilation. Issued March 27, 1940, pursuant to a farm crop production and harvesting loan statute of 1937,[521] the instrument certified that four Washington counties were distressed emergency areas and, therefore, not subject to the loan limitations stated in the law.[522] Although there is evidence that Presidents had issued statutorily authorized certificates prior to this time, no directives of this designation have appeared in subsequent CFR Title 3 compilations.[523]

Designations of Officials

Since the establishment of the Federal Register and the CFR, presidential letters designating individuals to hold specified official positions in the government have been reproduced in these publications. The first, dated May 28, 1941, vested Secretary of the Interior Harold L. Ickes with the additional position and accompanying duties of Petroleum Coordinator for National Defense. The second, however, established a new position, Coordinator of Information, and designated William J. Donovan, a private individual, to fill it.[524] Subsequent designations have been of both types—some being an additional position for an individual already holding an official post, others being an original appointment of a private person to an existing vacant or newly created position. The President may unilaterally make designations where no Senate approval of the appointment is required and where he has the authority and resources to create new official positions to be filled by designees. Some designations are merely delegations of presidential authority to constitutional officers such as Cabinet secretaries.[525] Two more recent designations, one in 1979 and another in 1982, were of a slightly different character: officials, by title, were designated to have authority to security classify information at the "Top Secret" level.[526]

Executive Orders

Executive orders are one of the oldest types of presidential directive, an early model appearing in June 1789, when President Washington directed the acting

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[521] 50 Stat. 5.

[522] 3 C.F.R., 1938-1943 Comp., p. 1322.

[523] See, for example, Samuel I. Rosenman, comp., The Public Papers and Addresses of Franklin D. Roosevelt. Vol. 4: The Court Disapproves, 1935 (New York: Random House, 1938), p. 113 (certification of the proposed Constitution of the Philippine Islands).

[524] See 3 C.F.R., 1938-1943 Comp., pp. 1323-1325.

[525] See Ibid., p. 1326; Ibid., 1943-1948 Comp., p. 1083.

[526] See Ibid., 1979 Comp., p. 519; Ibid., 1983 Comp., pp. 257-259.

holdover officers of the Confederation government to prepare for him a report "to impress me with a full, precise, and distinct general idea of the affairs of the United States" handled by each official. Like most executive orders, it was directed to, and governed actions by, executive officials and agencies. However, some executive orders, such as perhaps those concerning emergency situations and relying upon the President's constitutional authority or powers statutorily delegated to him by Congress to respond to exigencies, were of a more profound character. For example, President Roosevelt used an executive order (E.O. 9066) on February 19, 1942, to require the internment of American citizens of Japanese ancestry who were living in certain designated Pacific coast defense areas.

The issuance of executive orders by Presidents followed not only the practice of state governors, but also relied upon constitutional authority, such as the Commander-in-Chief role and the faithful execution of the laws clause, and statutory law. Under the new federal government, the Department of State was responsible for preserving presidential executive orders. Examples of early presidential directives having the characteristics of executive orders may be found in Richardson's A Compilation of the Messages and Papers of the Presidents. In 1907, the Department of State began to assign identification numbers to both executive orders and proclamations, making a determined, but not totally successful, effort to include previously issued instruments of both types in this accounting.[527] The numbering of executive orders began with an October 20, 1862, instrument signed by President Lincoln. The Federal Register Act of 1935 effectively required that both executive orders and proclamations be published in the Register.[528] The first executive order so published was E.O. 7316 of March 13, 1936, concerning the enlargement of the Cape Romain migratory bird refuge in South Carolina. Beginning with this instrument, all subsequent presidential executive orders have been reproduced in CFR Title 3 compilations. Regulations governing the preparation, presentation, filing, and publication of executive orders and proclamations are prescribed in E.O. 11030, as amended.

General Licenses

Indications are that only one presidential general license, as such, was published in the Federal Register and subsequently included in a CFR Title 3 compilation. Issued December 13, 1941, shortly after the Japanese attack on Pearl Harbor and congressional declarations of war on Japan and Germany,[529] the general license, signed by President Roosevelt, authorized the conduct of certain export transactions otherwise prohibited during wartime by the Trading with the Enemy Act of 1917, as amended. It also delegated to the Secretary of the Treasury

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[527] Laurence F. Schmeckebier and Roy B. Eastin, Government Publications and Their Use, 2nd revised edition (Washington: Brookings Institution, 1969), p. 341.

[528] See 44 U.S.C. 1505.

[529] See 55 Stat. 795, 796.

responsibility to regulate such transactions.[530] An emergency action taken to assist the prosecution of the war, the general license facilitated the shipment of material to U.S. allies for that effort. No directives of this designation have appeared in subsequent CFR Title 3 compilations.

Homeland Security Presidential Directives

In the aftermath of the September 11, 2001 terrorist attacks on the World Trade Center in New York City and the Pentagon in suburban Washington, DC, President George W. Bush established, with E.O. 13228 of October 8, 2001, the Office of Homeland Security and the Homeland Security Council within the Executive Office of the President to assist with the planning and coordination of federal efforts to combat terrorism and maintain the domestic security of the United States. On October 29, 2001, the President issued the first instrument in a new series denominated Homeland Security Presidential Directives (HSPDs) "that shall record and communicate presidential decisions about the homeland security policies of the United States." HSPDs are not published in the Federal Register, but are available from the White House website upon issuance and are subsequently published in the Weekly Compilation of Presidential Documents. The initial directive concerned the organization and operation of the Homeland Security Council. By late November 2008, 24 of these directives had been issued. Some, like HSPD-13 (NSPD-41), HSPD-14 (NSPD-43), HSPD-16 (NSPD-47), HSPD-20 (NSPD-51), and HSPD-24 (NSPD-59) were also issued concurrently as National Security Presidential Directives.

Interpretations

Only two presidential interpretations, denominated as such, have appeared in the Federal Register and CFR Title 3 compilations. The first, dated May 20, 1942, and signed by President Roosevelt, was a clarification and interpretation of E.O. 9128 of April 13, 1942, concerning functions of the Department of State and the Board of Economic Warfare.[531] The second, dated November 5, 1943, was actually a letter to Attorney General Francis Biddle from President Roosevelt. It concerned the construction of E.O. 9346 of May 27, 1943, regarding the insertion in government contracts of a provision obligating signatory contractors not to discriminate against any employee or applicant for employment on account of race, creed, color, or national origin.[532] Neither instrument was actually a presidential directive, but both did interpret previously issued directives. Furthermore, it could be argued that the President might have asked the Attorney

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[530] 3 C.F.R. 1938-1943 Comp., p. 1328.

[531] Ibid., 1938-1943 Comp., pp. 1329-1330.

[532] Ibid., 1943-1948 Comp., p. 1084.

General to prepare and issue these interpretations on his behalf, but apparently wished to offer his own viewpoint in these two instances.[533]

Letters on Tariffs and International Trade

Presidential letters on tariffs and international trade have appeared in the Federal Register and the CFR since the beginning of their publication. The earliest, dated March 20, 1936, and addressed to the Secretary of the Treasury, directs the continuation of duties on imported goods produced by certain specified countries.[534] Indeed, the Secretary of the Treasury appears to be the recipient of all such published letters appearing in CFR Title 3 compilations through 1978. The last such letter to date to appear in these compilations was sent jointly to the Speaker of the House and the President Pro Tempore of the Senate on January 4, 1979. Presidential letters and memoranda on matters other than tariffs and international trade are sometimes denominated as administrative orders and appear as such in CFR Title 3 compilations (see above).

Military Orders

CFR Title 3 compilations for the 1938-1943 and 1943-1948 periods contain the texts of 12 presidential directives denominated as military orders.[535] The first of these was issued on July 5, 1939, and the last on October 18, 1948. Ten of them bear the signature of President Roosevelt; the other two were signed by President Truman. These directives appear to have been issued by the President in conjunction with the execution of his duties as Commander-in-Chief and pertain to matters concerning armed forces administration and personnel. Indeed, half of them bear the Commander-in-Chief title below the President's signature. Moreover, while all of them make reference to "the authority vested in me as President of the United States and as Commander-in-Chief of the Army and Navy of the United States," two also cite a specific Article of War and six also cite explicit statutory authority for their issuance. No directives of this designation were subsequently produced in the Federal Register or CFR Title compilations until November 2001, when President George W. Bush issued a controversial military order on the detention, treatment, and trial, by military tribunals, of noncitizens alleged to be terrorists.[536]

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[533] The published legal interpretations of the Attorneys General appear in periodical volumes of the Official Opinions of the Attorney General of the United States for the years 1789-1974 and in the succeeding Opinions of the Office of Legal Counsel of the United States Department of Justice for the years 1977 to date.

[534] See 3 C.F.R., 1936-1938 Comp., p. 419.

[535] See Ibid., 1938-1943 Comp., pp. 1306-1308; Ibid., 1943-1948 Comp., pp. 1074-1075.

[536] Federal Register, vol. 66, November16, 2001, pp. 57833-57836.

National Security Instruments

Shortly after the creation of the National Security Council (NSC) in 1947, supporting staff began producing four types of policy papers: basic comprehensive policy statements on a broad variety of national security problems, together with pertinent political, economic, and military implementation strategies; situation profiles of large geographic areas or specific countries; assessments of mobilization, arms control, atomic energy, and other functional matters; and organizational statements on NSC, foreign intelligence, and internal security structure and activities. The initial products in the series reportedly were of the geographical type; the first comprehensive policy statement was completed and given NSC approval in November 1948.[537]

The early NSC policy papers were initiated by the council's members, executive secretary, and supporting staff. Some ideas were also drawn from studies and reports prepared by the State-Army-Navy-Air Force Coordinating Committee, which was subsequently dissolved in 1949. The Department of State "was the most important single source of project requests, with the Defense Department a close second." Moreover, the early council papers were drafted primarily by the policy planning staff of the Department of State.[538] Some of these papers came before the NSC for information or served solely as a basis for discussion. However, others, containing policy recommendations, eventually reached the President. His signature indicated approval of the proposed policy.[539] Also, according to the first NSC executive secretary, if implementing legislation was required for the new policy, it was prepared by the appropriate department(s) and cleared in the usual way through the Bureau of the Budget before submission to Congress.[540] Nonetheless, a new type of presidential directive was in the making. By the time President Dwight D. Eisenhower took office, approximately 100 NSC papers mandated operative policy.[541]

With each succeeding President, national security instruments of varying denominations and character evolved from the NSC policy papers. In general, they were not required to be published in the Federal Register, were usually security classified at the highest level of protection, and were available to the

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[537] Stanley L. Falk, "The National Security Council Under Truman, Eisenhower, and Kennedy," Political Science Quarterly, vol. 79, September 1964, pp. 409-410.

[538] Ibid.; Sidney W. Souers, "Policy Formulation for National Security," American Political Science Review, vol. 43, June 1949, pp. 539-540.

[539] Falk, "The National Security Council Under Truman, Eisenhower, and Kennedy," pp. 410-411.

[540] Souers, "Policy Formulation for National Security," p. 541.

[541] Robert Cutler, "The Development of the National Security Council," Foreign Affairs, vol. 34, April 1956, p. 449.

public after a great many years had elapsed, usually at the official library of the President who had approved them. Many of the more recent ones remain officially secret. The national security instruments of the past several administrations are briefly profiled.

NSC Policy Papers

The production of NSC policy papers continued under President Eisenhower. Almost any official in the NSC system, from the President on downward, could suggest topics for policy papers. In response, a preliminary staff study might be prepared within the NSC Planning Board, a new body composed of assistant secretary-level officers representing agencies having statutory or presidentially designated membership on the council. A first draft, drawn from the preliminary staff study, would be produced by the agency having primary policy interest, followed by various reviews, revisions, and, ultimately, presentation to the President. A new component of the NSC policy papers during this period was a "financial appendix" indicating the fiscal implications of proposed policy.[542] The sequential numbering system for NSC papers that had been begun by the Truman Administration was continued by the Eisenhower Administration. About 270-300 NSC policy papers were accounted for at the end of President Eisenhower's second term. Many of them went through major revisions after their initial issuance, some undergoing three or four such overhauls. Indeed, in their preparations for their successors, Eisenhower Administration officials updated almost every operative NSC paper, approving no fewer than 18 revamped policies during Eisenhower's last month in office.[543]

National Security Action Memoranda

During the Presidency of John F. Kennedy, NSC policy papers were superseded by a new type of instrument denominated National Security Action Memoranda (NSAM). Their generation began with a Cabinet official or a senior presidential assistant. This manager coordinated development of a draft position paper with other responsible individuals, often through the use of ad hoc interdepartmental working groups. Fiscal considerations were integrated into the body of the document and no longer appeared in a separate "financial appendix." Discussion of and debate over the final text continued all the way to and into the Oval Office. Once the President approved the recommendations of the position paper, his decision was recorded by responsible agency or NSC staff in a brief NSAM.[544]

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[542] Falk, "The National Security Council Under Truman, Eisenhower, and Kennedy," pp. 421-422; Cutler, "The Development of the National Security Council," p. 450.

[543] I. M. Destler, "The Presidency and National Organization," in Norman A. Graebner, ed., The National Security: Its Theory and Practice, 1945-1960 (New York: Oxford University Press, 1986), p. 239.

[544] Falk, "The National Security Council Under Truman, Eisenhower, and Kennedy," pp. 430-431.

President Lyndon B. Johnson largely continued these arrangements, and approximately 370 NSAMs were produced during the Kennedy-Johnson years.

National Security Study Memoranda and National Security Decision Memoranda

When Richard Nixon became President, he appointed Henry Kissinger as his national security adviser. Kissinger recruited a substantial and influential NSC staff, and they produced national security position papers which were designated National Security Study Memoranda (NSSM). They were developed through the use of various interdepartmental working groups composed of high level representatives from pertinent agencies.[545] Beginning with a study answering 26 questions on Vietnam, multiple NSSMs were immediately assigned.[546] During his first hundred days, Kissinger reportedly called for the preparation of 55 such study memoranda, with a total of 85 inaugurated in 1969, another 26 initiated in 1970, and 27 apportioned during the first nine months of 1971.[547]

The NSSMs were among the resources used by the President when determining national security policy, which he would express in National Security Decision Memoranda (NSDM). However, according to a Kissinger biographer, "the most important decisions were made without informing the bureaucracy, and without the use of NSSMs or NSDMs."[548] Both types of instruments continued to be produced during the presidential tenure of Gerald Ford. Almost 250 NSSMs were generated during the Nixon-Ford years, and, perhaps more important, at least 318 presidentially approved NSDMs were issued.

Presidential Review Memoranda and Presidential Directives

The presidential national security studies and dicta emanating from the NSC system during the administration of President Jimmy Carter were called Presidential Review Memoranda (PRM) and Presidential Directives (PDs). Approximately 30 PRMs reportedly "were issued in the first half of 1977, over half

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[545] John P. Leacacos, "Kissinger's Apparat," Foreign Policy, Winter 1971-1972, pp. 5-6; I. M. Destler, Presidents, Bureaucrats, and Foreign Policy (Princeton, NJ: Princeton University Press, 1974), pp. 132-142.

[546] The text of NSSM-1 appears in Congressional Record, vol. 118, May 10, 1972, pp. 16748-16836.

[547] Leacacos, "Kissinger's Apparat," p. 13.

[548] Seymour M. Hersh, The Price of Power: Kissinger in the Nixon White House (New York: Summit Books, 1983), p. 35.

of them during the President's first week in office."[549] President Carter is credited with issuing 63 PDs during his tenure.

National Security Study Memoranda and National Security Decision Directives

President Ronald Reagan designated his instruments in the national security series as National Security Study Memoranda (NSSM) and National Security Decision Directives (NSDD). During his tenure, President Reagan issued 325 NSDDs.

National Security Reviews and National Security Directives

National security studies were called National Security Reviews (NSRs) by President George H. W. Bush, and his policy instruments were denominated as National Security Directives (NSDs).[550] He is credited with having issued 79 NSDs, as well as seven National Space Policy Directives (NSPDs).[551]

Presidential Review Directives and Presidential Decision Directives

For President William Clinton, Presidential Review Directives (PRDs) were the equivalent of the NSSMs of the Reagan Administration and the NSRs of the Bush Administration. Also, the Presidential Decision Directives (PDDs) of the Clinton Administration were equivalent to the NSDDs of the Reagan Administration and the NSDs of the George H. W. Bush Administration. President Clinton is credited with issuing 75 PDDs. Also, between January 25, 1994, and September 19, 1996, President Clinton signed eight separate and distinct PDDs arising from National Science and Technology Council deliberations.[552]

National Security Presidential Directives

Although President George W. Bush and his national security advisers have provided little detail about his directives in this series, the first such instrument, dated February 13, 2001, and approved for public release by the National Security Council staff on March 13, indicates that they are denominated National Security

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[549] Philip A. Odeen, "Organizing for National Security," International Security, vol. 5, Summer 1980, p. 114.

[550] U.S. General Accounting Office, National Security: The Use of Presidential Directives to Make and Implement U.S. Policy, GAO Report GAO/NSIAD-92-72 (Washington: January 1992).

[551] The NSPDs arose from the deliberations of the National Space Council, created by E.O. 12675 of April 20, 1989, 3 C.F.R., 1989 Comp., pp. 218-221.

[552] The National Science and Technology Council was established by E.O. 12881 of November 23, 1993, 3 C.F.R., 1993 Comp., pp. 679-681.

Presidential Directives (NSPDs) and may serve double duty for both decision and review purposes. The initial NSPD pertained to the organization of National Security Council policy and coordination subgroups. By late November 2008, 59 of these directives had been issued. Some, like NSPD-41 (HSPD-13), NSPD-43 (HSPD-14), NSPD-47 (HSPD-16), NSPD-51 (HSPD-20), and NSPD-59 (HSPD-24) were also issued concurrently as Homeland Security Presidential Directives.

Presidential Announcements

An oral presidential directive oftentimes is captured in an announcement which records what the President has prescribed or instructed. For example, President Richard Nixon established his Advisory Council on Executive Organization in this manner, with a April 5, 1969, announcement,[553] as did President William Clinton when he inaugurated his National Performance Review task force on March 3, 1993.[554] By contrast, such temporary government reform study panels were mandated on various occasions during the first half of the twentieth century and during the Reagan Administration with written charters expressed in statutes or executive orders. Such presidential announcements, as in the examples cited, often are recorded in the Weekly Compilation of Presidential Documents, a presidential gazette launched in the summer of 1965 and published 52 times a year. However, they do not appear in the Federal Register or in the Public Papers of the Presidents of the United States, produced by the National Archives for Presidents Herbert Hoover, Harry S. Truman, and the Chief Executives succeeding Truman.[555]

Presidential Findings

Presidential findings, as such, initially appeared in the Federal Register and CFR Title 3 compilations as instruments determining that certain conditions of the Agricultural Trade Development and Assistance Act of 1954, as amended, had been satisfied and, therefore, sales of agricultural commodities could proceed. Presidential findings of this type were reproduced in CFR Title compilations as administrative orders.[556] In 1974, the reference to a presidential finding took on its current popular meaning when Congress adopted the so-called Hughes-Ryan amendment to the Foreign Assistance Act of that year. Set out in section 662 of the statute, it prohibited the expenditure of appropriated funds by or on behalf of the Central Intelligence Agency for intelligence activities "unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such

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[553] See Weekly Compilation of Presidential Documents, vol. 5, April 14, 1969, pp. 530-531.

[554] Ibid., vol. 29, March 8, 1993, pp. 350-352.

[555] See Warren R. Reid, "Public Papers of the Presidents," American Archivist, vol. 25, October 1962, pp. 435-439.

[556] See 3 C.F.R., 1966-1970, pp. 1006-1008.

operation to the appropriate committees of Congress."[557] The requirements of this provision subsequently went through a series of transformations, the vestiges of which were recently codified in the Intelligence Authorization Act, Fiscal Year 1991, but this act still requires a written presidential finding satisfying certain conditions set forth in the statute for covert actions to occur.[558] Such presidential findings, which are security classified, are to be "reported to the intelligence committees as soon as possible" after being approved "and before the initiation of the covert action authorized by the finding." Thus, these findings are not published in the Federal Register or reproduced in CFR Title 3 compilations.

Presidential Reorganization Plans

Congress first authorized the President to propose plans for the reorganization of the executive departments and agencies in a 1939 statute.[559] The objective of such reconfigurations was to achieve efficiency and economy in administration. A presidential reorganization plan, submitted to Congress, became effective after 60 days unless both houses of Congress adopted a concurrent resolution of disapproval. Such reorganization authority, renewed periodically a dozen times between 1945 and 1984, with slight variations remained available to the President for nearly half a century. At different junctures, qualifications were placed upon its exercise. For example, reorganization plans could not abolish or create an entire department, or deal with more than one logically consistent subject matter. Also, the President was prohibited from submitting more than one plan within a 30-day period and was required to include a clear statement on the projected economic savings expected to result from a reorganization.

Reorganization plans not disapproved by Congress were published in the Federal Register prior to being implemented, and also in the Statutes at Large and the CFR (Title 3) for the year in which they became effective.

Modification of the President's reorganization plan authority was made necessary in 1983, when the Supreme Court effectively invalidated continued congressional reliance upon a concurrent resolution to disapprove a proposed plan.[560] Under the Reorganization Act Amendments of 1984, several significant changes were made in the reorganization plan law. Any time during the period of 60 calendar days of continuous session of Congress following the submission of a reorganization plan, the President might make amendments or modifications to it. Within 90 calendar days of continuous session of Congress following the submission of a reorganization plan, both houses must adopt a joint resolution

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[557] 88 Stat. 1795, at 1804.

[558] See 105 Stat. 429, at 442.

[559] 53 Stat. 561.

[560] See INS v. Chadha, 462 U.S. 919 (1983).

(which, unlike a concurrent resolution, becomes law with the President's signature) for a plan to be approved. This amendment, however, continued the President's reorganization plan authority only to the end of 1984, when it automatically expired.[561] Although Presidents Ronald Reagan, George H. W. Bush, and William Clinton did not request the reestablishment of reorganization plan authority, President George W. Bush indicated an interest in pursuing its restoration in his FY2003 budget message.

Proclamations

Proclamations are also one of the oldest types of presidential directive, the earliest appearing in October 1789, when President Washington declared Thursday, November 26, to be "a day of public thanksgiving." Like most proclamations, it affected primarily the activities and interests of private individuals and, like many proclamations, it was at best hortative. However, some proclamations, declaring emergency situations and invoking the President's constitutional authority as Commander-in-Chief or powers statutorily delegated to him by Congress to respond to exigencies, were of a more profound character. An early proclamation, promulgated by President Washington on August 7, 1794, exemplified this latter use of such instruments. Responding to rebellious activities in western Pennsylvania and Virginia in protest of a federal excise tax on whiskey, the President called forth the militia and personally took command. This was done pursuant to statutory arrangements.[562]

The issuance of proclamations by the President followed a tradition established by British monarchs and practiced by royal governors in the North American colonies and by their elected successors after the Revolution.[563] Under the new federal government, the Department of State was responsible for preserving presidential proclamations. Numerous examples of the early proclamations may be found in Richardson's A Compilation of the Messages and Papers of the Presidents. In 1907, the Department of State began to assign identification numbers to both proclamations and executive orders, making a determined, but not totally successful, effort to include previously issued instruments of both types in this accounting.[564] The Federal Register Act of 1935 effectively required that both proclamations and executive orders be published in the Register.[565] The first proclamation so published was Proc. 2161 of March 19, 1936, concerning

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[561] See 5 U.S.C. 901-912.

[562] See 1 Stat. 264-265.

[563] See Hans Aufricht, "Presidential Proclamations and the British Tradition," Journal of Politics, vol. 5, May 1943, pp. 142-161.

[564] Schmeckebier and Eastin, Government Publications and Their Use, p. 341.

[565] See 44 U.S.C. 1505.

contributions to the American Red Cross for flood relief. Beginning with this instrument, all subsequent presidential proclamations have been reproduced in CFR Title 3 compilations. For the past 20 years, proclamations have been largely hortative, often being used to declare commemorative occasions. Regulations governing the preparation, presentation, filing, and publication of proclamations and executive orders are prescribed in E.O. 11030, as amended.

Regulations

CFR Title 3 compilations for the 1938-1943 and 1943-1948 periods contain the texts of nine administrative documents denominated as regulations.[566] The first of these was issued on September 6, 1939, and the last on September 19, 1945. Eight of them bear the signature of President Roosevelt; another one, signed by three commissioners of the U.S. Civil Service Commission, indicates it was approved by President Truman. With the exception of one brief extension item and another relying upon an executive order, all of these documents cite explicit statutory authority for their issuance. The Roosevelt items largely pertained to the allocation of defense materials to nations of Western Europe engaged in war with Germany. The regulations approved by Truman concerned within-grade salary advancements for federal employees. While earlier examples of Presidents issuing regulations can be found, no directives of this designation have appeared in subsequent CFR Title 3 compilations.[567] Current regulations governing the preparation, presentation, filing, and publication of executive orders and proclamations are prescribed in an executive order, E.O. 11030, as amended. Agency regulations appear in other titles of the CFR.

Source Tools

Presidential directives published in the Federal Register are reproduced in CFR Title 3 compilations. Single volume compilations have been published for the 1936-1938, 1938-1943, 1943-1948, 1949-1953, 1954-1958, 1959-1963, 1964-1965, 1966-1970, and 1971-1975 periods. Annual CFR Title 3 volumes have been published for the subsequent years. Current full text versions of many primary proclamations and executive orders, as amended, may be found in the periodically produced Codification of Presidential Proclamations and Executive Orders prepared by the Office of the Federal Register, National Archives and Records Administration.

More recent executive orders, proclamations, and presidential directives, dating from 1994, may be found at the Office of Federal Register website at

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[566] See 3 C.F.R., 1938-1943 Comp., pp. 1309-1319; Ibid., 1943-1948 Comp., pp. 1076-1077.

[567] James D. Richardson's A Compilation of the Messages and Papers of the Presidents, for example, contains executive orders of June 10, 1921 (Alaskan railroad townsites), September 21, 1921 (budget preparation and submission), and April 4, 1924 (commercial research of government officials in foreign lands), setting regulations, as well as an undenominated instrument of November 8, 1921 (budget preparation and submission).

http://www.archives.gov/federal_register/presidential_documents/website_guide.html. The first 8,030 executive orders (1862-1938) are very briefly profiled in one volume and indexed in a companion volume of Presidential Executive Orders, prepared by the Historical Records Survey, New York City, under the editorship of Clifford L. Lord, and published by Archives Publishing Company of New York in 1944.

Some unclassified presidential national security directives may be found at the Federation of American Scientists website at http://www.fas.org/irp/offdocs/direct.htm. For a published compilation, see Christopher Simpson, ed., National Security Directives the Reagan & Bush Administrations (Boulder, CO: Westview, 1995). The Homeland Security Presidential Directives of the Bush Administration may be found in the Weekly Compilation of Presidential Documents and on the White House website at http://www.whitehouse.gov.

Executive Orders: Issuance and Revocation, RS20846 (March 25, 2010)

VANESSA K. BURROWS & T.J. HALSTEAD, CONGRESSIONAL RESEARCH SERV., EXECUTIVE ORDERS: ISSUANCE AND REVOCATION (2010), *available at* http://www.intelligencelaw.com/library/secondary/crs/pdf/RS20846_3-25-2010.pdf.

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RS20846

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Summary

Executive orders and proclamations are used extensively by Presidents to achieve policy goals, set uniform standards for managing the executive branch, or outline a policy view intended to influence the behavior of private citizens. The Constitution does not define these presidential instruments and does not explicitly vest the President with the authority to issue them. Nonetheless, such orders are accepted as an inherent aspect of presidential power, and, if based on appropriate authority, they have the force and effect of law. This report discusses the nature of executive orders and proclamations, with a focus on the scope of presidential authority to execute such instruments and judicial and congressional responses thereto.

In the 111th Congress, several bills have been introduced regarding the revocation and modification of executive orders: H.R. 35, H.R. 500/S. 237, H.R. 603, H.R. 1228, H.R. 3465, H.R. 4453, and S. 2929. Other bills on executive orders proposed in this Congress are prescriptive and contain provisions that do not necessarily revoke or require alteration of executive orders: H.R. 21, H.R. 292, H.R. 669, H.R. 1082, H.R. 1367, H.R. 3293, S. 237, and S. 2929. In some cases, these bills may expand upon existing executive orders.

The 111th Congress has also passed several laws with provisions related to existing executive orders: P.L. 111-5, the American Recovery and Reinvestment Act of 2009 (ARRA); P.L. 111-8, the Omnibus Appropriations Act, 2009; P.L. 111-80, the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010; and P.L. 111-117, the Consolidated Appropriations Act, 2010. Additionally, President Obama has issued an executive order titled Patient Protection and Affordable Care Act's Consistency with

Longstanding Restrictions on the Use of Federal Funds for Abortion, which was discussed during the House floor debate on H.R. 3590/P.L. 111-148.

Definition and Authority

The Constitution does not contain any provisions that define executive orders or proclamations. The most widely accepted description appears to be that of the House Government Operations Committee in 1957:

> *Executive orders and proclamations are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law.... In the narrower sense Executive orders and proclamations are written documents denominated as such.... Executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly. Proclamations in most instances affect primarily the activities of private individuals. Since the President has no power or authority over individual citizens and their rights except where he is granted such power and authority by a provision in the Constitution or by statute, the President's proclamations are not legally binding and are at best hortatory unless based on such grants of authority. The difference between Executive orders and proclamations is more one of form than of substance.*[568]

In addition to executive orders and proclamations, Presidents often issue "presidential memoranda." The distinction of these instruments from executive orders and proclamations is likewise more a matter of form than of substance. Specifically, all three instruments can be employed to direct and govern the actions of government officials and agencies.[569] Further, if issued under a valid claim of authority and published, all three may have the force and effect of law,

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[568] Staff of House Comm. on Government Operations, 85th Cong., 1st Sess., Executive Orders and Proclamations: A Study of a Use of Presidential Powers (Comm. Print 1957) [hereinafter Orders and Proclamations].

[569] For example, the Homeland Security Council (HSC) was first established by § 5 of Executive Order 13228 on October 8, 2001. 66 Fed. Reg. 51812-17 (Oct. 10, 2001). Its location was not specified in that executive order. Its organization and operation were addressed in a Homeland Security Presidential Directive on October 29, 2001, HSPD-1. See http://www.dhs.gov/xabout/laws/gc_1213648320189.shtm#1; CRS Report RS22840, Organizing for Homeland Security: The Homeland Security Council Reconsidered, by Harold C. Relyea, at 2. The HSC was later established within the Executive Office of the President in Title IX of the Homeland Security Act of 2002.

requiring courts to take judicial notice of their existence.[570] Indeed, it would appear that the only technical difference between executive orders and proclamations in relation to presidential memoranda is that the former must be published in the Federal Register, while the latter are published only when the President determines that they have "general applicability and legal effect."[571]

Just as there is no definition of executive orders and proclamations in the Constitution, there is, likewise, no specific provision authorizing their issuance. As such, authority for the execution and implementation of executive orders stems from implied constitutional and statutory authority. In the constitutional context, presidential power to issue such orders has been derived from Article II, which states that "the executive power shall be vested in a President of the United States," that "the President shall be Commander in Chief of the Army and Navy of the United States," and that the President "shall take Care that the Laws be faithfully executed."[572] The President's power to issue executive orders and proclamations may also derive from express or implied statutory authority.[573] Irrespective of the implied nature of the authority to issue executive orders and proclamations, these instruments have been employed by every President since the inception of the Republic.[574]

Despite the amorphous nature of the authority to issue executive orders, Presidents have not hesitated to wield this power over a wide range of often controversial subjects, such as the suspension of the writ of habeas corpus;[575] the

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[570] Armstrong v. United States, 80 U.S. 154 (1871); see also Farkas v. Texas Instrument, Inc., 372 F.2d 629 (5th Cir. 1967); Farmer v. Philadelphia Electric Co., 329 F.2d 3 (3rd Cir. 1964); Jenkins v. Collard, 145 U.S. 546, 560-61 (1893).

[571] 44 U.S.C. § 1505. The Federal Register Act requires that executive orders and proclamations be published in the Federal Register. Id. Furthermore, executive orders must comply with preparation, presentation and publication requirements established by an executive order issued by President Kennedy. See Exec. Order No. 11030, 27 Fed. Reg. 5847 (1962).

[572] U.S. Const., Art. II, § 1, 2, and 3. See Orders and Proclamations, supra note 1, at 6-12.

[573] See Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[574] President George Washington's order of June 8, 1789, asking the heads of executive departments "to submit 'a clear account' of affairs connected with their [d]epartments," is listed as the first executive order in a 1943 publication. The NEW JERSEY HISTORICAL RECORDS SURVEY, WORK PROJECTS ADMINISTRATION, LIST AND INDEX OF PRESIDENTIAL EXECUTIVE ORDERS, at 1 (1943). President Washington's first proclamations concerned A National Thanksgiving and treaties with Indian nations. JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, Vol. I, at 64, 80-81 (1896).

[575] See, e.g., Executive Order from President Lincoln to Major-General H.W. Halleck, Commanding in the Department of Missouri (Dec. 1861) in JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1902, at 99

establishment of internment camps during World War II;[576] and equality of treatment in the armed services without regard to race, color, religion or national origin.[577] President Obama recently issued an executive order pertaining to the abortion provisions in the new health care law, the Patient Protection and Affordable Care Act.[578] This broad usage of executive orders to effectuate policy goals has led some commentators to suggest that many such orders constitute executive lawmaking that impacts the interests of private citizens and encroaches upon congressional power.[579] The controversial nature of many presidential directives thus raises questions regarding whether and how executive orders may be amended or revoked.

