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Dialing M for Murder: Assessing the Interstate Commerce Requirement for Federal Murder-for-Hire

Christopher Lieb Nybo†

Betty Louise Marek, a fifty-five-year old insurance agent from Port Lavaca, Texas, was heartbroken over a recent breakup with her boyfriend and that he had found a new girlfriend.1 While on a business trip in the Rio Grande Valley, she struck up a conversation with Robert Cervantes, a man she met at a fruit stand.2 When Cervantes mentioned that he had a criminal past,3 Marek responded by confiding in Cervantes that she was upset about her recent breakup with her boyfriend and that she wanted to get somebody to “wipe him out.”4 Cervantes promptly reported the conversation to local law enforcement authorities, who collaborated with the Texas Rangers and the FBI to set a trap for Marek.5 Working with undercover authorities, Cervantes persuaded Marek to hire a hitman to murder her ex-boyfriend and his new girlfriend.6 Unfortunately, the trap did not work as planned. Rather than going to Harlingen, Texas to pay the undercover hitman directly, Marek went to Houston and wired the money to him through Western Union.7

Despite this deviation from the plan, federal authorities arrested Marek and charged her with the federal crime of attempting to use interstate commerce facilities to arrange a murder-for-

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1 B.A. 1999, Dartmouth College; J.D. Candidate 2002, University of Chicago.
2 John W. Gonzalez, Woman Accused of Trying to Have Ex-Beau, 70, Rival, 66, Killed, Houston Chron A23 (Nov 26, 1997).
3 Woman Indicted in Murder-for-Hire Scheme, San Antonio Express-News B6 (Dec 18, 1997).
4 Id.
5 Gonzalez, Woman Accused of Trying to Have Ex-Beau Killed, Houston Chron at A23 (cited in note 1).
6 United States v Marek, 198 F3d 532, 535 (5th Cir 1999), affd, 238 F3d 310 (5th Cir 2001) (en banc).
7 Gonzalez, Woman Accused of Trying to Have Ex-Beau Killed, Houston Chron at A23 (cited in note 1); Woman Indicted in Murder-for-Hire Scheme, San Antonio Express-News at B6 (cited in note 2).
hire in violation of 18 USC § 1958. At her trial, Marek pled guilty and was convicted, despite the fact that the government introduced no evidence to show that the Western Union transmission actually crossed the Texas state line. Marek appealed her conviction to the Fifth Circuit, arguing that the district court erred in finding that she violated the federal murder-for-hire statute.

Section 1958 prohibits using or causing another “to use the mail or any facility in interstate or foreign commerce with intent that a murder be committed.” The requirement that a defendant use the mail or a facility somehow connected to interstate commerce—the interstate nexus requirement—is jurisdictional. Marek contended that because her Western Union transfer originated and terminated in Texas, it did not involve the “use” of a “facility in interstate or foreign commerce,” as required under the statute. The central question in Marek’s appeal was whether § 1958 applied simply because Western Union was a facility with interstate commerce capability or if the statute required that Marek actually use the facility in interstate commerce in the attempted murder-for-hire.

At issue in Marek’s appeal was the degree of jurisdictional nexus required for prosecution under § 1958. In a previous decision, the Fifth Circuit suggested in dicta that in order to establish jurisdiction under the statute, a facility must actually be used in interstate commerce and not merely be capable of such use. This view accorded with interpretations of § 1958 in the Sixth Circuit and the Southern District of New York. Nonetheless, the panel in United States v Marek rejected this interpretation and held that the use of a “facility in interstate or foreign commerce” is

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8 Marek, 198 F3d at 533.
9 Marek, 238 F3d at 313.
10 See id (noting Marek’s argument that her intrastate use of Western Union did not constitute “use of a facility in interstate commerce” under the statute).
12 See United States v Razo-Leora, 961 F2d 1140, 1148 (5th Cir 1992) (holding that “travel in or use of interstate commerce facilities” under § 1958 is a “jurisdictional requirement”).
13 Marek, 198 F3d at 534.
14 Id.
15 United States v Cisneros, 194 F3d 626, 635 (5th Cir 1999), amended, 203 F3d 333 (5th Cir 2000), affd, Marek, 238 F3d 310.
16 See United States v Weathers, 169 F3d 336, 342 (6th Cir 1999) (“In order to establish the court’s jurisdiction under § 1958, the government must show that the defendant used a ‘facility in interstate commerce.’”); United States v Stevens, 842 F Supp 96, 98 (S D NY 1994) (holding that in fact “interstate use of a facility” suffices to establish jurisdiction).
synonymous with the use of any instrumentality of interstate or foreign commerce, regardless of whether the actual use is intra- or interstate.17 An en banc panel of the Fifth Circuit affirmed the decision.18

Employing traditional methods of statutory interpretation and looking at the public policy arguments regarding the use of federal prosecutorial resources, this Comment explores the circuit split over this jurisdictional issue. It concludes that narrowly interpreting § 1958 to require that a facility actually be used in interstate commerce is in keeping with established principles of statutory interpretation and public policy concerns regarding the appropriate use of federal prosecutorial resources. Courts should not interpret § 1958 to cover any use of a telephone, pager, or other facility capable of communicating across state lines. Rather, courts should limit the statute's application to defendants who use facilities that in some way actually cross state boundaries during the course of the alleged criminal activity. Part I describes the split among courts over how to interpret § 1958. Part II illustrates how a plain meaning analysis fails to resolve the interpretive problem. The remaining sections argue for a narrow interpretation of § 1958. Part III argues that the legislative history of § 1958 supports a narrow interpretation of its jurisdictional reach. Part IV explores how two canons of statutory construction—the rule of lenity and the clear statement rule—also support a narrow interpretation. Finally, Part V argues for a narrow interpretation in light of the need for selective use of scarce federal prosecutorial resources.

I. THE CURRENT SPLIT AMONG THE COURTS

Although only five cases in three separate courts have addressed the issue of what degree of jurisdictional nexus is required for prosecution under § 1958, the courts in four of these cases have narrowly interpreted § 1958 to require that a defendant employ a facility actually engaged in interstate commerce to trigger federal jurisdiction.19 One of the first courts to take this

17 Marek, 198 F3d at 535.
18 Marek, 238 F3d at 320.
19 See United States v Cisneros, 194 F3d 626, 631 (5th Cir 1999), amended, 203 F3d 333 (5th Cir 2000) (stating in dicta that “use of the facility must have been in the process of interstate or foreign commerce”), affd, United States v Marek, 238 F3d 310 (5th Cir 2001) (en banc); United States v Weathers, 169 F3d 336, 342 (6th Cir 1999) (“[I]n order to establish the court’s jurisdiction under § 1958, the government must show that the defendant used a ‘facility in interstate commerce.’”); United States v Paredes, 950 F Supp 584,
approach was the Southern District of New York. In United States v Stevens, a defendant in New York contacted a murder-for-hire middleman by placing several telephone calls to a paging device. These calls were routed to a transmitting station in New Jersey, which subsequently sent radio waves out across New York, New Jersey, and Connecticut. However, the defendant actually used the paging device to reach another person in New York. The court interpreted § 1958 to prohibit any "interstate use of a facility" of interstate commerce, thus adopting an approach that the communication itself must cross state lines, rather than merely have the capacity to do so. The court then held that the defendant's use of the interstate pager that sent signals across state lines satisfied the interstate nexus requirement for jurisdiction under § 1958:

The paging system's very purpose is to reach across state lines to find people. In pursuit of that purpose, it sends radio waves across the borders of three states each time it is activated; every time the system is used, it is used in an interstate manner.

The Southern District of New York reaffirmed its interpretation of § 1958 in United States v Paredes, a case with facts very similar to the transaction in Stevens. 20

590 (S D NY 1996), affd on different grounds, 162 F3d 1149 (2d Cir 1998) (holding that a defendant's use of a facility must be interstate); United States v Stevens, 842 F Supp 96, 98 (S D NY 1994) (holding that in fact "interstate use of a facility" suffices to establish jurisdiction).

20 842 F Supp 96 (S D NY 1994).
21 Id at 97.
22 Id.
23 Id.
24 Stevens, 842 F Supp at 98.
25 Id.
26 950 F Supp 584, 590 (S D NY 1996), affd on different grounds, 162 F3d 1149 (2d Cir 1998).

27 Paredes and Stevens are of particular interest because of a separate issue concerning § 1958. Although both cases held that an alleged participant must use a facility that is actually engaged in interstate commerce, the courts differed as to what constituted such use. Like Stevens, Paredes involved a defendant in New York who used an interstate paging system to contact someone else in New York. Paredes, 950 F Supp at 584. Unlike the Stevens court, however, the Paredes court reasoned that "the actual location of the parties at the time the paging system was used[,]" rather than the nature of the communication device—whether it sent signals across state lines regardless of the nature of the party being paged—was most important to the jurisdictional question. Id at 590. Since both parties were located in New York, the court dismissed the murder-for-hire charges for want of jurisdiction. Id. The court expressed its concern with basing jurisdiction on the nature of the technology, rather than on the location of the parties:
The Sixth Circuit has also interpreted § 1958's jurisdictional requirement narrowly. In *United States v Weathers*, the defendant used a cellular telephone to facilitate a murder-for-hire. While located in Kentucky, the defendant placed a call to an individual also located in Kentucky. The cellular phone sent signals across the Kentucky-Indiana border to communications equipment in Indiana. Although noting that the statute was ambiguous, the Sixth Circuit interpreted § 1958 narrowly to require that a murder-for-hire participant use a facility actually engaged "in interstate commerce." The court then found that the defendant had used such a facility because "even though the signal that actually connected the two parties was ultimately intrastate, interstate activities actually were required to make that connection possible."

