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Michael P. Murphy

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**“OF” AS A LOADED WORD: CONGRESS TESTS THE
BOUNDARIES OF ITS COMMERCE POWER
WITH AN AMENDMENT TO THE
FEDERAL MURDER-FOR-HIRE STATUTE**

Michael P. Murphy*

“The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”¹

INTRODUCTION

For Carl M. Drury, Jr., M.D., the third time was definitely not the charm. With his third marriage apparently intolerable and looking to loose his matrimonial bonds, Drury sadly settled on murder as his means to freedom.² Like Dr. Jekyll, to the community Drury seemed an upstanding citizen, generous with his time and a devoted father of five.³ Ironically, it was Drury’s generosity that ultimately helped bring him to justice. On one occasion in 2001, Drury invited his friend and patient, Stephen Whatley, to stay with him when Whatley separated from his wife.⁴ During that stay, Whatley, a U.S. Bureau of Alcohol, Tobacco, and Firearms (ATF) instructor, saw a very different side of Drury.⁵

Thinking he had found a sympathetic soul in Whatley, Drury asked for help in having his wife murdered.⁶ Once he determined that Drury was serious, Whatley reported the incident to the ATF’s Savannah field office, and a trap was set for

* Michael P. Murphy is a J.D. candidate at the College of William & Mary School of Law. He graduated from Hillsdale College with a bachelor of science in political economy. He wishes to thank the editors and staff of the *William & Mary Bill of Rights Journal* for their invaluable aid.

¹ United States v. Morrison, 529 U.S. 598, 618 (2000).

² See Terry Dickson, *ATF Instructor Says Drury Asked Him To Kill; Physician Ordered Detained Until Trial*, FLA. TIMES-UNION, Oct. 12, 2001, at A1, LEXIS, FLA Library, FLATUN File.

³ *Id.*

⁴ United States v. Drury, 344 F.3d 1089, 1093 (11th Cir. 2003), *vacated by* 358 F.3d 1280 (11th Cir. 2004), *vacated by* No. 02-12924, 2005 U.S. App. LEXIS 761 (11th Cir. Jan. 18, 2005).

⁵ *Id.* at 1093.

⁶ *Id.*

Drury.⁷ Another ATF agent, Louis Valoze, posed as the hit man and had a number of telephone conversations and meetings with Drury to work out the details of the murder.⁸ Although neither Valoze nor Drury left the borders of Georgia in the commission of the crime, one of Drury's phone calls passed through a Jacksonville, Florida switching center before reaching Valoze's cell phone in Georgia.⁹ To a jury of nine women and three men, this was enough to convict Drury under 18 U.S.C. § 1958 for using a facility in interstate commerce to effectuate a murder-for-hire scheme. Drury was then sentenced to seventeen years in federal prison.¹⁰

Drury appealed his conviction to the Eleventh Circuit Court of Appeals, challenging, among other things, the validity of federal jurisdiction.¹¹ In September 2003, the Eleventh Circuit affirmed Drury's conviction under § 1958, ruling that federal jurisdiction was proper because Drury's telephone calls to Valoze were temporarily routed through another state.¹² In affirming the conviction, however, the Eleventh Circuit construed § 1958 narrowly, declaring that actual interstate activity was required for federal jurisdiction to attach.¹³ The court's opinion represented the narrowest reading of the statute among the federal appeals courts that had considered the issue, driving the interpretive wedge among the circuit courts ever deeper.

On February 3, 2004, the Eleventh Circuit vacated its previous decision in *Drury* and scheduled an en banc rehearing of the case for June 15, 2004.¹⁴ Noting the uncertainty surrounding § 1958's jurisdictional element, the court instructed counsel to focus their briefs and arguments on the following three issues:

1. Whether the jurisdictional element of the murder-for-hire statute, 18 U.S.C. § 1958(a), which criminalizes the "use [of] the mail or any facility in interstate or foreign commerce," requires that there be a showing that the facility was actually used in interstate commerce or that it is sufficient to show that the facility, and not its use, was in interstate or foreign commerce in light of the statute's definition of a facility under § 1958(b)(2),

⁷ *Id.* at 1093–94.

⁸ *Id.*

⁹ *Id.* at 1094.

¹⁰ Terry Dickson, *Drury Gets 17 Years in Plot To Kill Wife; "I Was Railroaded" Despite Evidence*, FLA. TIMES-UNION, May 16, 2002, at A1, LEXIS, FLA Library, FLATUN File.

¹¹ *Drury*, 344 F.3d at 1092.

¹² *Id.* at 1104.

¹³ *Id.*

¹⁴ *Drury*, 358 F.3d 1280; Letter from Thomas K. Kahn, Clerk of the Eleventh Circuit Court of Appeals, to All Counsel of Record in United States v. Carl M. Drury, Jr. (Mar. 5, 2004) [hereinafter Kahn Letter], at <http://www.ca11.us.courts.gov/enbanc/issues/EB12924ISSUES.pdf>.

which provides that a “facility of interstate commerce includes means of transportation and communication.”

2. Address the federalism jurisprudence of the Supreme Court insofar as it may relate to this case.

3. Whether the district court erred under *United States v. Gaudin*, 515 U.S. 506 (1995), by instructing the jury that a pay or cellular telephone is a per se facility in interstate commerce, rather than asking the jury to decide whether such a phone is in interstate commerce.¹⁵

On January 14, 2005, the Eleventh Circuit issued an opinion vacating the previous order granting rehearing en banc and, rather than reinstate the panel opinion, remanded the case to the panel for further consideration.¹⁶ A model of judicial efficiency, the Eleventh Circuit panel issued its opinion four days later.¹⁷ Judge Marcus, who concurred in the panel’s original opinion but was sharply critical of the majority’s interpretation of § 1958, wrote for a unanimous panel.¹⁸ The circuit court affirmed Drury’s conviction on the same grounds as their previous opinion, noting that under either reading of § 1958, Drury’s phone calls crossed state lines, rendering him subject to federal jurisdiction.¹⁹ The court further affirmed the previous panel’s ruling that the district court’s jury instruction that a pay or cellular telephone is a per se facility in interstate commerce was harmless error because there was actual interstate activity.²⁰

Congress crafted the federal murder-for-hire statute, 18 U.S.C. § 1958, as a means for punishing people who employ instruments of interstate commerce in committing a murder.²¹ The law provides for federal punishment up to the death

¹⁵ Kahn Letter, *supra* note 14.

¹⁶ *United States v. Drury*, No. 02-12924, 2005 U.S. App. LEXIS 761, at *3 (11th Cir. Jan. 14, 2005).

¹⁷ *United States v. Drury*, No. 02-12924, 2005 U.S. App. LEXIS 887 (11th Cir. Jan. 18, 2005).

¹⁸ *Id.* Notably, Judge Marcus authored another significant Commerce Clause opinion for the Eleventh Circuit only eight days earlier that served as a harbinger of the *Drury* decision. In *United States v. Ballinger*, Judge Marcus, writing for a divided Eleventh Circuit sitting en banc, vacated a previous panel’s dismissal of a federal criminal conviction reinstating the conviction of Ballinger, a Satan-worshipping church arsonist who was convicted of violating a federal statute for setting a Georgia church ablaze. *Ballinger*, Nos. 01-14872 & 01-15080, 2005 U.S. App. LEXIS 343 (11th Cir. Jan. 10, 2005).

¹⁹ *Drury*, 2005 U.S. App. LEXIS 887, at *2.

²⁰ *Id.* at *22–24.

²¹ 18 U.S.C. § 1958 (2004). The Senate committee considering the legislation noted in its report that “[t]he gist of the offense is the travel in interstate commerce or the use of the facilities of interstate commerce or of the mails with the requisite intent.” S. REP. NO. 98-225, at 306 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182.

penalty for planning or committing murder in exchange for something of pecuniary value.²² Presumably designed as a tool to combat organized crime, the statute's Achilles heel has been the ambiguously worded jurisdictional element. This ambiguity has caused division in the federal courts. Two circuits, the Fifth²³ and the Seventh,²⁴ have ruled that federal jurisdiction arises even with the purely intrastate use of a facility of interstate commerce occurring in the commission of the crime. In contraposition, the Sixth Circuit²⁵ and Eleventh Circuit²⁶ have held that a defendant's use of the facilities of interstate commerce triggered federal jurisdiction only when the facility was actually used interstate. In December 2004, Congress amended the statute to resolve the textual ambiguity that plagued the statute.²⁷ By replacing the word "in" for "of" in the jurisdictional element of the statute, Congress clarified and broadened the statute's jurisdictional reach to include purely intrastate criminal activity.²⁸ Unfortunately, this change brings the statute into conflict with the Court's current Commerce Clause jurisprudence.

