THE ARMED CAREER CRIMINAL ACT: A SEVERE IMPLICATION WITHOUT EXPLANATION

The terms of the act do not authorize the infliction of a penalty greater . . . . Is there a safe implication that authority to inflict a greater penalty was intended to be conferred? The objections to this seem to me too strong to be overcome. In the first place, mere implication can hardly ever be safe ground on which to

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statutory minimum and maximum.[6] They reason that district courts must be able to sentence to the maximum of the statutory range granted by Congress and that the sentencing judge's discretionary power must be absolute and unreviewable.[7] To that end, if the ACCA contains a range of fifteen years to

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constitutional protections clearly absent from the ACCA, there is no existing higher maximum penalty to imply than the second most severe penalty permitted by law: life without parole.

B. The Three Previous Convictions Requirement

Unlike the ACCA's sentencing phrase, the predicate offenses provision has been the subject of frequent Supreme Court litigation. There have been thirteen Supreme Court cases that have attempted to clarify the statute's language with regard to its three previous convictions requirement.[30] The requirement encompasses a defendant's past convictions under both state and federal criminal statutes.[31] But, given the various definitions of different states' crimes, past convictions may or may not qualify under thripl.Rnier tt uhn th

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relevant statute defines the crime more narrowly, then the prior conviction can serve as an ACCA predicate because one guilty of the narrower crime's elements is necessarily guilty of the broader generic crime's elements.[38] However, if the statute is broader than the generic crime, then a conviction under that statute cannot count as an ACCA predicate, even if the defendant's acts would satisfy all of the generic crime's elements.[39] The key is the elements of the crime, not the facts.[40]

To illustrate this concept, let us look closer at the situation in *Taylor*. The predicate offense at issue was a conviction under a California burglary statute.[41] It provides that a person who enters certain locations, lawfully or unlawfully, with intent to commit larceny or any other felony, is guilty of burglary.[42] This statute is broader than generic burglary because most burglary statutes require the entry into the location to be unlawful.[43] Under the California statute, one who enters a grocery store and shoplifts could be convicted.[44] But, that same defendant could not be convicted under a generic burglary statute because it requires unlawful entry.[45] As a result, the California statute was overbroad and the defendant's prior conviction did not qualify as one of the three required predicate offenses for purposes of the ACCA, even though his actual conduct may have fit under a generic burglary statute.[46]

In *Shepard v. United States*, the Supreme Court applied a "modified categorical approach," which allows the sentencing court to look beyond the statutory elements to the charging paper and jury instructions used in a case.[47] The defendant had a prior conviction under a Massachusetts burglary statute with alternative elements—the statute prohibited entry into a building and, additionally, prohibited entry into boats and cars.[48]

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Massachusetts statute, which alternative the defendant was convicted of.[51] However, since the statute was divisible, the Supreme Court authorized the sentencing court to examine a limited set of materials, namely the terms of the plea agreement or transcript of colloquy between the judge and defendant, to determine if the defendant had pled guilty to entering a building, car, or boat.[52] The Court emphasized the narrow scope of the modified categorical approach: it was not to determine the facts of the defendant's underlying conduct in his prior conviction, but only to determine whether he pled to the version of the crime in the Massachusetts statute that corresponded to the generic offense (burglary of a building).[53]

The Court reasoned that the modified categorical approach would be applicable in a typical case brought under a divisible statute because the prosecutor charges one of the alternatives.[54]

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preponderance of the evidence, then the sentencing range increases from a maximum of ten years to not less than fifteen years.[61] The judge uses the existence of the prior convictions along with the instant offense to sentence the

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Court ultimately never resolved whether the statute contained a fixed sentence of 30 years or an implied life maximum.

However, three Supreme Court Justices expressed serious doubts during the oral argument, without disagreement from anyone else on the bench, when

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providing a fixed-term of years when an expressed statutory maximum is absent.

B. Stimpson v. Pond *and* Lin v. United States

These interpretations articulated by the three Justices reflect a court opinion written by one of their predecessors on the bench more than 150 years ago. While riding circuit in the mid-1800s, Justice Curtis held in *Stimpson v. Pond* that a federal statute prescribing "a penalty of not less than one hundred dollars . . . . d[id] not authorize the infliction of a greater penalty than one hundred dollars."[91] Rather, the "act authorize[d] the infliction of a penalty of just one hundred dollars for the offence described[.]"[92] Justice Curtis reasoned that the "[p]ower to inflict a particular penalty must be conferred by Congress in such terms as will bear a strict construction[]" and the power was "exhausted by imposing a penalty of just one hundred dollars."[93]

Justice Curtis specifically rejected the notion of an implied maximum

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C. Legislative History and Intent

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burglary convictions from receipt, possession, or transportation of firearms.[109] This allowed for federal imprisonment of career criminals without radically expanding federal jurisdiction over common law crimes.[110] It merely served as an enhanced penalty for a three-time felon convicted of the underlying federal offense—felon in receipt, possession, or transportation of firearms.