In addressing the jurisdictional reach of § 1958, the Fifth Circuit first hinted that it would also adopt a narrow interpretation of the statute. In *United States v Cisneros*, the mother of a teenager was distraught over her daughter's break-up with a boyfriend and sought the help of her fortuneteller to hire someone to murder him. Trying to locate a hitman, the fortuneteller received calls from an individual in Mexico who eventually hired two hitmen to commit the murder. Although the decision did not require a firm clarification of the jurisdictional nexus required for

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It is very likely that in the near future all electronic forms of communication will be transmitted across state lines regardless of the location of the communicating parties. As the original role of federal criminal jurisdiction was intended to be limited in nature, it is troubling to permit technological innovation to significantly expand its scope without a specific expression of Congressional intent.

Id. This separate issue is beyond the scope of this Comment.

29 Id at 337.
30 Id.
31 Id.
32 *Weathers*, 169 F3d at 342.
33 Id at 342. It is worth noting that the Sixth Circuit agrees with the *Stevens* court that the nature of the communicating device, rather than the actual location of communicating parties, is the essential factor in determining the interstate use of a facility. Id. See note 27 and accompanying text.
35 Id at 629.
36 Id at 629–30.
37 Id at 630.
jurisdiction under § 1958, the court nonetheless suggested in
dicta that it would construe the nexus narrowly.\textsuperscript{38} 

Despite this suggestion, when squarely faced with the issue,
the Fifth Circuit, sitting en banc, adopted a broad interpretation
of § 1958’s jurisdictional requirement, holding that the mere use
of a facility with interstate commerce capabilities was sufficient
to establish jurisdiction.\textsuperscript{39} As discussed above, Cisneros concerned
a Texas defendant’s use of Western Union to wire money to a
hitman.\textsuperscript{40} The Fifth Circuit affirmed the district court’s determina-
tion that it had jurisdiction over this case under § 1958, despite
the fact that the defendant used Western Union to wire money to
an in-state party and that the Western Union wire never crossed
state lines.\textsuperscript{41} 

Federal courts addressing the jurisdictional nexus required
under § 1958 have clearly disagreed over how to resolve the issue.
As a result, law enforcement officers, prosecutors, defendants,
and courts remain uncertain as to whether federal jurisdiction
extends to certain murders-for-hire. The effort to clarify the sta-
tute will begin with an examination of the text of § 1958.

II. THE TEXT OF § 1958

All statutory interpretation begins with the text of the stat-
ute.\textsuperscript{42} If the text provides a clear answer to statutory meaning,
then the inquiry is finished\textsuperscript{43} because courts should follow the
plain and unambiguous meaning of the statutory language.\textsuperscript{44} Concerning § 1958, courts are divided as to whether the text is so
clear as to be unambiguous.\textsuperscript{45}

\textsuperscript{38} Cisneros, 194 F3d at 635.
\textsuperscript{39} Marek, 238 F3d at 320.
\textsuperscript{40} See text accompanying notes 1–7.
\textsuperscript{41} Marek, 238 F3d at 320.
\textsuperscript{42} See, for example, Hughes Aircraft Co v Jacobson, 525 US 432, 438 (1999) (“As in
every case of statutory construction, our analysis begins with ‘the language of the statute.’”); United States v Alvarez-Sanchez, 511 US 350, 356 (1994) (“When interpreting a statute, we look first and foremost to its text.”); Howe v Smith, 452 US 473, 480 (1981) (“As in
every case involving the interpretation of a statute, analysis must begin with the language
employed by Congress.”).
\textsuperscript{43} See, for example, Hughes Aircraft, 525 US at 438 (“And where the statutory lan-
guage provides a clear answer, [statutory construction] ends there as well.”).
\textsuperscript{44} See United States v Albertini, 472 US 675, 680 (1985) (“Courts in applying . . . laws
must generally follow the plain and unambiguous meaning of the statutory language.”).
\textsuperscript{45} Compare Marek, 238 F3d at 315–16, 320–321 (arguing that the text of § 1958 is
unambiguous as to the jurisdictional reach of the statute), with Cisneros, 194 F3d at 632–
33 (arguing that the text of § 1958 is ambiguous as to the jurisdictional reach of the stat-
tute); Weathers, 169 F3d at 340 (same); Paredes, 950 F Supp at 587 (same).
Subsection (a) of the statute provides: “Whoever . . . uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed” is guilty of a crime. Furthermore, subsection (b)(2) states that “facility of interstate commerce” includes means of transportation and communication. The debate over this provision’s ambiguity is traceable to two issues: whether the phrase “in interstate or foreign commerce” in subsection (a) modifies “use” or “facility” and the significance of the phrase “facility of interstate commerce” in subsection (b)(2).

A. Does “In Interstate or Foreign Commerce” Modify “Use” or “Facility”?

The first issue is whether the phrase “in interstate or foreign commerce” modifies the word “facility” or “use.” If the phrase modifies the word “use,” then a facility must actually be engaged in interstate commerce to establish federal jurisdiction. The facility cannot merely possess interstate commerce capabilities. In contrast, if the phrase modifies “facility,” then simply using a facility with interstate commerce capabilities but not actually engaged in interstate commerce is sufficient to establish federal jurisdiction.

1. Arguments for interpreting “in interstate or foreign commerce” to modify “facility.”

An obvious argument for interpreting “in interstate or foreign commerce” to modify “facility” is that the phrase is situated more closely to “facility” than to “use.” If the phrase modifies the word “use,” then a facility must actually be engaged in interstate commerce to establish federal jurisdiction. The facility cannot merely possess interstate commerce capabilities but not actually engaged in interstate commerce is sufficient to establish federal jurisdiction.

46 18 USC § 1958(a).
47 18 USC § 1958(b)(2).
48 See Marek, 238 F3d at 316–20; id at 324–27 (Jolly dissenting); Paredes, 950 F Supp at 587.
49 See Marek, 238 F3d at 320–22; Weathers, 169 F3d at 340.
50 See Paredes, 950 F Supp at 587 (“A rigorous parsing of the statute also leads to the conclusion that it is the ‘use’ that must be ‘in interstate commerce,’ not the ‘facility.’ Stated another way, the statute may be read to indicate that the interstate nexus requirement turns not on the facility’s interstate capacity but its actual use in the particular case.”).
51 See Marek, 238 F3d at 320 (“[W]hen a facility employed to advance murder-for-hire is in interstate or foreign commerce generally, the jurisdictional element of § 1958 is satisfied even though the particular use of the facility on the specific occasion in question is only intra state.”).
However, if the drafters of § 1958 had intended to follow this so-called "rule of proximity" in using the phrase to modify "use," the grammatical construction of the statute would have been awkward. In addition, placing the phrase directly after the word "use" would have forced the phrase to modify "use of the mail" as well as "use of facilities," which the dissenter in Marek noted would conflict with Fifth Circuit precedent.

Another factor that cuts in favor of interpreting the "in interstate or foreign commerce" to modify "facility" is § 1958's title: "Use of interstate commerce facilities in the commission of murder-for-hire." It is generally accepted that one may resort to the title of an act as an aid in interpreting the statute. According to the majority in Marek, the use of the clause "[u]se of interstate commerce facilities" in the statute's title is further proof that "in interstate or foreign commerce" modifies "facilities," rather than "use." In response, one could argue that the title is "cursory and intended only as a quick, general description." By this reasoning, it would be somewhat absurd to rely upon such a general description to ascertain the meaning of a specific provision within the statute itself. In addition, the title fails to note the "foreign facilities" provision of § 1958, which extends § 1958's jurisdictional scope to participants using facilities in foreign commerce in arranging murders-for-hire. However, it hardly makes sense to

