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NOTES


INTRODUCTION

A neighborhood drug deal goes awry, leaving one party short a significant sum of cash to a rising competitor. Angry, the party on the short end of the transaction wants his new competitor killed and telephones an acquaintance, just blocks away, to cash in a favor. After some negotiation, the deal is closed, and, shortly thereafter, a man dies. Or, the contractor drives the two blocks to deliver the proposition in person and to pay in cash. Throughout their interactions, the parties to this hired murder never leave the familiar turf of their hometown. The conduct in either of these scenarios is entirely intrastate, and the criminal activity local in nature, though it involves the use of facilities that are a part of interstate commerce.

Under 18 U.S.C. § 1958, it is a federal crime to use "any facility in interstate . . . commerce," with the intent that a murder be committed for pay. The courts have difficulty resolving what it means to use a "facility in interstate commerce" in this context.

2. Section 1958 reads in relevant part:
(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 in interstate or foreign commerce, with the 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 . . . .
(b) As used in this section and section 1959

3. See United States v. Marek, 198 F.3d 532 (5th Cir. 1999), aff'd en banc, 238 F.3d 310 (5th Cir. 2001), cert. denied, 122 S. Ct. 37 (2001); cf. Marek, 238 F.3d at 324
The disagreement is focused on whether § 1958 is limited to conduct or activity that crosses state boundaries, or whether it regulates any use of an interstate commerce facility, regardless of the nature of the particular transaction. The question is twofold. First, it must be determined whether it is the particular "use" of the facility that must be in interstate commerce, or merely that the facility itself must be a part of interstate commerce, regardless of the nature of the particular use. Second, it must be determined what degree of interaction with interstate commerce is required.

The increasingly complex and expansive nature of communications technology magnifies the problems associated with interpreting the reach of federal jurisdiction where such jurisdiction is founded on the use of interstate commerce facilities. The infrastructure that modern communication devices rely upon "blurs the line between interstate and intrastate activity." This infrastructure routes calls through its respective network based on a variety of factors. There is little, if any, relationship between the physical proximity of the parties communicating and the actual path of communication over the network used. A call to your neighbor, for example, may actually travel to another state and back before ringing next door.

Section 1958 allows two interpretations, each with significantly different implications. Under a broad interpretation of § 1958, it is a federal crime to use any facility in arranging a murder-for-hire, so long as the facility itself is of the type generally engaged in interstate commerce. Under the narrower view, the perpetrator, through the use of the facility, must initiate activity that crosses state lines to bring the crime within federal jurisdiction. The

(Jolly, J., dissenting); United States v. Weathers, 169 F.3d 336 (6th Cir. 1999). See infra Part II for a discussion of these two cases and the resulting circuit split.


6. See id.

7. See, e.g., United States v. Kammersell, 7 F. Supp. 2d 1196, 1202 (D. Utah 1998) (finding that a message sent between two computers located in Utah just four miles apart traveled interstate), aff'd, 196 F.3d 1137 (10th Cir. 1999); United States v. Stevens, 842 F. Supp. 96, 98 (S.D.N.Y. 1994) (finding that the electronic signal used by a paging system to communicate between two parties within the same state traveled across three states); see also Miller & Biggerstaff, supra note 5, at 682-84 (discussing the constitutionality of federal regulation of electronic communication). For a discussion of the Stevens holding, see infra Part I.B.1.
broader view makes wholly intrastate criminal activity, namely murder, which has traditionally been a matter of state jurisdiction, a federal crime simply through the use of interstate commerce facilities. Under this broad interpretation the contractor of the opening hypothetical has committed a federal crime under either of the scenarios, as he used a "facility of interstate commerce" to arrange the hired murder.\footnote{See Marek, 238 F.3d 310, 324 (Jolly, J., dissenting). The courts have determined that both telephones and automobiles are themselves "instrumentalities of interstate commerce." See infra notes 139-142 and accompanying text (discussing various instrumentalities that constitute facilities of interstate commerce).}

An apparent inconsistency in the text of § 1958 further troubles courts in their attempts to interpret the statute's jurisdictional reach. In drafting the murder-for-hire statute, Congress used two different phrases in separate subsections of the statute in a manner that suggests that they carry the same meaning. Section 1958(a), which sets forth the elements of the criminal offense, applies to anyone who "uses any facility in interstate commerce."\footnote{18 U.S.C. § 1958(a) (2000) (emphasis added). See supra note 2 for the text of the murder-for-hire statute.} Section 1958(b), however, which sets out definitions for terms used in § 1958(a), defines "facility of interstate commerce" as including "means of transportation and communication."\footnote{18 U.S.C. § 1958(b) (2000) (emphasis added).} \footnote{169 F.3d 336 (6th Cir. 1999).} The phrase "facility of interstate commerce" does not otherwise appear in the statute.

Recent decisions from the Fifth and Sixth Circuits present conflicting interpretations of § 1958. The Sixth Circuit, in \textit{United States v. Weathers},\footnote{See infra Part II.A for a discussion of the holding in \textit{Weathers}.} limited § 1958 in application to conduct that crosses state lines. The \textit{Weathers} court found no acceptable way to resolve the discrepancy between § 1958(a) and § 1958(b), and, therefore, based its interpretation solely on the language contained in § 1958(a), as it comprised the substantive section of the statute.\footnote{See infra Part II.B for a discussion of the holding in \textit{Marek}.} Accordingly, the \textit{Weathers} court found that the defendant's use of a cell phone triggered § 1958 because it relied on communication towers across state lines.

In contrast, the Fifth Circuit found method in the legislature's madness, determining that the definitional phrase used in § 1958(b) acted to clarify the terms used in § 1958(a).\footnote{See infra Part II.B for a discussion of the holding in \textit{Marek}.}
Marek, the Fifth Circuit extended the jurisdictional reach of § 1958 to any use of a facility, so long as the facility was a facility of interstate commerce. In Marek, the defendant triggered federal jurisdiction through an intrastate transfer of funds over Western Union, a banking facility with an interstate network.

Part I of this note examines the legislative history and common law background of 18 U.S.C. § 1958, beginning with its inception as an amendment to the Travel Act, 18 U.S.C. § 1952. Part II discusses Weathers and Marek, two conflicting opinions issued respectively by the Sixth Circuit and the Fifth Circuit.

Part III of this note analyzes the varying interpretations of the jurisdictional reach of § 1958, and argues for a narrower interpretation of § 1958. Part III argues that a plain meaning reading of § 1958 lends itself to a narrower interpretation of the statute, and that § 1958(b)(2) serves only to clarify the types of facilities that come within the scope of § 1958(a). In addition, though the legislative history of § 1958 evidences a general intent by Congress to grant jurisdiction broadly, Congress never actually contemplated wholly intrastate activity; Congress gave no clear indication that it intended to regulate wholly intrastate criminal activity, an area traditionally within state jurisdiction. This note concludes, first, that federal jurisdiction under 18 U.S.C. § 1958 should be limited to activity that crosses state boundaries, and, second, that the degree of interaction must be substantial, more substantial than required in either United States v. Weathers or United States v. Marek.


Congress originally drafted the federal murder-for-hire statute, 18 U.S.C. § 1958, as an amendment to the Travel Act, 18 U.S.C. § 1952. The Travel Act, enacted by Congress in 1961, is a product of proposed legislation introduced by Attorney General Robert F. Kennedy to Congress as part of a program aimed at organized

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14. 198 F.3d 532 (5th Cir. 1999), aff'd en banc, 238 F.3d 310 (5th Cir. 2001), cert. denied, 122 S. Ct. 37 (2001).
15. 169 F.3d 336 (6th Cir. 1999).
16. 238 F.3d 310 (5th Cir. 2001).
crime and racketeering. Attorney General Kennedy sought to bring the crime fighting resources of the Federal Government to the aid of local law enforcement authorities in situations where the particular interstate nature of the crime was such that it could not be handled effectively by local authorities.

As originally enacted, the Travel Act was a general prohibition against interstate travel or the use of "facilities in interstate commerce" in furtherance of "unlawful activity," and did not specifically mention murder-for-hire. In 1984, Congress added a subsection to the Travel Act, § 1952A, which mirrored the specific statutory language of § 1952, though narrowed the focus from unlawful activity to murder-for-hire. In 1988, Congress re-designated § 1952A as § 1958. Thus, the statutory language now comprising § 1958 was initially part of the Travel Act. This language evolved through a series of compromises between different bills passed separately by the Senate and by House of Representatives in the process of enacting the Travel Act.