Judicially Enforced Limitations

The proper framework for analyzing executive orders in the judicial context may be found in Youngstown Sheet & Tube Co. v. Sawyer.[580] There, the Supreme Court dealt with President Truman's executive order directing the seizure of steel mills, which was issued in an effort to avert the effects of a workers' strike during the Korean War. Invalidating this action, the majority held that under the

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(Vol. VI)("General: As an insurrection exists in the United States and is in arms in the State of Missouri, you are hereby authorized and empowered to suspend the writ of habeas corpus within the limits of the military division under your command and to exercise martial law as you find it necessary, in your discretion, to secure the public safety and the authority of the United States."); see also Ex Parte Milligan, 71 U.S. 2, 115 (1866).

[576] Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942); see also Korematsu v. United States, 323 U.S. 214 (1944).

[577] Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948)("It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin.")

[578] Press Release, The White House, Executive Order—Patient Protection and Affordable Care Act's Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion (Mar. 24, 2010) http://www.whitehouse.gov/the-press-office/executive-order-patient-protection-and-affordable-care-acts-consistency-with-longst. Past Presidents have issued memoranda on abortion, including statements on the "Mexico City Policy" announced by President Reagan in August 1984, which concerned the Agency for International Development's funding of nongovernmental organizations "that engage in a wide range of activities, including providing advice, counseling, or information regarding abortion, or lobbying a foreign government to legalize or make abortion available." Memorandum on the Mexico City Policy, Pub. Papers 10 (Jan. 22, 1993); see also Policy Statement of the United States of America at the United Nations International Conference on Population (Second Session) Mexico, D.F., Aug. 6-13, 1984, at 4-5, http://www.populationaction.org/Publications/Reports/Global_Gag_Rule_Restrictions/MexicoCityPolicy1984.pdf; Memorandum of March 28, 2001, Restoration of the Mexico City Policy, 66 Fed. Reg. 17303 (Mar. 29, 2001).

[579] See William J. Olson and Alan Woll, Policy Analysis, Executive Orders and National Emergencies: How Presidents Have Come to "Run the Country" by Usurping Legislative Power, Cato Institute (Oct. 28, 1999).

[580] 343 U.S. 579 (1952).

Constitution, "the President's power to see that laws are faithfully executed refutes the idea that he is to be a lawmaker."[581] Specifically, Justice Black maintained that presidential authority to issue such an executive order "must stem either from an act of Congress or from the Constitution itself."[582] Applying this reasoning, Justice Black's opinion for the Court determined that as no statute or Constitutional provision authorized such presidential action, the seizure order was in essence a legislative act. The Court further noted that Congress had rejected seizure as a means to settle labor disputes during consideration of the Taft-Hartley Act. Given this characterization, the Court deemed the executive order to be an unconstitutional violation of the separation of powers doctrine, explaining "the founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."[583]

While Justice Black's majority opinion in Youngstown seems to refute the notion that the President possesses implied constitutional powers, it is important to note that there were five concurrences in the case, four of which maintained that implied presidential authority adheres in certain contexts.[584] Of these concurrences, Justice Jackson's has proven to be the most influential, even surpassing the impact of Justice Black's majority opinion.

Justice Jackson's Concurrence

Jackson established a tri-partite scheme for analyzing the validity of presidential actions in relation to constitutional and congressional authority.[585] Jackson's first category focuses on whether the President has acted according to an express or implied grant of congressional authority. If so, according to Jackson, presidential "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate," and such action is "supported by the strongest of presumptions and the widest latitude of judicial interpretation."[586] Secondly, Justice Jackson maintained that, in situations where Congress has neither granted or denied authority to the President, the President acts in reliance only "upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its

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[581] Id. at 587.

[582] Id. at 585.

[583] Id. at 586-89.

[584] Id. at 659 (Burton, J., concurring); id. at 661 (Clark, J., concurring in result only); id. at 610 (Frankfurter, J., concurring); id. at 635 (Jackson, J., concurring).

[585] 343 U.S. at 635-38.

[586] Id. at 635, 637.

distribution is uncertain."[587] In the third and final category, Justice Jackson stated that in instances where presidential action is "incompatible with the express or implied will of Congress," the power of the President is at its minimum, and any such action may be supported pursuant only to the President's "own constitutional powers minus any constitutional powers of Congress over the matter."[588] In such a circumstance, presidential action must rest upon an exclusive power, and the Courts can uphold the measure "only by disabling the Congress from acting upon the subject."[589]

Applying this scheme to the case at hand, Justice Jackson determined that analysis under the first category was inappropriate, due to the fact that President Truman's seizure of the steel mills had not been authorized by Congress, either implicitly or explicitly. Justice Jackson also determined that the second category was "clearly eliminated," in that Congress had addressed the issue of seizure, through statutory policies conflicting with the President's actions.[590] Employing the third category, Justice Jackson noted that President Truman's actions could only be sustained by determining that the seizure was "within his domain and beyond control by Congress."[591] Justice Jackson established that such matters were not outside the scope of congressional power, reinforcing his declaration that permitting the President to exercise such "conclusive and preclusive" power would endanger "the equilibrium established by our constitutional system."[592]

These standards remain applicable in the modern era. In 1996, the United States Court of Appeals for the District of Columbia invalidated an executive order issued by President Clinton on the grounds that it conflicted with the National Labor Relations Act (NLRA).[593] The order at issue prohibited federal agencies from contracting with employers that permanently replaced striking employees. Upon determining that the order conflicted with a provision of the NLRA guaranteeing the right to hire permanent replacements during strikes, the court of appeals held that the statute preempted the executive order, stripping it of any effect.[594]

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[587] Id. at 637.

[588] 343 U.S. at 637.

[589] Id. at 637-38.

[590] Id. at 638-39.

[591] Id. at 640.

[592] Id. at 638, 640-45.

[593] Chamber of Commerce v. Reich, 74 F.3d 1322 (1996).

[594] Id. at 1339.

Congressional Revocation and Alteration of Executive Orders

Further, as long as it is not constitutionally based, Congress may repeal a presidential order, or terminate the underlying authority upon which the action is predicated. For example, in 2006, Congress revoked part of an executive order from November 12, 1838, which reserved certain public land for lighthouse purposes.[595] Congress has also explicitly revoked executive orders in their entirety, such as in the Energy Policy Act of 2005, which revoked a December 13, 1912, executive order that created Naval Petroleum Reserve Numbered 2.[596] Another example of the express nullification of an executive order by Congress involved the revocation of an executive order by President George H. W. Bush to the Secretary of the Department of Health and Human Services to establish a human fetal tissue bank for research purposes.[597] To effectuate this repeal, Congress simply directed that the "the provisions of Executive Order 12806 shall not have any legal effect."[598] There have been numerous similarly revoked executive orders and proposals to revoke particular executive orders.[599]

Additionally, Congress has used its appropriations authority to limit the effect of executive orders, such as denying salaries and expenses for an office established in an executive order,[600] as well as denying funds to implement a particular section of a subsequently revoked executive order that would have enabled agency heads to designate a presidential appointee to serve as the agency's

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[595] P.L. 109-241, § 504(a); 16 U.S.C. § 668dd note. "In use from the earliest days of the Republic, the Executive Order was at first employed mainly for the disposition of the public domain, for the withdrawal of lands for Indian, military, naval, and lighthouse reservations or other similar public purposes." W.P.A. HISTORICAL RECORDS SURVEY, PRESIDENTIAL EXECUTIVE ORDERS, VOL. I, LIST, at v (1944).

[596] P.L. 109-58, § 334; 10 U.S.C. § 7420 note.

[597] Exec. Order No. 12806, 57 Fed. Reg. 21589 (May 21, 1992).

[598] P.L. 103-43, 107 Stat. 133, § 121. Given the highly speculative basis of any asserted constitutional authority for the President to issue such an order, there appears to be little doubt as to the legitimacy of this congressional revocation. See Youngstown, 343 U.S. at 635-638.

[599] See House Comm. on Rules, Subcomm. on Legislative and Budget Process, 106th Cong., 1st Sess., Hearing on the Impact of Executive Orders on Lawmaking: Executive Lawmaking?, at 124-27 (Oct. 27, 1999); see also H.R. 5658, § 2857(b), 110th Cong (2008). This section of H.R. 5658 would have revoked Executive Order 1922 of April 24, 1914, as amended, as it affected certain lands identified for conveyance to Utah.

[600] P.L. 108-199; 118 Stat. 338; see P.L. 110-161; 121 Stat. 2008-09; see also P.L. 111-8; 123 Stat. 669.

regulatory policy officer.[601] Additionally, Congress has used appropriations acts to enable a program created by executive order to receive donations for publicity materials about the program.[602] Outside of appropriations bills, other legislative proposals have included those that would codify existing executive orders with modifications.[603]

Select Laws Concerning Executive Orders Enacted During the 111th Congress

The 111th Congress has passed several laws with provisions relating to existing executive orders. For instance, P.L. 111-5, the American Recovery and Reinvestment Act of 2009 (ARRA) transferred functions, personnel, assets, liabilities, and administrative actions that applied to the National Coordinator for Health Information Technology appointed under an executive order or the related office to the National Coordinator appointed under that law and the applicable office. Furthermore, appropriations acts, such as P.L. 111-8 and P.L. 111-117, contain several provisions on funding of various executive orders, including the provisions mentioned in the previous paragraph denying funding for sections of executive orders and enabling the receipt of donations related to executive orders. P.L. 111-8 also contains prohibitions on the use of funds to delay implementation of executive orders. Another appropriations act, P.L. 111-80, denies funding for the promulgation of proposed or final rules allowing importation of Chinese poultry products, if the rules were not issued according to the procedures for significant rules set forth in an executive order.

Legislative Proposals in the 111th Congress

In the 111th Congress, several bills have been introduced regarding the revocation and modification of executive orders. For example, H.R. 35, H.R. 500/S. 237, and H.R. 1228 would deem particular executive orders to be without force or effect; H.R. 603 would revoke part of an executive order on certain lands identified for conveyance; H.R. 3465 would supersede an executive order; and H.R. 4453 would require the President to revoke an executive order and amend a separate, older executive order to restore the words removed by the executive order to be revoked. S. 2929 would require notice of presidential revocations, modifications, waivers, or suspensions of executive orders, or authorization of such an action, to be published in the Federal Register within 30 days after such action is taken.

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[601] Exec. Order 13422, 72 Fed. Reg. 2763, 2764 (Jan. 23, 2007) (revoked by Exec. Order 13497); P.L. 111-8, § 746; 123 Stat. 693.

[602] P.L. 108-199; 118 Stat. 338; see P.L. 110-161; 121 Stat. 2008-09; see also P.L. 111-8; 123 Stat. 669.

[603] H.R. 3090, § 421, 111th Cong. (2009); S. 642, 110th Cong. (2008).

Other bills on executive orders proposed in the 111th Congress are prescriptive, and do not necessarily require presidential modification or revocation of executive orders. For example, H.R. 21 would establish a committee in the Executive Office of the President that would succeed a committee established by executive order. H.R. 292 would require the Secretary of Veterans Affairs to ensure that that department is complying with a particular executive order. H.R. 669 would redesignate an office established by an executive order. H.R. 1082 would prohibit importation of foreign-made American flags, regardless of whether their proportions complied with an executive order. H.R. 1367 would expand the applicability of several executive orders to parent companies of foreign entities that commit acts outside the United States that would violate such executive orders if the acts were committed in the United States. H.R. 3293 would prohibit the appropriation or availability of funds for the procurement of goods made by child labor in certain industries and countries, in accordance with an executive order. S. 237 would provide for the continued existence of a council despite termination of an applicable section of an executive order.

Presidential Revocation and Alteration of Executive Orders

Illustrating the fact that executive orders are used to further an administration's policy goals, there are frequent examples of situations in which a sitting President has revoked or amended orders issued by his predecessor.[604] This practice is particularly apparent where Presidents have used these instruments to assert control over and influence the agency rulemaking process. President Ford, for instance, issued Executive Order 11821, requiring agencies to issue inflation impact statements for proposed regulations.[605] President Carter altered this practice with Executive Order 12044, requiring agencies to consider the potential economic impact of certain rules and identify potential alternatives.[606]

Shortly after taking office, President Reagan revoked President Carter's order, implementing a scheme asserting much more extensive control over the rulemaking process. Executive Order 12291 directed agencies to implement rules only if "the potential benefits to society for the regulation outweigh the potential

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[604] For example, on February 17, 2001, in Executive Orders 13201-04, President Bush revoked a series of executive orders issued by President Clinton regarding union dues and labor contracts, significantly altering several requirements pertaining to government contracts. 66 Fed. Reg. 11221, 11225, 11227-28 (2001); see Exec. Order No. 12871, 58 Fed. Reg. 52201 (1993); Exec. Order 12933, 59 Fed. Reg. 53559 (1994). President Obama revoked Executive Order 13201 in Executive Order 13496. 74 Fed. Reg. 6107 (Feb. 4, 2009). He revoked Executive Order 13202 in Executive Order 13502. 74 Fed. Reg. 6985 (Feb. 11, 2009). President Obama also revoked Executive Order 13204 in Executive Order 13495. 74 Fed. Reg. 6103 (Feb. 4, 2009).

[605] 3 C.F.R. 926 (1971-75).

[606] 3 C.F.R. 152 (1978).

costs to society," requiring agencies to prepare a cost-benefit analysis for any proposed rule that could have a significant economic impact.[607] This order was criticized by some as a violation of the separation of powers doctrine, on the grounds that it imbued the President with the power to essentially control rulemaking authority that had been committed to a particular agency by Congress.[608] Despite these concerns, there were no court rulings assessing the validity of President Reagan's order. In turn, President Clinton issued Executive Order 12866, modifying the system established during the Reagan Administration.[609] While retaining many of the basic features of President Reagan's order, E.O. 12866 eased cost-benefit analysis requirements, and recognized the primary duty of agencies to fulfill the duties committed to them by Congress. President George W. Bush issued two executive orders amending E.O. 12866, E.O. 13258, and E.O. 13422, both of which were revoked by President Obama in E.O. 13497.[610] President Bush's E.O. 13258 concerned regulatory planning and review, and it removed references in E.O. 12866 to the role of the Vice President, replacing several of them with a reference to the Director of the Office of Management and Budget (OMB) or the Chief of Staff to the President.[611] E.O. 13422 defined guidance documents and significant guidance documents and applied several parts of E.O. 12866 to guidance documents, as well as required each agency head to designate a presidential appointee to the newly created position of regulatory policy officer.[612] E.O. 13422 also made changes to the Office of Information and Regulatory Affairs' (OIRA's) duties and authorities, including a requirement that OIRA be given advance notice of significant guidance documents.[613] President Obama's executive order revoking E.O. 13258 and E.O. 13422 also directed the Director of OMB and the heads of executive departments

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[607] 3 C.F.R. 127, 128 (1981).

[608] See, e.g., Morton Rosenberg, Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12291, 80 MICH. L. REV. 193 (1981); Erik D. Olsen, The Quiet Shift of Power: OMB Supervision of EPA Rulemaking Under Executive Order 12,291, 4 VA. J. NAT. RES. L. 1 (1984).

[609] 58 Fed. Reg. 51735 (1993).

[610] 74 Fed. Reg. 6113 (Feb. 4, 2009)(revoking Executive Orders 13528 and 13422).

[611] 67 Fed. Reg. 9385 (Feb. 28, 2002)(amending Executive Order 12866).

[612] 72 Fed. Reg. 2763 (Jan. 23, 2007)(amending Executive Order 12866). For more information on how the now-revoked order had impacted Executive Order 12866, see CRS Report RL33862, Changes to the OMB Regulatory Review Process by Executive Order 13422, by Curtis W. Copeland.

[613] 72 Fed. Reg. 2763 (Jan. 23, 2007)(amending Executive Order 12866).

and agencies to rescind orders, rules, guidelines, and policies that implemented those executive orders.[614]

[614] Id.

The Executive Office of the President: An Historical Overview, 98-606 (November 26, 2008)

HAROLD C. RELYEA, CONGRESSIONAL RESEARCH SERV., THE EXECUTIVE OFFICE OF THE PRESIDENT: AN HISTORICAL OVERVIEW (2008), *available at* http://www.intelligencelaw.com/library/secondary/crs/pdf/98-606_11-26-2008.pdf.

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Updated November 26, 2008
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Summary

Established in 1939, the Executive Office of the President (EOP) consists of a group of federal agencies immediately serving the President. Among the oldest of these are the White House Office, where many of the President's personal assistants are located, and the Office of Management and Budget, which was established as the Bureau of the Budget in 1921 and by transfer became one of the original EOP units in 1939. Entities have been placed within the EOP by both presidential action and congressional determination. Some components have endured; others have been brief experiments. Some have been transferred to other quarters of the executive branch; others have been abolished with no successor. In large measure, the tenure and durability of an Executive Office agency is dependent upon its usefulness to the President — as a managerial or coordinative auxiliary, a national symbol, or a haven of political patronage, among other considerations. This report reviews the particular circumstances of the creation of, and underlying authority for, the Executive Office of the President, and provides profiles of the entities that have been, and still are, located within that enclave.

Introduction

Since 1939, federal agencies immediately assisting the President have been located in an enclave known as the Executive Office of the President (EOP). Within these entities are many, if not most, of the President's closest advisers and assistants on matters of policy, politics, administration, and management. Some of these EOP components have been creations of the President; others have been established by Congress. While some have endured, others have been brief experiments; some have been transferred to other quarters of the executive branch, others have been abolished with no successor. In large measure, the tenure and durability of an Executive Office agency is dependent upon its usefulness to the President — as a managerial or coordinative auxiliary, a national symbol, or a haven of political patronage, among other considerations.

Assessing the historical record, former presidential aide and student of the Presidency Theodore Sorensen once quipped that some Presidents use the Executive Office "as a farm league, some use it as a source of experts and implementers, and some use it as Elba."[615]

The Executive Office of the President represents an institutional response to needs felt by every occupant of the Oval Office, beginning with George Washington, who, of course, served before there even was a White House. Primarily, these were, and remain, needs for advice and assistance. Undoubtedly, there have always been many who are ready and more than willing to offer the President their advice. However, what has probably always been desired by Presidents in this regard were a few loyal and intelligent individuals who would offer counsel when asked and would keep such consultations confidential. Loyalty, competence, and ability to keep confidences were also qualities to be sought in individuals providing immediate assistance — with correspondence and records maintenance, appointments and scheduling, bookkeeping, and, in time, many more sophisticated tasks.

Executive Office Agency Precursors

The first experiments with special institutions to assist the President occurred during the administration of President Woodrow Wilson and the initial term of President Franklin D. Roosevelt.[616] The Council of National Defense was established by Congress, with Wilson's concurrence, in 1916.[617] In announcing the formation of the council, the President indicated its chief functions would be:

- coordination of all forms of transportation and the development of means of transportation to meet the military, industrial, and commercial needs of the Nation; [and]
- extension of the industrial mobilization work of the Committee on Industrial Preparedness of the Naval Consulting Board. Complete information as to our present manufacturing and producing facilities adaptable to many-sided uses of modern warfare will be procured, analyzed, and made use of.[618]

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[615] Theodore C. Sorensen, Watchmen in the Night (Cambridge, MA: M.I.T. Press, 1975), p. 100.

[616] This statement does not overlook the existence of the Cabinet, rooted in the President's Article II, Section 2, constitutional authority to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," but otherwise without legally specified composition, duties, or recognition.

[617] 39 Stat. 619 at 649.

[618] Grosvenor B. Clarkson, Industrial America in the World War (Boston, MA: Houghton Mifflin, 1923), p. 22.

The council's members included the Secretaries of Agriculture, Commerce, the Interior, Labor, the Navy, and War — the Cabinet minus the Attorney General, Secretary of State, Postmaster General, and Vice President. Its statutory mandate also provided that the council was to be assisted by a presidentially appointed advisory commission "consisting of not more than seven persons, each of whom shall have special knowledge of some industry, public utility, or the development of some natural resource, or be otherwise specially qualified ... for the performance of the duties ... provided."[619]

During U.S. involvement in World War I, the council and its advisory commission organized a large number of shifting subunits, largely composed of prominent persons who placed their services at the disposal of the federal government without compensation.[620] The result was a network for the exchange of information and advice between executive branch leaders of the American war effort and counterpart leaders in industry, business, science, and engineering. Certainly the President and his subordinates benefitted from this advisory structure, as well as from the additional staff made available by the existence of the council.

With the close of hostilities in Europe, the council began to curtail its operations. Council appropriations for FY1922 were denied, and the panel officially discontinued its activities on June 30, 1921.[621]

In combating the Great Depression, President Roosevelt seemingly preferred to assign newly created emergency programs to agencies freshly established, rather than to existing departments. To effect executive branch coordination, he chartered a temporary Executive Council with E.O. 6202A of July 11, 1933. The panel's 24 members — inclusive of the entire Cabinet, the Director of the Bureau of the Budget, and the heads of the various economic recovery agencies — met at the White House on Tuesday afternoons. Roosevelt himself presided over the sessions. He was assisted by the council's executive secretary, Frank C. Walker, who performed "such duties as may be prescribed him by the President" and was

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[619] 39 Stat. 649.

[620] See Lloyd M. Short, The Development of National Administrative Organization in the United States (Baltimore, MD: The Johns Hopkins University Press, 1923), pp. 441-450; U.S. Council of National Defense, Division of Statistics, Directory of Auxiliary War Organizations (Washington: Council of National Defense, 1917).

[621] The council was briefly revived by President Roosevelt in 1940 as a vehicle for coordinating veiled U.S. mobilization efforts. A few months later, the Office for Emergency Management became the principal mobilization coordinator. Ultimately, the council's functions were unofficially usurped by the National Security Council in 1947. Authority

for the Council of National Defense, however, still exists, though it is considered inactive.

the only professional staff assistant serving the panel. Walker's role was purely administrative and was limited to the activities of the council: when FDR was absent from council meetings, the senior Cabinet officer present presided. After a few months, the panel, in one estimation, "proved too cumbersome for effective discussion."[622] The weakness of the council was its limited staffing and lack of power to coordinate department and agency efforts at combating the depression. However, it was a useful forum for the exchange of ideas by the President, department heads, and the leaders of the new emergency agencies. Indeed, the council meetings provided valuable information and advice, and Walker ably assisted FDR as a behind-the-scenes trouble shooter.[623]

Recognizing the deficiencies of the Executive Council, Roosevelt established another coordinating organization with a more limited membership. On November 17, 1933, he issued E.O. 6433A setting up the National Emergency Council. Composed of the Secretaries of the Interior (or Administrator of Public Works), Agriculture, Commerce, and Labor, the Administrators of Agricultural Adjustment and Federal Emergency Relief, the chairman of the Home Owners Loan Corporation, the governor of the Farm Credit Administration, and a representative from the Consumer's Council, the National Emergency Council had field directors in each of the states to coordinate federal relief efforts. Furthermore, responsibility for the dissemination of information and guidance to the public about federal recovery and relief activities was vested in the council.[624]

Like the Executive Council, the National Emergency Council met every Tuesday, but at two-week intervals. The agenda was set by the executive director in consultation with the President. The member agencies submitted progress reports to inform other participants and reduce misunderstandings and conflicts in administration. With the President presiding, disputes might be settled at his decision. Frank Walker initially acted as the council's executive director.

Recognizing the limitations of the National Emergency Council for coordinating the activities and administration of New Deal programs in the area of relief and unemployment, the President, with E.O. 6889A of October 31, 1934, consolidated the Executive Council, the National Emergency Council, and a National Recovery Administration oversight panel called the Industrial Emergency Committee. The executive director of the reorganized National Emergency Council was given sweeping new authority, but it could only be effectively exercised with the full

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[622] Lester G. Seligman and Elmer E. Cornwell, eds., New Deal Mosaic: Roosevelt Confers with His National Emergency Council, 1933-1936 (Eugene, OR: University of Oregon Books, 1965), p. xv.

[623] A. J. Wann, The President as Chief Administrator (Washington: Public Affairs Press, 1968), p. 51.

[624] Ibid., p. 56.

support of the President. Slipping into decline after December of 1935, the council held its last meeting on April 28, 1936.[625]

Subsequently, on September 16, 1937, Roosevelt issued E.O. 7709A abolishing the panel at the end of the year. He then changed his mind, however, thinking the council might be useful for dealing with the recession that had become widespread by November, and he extended the life of the panel. FDR thought the Emergency Council experience "a wonderful essay in democracy." He called it a New England town meeting that gave everybody a chance to "blow off." By his own admission, he learned things that some of his subordinates "wouldn't have liked me to know anything about." Eventually, Roosevelt admitted, the council became "too big to do much actual work." At the end, he was, he said, making "stump speeches" when he would have preferred to be receiving advice.[626] Nonetheless, it has been observed that FDR's experience with such super-Cabinet entities may well have convinced him that the coordination he desired could be better achieved through strengthened presidential staff rather than collegial bodies of department and agency leaders.[627]

Toward an Executive Office

FDR turned to a group of planners after his super-Cabinet experiments failed to result in the kind of coordination he wanted. Shortly after the Federal Emergency Administration of Public Works was established in June of 1933,[628] Harold Ickes, as the head of the new program, had created the National Planning Board to establish evaluation criteria and advise him on project selection. Its members included political scientist Charles E. Merriam, economist Wesley C. Mitchell (succeeded by George Yantes), and city planner Frederick A. Delano, who was the President's uncle. As Roosevelt became familiar with the board's work and as the board's members became increasingly aware of the lack of adequate information available for use in planning the development and application of the nation's resources, it was agreed that a permanent, broadly based planning body was needed. The result was the conversion of the National Planning Board into the National Resources Board and Advisory Committee, an independent Cabinet committee, with E.O. 6777 of June 30, 1934. When this new entity lost its statutory charter due to Supreme Court invalidation of the

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[625] See Ibid., pp. 54-66; Seligman and Cornwell, New Deal Mosaic: Roosevelt Confers with His National Emergency Council, 1933-1936, pp. xiv-xxix.

[626] See Louis Brownlow, A Passion for Anonymity: The Autobiography of Louis Brownlow, Second Half (Chicago, IL: University of Chicago Press, 1958), p. 321.

[627] Seligman and Cornwell, New Deal Mosaic: Roosevelt Confers with His National Emergency Council, 1933-1936, p. xxvi.

[628] 48 Stat. 195 at 200.

National Industrial Recovery Act,[629] the planning body was reconstituted as the National Resources Committee (NRC) with E.O. 7065 of June 7, 1935. Later, in 1939, when creating the Executive Office of the President, FDR abolished the NRC and transferred its functions to a newly established National Resources Planning Board (NRPB).[630] In June, Congress appropriated funds for the NRPB to carry out the functions of the NRC.[631] Eventually, however, continued congressional unhappiness with the NRPB resulted in its abolition, with no successor, in June of 1943.[632]

The original members of the National Planning Board were suggested to Ickes by one of his consultants, Louis Brownlow, who was the director of the Public Administration Clearing House in Chicago. Brownlow became a frequent, informal participant in the board's deliberations and meetings with Ickes. During the spring and summer of 1935, the planning group had progressed to having White House meetings with Roosevelt, who took a keen interest in Merriam's concept of planning and its relation to the presidency. At FDR's request, Merriam, with Brownlow's assistance, prepared a memorandum on the subject.[633] Subsequently reproduced in Brownlow's autobiography, this October 1935 memorandum stressed the importance of management and administration for national planning of natural and human resources. Turning to the presidency, Merriam called for greater development of the President's capabilities for management and administrative supervision of the government. He acknowledged that some steps — in personnel, budgeting, and planning — had been taken in this regard, but thought some analysis of the situation should be made, and called for "a study directed toward the institutional arrangements, general understandings and practices which would most effectively aid the Executive in the double task of management plus political leadership and direction." Merriam indicated that such a study of administrative management might be undertaken by the Public Administration Committee of the Social Science Research Council. Chaired by Brownlow, this committee, Merriam

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[629] Schechter Poultry Corporation v. United States, 295 U.S. 495 (1935).

[630] 53 Stat. 1423.

[631] 53 Stat. 927 at 931.

[632] 57 Stat. 169. See, generally, Marion Clawson, New Deal Planning: The NRPB (Baltimore, MD: The Johns Hopkins University Press, 1981); Otis L. Graham, Jr., Toward A Planned Society: From Roosevelt to Nixon (New York: Oxford University Press, 1976, pp. 52-58); Charles E. Merriam, "The National Resources Planning Board: A Chapter in American Planning Experience," American Political Science Review, vol. 38, December 1944, pp. 1075-1088; Philip W. Warken, A History of the National Resources Planning Board, 1933-1943 (New York: Garland Publishing Company, 1979).

[633] Barry Dean Karl, Executive Reorganization and Reform in the New Deal (Cambridge, MA: Harvard University Press, 1963), p. 203.

pointed out, was already engaged in an assessment of the administration of the Works Progress Administration, "and it might be persuaded to broaden the scope of its inquiry."[634]

Roosevelt shied away from passing the study project on to the Social Science Research Council and, instead, sought his own study committee, instructed by the President. The result was the President's Committee on Administrative Management, announced on March 22, 1936, and consisting of Merriam, Brownlow, and Luther Gulick.[635] Its task, as revealed in the President's letter to Congress, would be to make "a careful study of the organization of the Executive branch of the Government ... with the primary purpose of considering the problem of administrative management." FDR went on to stress that "many new agencies have been created during the emergency, some of which will, with the recovery, be dropped or greatly curtailed, while others, in order to meet the newly realized needs of the Nation, will have to be fitted into the permanent organization of the Executive branch."[636] Little concern with efficiency and economy through government reorganization was evident in the President's letter. Instead, the emphasis was upon structuring the Chief Executive's authority for effectively executing his constitutional responsibilities.

The Brownlow committee reported approximately ten months later. Among its recommendations was a proposed addition of six assistants to the President's staff and vesting responsibility in the President for the continuous reorganization of the executive branch.[637] Released to Congress on January 12, 1937, the report soon became lost in high politics. Three weeks after submitting the Brownlow committee's report to Congress, FDR announced he wanted to enlarge the membership of the Supreme Court. His "court packing" plan not only fed congressional fears of a presidential power grab, but also so preoccupied Congress that the Brownlow committee's reorganization recommendations were ignored.

The Brownlow committee's report made no recommendation for an Executive Office of the President. What was sought was a modest enlargement of the number of congressionally authorized presidential assistants. The President had

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[634] Brownlow, A Passion for Anonymity: The Autobiography of Louis Brownlow, Second Half, pp. 327-328.

[635] See Karl, Executive Reorganization and Reform in the New Deal, pp. 37-165.

[636] Samuel I. Rosenman, ed., The Public Papers and Addresses of Franklin D. Roosevelt: 1936 Volume, The People Approve (New York: Random House, 1938), pp. 144-146.

[637] U.S. President's Committee on Administrative Management, Report of the President's Committee (Washington: GPO, 1937), pp. 5-6, 29-42.

initially been granted funds in 1857 to employ a private secretary;[638] in 1929, Congress was persuaded to add two more secretaries and an administrative assistant to the presidential payroll.[639] The current situation, in the view of the Brownlow committee, called for more.

> *The President needs help. His immediate staff assistance is entirely inadequate. He should be given a small number of executive assistants who would be his direct aides in dealing with the managerial agencies and administrative departments of the government. These assistants, probably not exceeding six in number, would be in addition to the present secretaries, who deal with the public, with the Congress, and with the press and radio. These aides would have no power to make decisions or issue instructions in their own right. They would not be interposed between the President and the heads of his departments. They would not be assistant presidents in any sense. Their function would be, when any matter was presented to the President for action affecting any part of the administrative work of the Government, to assist him in obtaining quickly and without delay all pertinent information possessed by any of the executive departments so as to guide him in making his responsible decisions; and then when decisions have been made, to assist him in seeing to it that every administrative department and agency affected is promptly informed. Their effectiveness in assisting the President will, we think, be directly proportional to their ability to discharge their functions with restraint. They would remain in the background, issue no orders, make no decisions, emit no public statements. Men for these positions should be carefully chosen by the President from within and without the Government. They should be men in whom the President has personal confidence and whose character and attitude is [sic] such that they would not attempt to exercise power on their own account. They should be possessed of high competence, great physical vigor, and a passion for anonymity. They should be installed in the White House itself, directly accessible to the President. In the selection of these aides, the President should be free to call on departments from time to time for the assignment of persons who, after a tour of duty as his aides, might be restored to their old positions.*[640]

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[638] 11 Stat. 228.

[639] 45 Stat. 1230.

[640] U.S. President's Committee on Administrative Management, Report of the President's Committee, p. 5.

While this particular recommendation did not attract fervent opposition in Congress, the forces of resistance carried sway, and Roosevelt's hopes for executive branch reforms died in the 75th Congress.

Creating the Executive Office

Although efforts at gaining legislative approval of the Brownlow committee's recommendations lay in ruin in the spring of 1938, the buoyant Chief Executive had not deserted the cause. By July, FDR was meeting with Brownlow, Merriam, and Gulick. Their committee would not be officially reassembled, but he wanted each man's help with a reorganization authority proposal. Roosevelt sought out the Democratic congressional leadership to discuss the new reorganization measure. Legislative strategy was set in early December 1938 by Roosevelt, Merriam, Gulick — Brownlow was convalescing from a heart attack — and Senator James Byrnes, the chairman of the Senate Select Committee on Government Organization and manager of the reorganization legislation. Byrnes asked that the bill be initiated in the House, where debate could be limited and the Senate would be free to pursue pending business of the moment. The resulting measure — H.R. 4425 — empowered the President to propose reorganization plans, subject to a veto by a majority vote of disapproval in both houses of Congress, and to also appoint six administrative assistants.