Congress revised the bill's sentencing provision to state that career criminals "shall be . . . imprisoned not less than fifteen years."[111] Congress

meanings and Congress's actions speak louder than its individual members' words.

More important is what Congress wrote down and eventually passed as legislation.[119] The following two modifications in the imprisonment language from 1982 to 1983 collectively reveal Congress's intention to foreclose the availability of a life sentence:[120] revoking the "nor more than life" upper boundary and inserting "imprisoned" in place of the phrase "sentenced to a term of imprisonment."

First, Congress deleted the words "nor more than life" prior to enacting the ACCA into law, which signifies that Congress did not intend to authorize a sentencing range up to life imprisonment. The Supreme Court has pointed out that "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."[121] This casts serious doubt on the idea that Congress intended an implied maximum of life imprisonment after discarding the "nor more than life" language. Furthermore, the Supreme Court has reasoned that if Congress sought to grant something in a statute, it would not intentionall565 Twle[(bs1(ti)5.t4(ut)5.e-6.8(rlg67(tiin)4.7vea)5.)o(.2(d me)4.7(p)5.3(aer

Congress said the goal of the ACCA was to provide a new federal offense to improve public safety by "incapacitat[ing] the armed career criminal for the rest of the normal time span of his career which usually starts at about age 15 and continues to about age 30."[124] Congress expressed concern with judiciaries imposing ultra-lenient prison sentences on repeat offenders and parole boards releasing inmates well before the end of their sentence.[125] By failing to adequately confine these offenders, courts and parole boards endangered their communities because they allowed these repeat felons to continue their careers as criminals.[126] In order to protect these communities, Congress continually emphasized that the ACCA must prescribe a *certain* and substantial punishment—meaning no probation, suspended sentence, sentence less than fifteen years, or parole.[127]

In light of this purpose, it is particularly telling that Congress inserted the word "imprisoned" in place of "sentenced to a term of imprisonment" in the ACCA. Pursuant to the initial language, "shall be . . . *sentenced* to a term of imprisonment not less than fifteen years nor more than life," indicates the court must order a punishment between fifteen years and life imprisonment.[128] However, this provision does not contemplate a suspended sentence or parole because the verb "sentenced" only concerns the pronouncement of the sentence by the court.[129] Consequently, this language enabled judges to evade the ACCA's required sentence by issuing a sentence for fifteen years, but then suspending the execution of that sentence (i.e. giving probation). Furthermore, unless expressly stated otherwise in the act, a criminal sentenced under the

probation, suspension of sentence, sentence less than fifteen years (whether the defendant pleads guilty or is convicted following a trial), or parole shall be imposed upon an individual punished under the ACCA. Since Congress incorporated the word "imprisoned" at the same time it eliminated the "nor more than life" upper bound, it follows that Congress was creating a certain punishment, or "new maximums," in accordance with the abovementioned three Supreme Court Justices' opinions in the *O'Brien* oral argument.[132]

This interpretation advances the congressional objective to incapacitate armed career criminals for the rest of their careers, which usually starts "at about age 15 and continues to about age 30."[133] Given that the average prison sentence for armed career criminals at this time was less than four years, an enhanced fixed-term of fifteen years imprisonment comports with Congress's statutory language modifications, establishes a certain and substantial punishment, and prudently anticipates the potential for prisons overcrowding.[134] Accordingly, the "shall be . . . *imprisoned not less than* fifteen years" language does not permit a sentence longer than fifteen years; rather it establishes a fixed term and at the same time prohibits courts and parole boards from relieving an ACCA offender of the required fifteen-year confinement.[135]

D. Structure And Text

The ACCA's neighboring subsections within Section 924 reveal that Congress did not intend the ACCA's imprisonment provision to establish a range up to life. Under Subsections 924(c), 924(j), and 924(o), Congress expressly provided that certain acts are punishable by "any term of years *or for life*."[136] The Supreme Court has reiterated, "[w]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate . . . exclusion" and it should not be implied in the section where it is excluded.[137] Since Congress expressed a life maximum in three neighboring subsections, the absence of any language in the ACCA (924(e)) specifying a life maximum demonstrates Congress acted intentionally and purposely in the disparate exclusion. To be sure, Congress omitted the "nor more than life"

132. *See supra* text accompanying notes 83–90.

133. *See supra* note 124, at 7.

134. *See supra* text accompanying notes 19–20.