Criminal law traditionally has been the province of state authority.²⁹ Extending federal jurisdiction to crimes that are essentially local in nature and have only a tenuous connection to interstate commerce portends a significant upset in the balance of power between the federal government and the states. Furthermore, Congressional expansion of federal jurisdiction indicates an important transfer of power from the legislative branch to the executive branch in the form of prosecutorial discretion. Finally, applying the Court's framework for proper Commerce Clause legislation further defines the contours of Congress's most often exercised jurisdictional justification: the commerce power.

By amending the statute to broaden explicitly its jurisdiction in the murder-for-hire statute to cover purely intrastate activity, Congress has tested the boundaries of its commerce power, as construed in *Lopez* and *Morrison*, in the problematic realm of electronic communication. With the Supreme Court seemingly at the cusp of a leadership change, this rather small amendment could provide the impetus for a major shift in the Court's judicial deference to Congress in matters involving interstate commerce.

In consideration of the statute's text and the Court's Commerce Clause jurisprudence, 18 U.S.C. § 1958 as recently amended exceeds the commerce power of

²² *Id.*

²³ *United States v. Marek*, 238 F.3d 310 (5th Cir.), *cert. denied*, 534 U.S. 813 (2001).

²⁴ *United States v. Richeson*, 338 F.3d 653 (7th Cir.), *cert. denied*, 540 U.S. 934 (2003).

²⁵ *United States v. Weathers*, 169 F.3d 336 (6th Cir.), *cert. denied*, 528 U.S. 838 (1999).

²⁶ *United States v. Drury*, 344 F.3d 1089 (11th Cir. 2003).

²⁷ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6704, 118 Stat. 3638.

²⁸ *Id.*

²⁹ See, e.g., Edwin Meese, III, et al., *The Federalization of Criminal Law*, 1998 A.B.A. SEC. CRIM. JUST. REP. 5, available at <http://www.abanet.org/crimjust/fedreport.html>.

Congress under the Constitution and violates traditional principles of federalism. To pass Constitutional muster, Congress can extend federal jurisdiction for murder-for-hire prosecution only when a facility of interstate commerce is employed in actual interstate activity during the commission of a crime.

I. TEXT AND HISTORY OF 18 U.S.C. § 1958

A. Text

The federal murder-for-hire statute, the title of which reads: “Use of interstate commerce facilities in the commission of murder-for-hire,” provides:

- (a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, shall be fined under this title or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined under this title or imprisoned for not more than twenty years, or both; and if death results, shall be punished by death or life imprisonment, or shall be fined not more than \$ 250,000, or both.
- (b) As used in this section and section 1959 —
 - (1) “anything of pecuniary value” means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage;
 - (2) “facility of interstate or foreign commerce” includes means of transportation and communication; and
 - (3) “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.³⁰

The 2004 amendment substituted “facility of” for “facility in” in subsection (a), and inserted “or foreign” after “interstate” in subsection (b)(2).³¹ Prior to the

³⁰ 18 U.S.C. § 1958 (2004).

³¹ See § 6704, 118 Stat. 3638.

amendment, the inconsistency and ambiguity quickly surfaced in the statute's title that employed the phrase "use of interstate commerce facilities," subpart (a) which used the phrase "use . . . any facility *in* interstate . . . commerce," and subpart (b)(2) that used the term "facility *of* interstate commerce."³² While the amendment clarified the jurisdictional reach of the statute, it also became subject to the Court's invalidation.

B. History

The genesis of the federal murder-for-hire statute occurred in 1961 under the Interstate Travel in Aid of Racketeering Act (Travel Act).³³ With the Travel Act, Congress aimed to take a bite out of organized crime and racketeering.³⁴ Congress added the murder-for-hire statute to the Travel Act in 1984 as part of the Comprehensive Crime Control Act.³⁵ In 1988, the section was renumbered § 1958 and slightly amended.³⁶ Two years later,³⁷ and again in 1994³⁸ and 1996,³⁹ Congress slightly amended the statute, but did not alter the ambiguous language concerning the interstate commerce requirement. Two other statutes shared the same definition of "facilities of interstate commerce" with § 1958 but neither suffered from internal textual conflicts nor did they face the jurisdictional dilemma.⁴⁰

Buried deep within the colossal Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) is an amendment to 18 U.S.C. § 1958 that changed one word of the federal murder-for-hire statute's jurisdictional description and finally resolved the longstanding and circuit-dividing textual ambiguity.⁴¹ While the amendment

³² 18 U.S.C. § 1958 (2000) (emphasis added).

³³ 18 U.S.C. § 1952 (Supp. III 1958).

³⁴ See Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213, 242-43 (1984).

³⁵ Pub. L. No. 98-473, § 1002(a), 98 Stat. 1837, 2136 (1984). At the time of enactment the statute was codified at 18 U.S.C. § 1952A. *Id.*

³⁶ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7058(b), 102 Stat. 4181, 4403 (substituting "ten years" for "five years").

³⁷ Crime Control Act of 1990, Pub. L. No. 101-647, §§ 1205(k), 3558, 104 Stat. 4789, 4831, 4927.

³⁸ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 60003(a)(11), 140007(b), 320105, 330016(1)(L), (N), (Q), 108 Stat. 1796, 1969, 2033, 2111, 2147, 2148.

³⁹ Economic Espionage Act of 1996, Pub. L. No. 104-294, §§ 601(g)(3), 605(a), 110 Stat. 3488, 3500, 3509.

⁴⁰ 18 U.S.C. § 1959 (2000); 18 U.S.C. § 2332(b) (2000). Section 1959(b), which immediately follows § 1958, shares the definition with § 1958 although the term is never used anywhere in the statute. Section 2332(b) directly references § 1958(b)(2), yet concerns international terrorism so no similar jurisdictional question arises.

⁴¹ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6704, 118 Stat. 3638, 3766.

changed only one word — replacing “in” with “of” — it portends the need for Supreme Court clarification of the parameters of Congress’s commerce power in the realm of electronic communication and criminal law. Rarely has so much rested on so little.

C. Legislative History of § 1958

The legislative history for § 1958 is relatively meager. Prior to its enactment, a senate report acknowledged the potential federalism problems created by the statute, suggesting that the statute should be employed in limited circumstances considering a number of factors, including the type of suspect and the relative abilities of the state and federal agencies to investigate.⁴² The senate report also indicated that state and federal authorities should collaborate to the extent possible in these cases.⁴³ According to the report, the only limit on federal power in these cases resides with the U.S. Attorney in the form of prosecutorial discretion.⁴⁴

Despite clearly advocating broad prosecutorial discretion, the senate report failed to answer the important question of exactly when federal jurisdiction attached. The report also failed to reconcile, much less mention, the seemingly conflicting terms in the statute. Arguably the closest it came to resolving this issue was the committee’s distinction between travel in interstate commerce and the use of interstate commerce facilities, which could indicate that federal jurisdiction would arise whenever a facility of interstate commerce was employed, regardless of

⁴² S. REP. NO. 98-225, at 304–05 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3483–84. The Senate committee addressed the concerns about invoking federal jurisdiction and stated that “the apparent involvement of organized crime figures or the lack of effective local investigation because of the interstate features of the crime could indicate that Federal action was appropriate.” *Id.* at 305.

⁴³ *Id.*

⁴⁴ *Id.* at 304–05. The Senate Committee’s opinion on this point was refreshingly unambiguous:

[T]he committee believes that the option of Federal investigation and prosecution should be available when a murder is committed or planned as consideration for something of pecuniary value and the proper Federal nexus, such as interstate travel, use of the facilities of interstate commerce, or use of the mails, is present. This does not mean, nor does the Committee intend, that all or even most such offenses should become matters of Federal responsibility. Rather, Federal jurisdiction should be asserted selectively based on such factors as the type of defendants reasonably believed to be involved and the relative ability of the Federal and State authorities to investigate and prosecute.

Id.

interstate use, in the commission of a murder-for-hire scheme.⁴⁵ The Committee's concern for federalism problems may also indicate their intent to extend jurisdiction to purely intrastate activity, or it could reflect their recognition that most murder-for-hire cases are essentially local in nature even if the jurisdictional requirement of interstate activity is met.

The original legislative history of § 1958 did little to clear the murky water of its meaning, but generally seemed to support broader federal jurisdiction. Even so, the senate report expressed that § 1958 was aimed at national organized crime, not at local criminal activity.⁴⁶

Legislative history for the 2004 revision is virtually non-existent. Indeed, it appears that the revision received little consideration before receiving summary approval as "a technical corrections bill."⁴⁷

II. BACKGROUND: THE CIRCUIT SPLIT

Since the statute's inception in 1984, four circuit courts have confronted the challenge of interpreting the federal murder-for-hire statute.⁴⁸ Neither the Bureau of Justice Statistics nor any state keeps statistics on murder-for-hire prosecutions so it is difficult to determine the prosecutorial effect of the federal law. Perhaps indicative of the building momentum regarding this issue and application of the law, all four cases were decided in the last five years.⁴⁹ The statute's wooly language proved to be an open invitation to diverse interpretation by the courts. In the most recent decision, the Eleventh Circuit construed § 1958 narrowly, finding, as the Sixth Circuit did in 1999,⁵⁰ that the facilities of interstate commerce must be engaged in actual interstate activity for federal jurisdiction to arise.⁵¹

Taking the opposite position, both the Fifth Circuit⁵² and the Seventh Circuit⁵³ held that mere intrastate use of interstate commerce facilities is adequate to invoke federal jurisdiction. As the 2004 amendment indicates, Congress sided with the Fifth and Seventh Circuits when clarifying the law. Notably, none of the circuit courts considered whether the statute, as construed, exceeded Congress's commerce power.