After three days of discussion and debate, the House adopted the bill on March 8, 1939. Twelve days later, the Senate began considering the proposal. Following two days of sparring over amendments, the Senate adopted the bill. A quick conference cleared the measure for Roosevelt's signature on April 3.[641] Earlier, FDR had asked Brownlow, Merriam, and Gulick to return to Washington and assist with the preparation of his initial reorganization plans.[642]

Following consultations with Budget Director Harold D. Smith, the Brownlow group presented two reorganization proposals to Roosevelt on April 23. Plan 1, submitted to Congress on April 25, indicated that certain agencies were transferred to the Executive Office of the President, but offered no explanation of that entity.[643] In Plan 2, the National Emergency Council was abolished and most of its functions were transferred to the Executive Office.[644] While both plans were acceptable to legislators, their effective dates were troublesome in terms of accommodating fiscal calendar necessities. By joint resolution, Congress

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[641] 53 Stat. 561.

[642] Richard Polenberg, Reorganizing Roosevelt's Government (Cambridge, MA: Harvard University Press, 1966), pp. 184-187.

[643] 53 Stat. 1423.

[644] 53 Stat. 1431 at 1435.

provided that both plans would be effective on July 1, 1939.[645] Following this action, the President, on September 8, issued E.O. 8248 formally organizing the Executive Office and, thereby, defining it in terms of its components.[646] Brownlow, who drafted the initial reorganization plan, viewed the Executive Office as the institutional realization of administrative management and "the effective coordination of the tremendously wide-spread federal machinery." He called the initial version "a little thing" compared to its later size. It grew under Roosevelt and "it continued to expand and was further regularized by statute, by appropriation acts, and by more reorganization plans" during the succeeding years.[647]

Composition and Growth

The Executive Office organized by E.O. 8248 was to consist of the White House Office, the Bureau of the Budget, the National Resources Planning Board, the Office of Government Reports, which assumed the information responsibilities of the defunct National Emergency Council, the Liaison Office for Personnel Management, and, "in the event of a national emergency, such office for emergency management as the President shall determine." The Office for Emergency Management was created by an administrative order on May 25, 1940, and its functions were further specified in an administrative order of January 7, 1941.[648] It subsequently served as a parent unit for a number of subordinate emergency management bodies. Its functions were largely assumed by the Office of War Mobilization and Reconversion in the closing years of World War II, but it was never abolished and remains an inactive Executive Office unit.[649]

At the time of Roosevelt's death, the United States Government Manual indicated six principal EOP units, plus the Council of National Defense. However, the Office for Emergency Management, which, it was explained, "is primarily a framework within the confines of the Executive Office of the President, within which framework various civilian war agencies have been established," counted 16 major agencies.

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[645] 53 Stat. 813.

[646] 3 C.F.R., 1938-1943 Comp., pp. 576-579.

[647] Brownlow, A Passion for Anonymity: The Autobiography of Louis Brownlow, Second Half, p. 416.

[648] 3 C.F.R., 1938-1943 Comp., pp. 1320-1321.

[649] See Herman M. Somers, Presidential Agency (Cambridge, MA: Harvard University Press, 1950).

At the end of his first term as President, Harry S. Truman had an Executive Office of eight principal units, as well as the Council of National Defense, and the Office for Emergency Management had two subsidiary agencies. New Executive Office units created by Congress included the Council of Economic Advisers, the Central Intelligence Agency, the National Security Council, and the National Security Resources Board.[650] At the end of his second term, Truman had 11 Executive Office units, but the Office for Emergency Management was dormant.

Manuals for the Presidency of Dwight D. Eisenhower indicate eight Executive Office components at the end of his first administration and nine at the conclusion of his second term. At the time of his assassination, John F. Kennedy also had nine Executive Office entities, and Lyndon B. Johnson counted 11 such units at the conclusion of his Oval Office tenure. When Richard Nixon resigned the Presidency, he left behind 15 Executive Office agencies. His successor, Gerald Ford, also had 15 EOP components when he departed from the White House, but the next President, Jimmy Carter, had a reduced total of 11 entities at the end of his term. Ronald Reagan finished both of his administrations with nine Executive Office units, George H. W. Bush had 11 such agencies when he completed his term, and William Clinton had ten EOP entities during his presidency.[651] Profiles of the major entities within the Executive Office during the 1939-2000 period are presented in Appendix I of this report, and their chronological location in the EOP is portrayed in Appendix II.

Among the more enduring constructs of the Executive Office are the White House Office and the Office of Management and Budget (formerly the Bureau of the Budget), which were among the initial EOP structures. The Council of Economic Advisers, established in 1946,[652] and the National Security Council, created in 1947,[653] also appear to hold permanent status. Both the Office of the Special Representative for Trade Negotiations and the Council on Environmental Quality have endured for over two decades. It also seems unlikely that the President's administrative support staff unit, known as the Office of Administration, will soon be eliminated. If such did happen, its functions would most likely have to be assumed by the White House Office, which would increase both its personnel

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[650] While the Central Intelligence Agency could be considered a subunit of the National Security Council, it is treated here as a principal unit of the Executive Office of the President until 1981 when the United States Government Manual for that year listed it as an independent establishment.

[651] The staff office of the Vice President, though sometimes, for some purposes, is considered to be an Executive Office component, it was not so regarded in these counts.

[652] 60 Stat. 24.

[653] 61 Stat. 496.

and budget. Indeed, the Office of Administration was created, in part, in response to criticism that the White House staff was too large and too costly.

The number of units within the Executive Office of the President has not been a serious issue over the years. Congress, respecting the Constitution's separation of powers, has allowed the President to exercise a free hand with regard to the Executive Office. He may create a temporary EOP body and use appropriated discretionary funds to finance such a unit. However, it is expected that the creation and functioning of this entity, at a minimum, will not contravene prevailing statutes, and that its continued existence will be subject to congressional approval through the legislative or appropriations process. Congress routinely appropriates funds, directly or indirectly, for all Executive Office agencies.

When controversy has risen, it has usually involved resources for, and the powers of, Executive Office entities. As noted earlier, Congress was suspicious of Roosevelt's national planners; the National Resources Planning Board came to be seen as meddlesome, a threat to traditional political relationships, and a waste of money, so it was abolished.[654] Concerned that the director of the Office of War Mobilization, a unit of the Office for Emergency Management created by E.O. 9347 of May 27,1943,[655] was becoming too powerful, Congress created a replacement agency, the Office of War Mobilization and Reconversion, and made its director subject to Senate confirmation, gave him a two-year term, and specified his authority.[656] More recently, during the 1970s, congressional concern about the growth of the staff of the Executive Office ultimately resulted in an authorization statute setting personnel ceilings for the White House Office, the Vice President's Office, the President's domestic policy staff, and the Office of Administration.[657] In the summer of 1981, the House Committee on Appropriations denied the budget request of the Office of Policy Development in its entirety because witnesses from the agency refused to appear at a subcommittee hearing to discuss their funding. "After the subcommittee mark-up occurred," said the committee report, "the head of that Office met informally and off the record with the subcommittee to discuss the matter." Additional information on "the legal basis for refusing to appear" was to be provided, but,

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[654] 57 Stat. 169.

[655] 3 C.F.R., 1938-1943 Comp., pp. 1281-1282.

[656] 58 Stat. 785.

[657] 92 Stat. 2445.

because it was not subsequently received, the committee took its action.[658] The Office of Policy Development and other segments of the federal government were funded shortly thereafter through an emergency resolution continuing appropriations for FY1982.[659] Office of Policy Development officials did not again refuse to appear before an appropriations subcommittee.

In his 1958 autobiography, Louis Brownlow commented that he was quite certain that FDR, when creating the Executive Office, "had not in his wildest dreams" envisioned the expansion that later occurred.[660] Indeed, Brownlow himself was surprised. He might also be surprised that administrative management, stressed by the Brownlow Committee, has not been a major concern of many of the men succeeding Franklin D. Roosevelt as President. The past two decades have seen little awareness of or demonstrated interest in administrative management on the part of the men occupying the Oval Office. This situation is reflected in their public remarks, the relatively unchanging composition of the Executive Office, and the general absence of executive branch reorganization activities or plans. However, significant changes in the composition and staffing of the Executive Office, other than an isolated addition of a new unit or a few personnel, could occur depending upon the approach future Presidents have toward administrative management considerations for the execution of the duties of the Presidency.[661]

Appendix A: Profiles of the Principal Units of the Executive Office of the President: 1939-2008

Administration, Office of (1977-) Established in the Executive Office of the President by Reorganization Plan 1 of 1977 to provide components of the Executive Office with such administrative services as the President shall direct. A staff authorization was initially established in 1978 (92 Stat. 2448). The Office of Administration is headed by a presidentially-appointed director.

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[658] U.S. Congress, House Committee on Appropriations, Treasury, Postal Service and General Government Appropriation Bill, 1982, H.Rept. 97-171, 97th Cong., 1st sess. (Washington: GPO, 1981), pp. 30-31.

[659] 95 Stat. 958.

[660] Brownlow, A Passion for Anonymity: The Autobiography of Louis Brownlow, Second Half, p. 417.

[661] It might be noted in this regard that, while the initial 1993 report of the National Performance Review (NPR) offered a dozen major recommendations concerning the organization and operations of the Executive Office, none of these were of an administrative management character. Furthermore, neither the 1993 NPR report nor President Clinton indicated a governance theory of administrative management. See Office of the Vice President, From Red Tape to Results: Creating a Government that Works Better & Costs Less; Report of the National Performance Review (Washington: GPO, 1993), pp. 139-140.

Arts, National Council on the (1964-1965). Established in the Executive Office of the President by the National Arts and Cultural Development Act of 1964 (78 Stat. 905) to assist the President with regard to the growth and development of the arts and cultural resources of the United States, including the encouragement of private initiatives and the coordination of local, state, and federal activities. The council was headed by a presidentially appointed chairman, who was subject to Senate approval, and included the Secretary of the Smithsonian Institution and 24 other members appointed by the President from private life. The council was subsequently transferred to the National Foundation on the Arts and the Humanities by the National Foundation on the Arts and the Humanities Act of 1965 (79 Stat. 849).

Budget, Bureau of the (1939-1970). Established within the Department of the Treasury by the Budget and Accounting Act of 1921 (42 Stat. 20) to prepare the consolidated federal budget, but functioned under the immediate supervision of the President. The bureau was transferred to the Executive Office of the President by Reorganization Plan 1 of 1939. Headed by a presidentially-appointed director, it was subsequently reorganized as the Office of Management and Budget by Reorganization Plan 2 of 1970.

Civil and Defense Mobilization, Office of (1958-1961). Established in the Executive Office of the President as the Office of Defense and Civilian Mobilization by Reorganization Plan 1 of 1958 to direct and coordinate civilian mobilization activities and nonmilitary defense functions of the federal government. The Office of Defense and Civilian Mobilization was renamed the Office of Civil and Defense Mobilization by an act of August 25, 1958 (72 Stat. 861). Subsequently, the civil defense functions of the Office of Civil and Defense Mobilization were transferred to the Secretary of Defense by E.O. 10952 of July 20, 1961. With its remaining functions, the Office of Civil and Defense Mobilization was redesignated the Office of Emergency Planning by an act of September 22, 1961 (75 Stat. 630).

Congested Production Areas, Committee for (1943-1944). Established in the Executive Office of the President by E.O. 9327 of April 7, 1943, to provide for more efficient handling of government problems in areas that lacked adequate community services or facilities because of large increases in population. Chaired by the director of the Bureau of the Budget, the committee included among its members representatives from the Department of War, Department of the Navy, the War Production Board, the War Manpower Commission, the Federal Works Agency, and the National Housing Agency. It was subsequently terminated by the National War Agency Appropriation Act of 1945 (58 Stat. 535).

Consumer Affairs, Office of (1971-1973). Established in the Executive Office of the President by E.O. 11583 of February 24, 1971, to advise the President on all matters relating to consumer interests. Headed by a presidentially-appointed director, the office and its functions were subsequently transferred to

the Department of Health, Education, and Welfare by E.O. 11702 of January 25, 1973.

Defense and Civilian Mobilization, Office of (1958). Established in the Executive Office of the President by Reorganization Plan 1 of 1958 to direct and coordinate civilian mobilization activities and nonmilitary defense functions of the federal government. The Office of Defense and Civilian Mobilization was headed by a presidentially-appointed director, who was subject to Senate approval. The agency was renamed the Office of Civil and Defense Mobilization by an act of August 25, 1958 (72 Stat. 861).

Defense Mobilization, Office of (1950-1953; 1953-1958). Established in the Executive Office of the President by E.O. 10193 of December 16, 1950, to direct, control, and coordinate all mobilization activities of the government, including manpower, stabilization, and transport operations. The Office of Defense Mobilization was headed by a presidentially-appointed director, who was subject to Senate approval. Reorganization Plan 3 of 1953 established a new Office of Defense Mobilization, which assumed the functions of its predecessor and some other entities. This unit was subsequently consolidated with the Federal Civil Defense Administration into the Office of Defense and Civilian Mobilization by Reorganization Plan 1 of 1958.

Domestic Council (1970-1977; 1993-). Established in the Executive Office of the President by Reorganization Plan 2 of 1970 to formulate and coordinate domestic policy recommendations for the President. Chaired by the President, the council included among its members the Vice President; the Attorney General; the Secretary of Agriculture; the Secretary of Commerce; the Secretary of Health, Education, and Welfare; the Secretary of Housing and Urban Development; the Secretary of the Interior; the Secretary of Labor; the Secretary of Transportation; the Secretary of the Treasury; and such other officers of the executive branch as the President might direct. The council was abolished by Reorganization Plan 1 of 1977 and its functions were transferred to the Domestic Policy Staff. The council was recreated with E.O. 12859 of August 16, 1993, and was included within the Office of Policy Development when it was reinstituted in 1996.

Domestic Policy Staff (1977-1992). Established in the Executive Office of the President by Reorganization Plan 1 of 1977 to assure that the needs of the President for prompt and comprehensive advice were met with respect to matters of economic and domestic policy. A staff authorization was initially established in 1978 (92 Stat. 2448). Headed by an executive director, who was an assistant to the President, the Domestic Policy Staff was incorporated into the Office of Policy Development in 1981. It was abolished in a February 1992 presidential statement.

Drug Abuse Policy, Office of (1976-1977). Established in the Executive Office of the President by an amendment to the Drug Abuse Office and Treatment Act of 1972 (90 Stat. 242) to make recommendations to the President with

respect to the objectives, policies, and priorities for federal drug abuse functions and to coordinate the performance of those functions by federal departments and agencies. Headed by a presidentially-appointed director, who was subject to Senate approval, the Office of Drug Abuse Policy was abolished by Reorganization Plan 1 of 1977, which transferred certain of its functions to the White House Office.

Drug Abuse Prevention, Special Action Office for (1971-1975). Established in the Executive Office of the President by E.O. 11599 of June 17, 1971, and the Drug Abuse Office and Treatment Act of 1972 (86 Stat. 65) to assist the President with planning, policy formation, and establishing objectives and priorities for all drug abuse prevention functions. Headed by a presidentially-appointed director, who was subject to Senate approval, the Special Action Office was terminated on June 30, 1975, when its authorization expired (86 Stat. 70)

Economic Advisers, Council of (1946-). Established in the Executive Office of the President by the Employment Act of 1946 (60 Stat. 24), the council analyzes the national economy and its segments, advises the President on economic developments, appraises the economic programs and policies of the federal government, recommends to the President policies for economic growth and stability, assists in the preparation of the economic reports of the President to Congress, and produces its own annual report. The council is composed of three presidentially-appointed members, one of whom is designated chairman and all of whom are subject to Senate approval.

Economic Opportunity, Office of (1964-1975). Established in the Executive Office of the President by the Economic Opportunity Act of 1964 (78 Stat. 508) to administer programs providing opportunities for education and training, work, and overcoming conditions of poverty. The Office of Economic Opportunity was headed by a presidentially-appointed director, who was subject to Senate approval. Programs of the agency were subsequently transferred to the Departments of Labor; Health, Education and Welfare; and Housing and Urban Development during 1973 and dismantling of the agency was completed in 1975 when the final transfers were made to the Community Services Administration by the Headstart, Economic Opportunity, and Community Partnership Act of 1974 (88 Stat. 2310).

Economic Policy, Council on (1973-1974). Established in the Executive Office of the President by a presidential memorandum of February 2, 1973, to help ensure better coordination in the formation and execution of economic policy and to perform such functions relating to economic policy as the President or its chairman may direct. Headed by a chairman who was an assistant to the President, the council included among its members the Secretary of State, the Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the Secretary of Transportation, the director of the Office of Management and Budget, the chairman of the Council of Economic Advisers, the director of the Cost of Living Council, and the executive

director of the Council on International Economic Policy. Its functions were subsequently absorbed by the President's Economic Policy Board on September 30, 1974.

Emergency Management, Office for (1940-). Established in the Executive Office of the President by a presidential administrative order of May 25, 1940, in accordance with E.O. 8248 of September 8, 1939, organizing the Executive Office. The Office for Emergency Management assisted the President with coordination and supervision of agencies engaged in emergency activities concerning U.S. preparation for and prosecution of World War II. A multiplicity of civilian emergency entities was created as organizational subunits of the Office for Emergency Management, which was headed by a presidentially-appointed Liaison Officer for Emergency Management. When the incumbent liaison officer resigned on November 3, 1943, no successor was appointed. By this time, many of the functions of the Office for Emergency Management had been assumed by one of its subunits — the Office of War Mobilization. With the end of World War II, the Office for Emergency Management became dormant, but has never been formally terminated or abolished.

Emergency Planning, Office of (1961-1968). A scaled-down version of the Office of Civil and Defense Mobilization , the Office of Emergency Planning was so designated by an act of September 22, 1961 (75 Stat. 630), and assisted and advised the President in coordinating and determining policy for all emergency preparedness activities of the federal government. Headed by a presidentially-appointed director, who was subject to Senate approval, the office was renamed the Office of Emergency Preparedness by an appropriation act of October 21, 1968 (82 Stat. 1194).

Emergency Preparedness, Office of (1968-1973). A renamed Office of Emergency Planning, the Office of Emergency Preparedness was so designated by an appropriation act of October 21, 1968 (82 Stat. 1194). Headed by a presidentially-appointed director, who was subject to Senate approval, it advised and assisted the President on policy determination and coordination of emergency preparedness activities. The Office of Emergency Preparedness was abolished by Reorganization Plan 1 of 1973 and its functions were transferred to the Department of the Treasury, the Department of Housing and Urban Development, and the General Services Administration.

Energy Policy Office (1973-1974). Established in the Executive Office of the President by E.O. 11726 of June 29, 1973, to formulate and coordinate energy policies at the presidential level. Headed by a presidentially-appointed director, the Energy Policy Office was abolished by E.O. 11775 of March 26, 1974, and superseded by the Federal Energy Office.

Energy Resources Council (1974-1977). Established in the Executive Office of the President by the Energy Reorganization Act of 1974 (88 Stat. 1241) to insure communication and coordination among federal agencies having

responsibilities for the development and implementation of energy policy or for the management of energy resources. It also was to make recommendations to the President for improving the implementation of federal energy policies or the management of energy resources, particularly where two or more departments or agencies are involved. The council was composed of the Secretary of the Interior, the administrator of the Federal Energy Administration, the administrator of the Energy Research and Development Administration, the Secretary of State, the director of the Office of Management and Budget, and such other executive branch officials as the President might designate. The President designated a chairman from among these members. The council was terminated when its establishing authority was subsequently repealed by the Department of Energy Organization Act of 1977 (91 Stat. 608).

Environmental Quality, Council on (1970-). Established in the Executive Office of the President by the National Environmental Quality Act of 1969 (83 Stat. 854) to develop and recommend to the President national policies to promote the improvement of the quality of the environment, perform continuing analysis of changes or trends in the national environment, and assist the President in the preparation of the annual environmental quality report to Congress. The council is composed of three presidentially-appointed members, one of whom is designated as chairman by the President and all of whom are subject to Senate approval.

Federal Energy Office (1973-1974; 1976). Established in the Executive Office of the President by E.O. 11748 of December 4, 1973, to advise the President with respect to the establishment and integration of domestic and foreign policies relating to the production, conservation, use, control, distribution, and allocation of energy and with respect to all other energy matters. Headed by an administrator, who was the Deputy Secretary of the Treasury, the Federal Energy Office was abolished by E.O. 11790 of June 25, 1974, and its functions were transferred to the Federal Energy Administration. Temporarily recreated by E.O. 11930 of July 30, 1976, to carry out functions of the Federal Energy Administration, the reconstituted Federal Energy Office was headed by a presidentially-appointed administrator. It was finally abolished by E.O. 11933 of August 25, 1976, and its functions again were transferred to the Federal Energy Administration.

Federal Property Council (1973-1977). Established in the Executive Office of the President by E.O. 11724 of June 25, 1973, to review all federal real property policies with respect to their consistency with the overall objectives of the government, to make recommendations to the President regarding same, and to foster the development of more effective policies regarding the use of federal property. The council's members included the director of the Office of Management and Budget, the chairman of the Council of Economic Advisers, the chairman of the Council on Environmental Quality, and such other members from the Executive Office as the President might specify. The President

designated the council's chairman from among its members. The panel was abolished by E.O. 12030 of December 15, 1977.

Government Reports, Office of (1939-1942; 1946-1948). Established July 1, 1939, to perform functions of the National Emergency Council, which was abolished by Reorganization Plan 2 of 1939. Pursuant to E.O. 8248 of September 8, 1939, organizing the Executive Office of the President, the Office of Government Reports became a unit of the Executive Office. Headed by a presidentially-appointed director, it was mandated to provide a central clearinghouse through which citizens as well as state and local governments could make inquires and receive responsive information about federal activities and programs, to collect and distribute information concerning the purposes and operations of the departments and agencies, and to keep the President currently informed about the opinions, desires, and complaints of citizens and subnational government officials regarding the work of federal agencies. It was then consolidated with the Office of War Information, a subunit of the Office for Emergency Management, by E.O. 9182 of June 13, 1942. Temporarily reestablished in the Executive Office with new responsibilities by E.O. 9809 of December 12, 1946, the Office of Government Reports subsequently was statutorily restricted the following year to advertising and motion picture liaison and library operation (61 Stat. 588). In accordance with the liquidation arrangements set forth in E.O. 9809, the Office of Government Reports was terminated on June 30, 1948.

Gulf Coast Recovery and Rebuilding Council (2005 -). Established in the Executive Office of the President by E.O. 13389 of November 1, 2005, to promptly review and provide advice and recommendations regarding the effective, integrated, and fiscally responsible provision of federal support to state, local, and tribal governments, the private sector, and faith-based and other community humanitarian relief organizations in the recovery and rebuilding of the Gulf Coast region affected by Hurricane Katrina and Hurricane Rita. Initially chaired by the Assistant to the President for Economic Policy, the 21-member panel includes representatives from the Cabinet departments, the heads of certain independent agencies, and other Executive Office and White House Office officials. E.O. 13463 of April 18, 2008, designated the Assistant to the President for Homeland Security and Counterterrorism as the new chair of the council, and set February 28, 2009, as the date for the termination of the panel.

Homeland Security Council (2001- 2002; 2002-). Established in the Executive Office of the President by E.O. 13228 of October 8, 2001, to advise and assist the President with respect to all aspects of homeland security and serve as the mechanism for ensuring coordination of homeland security-related activities of executive departments and agencies and effective development and implementation of homeland security policies. Statutorily reconstituted to advise the President on homeland security matters; assess the objectives, commitments, and risks of the United States in the interest of homeland security and make resulting recommendations to the President; and oversee and review homeland

security policies of the federal government and make resulting recommendations to the President (116 Stat. 2135).

Homeland Security, Office of (2001-2004). Established in the Executive Office of the President by E.O. 13228 of October 8, 2001, to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks. The office is under the direction of the assistant to the President for homeland security. In late July 2003, doubt was cast on the future of OHS when House appropriators, in their report on the Departments of Transportation and Treasury and Independent Agencies Appropriations Bill, 2004, revealed that the Bush Administration had changed the "Office of Homeland Security" account to one for the "Homeland Security Council." The account change apparently also implied the shift of 66 staff from OHS to the council, which the report questioned "given the existence and support of the Department of Homeland Security."[662] Subsequently, the Consolidated Appropriations Act, 2004, which included funding for the agencies of the Executive Office of the President, did not make any allocation for OHS, but did provide $7.2 million for the Homeland Security Council.[663] The President's FY2005 budget made no mention of OHS, which, while not formally abolished, has become dormant.

Intellectual Property Enforcement Coordinator (2008-). Established in the Executive Office of the President by the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (122 Stat. 4256). The coordinator chairs the interagency intellectual property enforcement advisory committee; coordinates the development of the Joint Strategic Plan against counterfeiting and infringement by the advisory committee; assists, as requested, in the implementation of the Joint Strategic Plan; facilitates the issuance of relevant policy guidance; and reports to the President and Congress on his duties and responsibilities.

Intergovernmental Relations, Office of (1969-1972). Established in the Executive Office of the President by E.O. 11455 of February 14, 1969, to strengthen federal, state, and local relations. The Office of Intergovernmental Relations was under the immediate supervision of the Vice President, who designated its director. It was subsequently abolished by E.O. 11690 of December 14, 1972, which transferred its functions to the Domestic Council.

International Economic Policy, Council on (1971-1977). Established in the Executive Office of the President by a presidential memorandum of January,

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[662] U.S. Congress, House Committee on Appropriations, Departments of Transportation and Treasury and Independent Agencies Appropriations Bill, 2004, a report to accompany H.R. 2989, 108th Cong., 1st sess., H.Rept. 108-243 (Washington: GPO, 2003), p. 163.

[663] 118 Stat. 3.

19, 1971, to assist the President with the coordination and consistency of policy and activities concerning foreign economic affairs. Statutorily authorized by the International Economic Policy Act of 1972 (86 Stat. 646), the council was chaired by the President and its members included the Secretary of State, the Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the director of the Office of Management and Budget, the chairman of the Council of Economic Advisers, the assistant to the President for national security affairs, the executive director of the Domestic Council, and the Special Representative for Trade Negotiations. The council ceased operations on September 30, 1977 when its statutory authorization (87 Stat. 447) expired.

Management and Budget, Office of (1970-). Established in the Executive Office of the President by Reorganization Plan 2 of 1970 to assist the President with various aspects of federal budget preparation and administration, operations and funds management, management evaluation, efficient and economical conduct of government service, and policy coordination and clearance. The office is headed by a director, who, since 1974 (88 Stat. 11), has been subject to Senate approval.

Marine Resources and Engineering Development, National Council on (1966-1971). Established in the Executive Office of the President by the Marine Resources and Development Act of 1966 (80 Stat. 204) to provide advice and assistance to the President to assure that marine science and technology are effectively used in the interest of national security and the general welfare. Chaired by the Vice President, the council was composed of the Secretary of State, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Commerce, the chairman of the Atomic Energy Commission, the director of the National Science Foundation, the Secretary of Health, Education, and Welfare, the Secretary of the Treasury, and such other officers and officials as the President deemed advisable to designate as members. The council was subsequently terminated when its mandate was extended only to June 30, 1971, by an act of September 25, 1970 (84 Stat. 865).

Mutual Security Agency (1951-1953). Established and continued by the Mutual Security Acts of 1951 (65 Stat. 373) and 1952 (66 Stat. 141) as a unit of the Executive Office of the President to maintain security and promote foreign policy and provide for the general welfare of the United States by furnishing military, economic, and technical assistance to friendly nations in the interest of international peace and security. The Mutual Security Agency and the Office of the Director for Mutual Security were abolished by Reorganization Plan 7 of 1953 with the functions of both entities transferred to the Foreign Operations Administration, which was established by the same plan authority.

National Aeronautics and Space Council (1958-1973). Established in the Executive Office of the President by the National Aeronautics and Space Act of 1958 (72 Stat. 427) to advise and assist the President regarding aeronautical and space programs and activities. Chaired by the President, the council was

composed of the Secretary of State, the Secretary of Defense, the administrator of the National Aeronautics and Space Administration, the chairman of the Atomic Energy Commission, a presidentially-appointed member from the federal agencies, and three presidentially-appointed members from private life. The council was abolished by Reorganization Plan 1 of 1973.

National Critical Materials Council (1984-1993). Established in the Executive Office of the President by the National Critical Materials Act of 1984 (98 Stat. 1250) to advise the President on policies related to strategic and critical materials and to review federal programs, activities, and budget priorities with respect to these policies. The council was composed of three presidentially-appointed members, one of whom is designated chairman by the President and all of whom, if not already Senate-confirmed officers, were subject to Senate approval. Individuals named to the council were, as a result of training, experience, and achievement, to be qualified to carry out its duties and functions. The council was dissolved in 1993, its funding was discontinued, and its functions were assumed by the Office of Science and Technology Policy.

National Drug Control Policy, Office of (1988-). Established in the Executive Office of the President by the National Narcotics Leadership Act of 1988 (102 Stat. 4181) to advise the President regarding necessary changes in the organization, management, budgeting, and personnel allocation of federal agencies involved in drug enforcement activities and coordination of policy for consistency with the national drug control strategy. The Office of National Drug Control Policy is headed by a director, who is subject to Senate approval.

National Energy Office (1973). Established in the Executive Office of the President by E.O., 11712 of April 18, 1973, to advise the President with respect to all federal energy programs, activities, and related matters. Headed by a presidentially-appointed director, the National Energy Office was abolished by E.O. 11726 of June 29, 1973, which transferred its functions to the Energy Policy Office.

National Security Council (1949-). Established by the National Security Act of 1947 (61 Stat. 496), the council was transferred to the Executive Office of the President by Reorganization Plan 4 of 1949. Its statutory function is to advise the President with respect to the integration of domestic, foreign, and military policies relating to national security. Chaired by the President, the council includes among its statutory members the Vice President, the Secretary of State, and the Secretary of Defense. Each President may also designate other officials to attend and participate in council meetings on a regular basis. The Director of National Intelligence and the chairman of the Joint Chiefs of Staff serve as statutory advisers to the council. Although the council has been statutorily authorized to have a presidentially-appointed executive secretary since its creation, leadership of its staff has been exercised for many years by each President's national security assistant, who is actually a member of t

The White House Office staff. The work of the council is also conducted through various working groups and special policy instruments.

National Security Resources Board (1949-1953). Established by the National Security Act of 1947 (61 Stat. 499), the board was transferred to the Executive Office of the President by Reorganization Plan 4 of 1949. Functions of the board were transferred to its chairman, and the board was made advisory to him by Reorganization Plan 25 of 1950. The board primarily was to advise the President concerning the coordination of military, industrial, and civilian mobilization. Its chairman was appointed from civilian life by the President with Senate approval; its members included the heads or representatives from the various departments and agencies so designated by the President. Those functions of the board delegated by executive order were transferred to the Office of Defense Mobilization by E.O. 10438 of March 13, 1953. The board was subsequently abolished by Reorganization Plan 3 of 1953, which transferred its remaining function to the Office of Defense Mobilization.

National Space Council (1988-1993). Established in the Executive Office of the President by the National Aeronautics and Space Administration Authorization Act, Fiscal Year 1989 (102 Stat. 4102) and organized by E.O. 12675 of April 20, 1989, to advise and assist the President on national space policy and strategy. Chaired by the Vice President, the council included among its members the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the Secretary of Commerce, the Secretary of Transportation, the director of the Office of Management and Budget, the chief of staff to the President, the assistant to the President for national security affairs, the assistant to the President for science and technology, the Director of Central Intelligence, and the administrator of the National Aeronautics and Space Administration. The council was dissolved in 1993, its funding was discontinued, and its functions were assumed by the Office of Science and Technology Policy.

Operations Coordinating Board (1953-1957). Established by E.O. 10483 of September 2, 1953, to provide primarily for the integrated implementation of national security policies by several agencies. Chaired by the Under Secretary of State, the board included among its members the Deputy Secretary of Defense, the director of the Foreign Operations Administration, the Director of Central Intelligence, and apresidential representativedesignated by the President. With E.O. 10700 of February 25, 1957, the board was subsumed as a subunit of the National Security Council and its membership was slightly expanded, with both the chairman and a vice chairman designated from among its members by the President. The board was terminated by E.O. 10920 of February 18, 1961, which revoked E.O. 10700.

Personnel Management, Liaison Office for (1939-1953). Established in the Executive Office of the President by E.O. 8248 of September 8, 1939, organizing the Executive Office. Headed by a presidentially-appointed liaison officer, the office advised and assisted the President regarding personnel matters.

It was abolished by E.O. 10452 of May 1, 1953, and its functions were delegated to the chairman of the Civil Service Commission.

Policy Development, Office of (1981-1992; 1996-). A renamed Domestic Policy Staff, the Office of Policy Development continued to advise and assist the President in the formulation, coordination, and implementation of economic and domestic policy. Headedby the assistant to the President for economic and domestic policy, it was abolished in February 1992 by the President's reorganization statement, effective May 1992. Reinstituted in 1996 to consist of the Domestic Policy Council, established in 1993 by E.O. 12859, and the National Economic Council, created in 1993 by E.O. 12835.

Presidential Clemency Board (1974-1975). Established in the Executive Office of the President by E.O. 11803 of September 16, 1974, to examine the cases of individuals applying for executive clemency and to report findings and make recommendations to the President regarding the granting of clemency. The board consisted of eight presidentially-appointed members from private life, one of whom was designated chairman by the President. Having submitted its final recommendations to the President on September 15, 1975, the board, pursuant to E.O. 11878 of September 10, 1975, terminated its operations and its remaining administrative duties were transferred to the Attorney General.

