

INTERPRETING ACRONYMS AND EPITHETS: EXAMINING THE JURISPRUDENTIAL SIGNIFICANCE (OR LACK THEREOF)

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INTRODUCTION

In *United States v. Windsor*,¹ the Supreme Court prominently used a law's title to demonstrate moral disapproval, noting "[w]ere there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage."² Although Supreme Court opinions have used titles as guides to interpretation in the past, the *Windsor* decision certainly provided a prominent forum for their reemergence.³ But this decision may only be the beginning in regard to interpreting short titles, which have become increasingly sophisticated throughout the years.⁴ Contemporary names come adorned with lavish acronyms designed to be memorable and clever and to ease their way through the convoluted legislative process, but which could also play a significant part in interpretation. Should judges decide these acronyms merit interpretative status, the judiciary may have a dilemma on its hands. This Article discusses how contemporary acronyms are formed and their interpretive relevance,

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1. 133 S. Ct. 2675 (2013), available at http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf.

2. *Id.* at 2693.

3. See Brian Christopher Jones, *SCOTUS Short Title Turmoil: Time for a Congressional Bill Naming Authority*, 32 YALE L. & POL'Y REV. INTER ALIA 25 (2013); Adam Liptak, *Laws Deserve More Than Those Cute Names*, N.Y. TIMES (December 30, 2013), <http://www.nytimes.com/2013/12/31/us/colorful-names-for-laws.html>.

4. See Brian Christopher Jones, *The Congressional Short Title (R)Evolution: Changing Face of America's Public Laws*, 101 KY. L.J. ONLINE 42 (2013); Brian Christopher Jones, *One Redeeming Quality About the 112th Congress: Refocusing on Descriptive Rather than Evocative Short Titles*, 112 MICH. L. REV. FIRST IMPRESSIONS 1 (2013); Renata E.B. Strause et al., *How Federal Statutes Are Named*, 105 LAW LIBR. J. 7, 14-20 (2013).

arguing that the substance of contemporary acronym titles, such as epithets and backronyms, should be given little weight as interpretative devices. Further, the piece discusses the recent USA PATRIOT Act (Section 215) cases, noting the potential psycholinguistic interpretative effects of the historic title.

I. INTRODUCING EPITHETICAL BACKRONYMS

Contemporary acronym titles usually take the form of epithets, or what is sometimes referred to as a “backronym” (i.e., an acronym that is first formed around a particular word or phrase and then filled in with the spelled-out meaning).⁵ These have become especially common in the twenty-first century: USA PATRIOT, CAN-SPAM, PROTECT, etc. Congress has no qualms using gaudy,⁶ tendentious,⁷ and at times childlike language⁸ when penning titles for their federal laws, and this holds especially true for backronyms. Conversely, acronym titles such as DOMA⁹ and the commonly adjudicated ERISA¹⁰ are conventional, non-preconceived acronyms formed from the first letters of the statutes’ respective short titles.

In *Windsor*, Justice Kennedy used the spelled-out title, the Defense of Marriage Act, rather than the abbreviated version of the law, DOMA. This was because the latter, while politically significant, lacks a precise meaning. Epithetical backronyms (note: sometimes spelled “bacronym”), however, do not lack such a meaning, and could potentially be used in interpretation as a guide to meaning. Given the current popularity of employing these types of titles, such names will inevitably play an important interpretative role, and according to a couple recent decisions on NSA data collection, such effects may have already started to be felt. Before these decisions are discussed, however, it is important to determine where backronyms and epithets fit in terms of statutory interpretation relevance.

5. Defined as “[a] word interpreted as an acronym that was not originally so intended. This is a special case of what linguists call ‘back formation.’” *Backronym Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/backronym> (last visited Feb. 27, 2014). For a more complete explanation about the relatively new word, see the MacMillan Dictionary Buzzword entry that provides a bit more context and history. *Backronym Definition*, MACMILLAN DICTIONARY, <http://www.macmillandictionary.com/buzzword/entries/backronym.html> (last visited Feb. 27, 2014). The terms “backronym” and “epithet” are used interchangeably throughout the Article.