1. The Travel Act and Attorney General Kennedy's Legislative Proposal to Fight Organized Crime and Racketeering

As originally introduced in the Senate, the Attorney General's proposed bill criminalized travel between states for the purposes of furthering certain illegal activities. Specifically, the bill would have made it a federal crime to "travel[ ] in interstate or foreign commerce with intent to- (1) distribute the proceeds of any unlaw-


ful 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, carrying on, of any unlawful activity . . . .”24 The Attorney General drafted the proposed bill with organized crime as the “clear target.”25 The primary purpose was to enable the Federal Government “to take effective action against the racketeer who conducts an unlawful business, but lives far from the scene in comfort and safety.”26 As proposed, the Attorney General clearly intended that the crossing of a state or national boundary in furtherance of these “unlawful activities” be an essential component of the prohibited activity.27 “The bill which I submit to the Congress would impose criminal sanctions upon the person whose work takes him across State or National boundaries in aid of certain ‘unlawful activities.’”28

The Senate Judiciary Committee made several amendments to the Attorney General’s proposed bill.29 These amendments were in part to satisfy concern within the Senate about the far-reaching nature of the bill in some respects,30 and also concern that the bill was not broad enough in other respects.31 As a result, the Committee broadened the reach of the bill by including the use of interstate facilities, in addition to the actual physical crossing of a state boundary by the perpetrator, in the jurisdictional trigger of the proposed statute.32 To accomplish this, the Committee added a second section to the proposed bill, which stated that “[w]hoever uses any facility for transportation in interstate or foreign commerce, including the mail, with intent to [commit any of the acts prohibited in the

24. See S. REP. No. 87-644, at 5; Pollner, supra note 18, at 39.
25. S. REP. No. 87-644, at 3 (“The travel that would be banned is travel ‘in furtherance of a business enterprise’ which involves gambling, liquor, narcotics, and prostitution offenses or extortion or bribery.” (quoting the Attorney General’s testimony before the Senate Judiciary Committee)).
28. Id.
29. See S. REP. No. 87-644, at 1-2.
30. See id. at 2 (explaining the connection between travel and the unlawful acts in the proposed bill).
31. 107 CONG. REC. 13,943 (1961) (“The committee is of the opinion that the bill should not be limited to the travel of individuals in interstate commerce. Other interstate transportation facilities may be used by organized crime to carry out unlawful activity.”).
32. S. REP. No. 87-644, at 5-6.
first section of the proposed statute shall be subject to the same punishments].” 33 With these same amendments, however, the Senate limited the reach of the proposed statute by specifically enumerating the acts to which the bill would apply34 and by requiring a substantive connection between the travel and the enumerated prohibited act.35

Upon receiving the Senate’s final draft of the bill, the House of Representatives characterized the purpose of the Senate bill as to “prohibit travel in interstate or foreign commerce or the use of the facilities of interstate or foreign commerce, including the mail, in the aid of racketeering enterprises.”36 With this interpretation, and also upon hearing testimony by Attorney General Kennedy, the House Judiciary Committee drafted and passed its own version of the bill.37 The House merged the two sections proposed by the Senate into one section, so that anyone who “travel[ed] in interstate or foreign commerce or use[d] any facility in interstate or foreign commerce including the mail” would be within the reach of the Act.38 In merging the two sections, the House omitted the words “for transportation” following the word “facility,” and, in so doing, adopted the language now found in the current version of the murder-for-hire statute.39

Congress appointed a Conference Committee to resolve the differences between the versions of the bill passed by the Senate and the House.40 The Committee recommended the merged ver-

33. Id. at 1-2. The section added by the Senate Judiciary Committee read:
Sec. 2. Transportation in commerce in aid of racketeering enterprises.
(a) Whoever uses any facility for transportation in interstate or foreign commerce, including the mail, 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 any of the acts specified in subparagraphs . . . .
Id. at 5-6. See id. for a full version of the bill passed by the Senate.
35. Id. at 2. “[T]o come within the provisions of the bill some activity in furtherance of a racketeering enterprise, subsequent to the performance of the travel, must take place and that accordingly the gravamen of the offense will be travel and a further overt act to aid the enterprise.” Id.
37. Id. at 2666-67
38. Id. at 2666.
39. See infra note 44 for the text of the murder-for-hire statute as originally passed.
sion of the bill as amended by the House,\textsuperscript{41} which was ultimately accepted in both houses of Congress and passed into law.\textsuperscript{42}

Neither the Conference Committee Report nor the House Report gave any indication that the House intended the merging of the two sections of the Senate bill, or the omission of "for transportation," to be a substantive change. However, had the Senate version passed, the scope of the bill would have been limited to the use of transportation facilities, whereas the final version of the bill extends to the use of any facility.\textsuperscript{43}

2. The Federal Murder-For-Hire Statute

Congress later adopted the language it used in defining the jurisdictional reach of the Travel Act directly into what today is the federal murder-for-hire statute. As part of the Comprehensive Crime Control Act of 1984, Congress added two sections to 18 U.S.C. § 1952, § 1952A, addressing murder-for-hire, and § 1952B, addressing contract murders and other violent crimes by organized crime figures.\textsuperscript{44} Congress limited § 1952A to punish "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."\textsuperscript{45} The language contained in this subsection of the Travel Act, as it pertained to the interstate nexus requirement to

\textsuperscript{41} Id. at 1.

\textsuperscript{42} Act of Sept. 13, 1961, Pub. L. No. 87-228, 75 Stat. 498 (prohibiting travel or transportation in commerce in aid of racketeering enterprises).

\textsuperscript{43} See Herbert J. Miller, Jr., The "Travel Act": A New Statutory Approach to Organized Crime in the United States, 181 DUQ. L. REV. 181, 190 (1963) (discussing the effect of removing "transportation" from the text of the bill).

\textsuperscript{44} Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1002(a), 98 Stat. 2136. When added, 18 U.S.C. § 1952A read as follows:

(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 in 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, shall be fined . . . .

(b) As used in this section and section 1952B

(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; and

(2) "facility of interstate commerce" includes means of transportation and communication.

trigger jurisdiction, mirrored the language used in the original version of the Travel Act, § 1952.46

In drafting § 1952A, Congress included a subsection to define terms used in the text of the entire statute. This subsection defined “facility of interstate commerce” as including “means of transportation and communication.”47 The phrase “facility of interstate commerce,” however, does not otherwise appear in the text of the statute; § 1952A(a) uses the phrase “facility in interstate commerce.” In subsequent years, Congress made several amendments to the murder-for-hire statute, though the apparent discrepancy between “facility in interstate commerce” and “facility of interstate commerce” has remained.48

In 1988, Congress re-designated 18 U.S.C. § 1952A as 18 U.S.C. § 1958.49 Congress again amended § 1958 in 1990,50 though these amendments focused entirely on § 1958(b), the most substantive of which was including a new paragraph defining “State” as including “a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.”51 In 1994, Congress enacted several amendments to § 1958, primarily to increase the maximum penalty to be imposed for violation of the statute, including a provision for the death penalty should death result from the murder-for-hire.52 Congress made two additional amendments in 1996 to fix minor errors in the construction53 and prior amendment54 of § 1958.

46. See id.
48. See infra Part II for a discussion of the varying judicial interpretations of the murder-for-hire statute.
49. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7053(a), 102 Stat. 4181, 4402. Congress also amended § 1958 during this congressional session by increasing the maximum period of imprisonment from “5 years” to “10 years” where injury results from violation of the statute. Id. § 7058(b), at 4403.
51. Id.
53. Congress noticed a misused connector in § 1958(a) and replaced “this title and imprisoned” with “this title or imprisoned.” Pub. L. 104-294, § 605(a), Oct. 11, 1996, 110 Stat. 3509.
54. See id. § 601(g)(3), at 3500.
B. Judicial Opinions Interpreting the Jurisdictional Reach of § 1958 Prior to United States v. Weathers

The courts offer relatively little analysis of the interstate jurisdictional requirement of § 1958 in the context of wholly intrastate activity. In fact, prior to United States v. Weathers, only two opinions considered the jurisdictional reach of the murder-for-hire statute. Both of these opinions were issued by the Southern District of New York and reached conflicting results where the defendant used a paging system with interstate paging capabilities to facilitate direct intrastate communication between the parties to a murder-for-hire scheme. A discussion of these two cases follows.

1. United States v. Stevens

In the first case, United States v. Stevens, defendant Stevens arranged a murder-for-hire in New York State and used an electronic pager to facilitate communication with his "hit-man." When the "hit-man" called Stevens' pager, the paging system sent a signal to a transmitting station in New Jersey, which, in turn, sent a search signal across New York, New Jersey, and Connecticut. This search signal was sent interstate regardless of the location of either party. During the course of arranging the murder-for-hire, Stevens and the "hit-man" were at all times within New York. Federal authorities subsequently indicted Stevens under § 1958 for using a facility in interstate commerce, his pager, in the commission of a murder-for-hire.