135. 18 U.S.C. § 924(e)(1) (2012) (emphasis added).

136. *Id.* § 924(c)(5)(B)(i) (emphasis added); *Id.* § 924(j)(1) (2012) (emphasis added). *See also id.* § 924(o). Also, 18 U.S.C. § 924(c)(1)(C)(ii) has the following imprisonment provision: "[B]e sentenced to imprisonment for life." *Id.* § 924(c)(1)(C)(ii).

137. Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

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upper boundary from the ACCA's text prior to its enactment. Therefore, imposing a life maximum into the ACCA contravenes the duty of courts to refrain from reading a particular phrase into a statute when Congress has left it out.[138]

Furthermore, the public law illustrates that Congress routinely specified a life maximum when it wished to define such an upper boundary in statutory sentencing ranges during the time the ACCA was enacted. Several acts codified alongside the ACCA in P.L. 98-473 expressly define penalties with maximums of life imprisonment: Section 503(a) provides "not less than three years and not more than life imprisonment"; Sections 1002(a) and 2002(a) provide imprisonment for "any term of years or for life."[139] Congress codified the ACCA along with Sections 503(a), 1002(a), and 2002(a) in P.L. 98-473 on October 12, 1984, one year after deleting the ACCA's life maximum provision.[140] It is implausible that Congress intended this life maximum it deleted to be implied in the "not less than fifteen years" language when

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force or of a child under fourteen years of age is "imprisonment for any term of years not less than 15 or for life."[143] Accordingly, implying an unstated life

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force or of a child under 14 is "imprisonment for any term of years not less than 15 or for life"); *id.* § 1591(b)(2) (sentencing range for sex trafficking of children between 14 and 18 is "imprisonment for not less than 10 years or for life"); *id.* § 1658(b) (sentencing range for extinguishing a light with intent to bring a ship into danger is "imprison [ment for] not less than ten years and [the defendant] may be imprisoned for life"); *id.* § 2241(c) (sentencing range for

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maximum in the ACCA violates the canon that courts must "construe statutes, where possible, so as to avoid rendering superfluous any parts thereof."[144]

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The countervailing surplusage argument—that a fixed-term interpretation would render the words "not less than" superfluous—overlooks the ACCA's history and text. In 1983, Congress signaled a fixed sentence of fifteen years by simultaneously incorporating the language "shall be . . . imprisoned not less

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district courts imposed lower sentences.[156] In *United States v. Higgs*, the district court imposed a sentence of three years under § 924(c).[157] Although the court acknowledged that § 924(c) facially stood for a five-year fixed sentence, it speculated that Congress might not have "adequately . . . consider[ed] certain [mitigating] factors."[158] The language "sentenced to . . . five years," by itself, does not *affirmatively* forbid an imposition of a sentence lower than five years. This reflected congressional uncertainty to the sentencing court in *Higgs*, so it departed downward from the fixed term of five years to impose a more fitting punishment of three years.

The ACCA more effectively establishes a certain punishment because its "imprisoned not less than" language affirmatively forbids the imposition of a lower sentence. Since the sentencing judge cannot look at the underlying facts

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instinctive distaste against one languishing in prison unless the lawmaker has clearly said they should.[170] When an offender examines the ACCA's text, construction, and legislative history, a life maximum is not plainly visible. Rather, it would, at best, amount to a guess. Under the rule of lenity, when given two options, in order for a court to apply the harsher construction of the statute, its text must be plain and unmistakable.[171]

Furthermore, the adjudicative mechanism of the ACCA supports the imprisonment provision to constitute a fixed term of fifteen years. Prior to the enacted ACCA, the earlier bills proscribed an individual with two prior convictions from carrying a firearm *during* the commission of a robbery or burglary.[172] But after President Reagan vetoed the bill, the enacted ACCA outlawed a person with three previous convictions from mere possession of a firearm.[173]

Under the prior bills, the triggering offense proved to a jury would have been the third violent felony committed with a firearm.[174] For that reason, the sentencing judge would have been able to consider the defendant's conduct underlying the third conviction. For example, this enables the sentencing judge to consider whether the defendant's third conviction for armed robbery was committed with a starter gun or a machine gun;[175] whether it was motivated by a desperate family financial situation or merely a desire for excitement; whether the robber meant to inflict a greater harm or simply intended to pull off the armed robbery; whether the robber wielded a firearm himself or simply drove the getaway car; whether the victim was a blind newsstand operator or a person against whom the robber had legitimate grievances; whether the robber stole a loaf of bread or one million dollars; and whether the robber walked voluntarily into a police station to confess or desperately resisted capture.[176]

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The legislature's actions when crafting the ACCA are also revealing. Prior to enacting the ACCA into law, Congress deleted the words "nor more than