6. See Brian Christopher Jones, *Drafting Proper Short Titles: Do States Have the Answer?*, 23 STAN. L. & POL’Y REV. 455, 456-58 (2012).

7. See generally Brian Christopher Jones & Randall Shaheen, *Thought Experiment: Would Congressional Bill Titles Survive FTC Scrutiny?*, 37 SETON HALL LEGIS. J. 57 (2012).

8. See, for example, the recently introduced “A PLUS Act.” H.R. 2456, 113th Cong. (1st Sess. 2013).

9. Defense of Marriage Act, Pub. L. No. 104-99, 110 Stat. 2419 (1996).

10. Employment Retirement Income Security Act, Pub. L. No. 93-406, 88 Stat. 829 (1974).

II. PROPER INTERPRETATIVE ENTITIES OR HOLLOW POLITICAL POSTURING?

Although it is well established that statutory titles are not to be used in interpretation when the text of the statute is clear,¹¹ in *INS v. National Center for Immigrants' Rights*, Justice Stevens noted that “the title of a statute or section can aid in resolving an ambiguity in the legislation's text.”¹² This standard is still recognized today. In *Reading Law*, Scalia and Garner note in the title-and-headings canon that “[t]he title and headings are permissible indicators of meaning.”¹³ But do these principles also apply to backronyms or epithets? If so, difficulties arise.

Traditional acronym titles such as DOMA and ERISA usually do not mean anything in the literal sense; the letters merely happen to lend themselves to unofficial but pronounceable “words.” Therefore the spelled-out titles would be used for interpretative purposes, as in *Windsor*. Epithets and backronyms, however, are another matter, considering the multi-significance of the epithet formed and also the spelled-out version of the title. If they are legally relevant to interpretation, then questions arise as to what version should be used: either the epithet that spells a word with a textual meaning, the spelled-out short title that forms the epithet, or both? According to the legal principles mentioned above, the short answer is that both could be used, although there is certainly room for debate.

Some epithets appear to harness the essence of a bill or law better than the spelled-out version (e.g., the infamous CAN-SPAM Act: Controlling the Assault of Non-Solicited Pornography And Marketing Act).¹⁴ If such titles are designed in this particular manner, with the epithet serving such a prominent function, then do the words inscribed in the spelled-out portion of the acronym bear significance? Given their construction, the spelled-out titles are essentially filler for the larger message (i.e., the epithetical backronym formed), and probably should not be used in interpretation. Although effort is made to

11. See *Caminetti v. United States*, 242 U.S. 470, 489-90 (1917), available at <http://supreme.justia.com/cases/federal/us/242/470> (“In this connection, it may be observed that while the title of an act cannot overcome the meaning of plain and unambiguous words used in its body, the title of this act embraces the regulation of interstate commerce ‘by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes.’ . . . But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source.” (citations omitted)).

12. 502 U.S. 183, 189 (1991), available at <http://supreme.justia.com/cases/federal/us/502/183>.

13. ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 221-24 (2012).

14. Controlling the Assault of Non-Solicited Pornography And Marketing (CAN-SPAM) Act of 2003, Pub. L. No. 108-87, 117 Stat. 2699.

connect the spelled-out words to the bill's substance, the focus remains on the larger message (i.e. the epithet), thus lending decreased importance to the spelled-out title. However, many epithets are too general and do not lend themselves to the substance of the legislation at all (i.e., the HEART Act: Heroes Earnings Assistance and Relief Tax Act¹⁵), thus making it difficult to apply any meaning to them in regard to a law's substance. Recently, epithet titles have even been attached to laws that do not appear to have any spelled-out words that the letters stand for (e.g., the REAL ID Act of 2005¹⁶). Thus, inherent difficulties lie in both the epithets and the spelled-out titles in regard to backronyms.