⁴⁵ "The gist of the offense is the travel in interstate commerce or the use of the facilities of interstate commerce or of the mails with the requisite intent and the offense is complete whether or not the murder is carried out or even attempted." *Id.* at 306.

⁴⁶ *See id.* at 304–05.

⁴⁷ H.R. REP. NO. 108-505, at 8 (May 20, 2004), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_Cong_reports&docid=f:hr505.108.pdf.

⁴⁸ *See supra* notes 17–20 and accompanying text.

⁴⁹ *See infra* notes 39–42.

⁵⁰ *United States v. Weathers*, 169 F.3d 336 (6th Cir.), *cert. denied*, 528 U.S. 838 (1999).

⁵¹ *United States v. Drury*, 344 F.3d 1089 (11th Cir. 2003).

⁵² *United States v. Marek*, 238 F.3d 310 (5th Cir.), *cert. denied*, 534 U.S. 813 (2001).

⁵³ *United States v. Richeson*, 338 F.3d 653 (7th Cir.), *cert. denied*, 540 U.S. 934 (2003).

A. The Sixth Circuit

The Sixth Circuit was the first federal appellate court to weigh in on the proper reading of the pre-revision federal murder-for-hire statute in *United States v. Weathers*.⁵⁴ While noting that Congress’s intent in this statute was unclear,⁵⁵ the court determined that 18 U.S.C. § 1958 required interstate activity by the defendant to establish federal jurisdiction.⁵⁶

The *Weathers* court emphasized that the phrases “facility *in* interstate commerce” and “facility *of* interstate commerce” were purposefully distinct, with Congress intending to regulate two separate categories of activity.⁵⁷ In divining which phrase defined the jurisdictional nexus, the court concluded that subsection (a), which creates the criminal offense, controls subsection (b), which merely has a definitional character.⁵⁸

Interstate activity did not need to be direct to satisfy the jurisdictional nexus, according to the Sixth Circuit.⁵⁹ In this case, telephone calls to the defendant’s cellular phone provided the interstate activity sufficient for federal jurisdiction, despite the fact that “the signal that . . . connected the two parties was ultimately *intra* state.”⁶⁰ The only interstate activity was the cellular telephone service provider’s search signal that was sent out when a call was placed to the defendant’s cellular phone.⁶¹ As soon as the defendant’s phone was located by one of the cell sites, the interstate cell phone signal was terminated.⁶² Thus, according to the Sixth Circuit, § 1958 required the interstate use of an instrumentality of interstate commerce, but that interstate activity need not be direct, only essential to the use of the instrumentality.⁶³

⁵⁴ 169 F.3d 336.

⁵⁵ *Id.* at 342 (“We would be remiss, however, if we failed to point out that the intent of Congress, as expressed in the inconsistent provisions in § 1958(a) and (b)(2), is far from clear.”).

⁵⁶ *Id.* (“[I]n order to establish the court’s jurisdiction under § 1958, the government must show that the defendant used a ‘facility *in* interstate commerce.’”).

⁵⁷ *Id.*

⁵⁸ *Id.* The court dismissed the idea that Congress intended the phrases to be interchangeable. *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* The defendant and investigating law enforcement officers were in Kentucky at all times during these telephone calls. *Id.* at 339. Because of the proximity of Louisville, Kentucky, to the Indiana state line, when a call is made to a cellular phone, search signals are sent out to cell sites in both Kentucky and Indiana. *See id.*

⁶² *Id.*

⁶³ *Id.* at 342.

Notably, the Sixth Circuit's decision in the 2002 case *United States v. Cope*⁶⁴ created an interpretational puzzle when it adopted the Fifth Circuit's statutory reading of § 1958.⁶⁵ The *Cope* court expressly limited its analysis to the relationship between the word "mail" and "in interstate or foreign commerce."⁶⁶ However, the court also seemed to adopt the Fifth Circuit's general interpretation that "in interstate or foreign commerce" modifies "facility."⁶⁷ This case further muddled the interpretive water surrounding § 1958.

B. The Fifth Circuit

United States v. Marek was the leading case in support of a broad reading of pre-revision § 1958.⁶⁸ In *Marek*, the Fifth Circuit engaged in a lengthy analysis of the federal murder-for-hire statute and concluded that the facility, not the use, had to be interstate to satisfy the jurisdictional requirements of § 1958.⁶⁹ The court was satisfied that

when § 1958 is read as a whole and viewed in context as part of the power of Congress to regulate and protect the instrumentalities of interstate commerce, even when the threat comes from intrastate activities, it becomes clear that the *facility*, not its use, is what must be "in interstate or foreign commerce."⁷⁰

To the Fifth Circuit, if an interstate commerce facility was generally used in interstate commerce, the actual use relied upon to establish a federal nexus need not be actually interstate, but could be purely intrastate.⁷¹

While the *Marek* court applied a number of theories of statutory interpretation to § 1958, the court ultimately concluded that "the statute is unambiguous and clear on its face."⁷² First, the court considered the structure of the statute and concluded

⁶⁴ *United States v. Cope*, 312 F.3d 757 (6th Cir. 2002), *cert. denied*, 540 U.S. 995 (2003).

⁶⁵ *Id.* at 771 ("As a matter of statutory construction [of § 1958], we agree with the Fifth Circuit's analysis."). The court concluded that "'in interstate commerce' . . . modifies 'facility,' . . . not 'to use.'" *Id.*

⁶⁶ *Id.* ("[W]e note that *Weathers* does not interpret the word 'mail,' but rather the phrase 'facility in interstate or foreign commerce,' and is thus inapposite here.").

⁶⁷ *Id.* ("[I]n interstate or foreign commerce' modifies 'facility' . . .").

⁶⁸ *United States v. Marek*, 238 F.3d 310 (5th Cir.), *cert. denied*, 534 U.S. 813 (2001).

⁶⁹ *Id.*

⁷⁰ *Id.* at 320 (footnote omitted).

⁷¹ *Id.*

⁷² *Id.* at 321. In reaching that conclusion, the court noted that the statute's title, while not dispositive, heavily weighed in favor of its interpretation. *Id.*

that the phrase "in interstate or foreign commerce" modified "facilities," not "use."⁷³ Second, the court found that the statutory context cut against any meaningful distinction between "of" and "in" as used in the statute.⁷⁴ The court also relied on the legislative history to support its finding.⁷⁵ According to *Marek*, the two phrases found in subsections (a) and (b) were intended to be interchangeable.⁷⁶ The court found that the surrounding statutes indicated that § 1958 aimed to regulate even the intrastate use of interstate facilities.⁷⁷

In discerning a constitutional basis for the statute, the court determined that Congress enacted § 1958 under the authority found in the second prong of the *Lopez* framework.⁷⁸ This second prong of the commerce power permits Congress "to regulate and protect the instrumentalities of interstate commerce."⁷⁹

The dissent in *Marek* interpreted § 1958 completely differently, finding that the statute required that the facility's particular use be in interstate or foreign commerce during the commission of the offense.⁸⁰ Contrary to the majority, the dissent argued early on that the statute was ambiguous.⁸¹ The dissent employed various canons of construction, including the clear statement rule⁸² and the rule of lenity,⁸³ to ultimately conclude that § 1958 had to be read in favor of the defendant and therefore required actual interstate activity to trigger federal jurisdiction.⁸⁴

⁷³ *Id.* at 316 (noting also that a "conclusion — that 'in interstate or foreign commerce' modifies 'use' — would require a strained structural interpretation of the statute").

⁷⁴ *Id.* at 319 n.44 (Although the majority recognized "that similarly varying phraseology . . . can have statutory significance," it determined that there was no such significance in § 1958 due to legislative history and grammatical structure.).

⁷⁵ *Id.* at 321. The court exclusively relied on a 1983 Senate Judiciary Committee report issued before § 1958 was enacted.

⁷⁶ *Id.* at 322.

⁷⁷ *Id.* at 323.