The district court addressed whether this intrastate use of a paging system satisfied the jurisdictional requirement of § 1958 where the signal used to search for Stevens' pager went interstate. The court read § 1958 to require that the "facility" be used in interstate commerce, such as an interstate transaction, to trigger federal jurisdiction under § 1958. Under the court's interpretation, Stevens' use of the paging system satisfied this jurisdictional require-

57. Id. at 97. Oliver Kellman, alleged to be an intermediary between Stevens and the supposed hit man, actually leased the paging service used by Stevens. Id. All three parties were within the State of New York while arranging the murder for hire. Id.
58. Id. at 98.
59. Id. at 97.
60. See id. This district court judge made no note of the apparent conflict between §§ 1958(a) and (b). The statute was apparently interpreted only from the substantive clause in § 1958(a). See id.
ment because the pager sent a signal interstate each time Stevens used it to contact the parties to the murder-for-hire, regardless of the location of the parties at the time of the communication. That “the paging systems very purpose [was] to reach across state lines to find people” further supported the district court’s conclusion.

2. United States v. Paredes

Two years later, in United States v. Paredes, another judge from the Southern District of New York took a different approach to the jurisdictional reach of § 1958. Defendant Paredes also used a paging system to facilitate intrastate contact with an alleged “hit man” in the process of arranging a murder-for-hire. As in Stevens, Paredes’ paging system also sent an interstate search signal each time an incoming call activated it.

As in Stevens, the Paredes court made a threshold interpretation of § 1958 as requiring that the use of the facility under the particular facts of the murder-for-hire involve activity that crossed state lines. Unlike the Stevens court, however, the Paredes court found the phrase “use . . . any facility in interstate commerce” ambiguous, noting two cognizable interpretations, “one stressing use and the other stressing facility.” The court considered it irrelevant that Paredes’ pager sent an interstate search signal when triggered. Instead, the court focused on the location of the

61. Id. at 98.
62. Id. at 97.
63. Id. In this respect, the district court’s holding is limited in application to the use of paging systems that send signals across state lines. See id. at 98.
64. 950 F. Supp. 584 (S.D.N.Y. 1996).
65. Id. at 585.
66. Id. at 590.
67. See id. at 585; cf. supra note 57 and accompanying text. As in Stevens, the court made no note of the apparent language conflict in § 1958. Id. In its initial interpretation of the jurisdictional requirements of § 1958, the court stated that “the term ‘facility in interstate commerce’ includes ‘means of transportation and communication.’” Id. The court supported this interpretation with a citation to § 1958(b). Id. Section 1958(b), however, reads “‘facility of interstate commerce’ includes means of transportation and communication.” 18 U.S.C. § 1958(b)(2). Therefore, the Paredes court either mistakenly read § 1958(b) as using the term “facility in interstate commerce,” or made an unsupported determination that § 1958 as a whole defines “facility in interstate commerce,” and, therefore, that the terms “facility in interstate commerce” and “facility of interstate commerce” are equivalent. See Paredes, 950 F. Supp at 584.
68. Paredes, 950 F. Supp. at 587 (concluding that “it is the ‘use’ that must be ‘in interstate commerce,’ not the ‘facility’”).
69. See id. at 588-90.
communicating parties while they arranged the murder-for-hire.\textsuperscript{70} The court, therefore, found that defendant's intrastate use of his paging system did not satisfy § 1958's jurisdictional requirement.\textsuperscript{71} The court further reasoned that an interpretation of § 1958 that focused on the type of the facility used, rather than the manner in which it was used, would allow "federal jurisdiction to expand in lock-step with communication technology,"\textsuperscript{72} noting that Congress expressed its intent to avoid such a result.\textsuperscript{73}

The Southern District of New York presented two conflicting interpretations of § 1958 with its holdings in \textit{Stevens} and \textit{Paredes}. Although both opinions read § 1958 to require that the defendant's particular use of a facility be interstate in nature in order to trigger federal jurisdiction, they disagreed on the degree of interstate activity required. One interpretation required that the actual communication between the parties be across state lines,\textsuperscript{74} while the other simply required that the use of the facility initiate activity that crossed state lines, regardless of the location of the parties.\textsuperscript{75} It is also worth noting that in each case the court appeared to overlook the apparent conflict between the statutory language of §§ 1958(a) and (b). These cases provide a backdrop for a discussion of two recent opinions from the federal courts of appeals, each offering its own interpretation of § 1958.

\section*{II. \textit{Weathers} and \textit{Marek}: Current Interpretations of the Jurisdictional Reach of 18 U.S.C. § 1958}

The courts of appeals currently present two conflicting analyses of the jurisdictional reach of § 1958. In \textit{United States v. Weathers},\textsuperscript{76} the Sixth Circuit found that conduct crossing state lines was a prerequisite for federal jurisdiction under § 1958. In contrast, in \textit{United States v. Marek},\textsuperscript{77} the Fifth Circuit read the statute more broadly and found that wholly intrastate use of a facility of interstate commerce satisfied § 1958.

\begin{itemize}
\item \textsuperscript{70} See id. at 589.
\item \textsuperscript{71} Id. at 590.
\item \textsuperscript{72} Id. at 588. The court further noted that such an interpretation would "transform virtually all murder-for-hire schemes that involve electronic forms of communication into federal crimes." Id.
\item \textsuperscript{73} See id. at 587 (citing S. REP. No. 98-225, at 305 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3484).
\item \textsuperscript{74} Id. at 584.
\item \textsuperscript{75} United States v. Stevens, 842 F. Supp. 96, 96 (S.D.N.Y. 1994).
\item \textsuperscript{76} 169 F.3d 336, 342 (6th Cir. 1999).
\item \textsuperscript{77} 198 F.3d 532, 535 (5th Cir. 1999), \textit{aff'd en banc}, 238 F.3d 310 (5th Cir. 2001).
\end{itemize}
A. United States v. Weathers

In October of 1996, Jeffrey Eugene Weathers called Dan Peterson on his cell phone and asked him to kill Sergeant Dale Vittitoe of the Audubon Park Police Department. Weathers offered to pay Peterson $2500 and two ounces of cocaine to kill Vittitoe; Weathers would also provide the shotgun.

Sergeant Vittitoe had recently arrested Weathers for several state criminal offences, including trafficking in cocaine, possession of cocaine, possession of a stolen firearm, two counts of carrying a concealed weapon, possession of drug paraphernalia, reckless driving, and speeding. Weathers thought killing Sergeant Vittitoe was his best chance at avoiding jail time.

Over the course of the arrangements for this hired murder, Weathers and Peterson, who was working undercover for Kentucky State Police, remained at all times within Kentucky. During their final meeting, in a local hotel room, Weathers provided the murder weapon and the two discussed final payment arrangements. At the consummation of this meeting, the Kentucky State Police arrested Weathers and seized several weapons, his cell phone, and his pager. The authorities then charged Weathers under § 1958 for using a facility in interstate commerce, his cell phone, to arrange a murder-for-hire.

The service for Weathers' cell phone covered the Louisville metropolitan area, including parts of southern Indiana. When Detective Peterson placed a call to Weathers' cell number, cell towers located throughout Kentucky and Indiana sent a signal to search for Weathers' cell phone. The final telephone connection between the parties was wholly intrastate, as Weathers and detective Peterson never left Kentucky, though the telephone connection between them relied on the use of an interstate cellular network.

In determining whether Weathers' use of his cell phone satisfied the interstate nexus requirement of § 1958, the district court

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78. Weathers, 169 F.3d at 338.
79. Id.
80. Id.
81. Id.
82. Id.
83. Id. at 339.
84. Id. An expert witness at trial explained that cell phones constantly emit a signal, which is comprised of the telephone number and an electronic serial number to identify that particular cellular phone. Id.
85. Id.
86. See id.
initially noted the discrepancy between the terms "facility in interstate commerce" and "facility of interstate commerce" and the different interpretations that could follow each. Yet, after acknowledging this distinction, the district court synthesized the two terms into one definition, applying to one category of activity.

This "hybrid" created by the district court focused on the manner in which the defendant used the particular facility, rather than the nature of the facility used. Because the connection between Weathers and Detective Peterson relied on a search signal that made electronic contact with cell towers located in southern Indiana, the court found that Weathers used the facility in an interstate manner. This led the district court to determine that Bell South Mobility acted as an "interstate communication facility," and the use of this facility qualified as an "interstate communication" when searching for Weathers' cell phone. The district court ultimately determined that Weathers' use of his cell phone to contract the murder of Sergeant Vittitoe was a "communication facility usage that was interstate," and, therefore, came within the jurisdictional reach of § 1958.