President's Economic Policy Board (1974-1977). Established in the Executive Office of the President by E.O. 11808 of September 30, 1974, to provide advice to the President concerning all aspects of national and international economic policy, oversee the formulation, coordination, and implementation of all economic policy, and serve as the focal point for economic policy decisionmaking. Chaired by the Secretary of the Treasury, the board included among its members the assistant to the President for economic affairs, the Secretary of State, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the Secretary of Health, Education, and Welfare, the Secretary of Housing and Urban Development, the Secretary of Transportation, the director of the Office of Management and Budget, the chairman of the Council of Economic Advisers, and the executive director of the Council on International Economic Policy. It was subsequently terminated by E.O. 11975 of March 7, 1977.

Privacy and Civil Liberties Oversight Board (2004-2007). Established in the Executive Office of the President by the Intelligence Reform and Terrorism Prevention Act of 2004 (118 Stat. 3638) to advise the President or the head of any department or agency of the executive branch to ensure that privacy and civil liberties are appropriately considered in the development and implementation of laws, regulations, and executive branch policies to protect the nation from terrorism; to review proposed regulations and policies related to efforts to protect the nation from terrorism; to review the implementation of laws, regulations, and executive branch policies related to efforts to protect the nation from terrorism; and to provide advice on proposals to retain or enhance a particular

governmental power relative to the need to protect privacy and civil liberties. The board was composed of five members, all appointed by the President, and two of which, the chair and vice chair, were subject to Senate confirmation. The board became an independent agency within the executive branch pursuant to the Implementing Recommendations of the 9/11 Commission Act of 2007 (121 Stat. 266).

Resources Planning Board, National (1939-1943). Established in the Executive Office of the President by Reorganization Plan 1 of 1939 to collect, prepare, and make available to the President, with recommendations, such plans, data, and information as may be helpful to a planned development and use of natural resources. The board was composed of five members appointed by the President, with one designated as chairman and another designated as vice chairman. The board was abolished by an appropriation act of June 26, 1943 (57 Stat. 170).

Rural Affairs, Council for (1969-1970). Established in the Executive Office of the President by E.O. 11493 of November 13, 1969, to advise and assist the President with respect to the further development of the nonmetropolitan areas of the country. Chaired by the President, the council included among its members the Vice President, the Secretary of Agriculture, the Secretary of the Interior, the Secretary of Commerce, the Secretary of Health, Education, and Welfare, the Secretary of Housing and Urban Development, the Secretary of Labor, the chairman of the Council of Economic Advisers, the director of the Bureau of the Budget, the director of the Office of Economic Opportunity, and such other heads of departments and agencies as the President might direct. The council was subsequently terminated by E.O. 11541 of July 1, 1970, which transferred its functions to the Domestic Council.

Science and Technology, Office of (1962-1973). Established in the Executive Office of the President by Reorganization Plan 2 of 1962 to advise and assist the President with respect to developing policies and evaluating and coordinating programs to assure that science and technology are used most effectively in the interests of national security and the general welfare. Headed by a presidentially-appointed director, who was subject to Senate approval, the Office of Science and Technology was abolished and its functions were transferred to the National Science Foundation by Reorganization Plan 1 of 1973.

Science and Technology Policy, Office of (1976-). Established in the Executive Office of the President by the Presidential Science and Technology Advisory Organization Act of 1976 (90 Stat. 463) to provide advice to the President on scientific, engineering, and technological aspects of issues that require attention at the highest levels of government. The Office of Science and Technology Policy is headed by a presidentially-appointed director, who is subject to Senate approval.

Special Representative for Trade Negotiations, Office of the (1963-1979). Established in the Executive Office of the President by E.O. 11075 of January 15, 1963, to assist the President with supervising and coordinating the trade agreements program and directing U.S. participation in trade negotiations with other countries. Headed by the Special Trade Representative, who was subject to Senate approval, the agency was redesignated the Office of the United States Trade Representative by Reorganization Plan 3 of 1979.

Telecommunications Adviser to the President (1951-1953). Established in the Executive Office of the President by E.O. 10297 of October 9, 1951, the Telecommunications Adviser, who was presidentially-appointed, was to assist and advise the President concerning telecommunications policies and programs. The adviser's mandate was revoked and his functions were transferred to the director of the Office of Defense Mobilization by E.O. 10460 of June 16, 1953.

Telecommunications Policy, Office of (1970-1977). Established in the Executive Office of the President by Reorganization Plan 1 of 1970 to establish and implement executive branch communications policies, coordinate the planning and evaluate the operation of executive branch communications activities, and develop mobilization plans for the nation's communications resources and implement those plans during an emergency. Headed by a presidentially-appointed director, who was subject to Senate approval, the Office of Telecommunications Policy was subsequently abolished by Reorganization Plan 1 of 1977 and its functions were transferred to the Department of Commerce.

United States Trade Representative, Office of the (1979-). A renamed Office of the Special Representative for Trade Negotiations, the Office of the United States Trade Representative was so designated by Reorganization Plan 3 of 1979. Headed by the presidentially-appointed U.S. Trade Representative, who is subject to Senate approval, it advises and assists the President with setting and administering overall trade policy.

Urban Affairs, Council for (1969-1970). Established in the Executive Office of the President by E.O. 11452 of January 23, 1969, to assist the President with the formulation and implementation of a national urban policy. Chaired by the President, the council included among its members the Vice President, the Attorney General, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the Secretary of Health, Education, and Welfare, the Secretary of Housing and Urban Development, the Secretary of Transportation, and such other heads of departments and agencies as the President might direct. The council was subsequently terminated by E.O. 11541 of July 1, 1970, which assigned its functions to the Domestic Council.

Wage and Price Stability, Council on (1974-1981). Established in the Executive Office of the President by the Council on Wage and Price Stability Act of 1974 (88 Stat. 750) to identify and monitor economic factors contributing to inflation, including the effects on inflation of industrial, wage, and productivity

performance and federal policies, programs, and activities. The council consisted of eight presidentially-appointed members from within the executive branch, with one designated as chairman by the President. Among those so appointed were certain Cabinet secretaries, heads of other Executive Office agencies, and senior White House Office staff members. The council was subsequently abolished by E.O. 12288 of January 29, 1981. Its funding was immediately ended by an appropriation act of June 5, 1981 (95 Stat. 74), and its authorization was repealed by the Omnibus Budget Reconciliation Act of 1981 (95 Stat. 432).

War Refugee Board (1944-1945). Established in the Executive Office of the President by E.O. 9417 of January 22, 1944, to effectuate with all possible speed the rescue and release of victims of enemy oppression in immediate danger of death, and otherwise to afford such victims all possible relief and assistance. Composed of the Secretaries of State, War, and the Treasury, the board was to report to the President at frequent intervals concerning the steps taken for the rescue and relief of war refugees and to make recommendations to overcome any difficulties encountered regarding such efforts. The board was terminated by E.O. 9614 of September 14, 1945.

White House Office (1939-). Established in the Executive Office of the President by Reorganization Plan 1 of 1939 to provide assistance to the President in the performance of his many detailed activities incident to his immediate office. The White House Office is organized in accordance with the wishes of each incumbent President and is directed by staff chosen by the President. A staff authorization was initially established in 1978 (92 Stat. 2445). Some presidential boards, committees, and commissions function organizationally as subunits of the White House Office.

White House Office of Faith-Based and Community Initiatives (2001-). Established in the Executive Office of the President by E.O. 13199 of January 29, 2001. The Office, among other responsibilities, develops, leads, and coordinates the Administration's policy agenda affecting faith-based and other community programs and initiatives, expands the role of such efforts in communities, and increases their capacity through executive action, legislation, federal and private funding, and regulatory relief.

Congressional Rules

House and Senate Rules of Procedure: A Comparison, RL30945 (April 16, 2008).

JUDY SCHNEIDER, CONGRESSIONAL RESEARCH SERV., HOUSE AND SENATE RULES OF PROCEDURE: A COMPARISON (2008), *available at* http://www.intelligencelaw.com/library/secondary/crs/pdf/RL30945_4-16-2008.pdf.

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Summary

More differences than similarities emerge when comparing selected House and Senate rules of procedure for referring legislation to committees, and for scheduling, raising and considering measures on the floor.

While the House uses four calendars (Union, House, Private, Discharge), the Senate only employs two calendars (Legislative and Executive). The House's system of special days for considering certain types of measures (e.g., "District Days") has no equivalent in the Senate.

In making scheduling decisions, the Speaker typically consults only with majority party leaders and selected Representatives whereas the Senate Majority Leader confers broadly with minority party leaders and interested Senators. The Speaker's dual position as leader of the majority party and the House's presiding officer gives him more authority to govern floor proceedings than the Senate's presiding officer. While debate time is always restricted in the House, individual Senators generally have the right to unlimited debate.

Most noncontroversial measures are approved by "suspension of the rules" in the House, and by unanimous consent in the Senate. Floor consideration of major bills is generally governed by "special rules" in the House, and by "complex unanimous consent agreements" in the Senate. The House typically meets in the Committee of the Whole to consider major legislation; no such committee exists in the Senate. The House considers and amends legislation in a more structured manner (e.g., by section or title) than the Senate. In addition, while germaneness of amendments is required in the House, it is mandated only in four instances in

the Senate. Rollcall votes can be requested at almost any time in the Senate, but only after completing a voice or division vote in the House.

Because the Senate often recesses instead of adjourning at the end of the day, Senate legislative days can continue for several calendar days. By contrast, the House routinely adjourns at the end of each legislative day.

Introduction

House and Senate rules of procedure are largely a function of the number of members comprising each chamber. In the House, a structured legislative process and strict adherence to the body's rules and precedents have resulted from the need to manage how 435 Representatives make decisions. By contrast, the Senate's smaller membership has brought about a less formal policy-making process and a more flexible approach to the chamber's standing rules. While individual Representatives must typically yield to the majority will of the House, the Senate usually accommodates the interests of individual Senators.

This report compares selected House and Senate rules of procedure for various stages of the legislative process: referral of legislation to committees; scheduling and calling up measures; and floor consideration. No attempt is made to present a comprehensive discussion of how both chambers operate.

Referral of Legislation

In both the House and Senate, the presiding officer (see "Presiding Officer and Recognition Practices" section) refers newly-introduced legislation and measures passed by the other chamber to the appropriate standing committee. Upon advice from the Parliamentarian, the presiding officer bases referral decisions on the chamber's rules and precedents for subject matter jurisdiction. Legislation passed by the other body usually receives floor consideration without reference to a committee if there already is a companion bill on a calendar (see discussion of calendars in next section).

The House changed its referral rule (Rule XII, clause 2) at the beginning of the 104th Congress. This change was aimed at reducing the number of measures referred to more than one committee, commonly called "multiple referrals." The rules change eliminated joint referrals, a type of multiple referral where a measure is simultaneously referred to two or more committees. Under the new rule, the Speaker designates "a committee of primary jurisdiction" (based on the committee jurisdictions itemized in Rule X) when referring measures to more than one committee. In practice, two types of multiple referrals can take place if the Speaker first selects a primary committee: a sequential referral (the measure is referred to one committee, then to another, and so on; the Speaker can establish time limits for each committee's consideration); and a split referral (specifically designated portions of a measure are referred to one or more committees). In the 108th Congress, House rules were changed to allow the

Speaker to not designate a primary committee "under exceptional circumstances."

House committees often develop "memorandums of understanding" (sometimes referred to as "letters of agreement") which explain an agreement between committees about how to divide jurisdiction over specific policy issues. These memorandums are sent to the Speaker in the form of letters from the involved committee chairmen, and are sometimes printed in the Congressional Record. The memorandums seek to advise the Speaker on referral decisions where committee jurisdictions are unclear or overlapping.

Under the Senate's referral rule (Rule XVII, paragraph 1), legislation is referred to "the committee which has jurisdiction over subject matter which predominates" in the measure (sometimes referred to as "predominant jurisdiction").[664] Senate Rule XXV lists the subjects for which the standing committees are responsible. Senate Rule XIV requires that measures be read twice on different legislative days (see "Adjournment and Legislative Days" section) before being referred to a committee. Most bills and joint resolutions, however, are considered as having been read twice and are referred to committee upon introduction. Under Rule XIV, when a Senator demands two readings and there is objection to the measure's second reading, the measure is placed directly on the Calendar of Business (see next section) without reference to committee.

Three types of multiple referrals — joint, sequential and split — are allowed in the Senate. In practice, measures are referred to multiple committees by unanimous consent. Under the Senate's standing rules (Rule XVII, paragraph 3), the Senate Majority and Minority Leaders can make a joint leadership motion to jointly or sequentially refer legislation to multiple committees. However, this rule has never been used since its adoption by the Senate in 1977. In general multiple referrals are more common in the House than in the Senate.

Scheduling and Raising Measures

Calendars

Measures reported from House committees (except for private measures) are referred to either the Union or House Calendar (Rule XIII, clause 1(a)). In general, the Union Calendar receives all measures which would be considered in the Committee of the Whole, such as tax, authorization, and appropriations measures. All other public bills and public resolutions are referred to the House Calendar (Rule XIII, clause 1(a)(2)). The House also maintains a Private Calendar

[664] Treaties and nominations submitted by the President also are referred to committees to be studied and reported. This report does not discuss procedures governing Senate consideration of treaties and nominations. See the discussion of these procedures in U.S. Congress, Senate, Riddick's Senate Procedure, S.Doc. No. 101-28, 101st Cong., 2nd sess. (Washington: GPO, 1992), 1608 p.

(Rule XIII, clause 1(a)(3); and Rule XV, clause 5) for measures of a private character affecting individual persons or entities, and a Calendar of Motions to Discharge Committees (Rule XIII, clause 1(b); and Rule XV, clause 2) from further consideration of particular measures (see "Legislation Blocked in Committee" section for a discussion of the discharge motion).

The Senate only has two calendars: the Calendar of Business (commonly called the "Legislative Calendar"), and the Executive Calendar. Nominations and treaties are referred to the Executive Calendar. Legislation reported from committee are referred to the Calendar of Business, or placed on this calendar by unanimous consent. As discussed earlier, Rule XIV provides a procedure for placing measures on the Calendar of Business without reference to committee.

A measure commonly becomes eligible for floor consideration in both chambers once it has been placed on a calendar. The calendar number assigned to a measure indicates the chronological order the measure was placed on the calendar, not the order for floor consideration.

Calling Up Measures

The scheduling of legislation for House floor action is the fundamental prerogative of the Speaker. Individual Representatives cannot easily circumvent, influence, or reverse leadership decisions about which measures should come to the floor. The most significant and controversial measures are usually made in order for floor consideration by a "special rule" passed by a majority vote of the House (see next section). Less controversial measures are often raised under the "suspension of the rules" procedure (Rule XV, clause 1) every Monday, Tuesday, and Wednesday and during the last six days of a session. On these "suspension days"(and at other times by unanimous consent or by special rule), the Speaker may recognize a Member to move to suspend the rules and pass a measure. A suspension motion must be approved by two-thirds of those present and voting. The House may also agree to take up a measure by unanimous consent, but does so much less frequently than the Senate.

House rules set aside specific days of the month when bills from the Private Calendar (always the first Tuesday, Rule XV, clause 5(a); also, the third Tuesday, Rule XV, clause 5(b)(1), at the Speaker's discretion) can be brought up for floor consideration. Legislation involving the District of Columbia can be raised on the second and fourth Mondays of each month (Rule XV, clause 4) sometimes referred to as "District Days." The Calendar Wednesday procedure (Rule XV, clause 6) reserves Wednesdays for the "call of committees," during which time committees can raise reported bills that have not been granted a special rule or otherwise made privileged for floor action. In today's House, Calendar Wednesday is usually dispensed with by unanimous consent. All these procedures require a simple majority for passage, except for correction measures which require a three-fifths vote. Certain "privileged" measures reported by the committees on Appropriations, Budget, House Administration, Rules, and

Standards of Official Conduct can be called up at any time under House Rule XIII, clause 5(a). Rules governing privileged reports by the Committee on Rules are detailed under Rule XIII, clause 6.

The Senate Majority Leader has the authority to raise measures for Senate floor consideration. Most measures reach the Senate floor either by a simple unanimous consent request, or under a complex unanimous consent agreement (described in next section). The Majority Leader also can offer a debatable motion to proceed to the consideration of a measure. Before scheduling measures for floor action, the Majority Leader consults with the Minority Leader, appropriate committee chairmen, and individual Senators who have notified him of their interest in specific measures. Consultation with individual Senators is necessary because most measures are raised by unanimous consent.

A Senator or group of Senators can place a "hold" on the bringing up of measures. "Holds" are an informal custom in the Senate. Early in the 106th Congress, Senate Majority Leader Lott and Minority Leader Tom Daschle announced that all Senators, who wished to place a hold on any measure, must notify the sponsor and the committee of jurisdiction of their intentions before providing such notice in writing to the respective party leader.

Special Rules vs. Complex Unanimous Consent Agreements

"Special rules" establish the parliamentary conditions governing House floor consideration of most major measures. The House Rules Committee reports a special rule (often referred to as a "rule") in the form of a simple resolution. The typical special rule provides a specific amount of time for general debate and determines whether or not amendments are in order. A rule may limit debate on specific amendments and waive points of order against specific provisions or amendments. Because special rules are "privileged" for floor consideration under Rule XIII, clause 6, they can be called up, debated, and voted upon at any time. Special rules must be agreed to by a majority vote of the House.

According to House precedents, the Rules Committee can report a special rule for a bill that is pending before a committee. The effect of this rarely-used authority is to discharge the bill from the committee. Conversely, Representatives can move to discharge the Rules Committee from considering a special rule after it has been before the committee for seven legislative days (see "Legislation Blocked in Committee" section for a discussion of the discharge motion).[665] The Calendar

[665] Special rules are usually reported as original measures by the Rules Committee. Therefore, to attempt to discharge a special rule from this committee, a Representative must first introduce a special rule in the form of a simple resolution (the resolution cannot provide for the consideration of more than one bill or resolution). The Representative can move to discharge this resolution from the Rules Committee after seven legislative days have passed.

Wednesday procedure (see previous section) allows committees to call up measures they have reported, but which have not been granted a special rule.

In the Senate, complex unanimous consent agreements specify the parliamentary conditions governing floor consideration of major measures.[666] These agreements (sometimes referred to as "time agreements") can limit debate time, structure the amendment process, and waive points of order against specific provisions or amendments. The agreements are negotiated by the Majority Leader, in consultation with the Minority Leader, committee chairmen, and interested Senators. These negotiations are conducted in private meetings or, less frequently, on the Senate floor. A unanimous consent agreement must be accepted by all Senators on the floor when the Majority Leader or his designee formally offers the agreement. The objection of one Senator prevents the agreement from taking effect. An individual Senator can then request the leadership to modify the unanimous consent agreement to accommodate his or her concerns. Complex unanimous consent agreements are printed in the Senate's daily "Calendar of Business," and in the Congressional Record.

Legislation Blocked in Committee

Both chambers have procedures for calling up measures that have not been reported by a committee. In deference to each committee's right to consider legislation, Representatives and Senators are generally reluctant to employ these procedures.

Members of the House may offer a motion to discharge a committee from considering a measure 30 days after the measure was referred to the committee (7 days for resolutions before the Rules Committee). If 218 Members then sign a discharge petition, the discharge motion is placed on the Discharge Calendar and can be called up on the second or fourth Mondays of each month. If the motion is adopted, a motion to call up the underlying measure for immediate consideration can then be offered. Most discharge motions do not attract the required 218 signatures, and few have been adopted since the discharge rule's (Rule XV, clause 2) inception. Nevertheless, the act of filing a discharge petition, or threatening to do so, is sometimes used to prompt committee action on measures. The motion to suspend the rules and pass a measure is another procedure for raising unreported measures, but is rarely done over the objection of the relevant committee chairman. As discussed earlier, the two-thirds vote required for approving suspension motions means they are generally employed to call up noncontroversial measures.

[666] Simple unanimous consent agreements, which are offered orally, are used for noncontroversial measures and routine floor business (e.g., to "rescind" a quorum call).

It is easier to circumvent committees in the Senate than in the House, primarily because Senators generally have the right to offer non-germane amendments (commonly known as "riders") to measures being considered on the floor.[667] For example, a Senator could offer an amendment containing the text of a bill blocked in committee. A Senator also could use Rule XIV (discussed earlier) to bypass a committee that has not reported a particular measure. In this situation, the Senator would reintroduce the bill, demand two readings, and then object to the second reading. Under Rule XIV, the measure would be placed directly on the Calendar of Business. Other Senate procedures for bypassing committees, such as the motion to discharge a committee and the motion to suspend the rules, are employed so infrequently they are not discussed here. Senate committees are sometimes discharged by unanimous consent.

Floor Consideration

Presiding Officer and Recognition Practices

The Speaker of the House is both the leader of the majority party and the chamber's presiding officer. In this dual position, the Speaker uses his parliamentary and political powers to govern House floor proceedings. He has the discretionary power to recognize, or not recognize, Members to speak. When a Representative seeks recognition, the Speaker will frequently ask: "For what purpose does the Gentleman (Gentlewoman) rise?" The Speaker does so in order to determine what business the Member wants to conduct. If the business does not have precedence (e.g., a special order speech), the Speaker can usually deny recognition. The Speaker does adhere to some established House practices of recognition, such as giving Members of the committee reporting a bill priority recognition for offering floor amendments.

A Speaker has the right to vote and to debate from the floor, if he wishes. The extent to which this right is exercised varies from Speaker to Speaker. The Speaker presides over House floor proceedings,[668] but not over meetings of the Committee of the Whole (formally, the Committee of the Whole House on the State of the Union). He appoints a majority party Representative to preside as chairman of the Committee of the Whole. The House resolves into the Committee of the Whole, a committee to which all Members belong, to consider measures that will be amended (see "Amending Measures" section). A non-partisan Parliamentarian, an officer of the House, is always present to advise the presiding officer on rulings and precedents.

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[667] There are four instances when germaneness of amendments is required in the Senate. See the "Amending Measures" section for more information.

[668] In his absence, the Speaker appoints a majority party Representative to preside over meetings of the House as "Speaker pro tempore."

The Vice President of the United States is the Senate's official presiding officer (formally, "President of the Senate"), as provided in Article I of the Constitution. The Constitution also requires that a "President pro tempore" preside over the Senate in the Vice President's absence. The President pro tempore, in modern times the most senior Senator of the majority party, is elected by a majority vote of the Senate. In practice, the Vice President and the President pro tempore seldom preside over Senate proceedings. The Vice President typically presides when he might be required to break a tie vote on an important administration priority. Most of the time, the President pro tempore exercises his right under the Senate's standing rules (Rule 1) to appoint a Senator as "Acting President pro tempore." This senator, in turn, can appoint another Senator to serve as Acting President pro tempore. As a result, the duties of presiding officer are routinely filled by a rotation of junior and first-term Senators of the majority party who preside for approximately one hour at a time.

Since the Senate's official presiding officer is not a member of the body, the presiding officer position does not have the same powers to control floor proceedings as those held by the Speaker of the House. The Senate's presiding officer may speak only if granted permission to do so by the unanimous consent of the membership, and he may vote (as noted above) only to break a tie.[669] He also must recognize the first Senator standing and seeking recognition. When several Senators seek recognition at the same time, the Senate's precedents give preferential recognition to the Majority and Minority Leaders, and the majority and minority floor managers, in that order. The Senate's presiding officer never interrogates Senators about their purpose for seeking recognition. A non-partisan Senate Parliamentarian is always present to advise on rulings and precedents.

Appealing Rulings of the Chair

By House tradition, the presiding officer's rulings on points of order raised by Members are seldom appealed. As a result, the House has a relatively large and consistent body of precedents based on rulings of the chair. If the chair's ruling is appealed, the full House decides by majority vote whether to sustain or overrule this ruling. Because this vote is viewed as a serious test of the chair's authority, it is typically settled along party lines, with the majority sustaining the chair. In contrast to the Senate, there are only a few situations when the House's presiding officer does not rule on points of order.[670]

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[669] The Vice President may vote to break a tie; a Senator serving as presiding officer retains his right to vote in all cases.

[670] For example, the chair does not rule on points of order established under the Unfunded Mandates Reform Act of 1995 (P.L. 104-4).

In the Senate, the presiding officer's rulings on points of order raised by Senators are frequently appealed. The full Senate votes on whether to sustain or overrule the ruling. Under Rule XX, the presiding officer has the option of submitting any question of order to the full Senate for a majority vote decision. He is required to submit questions of order that raise constitutional issues, and those concerning the germaneness or relevancy of amendments to appropriations bills, to the full Senate. Senate votes on appealed rulings of the chair, and on points of order submitted to the full body, often turn on the political concerns of the moment rather than on established Senate practices and procedures. As a result, the Senate has a smaller and less consistent body of precedents than does the House. Yet, because the Senate usually operates informally, it is a more precedent- than rule-regulated institution.

Debate Time Restrictions

House debate nearly always takes place under some form of time restriction. There is the "one-hour" rule for debate in the House (Rule XVII, clause 2), and the "five-minute" rule during the amendment process in the Committee of the Whole (Rule XVIII, clause 5(a)). Debate is limited to forty minutes for bills considered under the suspension of the rules procedure. Special rules can impose time restrictions on debate, and rule-making provisions in statutes often limit debate on certain types of measures such as budget resolutions.

Time restrictions make it difficult for individual Representatives to get debate time on the floor. When Members are accorded debate time, they rarely receive more than two to five minutes. Representatives can be recognized to speak for up to five minutes during the "morning hour" debates before legislative business commences on Mondays and Tuesdays, for "one-minute" speeches (at the Speaker's discretion and usually at the beginning of the legislative session), and for "special order" speeches of a specified length (ordinarily at the end of the day).

In the Senate, individual Senators have the right to unlimited debate. Senators also can seek unanimous consent to speak out of turn on another subject, or to interrupt proceedings with an unrelated matter. Unanimous consent is usually granted. Senators may use their right to extended debate and employ other parliamentary maneuvers to delay floor action, a tactic known as a "filibuster." The threat of a filibuster, particularly at the end of a session or near a scheduled recess, can be used to try to extract concessions from the Senate leadership.

To be sure, it would be impossible for the Senate to act on legislation in a timely fashion if Senators always exercised their right to extended debate. For this reason, the Senate often agrees to debate restrictions as set forth in complex unanimous consent agreements. Floor debate on certain types of measures, such as budget resolutions, is often limited by rule-making provisions in statutes, as is the case in the House.

Ending Debate

Representatives can offer a motion for the previous question to end debate in the House (Rule XIX, clause 1(a)). Adoption of this motion by a majority vote ends debate on the pending question, prevents the offering of any further motions and amendments, and brings about an immediate vote on approving the pending question. This motion cannot be offered when the House meets in the Committee of the Whole.

In the Committee of the Whole, Representatives may offer a motion to close or limit debate on the pending question (Rule XVIII, clause 8). The motion may propose to end debate immediately or when a specified time expires. Adoption of this motion by a majority vote only closes or limits debate on the pending question; it does not preclude Members from offering additional motions or amendments (although they may be precluded from debating them) and does not produce an immediate vote on the pending question. Members also may ask unanimous consent to end debate on pending amendments in Committee of the Whole. When a special rule establishes time limitations on general debate or on the debate of specific amendments, debate ends when these time limitations expire.

Senate debate usually ends when a Senator yields the floor and no other Senator seeks recognition, or when a previously-established time limitation (e.g., in a complex unanimous consent agreement or a rule-making statute) expires. The Senate's adoption of a motion to table by majority vote will end debate on a pending measure, motion, or amendment. The practical effect of adopting this motion, however, is to reject the pending question. The Senate can only resume consideration of the tabled matter by unanimous consent. Usage of the motion to table is generally reserved for cases when the Senate is prepared to reject the pending question.

A cloture motion signed by 16 Senators can be filed to end extended debate on a measure, motion, or amendment. This motion is filed when informal negotiations cannot end a filibuster (discussed in previous section). Once the cloture motion is adopted by three-fifths of the Senate, debate can only continue for a maximum of 30 more hours (called the "post-cloture" period). At the end of the post-cloture period, debate time expires or has been yielded back, and the Senate votes on the underlying matter.

Amending Measures

The House typically meets in the Committee of the Whole to consider legislation that will be amended. The House resolves itself into the Committee of the Whole by a motion of the majority floor manager, or pursuant to the provisions of a special rule. The rules of the Committee of the Whole expedite floor consideration of measures. Consideration begins with a designated period of time for general debate, followed by the offering of amendments. Legislation is

amended in an orderly fashion (i.e., by section or paragraph, or under the terms specified in a special rule). Members can only offer amendments to the part of the bill that has been read, or designated, for amendments. Any deviation from this orderly sequence requires unanimous consent or a provision in a special rule. Amendments must always be germane, unless a special rule permits the offering of specified, non-germane amendments.

The principles governing the order of voting on amendments in the Committee of the Whole are graphically displayed in one "basic amendment tree."[671] When the Committee of the Whole approves amendments, it does not actually amend the bill's text. The Committee of the Whole, similar to a House standing committee, reports the measure back to the House with the amendment[s] it adopted. Such amendment[s] must then be approved by the full House.

The Senate (the chamber does not have a Committee of the Whole) considers and amends legislation in a less structured manner than the House. As a result, the sequence and duration of floor consideration is less predictable in the Senate. When recognized, Senators can decide whether they wish to debate the bill in general or offer an amendment. Amendments to the bill may be proposed in any order. At times, the Senate agrees to a complex unanimous consent agreement that allows only specific amendments to be offered and limits the time for debate on each amendment. However, even under unanimous consent arrangements, it is rare for the Senate to impose a specific sequence for debate and amendment. Four amendment trees depict the principles of precedence for offering and voting upon amendments in the Senate.[672]

Germaneness of amendments is not required in the Senate, except in four specific instances: 1) if a unanimous consent agreement so requires; 2) in the post-cloture period (see previous section); 3) if a rule-making provision in a statute so requires (e.g., provisions of the Congressional Budget and Impoundment Act of 1974 governing consideration of budget resolutions and reconciliation bills); and 4) if the underlying measure is a general appropriations bill.

Quorum Calls

The Constitution requires that a quorum — a simple majority of the membership — be present for the House (218) and the Senate (51) to conduct business. When the House meets in the Committee of the Whole, a quorum of 100 Members is required. Both chambers typically assume that a quorum is present unless it can be demonstrated otherwise.

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[671] See House Practice: A Guide to Rules, Precedents and Procedures of the House, 108th Cong., 1st sess. (Washington: GPO, 2003), pp. 27-31.

[672] See Riddick's Senate Procedure, pp. 72-95.

The rules of the House restrict when Members can make a point of order that a quorum is not present in the House or in the Committee of the Whole. This point of order is generally permitted only in connection with record votes. In recent years, House quorum calls have typically lasted 15-17 minutes.

Senate quorum calls are in order at almost any time. Quorum calls made for the purpose of obtaining the presence of a majority of Senators are called "live quorums." More commonly, however, a Senator will "suggest the absence of a quorum" for purposes of constructive delay. This type of quorum suspends action on the Senate floor without requiring the Senate to recess or adjourn. This pause in floor action provides time for informal negotiations to take place, and for absent Senators to reach the floor. The Clerk slowly calls the roll until a Senator asks unanimous consent to "rescind," or dispense with, the quorum call. There is no time limit on this type of quorum call.

Voting Procedures

The House and Senate each have three main types of votes: voice, division, and record. Record votes include all those in which the names of Members voting on each side are individually recorded, and the cumulative totals of yeas and nays are compiled. The Senate refers to record votes as "yea and nay votes" or "rollcall votes;" in the House, record votes include both "yea and nay votes" and recorded votes."

In each house, most questions are first put to a voice vote. For voice votes, the chair first asks those in favor to respond "Aye," and then those in opposition to respond "No" (House Rule I, clause 6)[673]. The chair then announces which side has prevailed. Before he or she does so, a Member may ask for a division or record vote. For division votes (also called "standing votes"), those in favor stand up and are counted by the chair, followed by those in opposition. The chair then announces the result (House Rule XX, clause 1(a)). Division votes in the Senate are rare, they are sometimes taken by Senators raising their hands instead of rising, and the chair does not announce the number voting on each side.

The two chambers differ in their conduct of record votes. After a voice or division vote has taken place in the House, but before the final result had been announced, Representatives can demand either a "yea and nay vote" or a "recorded vote," except that a yea and nay vote may not be demanded in Committee of the Whole. The demand for a yea and nay vote must be supported by one-fifth of those present, or the vote may be ordered automatically if a Member objects to a pending vote on the ground that a quorum is not present. The demand for a recorded vote must be supported by one-fifth of a quorum in

[673] No Senate rule explicitly governs voice or division votes. Also counted as a voice vote is Senate action on which the chair declares a measure agreed to "without objection."

the House (a minimum of 44 Members), or by 25 Members in Committee of the Whole (House Rule XX, clauses 1(b), 6(a); Constitution, Article I, section 5).

Record votes in the House normally take place by electronic device. Members vote with electronic voting cards and their votes are displayed on an electronic board in the chamber. While a vote is taking place, Members preparing to vote often look at the electronic board to see how other Members voted. The majority and minority party floor whips also use their board to carry out their vote-counting responsibilities. House rules (Rule XX, clauses 2(a), 9) require a minimum 15-minute voting period for record votes, except that in specified situations (e.g., when a record vote immediately follows a quorum call in the Committee of the Whole) the presiding officer may reduce the time to not less than five minutes. The voting period may also be extended at the discretion of the chair. The chair also has the authority to postpone and cluster certain votes, such as those ordered on motions to suspend the rules (Rule XX, clause 10).