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52 Id at 316.
53 Id at 325 (Jolly dissenting).
54 Id. As the dissent noted, the statute would have to be written as follows: "whoever causes another to use, in interstate or foreign commerce, the mail or any facility." Marek, 238 F3d at 325 (Jolly dissenting).
55 See id at 325 n 3 (Jolly dissenting). By writing the statute to conform with the "rule of proximity," as demonstrated in note 54, the clause "in interstate or foreign commerce" would have been located in the statute at a position where it would modify "use" of both facilities and the mail in commission of murder-for-hire. However, in United States v Heacock, 31 F3d 249 (5th Cir 1994), the Fifth Circuit held that both inter- and intrastate use of the mail was sufficient to establish jurisdiction under § 1958. Id at 254-55. Therefore, writing the statute to conform to the "rule of proximity" would create a conflict with this holding.
56 18 USC § 1958(a).
57 See, for example, Strathern SS Co v Dillon, 252 US 348, 351-52 (1920) ("But the title of an act cannot limit the plain meaning of its text, although it may be looked to to aid in construction in cases of doubt.").
58 Marek, 238 F3d at 321.
59 Id at 325 (Jolly dissenting).
60 See Goodlett v Louisville & N R Co, 122 US 391, 408-09 (1887) ("While the title of a statute should not be entirely ignored in determining the legislative intent, it cannot be used 'to extend or restrain any positive provisions contained in the body of the act,' and is of little weight even when the meaning of such provisions is doubtful.").
61 18 USC § 1958(a).
argue that an incomplete title gives courts liberty to interpret the omission as an indication of legislative intent to exclude foreign facilities from the realm of the statute. 62

2. Arguments for interpreting “in interstate or foreign commerce” to modify “use.”

Under the presumption of consistent usage, 63 “identical words used in different parts of the same act are intended to have the same meaning.” 64 Courts should thus interpret identical clauses similarly because statutory interpretation is a “holistic endeavor.” 65 The Supreme Court explains:

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. 66

Concerning § 1958, Congress twice used the phrase “in interstate or foreign commerce” in subsection (a) of the statute; thus, the phrases should be interpreted in a consistent manner. 67 The phrase initially appears in the first section of subsection (a), which provides: “[w]hoever travels in . . . interstate or foreign commerce.” 68 In this section, the phrase operates as an adverbial phrase modifying the verb “travels.” Travel must cross a state or national border for jurisdiction to arise under § 1958. 69 In light of this phrase’s use as an adverbial modifier in the early part of subsection (a), so the argument goes, courts should interpret the

62 See Marek, 238 F3d at 325 (Jolly dissenting) (noting the title’s omission of any reference to foreign facilities and the absurdity of using this omission to interpret the statute so as not to cover the use of facilities in foreign commerce from the jurisdictional reach of the statute).
66 Id.
67 See Marek, 238 F3d at 325 (Jolly dissenting).
68 18 USC § 1958(a).
69 See Marek, 238 F3d at 325 (Jolly dissenting) (noting that “the ‘in’ clause tells us where the travel occurred”). See also Black’s Law Dictionary 819 (West 6th ed 1990) (defining “interstate commerce” as “[t]raffic, intercourse, commercial trading, or the transportation of persons or property between or among the several states of the Union, or from or between points in one state and points in another state”).
subsequent use of the phrase as an adverbial clause modifying "use," rather than as an adjectival clause modifying "facility." Second, as the Marek dissenters explained, interpreting "in interstate or foreign commerce" to modify "facility" may create greater ambiguity:

There are two possible interpretations of that grammatical construction: either any facility that is generally engaged "in" interstate or foreign commerce will qualify, or the facility must be "in" interstate or foreign commerce at the moment of the offense.

To avoid this ambiguity, the better interpretation may be that the phrase modifies "use."

B. Does the Statute Prohibit Use of a "Facility in Interstate or Foreign Commerce" or a "Facility of Interstate Commerce"?

An apparent inconsistency between subsection (a) and subsection (b)(2) of the statute also contributes to statutory ambiguity. While subsection (a) speaks in terms of a "facility in interstate or foreign commerce," subsection (b)(2) defines "facility of interstate commerce" to include "means of transportation and communication." The statute, however, does not otherwise define the term "facility in interstate or foreign commerce," and the phrase "facility of interstate commerce" does not appear in subsection (a).

Despite this apparent inconsistency, this difference in language may not be significant. Subsection (b)(2) does not actually define "facility," but "merely clarifies that a facility can be a means of transportation ... or a means of communication." Therefore, as the Fifth Circuit found, this "inconsistency" may be

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70 Marek, 238 F3d at 325 (Jolly dissenting); United States v Barry, 888 F2d 1092, 1095 (6th Cir 1989) ("The word 'in' [requires] particular use of a facility—a use that crosses state lines.").

71 Marek, 238 F3d at 325 (Jolly dissenting).

72 18 USC § 1958(a) (emphasis added).

73 18 USC § 1958(b)(2) (emphasis added).

74 Although this apparent inconsistency between the provisions is interesting from an academic perspective, this issue may be of little practical significance in the future. Advocates of a broad interpretive approach may follow the Fifth Circuit's lead and hinge their argument for a broad jurisdictional requirement solely on an interpretation of "facility in interstate commerce" in subsection (a), obviating the need for any reliance on subsection (b)(2). See text accompanying notes 52–59. Nonetheless, this inconsistency in language strengthens the argument that § 1958 is textually ambiguous.

75 Marek, 238 F3d at 320.
“more apparent than real” and may not have been “intended by Congress to limit the scope of the statute.”

In contrast to the Fifth Circuit, other courts consider this small difference in language to be quite significant. As the *Cisneros* court explained:

Under the term in (a), the use of the facility must have been in the process of interstate or foreign commerce. That would require us to undertake a fact-intensive inquiry to establish the interstate or foreign character of the instant use. If the definition in (b) applies, however, the statute would encompass even intrastate use of telephones or vehicles, since those are items connected to interstate commerce.

In addition, under the rule of diverse terminology, where different terms are used in a statute, courts should presume that Congress intended the terms to have different meanings. Courts should thus presume that Congress intended the different phrases in subsections (a) and (b)(2) of § 1958 to have different meanings. Finally, courts should also be hesitant to equate these two phrases in light of the Supreme Court’s recent distinction in *United States v Lopez* between “the instrumentalities of interstate commerce” and “persons or things in interstate commerce.”

In the end, good arguments exist on both sides of the debate as to whether § 1958 is textually ambiguous, but none cuts strongly in favor of one interpretation of the statute’s text. The jurisdictional nexus under the statute remains ambiguous. When faced with such ambiguity, interpreters must use other sources to

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76 Id. See also, *United States v Coates*, 949 F2d 104, 105 (4th Cir 1991) (ignoring the difference in language between subsections (a) and (b)(2)).

77 194 F3d at 632.

78 See *National Insulation Transportation Committee v ICC*, 683 F2d 533, 537 (DC Cir 1982) (“[T]he use of different terminology within a statute indicates that Congress intended to establish a different meaning.”). See also *National Wildlife Federation v Gorsuch*, 693 F2d 156, 172 (DC Cir 1982) (“[U]se of two different terms is presumed to be intentional.”).

79 See *Weathers*, 169 F3d at 341 (“[W]e must reject the district court’s attempt to reconcile the differences in the wording of § 1958 (a) and (b)(2) by integrating them to apply to a single category of activities.”).


81 Id at 558–59 (distinguishing between the two as separate categories which Congress is “empowered to regulate and protect”).
discern legislative intent. The remainder of this Comment examines these extra-textual sources, beginning with the legislative history of § 1958.

III. THE LEGISLATIVE HISTORY OF § 1958

The legislative history of a statute is generally regarded as the record of deliberations leading up to a law's enactment. The use of this history as an aid in statutory interpretation has both its critics and supporters. Proponents of "new textualism," such as Justice Scalia, strongly criticize the use of legislative history. First, they argue that only text-based interpretation is constitutionally legitimate. Under the Constitution, a bill does not become a law until both Houses of Congress pass it and present it to the President. Only the text actually becomes law.

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82 Paredes, 950 F Supp at 587 ("Faced with unavoidably ambiguous statutory wording, a court must look behind the words themselves in an attempt to reconstruct their purpose.").
84 One of the central premises of new textualism is that "the only object of statutory interpretation is to determine the meaning of the text and that the only legitimate sources for this inquiry are text-based or text-linked sources." William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett, Legislation and Statutory Interpretation 228 (West 2d ed 2000).
85 See, for example, Scalia, Common-Law Courts at 29–37 (cited in note 83); Bank One Chicago v Midwest Bank & Trust Co, 516 US 264, 279 (1996) (Scalia concurring in part) (making the case against the use of legislative history); Chisom v Roemer, 501 US 380, 406 (1991) (Scalia dissenting) (arguing that the Supreme Court is "here to apply the statute, not legislative history, and certainly not the absence of legislative history"); Green v Bock Laundry Machine Co, 490 US 504, 527 (1989) (Scalia concurring) (arguing that statements of a handful of legislators in Congress should not determine the meaning of the statute's text). For a general discussion, see William N. Eskridge, Jr., The New Textualism, 37 UCLA L Rev 621 (1990) (identifying problems with the use of legislative history and examining the new textualism theory of statutory interpretation which relies on the interpretation of statutory text over legislative history).
86 See Bank One Chicago, 516 US at 279 (Scalia concurring).
87 See US Const Art I, § 7, cl 2. The clause provides:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve 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. If after such Reconsideration two thirds of that House shall
Thus, new textualists argue that reliance on legislative history is unconstitutional because "it amounts to lawmaking by congressional subgroups" that contribute to the legislative history. Under the new textualist rubric, courts engage in legitimate statutory interpretation only when employing text-based interpretation.\(^8\) As Eskridge, Frickey, and Garrett explain, though, this "approach does not mean [that courts] should not consider context."\(^9\) New textualists look to various sources to provide context, such as dictionaries, other provisions of the statute, and other statutes.\(^9\)

Relying on legislative history may also undermine what Justice Scalia terms the "rule of law."\(^8\) The rule of law requires a law

\(^8\) Eskridge, 37 UCLA L Rev at 671 (cited in note 85) (describing Scalia's position as resting on the belief that "the only thing that actually becomes law is the statutory text; any unwritten intentions of one House, or of one committee or of one Member, in Congress are not law unless it can be shown that they were understood and accepted by both Houses and by the President").