On appeal, the Sixth Circuit affirmed the district court's holding, though it rejected the court's reasoning. The Sixth Circuit

87. Id. at 340 (emphasis added). The district court's opinion is unpublished. All references to the lower court's decision are taken from the text of the opinion of the Court of Appeals. See supra notes 47-48 and accompanying text (noting this discrepancy in the text of § 1958).
88. Weathers, 169 F.3d at 340.
89. Id. Addressing this issue for the first time, the district court judge relied on the approaches taken in two conflicting district court opinions from the Southern District of New York to formulate its interpretation of § 1958. See supra Parts I.B.1 and B.2 for a discussion of United States v. Stevens and United States v. Paredes.
90. See Weathers, 169 F.3d at 341.
91. Id. "I think that the question that we are presented with is how is the communication facility used under these particular circumstances not with respect to where the call was completed but how the facility itself was used." Id. at 340.
92. Id. at 341.
93. Bell South Mobility was the cell phone service provider used by Weathers. Id. at 339.
94. Id. at 341.
95. See id.
96. Id.
97. Id. at 344.
98. Id. at 341.
saw a critical distinction between "in" and "of" interstate commerce, and, therefore, found that the merger of these terms into one definition was an unacceptable interpretation of § 1958. The Sixth Circuit determined that the terms "facility in interstate commerce" and "facility of interstate commerce" encompass different categories of activity, both of which Congress intended to regulate.

Having rejected the district court's approach to the problem presented by the differing subsections of § 1958, the Sixth Circuit reached the same conclusion as the district court by looking at the plain language of § 1958. The Weathers court determined that subsection § 1958(a) controls over § 1958(b) because it contains the "key prohibition creating the criminal offense." The court dispensed with the use of the term "facility of interstate commerce" in § 1958(b)(2) as "merely [a definition of] an otherwise nonexistent term."

Focusing on § 1958(a), the Weathers court concluded that the defendant must have used a "facility in interstate commerce" in attempting to hire the killing of Sergeant Vittitoe, and found that this provision of § 1958 would be satisfied if Weathers' use of a facility caused activity that crossed state lines. After reaching this conclusion on the jurisdictional reach of § 1958, the Sixth Circuit's

99. Id. The Sixth Circuit relied on previous opinions that had found distinctions between these terms when used in different statutes. See, e.g., Aquionics Acceptance Corp. v. Kollar, 503 F.2d 1225, 1228 (6th Cir. 1974) (distinguishing between "in" and "of" interstate commerce in an interpretation of the Securities and Exchange Act).

100. See Weathers, 169 F.3d at 341.

101. Id. at 341. The Sixth Circuit supported this position with reasoning used by the Supreme Court in United States v. Lopez, 514 U.S. 549 (1995). In Lopez, the Court identified three categories of activity that Congress may regulate under the Commerce Clause: the use of the channels of interstate commerce; the instrumentalities of interstate commerce; and activities that "substantially affect interstate commerce." See id. at 558-59. The Sixth Circuit used this reasoning to interpret "facility in interstate commerce," as used in § 1958, as Congress' attempt to regulate the use of the channels of interstate commerce, and "facility of interstate commerce" as Congress' attempt to regulate the instrumentalities of interstate commerce. Weathers, 169 F.3d at 342. For a discussion of the implications of Lopez in the context of what the author calls "non-subject matter specific criminal statutes," such as the mail fraud statute, 18 U.S.C. § 1341 (1994), the wire fraud statute, 18 U.S.C. § 1343 (1994), the Hobbs Act, 18 U.S.C. § 1951 (1994), the Travel Act, 18 U.S.C. § 1952 (1994), and the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1962-1968 (1994), see St. Laurent, supra note 4.

102. Weathers, 169 F.3d at 343.

103. Id. at 342.

104. Id.

105. Id.
analysis followed the analysis of the district court. It determined that the call to Weathers’ cell phone could not have taken place without the interstate search, and, therefore, that Weathers used “an instrumentality in interstate commerce.”

B. United States v. Marek

In Marek, the Fifth Circuit faced the same issue when Betty Louise Marek attempted to contract the killing of Betty Hooten Wade for interfering in Marek’s romantic relationship with Arnold Blake. Marek mistakenly confided her desires in Ricardo Cervantes, who reported directly to the local sheriff, and in turn, agreed to work with the Texas Rangers and the FBI in apprehending Marek. Cervantes, under the direction of the FBI, referred Marek to Jose Cerrano, an FBI agent who would work undercover as the “hit man.” Marek and Cerrano arranged the murder over the course of ten telephone conversations, which were recorded by the FBI. Although Marek refused to meet Cerrano in person, she did agree to wire him $500 by Western Union for murdering Wade. Both parties were in Texas when Marek transferred the funds. Upon delivery of these funds, the FBI indicted Marek under § 1958 for using a facility in interstate commerce, Western Union, to facilitate a murder-for-hire.

On appeal, the Fifth Circuit affirmed the lower court’s conviction. In reaching this conclusion, the Fifth Circuit did not find the conflict between § 1958(a) (“facility in interstate commerce”)

106. Id.
107. 198 F.3d 532 (5th Cir. 1999), aff’d en banc, 238 F.3d 310 (5th Cir. 2001), cert. denied, 122 S. Ct. 37 (2001).
108. Id. at 533.
109. Id.
110. Id.
111. Id.
112. Id.
113. Id.
114. Id.
115. Id. at 538. Marek pleaded guilty to the § 1958 indictment as part of a plea bargain. However, after sentencing, Marek filed a timely appeal of the judgment and the sentence imposed. Id. at 533.
116. Id. at 533. In United States v. Cisneros, the Fifth Circuit addressed this issue in dicta, as that case involved telephone conversations between the United States and Mexico, which clearly satisfied the jurisdictional requirements of § 1958. United States v. Cisneros, 194 F.3d 626, 630-31, 634-35 (5th Cir. 1999) vacated by 203 F.3d 333 (5th Cir. 2000), aff’d in banc sub nom., United States v. Marek, 238 F.3d 310 (5th Cir. 2001), cert. denied, 122 S. Ct. 37 (2001). The court in Marek, therefore, was not bound by Cisneros on this issue, and refuted the reasoning therein. Marek, 198 F.3d at 534.
and § 1958(b) ("facility of interstate commerce") that the Sixth Circuit found in Weathers. Using the plain meaning of the statute, the Marek Court determined that the phrase "use . . . any facility in interstate commerce" identified "functions of the kind of facility that must be used," rather than specifying how the facility must be used in the relevant transaction. In simpler terms, under the Fifth Circuit's interpretation, § 1958 required only the use of a facility that was of the type generally engaged in interstate commerce to bring the conduct under federal jurisdiction and did not hinge on the nature of the particular use while committing the murder-for-hire.

In reaching this conclusion, the court used a plain meaning construction of the phrase "use . . . any facility in interstate . . . commerce." The Fifth Circuit concluded that, since "the word 'in' is more closely juxtaposed to 'facility' than it is to 'use,' . . . 'in interstate commerce' [should be read to modify] 'facility,' not 'use.'" Therefore, under the Fifth Circuit's construction of § 1958, it is the facility that must be "in interstate . . . commerce," not the use.

The Fifth Circuit supported this reading of § 1958 with an interpretation of Congressional intent. The court noted that Congress used the terms "facility in interstate commerce" and "facility of interstate commerce" interchangeably in its discussion of § 1958. Thus, according to the Fifth Circuit, it followed that Congress intended to equate these terms and "to criminalize any use of a 'facility of interstate commerce' in a murder-for-hire scheme."
The Weathers court’s reading of § 1958 required that a portion of the statute be ignored because the court found subsections (a) and (b) to be in conflict. However, the Marek court found this reading unpersuasive because it found no inconsistency between the subsections. Further, such a reading ran contrary to the Supreme Court’s stance on statutory construction, in particular that “[a] statute should be interpreted so as to give each provision significance.” The court ruled that under its own interpretation of § 1958, where “facility in interstate commerce” and “facility of interstate commerce” are “interchangeable synonyms,” § 1958(b) serves to clarify § 1958(a), and, therefore, gives every section of the statute meaning. The Marek court preferred this interpretation because it gave effect to “as much of the statute’s language as possible,” and would “moot[] the least language.” The Marek court found that an interpretation of § 1958 that left out an entire section was suspect, and that it “strains credibility to assume that an entire subsection was placed in the statute by accident or without purpose.”