Different schools of statutory interpretation (textualism, purposivism, etc.) may regard acronyms differently. A textualist may use both the acronym form and also the spelled-out title as evidence. This would be perfectly valid, because most public laws list both the acronym title and the spelled-out title on the official statutes.¹⁷ However a stringent textualist would probably be looking for consistency between both titles, which could prove difficult or nearly impossible in many instances (see the HEART example above). Conversely, a purposivist could potentially use both, but would be more likely to choose between one of the two (i.e., the title that better captures the intent of the statute). If the epithet is a better indication of the purpose of the statute than the spelled-out title, or vice versa, then that would be appropriate to use. Given the vast discrepancies that can arise between epithets and spelled-out titles, and also given the problematic nature by which backronyms are constructed, I believe it would be wise for the judiciary to refrain from using such titles in their decisions.

III. POSSIBLE PSYCHOLINGUISTIC EFFECTS

Another consideration is whether epithets can affect the ordinary or definitional meaning of spelled-out titles, or the meaning (or the perceived meaning) of other words in the substance of the statute. In *The Language of Statutes*, Lawrence Solan demonstrated that psycholinguistics significantly affects the interpretation of statutes (e.g., interpreters tend to think in both prototypical (bottom up) and rule-like fashion (top down) when conceptualizing and categorizing words).¹⁸ He notes that when thinking about a

15. Heroes Earnings Assistance and Relief Tax (HEART) Act of 2008, Pub. L. No. 110-245, 122 Stat. 1624.

16. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 302. The acronym REAL ID does not appear to have ever had a spelled-out meaning.

17. See, e.g., Stop Trading on Congressional Knowledge (STOCK) Act of 2012, Pub. L. No. 1122-105, 126 Stat. 291.

18. See LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* 62-66 (2010).

concept, we form “mental models,” which contain a wide array of information to draw on for potential interpretative use.¹⁹ Ultimately, defining words with conditions that are both necessary and sufficient proves extremely challenging, which makes the use of ordinary meaning and definitional meaning common throughout the judiciary.²⁰ While it could prove difficult to determine whether a backronym or epithet influenced the application of ordinary or definitional meaning, it certainly is not out of the question.²¹

Epithets may also have additional psycholinguistic effects in regard to the perception or approval of various statutes; in fact many display unduly emotional and engaging qualities (e.g., the HEART Act, the Ryan White CARE Act, the FRIENDSHIP Act, or the FREEDOM Support Act). Separating these (highly manufactured) characteristics from laws, not to mention the at-times contentious political debates inherent in the passing and implementation of law, could prove difficult.²²

19. *Id.* at 37.

20. *See id.* at 63. Although in legal interpretation, the definitional meaning tends to be preferred. *See also* J.A. Fodor et al., *Against Definitions*, 8 COGNITION 263 (1980).

21. In fact, some potentially interesting cases exist. For example, what does the use of “appropriate” mean in the USA PATRIOT Act’s spelled-out short title (Uniting and Strengthening America by Providing *Appropriate* Tools Required to Intercept and Obstruct Terrorism Act)? Given that Congress passed the law with such a title, can it be ascertained that they have deemed such tools “appropriate,” and therefore constitutional? Or, does it mean that the tools should be used “appropriately” by those who are doing so? If a judge decides that Congress further considered such methods constitutional by using the word “appropriate” (in addition to passing the bill), then that could influence the judge’s decision. To provide another example: does the use of “today” in the spelled-out version of the PROTECT Act (Prosecutorial Remedies and Other Tools to End the Exploitation of Children *Today* Act of 2003, Pub. L. No. 108-21, 117 Stat. 650) have any significance for the enforcement of the law? Difficulties could arise if a court subsequently gave undue weight to the word, therefore construing some special speedy enforcement meaning to the law where none existed. (Many thanks to *SLPR* editors for acknowledging this latter point regarding the PROTECT Act.)