The Senate does not use an electronic voting system to conduct rollcall votes. Under Rule XII, the Clerk calls the names of all Senators in alphabetical order (formally, "calls the roll"). Senators come to "the well" of the Senate to vote, and the Clerk announces how each Senator voted.[674] Senators can track how colleagues have voted by checking the tallies kept by majority and minority floor staff. A Senator's demand for a rollcall vote must be supported by a minimum of 11 senators, which is one-fifth of the minimal quorum for doing business (51). In general, this requirement is casually enforced. A 15-minute period for rollcall votes is usually established in a unanimous consent agreement adopted on the opening day of a new session of Congress. The party floor leaders can extend this voting time period at their discretion.

Senators can, and usually do, ask for a rollcall vote at any time a question is pending before the Senate. They do not have to wait for a voice or division vote to first take place. For example, a Senator offering an amendment can ask for a rollcall vote even before debate on the amendment begins. When this happens, the yeas and nays are ordered after the Clerk confirms that a sufficient second supports the request. The ordering of the yeas and nays does not bring about an immediate vote. In fact, most roll call votes in the Senate do not take place immediately upon being ordered.

Adjournment and Legislative Days

The House routinely adjourns at the end of a day's proceedings. As a result, the House's calendar days and legislative days are almost always the same. The

[674] Under a standing order (rarely enforced), any Senator may demand that Senators vote from their desks.

exceptions are when the House is in session past midnight and in a rare procedural situations.

The motion to adjourn in the Senate ends the day's proceedings and creates a new legislative day when the chamber next convenes. A motion to recess, however, keeps the Senate in the same legislative day. This means that a legislative day in the Senate can continue for many calendar days. At times, there are procedural advantages for the Majority Leader to keep the Senate operating in the same legislative day. In doing so, he avoids having to conduct some routine business required on new legislative days. Senators might otherwise use this routine business for purposes of delay. At other times, there may be procedural advantages for the Majority Leader to create a new legislative day by adjourning. At the beginning of a new legislative day the motion to proceed to consider a measure is non-debatable. This motion is fully debatable at any other time, thus creating an opportunity for a filibuster.

Judicial Rules

Promulgating Procedural Rules For the United States District Courts and Courts of Appeals, 98-292 (March 26, 1998).

P. L. MORGAN, CONGRESSIONAL RESEARCH SERV., PROMULGATING PROCEDURAL RULES FOR THE UNITED STATES DISTRICT COURTS AND COURTS OF APPEALS (1998), *available at* http://www.intelligencelaw.com/library/secondary/crs/pdf/98-292_3-26-1998.pdf.

98-292 A
March 26, 1998

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Summary

By rules enabling acts, Congress has authorized federal courts to promulgate rules of procedure, but it has generally reserved the right to review proposed rules before they become effective. On occasion, the Legislature has amended the changes submitted and it has also, sua sponte, made amendments through legislation. This report sketches the manner in which procedural rules for United States district courts and United States courts of appeals are adopted or modified and the participants in the process. This report will be updated if changes take place in the way procedural rules are promulgated for the federal courts.

Introduction

All courts created by Act of Congress have been given the power to prescribe rules for the conduct of their business, after giving public notice and allowing time for comment, so long as the rules are consistent with Acts of Congress and procedural rules promulgated by the Supreme Court.[675] District court rules so

[675] 28 U.S.C. § 2071. Also, the U. S. Court of Military Appeals has been specifically authorized to promulgate its own rules of procedure, 10 U.S.C. § 944, as has the U. S. Tax Court, 26 U.S.C. § 7453 (with exceptions), the U.S. Court of Federal Claims, 28 U.S.C. § 2503, and the U. S. Court of Veterans Appeals, 38 U.S.C. § 7264. The territorial courts, with a hybrid U.S. local jurisdiction, use federal rules of procedure where appropriate. See generally 48 U.S.C. §§ 1424 through 1424-4 (District Court of Guam), 48 U.S.C. §§ 1611 through 1614 (District Court of Virgin Islands), and 48 U.S.C. §§ 1821 through 1824 (District Court for the Northern Mariana Islands). The District of Columbia Court of Appeals conducts its business according to the Federal Rules of Appellate Procedure, which it may modify, 11 D.C. Code § 743, and the District of Columbia Superior Court conducts its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure which it may modify with the approval of the D.C. Court of Appeals. Rules

made may be modified or abrogated by circuit judicial councils,[676] while the Judicial Conference of the United States[677] may modify or abrogate rules prescribed by courts other than the Supreme Court.[678]

For more than 65 years, by virtue of the authority granted in several enabling acts, Congress has authorized the Supreme Court of the United States to promulgate rules of procedure for the federal district courts and courts of appeals. [679] It has provided that "[s]uch rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."[680] The long standing practice of having committees of the Judicial Conference review proposed rule changes has been statutorily recognized albeit with a requirement that the meetings generally be open to the public.[681] The committees are composed of

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which do not modify the federal rules may be adopted by the Superior Court without the approval of the Court of Appeals. 11 D.C. Code § 946.

[676] Each judicial circuit has a circuit council consisting of the chief judge, who presides, and an equal number of circuit and district judges of the circuit as determined by vote of all judges in the circuit. The council's principal statutory duties are to: make necessary and appropriate orders for the effective and expeditious administration of justice within the circuit; make or amend general orders relating to practice and procedure within the circuit; periodically review rules promulgated by the circuit's district courts and amend or abrogate the rules as necessary; and to appoint, and assign duties to, a circuit executive who shall be subject to supervision by the chief judge of the circuit.

[677] The Conference, established in 1922, is the policy making body of the federal judiciary with the Chief Justice as its chairman and membership composed of the chief judge of each circuit, the chief judge of the Court of International Trade, and a district judge from each circuit. 28 U.S.C. § 331. Its principal statutory duties are to: survey conditions of business in the federal courts so judges may be reassigned according to need; submit suggestions to the federal courts for purposes of uniformity and expedition of business; and to conduct a continuous study of federal judicial practices and procedure for the improvement of the administration of justice. Id.

[678] 28 U.S.C. § 2071.

[679] Beginning with the Act of February 24, 1933 [procedure after verdict], Congress authorized the Court to promulgate rules of procedure. Other authorizing Acts were those of: June 19, 1934 [rules of civil procedure]; June 29, 1940 [procedure to and including verdict]; October 9, 1940 [procedure for and appeal from trial by U.S. magistrates]; October 3, 1964 [bankruptcy rules]; and January 2, 1975 [rules of evidence]. Except for the authority to promulgate the bankruptcy rules, these various authorities were combined into one statute, 28 U.S.C. § 2072, by Pub. L. 100-702, Act of November 19, 1988, 102 Stat. 4648, eff. December 1988. Authority to promulgate bankruptcy rules remains in a separate statute, 28 U.S.C. § 2075.

[680] 28 U.S.C. § 2072.

[681] Pub. L. 100-702, Act of November 19, 1988, codified at 28 U.S.C. § 2073. There had been instances where rules had been promulgated with little or no notice to the bar or public. See David D. Siegel, Commentary: The Method for Prescribing the General Rules, following 28 U.S.C.A. § 2073 (1994).

"members of the bench and the professional bar, and trial and appellate judges."[682]

The amendatory process begins with a suggestion for a change, addition or deletion to the rules made, in writing, to the Secretary of the Judicial Conference. The suggestion is then forwarded to the Chair of the Standing Committee on Rules of Practice and Procedure and the Chair of the appropriate advisory committee of which there are five one each for appellate rules, bankruptcy rules, civil rules, criminal rules, and evidence rules. If the advisory committee finds that the proposal is important enough to merit changing the rules, a draft of the change is made and, with permission of the Standing Committee, is published for comment and mailed to, inter alia, the bench and bar, legal publishers, and government agencies. During a six month comment period, the advisory committee schedules one or more public hearings on the proposed amendment. After the hearings, the advisory committee again considers the proposal in light of the public comments. If approved, the amendment, along with a report summarizing the public comments and any minority views of the committee, is forwarded to the Standing Committee on Rules of Practice and Procedure. If accepted by that body, the proposal is forwarded to the Judicial Conference for approval. The Conference normally considers changes to the rules in September and if ratified, the proposed rule amendment is forwarded to the Supreme Court for transmittal to Congress.[683]

When a new or amended rule is proposed, the Supreme Court must transmit it to Congress not later than May 1 of the year in which it is to become effective. The rule shall take effect no earlier than December 1 of the year in which it is transmitted unless otherwise provided by law. Generally, the Supreme Court may fix the extent to which the rule shall apply to pending proceedings.[684] Rules creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.[685]

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[682] 28 U.S.C. § 2073.

[683] See generally Administrative Office of the U.S. Courts, The Federal Rules of Practice and Procedure: A Summary for the Bench and Bar (Brochure, October 1993).

[684] 28 U.S.C. § 2074(a).

[685] 28 U.S.C. § 2074(b). This provision was added as a floor amendment to the then-proposed Federal Rules of Evidence. It was argued that:" [e]videntiary privileges are not simple legal technicalities, they involve extraordinarily important social objectives. They are truly legislative in nature. ... I think that the importance of privileges requires Congress to act affirmatively and not to delegate power to the Supreme Court to legislate in this area. To give you one example, I think it would be incredible if that after months and months of controversy and argument, we in the Congress enacted a newspaperman's privilege and then the Supreme Court passed a rule modifying that law ... ." 120 Cong. Rec. 2391 (1974) (Statement of Rep. Holtzman).

The Supreme Court may prescribe general bankruptcy rules of procedure but such rules may not abridge, enlarge, or modify any substantive right.[686] "Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported."[687]

Congress acquiesced in the rules proposed by the Supreme Court until 1973 when the long-awaited, controversial, Federal Rules of Evidence (FRE) were submitted by the Chief Justice along with proposed amendments to the Federal Rules of Criminal Procedure (FRCrP) and to the Federal Rules of Civil Procedure (FRCP).[688] Those rules changes, delayed to allow additional time for review,[689] were later amended and approved by Congress.[690] Since that time, on several occasions, Congress has delayed or amended rules changes submitted by the Supreme Court and has, sua sponte, amended the FRE, the FRCrP, and the FRCP, as well as the Federal Rules of Appellate Procedure (FRAP), legislatively.[691]

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[686] 28 U.S.C. § 2075.

[687] Id.

[688] 119 Cong. Rec. 3247 (1973).

[689] Pub. L. 93-12, Act of March 30, 1973.

[690] Pub. L. 93-595, Act of January 2, 1975.

[691] E.g., Pub. L. 94-64, Act of July 31, 1975, added FRCrP Rules 12.1, 12.2, and 29.1; Pub. L. 95-540, Act of October 28, 1978 added FRE Rule 412; Pub. L. 96-481, Act of October 21, 1980, repealed FRCP Rule 37(f); Pub. L. 98-473, Act of October 12, 1984, amended FRAP Rule 9(c), FRE Rule 704, and several FRCrP Rules; Pub. L. 100-690 amended FRCP Rule 35, FRAP Rule 4(b), FRE Rules 412, 615, 804(a)(5), and 1101(a), FRCrP Rules 11(c)(1) and 54(c), and added FRCrP Rule 12.3; Pub. L. 103-322, Act of September 13, 1994, added FRE Rules 413 to 415; Pub. L. 104-132, Act of April 24, 1996, amended FRCrP Rule 32(b).

SOURCES OF INTERNATIONAL LAW

Treaties and Other International Agreements

International Law and Agreements: Their Effect Upon U.S. Law, RL32528 (January 26, 2010)

MICHAEL JOHN GARCIA, CONGRESSIONAL RESEARCH SERV., INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW (2010), *available at* http://www.intelligencelaw.com/library/secondary/crs/pdf/RL32528_1-26-2010.pdf.

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Summary

This report provides an introduction to the roles that international law and agreements play in the United States. International law is derived from two primary sources—international agreements and customary practice. Under the U.S. legal system, international agreements can be entered into by means of a treaty or an executive agreement. The Constitution allocates primary responsibility for entering into such agreements to the executive branch, but Congress also plays an essential role. First, in order for a treaty (but not an executive agreement) to become binding upon the United States, the Senate must provide its advice and consent to treaty ratification by a two-thirds majority. Secondly, Congress may authorize congressional-executive agreements. Thirdly, many treaties and executive agreements are not self-executing, meaning that implementing legislation is required to provide U.S. bodies with the domestic legal authority necessary to enforce and comply with an international agreement's provisions.

The status of an international agreement within the United States depends on a variety of factors. Self-executing treaties have a status equal to federal statute, superior to state law, and inferior to the Constitution. Depending upon the nature of executive agreements, they may or may not have a status equal to federal statute. In any case, self-executing executive agreements have a status that is superior to state law and inferior to the Constitution. Treaties or executive agreements that are not self-executing have been understood by the courts to have limited status domestically; rather, the legislation or regulations implementing these agreements are controlling domestically.

The effects of the second source of international law, customary international practice, upon the United States are more ambiguous and controversial. While

there is some Supreme Court jurisprudence finding that customary international law is part of U.S. law, conflicting U.S. statutes remain controlling. Customary international law is most clearly recognized under U.S. law via the Alien Tort Statute (ATS), which establishes federal court jurisdiction over tort claims brought by aliens for violations of "the law of nations."

Recently, there has been some controversy concerning references made by U.S. courts to foreign laws or jurisprudence when interpreting domestic statutes or constitutional requirements. Historically, U.S. courts have on occasion looked to foreign jurisprudence for persuasive value, particularly when the interpretation of an international agreement is at issue, but foreign jurisprudence never appears to have been treated as binding. Though U.S. courts will likely continue to refer to foreign jurisprudence, where, when, and how significantly they will rely upon it is difficult to predict.

Introduction

International law consists of "rules and principles of general application dealing with the conduct of [S]tates and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical."[692] Rules of international law can be established in three main ways: (1) by international, formal agreement, usually between states (i.e., countries), (2) in the form of international custom, and (3) by derivation of principles common to major world legal systems.[693]

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[692] RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 101 (1987). Recorded international law dates back to agreements between Mesopotamian rulers five thousand years ago, but international law as we understand it began with the Roman Empire, whose scholars formulated a jus gentium (law of nations) they believed universally derivable through reason. See generally DAVID J. BEDERMAN, INTERNATIONAL LAW IN ANTIQUITY (2001). The term "international law" appears to have been coined by Jeremy Bentham in 1789. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 326 n. 1 (Hafner Publ'g Co. 1948) (1789). Although originally governing State-to-State relations, the scope of international law has grown, beginning in the latter half of the 20th century with the emerging fields of human rights law and international criminal law, to regulate the treatment and conduct of individuals in certain circumstances. See, e.g., Universal Declaration on Human Rights, UN GAOR, Supp. No. 16, UN Doc. A/6316 (1948); Geneva Convention (Third) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (Fourth) Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 3rd Comm., 21st Sess., 1496th plen. mtg., U.N. Doc. A/RES/2200A (XXI) (1966). See also U.S. State Dept. Pub. No. 3080, REPORT OF ROBERT H. JACKSON, INTERNATIONAL CONFERENCE ON MILITARY TRIALS 437 (1949) (arguing that crimes against humanity were "implicitly" in violation of international law even before Nuremberg).

[693] RESTATEMENT, supra footnote 1, § 102.

Since its inception, the United States has understood international legal commitments to be binding upon it both internationally and domestically.[694] The United States assumes international obligations most frequently when it makes agreements with other states or international bodies that are intended to be legally binding upon the parties involved. Such legal agreements are made through treaty or executive agreement. The U.S. Constitution allocates primary responsibility for such agreements to the executive, but Congress also plays an essential role. First, in order for a treaty (but not an executive agreement) to become binding upon the United States, the Senate must provide its advice and consent to treaty ratification by a two-thirds majority.[695] Secondly, Congress may authorize congressional-executive agreements. Thirdly, in order to have domestic, judicially enforceable legal effect, the provisions of many treaties and executive agreements may require implementing legislation that provides U.S. bodies with the authority necessary to enforce and comply with an international agreement's provisions.[696]

The effects of customary international law and the law of foreign states (foreign law) upon the United States are more ambiguous and sometimes controversial. There is some Supreme Court jurisprudence finding that customary international law is incorporated into domestic law, but this incorporation is only to the extent that "there is no treaty, and no controlling executive or legislative act or judicial decision" in conflict.[697] Though foreign law and practice have long been seen as

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[694] See, e.g., Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) ("[w]hen the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement"); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) ("the United States had, by taking a place among the nations of the earth, become amenable to the law of nations"); see also Letter from Thomas Jefferson, Secretary of State, to M. Genet, French Minister (June 5, 1793) (construing the law of nations as an "integral part" of domestic law).

[695] U.S. CONST. art. II, § 2 (providing that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur").

[696] See, e.g., Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1828) (Marshall, C.J.) (finding that international agreements entered into by the United States are "to be regarded in courts of justice as equivalent to an act of the legislature, wherever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the [agreement] addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court"), overruled on other grounds by United States v. Percheman, 7 Pet. 51, 8 L.Ed. 604 (1833). CONGRESSIONAL RESEARCH SERVICE, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, A STUDY PREPARED FOR THE SENATE COMM. ON FOREIGN RELATIONS 4 (Comm. Print 2001); RESTATEMENT, supra footnote 1, § 111(3).

[697] The Paquete Habana, 175 U.S. 677, 700 (1900). See also, e.g., United States v. Yousef, 327 F.3d 56 (2nd Cir. 2003); Galo-Garcia v. I.N.S., 86 F.3d 916 (9th Cir. 1996) ("where a controlling executive or legislative act ... exist[s], customary international law is inapplicable"); Committee of

persuasive by American courts as evidence of customary norms, their use in certain regards (particularly with respect to interpreting the Constitution) has prompted some criticism by a number of lawmakers and scholars. This report provides an introduction to the role that international law and agreements play in the United States.

Forms of International Agreements

The United States regularly enters into international legal agreements with other states or international organizations that are legally binding as a matter of international law. Under U.S. law, legally binding international agreements may take the form of treaties or executive agreements. In this regard, it is important to distinguish "treaty" in the context of international law, in which "treaty" and "international agreement" are synonymous terms for all binding agreements,[698] and "treaty" in the context of domestic American law, in which "treaty" may more narrowly refer to a particular subcategory of binding international agreements.[699]

Treaties

Under U.S. law, a treaty is an agreement negotiated and signed[700] by the executive branch that enters into force if it is approved by a two-thirds majority of the Senate and is subsequently ratified by the President. Treaties generally require parties to exchange or deposit instruments of ratification in order for them to enter into force. A chart depicting the steps necessary for the United States to enter a treaty is in the Appendix.

U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 939 (D.C. Cir.1988); Garcia-Mir v. Meese, 788 F.2d 1446, 1453 (11th Cir.), cert. denied, 479 U.S. 889 (1986). But see Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (holding that the Alien Tort Statute , 28 U.S.C.A. § 1350, recognized an individual cause of action for certain egregious violations of the law of nations).

[698] Vienna Convention on the Law of Treaties, entered into force Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter "Vienna Convention"], art.2. Although the United States has not ratified the Vienna Convention, it recognizes it as generally signifying customary international law. See, e.g., Fujitsu Ltd. v. Federal Exp. Corp., 247 F.3d 423 (2nd Cir. 2001) ("we rely upon the Vienna Convention here as an authoritative guide to the customary international law of treaties ... [b]ecause the United States recognizes the Vienna Convention as a codification of customary international law ... and [it] acknowledges the Vienna Convention as, in large part, the authoritative guide to current treaty law and practice") (internal citations omitted).

[699] The term "treaty" is not always interpreted under U.S. law to refer only to those agreements described in Article II, § 2 of the Constitution. See Weinberger v. Rossi, 456 U.S. 25 (1982) (interpreting statute barring discrimination except where permitted by "treaty" to refer to both treaties and executive agreements); B. Altman & Co. v. United States, 224 U.S. 583 (1912) (construing the term "treaty," as used in statute conferring appellate jurisdiction, to also refer to executive agreements).

[700] Under international law, States that have signed but not ratified treaties have the obligation to refrain from acts that would defeat the object or purpose of the treaty. See Vienna Convention, art. 18.

The Senate may, in considering a treaty, condition its consent on certain reservations,[701] declarations,[702] understandings,[703] and provisos[704] concerning treaty application. If accepted, these conditions may limit and/or define U.S. obligations under the treaty.[705] The Senate may also propose to amend the text of the treaty itself. The other party or parties to the agreement would have to consent to these changes in order for them to take effect.

Executive Agreements

The great majority of international agreements that the United States enters into are not treaties but executive agreements—agreements entered into by the executive branch that are not submitted to the Senate for its advice and consent. Congress generally requires notification upon the entry of such an agreement.[706] Although executive agreements are not specifically discussed in the Constitution, they nonetheless have been considered valid international compacts under Supreme Court jurisprudence and as a matter of historical practice.[707] Starting in the World War II era, reliance on executive agreements has grown

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[701] A "reservation" is "a unilateral statement ... made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Id. art.2(1)(d). In practice, "[r]eservations change U.S. obligations without necessarily changing the text, and they require the acceptance of the other party." TREATIES AND OTHER INTERNATIONAL AGREEMENTS, supra footnote 5, at 11; Vienna Convention, arts. 19-23.

[702] Declarations are "statements expressing the Senate's position or opinion on matters relating to issues raised by the treaty rather than to specific provisions." TREATIES AND OTHER INTERNATIONAL AGREEMENTS, supra footnote 5, at 11.

[703] Understandings are "interpretive statements that clarify or elaborate provisions but do not alter them." Id.

[704] Provisos concern "issues of U.S. law or procedure and are not intended to be included in the instruments of ratification to be deposited or exchanged with other countries." Id.

[705] As a matter of customary international law, States are "obliged to refrain from acts which would defeat the object and purpose of a treaty," including entering reservations that are incompatible with a treaty's purposes. Vienna Convention, arts. 18-19.

[706] See 1 U.S.C. § 112b (requiring text of executive agreements to be transmitted to Congress within 60 days, subject to certain exceptions).

[707] E.g., American Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003) ("our cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate ... this power having been exercised since the early years of the Republic"); United States v. Belmont, 301 U.S. 324, 330 (1937) ("an international compact ... is not always a treaty which requires the participation of the Senate").

significantly.[708] Whereas 27 executive agreements (compared to 60 treaties) were concluded by the United States during the first 50 years of the Republic, between 1939 and 2009 the United States concluded roughly 16,500 executive agreements (compared to approximately 1,100 treaties).[709]

There are three types of prima facie legal executive agreements: (1) congressional-executive agreements, in which Congress has previously or retroactively authorized an international agreement entered into by the executive; (2) executive agreements made pursuant to an earlier treaty, in which the agreement is authorized by a ratified treaty; and (3) sole executive agreements, in which an agreement is made pursuant to the President's constitutional authority without further congressional authorization. The executive's authority to enter the agreement is different in each case. A chart describing the steps in the making of an executive agreement is in the Appendix.

In the case of congressional-executive agreements, the "constitutionality … seems well established."[710] Unlike in the case of treaties, where only the Senate plays a role in approving the agreement, both houses of Congress are involved in the authorizing process for congressional-executive agreements. Congressional authorization of such agreements takes the form of a statute which must pass both houses of Congress. Historically, congressional-executive agreements have been made for a wide variety of topics, ranging from postal conventions to bilateral trade to military assistance.[711] The North American Free Trade Agreement and the General Agreement on Tariffs and Trade are notable examples of congressional-executive agreements.

Agreements made pursuant to treaties are also well-established as legitimate, though controversy occasionally arises as to whether the agreement was actually

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[708] WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 376 (5th ed. 2007).

[709] This estimate is based on numbers obtained via SLOMANSON, supra footnote 17, at 376 (discussing executive agreements and treaties that the United States has concluded between 1789 and 2004) and CRS research regarding treaties and executive agreements concluded from 2005 to 2009. Between 1789 and 2004, the United States entered 1,834 treaties and 16,704 executive agreements, meaning that roughly 10% of agreements concluded by the United States during that period took the form of treaties. Id. The percentage of agreements entered as treaties has decreased further since 2004.

[710] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, supra footnote 5, at 5. See also CRS Report 97-896, Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than as Treaties, by Jeanne J. Grimmett; LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION (2nd ed. 1996) at 215-18.

[711] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, supra footnote 5, at 5.

imputed by the treaty in question.[712] Since the earlier treaty is the "Law of the Land,"[713] the power to enter into an agreement required or contemplated by the treaty lies fairly clearly within the President's executive function.

Sole executive agreements rely on neither treaty nor congressional authority to provide for their legal basis. The Constitution may confer limited authority upon the President to promulgate such agreements on the basis of his foreign affairs power.[714] If the President enters into an executive agreement pursuant to and dealing with an area where he has clear, exclusive constitutional authority—such as an agreement to recognize a particular state for diplomatic purposes—the agreement is legally permissible regardless of Congress's opinion on the matter.[715] If, however, the President enters into an agreement and his constitutional authority over the agreement's subject matter is unclear, a reviewing court may consider Congress's position in determining whether the agreement is legitimate.[716] If Congress has given its implicit approval to the President entering the agreement, or is silent on the matter, it is more likely that the agreement will be deemed valid. When Congress opposes the agreement and the President's constitutional authority to enter the agreement is ambiguous, it is unclear if or when such an agreement would be given effect. The Litvinov Assignment, under which the Soviet Union purported to assign to the United States claims to American assets in Russia that had previously been nationalized by the Soviet Union, is an example of a sole executive agreement.

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[712] Id.

[713] U.S. CONST. art. VI, § 2 ("the laws of the United States ... [and] all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land").

[714] See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, supra footnote 5, at 5, citing U.S. CONST. arts. II, § 1 (executive power), § 2 (commander in chief power, treaty power), § 3 (receiving ambassadors). Courts have recognized foreign affairs as an area of very strong executive authority. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[715] See RESTATEMENT, supra footnote 1, § 303 (4).

[716] See Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding sole executive agreement concerning the handling of Iranian assets in the United States, despite the existence of a potentially conflicting statute, given Congress's historical acquiescence to these types of agreements); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) ("When the President acts pursuant to an express or implied authorization of Congress, his powers are at their maximum.... Congressional inertia, indifference or quiescence may ... invite, measures of independent Presidential responsibility.... When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter") (Jackson, J., concurring). But see Medellin v. Texas, 128 S. Ct. 1346, 1371 (U.S. 2008) (suggesting that Dames & Moore analysis regarding significance of congressional acquiescence might be relevant only to a "narrow set of circumstances," where presidential action is supported by a "particularly longstanding practice" of congressional acquiescence).

Nonlegal Agreements

Not every pledge, assurance, or arrangement made between the United States and a foreign party constitutes a legally binding international agreement. In some cases, the United States makes "political commitments" or "gentlemen's agreements" with foreign states. Although these commitments are nonlegal, they may nonetheless carry significant moral and political weight. The executive has long claimed the authority to enter such agreements on behalf of the United States without congressional authorization, asserting that the entering of political commitments by the executive is not subject to the same constitutional constraints as the entering of legally binding international agreements.[717] An example of a nonlegal agreement is the 1975 Helsinki Accords, a Cold War agreement signed by 35 nations, which contains provisions concerning territorial integrity, human rights, scientific and economic cooperation, peaceful settlement of disputes, and the implementation of confidence-building measures.

An international agreement is generally presumed to be legally binding in the absence of an express provision indicating its nonlegal nature. State Department regulations recognize that this presumption may be overcome when there is "clear evidence, in the negotiating history of the agreement or otherwise, that the parties intended the arrangement to be governed by another legal system."[718] Other factors that may be relevant in determining whether an agreement is nonlegal in nature include the form of the agreement and the specificity of its provisions.[719]

Effects of International Agreements on U.S. Law

The effects that international legal agreements entered into by the United States have upon U.S. domestic law are dependent upon the nature of the agreement; namely, whether the agreement is self-executing or non-self-executing, and possibly whether it was made pursuant to a treaty or an executive agreement.

Self-Executing vs. Non-Self-Executing Agreements

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[717] See generally Robert E. Dalton, Asst. Legal Adviser for Treaty Affairs, International Documents of a Non-Legally Binding Character, State Department, Memorandum, March 18, 1994, available at http://www.state.gov/documents/ organization/65728.pdf (discussing U.S. and international practice with respect to nonlegal, political agreements); Duncan B. Hollis and Joshua J. Newcomer, "Political" Commitments and the Constitution, 49 VA. J. INT'L L. 507 (2009) (discussing U.S. political commitments made to foreign States and the constitutional implications of the practice).

[718] 22 C.F.R. § 181.2(a).

[719] Id. See also State Department Office of the Legal Adviser, Guidance on Non-Binding Documents, at http://www.state.gov/s/l/treaty/guidance/.

Some provisions of international treaties or executive agreements are considered "self-executing," meaning that they have the force of law without the need for subsequent congressional action.[720] Treaty provisions that are not considered self-executing are understood to require implementing legislation to provide U.S. agencies with legal authority to carry out the functions and obligations contemplated by the agreement or to make them enforceable in court by private parties.[721] Treaties have been found to be non-self-executing for at least three reasons: (1) the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation; (2) the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation;[722] or (3) implementing legislation is constitutionally required.[723] There is significant scholarly debate regarding the distinction between self-executing and non-self-executing agreements, including the ability of U.S. courts to apply and enforce them.[724]

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[720] See, e.g., Medellin, 128 S. Ct. at 1356 n.2 (U.S. 2008) ("What we mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification."); Cook v. United States, 288 U.S. 102, 119 (1933) ("For in a strict sense the [t]reaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions."); Foster v. Neilson, 2 Pet. 253, 315, 7 L.Ed. 415 (1829) (Marshall, C.J.) (describing a treaty as "equivalent to an act of the legislature" when it "operates of itself without the aid of any legislative provision"), overruled on other grounds by United States v. Percheman, 7 Pet. 51, 8 L.Ed. 604 (1833). See generally RESTATEMENT, supra footnote 1, § 111 & cmt. h.

[721] E.g., Medellin, 128 S.Ct. at 1356 ("In sum, while treaties may comprise international commitments ... they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.") (internal citations and quotations omitted); Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("When the [treaty] stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by congress as legislation upon any other subject."). See generally RESTATEMENT, supra footnote 1, § 111(4)(a) & cmt. h.

[722] For example, in the case of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984), the Senate gave advice and consent subject to a declaration that the treaty was not self-executing. U.S. Reservations, Declarations, and Understandings to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. S17486-01 (daily ed., Oct. 27, 1990). Congress has specified that neither World Trade Organization (WTO) agreements nor rulings made by the WTO Dispute Settlement Body pursuant to these agreements have direct legal effect under U.S. domestic law. See CRS Report RS22154, World Trade Organization (WTO) Decisions and Their Effect in U.S. Law, by Jeanne J. Grimmett.

[723] RESTATEMENT, supra footnote 1, § 111(4)(a) & reporters' n. 5-6.

[724] See, e.g., John H. Jackson, Status of Treaties in Domestic Legal Systems: A Policy Analysis, 86 AM. J. INT'L L. 310 (1992); Jordan J. Paust, Self-Executing Treaties, 82 AM. J. INT'L L. 760 (1988); Carlos Manuel Vázquez, Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties, 122 HARV. L. REV. 599 (2008); John C. Yoo, Globalism and

Until implementing legislation is enacted, existing domestic law concerning a matter covered by an international agreement that is not self-executing remains unchanged and controlling law in the United States. However, when a treaty is ratified or an executive agreement is entered into, the United States acquires obligations under international law and may be in default of those obligations unless implementing legislation is enacted.[725]

Conflict with Existing Laws

Sometimes, a treaty or executive agreement will conflict with one of the three main tiers of domestic law—state law, federal law, or the Constitution. For domestic purposes, a ratified, self-executing treaty is the law of the land equal to federal law[726] and superior to state law,[727] but inferior to the Constitution.[728] A self-executing executive agreement is likely superior to state law,[729] but sole executive agreements may be inferior to conflicting federal law in certain circumstances (congressional-executive agreements or executive agreements pursuant to treaties are equivalent to federal law),[730] and all executive

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the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 COLUM. L. REV. 1955 (1999).

[725] See RESTATEMENT, supra footnote 1, § 111, cmt. h.

[726] See Whitney, 124 U.S. at 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.").

[727] See U.S. CONST., art. VI, § 2 ("the laws of the United States ... [and] all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land"); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 237 (1796) ("laws of any of the States, contrary to a treaty, shall be disregarded").

[728] See Reid v. Covert, 354 U.S. 1 (1957) (Black, J., plural) ("It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights-let alone alien to our entire constitutional history and tradition-to construe [the Supremacy Clause] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions."); Doe v. Braden, 57 U.S. 635, 657 (1853) ("[t]he treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States"). See generally RESTATEMENT, supra footnote 1, § 115.

[729] United States v. Belmont, 301 U.S. 324 (1937) (sole executive agreement concerning settlement of U.S.-Soviet claims provided federal government with authority to recover claims held in New York banks, despite existence of state laws that would generally bar their recovery); United States v. Pink, 315 U.S. 203. (1942) (similar).

[730] Executive agreements have been held to be inferior to conflicting federal law when the agreement concerns matters expressly within the constitutional authority of Congress. See, e.g., United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953) (finding that executive

agreements are inferior to the Constitution.[731] In cases where ratified treaties or certain executive agreements are equivalent to federal law, the "last in time" rule establishes that a more recent statute will trump an earlier, inconsistent international agreement, while a more recent self-executing agreement will trump an earlier, inconsistent statute.[732] In the case of treaties and executive agreements that are not self-executing, it is the implementing legislation that is controlling domestically, not the agreements or treaties themselves.[733] "The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress."[734] Accordingly, it appears unlikely that a non-self-executing agreement could be converted into judicially enforceable domestic law via unilateral presidential action.[735]

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agreement contravening provisions of import statute was unenforceable); RESTATEMENT, supra footnote 1, § 115 reporters' n.5. However, an executive agreement may trump pre-existing federal law if it concerns an enumerated or inherent executive power under the Constitution, or if Congress has historically acquiesced to the President entering agreements in the relevant area. See Pink, 315 U.S. at 230 ("[a]ll Constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature") (quoting The Federalist No. 64 (John Jay)); Dames & Moore, 453 U.S. at 654 (upholding sole executive agreement concerning the handling of Iranian assets in the United States, despite the existence of a potentially conflicting statute, given Congress's historical acquiescence to these types of agreements).