Weathers and Marek present two conflicting interpretations of § 1958. The Weathers court found that activity that crossed state lines was a necessary prerequisite for federal jurisdiction under § 1958. The court found this requirement had been met, however, not because the parties communicated across state lines, but because their intrastate communication relied on communication facilities that were across state lines. Presumably, the Weathers court would have held differently had Weathers used a traditional landline telephone as opposed to his cell phone. The Marek court, in contrast, found that wholly intrastate use of an interstate com-

128. United States v. Weathers, 169 F.3d 336, 342 (6th Cir. 1999)
129. Marek, 198 F.3d at 535 (“We find no . . . conflict between the two provisions.”). The Marek court went on to criticize dicta in United States v. Cisneros, in which the court noted that the “narrower interpretation of the statute, which applies the substantive part of the statute in (a), appears to be the appropriate one to use.” Id. at 536 (quoting United States v. Cisneros, 194 F.3d 626, 635 (5th Cir. 1999), vacated by 203 F.3d 333 (5th Cir. 2000), aff’d en banc sub nom., United States v. Marek, 238 F.3d 310 (5th Cir. 2001)).
130. Id. at 535, 536 (citing United States v. Nordic Village, Inc., 503 U.S. 30, 36 (1992)).
131. Id. at 536.
132. Id.
133. Id. at 536-37.
134. Weathers, 169 F.3d at 342.
135. Id. at 339.
merce facility satisfied § 1958.\textsuperscript{136}


The federal murder-for-hire statute proscribes paying another to commit a murder for hire in two instances: when the perpetrator either (1) travels in or causes another to travel in interstate commerce, or (2) uses or causes another to use the mail or any facility in interstate commerce.\textsuperscript{137} The first instance requires simply that the perpetrator cause the physical interstate movement of a person, and has given the courts little difficulty.\textsuperscript{138} The courts have experienced greater difficulty in interpreting the jurisdictional reach of § 1958 in the second instance, however, which hinges on the meaning of the phrase “uses or causes another to use the mail or any facility in interstate or foreign commerce.” The apparent discrepancy within the text of § 1958 further complicates the interpretation of § 1958’s jurisdictional reach.

Section 1958, therefore, allows two possible interpretations of the statute’s jurisdictional reach, one significantly broader than the other. Under the broader interpretation, the statute would encompass the use of a telephone\textsuperscript{139} or the mail\textsuperscript{140} to communicate with a

\textsuperscript{136} Marek, 198 F.3d at 538.
\textsuperscript{138} See Marek, 238 F.3d at 316.
\textsuperscript{139} See United States v. Gilbert, 181 F.3d 152, 158 (1st Cir. 1999) (noting that a telephone is an instrumentality of interstate commerce, the use of which is a sufficient basis for federal jurisdiction); United States v. Clayton, 108 F.3d 1114, 1117 (9th Cir. 1997) (holding that cellular telephones are instrumentalities of interstate commerce, and “[a]s such they fall under category two of Lopez, and no further inquiry is necessary to determine that their regulation . . . is within Commerce Clause authority”); Aquionics Acceptance Corp. v. Kollar, 503 F.2d 1225, 1228 (6th Cir. 1974) (holding that intrastate use of a telephone satisfied the jurisdictional requirement of section 10(b) of the Securities and Exchange Act); see also Miller & Biggerstaff, supra note 5, at 679-86 (discussing whether Congress has the constitutional authority to regulate purely intrastate calls and faxes under the Telephone Consumer Protection Act).
\textsuperscript{140} See United States v. Heacock, 31 F.3d 249, 255 (5th Cir. 1994) (holding that a post office is a facility in interstate commerce); United States v. Photogrammetric, 103 F. Supp. 2d 875, 882 (E.D. Va. 2000) (holding that the amended version of the federal mail fraud statute, 18 U.S.C. § 1341, covers “purely intrastate delivery of mails by private or commercial carriers as long as those carriers engage in interstate deliveries . . . . While jurisdiction lies only under the Commerce Clause for the use of private or commercial carriers, Congress may still regulate their intrastate activities because they are instrumentalities of interstate commerce”), aff’d, 259 F.3d 229 (4th Cir. 2001), cert. denied, 122 S. Ct. 1295 (2002).
hired killer, the use of an automatic teller machine to withdraw payment,\textsuperscript{141} or an automobile to deliver the money,\textsuperscript{142} even where such use was entirely intrastate. Such a broad interpretation would make virtually every hired murder a federal crime, as it is hard to imagine a murder-for-hire scheme that would not make use of one of these facilities.

A narrower interpretation of § 1958, however, limits federal jurisdiction to those situations where the defendant has caused interstate activity in the process of committing a murder-for-hire. Further, even within this general interpretation of § 1958, there is some disagreement over the degree of interaction with interstate commerce that is required to trigger the statute.

A. Reconciling the Differences Between § 1958(a) and § 1958(b)(2)

The discrepancy in terms within the text of § 1958 plays a significant part in the disagreement in the courts over the jurisdictional reach of the statute.\textsuperscript{143} In the statute's current form, § 1958(a) uses the phrase "facility in interstate commerce" in its jurisdictional trigger, while § 1958(b), apparently there to define terms used in § 1958(a),\textsuperscript{144} defines the phrase "facility of interstate commerce." Further, "facility of interstate commerce" is enclosed in quotes in the text of § 1958(b)(2), suggesting that the section is defining that specific phrase and that the drafters intended to take it verbatim from § 1958(a). Section 1958(b) also defines the terms "anything of pecuniary value," § 1958(b)(1), and "state," § 1958(b)(3), both of which appear as quoted in the text of

\textsuperscript{141} See United States v. Baker, 82 F.3d 273, 275-76 (8th Cir. 1996) (holding that an interstate network of ATMs is a facility in interstate commerce, the unlawful use of which "falls squarely within the literal language of the Travel Act").

\textsuperscript{142} See United States v. Hickman, 179 F.3d 230, 232 (5th Cir. 1999) (holding that a car is an instrumentality of interstate commerce); United States v. Cobb, 144 F.3d 319, 322 (4th Cir. 1998) (holding that automobiles qualify as instrumentalities of interstate commerce); United States v. Randolph, 93 F.3d 656, 660 (9th Cir. 1996) ("[C]ars are themselves 'instrumentalities' of interstate commerce."); United States v. Bishop, 66 F.3d 569, 588 (3d Cir. 1995) ("Motor vehicles are the quintessential instrumentalities of modern interstate commerce.").

\textsuperscript{143} Congress created this apparent discrepancy in 1984 when it enacted the murder-for-hire statute by, first, adopting language from the Travel Act (specifically, the jurisdictional trigger, using the phrase "facility in interstate commerce") and, second, by adding a section to the statute defining the phrase "facility of interstate commerce." See supra Part I.A.2 for a discussion of the evolution of the text of the murder-for-hire statute.

\textsuperscript{144} Section 1958(b) defines terms for the purposes of both § 1958 and § 1959, but neither section uses the phrase "facility of interstate commerce."
§ 1958(a). This discrepancy has survived numerous statutory amendments, and remains in the text of the current murder-for-hire statute. As a result, some courts have found § 1958 ambiguous on its face, while others have found the ambiguity "more apparent than real." 

The courts have traditionally given these phrases different meanings, which complicate an attempt to reconcile the apparently conflicting subsections of § 1958. Courts have interpreted use of a "facility of interstate commerce" to apply to any use of a facility where the facility itself is somehow interstate in nature, but have interpreted use of a "facility in interstate commerce" to apply only where the actual use of the facility is interstate in nature, regardless of the nature of the facility used.

There are a number of possibilities for this apparent discrepancy, though they fall into two general, and perhaps obvious, categories: (1) that the discrepancy is the result of an overlooked drafting error by Congress, or (2) that Congress wished to clarify that the use of communication and transportation facilities could trigger the statute by defining the phrase "facility of interstate commerce," either to equate with "facility in interstate commerce," or to help define the types of facilities to which "facility in interstate commerce" would apply.

Congress made many amendments to the murder-for-hire statute subsequent to enacting it. The fact that this apparent discrepancy survived the amendments suggests that the statute's current form accurately reflects Congress' intentions. These amendments extend from substantive changes to the correction of errors in the statute's construction, many of which have been minute gram-


146. United States v. Marek, 238 F.3d 310, 320 (5th Cir. 2001).

147. See, e.g., United States v. Miles, 122 F.3d 235, 246 (5th Cir. 1997) (per curiam) (DeMoss, J., concurring).

148. See, e.g., id.; Aquionics Acceptance Corp. v. Kollar, 503 F.2d 1225, 1228 (6th Cir. 1974).

149. For example, Congress increased the penalty for violations of the statute, including a provision for the death penalty, see supra notes 49, 52, and added "state" to the terms defined in § 1958(b). See supra Part I.A.2.