⁷⁸ *Id.* at 317 ("When it adopted § 1958, Congress was acting within the second of three broad categories identified by the Supreme Court in *United States v. Lopez* as conduct appropriately subject to regulation under the Commerce Clause.") (footnotes omitted). The problem with this conclusion arises out of the fact that § 1958 was enacted in 1984, over ten years before *Lopez* was decided. At the time of passage, the Supreme Court's Commerce Clause jurisprudence was quite different and significantly more deferential to Congress. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.3.1 (2d ed. 2002) (describing the breadth of the Commerce Clause power in the context of criminal law). At the time, in criminalizing even purely intrastate activity, Congress needed only a rational basis for believing the activity affected interstate commerce. See *id.*

⁷⁹ *United States v. Lopez*, 514 U.S. 549, 558 (1995).

⁸⁰ *Marek*, 238 F.3d at 324 ("I find that § 1958 requires that the use of the facility be in interstate or foreign commerce . . .") (Jolly, J., dissenting).

⁸¹ *Id.* at 326.

⁸² *Id.*

⁸³ *Id.* at 327–28.

⁸⁴ *Id.*

C. The Seventh Circuit

In *United States v. Richeson*,⁸⁵ the Seventh Circuit adopted the reasoning of the Fifth Circuit, finding that the purely intrastate use of a facility of interstate commerce was sufficient to establish federal jurisdiction.⁸⁶ Finding that telephone lines were facilities of interstate commerce, Mr. Richeson's mere use of a telephone, even if purely intrastate, was adequate to attach federal jurisdiction.⁸⁷

D. The Eleventh Circuit

In *Drury*, the Eleventh Circuit, for the first time, faced the challenge of interpreting and applying the federal pre-revision murder-for-hire statute.⁸⁸ After an examination of the legislative history of the Travel Act and applying various canons of statutory construction, the majority determined that federal jurisdiction only arose when there was actually interstate criminal activity.⁸⁹ While noting that reliance on legislative history was unnecessary to reach a proper interpretation of the statute,⁹⁰ the *Drury* court asserted that the legislative history of the Travel Act, under which § 1958 was later added, indicated that the purpose of the Act was to criminalize certain activities that involved interstate activity.⁹¹ Likewise, the court concluded that the specific legislative history relating to § 1958 indicated Congress's intent for the jurisdictional nexus to require interstate activity.⁹²

The *Drury* court applied several canons of statutory construction in concluding, in contrast to the Fifth Circuit, that § 1958 is inherently ambiguous.⁹³ After

⁸⁵ 338 F.3d 653 (7th Cir.), *cert. denied*, 540 U.S. 934 (2003).

⁸⁶ *Id.* at 660 ("We believe there is only one way to read the plain language of the murder-for-hire statute, and that is to require that the facility, and not its use, be in interstate or foreign commerce.").

⁸⁷ *Id.* at 661.

⁸⁸ *United States v. Drury*, 344 F.3d 1089 (11th Cir. 2003).

⁸⁹ *Id.* at 1095–1104. "[W]e conclude that 18 U.S.C. § 1958(a)'s jurisdictional element requires that a defendant must actually use a facility in a *manner* that implicates interstate commerce, not just that the facility itself possess the *capability* of affecting interstate commerce." *Id.* at 1104.

⁹⁰ *Id.* at 1102.

⁹¹ *Id.*

⁹² *Id.* at 1103–04 ("[I]t would make little sense for the Subcommittee expressly to indicate that an 'interstate telephone call is sufficient to trigger federal jurisdiction' if it intended that *all* phone calls — regardless of origin or destination (i.e., even *intrastate* calls) — could achieve this end.").

⁹³ *Id.* at 1099–1104 (employing such canons as the rule against surplusage, the clear statement rule, and the rule of lenity); *id.* at 1099 ("[T]he structure and language of 18 U.S.C. § 1958 make it impossible to discern a 'plain and unambiguous meaning . . .'" (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997))).

determining that the plain meaning of § 1958 was indefinite, the court sought to give every word meaning while at the same time harmonizing its language. From this exercise, the court concluded that § 1958 “applies solely to facilities that are actually used in interstate commerce.”⁹⁴ In support of this conclusion, the court applied the clear statement rule, which requires Congress, whenever it “intends to alter the usual constitutional balance between the States and the Federal Government[,] to make its intention to do so ‘unmistakably clear in the language of the statute.’”⁹⁵ Finding that § 1958 encroached upon the traditional powers of the states, the court concluded that Congress did not clearly indicate its intention to alter the federal-state balance in § 1958, and thus the statute should be construed in a manner that minimized the federal encroachment on state police powers.⁹⁶

The *Drury* court, like the *Marek* court, supported a narrow interpretation of § 1958 with the rule of lenity, which states that “when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.”⁹⁷

Although the court read § 1958 to require actual interstate activity to trigger federal jurisdiction, the court also implicitly held that there were no substantive minimums for the amount of interstate activity.⁹⁸ In fact, it held that the mere routing of an electronic telephone signal through a Florida switching facility from one person in Georgia to another in the same state was sufficient to satisfy the jurisdictional nexus.⁹⁹

The concurrence strongly disagreed with the jurisdictional interpretation of the statute and concluded that merely using a facility that involved interstate commerce, even if purely intrastate, sufficed to support federal jurisdiction.¹⁰⁰

E. Other Courts

The First Circuit avoided interpreting the jurisdictional requirements of § 1958 when the appellant in *United States v. Houlihan*¹⁰¹ failed to contest the prosecution’s

⁹⁴ *Id.* at 1100. The court dismissed the idea that Congress intended the words “in” and “of” to be interchangeable, instead finding that the words are harmonious, with subsection (a) defining the jurisdictional nexus requirement, and subsection (b) serving not a definitional, but an exemplary role. *Id.*

⁹⁵ *Id.* at 1100 (quoting *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989)).

⁹⁶ *Id.* at 1100–01.

⁹⁷ *Id.* at 1101 (quoting *McNally v. United States*, 483 U.S. 350, 359–60 (1987)).

⁹⁸ *Id.* at 1105 (“[I]t is of no moment that *Drury*’s telephone calls to Valoze only incidentally and unintentionally ventured out of state.”).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1111 (Marcus, J., concurring) (“I have little doubt that the purely intrastate use of an instrumentality of interstate commerce is sufficient to confer jurisdiction under § 1958.”).

¹⁰¹ 92 F.3d 1271 (1st Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997).

claim that the use of telephones satisfied the required jurisdictional nexus under § 1958.¹⁰²

The United States District Court for the Southern District of New York has had two occasions to interpret pre-revision § 1958, but has reached conflicting conclusions.¹⁰³ Judge Preska, in the 1994 case *United States v. Stevens*,¹⁰⁴ determined that the intrastate use of an interstate paging system satisfied the jurisdictional minimum standards of the murder-for-hire statute because the paging signals were sent across state lines.¹⁰⁵ The court did not engage in a lengthy analysis, but found that even under the narrower construction, the jurisdictional nexus was met by the paging signal.

Two years later in *United States v. Paredes*,¹⁰⁶ Judge Scheindlin concluded that the intrastate use of an interstate paging system did not satisfy the jurisdictional nexus under pre-revision § 1958, even though the paging signals crossed state lines.¹⁰⁷ The court warned of the inherent danger in extending federal jurisdiction to cases where the sole interstate activity was merely an electronic signal which crossed state lines to connect two people in the same state.¹⁰⁸

III. CONSTITUTIONALITY OF § 1958

The federal murder-for-hire statute implicates two areas of constitutional law upon which the Court could pass judgment: (1) the extent of Congress's commerce power, and (2) the Tenth Amendment's reservation to states of the powers not constitutionally delegated to the federal government.¹⁰⁹ Notably, none of the circuits have considered the constitutionality of § 1958 because it has not been directly challenged on those grounds.

¹⁰² *Id.* at 1292. Although the court assumed that the mere use of telephones was sufficient to support federal jurisdiction, it did so only on procedural grounds. The court did not substantively consider the ambiguity of 18 U.S.C. § 1958. *See id.*

¹⁰³ *United States v. Paredes*, 950 F. Supp. 584 (S.D.N.Y. 1996), *aff'd*, 162 F.3d 1149 (2d Cir. 1998); *United States v. Stevens*, 842 F. Supp. 96 (S.D.N.Y. 1994).

¹⁰⁴ 842 F. Supp. 96 (S.D.N.Y. 1994).

¹⁰⁵ *Id.* The Sixth Circuit in deciding *United States v. Weathers*, followed the same reasoning to establish the requisite jurisdictional nexus (i.e., interstate activity) when all parties involved are in the same state. *See Weathers*, 169 F.3d at 340.

¹⁰⁶ 950 F. Supp. 584 (S.D.N.Y. 1996).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 590 ("By allowing federal jurisdiction to expand in lock-step with communications technology, the government threatens to transform virtually all murder-for-hire schemes that involve electronic forms of communication into federal crimes . . .").

¹⁰⁹ U.S. CONST. amend. X.