\(^9\) Eskridge, Frickey, and Garrett, Legislation at 228-29 (cited in note 84); Blanchard v Bergeron, 489 US 87, 99 (1989) (Scalia concurring) ("What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself."); United States v Taylor, 487 US 326, 345 (1988) (Scalia concurring in part) ("The text is so unambiguous on these points that it must be assumed that what the Members of the House and the Senators thought they were voting for, and what the President thought he was approving when he signed the bill, was what the text plainly said, rather than what a few Representatives, or even a Committee Report, said it said."); Thompson v Thompson, 484 US 174, 191-92 (1988) (Scalia concurring in the judgment) ("An enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed. Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President."); Scalia, Common-Law Courts at 29-37 (cited in note 85) (arguing that judges should not consult legislative history because such materials are an illegitimate source of statutory meaning under Article I, Section 7 of the Constitution, which renders the text the only source of law and argues against crediting the views of congressional subgroups).

\(^9\) Id.

\(^9\) Id.

of rules that are predictably applied to everyone.94 Using extratextual sources to interpret statutes undermines this predictability.95 First, judges are free to “substitute their political preferences for those legitimately adopted by the legislature.”96 Subsequently, “people need not obey the letter of the law because the softies in the judiciary will bend the law and create exceptions.”97 Opponents of legislative history argue that these exceptions contribute to unpredictability in the law. To prevent such unpredictability, courts should not use legislative history to interpret statutes.

Finally, reliance on legislative history in statutory interpretation has led to the manipulation of legislative history by interested parties, which has resulted in a cheapening or polluting of the reliability of that history in discerning legislative intent.98 According to one school of thought, using legislative history has “stimulated a cottage industry of junior associates, law clerks, and lobbyists whose main job is to find or plant smoking guns in legislative history,” knowing that courts will use this material as “evidence” of legislative intent.99 This manipulation of legislative history makes it “increasingly unreliable evidence of what the voting Members of Congress had actually had in mind.”100 As one judge commented, using legislative history to support one’s view of statutory meaning is like “looking over a crowd and picking out your friends.”101

Although legislative history has come under attack in the wake of new textualism, there are persuasive arguments in favor of its use.102 The use of extrinsic aids in the interpretation of statutes has a long history dating back to the Marshall Court. In

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94 Id at 1179.
95 Id at 1182 (arguing generally that allowing judges to approach questions of legal interpretation on the basis of the totality of the circumstances leads to the situation where, among other effects, "predictability is destroyed").
96 Id.
97 Scalia, 56 U Chi L Rev at 1182 (cited in note 93).
98 Eskridge, Frickey, and Garrett, Legislation at 229–30 (cited in note 84). This argument is premised on the assumption that such “legislative intent” even exists. Some would argue that it does not. See, for example, Scalia, Common-Law Courts at 32 (cited in note 84) (arguing that the problem with the search for intent is that there is none).
100 Blanchard, 489 US at 99 (Scalia concurring).
102 See, for example, Burlington Northern Railroad Co v Oklahoma Tax Commission, 481 US 454, 461 (1987) (“Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity.”).
United States v Fisher, Chief Justice Marshall noted that "[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived." Building from this generalization, supporters note the sheer utility of legislative history in "understand[ing] the context and purpose of a statute." In Wisconsin Public Intervenor v Mortier, the Supreme Court noted that "[a]s for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it." In his defense of legislative history, Justice Breyer provides several examples where courts have used legislative history to avoid absurd results, correct drafting errors, and understand the meaning of specialized terms. For example, he noted the situation of a federal criminal statute that at one time proscribed that "whoever ... possesses any false, forged, or counterfeit coin, with intent to defraud any person" was guilty of a crime. In 1982, a question arose as to whether the statute covered a person who (with the requisite fraudulent intent) possessed, in the United States, false Krugerrands, gold coins used as currency in South Africa, but not in the United States. By looking solely at the text of the statute, it appeared that use of false Krugerrands fell within the statute, which prohibited the use of "any ... counterfeit coin." The legislative history of this statute, however, revealed that the old statute on which the newer one was based contained a qualifying phrase, indicating clearly that the provision applied to American, and not to foreign coins. By looking at the statute's legislative history, the court examining this issue was able to conclude that the failure to include a similar limiting phrase in the newer version of the statute was a drafting error.

In response to the criticism that congressional staffers and lobbyists abuse or pollute legislative history, supporters counter that the proper response to this potential abuse is "careful" use of legislative history rather than its total abandonment. As for the
criticism that legislative history is illegitimate because it elevates the history to the status of law, supporters respond that the history of the statute does not become "law," but only that the history is helpful in trying to understand the meaning of the words that constitute the "law." Finally, in response to the criticism that using legislative history violates the rule of law, supporters note that courts only use history to interpret unclear statutes and that this use makes it easier, rather than more difficult, for citizens to understand the law.

The legislative history of §1958 is sparse. Congress conducted congressional hearings on the murder-for-hire provisions of the Comprehensive Crime Control Act of 1983, but they offer little insight into legislative intent underlying the statute's jurisdictional requirement. The only helpful historical source is a report prepared by the Senate Subcommittee handling the proposed crime act.

Concerning committee reports, courts frequently use such reports when interpreting statutes. Even vociferous opponents of legislative history concede that committee reports may sometimes be helpful. For example, Justice Jackson, who generally

114 See id at 863.
115 See Breyer, 65 S Cal L Rev at 869 (cited in note 83):

[The rule of law] argument overlooks the fact that courts use history to interpret unclear statutes. The use of legislative history can therefore make it easier, not more difficult, for the law-abiding citizen to plan conduct according to law. Legislative history is not difficult to find, at least not for the lawyer trying to understand an unclear statute. Summaries are available in most libraries and the federal government maintains depository libraries with full texts of relevant documents. Furthermore, the costs of using history are meaningful only when compared against the benefits of whatever clarity it may bring and with the costs of alternative ways of achieving the same objective.

119 See Jorge Carro and Andrew Brann, The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis, 22 Jurimetrics J 294, 304 (1982) (noting that over a forty-year period, over 60 percent of the Supreme Court's citations to legislative history were references to committee reports). See also Eskridge, Frickey, and Garrett, Legislation at 743–58 (cited in note 84) (discussing the use of committee reports and
opposed the use of legislative history, made an exception for committee reports, which he thought, unlike other pieces of legislative history, were presumably "well considered and carefully prepared."120 Unlike Justice Jackson, new textualists make no exception for use of committee reports in statutory interpretation. While on the D.C. Circuit, Justice Scalia wrote:

I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill. And I think it time for courts to become concerned about the fact that routine deference to the detail of committee reports . . . are converting a system of judicial construction into a system of committee-staff prescription.121

Justice Scalia's objection to relying on committee reports has continued throughout his tenure on the Supreme Court.122

If one accepts that legislative history is a legitimate aid in statutory interpretation,123 then the history of § 1958 appears to clarify the statute's jurisdictional reach. Although some evidence exists to support a broad interpretation of § 1958, the record supports the position that the drafters of § 1958 intended to limit the statute's jurisdictional scope.

A. Evidence of Intent to Limit the Jurisdictional Scope of § 1958

The legislative history of § 1958 supports the conclusion that the drafters did not intend that jurisdiction extend to every use, inter- or intrastate, of a facility of interstate commerce. The Senate report offers an example of when federal jurisdiction would arise under § 1958: "Thus, an interstate telephone call is sufficient

\[^{120}\text{See Schwegmann Brothers v Calvert Distillers Corp, 341 US 384, 395 (1951) (Jackson concurring) ("Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared.").}\]

\[^{121}\text{Hirschey v FERC, 777 F2d 1, 7–8 (DC Cir 1985) (Scalia concurring).}\]

\[^{122}\text{Blanchard, 489 US at 97–100 (Scalia concurring) (criticizing the majority's reliance on committee reports in interpreting a provision of the Civil Rights Attorney's Fees Award Act).}\]

\[^{123}\text{The author recognizes that it is beyond the scope of this Comment to take a definitive position on this issue.}\]
to trigger federal jurisdiction." The dissenters in Marek observed: "The report does not assert that any use of a telephone is sufficient. Instead it suggests that the actual use must be in interstate or foreign commerce." In another section, the report notes that "the committee fully appreciates that many state and local police forces and prosecutor offices are quite capable of handling a murder-for-hire case notwithstanding the presence of some interstate aspects." This passage indicates that the drafters intended that all cases under § 1958 have some "interstate aspects" and not just a tenuous connection with some means of interstate commerce. Under this analysis, courts that interpret § 1958 to confer federal jurisdiction over murders-for-hire involving the intrastate use of interstate commerce facilities appear to violate the expressed intent of the drafters.