150. In particular, in 1996, Congress corrected a 1994 amendment, which mistakenly added, for a second time, the phrase "or who conspires to do so." See supra note 52. During this same session, Congress also noticed and corrected a misused connector, replacing the phrase "this title and imprisoned" with "this title or imprisoned." See supra note 53.
matical corrections of the type that would be required to amend the apparent discrepancy between § 1958(a) and § 1958(b), if this conflict were the result of mistake. This suggests that Congress gave § 1958 a degree of scrutiny that would have discovered such a mistake, were there a mistake to be discovered. The statute as it stands, with respect to the language relevant to this discussion, in all likelihood accurately reflects the intent of Congress.\textsuperscript{151}

If § 1958 in its current form is as Congress intended, then Congress must also have either intended “facility of interstate commerce” to be synonymous with “facility in interstate commerce,” or intended its definition of “facility of interstate commerce,” to refine or explain the scope of the jurisdictional trigger used in § 1958(a), the use of a “facility in interstate commerce.” Any other interpretation renders § 1958(b)(2) meaningless, as it would “define[] an otherwise non-existent term,”\textsuperscript{152} and, as such, ignores the Supreme Court’s consistent admonition to interpret statutory provisions in a way that gives meaning to the entire statute.\textsuperscript{153}

Further, the legislative history of § 1958 suggests that Congress intended § 1958(a) and § 1958(b)(2) to be read in conjunction with one another. Congress used the terms “facility in interstate commerce” and “facility of interstate commerce” interchangeably throughout the statute’s legislative history.\textsuperscript{154} Congress also interchangeably used the phrase “use of interstate facilities.”\textsuperscript{155} In addition, Congress specifically contemplated the use of communication and transportation facilities when drafting the statute, and ex-


\textsuperscript{152} See United States v. Weathers, 169 F.3d 336, 342 (6th Cir. 1999).

\textsuperscript{153} See Ratzlaf v. United States, 510 U.S. 135, 140-41 (1994) (stating that judges should hesitate to treat statutory terms as surplusage in any setting, and “expressing ‘deep reluctance’ to interpret statutory provisions ‘so as to render superfluous other provisions in the same enactment’” (quoting Pa. Dept. of Pub. Welfare v. Davenport, 495 U.S. 552, 562 (1990))); United States v. Nordic Village, Inc., 503 U.S. 30, 36 (1992) (stating that a statute should be interpreted so that every word is given significance); Colautti v. Franklin, 439 U.S. 379, 392 (1979) (stating that it is an “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative”); United States v. Menasche, 348 U.S. 528, 538-39 (1959) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute’ . . . rather than to emasculate an entire section.” (citation omitted)).

\textsuperscript{154} S. Rep. No. 98-225, at 304-06 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3483-86. A federal investigation of a murder-for-hire should be available when the proper federal nexus exists, “such as . . . use of the facilities of interstate commerce,” id. at 305, and the murder-for-hire statute reaches “the use . . . of a facility in interstate . . . commerce,” id. at 306.

\textsuperscript{155} Id. at 305, reprinted in 1984 U.S.C.C.A.N. 3182, 3484.
pressed its intention that the prohibition against the use of facilities in the commission of a murder-for-hire includes these specific types of facilities.\textsuperscript{156} Congress, therefore, intended § 1958(2)(b) as a substantive addition to the scope of the statute, which further discourages an interpretation of § 1958 that renders § 1958(b)(2) superfluous. The manner in which Congress used these terms in its discussion of § 1958 suggests that they have a related meaning in the context of the murder-for-hire statute.

The proper reading of 18 U.S.C. § 1958 interprets the phrases "facility in interstate commerce" and "facility of interstate commerce" in conjunction, rather than in conflict, with one another.\textsuperscript{157} The use of these terms throughout the statute's legislative history shows that Congress used these terms interchangeably and suggests that it intended them to apply to the same category of activity, at least within the context of the murder-for-hire statute. Further, this is the only reading that gives meaning to § 1958 in its entirety, thereby complying with established rules of statutory construction.

B. \textit{Defining The Jurisdictional Reach of § 1958}

If § 1958(a) and (b) are to be read in conjunction with one another and as applying to a single category of activity for the purposes of § 1958, as discussed in the preceding section of this note, then the next inquiry must determine whether Congress intended to regulate any use of a "facility of interstate commerce," or whether it intended to regulate only the use of facilities where the actual use was interstate. An analysis of the text and legislative history of § 1958 and a look at the Travel Act suggest that § 1958 should be read to extend only to use of facilities where the use is interstate in nature. This is the only interpretation of § 1958 that gives meaning to the entire text of the statute. Further, although Congress stated that the use of the facilities of interstate commerce could trigger federal jurisdiction, it did so only in the context of establishing that the use of such facilities could be equivalent to the actual interstate

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{156} \textit{Id. at 305-06, reprinted in 1984 U.S.C.C.A.N. 3182, 3484-85; see, e.g., 107 CONG. REC. 13,943 (1961) (including comments by Senator Eastland that "[o]ther interstate transportation facilities may be used by organized crime to carry out unlawful activity" and should be included within the purview of the Travel Act). See \textit{supra} notes 20-36 and accompanying text for a discussion of Congress' intention to include transportation and communication facilities as jurisdictional triggers for the Travel Act.}
\item\textsuperscript{157} \textit{See United States v. Marek, 238 F.3d 310, 324 (5th Cir. 2001) (Jolly, J., dissenting) (agreeing with the majority that § 1958(b) is not definitional in a sense that conflicts with § 1958(a), but, rather, merely provides examples of what might constitute a "facility" for purposes of § 1958(a)).}
\end{itemize}
\end{footnotesize}
travel by a person when such use was interstate in nature.\textsuperscript{158} Congress never contemplated wholly intrastate activity.\textsuperscript{159}

1. Plain Meaning Construction of § 1958

In any instance of statutory interpretation, the specific language of the statute is the appropriate place to begin,\textsuperscript{160} and, “unless otherwise defined, words [carry] their ordinary, contemporary, common meaning.”\textsuperscript{161} The text of § 1958, however, presents this traditional approach with an immediate challenge, as the statute uses two different phrases in a manner that suggests that they be used interchangeably.\textsuperscript{162} In addition, the courts have found a “critical” distinction between these two phrases.\textsuperscript{163}

A literal reading of the statute disregards the definition in § 1958(b), as it defines a seemingly irrelevant term, and leaves only the substantive portion, § 1958(a).\textsuperscript{164} This approach, however, runs contrary the Supreme Court’s admonition to give every statutory term significance.\textsuperscript{165} But, this cannon of construction is as difficult to apply, as it is to ignore. Using the more broad phrase contained in § 1958(b), “facility of interstate commerce,” to define the scope of § 1958(a)’s use of “facilities in interstate commerce” would mean that any use of an interstate commerce facility would trigger § 1958 under a construction of that phrase alone. This interpretation would render meaningless the provisions of § 1958(a) that address using the mail and using facilities in “foreign commerce.” If the use


\textsuperscript{159} Id. at 306-07, reprinted in 1984 U.S.C.C.A.N. 3182, 3485-86.


\textsuperscript{161} Perrin v. United States, 444 U.S. 37, 42 (1979) (citing Burns v. Alcala, 420 U.S. 575, 580-81 (1975)).

\textsuperscript{162} See supra Part III.A for a discussion of, and attempt to reconcile, the apparent discrepancy between the phrases “facility in interstate commerce” and “facility of interstate commerce” within the text of § 1958.

\textsuperscript{163} United States v. Weathers, 169 F.3d 336, 341 (6th Cir. 1999); see United States v. Miles, 122 F.3d 235, 246 (5th Cir. 1997) (per curiam) (DeMoss, J., concurring) (distinguishing between “in” and “of” interstate commerce); United States v. Barry, 888 F.2d 1092, 1095 (6th Cir. 1989) (stating 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”); Aquionics Acceptance Corp. v. Kollar, 503 F.2d 1225, 1228 (6th Cir. 1974) (making the same distinction where Congress used these terms in a different statute).