22. Although some judges may believe their jurisprudence is immune to biases and other cognitive errors, the academic literature demonstrates that they are often just as susceptible to such characteristics as others. *See generally* Neil Vidmar, *The Psychology of Trial Judging*, 20 CURRENT DIRECTIONS IN PSYCHOL. SCI., 58 (2011) (highlighting studies questioning the differences between judges and laypersons concerning a number of issues). Further, Wrightsman has noted that judges respond differently to ideological (i.e., “hot button”) as opposed to non-ideological cases, and that certain justices’ personalities are more persuadable than others. *See* Lawrence S. Wrightsman, *Persuasion in the Decision Making of U.S. Supreme Court Justices*, in DAVID E. KLIEN & GREGORY MITCHELL, *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING* 57, 58 (2010). And let us not forget prominent realist Jerome Frank, who once noted, “The truth is that the talk about mechanical operation of rules in property, or commercial, or other cases is not at all a description of what really happens in courts in contested cases,” and further noted that:

If, now, law were viewed as decisions (judgments, orders and decrees) and the judicial process as the process of deciding cases, then what Pound and Dickinson call “non-legal” or “anti-legal” would be brought directly into focus. Such a conception of law would force on the conscious attention of the hard-headed student and the hard-headed lawyer all the factors

In subtle ways this may have already been seen in the recent NSA and USA PATRIOT (Section 215) decisions, given the differences in some of the symbolic language employed throughout the opinions. Two federal judges recently reached opposite conclusions on the constitutionality of the NSA's bulk telephony metadata collection system. Judge Pauley from the Southern District of New York found the program constitutional,²³ while District of Columbia Judge Richard Leon decided otherwise.²⁴ (In both opinions, the name of the USA PATRIOT Act is only used in acronym form, and not fully spelled out; even early challenges²⁵ to the law use the acronym form and do not seem to spell out the law's entire name). Judge Leon's opinion is spotted with references to author George Orwell, citing "almost Orwellian" technologies.²⁶ Would he have expressed this in such a manner if the law were named differently, possibly known as the "Prevention of Terrorism Act," or the "Antiterrorism Act"? Perhaps, but it seems unlikely.²⁷ Conversely, Judge

that enter into decision-making. They would see that intensive knowledge of the various non-rule elements is a necessary part of the daily work of the practitioner and the judge.

No more could "that stuff" be laughed at as sociology, preacher's non-sense, high-brow twaddle or the like. It would be recognized for what it is, i.e. articulate and conscious knowledge of that which every capable lawyer knows but knows today only in inarticulate or semi-conscious form.

Jerome Frank, *Are Judges Human? Part I: The Effect on Legal Thinking of the Assumption that Judges Behave Like Human Beings*, 80 PENN. L. REV. 17, 33, 45 (1931).

23. *ACLU v. Clapper*, No. 13 F. Civ. 3994(WHP), 2013 WL 6819708 (S.D.N.Y. Dec. 27, 2013), available at <http://www.nysd.uscourts.gov/cases/show.php?db=special&id=364>.

24. *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013), available at <http://s3.documentcloud.org/documents/901810/klaymanvobama215.pdf>. I would also like to note here that both Judge Pauley and Judge Leon's opinions give substantial weight to the substantive legal arguments of the NSA bulk telephony metadata collection system, and analyze these accordingly. There are reasonable arguments on both sides of the issue, and my article does not claim to be a comprehensive account of these two highly detailed and thoroughly reasoned decisions.

25. *E.g.*, *Complaint, Muslim Comm. Assoc. of Ann Arbor v. Ashcroft*, 459 F. Supp. 2d 592 (S.D. Mich. 2003), available at <https://www.aclu.org/files/FilesPDFs/complaint%20final%20pdf.pdf>.

26. *Klayman*, 957 F. Supp. at 49. To be fair, he also analogizes the NSA bulk telephony data collection program to the Beatles. *Id.* at 38 ("To draw an analogy, if the NSA's program operates the way the Government suggests it does, then omitting Verizon Wireless, AT&T, and Sprint from the collection would be like omitting John, Paul, and George from a historical analysis of the Beatles. A Ringo-only database doesn't make any sense, and I cannot believe the Government would create, maintain, and so ardently defend such a system.").