The legislative history of § 1958 further reveals that the drafters did not intend "that all or even most such offenses should become matters of Federal responsibility." The drafters did not want the statute to "allow the usurpation of significant cases by the federal authorities that could be handled as well or better at the local level." If courts interpret § 1958 to confer jurisdiction over the use of any facility with interstate commerce capabilities, federal jurisdiction would extend to essentially every murder-for-hire, a result clearly at odds with a desire to avoid usurpation of local authorities.

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125 Marek, 238 F3d at 327 (Jolly dissenting).
126 S Rep No 98-225 at 305 (cited in note 117).
127 Marek, 238 F3d at 327 (Jolly dissenting).
129 Id.
130 This would be so because most means of communication and travel are now considered facilities of interstate commerce. Courts have held that telephones, cellular telephones, automobiles, airplanes, and the internet are inherently instrumentalities of interstate commerce, even when used intrastate. See Weathers, 169 F3d at 341 (holding that intrastate telephone calls qualify as use of an instrumentality of interstate commerce); FTC v Shaffner, 626 F2d 32, 37 (7th Cir 1980) (same); Dupuy v Dupuy, 511 F2d 641, 644 (5th Cir 1975) (same); Aquionics Acceptance Corp v Kollar, 503 F2d 1225, 1228 (6th Cir 1974) (same); United States v Holder, 302 F Supp 296, 298 (D Mont 1969) (same); United States v Clayton, 108 F3d 1114, 1117 (9th Cir 1997) (holding cellular telephones to be instrumentalities of interstate commerce); United States v Hickman, 179 F3d 230, 232 (5th Cir 1999) (holding that a car is an instrumentality of interstate commerce); United States v Cobb, 144 F3d 319, 322 (4th Cir 1998) (same); United States v Randolph, 93 F3d 656, 660 (9th Cir 1996) (same); United States v Hume, 453 F2d 339, 340 (5th Cir 1971) (finding that 18 USC § 32, which criminalizes damage to "civil aircraft used, operated, or employed in interstate, overseas, or foreign commerce," protects aircraft even while they are not actually operating interstate); United States v Carroll, 105 F3d 740, 742 (1st Cir 1997) (finding that internet activity satisfied the interstate commerce element in a prose-
Aside from indicating that use of a facility would need to have some interstate aspects in order to establish jurisdiction and that not all murders-for-hire should become matters of federal responsibility, a third theme running throughout § 1958’s legislative history further supports a narrow interpretation of the jurisdictional nexus required under the statute. The committee report notes that the proposed murder-for-hire statute followed the format of another statute, the Interstate Travel in Aid of Racketeering statute (“the Travel Act”). In a footnote, the committee expressed its intention “that the full breadth of the phrase ‘any facility in interstate or foreign commerce’ as used in [the Travel Act] also be applicable” in the murder-for-hire statute. This evidence suggests that courts should consider the interpretation of the jurisdictional requirement in the Travel Act to resolve ambiguities that may arise in the interpretation of § 1958.

In United States v Barry, the Sixth Circuit addressed the jurisdictional nexus in the Travel Act. Prior to its revision in 1990, § 1952 prohibited “us[ing] ... any facility in interstate or foreign commerce, including the mail, with intent to” commit or

Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—

(1) distribute the proceeds of any unlawful activity; or
(2) commit any crime of violence to further any unlawful activity; or
(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform—

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or
(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

134 18 USC § 1952(a) (1994). The relevant text of the statute provides:

136 See United States v Edelman, 873 F2d 791, 794 (5th Cir 1989) (holding that it is appropriate to interpret § 1958 in light of § 1952 given that the two sections employ similar language).
137 888 F2d 1092 (6th Cir 1989).
further unlawful activities. The court addressed whether the statute made criminal "purely intrastate use of the mail in furtherance of an unlawful activity." Examining the statute's legislative history and purpose, the court conceded that there was a difference between the use of the words "in" and "of." The court concluded that "a statute that speaks in terms of an instrumentality in interstate commerce rather than an instrumentality of interstate commerce is intended to apply to interstate activities only." Thus, a purely intrastate use of the mail was not sufficient to establish federal jurisdiction.

After the Sixth Circuit's decision in Barry, Congress revised the Travel Act to prohibit "us[ing] the mail or any facility in interstate or foreign commerce" to further unlawful activities. This amendment effectively overruled Barry's specific holding that intrastate use of the mail was not sufficient to establish federal jurisdiction under § 1952(a). Nonetheless, the amendment did not overrule Barry's holding regarding the use of facilities other than the mail in the commission of unlawful activities. In order to establish federal jurisdiction under § 1952, such facilities must be used in interstate commerce, and not just merely have the capacity for such use. Since Congress clearly modeled § 1958 on § 1952, courts should interpret the "facility in interstate or foreign commerce" language use in both statutes to require that a defendant actually use the facility in activities that cross state lines. Use of a facility that merely has the capacity for interstate use should not be sufficient.

139 Barry, 888 F2d at 1092.
140 Id at 1095.
141 Id.
142 Id at 1096 (emphasis added).
144 Marek, 238 F3d at 318.
145 As an example of the continuing validity of this specific holding, see Weathers, 169 F3d at 341 ("In interpreting the Travel Act, 18 U.S.C. § 1952, of which the current murder-for-hire statute was originally a subset, we have previously discussed the significance of the use of the phrase 'instrumentality in interstate commerce' in the Travel Act, as opposed to other statutes that speak in terms of an 'instrumentality of interstate commerce,' and concluded that 'a statute that speaks in terms of an instrumentality in interstate commerce rather than an instrumentality of interstate commerce is intended to apply to interstate activities only.'"), quoting Barry, 888 F2d at 1095.
146 Barry, 888 F2d at 1095.
B. Evidence of Intent for a Broad Jurisdictional Scope

Evidence supporting a broad interpretation of § 1958 is weak. The Senate report on the bill generally employs the phrase “facility of interstate commerce,” rather than “facility in interstate commerce” in discussing the scope of the statute. The report describes the offense punishable under § 1958 as:

the travel in interstate or foreign commerce or the use of the facilities of interstate or foreign commerce or of the mails, as consideration for the receipt of anything of pecuniary value, with the intent that a murder be committed.

In addition, the report explains 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 and the offense is complete whether or not the murder is carried out or even attempted.” Finally, the report explicitly states that federal prosecution should be available for murders-for-hire when “the proper Federal nexus, such as . . . use of the facilities of interstate commerce[,] is present.”

Based on the repetitive use of the phrase “facility of interstate commerce” throughout the report, it does not appear that the inclusion of this phrase in subsection (b)(2) of the statute was a mere drafting error. In contrast, it appears that the Senate subcommittee used the words “in” and “of” interchangeably with respect to the jurisdictional requirement of the statute and may have intended the mere use of a facility with interstate commerce capabilities sufficiently to establish federal jurisdiction.

Proponents of a broad interpretation of § 1958’s jurisdictional requirement also argue that, while the subcommittee did not intend “that all or even most such offenses should become matters of Federal responsibility,” it may have intended that any limits on jurisdiction be established through federal prosecutorial discretion rather than by judicial restriction of the statute’s jurisdictional scope. The Senate report notes that the subcommittee wanted federal jurisdiction to “be asserted selectively based on

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148 Id at 304–05.
149 Id at 304 (emphasis added).
150 Id at 306 (emphasis added).
152 Id at 305.
153 Id.
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.\textsuperscript{154} The use of the phrase "asserted selectively" suggests that the Senate subcommittee acknowledged the potentially broad jurisdictional scope of § 1958 but preferred that prosecutors exercise discretion in choosing which cases to pursue.\textsuperscript{155} Rather than pursuing all such cases, federal prosecutors are encouraged to use "[c]ooperation and coordination" with state officials and only use § 1958 in "appropriate cases."\textsuperscript{156}

There are several problems with these arguments. First, although the Senate subcommittee used the phrases "facility in interstate commerce" and "facility of interstate commerce" interchangeably, this does not support an inference that the subcommittee intended to broaden jurisdiction to any use of a facility with interstate commerce capabilities. Such a position assumes that the subcommittee meant to use "facility of interstate commerce" consistently in the discussions leading to enactment of § 1958 and in the statute itself. However, the subcommittee used "facility in interstate commerce" at two points, in the enactment stage\textsuperscript{157} and in the statute itself.\textsuperscript{158} The legislative history simply does not support the argument that the drafters meant for the clauses to be used interchangeably.