\textsuperscript{164} See Weathers, 169 F.3d at 342 (concluding that there is an irresolvable discrepancy between § 1958(a) and (b), and that § 1958(a) controls over § 1958(b), as § 1958(a) contains the language setting out the criminal offense).

of any "facility of interstate commerce" triggered the statute, then there would be no need to mention the use of the mail or the use of facilities in foreign commerce, as each of these activities would be covered within the use of a "facility of interstate commerce." 166

In United States v. Marek,167 in an attempt to reconcile the apparent conflict between § 1958(a) and § 1958(b), the court found that "in interstate or foreign commerce" was "an adjective phrase that modifies 'facility,' the noun that immediately precedes it—not an adverbial phrase that modifies the syntactically more remote verb '[to] use.'" 168 The Marek court concluded that the use of a "facility in interstate commerce" was synonymous with the use of an "interstate commerce facility," and, therefore, that any use of such a facility triggered the jurisdictional element of § 1958, regardless of whether the particular use was intrastate or interstate.169

The Marek court's interpretation of § 1958, though convenient, does not resolve the problems associated with a plain meaning approach to § 1958; it also makes superfluous express provisions of the statute. Just two paragraphs after its interpretation of § 1958, the Marek court states:

[T]he U.S. Post Office is a facility in interstate commerce, . . . [and that] whenever a person uses the United States Post Office . . . to deliver parcels, money, or other material by means of the mail, that person clearly and unmistakably has used a "facility in interstate commerce," irrespective of the intrastate destination of the item mailed.170

The Marek court's plain meaning construction of § 1958(a), therefore, renders superfluous the use of "the mail" as a jurisdictional trigger of § 1958, as the use of a "facility in interstate commerce," under the Marek court's construction, would encompass any use of the mail.171

166. See supra notes 139-142 and accompanying text for a discussion of the types of facilities that constitute "facilities of interstate commerce."
167. 238 F.3d 310 (5th Cir. 2001), cert. denied, 122 S. Ct. 37 (2001).
168. Id. at 316.
169. Id. at 321.
170. Id. at 317 (quoting United States v. Heacock, 31 F.3d 249, 255 (5th Cir. 1994)).
2. The Federalism Implications of Defining the Scope of § 1958

Further supporting a narrow construction of § 1958, the Supreme Court has indicated that federalism concerns could affect statutory interpretation. In Wickard v. Filburn, the Court stated "[t]hat an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it." The Wickard Court, however, did not indicate what would constitute a "doubtful case," though the Court applied this concept in a later opinion, United States v. Bass.

In Bass, the Supreme Court reversed a conviction for a firearms possession in violation of the Omnibus Crime Control and Safe Streets Act of 1968, which made it a federal crime for any convicted felon who "receives, possesses, or transports [a firearm] in interstate commerce or affecting commerce." Rejecting the prosecution's argument that possession was punishable without showing a connection to commerce, the Court stated: "Because its sanctions are criminal and because, under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States, we refuse to adopt a broad reading in the absence of a clearer direction from Congress." In further explaining its refusal to adopt the prosecution's argument, the Court reasoned that "[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."

Interpreting the murder-for-hire statute implicates these same concerns. Under a broad reading of § 1958, a hired murder becomes a federal crime simply through the use of a facility of interstate commerce. Murder has traditionally been a matter of local concern. In enacting § 1958, Congress gave no indication that it


174. Id. at 124.
176. Id. at 348.
177. Id. at 339
178. Id. at 349.
intended to infringe on the jurisdiction of local authorities. To the contrary, Congress expressed sensitivity to the possibility, suggesting that the murder-for-hire statute should be enforced in a manner that avoided this effect.180

Considering the potential that a murder-for-hire scheme could be inherently local, even where it involves some minimal use of interstate commerce facilities, a general rule granting jurisdiction broadly under § 1958 goes against the concerns the Supreme Court expressed in *Wickard* and *Bass*. A narrow reading, however, which would look at the nature of the particular use of interstate commerce facilities, would honor these concerns by giving federal jurisdiction only to those hired murders that actively engage interstate commerce and avoid upsetting the "federal-state balance."181

3. Interpreting § 1958 in its Statutory Context

a. Legislative History of the Murder-For-Hire Statute

When Congress first introduced the murder-for-hire statute, it generally implied that, though conscious of potential infringement on traditional areas of state law, it intended federal authorities to have some prosecutorial discretion under the statute.182 At the same time, Congress warned the Justice Department to exercise dis-

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181. See supra notes 164-66 and accompanying text. For a discussion of increasing trend toward federalization of crime, see generally Brickey, supra note 179 (discussing the problems associated with reconciling the expansion of federal criminal law and the enlarging of the national police power with principles of federalism); Sara Sun Beale, *Too Many and Yet Too Few: New Principles To Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995) (arguing that the number of federal criminal prosecutions should be reduced to return the balance between the state and federal governments and to safeguard the functioning of the federal courts); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987) (critiquing the modern expansion of the commerce power). See also Laura Ann Forbes, Comment, *A More Convenient Crime: Why States Must Regulate Internet-Related Criminal Activity Under the Dormant Commerce Clause*, 20 PACER L. REV. 189 (1999) (arguing, in part, that if the federal courts claim jurisdiction under the Commerce Clause over internet crimes, there will be a significant reduction in the prosecutorial ability of the states and a weakening of their police power). But see Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247 (1997) (arguing that concerns that crime is becoming overly federalized are unfounded and generally misdirected, and that constitutional and policy considerations suggest the opposite conclusion, that the federal government can and should exercise more authority, particularly with respect to street crime).
cretion in asserting jurisdiction and to work closely with local authorities.

[T]he Committee is aware of the concerns of local prosecutors with respect to the creation of concurrent Federal jurisdiction in an area, namely murder cases, which has heretofore been the almost exclusive responsibility of State and local authorities. However, the 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. 183

Congress also set forth criteria to determine when jurisdiction should be asserted, giving the Justice Department guidance in exercising its authority under the statute:

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. For example, 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. 184

Although this language appears at times to evidence an intent to grant jurisdiction broadly, Congress' seemingly indiscriminate use of the terms "facility of interstate commerce" and "facility in interstate commerce" in describing the scope of the murder-for-hire statute suggests that it may not have intended these phrases to have any specific or determinative effect on the jurisdictional reach of the statute. 185

In its more substantive discussions of the reach of the statute, Congress gave some indication that it anticipated activity that crossed state lines when articulating the scope of the statute. In discussing the addition of § 1958(b)(2), 186 the provision of the murder-for-hire statute that expressly expands the reach of the statute

183. Id.
184. Id.
185. See id. at 3484-85.
186. Section 1958(b)(2) defines "facility of interstate commerce" as including "means of transportation and communication." See supra notes 47-48 and accompanying text. At the time it was introduced, the murder-for-hire statute was a supplement to the Travel Act, § 1952A, but was subsequently designated § 1958. For convenience, I am using the designation § 1958.
to include transportation and communication facilities, Congress stated that "an interstate telephone call is sufficient to trigger Federal jurisdiction, as it did" under the Travel Act.\textsuperscript{187} It gave no indication that an intrastate call would be sufficient. Congress' statements in this context suggest that, with the addition of § 1958(b)(2), it only intended to make clear that the proper interstate nexus could be achieved through the use of a telephone, not that the use of a telephone itself was sufficient grounds for jurisdiction under § 1958.\textsuperscript{188}

Furthermore, Congress stated that, with respect to the use of communication facilities, it intended "that the full breadth of the phrase 'any facility in interstate or foreign commerce' as used in the [Travel Act] also be applicable" to the murder-for-hire statute.\textsuperscript{189} In support, and as an example of the "full breadth" of "any facility in interstate . . . commerce" as that phrase appeared in both the Travel Act and the murder-for-hire statute, Congress cited a court of appeals case, \textit{United States v. Villano}.\textsuperscript{190} \textit{Villano} involved a Travel Act indictment for using an interstate commerce facility, a telephone, to further an illegal gambling activity. The defendant in \textit{Villano}, however, used this telephone to call across state lines, and the authorities based his indictment under the Travel Act on this interstate use.\textsuperscript{191}

Although the legislative history of the murder-for-hire statute suggests that Congress granted jurisdiction and some degree of prosecutorial discretion to the justice department, in so doing, Congress did not indicate that wholly intrastate activity is sufficient to trigger the statute. In addition, Congress indiscriminately used the phrases "facility in" and "facility of" interstate commerce suggesting that it did not intend these phrases to have a determinative effect on the scope of the statute. To the contrary, Congress' substantive discussions of the scope of the statute indicate that the statute only regulates interstate activity.


\textsuperscript{188} See id.

\textsuperscript{189} See id. at 3485 n.5.

\textsuperscript{190} 529 F.2d 1046 (10th Cir. 1976); see S. Rep. No. 98-225, reprinted at 1984 U.S.C.C.A.N. 3182, 3485 n.5 (citing \textit{United States v. Villano} to illustrate its statement that it intended an interstate telephone call to be sufficient grounds for federal jurisdiction under the murder-for-hire statute as it would under the Travel Act).