[731] See generally RESTATEMENT, supra footnote 1, § 115.

[732] Whitney, 124 U.S. at 194.

[733] Congress may enact legislation in order to comply with U.S. treaty obligations that would otherwise intrude upon a state's traditional rights under the 10th Amendment. In the 1920 case of Missouri v. Holland, 252 U.S. 416 (1920), the Supreme Court upheld a federal law regulating the killing of migratory birds that had been adopted pursuant to a treaty between the United States and Great Britain, notwithstanding the fact that a similar statute enacted in the absence of a treaty had been ruled unconstitutional on 10th Amendment grounds. The extent to which Congress may intrude upon traditional state authority through treaty-implementing legislation remains unclear, though there is reason to believe that it could not enact legislation that infringed upon the essential character of states, such as through legislation that commandeered state executive and legislative authorities. See Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992). See generally Edward T. Swaine, Does Federalism Constrain the Treaty Power?, 103 COLUM. L. REV. 403 (2003).

[734] Medellin, 128 S.Ct. at 1368.

[735] Id. at 1368-1369 (holding that presidential memorandum ordering state court to give effect to non-self-executingtreaty requirement did not constitute federal law preempting the state's procedural default rules). For further discussion, see CRS Report RL34450, Can the President Compel Domestic Enforcement of an International Tribunal's Judgment? Overview of Supreme Court Decision in Medellin v. Texas, by Michael John Garcia.

Customary International Law

Customary international law is defined as resulting from "a general and consistent practice of States followed by them from a sense of legal obligation."[736] This means that all, or nearly all, states consistently follow the practice in question and they must do so because they believe themselves legally bound, a concept often referred to as *opinio juris sive necitatis* (*opinio juris*). If states generally follow a particular practice but do not feel bound by it, it does not constitute customary international law.[737] Further, there are ways for states to avoid being subject to customary international law. First, a state which is a persistent objector to a particular requirement of customary international law is exempt from it.[738] Second, under American law, the United States can exempt itself from customary international law requirements by passing a contradictory statute under the "last in time" rule.[739] As a result, while customary international law may be incorporated, its impact when in conflict with other domestic law appears limited.

In examining state behavior to determine whether *opinio juris* is present, courts might look to a variety of sources, including, inter alia, relevant treaties, unanimous or near-unanimous declarations by the United Nations General Assembly concerning international law,[740] and whether noncompliance with an espoused universal rule is treated as a breach of that rule.[741]

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[736] RESTATEMENT, supra footnote 1, § 102(2).

[737] Id. at § 102 cmt. c.

[738] Id. at § 102, reporters' n. 2. The philosophy underlying the consistent objector exemption is that States are bound by customary international law because they have at least tacitly consented to it. Binding them to abide to customary practices despite their explicit rejection of these norms would violate their sovereign rights—though States are likely still bound in the case of peremptory, jus cogens norms which are thought to permit no State derogation, such as the international prohibition against genocide or slavery. See Colom v. Peru, 1950 I.C.J. 266 (Nov. 20); U.K. v. Norway, 1951 I.C.J. 116 (Dec.18).

[739] Whitney, 124 U.S. at 194 (When…[a statute and treaty] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing.").

[740] RESTATEMENT, supra footnote 1, § 102 (2) cmt. c. For a discussion of potential difficulties in relying U.N. General Assembly Resolutions as evidence of customary international law, see Oscar Schachter, International Law in Theory and Practice: General Course in Public International Law, 178 Rec. Des Cours 111-121 (1982-V).

[741] See Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004) (declining to apply protections espoused by the Universal Declaration of Human Rights because it "does not of its own force impose obligations as a matter of international law").

In 1900, the Supreme Court stated that customary international law "is our law," but only when there is not already a controlling executive or legislative act.[742] There does not appear to be a case where the Court has ever struck down a U.S. statute on the ground that it violated customary international law. However, customary international law can potentially affect how domestic law is construed. If two constructions of an ambiguous statute are possible, one of which is consistent with international legal obligations and one of which is not, courts will often construe the statute so as not to violate international law, presuming such a statutory reading is reasonable.[743]

Some particularly prevalent rules of customary international law can acquire the status of *jus cogens* norms—peremptory rules which permit no derogation, such as the international prohibition against slavery or genocide.[744] For a particular area of customary international law to constitute a *jus cogens* norm, state practice must be extensive and virtually uniform.[745]

The Alien Tort Statute (ATS)

Perhaps the clearest example of U.S. law incorporating customary international law is via the Alien Tort Statute (ATS), sometimes referred to as the Alien Tort Claims Act.[746] The ATS originated as part of the Judiciary Act of 1789, and establishes federal court jurisdiction over tort claims brought by aliens for violations of either a treaty of the United States or "the law of nations."[747] Until 1980, this statute was rarely used, but in *Filartiga v. Pena-Irala*, the Second

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[742] The Paquete Habana, 175 U.S. at 700. As a result, it is the opinion of some commentators that "no enactment of Congress may be challenged on the grounds that it violates customary international law." Wade Estey, The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality, 21 HASTINGS INT'L. & COMP. L. REV. 177, 180 (1997). See also Committee of U.S. Citizens Living in Nicaragua, 859 F.2d at 940.

[743] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, J.) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains…."). But see Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1151-54 (7th Cir. 2001) (suggesting that given the "present uncertainty about the precise domestic role of customary international law," application of this canon of construction to resolve differences between ambiguous congressional statutes and customary international law should be used sparingly).

[744] RESTATEMENT, supra footnote 1, § 702, cmt. n.

[745] Buell v. Mitchell, 274 F.3d 337 (6th Cir. 2001), citing North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/The Netherlands) 1969 I.C.J. 51/52 (Feb. 20) & RESTATEMENT, supra footnote 1, § 102 (2) cmt. k. & reporters' n. 6.

[746] 28 U.S.C. § 1350.

[747] For additional background on the ATS, see CRS Report RL32118, The Alien Tort Statute: Legislative History and Executive Branch Views, by Jennifer K. Elsea.

Circuit relied upon it to award a civil judgment against a former Paraguayan police official who had allegedly tortured the plaintiffs while still in Paraguay. In doing so, the *Filartiga* Court concluded that torture constitutes a violation of the law of nations and gives rise to a cognizable claim under the ATS.[748] Since that time, the ATS has been used by aliens on a number of occasions to pursue civil judgments against persons or entities for alleged human rights violations.[749]

Until recently, the Supreme Court had not addressed the scope of the causes of action available to aliens under the ATS. In 2004, however, the Supreme Court heard *Sosa v. Alvarez-Machain*,[750] a case in which the plaintiff attempted to derive from the Alien Tort Statute a cause of action for violation of rules of customary international law. The case arose from the 1985 seizure of a Mexican national, Humberto Alvarez-Machain, on suspicion of assisting in the torture of a Drug Enforcement Agency (DEA) agent. When extradition attempts failed, the DEA contracted with Mexican nationals, including Jose Francisco Sosa, to abduct Alvarez-Machain from his home and bring him to the United States so he could be arrested by federal officers.[751] After a lengthy procedural challenge,[752] Alvarez-Machain was acquitted by the district court. In 1993, he returned to Mexico and commenced a civil suit against the United States and Sosa for his allegedly arbitrary arrest and detention, with his claim against Sosa being made under the ATS. The holding in Sosa clarifies when and whether the ATS provides for a cause of action on the basis of an alleged violation of customary international law.

The Supreme Court interpreted the ATS as being primarily a jurisdictional statute, giving federal courts authority to entertain claims but not creating a statutory cause of action. Nonetheless, an assessment of historical materials led the Sosa majority to conclude that the statute "was intended to have practical effect the moment it became law … [based] on the understanding that the common law would provide a cause of action for the modest number of

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[748] 630 F.2d 876 (2nd Cir. 1980). The court based its conclusion that torture was prohibited under international law upon sources including, inter alia, U.N. resolutions, the U.N. Charter, and the Universal Declaration of Human Rights.

[749] See, e.g., Flores v. Southern Peru Copper Corp., 343 F.3d 140 (2nd Cir. 2003) (Peruvian plaintiffs brought personal injury claims under ATS against American mining company, alleging that pollution from mining company's Peruvian operations had caused severe lung disease); Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (former prisoners in Ethiopia filed lawsuit under ATS against former Ethiopian official for torture); Kadic v. Karadzic, 70 F.3d 232 (2nd Cir.1995) (Bosnian plaintiffs brought suit against the self-proclaimed leader of unrecognized Bosnian-Serbian entity under the ATS for war crimes).

[750] 542 U.S. 692 (2004).

[751] Alvarez-Machain v. United States, 331 F.3d 604, 609 (9th Cir. 2003) (en banc).

[752] See United States v. Alvarez-Machain, 504 U.S. 655 (1992).

international law violations with a potential for personal liability at the time."[753] Claims could be pursued under the ATS based on violations of present-day international customary law, but such violations should "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" which existed at the time the ATS was enacted (e.g., a violation of safe conducts, infringement of the rights of ambassadors, or piracy).[754] Applying this standard, the Court held that Sosa's claim of arbitrary and unlawful arrest did not give rise to relief under the ATS.

The Court declined to provide examples of modern-day violations of the law of nations that might provide grounds for an ATS claim, and counseled restraint in finding them.[755] However, the majority opinion cites to *Filartiga* on a number of occasions, including citing in dicta to the *Filartiga* Court's finding that "for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."[756] The Court did not, however, view provisions contained in either the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR)—two documents signed by the United States (and in the case of the ICCPR, ratified as a treaty) that have been widely recognized as evidence of customary international norms—as necessarily reflecting the existence of a customary international norm sufficient to support an ATS claim.[757] The application of customary international law in U.S. courts, at least with respect to providing grounds for aliens to pursue civil claims under the ATS, appears limited in scope.[758]

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[753] Sosa, 542 U.S. at 724.

[754] Id. at 725.

[755] Id. at 723.

[756] Id. at 732.

[757] Id. at 734-735.

[758] Id. See also, e.g., Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242 (11th Cir. 2005), cert. denied, 127 S. Ct. 596 (2006) (while claim of torture was cognizable under ATS, claims of arbitrary detention and cruel, inhuman or degrading treatment were not); Taveras v. Taveraz, 477 F.3d 767 (6th Cir. 2006) (cross-border child abuduction by parent did not constitute violation of "law of nations" cognizable under ATS); Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2nd Cir. 2009) (jurisdiction existed under ATS for claim against private company that, with the aid of Nigerian government, allegedly violated customary international prohibition on non-consensual human medical experimentation).

Reference to Foreign Law by U.S. Courts

In recent years, foreign or international legal sources have increasingly been cited by the Supreme Court when considering matters of U.S. law. While these sources have been looked to for persuasive value, they have not been treated as binding precedent by U.S. courts.[759] Reference to foreign law or jurisprudence is not a new occurrence. For example, in 1815, the Supreme Court noted that "decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect."[760] With respect to international law and treaty interpretation, at least, foreign practice and understanding have always been considered to have persuasive value.[761] However, domestic court reference to foreign law and practice has become increasingly controversial. There is some dispute among scholars and policymakers over the extent to which American courts can and should rely on foreign practices in making decisions interpreting U.S. statutes and the Constitution, particularly following recent Supreme Court rulings that referred to foreign jurisprudence.[762]

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[759] See, e.g., Sanchez-Llamas v. Oregon, 548 U.S. 331, 354 (2006) (while Optional Protocol of the Vienna Convention on Consular Relations, to which the United States was a party, gave the International Court of Justice jurisdiction to settle disputes between parties regarding the treaty's meaning, ruling by the international tribunal was not binding precedent on U.S. courts; if "treaties are to be given effect as federal law … determining their meaning as a matter of federal law is emphatically the province and duty of the judicial department, headed by the one [S]upreme Court established by the Constitution") (citations and quotations omitted).

[760] Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191 (1815).

[761] See, e.g., Medellin, 128 S.Ct. at 1357 (Court interpretation of international agreement may be aided by examining negotiating and drafting history and the post-ratification understanding of contracting parties); Zicherman v. Korean Air Lines Co., Ltd., 516 U.S. 217 (1996) (same); I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987) (using U.N. interpretative materials to "provide significant guidance in construing" the 1967 United Nations Protocol Relating to the Status of Refugees); Air France v. Saks, 470 U.S. 392, 404 (1985) (finding that "the opinions of our sister signatories to be entitled to considerable weight" when interpreting agreement provisions); Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184 n.10 (1981) (position of Japanese government entitled to great weight when interpreting provisions of U.S.-Japan treaty); Jordan v. Tashiro, 278 U.S. 123, 127 (1928) (finding that provisions of treaties "should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them").

[762] See generally Steven G. Calabresi and Stephanie Dotson Zimdahl, The Supreme Court And Foreign Sources Of Law: Two Hundred Years Of Practice And The Juvenile Death Penalty Decision, 47 WM. & MARY L. REV. 743 (2005) (discussing historical usage of foreign law by Supreme Court and controversy regarding usage in recent cases involving constitutional interpretation).

Possibly the most notable recent references to foreign law by the Supreme Court occurred in the 2003 case of *Lawrence v. Texas*[763] and the 2005 case of *Roper v. Simmons*.[764] In *Lawrence*, the Court held that a Texas statute outlawing same-sex sodomy violated the Due Process Clause of the Fourteenth Amendment. In an earlier Court decision upholding anti-sodomy laws, *Bowers v. Hardwick*, Chief Justice Burger had written that practices akin to those in question in Lawrence had been prohibited throughout Western history.[765] Writing for the majority in *Lawrence*, Justice Kennedy responded to this claim by noting that decisions by other nations and the European Court of Human Rights within the past few decades conflicted with the reasoning and holding of Bowers. The *Lawrence* Court's opinion went on to imply in dicta that trends in other countries' understandings of "human freedom" can inform our own, though the anti-sodomy statute was struck down on separate grounds.[766]

In *Roper*, the Court held that the execution of persons who were juveniles at the time of their capital offenses was prohibited under the Eighth and Fourteenth Amendments. In earlier cases, the Court had struck down the death penalty for juvenile offenders under the age of 16,[767] but found that there was not a national consensus against the execution of those persons who were aged 16 or 17 at the time of the offense.[768] The Court in *Roper* held that "evolving standards of decency" had led to a consensus that the execution of juvenile offenders was "cruel and unusual" punishment prohibited under the Constitution.[769] Besides citing to U.S. state practice and the views of non-governmental, domestic groups as evidence confirming a national consensus against executing juvenile offenders, the *Roper* Court also noted "the overwhelming weight of international opinion against the juvenile death penalty."[770] Justice Kennedy, writing for the majority, stated that "[t]he opinion of the world community, while not controlling our

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[763] 539 U.S. 558 (2003).

[764] 543 U.S. 551 (2005).

[765] 478 U.S. 186, 192 (1986).

[766] Lawrence, 539 U.S. at 576-577. In dissent, Justice Scalia referred to the majority's discussion of foreign law as "meaningless ... [d]angerous dicta." Id. at 2495 (Scalia, J., dissenting).

[767] Thompson v. Oklahoma, 487 U.S. 815 (1988).

[768] Stanford v. Kentucky, 492 U.S. 361 (1989).

[769] For further discussion, see CRS Report RS21969, Capital Punishment and Juveniles, by Alison M. Smith.

[770] Id. at 578.

outcome, does provide respected and significant confirmation for our own conclusions."[771]

It is not yet clear how persuasive foreign law is considered to be, or whether the Court's decisions in *Lawrence*, *Roper*, and other cases evidence a growing practice of looking to foreign jurisprudence to inform constitutional or statutory interpretation. Thus far, it does not appear that an American court has based its holding on a question of statutory or constitutional interpretation solely on foreign law. Although foreign law and practice have historically had a role in American jurisprudence and courts will likely continue to refer to it, where, when, and how significantly they will rely upon it is difficult to predict.

[771] Id.

LEGAL RESEARCH AND LEGISLATIVE PLANNING

Tracking Congressional Legislation and Administrative Rulemaking

Tracking Current Federal Legislation and Regulations: A Guide to Resources, RL33895 (February 28, 2007)

PAMELA HAIRSTON & CAROL D. DAVIS, CONGRESSIONAL RESEARCH SERV., TRACKING CURRENT FEDERAL LEGISLATION AND REGULATIONS: A GUIDE TO RESOURCES (2007), *available at* http://www.intelligencelaw.com/library/secondary/crs/pdf/RL33895_2-28-2007.pdf.

Order Code RL33895

Pamela Hairston
Information Research Specialist Knowledge Services Group

Summary

This guide has been designed to introduce congressional staff to selected official government and commercial sources that are useful in tracking and obtaining background information and specific facts on the status of federal legislative or regulatory initiatives. By using a variety of these sources, congressional staff can track federal legislation and regulations.

Those who prefer weekly overviews would be interested in such commercial publications such as CQ Weekly, Newsweek, Time, and U.S. News and World Report. For daily coverage, helpful resources are the Congressional Record, CQ Today, (formerly CQ Daily Monitor), the Federal Register, The New York Times, The Washington Post, The Wall Street Journal, and The Los Angeles Times. Databases such as GPO Access, LexisNexis, Westlaw, and the websites of the U.S. House of Representatives and the U.S. Senate are also useful.

The Code of Federal Regulations, the Index to the Code of Federal Regulations, and the CIS/Index to Publications of the United States Congress provide subject access to regulatory and legislative publications. Government sources such as the Legislative Resource Center, the White House's Office of the Executive Clerk, and the Office of the Federal Register can give brief information on legislative and regulatory developments too new to have been captured by standard online or printed sources. Capsule descriptions of directories and other media sources are provided. Annotations for each source contain publisher contact information. This report will be updated as needed.

Additional information on tracking legislation for congressional offices is provided in CRS Report RL30796, Legislative Research in Congressional Offices:

A Primer, and CRS Report RS20991, Legislative Planning: Considerations for Congressional Staff.

Introduction[772]

Tracking the status of current federal legislation and regulations is often viewed as a difficult task, requiring a vast library of costly resources, in-depth knowledge of the issues, and strong familiarity with the federal government's inner workings. This is not necessarily so. Although access to sophisticated databases and comprehensive knowledge of the federal government may help, it is possible for most congressional staff to follow an issue by using a variety of resources readily available. The scope of the issue will determine how complicated and time-consuming the process will be.

This guide has been designed to introduce researchers to selected authoritative government and commercial sources that are useful in tracking and obtaining background information or specific facts on the status of federal legislative or regulatory initiatives. The sources are arranged alphabetically in two broad sections: tracking current federal legislation and tracking current federal regulations. The sections are organized into subcategories composed of official government and commercial sources. Additional commercial resources, primarily newspapers, have also been included. Annotations describing each source's contents and organization are included so that researchers can select those that most closely fit their needs. Internet addresses usually provide information about the items, rather than access to them.

Most of the publications cited in this guide are available in local public or research libraries. Federal publications can often be found in libraries designated as federal depository libraries. To get their addresses, contact a local library; telephone the office of Depository Services of the U.S. Government Printing Office (GPO) at (202) 512-1119; or go to the Locate a Federal Depository Library page on the GPO Access website at [http://www.gpoaccess.gov/libraries.html].

For all other materials, publisher contact information has been provided. Since pricing structures vary by subscriber type and prices change frequently, publishers must be contacted to obtain the latest order information. GPO publications can be ordered, prepaid, bymail, telephone (toll-free 866-512-1800), or fax (202-512-2250) on any Discover, MasterCard, VISA, or American Express credit card from Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954.

Tracking Current Federal Legislation

Action on legislation passed or pending in the current Congress, and its status in the legislative process, is reported in the Congressional Record. This is the

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[772] This report was originally authored by CRS Information Specialist Carol D. Davis.

primary source for the text of floor debates and the official source for recorded votes.

An accurate and widely used database, the Legislative Information Service (LIS) [www.congress.gov] website is a portal to a variety of commercial, academic, and government legislative sources, including LIS specialized databases. LIS databases, identified by the LIS logo on the search pages, include Bill Summary and Status, Bill Text, the Congressional Record, and Committee Reports. (The Congressional Record can be accessed from LIS.) Basic information about bills, including the sponsor and cosponsors, committees of referral, official or long title, and status appears in the Bill Summary & Status file the day after introduction of the measure.

Since some current legislation amends previously enacted law, it may be necessary at times to consult the earlier laws in the United States Statutes at Large or the United States Code at [http://www.gpoaccess.gov/cfr/index.html] and [http://www.gpoaccess.gov/uscode/index.html].

Official Government Sources

Congressional Record

[http://www.gpoaccess.gov/crecord/index.html]
Superintendent of Documents P.O. Box 371954 Pittsburgh, PA 15250-7954 Tel: (866) 512-1800 Fax: (202) 512-2250
Frequency: Published each day that one or both chambers are in session, except infrequent instances when two or more consecutive issues are printed together.

The Congressional Record contains the edited transcript of activities on the floor of the House and the Senate. The "Daily Digest" section summarizes action in each chamber, committee hearings, new public laws, and committee meetings scheduled for the next legislative day. Indexes are issued twice a month. The subject index section can be used to identify bills by topic, and the "History of Bills and Resolutions" section tracks action on specific bills. The indexes, which are available online at [http://www.gpoaccess.gov/cri/index.html], are eventually cumulated into bound volumes.

Daily Calendar Information

Both political parties in the Senate and the House provide recorded messages about the proceedings on the floor of each chamber every day they are in session. Call the following numbers for these cloakroom recordings:
Senate: (202) 224-8601 (Republican) House: (202) 225-7430 (Republican)
(202) 224-8541 (Democratic) (202) 225-7400 (Democratic)

GPO Access

[http://www.gpoaccess.gov/index.html]

GPO Access User Support Team Tel: (202) 512-1800
Superintendent of Documents (866) 512-1800
U.S. Government Printing Office Fax: (202) 512-2104
732 North Capitol Street, NW
Mail Stop: IDCC
Washington, DC 20401
E-mail: ContactCenter@gpo.gov

The Government Printing Office (GPO) provides free Internet access to a wide variety of legislative, regulatory, and executive material, such as congressional bills, the Congressional Record and the Congressional Record Index (including the "History of Bills and Resolutions" section), congressional calendars, public laws, selected congressional reports and documents, the Weekly Compilation of Presidential Documents, the Federal Register, and the Code of Federal Regulations. Time spans covered vary by category.

Legislative Information Service (LIS) at [http://www.congress.gov]

Legislative Information System provides Members of Congress and their staffs access to legislative information that is accurate, timely, and complete. This website, accessible only to Members and their staff, is a portal to a variety of commercial, academic, and government legislative sources, including LIS specialized databases. LIS databases, identified by the LIS logo on the search pages, include Bill Summary and Status, Bill Text, the Congressional Record, and Committee Reports. Basic information about bills, including the sponsor and cosponsors, committees of referral, official or long title, and status appears in the Bill Summary & Status file the day after introduction of the measure.

Legislative Resource Center (LRC)

The Legislative Resource Center assists with the retrieval of legislative information and records of the House for congressional offices and the public. The Legislative Resource Center provides centralized access to all published documents originated and produced by the House and its committees, to the historical records of the House, and to public disclosure documents. The center combines the responsibilities of several previously separate offices — the House Library, House Historical Services, the House Document Room, the Office of Legislative Information, and the Office of Records and Registration. For assistance regarding the status of current legislation, call (202) 225-1772.

Public Laws Update Service

Information on new public law numbers assigned to recently enacted public laws can be obtained from a recorded message maintained by the National Archives and Records Administration's Office of the Federal Register at (202) 741-6043 or by subscribing to its Public Laws Electronic Notification Service (PENS) at [http://listserv.gsa.gov/cgi-bin/wa.exe?SUBED1=publaws-l&A=1].

U.S. Capitol Switchboard

The office of any Member of Congress, congressional committee, or congressional subcommittee can be reached by calling (202) 224-3121.

U.S. House of Representatives Home Page at [http://www.house.gov]

This Web source provides legislative details such as:

- recent major House floor and committee actions;
- legislative schedules;
- background information on, and links to material concerning the legislative process;
- directories of Representatives by state and by name;
- the chamber's leadership;
- House roll-call votes starting with the 101st Congress, second session (1990); and
- brief descriptions of floor proceedings when the House is in session.

U.S. Senate Home Page at [http://www.senate.gov]

Materials of legislative interest offered at this Internet source include the following:

- Senate calendars;
- background information on, and links to materials on the legislative process;
- Senate roll-call votes starting with the 101st Congress (1989);
- the chamber's leadership;
- descriptions of the Senate committee system and of individual committees;
- historical information about the Senate;
- directories of Senators by name, state, class (term expiration date),
- and party; and glossary of common legislative terms.

Weekly Compilation of Presidential Documents [http://www.gpoaccess.gov/wcomp/index.html]

Superintendent of Documents P.O. Box 371954 Pittsburgh, PA 15250-7954 Tel: (866) 512-1800 Fax: (202) 512-2250

Frequency: Weekly, with quarterly, semiannual, and annual indexes.
This weekly periodical provides information such as the dates on which the President signed or vetoed legislation. Also, it contains transcripts of presidential messages to Congress, executive orders, and speeches and other material released by the White House.

White House Records

Via a recorded message, the Office of the Executive Clerk at the White House provides dates for the following information: presidential signings or vetoes of recent legislation; presidential messages; executive orders; and other official presidential action. If the desired information is not in the taped message, callers can stay on the line to speak with a staffer. The recorded message is available at (202) 456-2226.

Commercial Sources

Congressional Information Service (CIS)/Index to Publications of the United States Congress [http://www.lexisnexis.com/academic]

LexisNexis Academic & Library Solutions
7500 Old Georgetown Road
Bethesda, MD 20814-6126
E-mail: academicinfo@lexisnexis.com
Tel: (301) 654 - 1550 (800) 638 - 8380 Fax: (301) 657- 3203
Frequency: Monthly index and abstracts issues, with quarterly indexes and annual cumulations.

This source provides detailed abstracts of congressional publications, such as printed hearings, reports, committee prints, and documents. Titles, subjects, publication numbers, bill numbers, and witness names can be searched. Also, the legislative histories of public laws are provided. Coverage dates are 1970 to the present.

CQ Today

[http://www.cq.com]
Congressional Quarterly, Inc. Tel: (202) 419-8279
1255 22nd Street, NW (800) 432-2250, ext. 279
Washington, DC 20037
Frequency: Monday through Friday when Congress is in session, with updates throughout the day on the Web.

This subscription newsletter provides daily news on Congress, such as planned floor action for the Senate and the House, bill and amendment descriptions, and notices of bill markup sessions and conference negotiations. Also, daily and selected future committee schedules are given. Significant sections are the "Pulse of Congress," with behind-the-scenes information on Members and committees; "People on the Move," which highlights congressional staff changes; and the "Appropriations" section, which appears during the appropriations cycle. Subscribers also receive an afternoon e-mail newsletter, CQ Today Extra, with the day's latest news about Congress and updated information on the next day's congressional schedule.

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Congressional Quarterly, Inc. Tel: (202) 419-8279
1255 22nd Street, NW (800) 432-2250, ext. 279
Washington, DC 20037
Frequency: Weekly, with special supplements and annual Almanac.

This weekly summary of congressional action and developments contains status tables for appropriations bills and other major legislation, roll-call vote charts for both chambers, and topical treatments of committee and floor actions. Most issues have articles that provide current and background information on legislative topics. Occasionally, special reports are printed. Quarterly indexes are issued. The annual Congressional Quarterly Almanac is a comprehensive review of the year's legislative session.

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Washington, DC 20037
E-mail: hotline@cq.com

Bill texts, summaries, tracking, and analysis are provided in this database. Among its other features are forecasts of major pending bills; versions of bills; links to related bills; roll-call votes; legislative histories; floor and committee schedules; detailed committee coverage; texts of committee reports; transcripts of witnesses' testimony; and publications such as the CQ Weekly, CQ Today (formerly CQ Daily Monitor), the Congressional Record, and the Federal Register. Among CQ.com's access points are bill number, keyword, phrase, Member name, and date. Time spans covered vary by the category of information sought. Only CQ.com subscribers can access this system on the Internet.

Westlaw

[http://www.westlaw.com]
West Group Tel: (651) 687-7000
610 Opperman Drive
Eagan, MN 55123

Although Westlaw was designed primarily as a legal reference database, many of its files contain material useful to anyone tracking legislation or regulations. For example, the Congressional Record is available in full text on this subscription service, as are the Federal Register and the current Code of Federal Regulations. Also available in full text are congressional bills, selected presidential documents, and federal laws. Only Westlaw subscribers can access the system.

Tracking Current Federal Regulations

Regulations are issued by federal departments and agencies under the authority delegated to them by federal law or presidential executive order and have the force of law. Final regulations are printed in the Federal Register (FR) and later codified by subject in the Code of Federal Regulations (CFR). By using these two sources with their many indexes and tables, it is possible to identify existing regulations in a subject area or pertaining to a specific section of the United States Code, identify regulations issued pursuant to a specific public law, or find proposed regulations that are not yet final.

The Federal Regulatory Directory describes the regulatory responsibilities of more than 100 federal agencies, and the Index to the Code of Federal Regulations provides indexing to the CFR.

Official Government Sources

Code of Federal Regulations [http://www.gpoaccess.gov/cfr/index.html]

Superintendent of Documents P.O. Box 371954 Tel: (866) 512-1800 Fax: (202) 512-2250
Pittsburgh, PA 15250-7954
Frequency: Revised annually (about one quarter of the titles at a time) in January, April, July, and October.
The Code of Federal Regulations (CFR) codifies final regulations having general applicability and legal effect that first appeared in the Federal Register. Its 50 titles are arranged by subject. Since the annual revision incorporates new regulations and drops superseded ones, the CFR reflects regulations in effect at the time of printing. Several indexes and tables accompany the set.

Federal Register

[http://www.gpoaccess.gov/fr/index.html]
Superintendent of Documents Tel: (866) 512-1800
P.O. Box 371954 Fax: (202) 512-2250
Pittsburgh, PA 15250-7954
Customer Service: (202) 741-6000
Frequency: Daily, Monday through Friday; not published on Saturdays, Sundays, or federal holidays.

The Federal Register (FR) is the official announcement of regulations and legal notices issued by federal departments and agencies. These include proposed and final federal regulations having general applicability and legal effect; executive orders and presidential proclamations; documents required to be published by act of Congress; and other federal documents of public interest. It also updates the CFR. Daily and monthly indexes, and an accompanying publication, List of CFR Sections Affected, aid in its use.

The Register also publishes the "Unified Agenda of Federal Regulatory and Deregulatory Actions" twice a year (usually in April and October) at [http://www.gpoaccess.gov/ua/index.html]. This document provides advance notice of proposed rulemaking by listing all rules and proposed rules that more than 60 federal departments, agencies, and commissions expect to issue during the next six months. Regulations that concern the military or foreign affairs, or that deal only with agency personnel, organization, or management matters, are excluded. The agenda is available online from 1994 through the present at [http://www.gpoaccess.gov/ us/index/html], and can be searched by subject, agency, and Code of Federal Regulations part number.

Congressional staffers who need copies of pages of the Federal Register can photocopy as many pages as they need in person at the Office of the Federal Register. The address is the National Archives and Records Administration, 800 North Capitol Street, NW, Suite 700, Washington, DC 20001. For information on per-page copying costs and hours of operation, contact the Federal Register at number above.

GPO Access

[http://www.gpoaccess.gov/index.html]
GPO Access User Support Team Tel: (202) 512-1800
Superintendent of Documents (866) 512-1800
U.S. Government Printing Office Fax: (202) 512-2104
732 North Capitol Street, NW
Mail Stop: IDCC
Washington, DC 20401
E-mail: ContactCenter@gpo.gov

The Government Printing Office provides free Internet access to the Code of Federal Regulations, the codification of the general and permanent rules published in the Federal Register by the executive departments and agencies of the federal government. It is divided into 50 titles that represent broad areas subject to federal regulation. Each volume of the CFR is updated once each calendar year and is issued on a quarterly basis.

Office of Management and Budget's "Regulatory Matters" Web Page

[http://www.whitehouse.gov/omb/inforeg/regpol.html]

Reviewing proposed and final federal regulations is the job of the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs (OIRA), which focuses on cost-benefit analysis. Information on regulations that OIRA is reviewing or has reviewed during the past 30 days can be found on the "Regulatory Matters" page of the OMB website at the Web address given above. Also available is data on rules reviewed by the agency since 1981.

RegInfo.gov

[http://www.reginfo.gov]
This website is produced by OMB and General Services Administration (GSA). Here you will find a list of all rules undergoing OIRA EO 12866 regulatory review. Updated daily, a list of all rules on which review has been concluded in the past 30 days; lists and statistics on regulatory reviews dating back to 1981; and letters to agencies regarding regulatory actions.

Regulations.gov

[http://www.regulations.gov]
This website was launched by the federal government in 2003 to enhance public participation in federal regulatory activities. Here, people can search and view proposed regulations from about 160 federal departments and agencies. Also, every entry links to a comment form that readers can complete and submit to the appropriate department or agency. Regulations.gov is updated each business day with proposed new regulations. Among the database's search options are

- keyword or subject;
- department or agency name;
- regulations published today;
- comments due today;
- open regulations or comments by publication dates; and
- Code of Federal Regulations citation.

White House Records (202) 456-2226
The Office of the Executive Clerk at the White House provides a recorded message with information on the dates that executive orders and presidential proclamations appeared in the Federal Register. If the desired information is not included in the taped message, callers can also be connected with a staffer.