The suggestion that prosecutorial restraint, rather than judicial interpretation, is the appropriate check on the jurisdictional reach of § 1958 is novel. Unfortunately, there is simply no direct evidence that Congress intended to establish jurisdiction through any use of a facility with interstate commerce capability with the understanding that prosecutors would exercise jurisdiction selectively. In contrast, there is some evidence that the drafters intended to limit jurisdiction and still expected prosecutors to prosecute selectivity.\textsuperscript{159} Even when conduct may meet the juris-

\textsuperscript{154} Id (emphasis added).
\textsuperscript{155} See Stevens, 950 F Supp at 588 (noting that the Senate report has "been interpreted to be a guideline for the exercise of prosecutorial discretion in the application of the murder-for-hire statute").
\textsuperscript{156} Id.
\textsuperscript{157} S Rep 98-225 at 306, n 5 (cited in note 117) ("Section 1952A reaches travel in interstate or foreign commerce or the use of mails or a facility in interstate or foreign commerce with the intent that a murder be committed in violation of State or Federal law."); "The Committee intends that the full breadth of the phrase 'any facility in interstate or foreign commerce' as used in the ITAR statute also be applicable here.") (emphasis added).
\textsuperscript{158} 18 USC § 1958(a).
\textsuperscript{159} See S Rep 98-225 at 305 (cited in note 117) ("[T]he Committee fully appreciates that many State and local police forces and prosecutors offices are quite capable of handling a
dictional threshold under the narrow approach, there may still be strong reasons for federal prosecutors to forego taking action.\textsuperscript{160} Congressional reflections on prosecutorial discretion do not tilt the scales in either direction as to the power of the federal courts to adjudicate murders-for-hire.

In the end, if one accepts that legislative history is a legitimate aid in statutory interpretation, then the history of § 1958 appears to clarify the statute’s jurisdictional reach to extend only to situations where a defendant has used or caused the use of a facility that actually engaged in interstate commerce. In other words, the use of the facility must somehow involve the crossing of state lines. Although some evidence exists to support the interpretation that any use of a facility with interstate commerce capabilities is sufficient to establish jurisdiction under the statute, that evidence is comparatively weak and inconclusive.

IV. RESOLVING STATUTORY AMBIGUITY USING CANONS OF CONSTRUCTION

Other interpretative aids, particularly two canons of statutory construction, support the conclusion that courts should construe the jurisdictional reach of § 1958 narrowly. Canons are “rules of thumb that help courts determine the meaning of legislation.”\textsuperscript{161} Two canons are particularly helpful in resolving the jurisdictional ambiguity at issue here: the rule of lenity and the clear statement rule.\textsuperscript{162}

\textsuperscript{160} See Charles D. Bonner, \textit{The Federalization of Crime: Too Much of a Good Thing?}, 32 U Rich L Rev 905, 934–35 (1998) (explaining that federal intervention in fighting crime is appropriate in three circumstances: (1) when an offense is committed against the United States itself or directly implicates U.S. property; (2) where efficiency based considerations favor federal prosecution because of the interstate or international character of the offense, or economies of scale; and (3) where uniformity in application of the law is important). Using these criteria, murder-for-hire scenarios that do not implicate federal concerns are entirely plausible.


\textsuperscript{162} See \textit{Marek}, 238 F3d at 325–28 (applying both canons to § 1958) (Jolly dissenting); \textit{Cisneros}, 194 F3d at 635 (applying the rule of lenity to § 1958).
A. The Rule of Lenity

The rule of lenity is a canon that applies specifically to penal statutes.\(^\text{163}\) Under the rule of lenity, "where the intention of Congress is not clear from the Act itself, and reasonable minds might differ as to its intention, the Court will adopt the less harsh meaning."\(^\text{164}\) The canon has three primary justifications.\(^\text{165}\) First, because it "is rooted in the due process requirement that Congress clearly articulate what conduct it has made criminal,"\(^\text{166}\) the canon ensures that citizens are aware of what conduct Congress has prohibited.\(^\text{167}\) The rule also seeks to promote equal protection values by preventing the "arbitrary or discriminatory applications of a criminal statute" by prosecutors exercising discretion.\(^\text{168}\) Finally, the canon seeks to protect separation of powers by "presuming that it is the legislative, not the judicial function to define crimes."\(^\text{169}\) To serve this end, the canon requires Congress to speak in "clear and definite" language when prohibiting certain conduct.\(^\text{170}\)

Courts generally apply the rule of lenity when two conditions exist. A criminal statute must be so ambiguous that after "seizing

\(^{163}\) See United States v Lanier, 520 US 259, 266 (1997) (noting that the canon is also referred to as "the canon of strict construction of criminal statutes" and that it applies in resolving ambiguous criminal statutes).

\(^{164}\) See United States v Callanan, 173 F Supp 98, 105 n 3 (D C Mo 1959).

\(^{165}\) For a defense of the rule on lenity, see Lawrence M. Solan, Law, Language, and Lenity, 40 Wm & Mary L Rev 57 (1998) (arguing that a narrow rule of lenity embodies important values with which the law community is unwilling to dispense: deference to legislative will and adequate notice to defendants).

\(^{166}\) Marek, 238 F3d at 327 (Jolly dissenting).

\(^{167}\) See Eskridge, Frickey, and Garrett, Legislation at 362 (cited in note 84) ("Reflecting due process concerns, the canon is designed to promote fair notice to the citizenry about what conduct subjects them to criminal sanctions."); Dan M. Kahn, Lenity and Federal Common Law Crimes, 1994 S Ct Rev 345 (1994) (arguing that "[n]arrow construction of criminal statutes . . . assures citizens fair notice of what the law proscribes").

\(^{168}\) Eskridge, Frickey, and Garrett, Legislation at 362 (cited in note 84). See also Kahn, 1994 S Ct Rev at 345 (cited in note 167) (arguing that "[n]arrow construction of criminal statutes . . . constrains the discretion of law enforcement officials").

\(^{169}\) Eskridge, Frickey, and Garrett, Legislation at 362–63 (cited in note 84). See also Kahn, 1994 S Ct Rev at 350 (cited in note 167) ("In fact, lenity has a slightly different and more specialized mission: to enforce legislative supremacy in criminal law. Under this view, criminal lawmaking is the prerogative of Congress and Congress alone. Lenity promotes this conception of legislative supremacy not just by preventing courts from covertly undermining legislative decisions, but also by forcing Congress to shoulder the entire burden of criminal lawmaking even when it prefers to cede some part of that task to courts.").

\(^{170}\) See United States v Universal C.I.T. Credit Corp, 344 US 218, 221–22 (1952) ("But when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.").
everything from which aid can be derived,” a court can make “no more than a guess as to what Congress intended.”171 In addition, a court must be faced with a choice between a broad application of the statute—under which a defendant’s conduct is clearly culpable—and a narrow or less harsh interpretation—under which a defendant’s conduct may not be culpable.172 Under the rule of lenity, when these two conditions exist, a court should construe the statute less harshly in favor of a defendant.173

As discussed in Part II, the text of § 1958 does not clearly reveal what degree of interstate nexus the statute requires to establish jurisdiction. Courts are faced with two choices: a broad interpretation under which any use of a facility with interstate or foreign commerce capabilities is sufficient or a narrow interpretation under which a defendant must use a facility actually engaged in interstate or foreign commerce. This ambiguity meets the prerequisite for applying the rule of lenity.174 Thus, courts should adopt the less harsh interpretation.

There are arguments against applying the rule of lenity to resolve the jurisdictional uncertainty of § 1958. Some commentators oppose use of the rule of lenity in all circumstances.175 As one commentator noted, the rule of lenity ignores the essential existence of “federal common law.”176 Under this theory, “broad statutory language is understood to constitute an implicit delegation of lawmaking power to courts” in which judges “fill the interstices of open-textured statutory provisions.”177 By requiring courts to construe unclear statutes as narrowly as possible, the rule of lenity “raises the practical and political cost of lawmaking by preventing Congress from implicitly delegating lawmaking power to courts.”178 The rule prohibits courts from developing a body of common law interpreting statutes.179

171 United States v Wells, 519 US 482, 499 (1997) (internal citations omitted).
172 Id.
173 See Jones v United States, 529 US 848, 858 (2000) (“We have instructed that . . . when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in a language that is clear and definite.”) (internal citations omitted).
174 See notes 171–73 and accompanying text.
175 For a thorough criticism of the rule and arguments for its elimination, see Kahan, 1994 S Ct Rev at 345–428 (cited in note 167). A full discussion of these arguments is beyond the scope of this Comment.
177 Id.
178 Id at 382.
179 Id at 425. Professor Kahan argues that:
This criticism of the rule is problematic. Although it may be true that the rule inhibits the development of “federal common law,” the existence of such “delegated judicial lawmaking has never been formally recognized in federal criminal jurisprudence.” A central principle of this jurisprudence is that there are no and can be no “federal common law crimes.” Under the Constitution, lawmaking power is given to Congress. As such, we should discourage both judicial lawmaking and interpretive approaches that undermine effective congressional lawmaking. As Justice Frankfurter noted in a much-cited article:

Loose judicial reading makes for loose legislative writing... In a democracy the legislative impulse and its expression should come from those popularly chosen to legislate, and equipped to devise policy, as courts are not. The pressure on legislatures to discharge their responsibility with care, understanding and imagination should not be stiffened, not relaxed. Above all, they must not be encouraged in irresponsible and undisciplined use of language.