\textsuperscript{191} See \textit{Villano}, 529 F.2d at 1050-51.
b. Contemporary Interpretations of the Travel Act

The federal murder-for-hire statute directly descends from the Travel Act, initially comprising a supplement to that Act.\footnote{192} Considering the murder-for-hire statute's history, the courts have found it appropriate to interpret the statute in light of the Travel Act.\footnote{193}

Of particular interest is a 1990 Congressional amendment to the Travel Act,\footnote{194} which appears to be a response by Congress to a 1989 decision by the Sixth Circuit, United States v. Barry,\footnote{195} holding that the Travel Act applied only to interstate mailings.\footnote{196} In reaching this conclusion, the Barry court first determined that the jurisdictional requirement of § 1952, to "use[] any facility in interstate or foreign commerce," expressed Congress' intent to regulate only interstate activity, and did not apply to wholly intrastate activities.\footnote{197} Examining the rest of § 1952's language, the court determined that Congress gave no indication that it intended the mail to be treated differently than other facilities, and, therefore, concluded that § 1952 applied only to interstate mailings.\footnote{198} The court went on to mention that if Congress had intended § 1952 to cover not only interstate travel and interstate use of other facilities, but all uses of the mail, the logical wording would have been "use of facili-


\footnote{193} See Edelman, 873 F.2d at 794 ("[I]t is appropriate to review [a federal murder-for-hire conviction] in light of . . . interpretations of the Travel Act."); accord United States v. Marek, 238 F.3d 310, 317 (5th Cir. 2001) (allowing jurisdiction based on intrastate use of interstate facilities for other statutes similar to § 1958), aff'd en banc, 238 F.3d 310 (5th Cir. 2001), cert denied, 122 S. Ct. 37 (2001); United States v. Weathers, 169 F.3d 336, 341 (6th Cir. 1998) (interpreting the murder-for-hire statute as a subset of the Travel Act).


\footnote{195} 888 F.2d 1092 (6th Cir. 1989).

\footnote{196} Id. at 1096. When the Sixth Circuit decided Barry, § 1952 read in relevant part: "Whoever travels in interstate [or] foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to [engage in unlawful activity] . . . shall be fined . . . ." Id. at 1092; cf. United States v. Heacock, 31 F.3d 249, 254 (5th Cir. 1994) (holding that, applying § 1952 before the 1990 amendment, any use of the mail is an use of an interstate facility even if the mailings themselves were intrastate only).

\footnote{197} Barry, 888 F.2d at 1095.

\footnote{198} Id. at 1096.
ties in interstate commerce or the mail."\textsuperscript{199}

Congress appears to have taken up the \textit{Barry} court's suggestion. During its 1990 session, just one year after the \textit{Barry} decision, Congress amended the wording of § 1952 so that it applied to "whoever uses the mail or any facility in interstate or foreign commerce," in order to clarify applying § 1952 to mailings for unlawful activities.\textsuperscript{200} Congress did not "clarify the applicability" of § 1952 to the use of all facilities, but only to all use of the mail. Given that, under the \textit{Barry} court's construction, § 1952 applied only to interstate use of facilities and interstate use of the mail and Congress chose to clarify § 1952 only with respect to the mail, it seems a reasonable inference that the \textit{Barry} court correctly interpreted Congress' intent to have § 1952 apply only to the interstate use of facilities other than the mail.

Congress could have left § 1952 in its pre-1990 form and still issued its clarifying amendment. Congress made this amendment, however, to ensure that § 1952 applied to all uses of the mail,\textsuperscript{201} while appearing to leave intact, and even condone, the \textit{Barry} court's interpretation of § 1952 as applying only to the interstate use of facilities other than the mail. The Supreme Court has stated that statutory provisions should be interpreted consistently with subsequent statutory amendments.\textsuperscript{202} In light of Congress' 1990 amendment, it seems most plausible to interpret the jurisdictional reach of the phrase "uses any facility in interstate ... commerce," within the context of the Travel Act, as being limited to the interstate use of facilities.

If the jurisdictional reach of the Travel Act is limited to the interstate use of facilities, then § 1958 might best be interpreted as having this same reach. Congress originally drafted § 1958 as a supplement to the Travel Act, and the two statutes contain identical language with respect to their jurisdictional triggers. Further, the courts have relied on Travel Act interpretations to shed light on the scope of § 1958.\textsuperscript{203}

\textsuperscript{199.} \textit{Id.} at 1096; cf. \textit{supra} note 196 (quoting the language of § 1952 at the time of the \textit{Barry} decision).


\textsuperscript{201.} See Crime Control Act of 1990 § 1604.


\textsuperscript{203.} See \textit{supra} notes 192-193 and accompanying text.
c. Legislative History of The Travel Act

At the inception of the Travel Act, Congress seemed to work from the assumption that the statute they were creating would apply to activity that crossed state lines. In proposing the bill, The Attorney General stated that he intended it “to take effective action against the racketeer who conducts an unlawful business, but lives far from the scene in comfort and safety . . . .” The Attorney General was addressing criminal activity that crossed state boundaries. Congress, however, did not expressly limit the legislation to interstate travel by a person. In fact, the version of the bill recommended by the Conference Committee, and adopted by both houses, expanded the interstate jurisdictional element to include the use of facilities, thereby removing the requirement that the actual perpetrator cross a state boundary.

There is some indication that Congress intended to satisfy concern over the bill’s potentially broad scope by limiting the application of the bill to specific crimes, rather than focusing on the interstate nexus requirement. The Attorney General initially addressed this anticipated concern by clearly demarcating the categories of activity that his proposal addressed. “We specifically have outlined the illicit operations we seek to curtail as those involving gambling, liquor, narcotics, prostitution businesses, or extortion or bribery . . . .” Congress reflected this concern in its deliberations over the scope of the bill. Congress seemed more concerned, however, with the types of criminal activity that the act would apply

204. See supra Part I.A.1 and accompanying text for a discussion of the scope of activity contemplated by Congress in enacting the Travel Act.


209. Id. “The travel that would be banned is travel ‘in furtherance of a business enterprise’ which involves gambling, liquor, narcotics, and prostitution offenses or extortion or bribery.” Id.

210. Id.

211. Id. at 2.
and that there be a firm connection drawn between the criminal activity and the actual travel, rather than limiting jurisdiction through the degree of interstate activity involved. In fact, Congress' only direct discussion of the interstate nexus requirement was to mention that there must be a "proper" one.

The murder-for-hire statute has similar inherent limiting characteristics. First, the activity addressed by the statute is very clearly limited to situations where there is "intent that a murder be committed . . . for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value . . . ." Second, the legislative history states that murder-for-hire is the type of crime that should be subject to the investigative and prosecutorial resources of the Federal Government. Congress limited the reach of the statute, in some degree, through a strict limitation on the category of activity prohibited.

Murder-for-hire is a specific category of activity. The crime, however, may not necessarily have an interstate element. Any murder-for-hire scheme will have an additional transaction that could serve to attenuate the perpetrator from the end result of the criminal activity, which compounds the nefarious nature of the crime. The person committing the murder-for-hire could remain in safety some distance from the actual murder, which creates the same threat that Congress contemplated in drafting the Travel Act. In and of itself, however, murder-for-hire is not a federal crime. An interpretation of the § 1958 that requires activity that crosses state lines to trigger the statute would balance the need to preserve principles of federalism with the need to combat crime that is legiti-

212. The House of Representatives limited the application of § 1952 by removing from the prohibited activities extortion and bribery not connected with the business of gambling, liquor, narcotics, or prostitution. This was accomplished by defining "unlawful activity" as "any business enterprise involving gambling, liquor, narcotics, or prostitution offenses." See Pollner, supra note 18, at 39.

213. S. REP. NO. 87-644, at 2, 5 (1961). "[T]o come within the provisions of the bill some activity in furtherance of a racketeering enterprise, subsequent to the performance of the travel, must take place and that accordingly the gravamen of the offense will be travel and a further overt act to aid the enterprise." Id.


216. "However, the 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 . . . ." S. REP. NO. 98-225 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3484.

217. See supra notes 200-204.
mately of federal concern and exceeds the crime fighting abilities of local authorities.

The best interpretation of § 1958 is one that requires that a facility be used in an interstate manner in order to trigger the statute. This interpretation gives effect to the entire statute and accords with Congress' intent and purpose when drafting the statute. This interpretation also accords with legislative and judicial treatment of the Travel Act.

**CONCLUSION**

Courts have interpreted 18 U.S.C. § 1958 in a number of different ways, each with varying implications for the jurisdictional reach of the murder-for-hire statute. The disagreement focuses on the interpretation of the phrase "use a facility in interstate . . . commerce" and is complicated by an apparent discrepancy in the text of the statute. Interpreting the statute as applying to any use of a facility of interstate commerce risks bringing traditionally state crimes within the jurisdiction of the Federal Government, even where the interaction with interstate commerce is unintended or random. Federal jurisdiction under these circumstances becomes inconsistent and fortuitous for the Federal Government.

An interpretation of § 1958 that requires that there be an interstate transaction associated with the murder-for-hire would require an inquiry into the particular facts of any murder-for-hire scheme prosecuted by the Federal Government. This approach, however, is supported by the text of the statute, by the legislative history of the statute, and by a thorough analysis of the varying judicial interpretations of § 1958 and the reasoning relied upon therein. Further, an interpretation of § 1958 that requires a factual inquiry to determine whether the particular use involved an interstate transaction would limit federal jurisdiction to those crimes that are legitimately federal.

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