Commercial Sources

Citation Publishing, Inc.

[http://www.citation.com]
Citation Publishing, Inc. Tel: (949) 770-2000
92 Argonaut Street, Suite 255 (800) 808-3372
Aliso Viejo, CA 92656
E-mail: sales@citation.com
Frequency: Daily

Full-text access to the daily Federal Register and to the current Code of Federal Regulations is available through this company's CyberREGS Online database. Although the company focuses on environmental issues, this database is not limited solely to that area. Only CyberREGS Online subscribers have web access this system on the Web.

Federal Regulatory Directory

[http:www.cqpress.com]
CQ Press Tel: (866) 427-7737
1255 22nd Street, NW, Suite 400
(202) 729-1800
Washington, DC 20037
Fax: (800) 380-3810 E-mail:
customerservice@cqpress.com
Frequency: Every two years

Profiles of the mandates and operations of more than 100 federal regulatory agencies are provided in this directory. Each profile gives a brief history and description of the agency and its regulatory oversight responsibilities, and lists key staff, information sources, legislation, and regional offices. An overview of the federal regulatory process is provided. Other aids are the full texts of key regulatory acts and executive orders, a guide to using the Federal Register and the Code of Federal Regulations, and subject and name indexes.

Index to the Code of Federal Regulations

[http://www.lexisnexis.com/academic]

LexisNexis Academic & Library Solutions 7500 Old Georgetown Road Bethesda, MD 20814-6126 E-mail: academicinfo@lexisnexis.com Tel: (301) 654-1550 (800) 638-8380 Fax: (301) 657-3203
Frequency: Annual, with quarterly updates

This Index to the Code of Federal Regulations (CFR) is arranged by subject; geography (by political entities or federally regulated properties), proper name of physical entities administered by the government (national parks, monuments, etc.); official headings for each section of the CFR; and new and revised CFR sections numbers.

LexisNexis Congressional

[http://www.lexisnexis.com/academic]
LexisNexis Academic & Library Solutions Tel: (301) 654-1550
7500 Old Georgetown Road (800) 638-8380
Bethesda, MD 20814-6126 Fax: (301)657-3203
E-mail: academicinfo@lexisnexis.com

This fee database contains detailed abstracts of congressional publications such as hearings, reports, documents, and committee prints. It is the enhanced Web-based counterpart of the CIS/Index to Publications of the United States Congress (see the “Printed Sources” section). Also provided are links to the full texts of

many congressional and federal documents, such as the Congressional Record, congressional hearing transcripts, the Federal Register, and the Code of Federal Regulations. Length of coverage varies depending on the category of information sought. These and other sources are accessible only to subscribers.

Westlaw

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610 Opperman Drive
Eagan, MN 55123

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Additional Commercial Sources

Information on what is happening in Washington can be gathered by exposure to an assortment of editorial perspectives, "inside" reporting, and political analysis.

Examples of major daily newspapers offering these types of coverage are The Washington Post, The Washington Times, The New York Times, The Boston Globe, The Chicago Tribune, The Miami Herald, The Atlanta Journal-Constitution, The Los Angeles Times, The Wall Street Journal, and The Christian Science Monitor. Weekly magazines such as National Journal, Newsweek, Time, and U.S. News and World Report also provide regular coverage of the Washington scene and are on the Web.

Similarly, Web-based media sources also provide such political coverage. Examples of these include the following:

The American Spectator [http://www.spectator.org/]

The American Spectator is a conservative-leaning American monthly magazine covering news and politics.

C-SPAN.org [http://www.c-span.org]

C-SPAN is a private, non-profit company, created in 1979 by the cable television industry as a public service. Its mission is to provide public access to the political process. C-SPAN receives no government funding; operations are funded by fees paid by cable and satellite affiliates who carry C-SPAN programming.

The Hill [http://www.hillnews.com]

The Hill is a non-partisan weekly newspaper covering Congress and its members.

CNN.com: Inside Politics [http://www.cnn.com/ALLPOLITICS]

CNN.com delivers breaking news and information on top stories, weather, business, entertainment, politics, and more.

The Nation [http://www.TheNation.com]

The Nation is self-described as "America's oldest weekly journal of progressive political and cultural news, opinion and analysis."

National Review Online [http://www.nationalreview.com]

The National Review Online provides conservative commentary on politics, news, and culture.

Roll Call [http://www.rollcall.com]

Roll Call daily newspaper has been covering Capitol Hill news since 1955. (Rollcall.com is only available on subscription basis - free for print subscribers.)

Slate [http://slate.msn.com]

Slate online magazine of liberal news and commentary on culture and politics

Legislative Research in Congressional Offices

Legislative Research in Congressional Offices: A Primer, RL30796 (January 9, 2001)

CLAY H. WELLBORN & MICHAEL KOLAKOWSKI, CONGRESSIONAL RESEARCH SERV., LEGISLATIVE RESEARCH IN CONGRESSIONAL OFFICES: A PRIMER (2001), *available at* http://www.intelligencelaw.com/library/secondary/crs/pdf/RL30796_1-9-2001.pdf.

Order Code RL30796
CRS Report for Congress
Updated January 9, 2001

Clay H. Wellborn
Specialist in American National Government

Michael Kolakowski
Librarian
Government and Finance Division

Summary

Because Members of Congress have a multitude of research needs, many kinds of information contribute to and result from the legislative policy research process. The type of research to be performed depends in large part on how a Member intends to use the findings.

Successful research depends in large part on the attributes of the researcher—a knack for finding appropriate sources and facts; skepticism; inventiveness; thoroughness; precision; and objectivity. Successful researchers appreciate the importance of assessing the validity and relevance of data and evaluating the cogency of arguments set forth by advocates of varying points of view; and they present findings and alternative courses of action in an organized, clear, and concise manner, both orally and in writing.

Although there are many ways to perform legislative policy research, four steps are common to most such undertakings: (1) definition of the scope of the research and of the questions to be addressed; (2) identification of the information needed, assessment of its availability, and collection of the information itself; (3) analysis and incorporation of the information collected; and (4) presentation of findings.

For relatively simple research assignments, each step is likely to be easy. For more complex assignments, each step may consist of a series of tasks, some of which may be difficult or time-consuming. Moreover, as researchers proceed with

their work, they may discover new information or new insights that require them to change some or all of their study design. On the other hand, they may find that the information they need is not available. Experienced researchers are not surprised when such circumstances arise in the course of their work. They allow time for adjustments.

Some congressional staff prefer to do all their legislative research themselves. OthersrelytovaryingdegreesoncongressionalsupportagencieslikeCRS. Some use congressional support agencies for data, copies of government documents, periodicals, and reference sources. In such cases the CRS reference centers and congressional reading rooms may have readily at hand the materials that are needed. Other congressional staff draw upon CRS professionals for technical advice, statistical help or extensive policy research and analysis.

Even when you are able to allocate ample amounts of time to legislative research, it is seldom necessary to start from scratch. Much of what is needed may have been done already by others. When time is your most valuable and scarcest resource, it is especially important to find and use what is already prepared, and to draw upon specialized, in-depth knowledge that may be quickly available.

Introduction

Members of Congress need many kinds of information and analysis to support their legislative, oversight, and representational work. They may, for example, need quick facts, or they may want to improve their understanding of a complex set of issues. They may need information to help them draft legislation or plan congressional oversight hearings. They may have to decide which bills to support, and so may want to enhance their grasp of the similarities and differences among them. On the other hand, they may want information to answer questions raised by constituents.

Doing the work to meet these needs for information, research, and analysis often falls to new legislative assistants, for whom this guide has been prepared. The guide does not pretend to present a uniquely correct way to conduct legislative research. There are many ways to proceed. Circumstances, which vary from assignment to assignment, determine opportunities and constraints: the amount of time available; how the Member intends to use the research findings; the availability of information; and the skill, knowledge, and insight of the researcher.

The type of research to be performed depends in large part on Members' varied needs and the use to be made of the research findings in their legislative, oversight, and representational work. As part of a Member's staff, you may be asked to develop information on legislative procedures or congressional administration, to evaluate the operation of a federal program, to assess the political viability of a legislative proposal, to arrange for a legal analysis, to estimate the impact of a proposed bill on a Member's state or district, to collect

the views of interest groups, or to compile survey research data and public opinion poll results. You may also be called upon to answer questions requiring economic analysis, estimates of costs and benefits, or projections of current trends. The list is limited only by the imagination.

Given the variety of congressional needs and purposes for research and analysis, you will need certain attributes to be successful. Among those attributes are the following:

- A knack for finding appropriate sources and facts;
- A detached skepticism about what one is told, and a commitment to finding evidence to support assertions;
- Inventiveness
- Thoroughness, precision, and objectivity in defining the research issues, in gathering and evaluating relevant information, and in presenting findings (even when research will be used ultimately for partisan purposes or to support a particular point of view).
- An ability to estimate the time required to perform the research task assigned and to set and maintain a realistic deadline for completion;
- An aptitude for assessing the validity, relevance, and reliability of data;
- Insight into the cogency and logic of arguments set forth by advocates of varying points of view;
- The ability to develop well-structured options for addressing policy issues;
- The ability to make clear, concise presentations both orally and in writing; and
- A sound grasp of the Member's principles, constituency, and intentions.

Conducting Research

There are many ways to perform legislative research. Your approach should be selected to be appropriate to the task and issues at hand. Nonetheless, four steps are common to most legislative research undertakings:

1. Definition of the scope of the research and of the questions to be addressed;
2. Identification of the information needed, assessment of its availability, and collection of the information itself;
3. Assimilation and analysis of the information collected; and
4. Presentation of findings.

When an assignment is relatively simple, each step is likely to be easy. For more complex assignments, each step may consist of a series of tasks, some of which might be difficult or time-consuming to complete. Moreover, as you proceed with your work, you may discover new information or have new insights that require you to change some or all of your research design. You may also find that the information you need is not available. Experienced researchers are not surprised

when such circumstances arise in the course of their work. Plan your work so as to allow time for such eventualities.

The following discussion offers a number of comments on the tasks that may be involved in completing each of the four steps.

Scope of the Research

The essential first step in legislative research—so obvious that it is sometimes done carelessly or even overlooked—is to define concrete questions that need to be answered. Some assignments are so specific that this step is easy. At other times, however, an assignment is relatively broad or not well defined. Successful completion of such an assignment depends on the your ability to understand what aspects of the assignment really matter to the Member, to perceive the central issues, to frame concrete questions, and to limit the study so that it will be useful, manageable, and timely.[773]

In determining the scope of the work to be done, a number of considerations come into play. These considerations will determine not only the work you will need to do and information you will have to collect, but also the content of your final presentation. Among them are the following:

Issues

What are the problems and issues to be addressed in your research? How are they related to other problems and issues that are also currently of concern? To what extent is there agreement on the facts underlying problems or issues?[774]

Background

What has led to the current issue or problem at hand? In other words, how did we get to this point? What is the context of the present situation?

Proposals

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[773] To the extent feasible, try to work with your Member or supervisor in defining the scope of the research to be undertaken in order to clarify expectations of all concerned. Ask for as much information about the assignment as you can—the purposes of the research, how the results are to be used, what format would be most helpful, and so forth. Establish a deadline for preliminary review, to ensure that expectations mesh with preliminary results; and set a clear and realistic deadline for final completion.

[774] Facts are sometimes obscured in political discourse. Advocates and opponents of specific proposals select the facts they choose to report. In some instances, what is said to be a fact may be merely an often-repeated assertion, a matter of speculation, or an error. This places a heavy responsibility on the researcher, who must keep a clear sense of the range of fact applicable to the matter at hand.

Have any proposals been made to deal with the issue or problem? Are they plausible? Have any of them been submitted to analysis, rigorous or otherwise? Are other options plausible?

Questions

What are the likely consequences of implementing each alternative? How likely is each to achieve its purposes? What secondary effects are likely? What new problems might arise because of the implementation of each option? What are the political implications of each alternative? What support or opposition is each likely to generate? Where might points of compromise be found? What are the advantages and disadvantages of each alternative from your Member's point of view? From other points of view?

Form of Presentation

Sometimes the assignment specifies the form your presentation is to take—e.g. a position paper; a policy paper assessing specific questions; a personal briefing; a staff workshop.

These and other considerations set the range of the research to be undertaken, indicate the types of analysis that are appropriate, determine what kinds of information sources are to be drawn from, and set the basic framework for the presentation of your findings.

Colleagues, committee staff, and staff of congressional support agencies can help you define the scope of your research task. The Congressional Research Service (CRS), for example, has analysts who are likely to be knowledgeable in the topic to be researched and who are available to assist you. Washington, D.C. contains professional experts in virtually all subject areas. Part of your growth in legislative policy research is learning how to contact the ones you need.

Collection of Information

The questions to be researched determine the types of data you need and the most appropriate sources and format of the data. You may need several types of information, but be selective in the information you gather. More information may be available than you can assimilate and use. Much of it may be irrelevant, biased, or both. Target your information collection effort, and keep in mind the issues you are addressing and what is important to your Member.

In some instances, the most effective means of collecting information may be through the Internet and Web sites, telephone calls, letters, or FAX transmissions.

Anecdotal Information

In the political process, anecdotal information may be more persuasive than analytical information. A trenchant example can often bring dry analysis to life.

Look for such examples to enhance your own understanding of the issues you are addressing and to enrich your presentation. Beware, however, of generalizing from anecdotal information. A good story can be evocative, illustrative and persuasive, but it is not analysis.

Sources

This guide is much too brief to list every source of information you may need in your research. The following list illustrates the types of sources you may wish to consult.

Basic Reference Publications

Publications used for legislative research can often be found in Members' offices and in committee offices. They can also be found in CRS congressional reading rooms (in the Jefferson and Madison buildings of the Library of Congress) and in the CRS reference centers in House and Senate office buildings. These basic reference sources can be consulted easily and often serve as good starting points for legislative research.[775]

Congressional Support Agencies

The Congressional Budget Office, the Congressional Research Service, and the General Accounting Office provide distinct services to Congress. They provide services upon request and in anticipation of congressional needs. They serve the Congress with reports, memoranda, consultations, seminars and workshops, and various forms of close support to Members and committees.[776]

Party Organizations

In each chamber of the Congress, the two major political parties have a variety of organizations that are often sources of useful information for the legislative researcher. They are especially appropriate sources of information on the party's position on issues before the Congress.

Informal Congressional Groups

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[775] A list of these basic sources is given in: Basic Reference Sources for Congressional Offices: An Annotated Selection of Publications and Services, CRS Report 95-57 C, by Maureen Bearden.

[776] Contact congressional support agencies directly for a description of the services each offers Members and committees, or access information via their Internet home pages. The Congressional Budget Office can be accessed at [http://www.cbo.gov]. The Congressional Research Service's (CRS) home page can be accessed at [http://www.crs.gov] and at [http://www.loc.gov/crs]. The General Accounting Office (GAO) Internet home page can be found at [http://www.gao.gov].

Despite recent elimination of official funding, various congressional caucuses, coalitions, ad hoc task forces, and other informal groups can provide information on legislative issues surrounding the matters in which they are interested.[777]

Executive Branch Agencies

The White House, presidential advisory organizations, executive departments, independent agencies, and other executive branch entities can supply information on legislative issues, federal programs, and public policies within their areas of responsibility. (See Evaluating Information from the Executive Branch on page 7.) The District of Columbia white pages telephone directory includes within its blue pages section a listing of some federal and District of Columbia Government agencies and services.[778] Moreover, most executive agencies have congressional liaison offices.[779]

Institutes, Associations, and Other Private Organizations

Interest groups, research institutes, industry organizations, labor unions, professional associations, and the like can be important sources of information for legislative research. The "associations" listing in classified telephone directories (Yellow Pages), especially for Washington, D.C., can be useful, as can other published lists of organizations.[780] CRS reading rooms and reference centers also have reference collections helpful in identifying and locating organizations that may be sources of useful information on matters bearing upon their purposes and interests.

Computerized Information

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[777] Congressional Yellow Book. Leadership and Member Organizations. (Washington: Leadership Directories, 2001). Updated quarterly. See also: Informal Congressional Groups and Member Organizations: An Informational Directory, 106th Congress. CRS Report RL30288 by Sula P. Richardson.

[778] For more detailed information see: Ann L. Brownson (ed.), 2000 Federal Staff Directory (Mt. Vernon, VA: Staff Directories Ltd., 2000). The keyword subject index and staff information it provides may be particularly helpful: See also: National Archives and Records Administration, Office of the Federal Register, The United States Government Manual, 2000/2001 (Washington: GPO, 1995). As the official handbook of the federal Government, it provides comprehensive information on the agencies of the three branches of government, with a focus on programs and activities.

[779] For a list of approximately 200 congressional liaison offices see: Congressional Liaison Offices of Selected Federal Agencies. CRS Report 98-446 C by Suzy Platt.

[780] See, for example, Encyclopedia of Associations, (Detroit: Gale Research Co. 3 vols.) Updated editions are published from time to time.

Information valuable for legislative research is available to congressional offices through House Information Systems, the Senate Computer Center, and the Library of Congress. Congressional offices also have access to vast amounts of information on the Internet and the World Wide Web. For example, the congressional support agencies, party organizations, and some informal groups, institutes, associations, and other private organizations have their own web pages. Moreover, many basic reference sources are also available in full text by way of the Internet and the Web. For a brief summary of computerized information sources available to congressional offices can be found in the appendix to this report.

Evaluating Sources and Information

Always be skeptical about information. Put it to the test. Be alert for errors which can occur inadvertently in any human enterprise, and for misinformation, which could conceivably be given to you intentionally. Evaluate the information and the source carefully, keeping the following points in mind:

- Is the information current? Who provided the information? Are they associated with a particular point of view or special interest? Is the information they provided free of bias?[781] If the information is based on sampling, is the sample design suitable for your purposes?
- Does the information come from a primary source? That is, did the source itself generate the data, or is the source merely reporting data or summarizing information collected or compiled by others? If the source is secondary, it may be worthwhile to get the information from the primary source to avoid reporting errors or "interpretations" that may reflect the biases of the secondary source.
- Is the information hearsay? This can be a special problem when dealing with such political information as who supports or opposes proposals being researched. Always try to corroborate such information.
- Be especially careful with information provided by a specialized expert affiliated with organizations that have policy positions on the matter you are researching. Compare that information to information provided by other specialized experts. Be cautious in the use of uncorroborated "expert" information.
- Be alert for information that has been offered less to inform you than to persuade you or to disrupt or delay your efforts.
- Beware of "common knowledge," the origin of which no one can quite recall.

<u>Evaluating Information from the Executive Branch</u>

[781] Biased information does not necessarily need to be discarded. If you understand the bias, your approach may allow you to take the bias into account in your analysis and appropriately to characterize it in your findings.

The guidelines given above are especially important when a congressional office solicits information from an agency in the executive branch. Executive agencies have their own biases and policy goals, so do not expect total objectivity from them. Their natural and understandable desire is to make their programs and policies look good. An official request for information will result in an official reply that reflects the agency's official position. From time to time, you may find reliable agency technicians who are willing to provide data and other information unencumbered by their agency's official position. But remember that the agency may not stand behind such informal information.

When assessing information provided by an executive branch agency, seek out the views of other agencies, individuals, and organizations—e.g., competitive agencies, think tanks, academics, the General Accounting Office (GAO), CRS, public interest groups, or state and local agencies.

Analysis

As noted earlier, there are as many different approaches to analysis as there are purposes for legislative research, perhaps more. Selecting the appropriate way to analyze the information you collect during your research requires that you keep in mind the kind of information you have available and the kind of answers you need to the questions you are trying to answer.

Keep in mind that analysis is not something that begins after all the necessary information is collected. It begins as soon as you start thinking about the research assignment. Analysis continues as you identify the kinds of information needed and as you assess the quality of the information you are collecting. As your research work proceeds, you will need repeatedly to revisit a series of analytical matters:

Facts and Values

What are the facts of the situation? Is the situation, problem, or issue concretely defined; or is it amorphous? Do all who are involved agree on the central facts? To what extent is there disagreement? Or is disagreement over facts really a disagreement about values? Do different legislative proposals derive from different sets of facts or from different sets of values? Keep in mind that disputes about the facts can blur important issues, which frequently turn not on facts but on value judgments.

Precedents or Analogies

Research on legislative problems or situations that are in some way similar to the problem or situation you are addressing can sometimes serve as a model to be emulated or avoided in your own work. Look for such situations. How are they similar? How are they different? What analyses were conducted to illuminate those situations? What lessons can be drawn from the earlier experience?

Impacts

The impacts of legislation can be analyzed at various levels of sophistication, depending on one's needs. The central questions in assessing impact are three: Who would benefit either directly or indirectly? Who would bear the costs? Who would make the operational decisions were the legislation enacted and implemented, and how would they be held politically accountable? Other questions of impact will depend upon the nature of the proposal you are researching. For example, impacts on the environment, on foreign policy, or on the international, national, or regional economies may be of importance, and long term consequences may differ greatly from immediate effects.

Money

When you are considering the dollar costs associated with legislation, be careful with the concepts and terms you use. Be sure you understand the federal budget and appropriations processes and such terms as budget authority, authorization, contract authority, outlays, obligations, expenditures, and the like. Explanation of budgetary terms is found in the Budget of the United States (see the volume entitled Analytical Perspectives), in the CRS Report 98-720 GOV, Manual on the Federal Budget Process, and in a glossary of budgetary terms prepared by the General Accounting Office.[782]

When you analyze trends in, say, appropriations, keep in mind that inflation makes a difference from year to year. Be alert to the need to adjust for inflation by calculating constant dollars using the appropriate index for the adjustments. Selecting the appropriate index is important and must be done with care.[783]

Statistical Analysis

If quantitative data are being used in the analysis, the researcher may need to call upon analysts with specialized statistical skills for assistance. Interpreting frequency and percentage distributions can sometimes require special skills. Special training is also helpful if the data you intend to use result from sample surveys. Such things as sample design and the research methods used to collect the data can directly affect the extent of error in the survey results and may have important implications for making legislative policy decisions.

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[782] U.S. General Accounting Office. A Glossary of Terms Used in the Federal budget Process; and Related Accounting, Economic, and Tax Terms (Washington: 1993). 144 pp.

[783] For example, the Office of Management and Budget publishes historical and projected budget deflators. See U.S. Executive Office of the President, Office of Management and Budget, Historical Tables, Budget of the U.S. Government, Fiscal Year 2001 Table 10.1-Gross Domestic Product and Deflators Used in the Historical Tables: 1940-2002 (Washington: GPO, 2000).

Political Support and Opposition

Analysis of political support and opposition on legislative issues requires collection and assessment of information for many sources: public opinion research, position statements from key lobbyists, statements of Members, reports in the general press and in such specialized publications as Congressional Quarterly and National Journal, and statements published in committee hearings and other documents. But do not feel limited to published documents. It is often helpful to have direct person-to-person conversations with committee and member staff and with representatives of organizations interested in the matter you are researching.

It is important to know who opposes and supports the alternatives you are examining, but it is far more important for the analyst to understand why. Make every effort to know and understand your opponents' best arguments as well as you know your own.

Presentation of Findings

Members of Congress are extraordinarily busy, balancing many competing demands for their time. Few can devote much time to chatting with a researcher or reading a lengthy report. So whether you present your findings orally or in writing, get straight to the point.

Members of Congress, like most people, prefer some modes of presentation over others. Some prefer written reports; others prefer oral briefings. Some Members want the big picture without having to wade through the details; others want all the details. In all likelihood a Member's preferences about presentations will vary with circumstances, the most important of which are likely to be the availability of time and the use the Member intends to make of the research findings. You will be able to communicate with Members most effectively if you know your Member's preferences, are sensitive to the circumstances of the moment, and shape your presentation accordingly.

Nonetheless, there are some principles that are generally applicable to most legislative or oversight situations where you must present research findings. Bear them in mind as you design your own presentation and remember that most of them hang on the admonition, "Get to the point."

- Define the important issues at the beginning of the presentation. This sets the basic framework for the rest of what is to be said and helps the reader or listener understand the relative importance of what you are going to present.
- Present only enough background information to adequately set the context of the issues. Avoid anything that is irrelevant to the assignment.
- It is usually preferable to present the big ideas before getting into the details so that the reader or listener will be able more easily to see the importance of and connections among the details.

- Use plain words. Do not try to be fancy or to sound "intellectual." Beware the professional jargon of academic and governmental writers.
- Make every word tell. Say only what is necessary to communicate the important ideas and information. Eliminate the dead wood. This will yield a more forceful and effective presentation and will take less of the reader's or listener's valuable time.
- Data are often more easily grasped and understood when presented graphically.
- Be scrupulously objective in presenting research findings. Point out options.
- Remember that most important policy decisions turn on value judgments. Structure your presentation so that discussion of the "facts" does not obscure the essential values involved in the issues at hand.

The Problem of Time

Although legislative research can sometimes be conducted at a relatively leisurely pace, with plenty of time for thoroughness of research and analysis, the usual assignment must be completed on fairly short notice. When faced with such a situation, make every effort to draw upon research and analysis conducted by others and on readily available reports and other documents. Some policy organizations post their reports on their Web sites. Other organizations will send you their reports by fax or mail. CRS, for example, provides analysis of legislative issues on its Web site [http://www.loc.gov/crs] or [http://www.crs.gov]. You can also get prepared CRS Reports, Issue Briefs and Info Packs quickly at the CRS Product Distribution Center (LM-212 of the Madison Building) or order them via the CRS web site, by phone or fax. You can also ask CRS for analysis designed to meet your specific needs.

Although CRS and other legislative support agencies may be able to respond to requests for new work relatively quickly, new research and analysis may take more than the time available to you. Be sure to speak to subject specialists in CRS and other support agencies whether or not the deadline is short. They may be able to provide quick oral briefings, pointing out the current legislative issues, providing helpful background information and alternative sources of information suited to your needs. They may also be able to estimate how much time would be required to fill your research needs.

How CRS Can Help

Some congressional staff prefer to do all of their research themselves, drawing upon support agencies like CRS only for data, copies of government documents, periodicals, or reference publications. Others prefer to draw upon CRS or other experts for assistance. Much is available directly from the CRS Web site at – [http://www.loc.gov/crs] or [http://www.crs.gov]

The CRS product distribution center, reference centers, and reading rooms also provide readily available the materials you may need.

CRS Services and Products

CRS provides a variety of analytical products and services ranging from background information for general distribution to expert technical assistance and analyses on key issues.

Analytic Services and Products

- In-depth policy analysis of legislative issues
- Legal analysis
- Economic analysis
- Confidential memoranda responding to specific questions
- Bill comparisons
- In-person and telephone briefings for Members and staff
- Support for legislative and oversight hearings
- Advisory assistance at mark-ups and conference committees
- Expert testimony
- Computer modeling and simulations

Research services

- Materials to support hearings or develop legislative proposals
- Facts and statistics
- Technical information on legislative issues
- Legislative histories
- Materials for offices to use in drafting speeches for Members
- Biographical materials
- Background information on virtually any subject

Reference, information, and bibliographic services

- Quick facts: Hotline telephone service
- Compilations of CRS products and articles on current topics
- "Legislative Alert," which lists products analyzing issues scheduled for floor debate during the week
- Summaries of current legislative issues
- Books or other material borrowed from the Library's collections
- Copies of specific items: Journal or newspaper articles, scientific or technical reports, legal or government documents
- Bibliographies on virtually any subject
- Foreign language translations and related services
- Assistance with responses to constituents
- Full-text retrieval from specialized databases
- On-line legislative documentation

Seminars and conferences for Members and staff

- Seminars and workshops on public policy issues
- Legislative institutes: courses on the legislative process
- Conferences for new Members
- Orientation for district and State staff
- Weekly briefings on CRS services
- Lectures on Federal law developments
- Assistance with committee retreats

For CRS assistance, call 7-5700.
[http://www.loc.gov/crs] Or [http://www.crs.gov]

Appendix: Computerized Research Tools Available from the Library of Congress and CRS

Prepared by Michael Kolakowski

The Library of Congress and the Congressional Research Service offer a wide variety of computerized resources for legislative research by way of the Internet and the World Wide Web. The Library's computerized resources are available to congressional offices and to the general public, while CRS computerized resources, are available only to congressional offices.

THOMAS

[http://thomas.loc.gov]
THOMAS is a collection of legislative information on the World Wide Web available to the Congress and the general public via the Internet. Designed and produced by the Library of Congress, THOMAS gathers data from various sources within the Library, the Congress, and other government agencies and provides uniform searching capabilities across the various types of data. There is extensive, very current information in three major areas – Legislation, Congressional Record, and Committee Information. To use THOMAS, your office must have an Internet connection and Web browser software.

"About THOMAS" (scroll to the bottom of the page) provides clear, detailed information about the various sections. The THOMAS home page also includes searching tips and answers to frequently asked questions. The "Legislative Process" area includes hypertext versions of two primers on the legislative process: How Our Laws Are Made (from the House of Representatives) and Enactment of a Law (from the Senate). "Historical Documents" includes the full text of the Constitution, Declaration of Independence and many other important documents from our Nation's earliest years. The ability to search and browse varies somewhat from title to title in these sections. THOMAS provides the following information:

Current activity in Congress. Tabs at the top of the page provide information about current House and Senate legislative activity. These are labeled "House Floor This Week," "House Floor Now," and "Senate Schedule." A column on the left includes links to "Bills in the News," historical documents, and additional legislative, executive and judicial websites.

Legislation. Bill Summary & Status (107th – 93rd Congresses): Information about bills and amendments (see below for bill text). This section provides information about each bill's sponsors, titles, summary, legislative history, and floor/executive actions, and much more. The bill records are searchable by word/phrase, subject (index) term, bill/amendment number, stage in the legislative process, dates of introduction, sponsor/cosponsor, and committee. There are browsable lists in several categories to assist in scanning and locating legislation, e.g. all legislation, public laws, vetoed bills, etc.

Bill Text. (107th – 101st Congresses): Full text of all Government Printing Office-supplied versions of bills. Searchable by word/phrase or bill number. Searches my be limited to only those bills receiving floor action, enrolled bills, or to House or Senate bills.

Major Legislation. (107th – 104th Congresses): Selected bills and amendments judged significant by legislative analysts in the Congressional Research Service. This area is browsable by topic, title, bill/amendment number, bills enacted into law.

Public Laws by Law Number. (107th – 93rd Congresses): Bill summary and status records for each bill that became public law, listed by law number order and in bill number sequence (including House Joint Resolutions, House Bills, Senate Joint Resolutions, Senate Bills).

House Roll Call Votes. (107th – 101st Congress, 2nd Session): Roll call (recorded) votes from the House of Representatives listed in reverse chronological order (by roll call vote number). The vote summary page lists roll call vote number, vote date, the "issue" (bill/amendment number, quorum call or Journal approval), the "question" (description of the vote), the result (Passed, Failed, or Agreed to), and the title/description of the legislation. Vote detail pages show individual member votes and vote totals by party.

Senate Roll Call Votes. (107th – 101st Congress, 1st Session): Roll call (yea -nay) votes from the Senate listed in reverse chronological order (by roll call vote number). The vote summary page lists roll call vote number, vote date, bill number, vote result, and title/description of vote. Vote detail pages show individual member votes ordered alphabetically by member, by vote category, and votes summaries. Senate votes on nominations and treaties are also shown.

Congressional Record.

Most recent issue. (107th Congress): A reverse chronological list of all issues received and processed in the current Congress. Browsable by date and part or section of the Record (House, Senate, Extension of Remarks, Daily Digest).

Congressional Record text. (107th – 101st Congresses): Full text of the daily edition of the Congressional Record searchable by word/phrase, by Member of Congress, and/or date or date range. Search the entire Record or limit searches by section of the Record, date, etc. Each daily section is preceded by a clickable Table of Contents.

Congressional Record Index. (107th – 103rd Congress, 2nd Session): Cumulative index for each session of Congress, published every two weeks. Index to the daily edition of the Record prepared by staff under the leadership of the Joint Committee on Printing. Searchable and browsable by index terms. Page references are linked to the full text file. For the 107th Congress, there is a link to the GPO version of the Congressional Record Index that is updated daily when Congress is in session.

Resumes of Congressional Activity. (107th, 1st Session– 91st Congresses): Here are "workload" statistics published after each session of Congress. Among the categories of legislative data are numbers of days and hours in session, bills enacted into law, measures introduced, vetoes, etc. This section also includes the Disposition ofExecutiveNominations– atable ofthe numbersofcivilian, Air Force, Army, Navy, and Marine Corps nominations submitted to the Senate by the President and their disposition. This section is in tabular format that is browsable but not searchable.

Days-in-Session Calendars. (Senate: 107th Congress, 1st Session – 95th Congress, 2nd Session; House: 107th Congress, 1st Session – 94th Congress, 1st Session): Monthly calendar format shows the days the House and Senate met during each session of Congress. Calendars are browsable but not searchable.

Committee Information

Committee Reports. (107th – 104th Congresses): This section provides access to the full text of House and Senate committee reports, conference reports, and joint committee reports printed by the GPO. Most, but not all committee reports are printed. This section is searchable by word/phrase, report number, bill number, committee. Searches can be limited by type of report. This section is also browsable.

Committee Home Pages. This browsable section provides links to House and Senate Committees' own home pages residing on House and Senate servers. Content varies, but these pages typically include information about committee jurisdiction, membership rosters, schedules, and publications.

Legislative Information System

[http://www.congress.gov]
The Legislative Information System (LIS) is designed to provide Members of Congress and their staff with access to the most current and comprehensive legislative information available. It is available only to the House and Senate and the legislative support agencies. The Library of Congress' THOMAS system and the Government Printing Office's GPO ACCESS system continue to provide legislative information to the public. A helpful chart comparing the features of LIS and THOMAS is available by clicking on "Help" at the top of the LIS homepage. To use the LIS, your office must have an internet connection with Web browser software.