A. Congress's Commerce Power

1. Statutory Context

While Congress's revision of § 1958 may have occurred in a relative vacuum of constitutional discussion, consideration of the constitutional ramifications of this revision deserves some statutory context. A look at similar criminal statutes employing interstate commerce as the jurisdictional hook reveals an inconsistent patchwork of phrasing that yields little insight into Congress's general understanding of its authority under the Commerce Clause to criminalize conduct, or perhaps reveals that by amending § 1958, Congress sought to preempt Supreme Court review of this statute's jurisdictional element.¹¹⁰ Congress defines "interstate commerce," as used in Title 18 of the U.S. Code, rather strangely. Instead of directly defining the term, it describes what the term includes: "commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia."¹¹¹

2. Supreme Court Jurisprudence: *Lopez* and *Morrison*

The Commerce Clause permits Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹¹² The Court's Commerce Clause jurisprudence has swung back and forth across a broad interpretive spectrum throughout the Court's history.¹¹³ Today, the Court interprets the Commerce Clause relatively narrowly, applying the three-pronged framework outlined in *United States v. Lopez*.¹¹⁴ In *Lopez*, the Court struck down the Gun-Free School Zone Act of 1990 (GFSZA) as exceeding Congress's commerce power.¹¹⁵ Under the *Lopez* framework, Congress may regulate activity that falls into any of three broad categories: (1) "the use of channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, . . . even though the threat may come only

¹¹⁰ For example, the Travel Act, 18 U.S.C. § 1952 (2000), to which the murder-for-hire law was later added, contains both a broader substantive prohibition ("any crime of violence to further any unlawful activity") and a narrower jurisdictional element ("Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce") than § 1958. 18 U.S.C. § 1952(a) (2000). The manifest incongruity in the jurisdictional elements of §§ 1952 and 1958 suggest a reactionary amendment to § 1958 to resolve the circuit split before the Supreme Court would have the opportunity to further clarify (and possibly narrow) the parameters of Congress's commerce power.

¹¹¹ 18 U.S.C. § 10 (2000).

¹¹² U.S. CONST. art. I, § 8, cl. 3.

¹¹³ See CHEMERINSKY, *supra* note 78, § 3.3.1.

¹¹⁴ 514 U.S. 549 (1995).

¹¹⁵ *Id.* at 549–50.

from intrastate activities”; and (3) any “activities having a substantial relation to interstate commerce.”¹¹⁶ In *Lopez*, the government proposed that the law, which prohibited possession of a firearm within a certain distance of a school, fell under the third prong of the commerce power.¹¹⁷ The Court in *Lopez* was unpersuaded by this reasoning because Congress made no attempt to link possession of a firearm with interstate commerce.¹¹⁸ After the decision, Congress amended the statute to include the necessary interstate commerce connection.¹¹⁹

The Court affirmed the three-pronged *Lopez* framework in *United States v. Morrison* when it struck down § 13981 of the Violence Against Women Act of 1994 (VAWA).¹²⁰ Congress created VAWA to provide a federal civil remedy for victims of gender-motivated crimes of violence, justifying its authority to do so under the Commerce Clause and the Fourteenth Amendment.¹²¹ Defending its authority before the Court, the Government justified its commerce power under the third prong of the *Lopez* framework, alleging that the statute was a “regulation of activity that substantially affects interstate commerce.”¹²²

As it did in *Lopez*, the Court analyzed VAWA under the “substantially affects” prong by considering four factors: (1) whether the regulated activity was economic in nature, (2) whether the jurisdictional reach was expressly limited to activity with an explicit connection to or effect on interstate commerce, (3) whether Congress made any findings regarding the effects of the regulated activity upon interstate commerce, and (4) the strength of the link between the regulated activity and a substantial effect on interstate commerce.¹²³ Like the GFSZA, the Court struck down the VAWA, ruling that in consideration of the aforementioned factors, the link

¹¹⁶ *Id.* at 558–59; *United States v. Morrison*, 529 U.S. 598, 608–09 (2000). Learning its lesson from *Lopez*, Congress supported its legislation with substantial information on the aggregate economic impact of crimes of violence against women, attempting to fit the law within the third prong of the *Lopez* framework. *Id.* at 614. The Court rejected this attempt, finding instead that gender-motivated violent crimes are not economic activities, regardless of proof of a cumulative economic impact. *Id.* at 617.

¹¹⁷ *Lopez*, 514 U.S. at 559, 563–64.

¹¹⁸ *Id.* at 564–68.

¹¹⁹ Compare 18 U.S.C. § 922(q)(2)(A) (2003) (“It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.”), with 18 U.S.C. § 922(q)(1)(A) (1988) (It is a federal offense “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.”).

¹²⁰ *Morrison*, 529 U.S. 598.

¹²¹ *Id.* at 605–07.

¹²² *Id.* at 609.

¹²³ *Id.* at 610–12.

between the activity and a substantial effect on interstate commerce was too attenuated to pass constitutional muster.¹²⁴

Even with this narrowed interpretation of the Commerce Clause, Congress may still regulate purely intrastate criminal activity. In 1971, the Court ruled that Congress may employ the Commerce Clause to regulate purely intrastate activity that it considers to misuse, threaten, or harm the legitimate activities of interstate commerce.¹²⁵ The case, *Perez*, focused on a federal statute that criminalized intrastate loan sharking activities.¹²⁶ In upholding the statute, the Court relied upon the fact that Congress had made specific findings regarding the aggregate interstate effect of local loan sharking.¹²⁷ Congress’s primary justification for the statute was that local loan sharking activities “s[i]phon[ed] funds from numerous localities to finance its national operations.”¹²⁸ It should be noted that while *Perez* was not overruled by *Lopez*, it was decided during a time when the Court gave significantly more deference to Congress regarding Commerce Clause legislation than it does today.¹²⁹ Overlaying the *Lopez* and *Morrison* decisions on *Perez*, the notion of criminalizing purely intrastate activity remains valid, but the activity must now substantially affect interstate commerce without the aid of aggregation.

The federal circuits have grappled with a similar issue when interpreting the Hobbes Act¹³⁰ which makes robbery and extortion that “obstructs, delays, or affects commerce” a federal crime.¹³¹ It is a “well-established rule that a robbery or extortion that depletes the assets of a business operating in interstate commerce will satisfy the jurisdictional requirements of the Hobbes Act by a minimal showing of effect on commerce.”¹³² On the other hand, a number of circuit courts have held that where the robbery or extortion is of an individual, as opposed to a business, a more substantial demonstration of the effect on interstate commerce is required.¹³³

¹²⁴ *Id.* at 617.

¹²⁵ *Perez v. United States*, 402 U.S. 146 (1971).

¹²⁶ *Id.* at 149–50.

¹²⁷ *Id.* at 154–56. Although the Court’s decision seemed to rely upon Congress’s demonstrated proof that local loan sharking practices affect interstate commerce, the Court noted that such a particularized finding was not necessary. *Id.* at 156.

¹²⁸ *Id.* at 157.

¹²⁹ See *infra* notes 135–36 and accompanying text.

¹³⁰ 18 U.S.C. § 1951 (2000).

¹³¹ *Id.*

¹³² *United States v. Jamison*, 299 F.3d 114, 120 (2d Cir. 2002), *cert. denied*, 537 U.S. 1196 (2003).

¹³³ See, e.g., *United States v. Lynch*, 282 F.3d 1049, 1053 (9th Cir. 2002), *aff’d*, 367 F.3d 1148 (9th Cir. 2004) (noting the distinction between robberies of individuals and those of businesses and adopting the *Collins* test for the former); *United States v. Wang*, 222 F.3d 234, 238 (6th Cir. 2000) (remarking that where “the criminal act is directed at a private citizen, the connection to interstate commerce is much more attenuated”); *United States v. Quigley*, 53 F.3d 909, 910–11 (8th Cir. 1995) (noting that robberies “normally have a lesser

Although the Court has not considered the propriety of these jurisdictional rules, applying this distinction to § 1958, federal jurisdiction over an intrastate murder-for-hire that was related to or motivated by a larger business or financial interest would not require a showing of a substantial effect on interstate commerce.¹³⁴ The other side of the coin, of course, is that cases like *Drury*, *Weathers*, *Marek*, and *Richeson*, without interstate travel, would fall outside the reach of federal jurisdiction.

3. *Lopez* and *Morrison* Applied

At the time when Congress amended the Travel Act to include a murder-for-hire provision, the Court was extending extreme deference to Congress's Commerce Clause legislative decisions, upholding any regulation of activity that had a rational relationship to interstate commerce.¹³⁵ In fact, until *United States v. Lopez*, the Court upheld every Commerce Clause regulation of private activity.¹³⁶ Undoubtedly, § 1958 would have passed constitutional muster had it been examined by the Court before 1995. Since that time, however, the Court has developed a critical eye for the use of the Commerce Clause to define and punish criminal activity.