Another criticism of applying the rule of lenity to § 1958 is that there is no uncertainty as to whether murder-for-hire is prohibited; thus applying the rule here does not promote the end of giving notice to potential defendants. Generally, the rule should not apply in situations where the allegedly criminal conduct is

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Lenity... conflicts with an equally basic, although largely unacknowledged, rule of federal criminal jurisprudence: that Congress may implicitly delegate, and courts exercise, the power to make criminal law. Congress faces a powerful incentive to alienate part of its lawmaking authority to the judiciary in order to reduce the practical and political cost of enacting criminal legislation. From early on, federal courts have accommodated this congressional preference by exercising what amounts to federal common-lawmaking power to fill in deliberately incomplete criminal statutes.

180 Id at 347.
181 Id.
182 See United States v Hudson & Goodwin, 11 US (7 Cranch) 32, 34 (1812) (holding that “all exercise of criminal jurisdiction in common law cases we are of opinion is not within [the] implied powers” of federal courts).
183 US Const Art 1, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).
185 Marek, 238 F3d at 327 (Jolly dissenting), citing Dunn v United States, 442 US 100, 112 (1979).
malum in se\textsuperscript{186} rather than malum prohibitum.\textsuperscript{187} Any reasonable defendant engaged in conduct that is malum in se should be aware that his conduct is prohibited.\textsuperscript{188} In contrast, a reasonable defendant engaged in conduct that is malum prohibitum may not necessarily be aware that her conduct is against the law.\textsuperscript{189} One commentator explains the distinction:

[The fair notice argument] works well when a court is applying a statute to conduct that sits on the boundary line between socially desirable and socially undesirable conduct. . . . But the situation is quite different when the underlying conduct is located . . . deep within the interior of what is socially undesirable . . . conduct that is already understood to be absolutely forbidden by independent laws or social mores. [I]ndividuals . . . do not need to consult these statutes to be put on "notice" that their conduct is unlawful.\textsuperscript{190}

In contrast to regulatory crimes, such as driving restrictions,\textsuperscript{191} participating in a murder-for-hire is clearly malum in se.\textsuperscript{192} The only question is whether the conduct is prohibited by both the federal and state governments or just the state governments. Under this analysis there is an argument that courts should not apply the rule of lenity. The Fifth Circuit took this position, arguing that it is "no surprise to [a defendant] that murder-for-hire is a serious crime with serious penalties."\textsuperscript{193}

\begin{footnotesize}
\begin{enumerate}
\item Conduct is malum in se when it is "inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state." \textit{Black's Law Dictionary} 971 (West 7th ed 1999).
\item Conduct is malum prohibitum when it is "not inherently immoral, but becomes so because its commission is expressly forbidden by positive law." \textit{Black's Law Dictionary} at 971 (West 7th ed 1999).
\item For example, a defendant stealing property that does not belong to him should generally be aware that this conduct is prohibited by some law, even though she may not know which exact statute forbids the conduct.
\item Mark D. Yochum, \textit{The Death of a Maxim: Ignorance of Law is No Excuse (Killed by Money, Guns, and a Little Sex)}, 13 St John's J Legal Commen 635, 670 (1999) (noting that one of the "classic elements" of conduct that is malum prohibitum is that "the offender reasonably thought the conduct was not criminal").
\item Kahan, 1994 S Ct Rev at 400–01 (cited in note 167).
\item See \textit{United States v Morrison}, 425 F Supp 1235, 1239 (D Md 1977) (noting that the offense of driving a vehicle over a posted speed limit of fifteen miles per hour within a federal military reservation is malum prohibitum, not malum in se).
\item See \textit{Rice v Paladin Enterprises, Inc}, 128 F3d 233, 252 (4th Cir 1997) (noting that murder is a malum in se crime).
\item Marek, 238 F3d at 322.
\end{enumerate}
\end{footnotesize}
The problem with this argument is that it ignores two of the three justifications for the rule of lenity. In addition to explicitly alerting the public as to what constitutes criminal conduct, the rule of lenity forces legislatures to use clear and definitive language in enacting criminal statutes and prevents arbitrary or discriminatory application of criminal laws.\(^{194}\) In refusing to apply the rule of lenity to all but the limited situations in which a defendant does not know whether his conduct is prohibited, the Fifth Circuit and some commentators essentially ignore these other important justifications for the rule. Rather than engage in factual inquiries as to whether a defendant actually had fair notice or whether his conduct is *malum in se* or *malum prohibitum*, the better approach is to force Congress to speak clearly in enacting criminal statutes and to prevent prosecutors from arbitrarily or discriminatorily exercising their discretion. These two goals can be accomplished by encouraging courts to notify Congress, through narrow construction, of ambiguous statutory provisions.\(^{195}\) In the end, § 1958's jurisdictional question presents a good situation for applying the rule of lenity. Doing so favors a narrow interpretation of the statute's jurisdictional nexus to avoid punishing defendants on the basis of an arguably ambiguous provision.

B. The Clear Statement Rule

The "clear statement rule" also supports a narrow interpretation of § 1958's jurisdictional requirement.\(^{196}\) Although commentators paraphrase the clear statement rule in various ways, most agree that the canon applies when Congress attempts to regulate a "core state function."\(^{197}\) According to this canon, if Congress

\(^{194}\) See text accompanying notes 168–70.

\(^{195}\) See text accompanying note 168.


\(^{197}\) See, for example, J. Harvie Wilkinson III, Lecture, *Federalism for the Future*, 74 S Cal L Rev 523, 538 (2001) ("The Gregory rule is most aptly applied in cases where federal laws will usurp core state functions."); Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 Minn L Rev 199, 211 (1999) ("[I]n *Gregory v. Ashcroft*, the Court had created a clear statement rule providing that, when Congress uses its power to regulate commerce in a fashion that may regulate the state governments, the statute will not be read as intruding upon core state functions unless it contains unmistakably clear text to that effect."); Michael P. Lee, Comment, *How Clear is "Clear"?: A Lenient Interpretation of the Gregory v Ashcroft Clear Statement Rule*, 65 U Chi L Rev 255 (1998) ("The general outline of the Gregory rule can be stated simply: if Congress wishes to regulate a core state function, it must make its intent 'unmistakably clear' in the statutory text.").
wishes to regulate a core state function, it must make its intent "unmistakably clear" in the statutory text. Under this canon, federal courts should preempt traditional state powers only if "the clear and manifest purpose of Congress" dictates that result.

Concerning § 1958, the first important question is whether the murder-for-hire statute regulates a core state function. State and local governments have traditionally been primarily responsible for the regulation of crime—particularly violent crime against individuals. In contrast, the federal government's role in fighting crime has traditionally been limited and narrowly tailored. As the Supreme Court noted in Patterson v New York, "preventing and dealing with crime is much more the business of the States than it is of the Federal Government." Most criminal conduct in America is "defined by state legislatures, investigated by state agents, prosecuted by state prosecutors, tried in state courts, and punished in state prisons." This traditional state function is rooted in the Constitution, which generally assigns only limited powers to the federal government and withholds "from Congress a plenary police power that would authorize enactment of every type of [criminal] legislation."

States generally prosecute murder-for-hire as they do other local crimes, but they take different approaches. A few have laws

The clear statement rule as expressed in Gregory is not without its detractors. Some commentators note that the Supreme Court has not clearly established the necessary conditions that trigger application of the rule. See Eskridge, Frickey, and Garrett, Legislation at 358 (cited in note 84). Must a federal law invade decisions "of the most fundamental sort for a sovereign entity," Gregory, 501 US at 460, or is mere intrusion "on state governmental functions," id at 470, sufficient? This issue remains unresolved and is beyond the scope of this Comment.

See Gregory, 501 US at 470 ("[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.") (internal quotations omitted).


See Sara Sun Beale, Federalizing Crime: Assessing the Impact on the Federal Courts, 543 Annals Am Acad Polit & Soc Sci 39, 40 (1996) ("The original scope of the federal courts' criminal jurisdiction was very narrow, and crime control was left largely to the states."); Lopez, 514 US at 561 n 3 ("Under our federal system, the States possess primary authority for defining and enforcing the criminal law.") (internal citations omitted).

Id at 201.


See Edwin Meese, III, Big Brother on the Beat: The Expanding Federalization of Crime, 1 Tex Rev L & Poli 1, 6 (1997) (explaining that "[t]he drafters of the Constitution clearly intended crime to be within the province of the states").

Lopez, 514 US at 566.
expressly prohibiting the solicitation of murder-for-hire. Other states consider the fact that a murder was part of a contract arrangement as an aggravating factor for sentencing purposes. Finally, some states choose to use existing accessory or conspiracy laws to prosecute murder-for-hire.