The information available through this system comes from a variety of sources, such as government agencies, the Congress, commercial sources, and the Library of Congress. Some databases, such as the text of bills, the text of the Congressional Record, etc. are processed by the Library of Congress so that users can search different files in similar ways. In other cases the system provides links to information resources that reside elsewhere and that provide their own means of indexing and displaying data.

LIS is organized into nine groups of links to legislative information. Titles of the groups do not always reveal the full range of information included at that point. Some resources can be reached from more than one location on the LIS or may be available from more than one supplier (CRS, GPO, etc.). Appearance, features, and currency vary. Browse around the categories and the "Help" feature to become familiar. Brief descriptions of the primary areas follow.

Floor Activities and Schedules. Schedule information for the Senate and House floor, committees, and leadership. Legislative and executive calendars. Links to commercial news and information sources, publications, events calendars, etc. Be sure to click on "These Links and More with Descriptions" for a menu of all the resources in this section accompanied by a two to three line description.

Committees. This section provides users with the ability to search the full text of committee reports, browse the full text of selected prints, hearings, and committee transcripts, view committee schedules and link to committee home pages.

Senate and House Links. Senate and House public home pages as well as their intranets (some features may have restricted access). Senate treaties, nominations, and executive communications files are available here. Senate and House member lists and links to their home pages. Click on "Legislative Reference Sources" for many additional links with brief explanations, such as floor activity and schedules, committee rosters, and jurisdictions, rules and procedures. In this subgroup are also links to the official Congressional

Directory, Pictorial Directory, and a continually updated version of the Biographical Directory of the United States Congress.

Other Government Links. Executive and judicial branch links are clustered here along with access to state and local government internet sites.

Executive Branch. Provides links to the White House and Executive Office of the President as well as executive agencies, independent agencies, boards, commissions, and committees. At the bottom of this page is a link to the "The Federal Judiciary," a site maintained by the Administrative Office of the U.S. Courts as a clearinghouse for information from and about the judicial branch.

Code of Federal Regulations. A group of resources provided by the Government Printing Office. These include the CFR (1996 and forward), Federal Register(1995andforward),UnitedStatesGovernment Manual(1995and forward), Weekly Compilation of Presidential Documents (1993 and forward), Public Papers of the Presidents (1995 and forward), and others.

Law Resources. Includes statutes in browsable and searchable forms from several sources, regulations, and judicial opinions from the Supreme Court, circuit courts of appeal and others.

The Constitution of the United States: Analysis and Interpretation. Presents the entire document with historical notes, amendments, and decisions.

State and Local Government. A compilation from many sources, this group offers links to state and local government information, statutes, organizations, as well as state government websites.

Legislation/Congressional Record. This section provides easy access to basic and advanced searching for Bill Summary & Status, Congressional Record, and Text ofLegislationFilesfromthe93rdCongresstothepresent. Searches can be conducted in a single Congress or in multi-Congress groups. There are links to vote information, CRS appropriations and budget information products, Public Laws, and the U.S. Code. Earlier Congresses may not have all of the searching capabilities found in the more recent years.

News and Commercial Sources. This section contains links to news wires and other commercial sources although access may be restricted to House only or Senate only. In addition, the section includes the CRS Public Policy Literature Abstracts database. There is also a direct link to the historical documents segment of THOMAS for direct access to documents such as the Declaration of Independence, the Federalist Papers, and the Constitution of the United States. This link to the Constitution does not include the notes, analysis, and interpretation found under "Other Government Links; CRS Constitutional Law Analysis."

Support Agencies. Five agencies' home pages, documents, and services can be reached from this segment: Congressional Research Service, Congressional Budget Office, General Accounting Office, Government Printing Office, and Library of Congress.

User Assistance and Guides. This section provides links to House and Senate user support groups, the CRS Guide to the Legislative and Budget Process, and the full text of the House document How Our Laws Are Made and the Senate document Enactment of a Law. Two other useful documents here are House Rules and Manual (Jefferson's Manual) and Standing Rules of the Senate. Don't overlook the Help button embedded in the flag banner at the top of the page.

Previous Congresses. The final section contains links to information from previous Congresses like that found in the section above, "Legislation/Congressional Record": Bill Summary and Status, Bill Text, Committee Reports, Public Laws, the Congressional Record, etc. Material in some categories is as early as the 93rd Congress.

CRS on the World Wide Web

[http://www.crs.gov]
The CRS World Wide Web site provides Members of Congress and their staff with information, documents, and links to resources that have been selected for their relevance to the work of the congressional office.

The CRS presence on the World Wide Web will undergo a major change and will appear in greatly enhanced form early in the 107th Congress. This primer will be updated accordingly to reflect the changes and the new features, emphasizing how researchers in congressional offices can best take advantage of the new CRS web site.

Legislative Planning: Considerations for Congressional Staff, RS20991 (June 5, 2008)

JUDY SCHNEIDER, CONGRESSIONAL RESEARCH SERV., LEGISLATIVE PLANNING: CONSIDERATIONS FOR CONGRESSIONAL STAFF (2008), *available at* http://www.intelligencelaw.com/library/secondary/crs/pdf/RS20991_6-5-2008.pdf.

Report RS20991

Judy Schneider
Specialist on the Congress
Government and Finance Division
June 5, 2008

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

The Congressional Research Service frequently receives inquiries about legislative planning. Legislative and office action plans are often used by congressional offices for almost every significant project, from organizing an extensive conference in the district or state to introducing and guiding legislation. A major action plan requires a firm understanding of the project's goal, a research strategy, and a time line for completing the project.

This report presents some of the factors usually considered in preparing an action plan. The information is provided in three sections. The first provides an overview which lays out summary considerations. The second raises questions to consider in preparing an outline for a project. The third details a sample action plan.

Overview

Define the Problem and Determine the Solution

Any legislative plan needs a thorough definition of the problem to be addressed and an explanation of what the appropriate solution might be. Solutions may include legislation, regulation, or media attention. A clearly defined issue makes the determination of the themes for developing the message and promoting the solution easier to explain to colleagues, supporters, opponents, constituents, and the press.

Next, a time line for solving the problem should be determined. Is this a one-session, or one-Congress, or longer-term project? Is it one-event or a coordinated

series of events? Should the event(s) be held in the Member's district or state, in Washington, or throughout the country?

Research the Problem

Prior to beginning work on the solution, an in-depth determination of the extent of the problem needs to be undertaken. For example, is the problem limited to one district, state, region, or is it nationwide? Should the solution address the specific issue or the policy in general?

Consultation with local and state officials, community leaders, and constituents is integral at this stage. Discussions in Washington may include committee and subcommittee leaders, the party leadership, think tanks, and interest groups.

Determine Strategy

One of the most important decisions is whether to conduct an "inside" or "outside" strategy, or possibly a combination of the two. Inside strategy entails work within the legislative process only, i.e., legislation, hearings, committee and floor amendments, floor debate, and conference consideration. Advocates may or may not be involved in any of this activity. An outside strategy calls for advocates to generate mail, press, and office visits, often to force an inside strategy to occur. A combined strategy includes using Dear Colleague letters, coordinated one-minute or special order speeches, Member-to-Member lobbying, and group press conferences.

Outline for Project

Goal

- What criteria are used to determine success? Political success? Press attention? Legislative success? Other?
- What is the duration of the project: one event, one session of Congress, two years, or longer?

Description of Project

- Are there other projects on this topic already underway? If so, should the Member conduct an independent project, or join forces? Does the political party or state of other Members involved influence the decision? Should it?
- Has the project ever been tried in the past? If yes, what Members tried it? What was the result? Is the project still needed? Are there lessons to be learned from the earlier attempt?
- What other Members, committees, or party leaders should be involved?
- What advocates should be involved? Which advocates will support, and which will actively oppose, the initiative?

Legislative Strategy

- Is legislation the appropriate remedy for the problem? Will a free-standing measure be necessary, or is there a vehicle to which an amendment can be offered?
- Should the Member introduce the legislation alone or seek original cosponsors? Should those cosponsors be bipartisan? Should they be of the same "type," e.g., women, philosophy, state and region, or district demographics, serving on the same committee?
  • Should a companion measure be introduced in the other chamber?
- Should Dear Colleague letters be sent prior to introduction? Should they be sent periodically throughout the process identifying status?
- When should the legislation be introduced, e.g. opening day, first or second session, a specific time of year?
- What should the legislation be titled? Is there a useful acronym to be found to assist in publicizing the legislation? Should a particular number be reserved, e.g., H.R. or S. 2020 relating to eye care?
- Should a working group be created? Staff only or Members only? What role should the party leadership play? What of committee leadership? What type of coalitions should be created?
- If legislation is being considered on the issue (not necessarily the Member's measure), should the Member testify at hearings? Are there others the Member would recommend as witnesses?
- If a measure is being marked up, should the Member offer an amendment, assuming the Member serves on the committee? If not, should an ally offer an amendment on the Member's behalf?
- Should one-minute speeches or special order speeches be made to keep pressure on the committee or chamber and to maintain press visibility? How often and who should be included?
- Should a Rules Committee (House only) strategy be devised?
- Should opponents strategy be monitored?

Other than Legislative Strategy

- If regulation is the appropriate solution, has the agency or executive branch been consulted?
- What is the appropriate timing?
- Should letters be written to the President? A Cabinet Secretary?

Outside Groups Strategy

• Which advocates should be contacted? At what stage should they be included?
• What role should the advocates play—research, letters to Members, media appearances, briefings?
• Should a coalition of several groups be created?

Press and Communications Strategy

Inside Communications

- Dear Colleague letters
- One-minute or special order speeches
- Staff working group
- Member working group
- Speak on floor during consideration of related measure

Outside Communications

- Press conferences
- News releases
- Op-ed pieces
- Syndicated columnists
- Editorial support, local and national
- TV or radio interviews

Time Line

- Determine time line for target dates for all activities
- Determine periodic dates to review progress and reassess strategy

Political Opportunity

- Meet with party campaign committees to discuss how project could help candidates
- Can state or local officials be given a role in promoting the project

Sample Action Plan for Legislative Project

Action plans embody the strategies employed to achieve goals. The office's strategic plan should not only identify specific steps, but also the person(s) responsible (including the Member) responsible for each step. It is also useful to include deadlines for completing action on each step. Periodic meetings to review progress on the plan may prove useful in keeping the project on track. Usually each person in the office, whether they have specific responsibility for parts of the plan, should be provided a copy of the plan.

- Identify appropriate executive branch agency(s).
- Meet with agency staff to review present programs and discuss legislative options.
- Meet with advocates to discuss problem and possible solutions.
- Determine if other legislation has already been introduced.
- Work with legislative counsel to draft legislation (or amendments).
- Obtain CBO cost estimate.
- Send out draft for comment to advocates, district and state leaders, constituents, others.
- Send out Dear Colleague letters.
- Determine appropriate Members to cosponsor legislation.
- Work with other chamber for companion legislation.

- Create staff working group after identifying other Members to be involved.
- Meet with committee and party leadership.
- Hold briefings on issue, for staff and Members.
- Develop local and national press strategy.
- Introduce legislation after determining most advantageous time.
- Hold field hearing.
- Hold town hall meeting in district/state.
- Seek opportunities, in committee, on floor, in district/state, in press, to publicize initiative.

Role of the Congressional Research Service

The Congressional Research Service and the American Legislative Process, RL33471 (March 19, 2008)

IDA A. BRUDNICK, CONGRESSIONAL RESEARCH SERV., THE CONGRESSIONAL RESEARCH SERVICE AND THE AMERICAN LEGISLATIVE PROCESS (2008), *available at* http://www.intelligencelaw.com/library/secondary/crs/pdf/RL33471_3-19-2008.pdf.

Order Code RL33471
Updated March 19, 2008

Ida A. Brudnick
Analyst on the Congress Government and Finance Division

Summary

The Library of Congress, as its name suggests, is a library dedicated to serving the United States Congress and its Members. It serves additionally as an unexcelled national library. The Library was located in the Capitol Building with the House of Representatives and the Senate until 1897, and its collections always have been available for use by Congress. Building upon a concept developed by the New York State Library and then the Wisconsin legislative reference department, Wisconsin's Senator Robert LaFollette and Representative John M. Nelson led an effort to direct the establishment of a special reference unit within the Library in 1914. Later known as the Legislative Reference Service, it was charged with responding to congressional requests for information. For more than 50 years, this department assisted Congress primarily by providing facts and publications and by transmitting research and analysis done largely by other government agencies, private organizations, and individual scholars. In 1970, Congress enacted a law transforming the Legislative Reference Service into the Congressional Research Service (CRS) and directing CRS to devote more of its efforts and increased resources to performing research and analysis that assists Congress in direct support of the legislative process.

Joined today by two other congressional support agencies, including the Congressional Budget Office and the Government Accountability Office, the Congressional Research Service offers research and analysis to Congress on all current and emerging issues of national policy. CRS analysts work exclusively for Congress, providing assistance in the form of reports, memoranda, customized briefings, seminars, videotaped presentations, information obtained from automated data bases, and consultations in person and by telephone. This work is governed by requirements for confidentiality, timeliness, accuracy, objectivity, balance, and nonpartisanship. This report will be updated as circumstances warrant.

Introduction

The Library of Congress, as its name suggests, is a library dedicated to serving the United States Congress and its Members.[784] It serves additionally as an unexcelled national library. The Library was located in the Capitol Building with the House of Representatives and the Senate until 1897, and its collections always have been available for use by Congress.

In 1914, Senator Robert LaFollette and Representative John M. Nelson, both of Wisconsin, promoted the inclusion in the legislative, executive, and judicial appropriations act of a provision directing the establishment of a special reference unit within the Library.[785] Building upon a concept developed by the New York State Library in 1890, and the Wisconsin legislative reference department in 1901, they were motivated by progressive era ideas about the importance of the acquisition of knowledge for an informed and independent legislature. The move also reflected the expanding role of the librarian and the professionalization of the profession. The new department was charged with responding to congressional requests for information. Renamed as the Legislative Reference Service and given a permanent authorization with the Legislative Reorganization Act of 1946, it assisted Congress primarily by providing facts and publications and by transmitting research and analysis done largely by other government agencies, private organizations, and individual scholars.[786]

In 1970, Congress passed legislation transforming the Legislative Reference Service into the Congressional Research Service (CRS) and directing CRS to devote more of its efforts and increased resources to doing research and analysis that assists Congress in direct support of the legislative process.[787] Today, CRS is joined by two other congressional support agencies. The Congressional Budget Office provides Congress with budget-related information, reports on fiscal, budgetary, and programmatic issues, and analyses of budget policy options, costs, and effects. The Government Accountability Office assists Congress in reviewing and monitoring the activities of government by conducting independent audits, investigations, and evaluations of federal programs.[788]

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[784] This report was originally written by Stanley Bach, formerly a Senior Specialist in the Legislative Process at CRS, who has since retired. The listed author has updated the report and is available to answer questions concerning its contents.

[785] ch. 141, July 16, 1914.

[786] ch. 753, title II, sec. 203, August 2, 1946, 60 Stat. 836.

[787] P.L. 91-510, title III, sec. 321(a), October 26, 1970, 84 Stat. 1181; 2 U.S.C. 166.

[788] For more information on this agency, see CRS Report RL30349, GAO: Government Accountability Office and General Accounting Office, by Frederick M. Kaiser.

Collectively, the three support agencies employ more than 4,000 people, giving the Congress access to information and analysis unequaled by any other national legislature.

CRS offers research and analysis to Congress on all current and emerging issues of national policy. Its staff of approximately 700 employees includes lawyers, economists, reference librarians, and social, natural, and physical scientists. Funded through the annual Legislative Branch Appropriations Acts, in FY2008 CRS was provided with approximately $102 million in budget authority.[789] Congressional responses take the form of reports, memoranda, customized briefings, seminars, videotaped presentations, information obtained from automated databases, and consultations in person and by telephone.

In all its work, CRS analysts are governed by requirements for confidentiality, timeliness, accuracy, objectivity, balance, and nonpartisanship. CRS makes no legislative or other policy recommendations to Congress; its responsibility is to ensure that Members of the House and Senate have available the best possible information and analysis on which to base the policy decisions the American people have elected them to make.

CRS is unique because its time and efforts are devoted to working exclusively for Congress. Only Members and their staffs can place requests and attend most seminars. While some CRS research and reports may reach the American public, dissemination is at the discretion of congressional clients.

CRS is part of a much larger congressional staff community numbering approximately 30,000 people. In addition to the staff of the other research support agencies and other support offices like the Library of Congress, the Government Printing Office, and the Architect of the Capitol, almost 6,700 people are employed by the U.S. Senate, while approximately 10,700 are employed by the U.S. House of Representatives.[790] Each Representative has as many as 18 full-time employees; Senators' staffs are larger and vary in size according to the populations of the states they represent. In addition, professional and clerical employees serve the committees and subcommittees in each house, while other staff members are employed by the congressional party leaders of the House and Senate, joint committees of the two houses, and the administrative officers of each house of Congress.

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[789] For additional information on the funding of the legislative branch, see CRS Report RL34031, Legislative Branch: FY2008 Appropriations, by Ida A. Brudnick.

[790] Figures obtained from: U.S. Office of Personnel Management, Federal Employment Statistics Report, September 2007, Table 9, Federal Civilian Employment and Payroll (in thousands of dollars) by Branch, Selected Agency, and Area, available online at [https://www.opm.gov/feddata/html/2007/september/table9.asp].

Supporting a System of Shared Powers

The staff of the U.S. Congress is much larger than in any other national legislature and is a consequence of the underlying nature of the American political system. In parliamentary systems, the "government," in the form of the Prime Minister and the Cabinet, and the legislature (or at least its "lower house") typically are controlled by the same party or coalition of parties. The lower house, such as the House of Commons in Canada or Great Britain, selects the Prime Minister who also is a member of the parliament and the leader of the dominant party. The Prime Minister's legislative program dominates the parliament's agenda, and new legislative elections may be necessary if it rejects a major government proposal for legislation. Normally, therefore, there is a collaborative relationship between the majority party or coalition in the parliament and the political leaders of the government ministries. When there is conflict between them, it is generally not because of the organization of government, but despite it.

Under the Constitution of the United States, by contrast, the powers of the federal government are distributed in a way that is intended and almost guaranteed to create competition and conflict between the legislative and executive branches. It has been said that the U.S. system of government is characterized by a separation of powers; in fact, however, it is a system of separate institutions sharing powers. This arrangement has led to a shifting balance of power between the two branches, as well as occasional conflicts with the Supreme Court, during more than 200 years of experience under the Constitution. During some periods, Congress exerted more influence over national policy than the President; at other times, the situation has been reversed.

The executive and legislative branches are distinctly separate institutions. In contrast to parliamentary systems, for example, Members of Congress may not hold positions of authority in the executive branch. Congress normally plays no part in selecting the President or Vice President, nor may it remove either of them from office only because of disagreements about policy. The Vice President does serve as President of the Senate, but the formal power of that position is very limited. Further, the President may not remove Members of Congress nor is there any provision for early dissolution of a Congress by the executive.

Representatives, Senators, and the President all serve for fixed terms and for different periods of time. Even when a President wins an overwhelming election victory, therefore, he still finds that two-thirds of the Senators had been elected two or four years earlier, and that all Representatives will run for re-election two years later when the President is not a candidate. One possible result is that a President of one political party may confront one or both houses of Congress controlled by the other party. In fact this situation has prevailed in most years since the end of World War II. In this circumstance, the competition between

separated institutions is made even more intense by the added dimension of competition between the different political parties controlling them.

Yet these separated institutions are linked by their shared powers. For example, Congress has the primary legislative power under the Constitution. The President may recommend any legislation he thinks desirable, but Congress is under no obligation to act on, much less approve, his proposals, though they usually do receive respectful and careful study. On the other hand, the President does have the constitutional power to disapprove (or veto) any bill approved by Congress, in which case it can become law only if approved again by two-thirds votes in both houses. So the legislative power is shared, and the threat of a presidential veto usually gives him great influence over Congress's legislative decisions.

Presidential powers also are shared. For instance, the President has the constitutional authority to nominate senior officers of the executive branch and all federal judges and justices and to negotiate treaties with other nations. The Senate must agree, however, by majority vote to each of his nominations, and no treaty can take effect unless the Senate approves it by a two-thirds vote. The President also is Commander-in-Chief of the armed forces, but Congress passes legislation controlling the size, composition, and budget of the military. In short, if either branch of government is to fulfill its constitutional responsibilities effectively, it needs the cooperation, or at least the acquiescence, of the other.

The reason for this system of shared powers lies in both an historic mistrust of government power and a concern over the efficient administration of the law. The authors of the Constitution had experience with excessive power in the hands of executive officials (the British king and his ministers), but they also feared that an uncontrolled legislative majority also might be liable to abuse its power. The best way to protect against abuses of power, they concluded, was to divide it among officials of different institutions, giving these officials an incentive to restrain each other in their own self-interest. The authors' experience with the ineffective Articles of Confederation also convinced them of the need for a strong apparatus to administer the law, a responsibility they saw better vested in an executive body than the legislature.

In this way, a system of "checks and balances" prevents any single institution of government from becoming too powerful. Although sharing powers between different institutions can create obstacles and cause delays for the government in making decisions, having a government that its citizens can control and hold accountable was preferred in 1787, when the Constitution was written, to having one effectively controlled by either the executive or the legislative branch. And although circumstances have changed dramatically since then, the fundamental framework of government under the Constitution remains unchanged today.

In order for the sharing of power to protect against the abuse of power, more is required than the words of the Constitution. Each branch of government must be able to protect its independence and assert its power effectively. In its continuing

effort to preserve its constitutional authority and independence, Congress can suffer from an important competitive disadvantage: it often possesses less information and knowledge than the executive branch, which has more than 2.6 million employees.[791] If the executive branch could control what Congress knows, it might largely nullify Congress's independent exercise of its powers and its ability to oversee the exercise of executive powers. While Congress would remain independent of the executive branch in theory, it could become its captive in practice. This is an important reason why Congress has created permanent committees of the House and Senate with responsibility for studying issues, recommending legislation, and conducting oversight on the subjects assigned to them. In this way, Congress develops policy expertise among its own members and the staffs of its committees.

For the same reason, Congress created its three support agencies, including CRS, which are not subject to executive branch direction and which assure Congress of its own expert and independent assessments of national and international events and condition, its own studies of existing laws and programs, and its own analyses of the options for change.

Nonpartisan Support for a Partisan Institution

There is another respect in which the mandate of CRS reflects the nature of U.S. political institutions and the party system: although the House and Senate are organized by the Democratic and Republican parties and nearly all Members of Congress are affiliated with one party or the other, CRS is a nonpartisan institution. Its purpose is to inform, not to persuade.

Members' party affiliations remain the single best basis for predicting how they will vote, and congressional party leaders have a profound effect on how the House and Senate conduct their legislative business. Although Congress historically has not experienced highly cohesive party voting, particularly in comparison with voting in the parliaments in which members are elected from party lists under a system of proportional representation, "partisan differentiation is still substantial ... [and] strict party votes always organize the House, and party unity votes are increasingly common (and often increasingly sharply dividing the two parties) on a wide range of substantive and procedural

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[791] Figure obtained from U.S. Office of Personnel Management, Federal Employment Statistics Report, September 2007, Table 9, Federal Civilian Employment and Payroll (in (continued...)
thousands of dollars) by Branch, Selected Agency, and Area, available at

[https://www.opm.gov/feddata/html/2007/september/table9.asp].

votes."[792] Despite these recent trends in partisanship, the Democratic and Republican parties continue to encompass diverse interests, a fact for which observers have credited both the national history and the rules of the U.S. electoral system for the operation of the current party system. This diversity has expanded the role of CRS as a nonpartisan source of research.

There cannot be a governing coalition of parties in the United States. The existence of a single, powerful, elective presidency encourages disparate factions and interests to coalesce into two parties at the national level. Historically, third parties have had great difficulty attracting and then maintaining widespread support in federal elections because they usually have had a narrow ideological focus and geographical base, and so have had no real hope of winning the single most visible and valuable prize of American political competition, the presidency. The result has been two parties with different centers of political gravity but with overlapping national constituencies in presidential elections.

In congressional elections, candidates run for the House of Representatives in 435 separate single member districts and for the Senate in 50 different states.[793] The constituencies are geographically, economically, and socially diverse. This electoral system, in which each House constituency elects only one legislator, and in which only one candidate can win each election, also encourages two-party competition at the state and local level, in contrast to systems in which legislators are elected by proportional representation from party lists. It is in this environment that CRS exists to serve as a source of nonpartisan analysis and information.

Serving All the Members of Congress

In addition to serving the committees and party leaders of the House and Senate, CRS responds to requests for assistance from all Members of both houses, regardless of their party, length of service, or political philosophy. Each Member, as a consequence of the American system of political parties and elections noted above, is an independent political decision-maker who makes his or her own judgments about what legislation to sponsor or support. Individual members of their staffs request help from CRS, for example, in learning about issues, developing ideas for legislation, and evaluating legislative proposals made by the President, their colleagues, or private organizations.

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[792] John H. Aldrich and David W. Rohde, "The Transition to Republican Rule in the House: Implications for Theories of Congressional Politics," *Political Science Quarterly*, vol. 112, no. 4 (Winter 1997), pp. 541-567, at pp. 545-546.

[793] These 435 Members are joined in the House of Representatives by the Delegates from American Samoa, Guam, the Virgin Islands, and the District of Columbia, and the Resident Commissioner from Puerto Rico.

The system of making congressional nominations through primary elections also severely limits the influence of party organizations on the selection of House and Senate candidates. Each party's candidates for election to Congress usually are chosen in a preliminary or "primary" election. In most states, any person can be listed on his party's primary election ballot if he or she can demonstrate some support from its members. The person who wins the primary election then becomes the party's candidate even if the state or local party leaders would have preferred someone else.

Thus, candidates for election to the House and Senate are political entrepreneurs. They usually decide at their own initiative that they want to seek election and they obtain the nomination of their party by winning a primary election, not by winning the support of a formal party organization. They then associate themselves with their party and its other candidates as it serves their own interests.

As a result, there is a direct and personal tie between each Representative and Senator and the voters in his or her district or state. The support Members enjoy in their constituencies rests partly on their party affiliations. Yet their election and re-election do not necessarily depend on their party support or the efforts of formal party organizations. When Members of either house are elected for the first time and arrive in Congress, they almost certainly feel an allegiance to their party and they wish to support its leaders whenever possible. But most new Members also understand that they were not elected merely because of their party; they owe their success largely to their own efforts.

In this situation, Representatives and Senators can be independent political decision-makers. They develop their own bills and amendments to promote the policies that are important to them and their constituencies. As they prepare for each legislative decision, Members may consider many influences, though they ultimately reach their own decisions based on their personal public policy preferences, the advice of their personal staff, and their assessment of what is in the best interests of their state or district. Each Member then needs direct access to a source of information and analysis to help him or her make these judgments — a source of accurate information and expert analysis that is independent and dependable and that has no interest in affecting the Member's decisions. To serve this need, the resources of CRS are available equally to each Representative and Senator without regard to party, position, or philosophy.

Support Throughout the Legislative Process

CRS supports the Members, committees, and leaders of the House and Senate at all stages of the legislative process, from helping them as they evaluate the need for new legislation before it is introduced, to giving them technical assistance as they reach final agreement on bills before they are presented to the President for his approval or disapproval.

The ideas for legislation come from many sources, but every bill must be introduced by a Representative or Senator before Congress can formally consider it. The President and other executive branch officials frequently submit drafts of proposed bills to Congress which Representatives and Senators introduce on their behalf. Legislative proposals also come from interest groups and other private organizations, and even from individual citizens who have become particularly interested in an issue. And of course, Members and their staffs frequently develop their own legislative ideas.

CRS can contribute at this preliminary stage in several ways. Members may ask CRS to provide background information and analysis on issues and events so they can better understand the existing situation and then assess whether there is a problem requiring a legislative remedy. This assistance may be a summary and explanation of the scientific evidence on a technically complex matter, for example, or it may be a collection of newspaper and journal articles discussing an issue from different perspectives, or a comparative analysis of several explanations that have been offered to account for a generally recognized problem. CRS also identifies national and international experts with whom Members and staff may consult about whatever issues concern them and sponsors programs at which Members meet with experts to discuss issues of broad interest to Congress.

If a Member decides to introduce a bill, CRS analysts can assist the legislator (or his or her staff) in clarifying the purposes of the bill, identifying issues it may address, defining alternative ways for dealing with them, evaluating the possible advantages and disadvantages of each alternative, developing information and arguments to support the bill, and anticipating possible criticisms of the bill and responses to them. Although CRS does not draft bills, resolutions, and amendments, its analysts may join staff consulting with the professional draftsman within each chamber's Office of the Legislative Counsel as they translate the Member's policy decisions into formal legislative language.

Members and committees also can request CRS to help them assess and compare legislative proposals, including competing bills introduced by Members and proposals presented by executive branch officials, private citizens and organizations. CRS can assess the intent, scope, and limits, of the various proposals.

When a bill is introduced in the House or Senate, it is assigned to a permanent legislative committee with responsibility for that subject, and then usually to a subcommittee of the committee. If the bill is broad in scope, it may be referred to two or more committees. There is no requirement for any subcommittee or committee to act on any bill, and the overwhelming majority of bills die because the committees choose not to act on them. When a subcommittee selects a bill (or several bills on the same subject) for serious attention, it usually begins by conducting public hearings on one or more days at which executive branch officials, other Members of Congress, representatives of private organizations,

and even individual citizens present their views on the bill's merits. CRS analysts can assist in this process by providing background information and reports, presenting a preliminary briefing to Members or staff, identifying potential witnesses, and suggesting questions that Members may consider asking the witnesses.

After the hearings on a bill, the subcommittee or committee meets to debate and vote on amendments to it. If requested, CRS staff may attend these meetings to serve as a nonpartisan source of expert information available to all Members. If the subcommittee and then the full committee conclude that new legislation is needed, they report a bill to the House or Senate for all its Members to consider. The committee also submits a written report that explains the background for its decision, analyzes the purposes and effects of each major provision of the bill, and includes other information, such as predictions about the cost of implementing it, that help other Members decide whether they should support the bill. CRS specialists may assist the committee's staff in preparing some sections of this report, although cost estimates are developed by the Congressional Budget Office.

During the committee and floor consideration stage of the legislative process, CRS can assist Representatives and Senators in several different ways, in addition to providing background information to assist Members in understanding the issues a bill addresses. CRS attorneys can help clarify legal effects the bill may have. CRS policy analysts can work with Members in deciding whether to propose amendments and then in making certain that their amendments are designed and phrased to achieve the desired results. CRS also can help Members prepare for the debate by providing data and other information that they can use to support the positions they have decided to take.

The House and Senate each has a complex set of rules for determining if, when, and how all its members will act on the bills its committees have approved. These procedures control, among other things, how long Members can debate the bill and if Members are free to offer amendments on the House or Senate floor to change its provisions. The legislative procedures of the House generally impose limits on deliberation, while the Senate, in part because it always has been much smaller than the House, has placed more importance on engaging in extended debate and less emphasis on reaching prompt decisions. CRS staff can clarify the legislative procedures of the House and Senate, assisting Members and staff in understanding the effects of these procedures and how Members can use the procedures to promote their own legislative goals.

When the House and Senate first pass a bill, they usually have some disagreement over precisely what it should say and do. All these disagreements must be resolved before the legislative process is completed and the bill can be presented to the President. For the most important bills, the two houses usually agree to create a temporary conference committee composed of both Representatives and Senators, most of whom had been involved in developing the

bill initially in the committees of the House and Senate. There is a different conference committee for each major bill; the purpose of the committee is to reach compromises that settle all the disagreements between the houses concerning that bill.

The discussions of a conference committee sometimes are very informal; in other cases, they are as formal as bilateral treaty negotiations. CRS analysts can contribute to this last stage of the legislative process by helping identify the issues to be resolved, by clarifying and comparing the positions of the two houses on each issue, and by identifying different ways in which the legislative disagreements could be resolved. Once the conferees reach agreement, as they usually do, they present their report to the House and Senate. If the two houses accept the report, the bill is ready to be sent to the President for his approval or veto.

Throughout this process, CRS offers timely and confidential assistance to all Members and committees that request it, limited only by CRS's resources and the requirements for balance, nonpartisanship and accuracy. CRS does not conduct research on sitting Members or living former Members of Congress, unless granted specific permission by that Member or that if Member is nominated by the President for another office.

Further, CRS services are not limited to those that relate directly to enacting new laws. For example, CRS attempts to assess emerging issues and developing problems so that it will be prepared to assist the Congress if and when it becomes necessary. Although it rarely conducts field research, CRS assists committees in other aspects of their study and oversight responsibilities. In addition, it offers numerous courses, including legal research seminars and institutes on the legislative process, the budget processes, and the work of district and state staff. At the beginning of each Congress, CRS also provides an orientation seminar for new Members.

Conclusion

The Congressional Research Service serves the American people and their constitutional system by serving Congress in a way that reflects underlying characteristics of the national political process. Although sometimes compared with research arms of other national legislatures, CRS is well-adapted to its own constitutional and political context and might not prosper if reproduced without change in a wholly different socioeconomic, historical, and constitutional setting. Yet there are requisites for accountability and effectiveness that every democratic government must meet in one way or another.

One such requisite is public participation in the lawmaking process through representative bodies such as the United States Congress and other national parliaments. Another is the need for the legislature and its members to be informed sufficiently well so that they can make reasoned choices in responding

to social needs, and thereby also reinforce popular support for democratic institutions. By helping to satisfy the information requirements of Congress and its Members, CRS makes its unique contributions to preserving and strengthening democratic government in the United States.