Applying the Court's Commerce Clause framework to § 1958 presents a few challenges, for determining which prong of the framework outlined in *Lopez* § 1958 falls under is not immediately clear. Under the first prong, Congress may regulate the channels of interstate commerce.¹³⁷ While § 1958 prohibits the use of the mail or any facility of interstate commerce, the statute is clearly aimed at murder-for-hire. This is not a regulation of the pathways of interstate commerce, the scope of the first prong of the Court's framework. As such, § 1958 is ill-fit for the first prong of *Lopez*.

effect on interstate commerce when directed at individuals rather than businesses"); *United States v. Collins*, 40 F.3d 95 (5th Cir. 1994), *cert. denied*, 514 U.S. 1121 (1995). The court affirmed as follows:

Criminal acts directed toward individuals may violate section 1951(a) only if: (1) the acts deplete the assets of an individual who is directly and customarily engaged in interstate commerce; (2) if the acts cause or create the likelihood that the individual will deplete the assets of an entity engaged in interstate commerce; or (3) if the number of individuals victimized or the sum at stake is so large that there will be some "cumulative effect on interstate commerce."

Id. at 100 (citations omitted) (quoting *Jund v. Town of Hempstead*, 941 F.2d 1271, 1285 (2d Cir. 1991)).

¹³⁴ This approach would also tend to focus the use of § 1958 on its original intended target — organized crime.

¹³⁵ *CHEMERINSKY*, *supra* note 78, § 3.3.4 (discussing the Commerce Clause from 1937 to 1995).

¹³⁶ *Id.* § 3.3.1.

¹³⁷ *United States v. Lopez*, 514 U.S. 549, 558 (1995).

The second prong of *Lopez* permits Congress to regulate the instrumentalities of interstate commerce, i.e., those things that move goods and people through interstate commerce channels.¹³⁸ Again, with § 1958 Congress primarily took aim at murder-for-hire, not the misuse of instrumentalities. Although the jurisdictional hook for each of the aforementioned cases was the use of an interstate instrumentality, namely a wireless communication device, § 1958 regulates violent crime that is not directed at the instrumentalities of interstate commerce and as such does not fit under the second prong of the *Lopez* framework.

Under the third prong of *Lopez*, Congress has authority under the Commerce Clause to regulate activities that "hav[e] a substantial relation to interstate commerce."¹³⁹ While § 1958 clearly regulates a type of commercial activity, albeit illegal activity, the question remains whether such economic activity is sufficiently related to interstate commerce for constitutional justification.

Applying the four factors for determining a substantial effect on interstate commerce reveals that a close question exists whether the federal murder-for-hire statute can survive judicial scrutiny under the third prong.¹⁴⁰ Preliminarily, determining whether the regulated activity, murder-for-hire, is economic in nature depends on the importance assigned to the various elements of the crime. Murder-for-hire does involve a transaction, but the harm is the murder, not the economic activity. Contrast this with loan sharking for example, where the usurious interest rate and harsh repayment terms are essential elements of both the transaction and the actual harm. With murder-for-hire, the economic element of this violent crime is essential only in the legal sense, for without the payoff, there is no murder-for-hire. Nevertheless the economic transaction is not ultimately necessary for the actual harm; the fact that a murder was paid for rather than performed merely as a favor, for example, does not affect the harm suffered by the victim. On balance, it is the murder, not the transaction, that Congress ultimately aims to prevent, and therefore murder-for-hire should not be classified as economic in nature. Even if it is an economic activity under the first factor, it is unlikely that this, standing alone, will convince the Court that murder-for-hire substantially affects interstate commerce.

Congress did not limit the application of the murder-for-hire statute to activity with an explicit connection to interstate commerce because both intrastate and interstate murder-for-hires fall within § 1958's jurisdiction. The second factor is

¹³⁸ *Id.*

¹³⁹ *Id.* at 558–59.

¹⁴⁰ The four factors for determining whether a regulated activity substantially affects interstate commerce are: (1) whether the regulated activity was economic in nature, (2) whether the jurisdictional reach was expressly limited to activity with an explicit connection to or effect on interstate commerce, (3) whether Congress made any findings regarding the effects of the regulated activity upon interstate commerce, and (4) the strength of the link between the regulated activity and a substantial effect on interstate commerce. *United States v. Morrison*, 529 U.S. 598, 610–13 (2000).

thus not met by this statute. The third factor is also not met. Unlike the VAWA, nowhere in the meager legislative history did Congress make any findings regarding the effects of murder-for-hire upon interstate commerce.

The strength of the link between murder-for-hire and a substantial effect on interstate commerce is not as easily determined. Like the GFSZA, which the Court struck down in *Lopez*, § 1958 has no jurisdictional requirement that the activity affect interstate commerce. However, the activity regulated in § 1958 is economic (payment for murder), which differentiates the statute from the GFSZA and the VAWA. Mere economic activity, however, does not suffice for reliance on the Commerce Clause; the activity must substantially affect interstate commerce.¹⁴¹ Unlike with the VAWA, Congress made no attempt to relate the activity of murder-for-hire to a substantial effect on interstate commerce.

Considered independently, a single murder-for-hire would rarely affect interstate commerce in any perceptible way. Where the robbery or extortion is of an individual, as opposed to a business, a number of circuits have required a more substantial demonstration of the effect on interstate commerce. However, because almost any private activity if aggregated over the entire national economy, from the cultivation of a backyard vegetable garden to slander of a city councilman, could be characterized as having a substantial effect on interstate commerce, the commerce power theoretically has no bounds.¹⁴² Recognizing this, the Court has “reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”¹⁴³ This limitation of aggregation to economic conduct makes the application to § 1958 uncertain. While murder-for-hire is technically an economic activity, it is also violent criminal conduct. Given the essentially local nature of this type of crime and the ancillary role of the transaction, it seems likely that the Court would bar the use of aggregation to justify jurisdiction. Without the aid of aggregation, § 1958 resembles the VAWA in this element — the link between the regulated activity, in this case murder-for-hire, and a substantial effect on interstate commerce appears fatally attenuated.

¹⁴¹ *Lopez*, 514 U.S. at 558–59.

¹⁴² This might be seen as the legal-economic analog to the Butterfly Effect, simply expressed in a nursery rhyme:

For want of a nail the shoe was lost;
 For want of a shoe the horse was lost;
 For want of a horse the rider was lost;
 For want of a rider the battle was lost;
 For want of a battle the kingdom was lost,
 And all for the want of a horseshoe nail.

Mother Goose Nursery Rhymes, *For Want of a Nail*, available at <http://www.mother-goose.com/Rhymes/frhymes.htm> (last visited Apr. 1, 2005).

¹⁴³ *Morrison*, 529 U.S. at 617. The Court further defined Congress’s commerce power, requiring that if the regulated crime is purely intrastate, it must be “directed at the instrumentalities, channels, or goods involved in interstate commerce.” *Id.* at 618.

Whether murder-for-hire substantially affects interstate commerce depends on the emphasis the court considering the statute places on the elements of the crime. Given the Supreme Court’s decisions in *Lopez* and *Morrison*, it is unlikely the Court would make such a declaration concerning murder-for-hire.

4. Alternative Approaches

Faced with the challenge of reconciling § 1958 with *Lopez* and *Morrison*, the Court could narrowly read the statute to fit it within the scope of the Commerce Clause’s parameters rather than ruling the law altogether unconstitutional.¹⁴⁴ This approach, however, includes constitutional dangers of its own. By narrowing the interpretation of a statute that otherwise would not pass constitutional muster, the Court in some ways validates Congress’s expansion of federal criminal law through tenuous jurisdictional hooks. Employing this method of statutory construction in areas abounding in constitutional ambiguity makes sense, but danger lies with the statute’s application in more certain constitutional circumstances, as it provides a powerful incentive for Congress to maximize its jurisdictional reach.¹⁴⁵

Further justification for granting federal jurisdiction over purely intrastate murder-for-hire, at least in situations involving technologies like cellular phones as in the *Drury* case, may be found in the fact that wireless communication depends on the use of the wireless spectrum, which is owned by the public, regulated by the

¹⁴⁴ CHEMERINSKY, *supra* note 78, § 3.3. In two cases after *Morrison*, *United States v. Jones* and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, the Supreme Court has narrowly interpreted federal laws to avoid “constitutional doubts” as to whether Congress exceeded its commerce power. In each instance, the Court did not declare the federal statute unconstitutional, but instead used the recent restrictive interpretations of the commerce power as a reason for limiting the scope of the federal laws.

Id. § 3.3.4, at 265 (footnotes omitted).

¹⁴⁵ Professor Chemerinsky has noted additional significant potential ramifications of this approach:

Although interpreting laws narrowly to avoid constitutional doubts is not new, its application to the commerce clause gives a powerful tool to lawyers challenging the application of federal civil and criminal laws. They need not persuade the Court that a federal statute is unconstitutional on its face or as applied. Instead, they only need to show that the application of the law would raise “constitutional doubts.” The Supreme Court never has explained how serious the constitutional doubts must be; nor has it indicated how plausible the narrowing construction has to be.