The legislative history of § 1958 indicates that Congress was aware of traditional state control over murder-for-hire and did not want to intrude upon it. For example, in the hearings on the murder-for-hire provisions of the Comprehensive Crime Control Act of 1983, Senate Judiciary Committee Chairman Paul Laxalt noted that the "last thing we want to do in this package is to intrude unnecessarily into the State and local realm." Interpreting § 1958 to extend federal jurisdiction over any murder-for-hire committed with the use of a facility of interstate commerce, as the Fifth Circuit did, would extend federal jurisdiction over essentially every local murder-for-hire. Such an interpretation would intrude into the traditional realm of state and local government prosecution of this crime.

Because prosecuting murder-for-hire is part of the core state function of regulating crime, the clear statement rule requires that if Congress intended to encroach on this area of state regulation, it could do so only with unmistakably clear language. Unfortunately, § 1958 does not pass this test. As discussed above, the

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206 See, for example, 720 ILCS 5/8-1.2 (West 2000).
207 See, for example, Ohio Rev Code Ann § 2929.04 (West 2000) (authorizing capital punishment for murder-for-hire).
208 See, for example, Commonwealth v D'Amour, 704 NE2d 1166 (Mass 1999) (relying on Mass Gen Law ch 274, § 2 (2000) to convict an alleged participant in a murder-for-hire).
210 See Hearings on S 829 at 295 (1984) (cited in note 116). At the hearings, Edwin L. Miller, the San Diego County District Attorney, testified on behalf of the National District Attorneys Association (NDAA). The NDAA feared the "unnecessary piecemeal expansion of federal jurisdiction over crimes which traditionally have been prosecuted at the state level," including murder-for-hire. Id at 319. The group "believe[d] that the prosecution of violent crimes should remain with the local prosecutor." Id at 295. In fact, the NDAA specifically opposed the apparent expansion of federal jurisdiction over murders-for-hire. Id. One of its concerns was that murders-for-hire actively investigated and prosecuted by the state prosecutors could be "taken over" by federal prosecutors "at the sole discretion of the federal government." Hearings on S 829 at 311–14 (cited in note 116). Another concern was that federal prosecutors would leave the "cast-offs" for state prosecutors to handle. Id at 314. A final concern of the NDAA was the "possibility of confusion or conflict regarding who should be conducting the investigation or preparing [cases] for prosecution." Id at 315.
211 Marek, 238 F3d at 320.
212 See note 130 and accompanying text.
text of the statute is ambiguous as to its jurisdictional reach.\textsuperscript{213} Furthermore, interpreting the statute to establish jurisdiction over any attempted murder-for-hire that employed a facility of interstate commerce would certainly alter the traditional balance of power between local and federal authorities by allowing the latter to encroach upon an area of criminal law over which states are primarily responsible.\textsuperscript{214} The clear statement rule thus supports a narrow interpretation of the jurisdictional requirement for § 1958.\textsuperscript{215}

V. PUBLIC POLICY AND THE USE OF FEDERAL PROSECUTORIAL RESOURCES

Although the text of § 1958 is inconclusive as to its jurisdictional scope, the statute's legislative history, the rule of lenity, and the clear statement rule all suggest that a narrow interpretation is proper. Public policy concerns regarding the use of federal prosecutorial resources further support this reading.

As discussed above, state and local governments have traditionally been responsible for the regulation of crime, particularly violent crime against individuals.\textsuperscript{216} State and local prosecutors are responsible for obtaining 96 percent of all criminal convictions.\textsuperscript{217} In contrast, existing federal resources that may be used in criminal prosecution are quite small when compared with both the state enforcement systems and the totality of crime in the United States. Furthermore, federal prosecutions comprise less than 5 percent of all prosecutions in the nation.\textsuperscript{216} As the ABA Task Force report notes, "federal criminal law can realistically respond to only a relatively small number of local crimes at any

\textsuperscript{213} See Part II.
\textsuperscript{214} \textit{Marek}, 238 F3d at 326 (Jolly dissenting):

The construction the majority proposes would alter this balance significantly. The majority's interpretation would make virtually every murder-for-hire a federal crime, because any use of a telephone or an automobile would qualify. It is difficult to imagine a murder-for-hire scheme that would not involve the use of a phone or a car at some point. But nothing in the language of the statute suggests that Congress intended to make all such crimes a matter of federal concern.

\textsuperscript{215} Id (noting that the clear statement rule "weighs heavily against the majority's interpretation").
\textsuperscript{216} See text accompanying notes 200–10.
\textsuperscript{218} Strazella, ABA Sec Crim Justice Rep at 19 (cited in note 203).
given time." According to one scholar, the "discrepancy between the broad range of applicability of the federal criminal law and the relatively limited federal resources suggests the need to examine both how these resources are, and how they can and should be, targeted." Most scholars agree that federal prosecution should play a limited role in the national enforcement efforts against crime. Many scholars have also advanced principles by which such resources ought to be selectively used and targeted. When there is a question as to whether certain criminal conduct has been federalized, several scholars have repeatedly advanced a similar principle—what one scholar calls "demonstrated state failure." This principle endorses "the federalization of criminal conduct only when there is a demonstrated failure of state and local authorities to deal with the targeted conduct."

This principle begins with a rebuttable presumption, grounded in traditional federalism principles, against federalizing criminal conduct over which there already exists state criminal jurisdiction. This presumption is rebuttable upon demonstration of state and local failure to address certain criminal conduct. Such failure could encompass both "a simple resource-driven inability to address criminal conduct, as well as intentional refusals to act." State and local authorities demonstrate such failure by "showing of the extent of the criminal conduct, the

219 Id at 18.
221 Id at 65.
223 Id at 1078. See also Philip B. Heymann and Mark H. Moore, The Federal Role in Dealing with Violent Street Crime: Principles, Questions, and Cautions, 543 Annals Am Acad Polit & Soc Sci 103, 115 (1996) (noting that the federal government "must investigate and prosecute the cases that are beyond the capacity of other jurisdictions and the cases that local police and prosecutors may be less than enthusiastic about"); Franklin E. Zimring and Gordon Hawkins, Toward a Principled Basis for Federal Criminal Legislation, 543 Annals Am Acad Polit & Soc Sci 15, 23 (1996) (noting that one justification for the federalization of criminal conduct is "when agencies of state criminal justice are relatively inefficient in the detection, prosecution, or punishment of behavior as compared with the federal government"); Jamie S. Gorelick and Harry Litman, Prosecutorial Discretion and the Federalization Debate, 46 Hastings L J 967, 972 (1995) (noting that federalization of criminal conduct is appropriate when "state criminal jurisdiction is inadequate to solve significant aspects of the problem").
224 Little, 46 Hastings L J at 1071 (cited in note 222).
225 Id at 1078–79.
adverse effects it is having on the public interest, and the amount of local resources and effort devoted thus far.\textsuperscript{226}

Applying the "demonstrated state failure" principle to the jurisdictional dispute concerning § 1958, one can only come to the conclusion that the principle supports a narrow reading of the statute. As discussed above, states are generally responsible for murder-for-hire. To date, there has been no indication whatsoever that states are incapable of handling these crimes. In other words, there has been no demonstrated state failure that would justify interpreting the arguably ambiguous § 1958 such that any use of a facility of interstate commerce, whether it be actually interstate or solely intrastate, should trigger federal jurisdiction.

In contrast, the drafters of § 1958 appeared to be concerned with appropriate use of federal prosecutorial resources when they proposed the relevant provisions. As noted in Part III, the drafters were "aware of the concerns of local prosecutors with respect to the creation of concurrent federal jurisdiction in an area ... which has heretofore been the almost exclusive responsibility of state and local authorities" and did not believe that "all or even most" murders-for-hire should become "matters of federal responsibility."\textsuperscript{227} Furthermore, the drafters did not want the statute to "allow the usurpation of significant cases by the federal authorities that could be handled as well or better at the local level."\textsuperscript{228}

Interpreting § 1958 broadly would bring more murder-for-hire cases within the scope of federal prosecutorial responsibility. A defendant would be subject to federal prosecution by the mere use of a facility of interstate or foreign commerce in an alleged murder-for-hire, regardless of whether he actually used the facility in a manner that somehow crossed state or foreign borders.\textsuperscript{229} In light of general public policy concerns with the appropriate use of federal prosecutorial resources and Congress's aversion to the over-extension of those resources as evidenced in § 1958's legislative history, courts should interpret § 1958 narrowly.

CONCLUSION

Much ambiguity exists as to whether Congress intended that § 1958 extend to all or even most murders-for-hire. But that is exactly what a broad interpretation of the statute's jurisdictional

\textsuperscript{226} Id at 1080.
\textsuperscript{227} S Rep No 98-225 at 304 (cited in note 117).
\textsuperscript{228} Id at 305.
\textsuperscript{229} Marek, 238 F3d at 320.
requirement, as advocated by the Fifth Circuit, would produce. This Comment has examined § 1958 through various interpretive lenses. Although a plain meaning analysis fails to clarify the ambiguity, § 1958's legislative history, the rule of lenity, the clear statement rule, and Congress's express desire to selectively use federal prosecutorial resources all support a narrow reading of the statute. Based on these considerations, courts should adopt a narrow approach and extend jurisdiction under § 1958 only in those cases where alleged participants use facilities that actually engage in interstate commerce.