QUESTION I (50 POINTS -- 50 MINUTES)

In its decision in Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) (excerpted in the text at pages 581-91), the Supreme Court interpreted 46 U.S.C. 596 and held that the provision imposed a mandatory penalty on the owner or master of a vessel for each day that payment is withheld from a seaman in violation of the statute. In 1983, one year after the Court decided Griffin, Congress revised much of Title 46 of the United States Code. Specifically, Congress enacted Public Law 98-89, which repealed Section 596, the provision that the Court construed in Griffin, and replaced it, in relevant part, with 46 U.S.C. 10313(g). That newly enacted statutory provision states that:

"When payment is not made as provided [by the statute] without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed."

Legislative history that is relevant to Congress's intent regarding both the comprehensive amendment to Title 46 and the specific text of the provision at issue here is attached to this page. The attached excerpt is from the Report of the House Committee responsible for drafting the legislation enacted in 1983. You are a law clerk for a new member of the Supreme Court. In discussing the 1983 amendments to Title 46 with your employer, you have learned that the Justice is a former member of Congress, who was in Congress at the time Title 46 was amended. You have learned
that the legislative process related to the amendment of Title 46 was dominated by Congress's concern that it avoid substantial turmoil by refusing to consider any substantive changes in the law that would be controversial. Congress believed that any effort to make controversial changes in the substance of Title 46 would produce massive efforts by the well-organized lobbyists for seamen's unions and for shippers to change the law to favor one side or the other.

A dispute has now arisen about the meaning of the new statute in a specific context that has not yet been addressed by the Supreme Court. In this lawsuit, the seaman brought an action in federal court against the owner of a vessel. The seaman sought the pay that the seaman alleged had been withheld in violation of the statute and a penalty pursuant to 46 U.S.C. 10313(g). The owner asserted a defense to the claim that wages were illegally withheld, but also deposited the amount of the disputed wages with the district court in an attempt to toll the running of the period of the penalty in the event that the seaman prevailed on the claim of illegal withholding.

The district court concluded that the owner had improperly withheld the seaman's wages and that the period for the penalty should extend until the time that the wages were actually paid to the seaman. The court therefore held that the owner's depositing of the wages with the court did not toll the period of the penalty. This decision was affirmed by the court of appeals and the Supreme Court granted certiorari only on the question of whether depositing the withheld wages with the court tolls the period of the penalty. The courts of appeals had split on this issue in cases decided prior to the 1983 amendment to Title 46.

The member of the Supreme Court for whom you clerk has been assigned to draft an opinion construing section 10313(g). The Court is closely divided on the question of whether depositing withheld wages into the court should toll the penalty period given the terms of section 10313(g).

The Justice for whom you clerk first wants you to draft the most persuasive possible opinion that will reverse the court of appeals. She therefore wants you to draft a decision holding that payment of withheld wages with a court does toll the penalty period. She wants you to address all sources of law that are important in analyzing and deciding this issue. In this regard, she wants you to anticipate the arguments that will be made by the dissent and to present cogent rejoinders to any such arguments. (This first part of your assignment will be worth 40 points.)

Second, she requests that you present your own views about how the statute should be construed in this case. (This second part of your assignment will be worth 10 points.)

EXCERPT FROM THE HOUSE REPORT PUBLISHED IN 1983 ON THE BILL AMENDING TITLE 46

On September 23, 1983, the Subcommittee on Coast Guard and Navigation and the Subcommittee on Merchant Marine held a joint hearing on H.R. 7103 (the legislation introduced in the 97th Congress to revise title 46) to hear the general views as well as specific suggestions for improving the bill. The tone was of general support for the undertaking, but concern was expressed over specific changes that were being made by the bill. Interested parties were encouraged to supply the Committee with any suggestions for changes in the text, on any areas of concern. The procedure followed by the Committee in responding to objections raised by maritime groups to provisions in H.R. 7103 was to make H.R. 7103 more accurately reflect the provisions of existing law in any area where a legitimate objection was raised. Through many discussions and frequent meetings numerous changes were made to the text of H.R. 7103 and a new bill, H.R. 2247, was introduced in the 98th Congress. During the hearing held on April 28, 1983, several maritime groups again testified in favor of the goal of simplifying these laws, but had a few remaining problems with specific provisions in the bill. Once again, representatives of the maritime industry were encouraged to notify the Committee of any specific concerns they had. The same procedure was followed in responding to these concerns as was done in response to objections to H.R. 7103 in the 97th Congress and the Committee continued to work with maritime groups, carefully considering all suggestions. Numerous meetings were held among Committee staff and representatives of the maritime community, and scores of changes were made to more accurately reflect the provisions of existing law. The maritime community has been aware of and has actively participated in this revision of the maritime safety laws.
since 1980 when the project was in its initial stages within the Coast Guard. Provisions in the early draft that were objectionable have been removed or altered. The remaining substantive changes are deemed noncontroversial by virtue of the fact that there has been no objection raised to them during the two and one half years in which the maritime community has examined and commented on each successive draft.

It is the belief of the Committee that the provisions in S. 46 are expressed as clearly as possible. The ambiguities that characterized the collection of statutes that are repealed have been removed when it could be done without controversy. In those cases where there was a significant difference of opinion as to what the existing law provides and where there was objection to the resolution of the differences as proposed by the Committee, the provision was restated as closely as possible to the existing law. Thus, in those few cases, the ambiguity that exists in the law today is carried over into this bill. Each side of the controversy retains its right to argue for its interpretation. In some cases, however, the Committee did not agree with the contention that the law was ambiguous. In that situation, the Committee bill reflects its interpretation of the previous law as it should be applied in today's circumstances.