Id. § 3.3.4, at 266.

federal government, and licensed to private parties.¹⁴⁶ Using the government's frequencies in furtherance of a murder-for-hire scheme has similarities to using the government's mail system, a scenario unquestionably within federal jurisdiction.¹⁴⁷ On the other hand, the distinctions between the wireless spectrum and the mail are significant: the mail is under the direct supervision and control of government agents; wireless signals sent out over the electromagnetic spectrum are entirely within the control of private entities and the government's involvement is more procedural. Basing a criminal regulation on the federal government's regulatory authority over the national electromagnetic spectrum opens many possibilities for future federal criminal jurisdiction, but would surely require revision of § 1958 to include such a jurisdictional hook before the Supreme Court would consider the validity of this approach.

For a more direct approach, Congress could easily regulate most intrastate murders-for-hire by merely requiring actual interstate activity during the commission of the crime. Given the state of technology, an interstate activity requirement would usually be easily met by a cellular phone call routed interstate, as in *Drury*, by a cellular phone search signal that crosses state borders, or even an interstate paging system signal. Until the Court imposes substantive minimums for interstate activity, these electronic signals could provide Congress a fertile source for federal criminal jurisdiction.

B. The Tenth Amendment

The Tenth Amendment reserves for the states powers not delegated to the federal government in the Constitution.¹⁴⁸ Like the Commerce Clause, the Court's interpretation of this amendment has evolved over time.¹⁴⁹ The Court has held that the Tenth Amendment does not limit Congress's commerce power to regulate private activity, but merely restricts Congress from regulating states as states.¹⁵⁰ In *Gregory v. Ashcroft*,¹⁵¹ the Court employed the Tenth Amendment as a canon of construction in cases where a federal law would impose a burden on a state government, requiring a clear statement from Congress that it intended to do so.¹⁵²

¹⁴⁶ See Kevin Werbach, *Supercommons: Toward a Unified Theory of Wireless Communication*, 82 TEX. L. REV. 863, 871 (2004).

¹⁴⁷ Congress derives its authority to regulate the mail from its postal power. U.S. CONST. art. I, § 8, cl. 7. Section 1958 is unambiguous in its application to anyone who "uses or causes another . . . to use the mail . . . with intent that a murder be committed." 18 U.S.C. § 1958(a) (2000).

¹⁴⁸ U.S. CONST. amend. X.

¹⁴⁹ See CHEMERINSKY, *supra* note 78, § 3.9.

¹⁵⁰ See *id.* § 3.9, at 318.

¹⁵¹ *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

¹⁵² *Id.* at 460–61.

Regarding § 1958, the burden on states, if it exists at all in the Tenth Amendment sense, is indirect. First, § 1958 does not regulate states as states, but is aimed at individuals.¹⁵³ Furthermore, any federal prosecution of a traditionally local crime may relieve the state of the burden of prosecution and punishment.¹⁵⁴ Thus it seems a stretch to assert that the expansion of federal criminal jurisdiction burdens states. Indirectly, though, states are burdened with the threat of inconsequence and the badge of incompetence. As federal criminal law expands, the states' reputations as competent protectors and enforcers of the law may be damaged. Even so, as an intangible, incalculable burden, it would not rise to the level of a Tenth Amendment violation.

IV. CONSTITUTIONAL IMPLICATIONS AND PUBLIC POLICY

Two bedrock constitutional concepts are implicated by § 1958: the separation of powers and federalism. While the purpose of these vertical and horizontal systems of checks and balances is generally clear, reasonable minds have differed about the proper constitutional contours of the relationships among the branches and between states and the federal government. Considering § 1958, the extension of federal jurisdiction to purely intrastate activity has the potential to harm severely the delicate balance of federal-state power. Section 1958 could choke the federal courts with hundreds of essentially local criminal prosecutions and waste federal prosecutorial and investigative resources on crimes that, in most cases, could easily be handled by local law enforcement. On the other hand, federal intrastate jurisdiction may foster more and better teamwork among federal, state, and local law enforcement. In addition, it may help put guilty offenders behind bars that would otherwise remain unprosecuted and reduce the costs of the legal system by fostering a freer flow of criminal justice resources between states and the federal government. From a broad perspective, intrastate jurisdiction over these violent crimes may be an entirely proper and realistic response to the transformation of this country from a collection of insulated states into an integrated national society and economy.

A. Separation of Powers

With the expansion of federal criminal law over the last thirty-five years, Congress has substantially increased the power and influence of the executive branch.¹⁵⁵ Broadly written criminal statutes and far-reaching jurisdictional hooks

¹⁵³ See CHEMERINSKY, *supra* note 78, § 3.9, at 318.

¹⁵⁴ WAYNE R. LAFAVE, CRIMINAL LAW § 4.6(a)(2) (4th ed. 2003).

¹⁵⁵ Meese, *supra* note 29, at 13.

give significant power to federal law enforcers in the form of prosecutorial discretion.¹⁵⁶

Crafting precise constitutional legislation requires diligence and care, both of which can easily take a back seat to other more immediate pressures of legislating. A Congress jealous of its power, as Madison envisioned,¹⁵⁷ is threatened by a Congress jealous of its incumbency.¹⁵⁸ Congressional abnegation of its authority to dictate the criminal law menu by establishing a generous buffet of criminal law from which federal prosecutors may freely choose threatens the system of checks and balances by effectively transferring power to establish priorities in criminal law to the executive branch.¹⁵⁹ The federal judiciary also plays a role in the erosion of the separation of powers when courts fail to constrain the use of overbroad federal criminal sanctions.¹⁶⁰

B. Federalism

Although the word “federalism” never appears in the Constitution, the principle of a vertical separation of powers between the states and federal government is central to American democracy.¹⁶¹ Traditionally, criminal justice has been considered almost entirely within the province of the states.¹⁶² In fact, the Constitution includes only two generalized powers for federal criminal prosecution — the

¹⁵⁶ Paul Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, LEGAL MEMORANDUM EXECUTIVE SUMMARY NO. 7 (Heritage Found., Washington, D.C.), June 25, 2003, at 15, available at <http://www.heritage.org/research/legalissues/lm7.cfm>. Prosecutorial discretion itself arises from the Separation of Powers doctrine. *United States v. Armstrong*, 517 U.S. 456, 464 (1996). Thus this concept is both protected by and endangers the separation of powers.

¹⁵⁷ See THE FEDERALIST NO. 47 (James Madison).

¹⁵⁸ Meese, *supra* note 29, at 11–12, 15–16.

¹⁵⁹ *Id.* at 24, 27.

¹⁶⁰ *Id.* at 15–16. There are two obvious ways courts may effectively and constitutionally reign in the use of overbroad federal criminal law. First, they might narrowly interpret statutory sections to avoid constitutional concerns. See CHEMERINSKY, *supra* note 78, § 3.3, at 265–68. Second, through the use of the canon of statutory construction known as constitutional avoidance, courts may narrowly construe a statute to avoid constitutional conflicts if there are competing plausible interpretations of the statute. *Clark v. Martinez*, 125 S. Ct. 716, 724–25 (2005). See the dissent for a broader interpretation of this canon. *Id.* at 732–37 (Thomas, J., dissenting).

¹⁶¹ See THE FEDERALIST NO. 45, at 324 (James Madison) (Benjamin Fletcher Wright ed., 1961) (discussing whether “the powers transferred to the federal government . . . will be dangerous to the portion of authority left in the several states”).

¹⁶² *United States v. Morrison*, 529 U.S. 598, 618 (2000) (“Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”).

power to punish "Offences against the Law of Nations"¹⁶³ and the power to "make all Laws . . . necessary and proper for carrying into Execution the foregoing Powers"¹⁶⁴ — and only specifies three discrete federal crimes — counterfeiting,¹⁶⁵ piracy,¹⁶⁶ and treason.¹⁶⁷

The Founding Fathers also intended that the powers of the federal government would be very limited while the states would possess the lion's share of power and influence under the Constitution.¹⁶⁸ An interpretation of § 1958 that extends federal jurisdiction to the prosecution of essentially local crime seems antithetical to this general principle.

Some scholars argue that Congress's exercise of the commerce power does not implicate federalism in a specific sense because the Commerce Clause is not a limit on federal power.¹⁶⁹ The Commerce Clause grants the federal government

¹⁶³ U.S. CONST. art. I, § 8, cl. 10.

¹⁶⁴ *Id.* at cl. 18.

¹⁶⁵ *Id.* at cl. 6.

¹⁶⁶ *Id.* at cl. 10.

¹⁶⁷ *Id.* at art. III, § 3, cl. 2. Gene Healy cautioned that the federalization of crime, although well-intentioned, is contrary to the Constitution:

The records of the Constitutional Convention indicate that the federal role in criminal law was limited by design. At the Philadelphia Convention, discussion of criminal law issues focused almost exclusively on treason, piracy, counterfeiting, and offenses against the law of nations. Federal criminal authority, like federal authority in general, was to be directed in the main toward affairs of state and international relations, as well as protecting the federal government and its interests.