27. In terms of connecting the issue to the citizenry and, moreover, to the media, we can only assume that Judge Leon knew what he was doing when using the phrase "almost Orwellian." Most major media outlets cited the "Orwellian" reference, and some even used it in the title of their articles on the decision. *See, e.g.*, Spencer Ackerman & Dan Roberts, *NSA Phone Surveillance Program Likely Unconstitutional, Federal Judge Rules*, THE GUARDIAN (Dec. 16, 2013), <http://www.theguardian.com/world/2013/dec/16/nsa-phone-surveillance-likely-unconstitutional-judge>; Philip Bump, *Judge Says NSA's 'Almost-Orwellian' Data Collection Likely Violates Constitution*, NATIONAL JOURNAL (Dec. 16, 2013),

Pauley's opinion commences and concludes by noting the September 11th terrorist attacks and how "dangerous and interconnected the world is,"²⁸ even quoting *Boumediene v. Bush* with regard to the reconciliation of liberty and security.²⁹ It additionally argues that the key to the Fourth Amendment is "reasonableness," stressing that citizens commonly volunteer personal information to transnational corporations for profit, which "is far more intrusive" than the government's metadata telephony collection system. From a psycholinguistic perspective it is difficult to read the decision, including the symbolic elements of the introduction and conclusion, and not think that patriotism comes into play in one form or another, especially in regard to trusting the government with a "reasonable" amount of personal information.

CONCLUSION

When evocative short titles began to proliferate in the early 1990s, nobody could have predicted that one tendentious title would have such a pronounced effect on a salient societal issue, and further, that this would take place in Supreme Court adjudication. The title of the Defense of Marriage Act, however, had such an effect. Now, Section 215 of the USA PATRIOT Act is under the microscope, and judges and commentators are bantering about "Orwellian" activities—something that would probably not have been mentioned had the law not been so provocatively and unscrupulously named.³⁰

It will certainly be interesting to see the rationales, symbolic and substantive, that the forthcoming appellate court decisions in New York and the District of Columbia provide, and whether some of the symbolic language

<http://www.nationaljournal.com/defense/judge-says-nsa-s-almost-orwellian-data-collection-likely-violates-constitution-20131216>.

Further, Judge Leon's comments are reminiscent of those made by former New York federal judge and U.S. Attorney General Michael Mukasey, who noted the following in a 2004 speech:

I think one would have to concede that the USA Patriot Act has an awkward, even Orwellian, name, which is one of those Washington acronyms derived by calling the law "Uniting and Strengthening America by Providing Appropriate Tools Required to Interrupt and Obstruct Terrorism." You get the impression they started with the acronym first, and then offered a \$50 savings bond to whoever could come up with a name to fit. Without offering my view on any case or controversy, current or future, I think that that awkward name may very well be the worst thing about the statute.

Peter Lattman, *Seven Things to Know About Michael Mukasey*, WALL ST. J. (Sept. 17, 2007), <http://blogs.wsj.com/law/2007/09/17/seven-tidbits-about-michael-mukasey> (quoting Mr. Mukasey).

28. *Clapper*, No. 13 F. Civ. 399 (WHP), at 1.

29. *See Boumediene v. Bush*, 553 U.S. 723, 798 (2008) ("Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.").

30. In addition to Mr. Mukasey's comments above, *supra* note 27, former President George W. Bush noted in his memoirs that he should have had Congress change the name before he signed it, further stating that it made the bill's opponents look unpatriotic. *See* GEORGE W. BUSH, DECISION POINTS 162 (2010).

coincides with that of the lower courts. Should the case ultimately reach the Supreme Court, as many commentators expect, it may prove difficult for the at-times garrulous justices not to comment on one of the most outlandish statutory titles in the history of the American Republic.