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It was the stated intention of the Committee in developing this bill to make no substantive changes of a controversial nature. That means that the Committee intended to make no substantive changes that were objected to by any affected party or that the Committee felt would be a significant change in maritime policy or that would adversely affect any rights, benefits, or duties of those impacted by this bill. The Committee wants to make it clear, however, that the bill as reported does in fact make a great many substantive changes to the present law. Those changes are all either minor changes, adjustments, or modifications, or they are more significant changes to which the Committee received no objection and which the Committee believed would enhance the clarity and effectiveness of the law and the [sic] generally accepted by the industry. Thus, if a comparison of the language of this bill with the existing law shows that a substantive change has resulted, it should be understood that that change was intended by the Committee. The Committee intends and hopes that the interpretation of the maritime safety laws as codified and enacted by this bill will be based on the language of the bill itself. The bill as reported, is based on that premise. There should, therefore, be little or no occasion to refer to the statutes being repealed in order to interpret the provisions of this bill. The Committee also feels, as the courts have held, that the literal language of the statute should control the disposition of the cases. There is no mandate in logic or in case law for reliance on legislative history to reach a result contrary to the plain meaning of the statute, particularly where that plain meaning is in no way unreasonable.

STANDARD CHANGES

Certain drafting conventions are used throughout the bill. Some of these are reflected in section 2101, "Definitions". The most significant of the other Standard changes are explained in the following paragraphs: As far as possible, the statute is stated in the present tense and in the active voice. When there is a choice of two or more words, otherwise of equal legal effect, the more commonly understood word is used. The word "shall" is used in the mandatory and imperative sense. The word "may" is used in the permissive sense, as "is permitted to" and "is authorized". The words "may not" are used in a prohibitory sense, as "is not authorized to" and "is not permitted to". The words "person may not" mean that no individual is required, authorized, or permitted to do the act. The words "any part of" means "all or part of" and "in whole or in part". The word "includes" means "includes but is not limited to". The word "considered" denotes the exercise of judgment. The word "deemed" is used where a legal fiction, or what may in some cases be a legal fiction, is intended. The word "is" is used for statements of fact. When a right is conferred, the words "is entitled" or their equivalent are used.

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QUESTION II (40 POINTS -- 40 MINUTES)

The Ethics in Government Act (EIGA) of 1978 requires Members of Congress (and others) to file annual financial disclosure statements generally detailing income, gifts, business transactions, and financial obligations for the year. The terms of the EIGA authorize the Attorney General to bring a court action against a Member of Congress who fails to file, or falsifies, a report under the EIGA, and the court may impose a civil fine in such an action for violations of the statute. The EIGA, however, contains no criminal penalties. The requirements of the EIGA have been incorporated in the House and Senate rules.
Congressperson Smith is alleged to have falsified her annual report under the EIGA. Two proceedings were commenced against Smith related to these alleged falsifications. First, in the House of Representatives, the House Committee on Standards of Official Conduct charged Smith with violations of the House rules, and, after proceedings prescribed in Committee and House Rules, the full House found merit in the allegations and censured Smith. In the next general election, Smith lost her seat in the House of Representatives.

Second, the U.S. attorney in the judicial district where Smith's congressional district was located asked a grand jury to return a criminal indictment against Smith. The federal prosecutor alleged that Smith had violated 18 U.S.C. 1001, which makes it a federal crime for a person "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully to make[] or use[] any false writing or document knowing the same to contain any false, fictional, or fraudulent statement or entry . . . ." The grand jury returned the indictment and, following a jury trial, Congressperson (by then former Congressperson) Smith was convicted of violating Section 1001 and was sentenced to jail.

Smith has appealed her conviction. Several Members of Congress have filed a brief as amicus curiae supporting Smith's statutory argument and arguing that Smith's suggested interpretation was intended by Congress.

1. Summarize and assess the strengths and weaknesses of Smith's argument that she has not engaged in conduct that is subject to a criminal penalty. Assume that there is no legislative history related to this issue. (20 points)

2. Discuss how a court should view the amicus curiae brief filed by the Members of Congress. Should the brief be viewed as good evidence of congressional intent?

3. Explain how you personally would decide the issue of statutory construction that is presented by Smith.

QUESTION III (30 POINTS -- 30 MINUTES)

In the provocative excerpt from his book entitled "A Common Law for the Age of Statutes" (pages 882-84 of the text), Dean Guido Calabresi makes two related comments that implicate much of the theory we have discussed during this semester. He states his view that "getting a statute enacted is much easier than getting it revised" and that, when defining the role that courts should play in interpreting statutes, one must "thoughtful[ly] allocat[e] the burden of inertia in a system of checks and balances which seeks both continuity and change."

1. Consider each of the three principal models of the legislative process that we have discussed throughout the semester. Choose one (and only one) of the three models and discuss how a thoughtful proponent* of that model would respond to Calabresi's view about the relative difficulty of enacting, as opposed to amending, legislation. Explain whether the proponent is likely to agree or disagree with Calabresi's view that it is easier to enact, than it is to amend, legislation. (15 points)

2. Choose a different one of the three principal models of the legislative process that we have discussed this semester and explain whether a proponent*/ of that model would agree or disagree with Calabresi's view that how one defines the role of courts in the process of interpreting statutes is principally determined by how one believes that the burden of inertia (or the burden of changing the status quo) should be allocated. Remember, for this second part of the problem, you should discuss one of the two models that you did not discuss in your response to the first part of this question. (15 points)

* For either or both parts of this question, you may wish to distinguish among different theorists who were characterized as proponents of the particular model you are discussing. That is, you may decide that not all proponents of the model you choose to discuss would take the same position regarding Calabresi's views. In that event, feel free to discuss the differences in the views of those who adhere to a particular model.