Gene Healy, *There Goes the Neighborhood: The Bush-Ashcroft Plan to "Help" Localities Fight Gun Crime*, POL'Y ANALYSIS NO. 440 (Cato Inst., Washington, D.C.), May 28, 2002, at 4 (footnotes omitted), available at <http://www.cato.org/pubs/pas/pa440.pdf>.

¹⁶⁸ See, e.g., THE FEDERALIST NO. 45, at 328 (James Madison) (Benjamin Fletcher Wright ed., 1961). Madison argued that there was no need to fear federal encroachment of state authority:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.

The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments in times of peace and security.

Id.

¹⁶⁹ Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV.

regulatory authority over commerce among the states with no caveats, exceptions, or restrictions. John Marshall expressed this very concept in *Gibbons v. Ogden*,¹⁷⁰ noting that the only restraints on Congress's commerce powers are "[t]he wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections."¹⁷¹ Additionally, some claim that federal criminal legislation must be over-inclusive, including criminal activities within the purview of local and state law enforcement agencies, to provide federal prosecutors sufficient flexibility.¹⁷² This flexibility would permit the prosecutor to cooperate with state and local agencies to select the appropriate cases for federal prosecution.¹⁷³

Permitting the mere use of an interstate commerce facility, even purely intra-state, to trigger federal jurisdiction opens wide the door of opportunity for federal prosecution of essentially local crime, as seen in § 1958. On the other hand, limiting federal jurisdiction under *Lopez* and *Morrison* ties the hands of federal prosecutors and may result in dangerous criminals remaining free.

C. Expansion of Federal Criminal Law

The first federal criminal statute was passed by Congress in 1790 and established several criminal offenses.¹⁷⁴ The new criminal offenses concerned exclusive federal interests such as theft of federal property, perjury in federal court, and bribery of federal officers.¹⁷⁵ While post-Civil War Reconstruction and the ill-fated federal war on alcohol in the early twentieth century were occasions where Congress greatly increased the number of federal crimes, more than forty percent of federal crimes were created after 1970.¹⁷⁶ Congress's all-out war on drugs and organized crime was the impetus for many of these new criminal statutes, of which the murder-for-hire statute is one example.¹⁷⁷ As the body of federal criminal law grows, so does the centralization of police power in the hands of the federal government.¹⁷⁸ Whether this is a positive trend is the subject of much debate.

921, 956–58 (1997). “[T]he Commerce Clause is plainly not a limitation on federal power or a source of state power at all.” *Id.* at 558.

¹⁷⁰ 22 U.S. (9 Wheat.) 1 (1824).

¹⁷¹ *Id.* at 197.

¹⁷² Litman & Greenberg, *supra* note 169, at 964–66.

¹⁷³ *Id.*

¹⁷⁴ Healy, *supra* note 167, at 5.

¹⁷⁵ *Id.*

¹⁷⁶ Meese, *supra* note 29, at 7.

¹⁷⁷ See 18 U.S.C. § 1958 (2000).

¹⁷⁸ Meese, *supra* note 29, at 26.

The explosive expansion of federal criminal law is largely owed to its political popularity.¹⁷⁹ Proposing and passing a law that criminalizes a reprehensible act, even if the crime is traditionally and purely local in nature, rarely meets with resistance.¹⁸⁰ Being tough on crime, regardless of the constitutional implications, has become a political safety zone. The effect of such political incentive is predictable: similar acts are criminalized in different ways. Because Congress is only accountable for the passage of legislation, it is free to blame the Executive and Judicial branches for failing to keep criminals off the streets. The federal murder-for-hire legislation is a perfect example. If no federal law existed to criminalize murder-for-hire, perpetrators of such acts would remain subject to prosecution by state authorities under state criminal statutes.

The ramifications are significant. As Congress responds to headlines in its criminal lawmaking activities, states and localities lose. Over time, popular perception that the federal government deals best with the toughest crimes, not necessarily the national ones, erodes the respect and admiration for state and local government.¹⁸¹ This erosion becomes a self-fulfilling prophecy as America's best and brightest head off to the Emerald City with a mild contempt for the perceived second-class citizen that is state government.

D. Resource Allocation

Notwithstanding the constitutional concerns, extending federal jurisdiction to essentially local crime, like most murder-for-hire cases, can cause practical problems, one of which is a serious strain on federal resources.¹⁸² Federalizing crime that has traditionally been prosecuted by states opens up new areas of responsibility for both the Executive and Judicial branches. With authority comes the burden of enforcement.

As federalization of criminal law taxes federal resources, it also has the potential to relieve state and local law enforcement of significant responsibility and expense. However, the benefits may not exceed the costs. As the ABA's 1998 report on the federalization of criminal law revealed, the reality of increased federalization of crime does not have a significant impact on the number of prosecutions at the state level.¹⁸³ In fact, many federal crimes are never charged, but merely serve as a handy potentiality if the occasion ever calls.¹⁸⁴

¹⁷⁹ *Id.* at 16.

¹⁸⁰ *Id.* at 14–17.

¹⁸¹ *Id.* at 26.

¹⁸² *Id.* at 18, 36–40.

¹⁸³ *Id.* at 19–20.

¹⁸⁴ *Id.* at 20–22.

Federal courts must also bear the heavy load of additional cases on an already bulging docket.¹⁸⁵ However, supporters of expanding federal criminal jurisdiction claim that the potential strain on the federal courts is largely blown out of proportion, and that the huge increase in criminal cases before federal courts is due to the dramatic rise in drug charges, not the increased prosecution of local crime.¹⁸⁶

E. Nationalization

Proponents of expanding federal criminal jurisdiction also find support in the self-evident nationalization of American society and economy. The same economic and social trends that gave birth to globalization have left an indelible mark on the United States: local economies feel the impact of dock strikes thousands of miles away; residents in rural Georgia would feel right at home in a Seattle Wal-Mart. As America's economy morphs from a sea of disconnected islands to a seamless web of commerce, more than Main Street is affected. Pervasive federal regulation, inexpensive and frequent interstate travel, and growth of a national economy have significantly weakened local culture and regional identity.¹⁸⁷ As such, some suggest that the importance of maintaining a strong sense of federalism seems to be waning.¹⁸⁸ Notwithstanding these trends, Congress's current unprincipled approach to federalizing crime hardly seems pragmatically reasonable, regardless of the constitutional implications.

CONCLUSION

By revising the federal murder-for-hire statute, 18 U.S.C. § 1958, to clear up its woolly language, Congress stepped out of one problem and into another. While its proactive resolution of a circuit-splitting statutory ambiguity deserves praise, Congress's extension of federal jurisdiction to purely intrastate local crime renders § 1958 at odds with the Supreme Court's modern Commerce Clause jurisprudence.

¹⁸⁵ *Id.* at 35–39.

¹⁸⁶ Litman & Greenberg, *supra* note 169, at 973–77. “[T]he increase in the [federal] criminal docket is not largely attributable to statutes like the Gun-Free School Zone Act that create concurrent federal jurisdiction over nondrug crimes.” *Id.* at 976.

¹⁸⁷ See CHEMERINSKY, *supra* note 78, § 3.9, at 306 (“[T]he notion of radically limited federal powers seems anachronistic in the face of a modern national market economy and decades of extensive federal regulations.”). Not only has the country become more homogeneous and interconnected economically, in the last fifty years the judiciary has become more active in securing individual liberties: “[T]here has been a major shift over time as to how abusive government is best controlled. Now it is thought that if a federal action intrudes upon individual liberties, the federal judiciary will invalidate it as unconstitutional. Judicial review is seen as an important check against tyrannical government actions.” *Id.*

¹⁸⁸ *Id.*

Given the imminent leadership change in the Court, which is currently closely divided on the proper interpretation of the Commerce Clause, the Court's consideration of the constitutionality of § 1958 has never been more important. In view of the Court's opinions in *Lopez* and *Morrison*, as well as the harmful constitutional effects of expanding federal criminal jurisdiction to local crime, the Court should invalidate § 1958 as exceeding Congress's commerce power. In the alternative, the Court should narrowly interpret § 1958 to extend jurisdiction only to actual interstate use of interstate commerce facilities in the commission of a murder-for-hire.¹⁸⁹ Regardless of the outcome, for the sake of clearly defining Congress's power to criminalize under the Commerce Clause, the constitutionality of Congress's recent amendment to 18 U.S.C. § 1958 deserves Supreme Court review.

¹⁸⁹ In recent cases, the Court has narrowly favored interpreting statutes passed under the commerce power rather than declaring them outright violations of the Constitution. CHEMERINSKY, *supra* note 78, § 3.3, at 265–68.