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Regents' Lectures

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Foreword: Regents' Lectures

by
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On behalf of the *International Tax & Business Lawyer* and the entire Boalt Hall community, I am pleased to introduce the *Regents' Lectures*[1] given by Dr. Lutz Krauskopf in October of 1990. The *Regents' Lectures* are given annually at the University of California at Berkeley by a renowned scholar on a topic or topics of significant interest. This year's lecturer and lectures certainly meet this standard of excellence.

Dr. Krauskopf is an internationally recognized expert in the field of criminal law generally and in the areas of insider trading, money laundering, organized crime, and banking law in particular. He is the Vice Director of the Federal Office of Justice of Switzerland and is in charge of negotiations between Switzerland and the European Community. He also serves as President of the Federal Commissions for New Legislation on Money Laundering, for Revision of the Bankruptcy and Penal Laws, and for Administrative Measures Against Organized Crime.

The topics entertained by Dr. Krauskopf are equally significant. Insider trading, money laundering, and mutual assistance and banking secrecy are all areas that have been hotbeds of legislative and judicial action in recent years, both in Switzerland and the United States. Dedicating a lecture to each of the three subjects, Dr. Krauskopf cogently describes the key Swiss developments in those areas and their impact on Swiss-American relations. In addition, he examines the historical contexts of these legal evolutions and revolutions. He ably demonstrates the "uniquely Swiss" characteristics of the applicable legislation. Finally Dr. Krauskopf, acting as a modern-day Nostradamus, offers interesting insights into the future of international efforts at solving the problems of insider trading, money laundering, and other forms of transnational crime.

While at first glance the three topics may seem separate and distinct, such is not the case. Instead, the lectures are largely a holistic enterprise. First of all, the three topics are all inexorably linked. The three involve issues of "white collar" crime. All three subjects are also the beneficiaries of recent

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1. Krauskopf, *Regents' Lectures: Comments on Insider Trading, Money Laundering, and Mutual Assistance and Swiss Banking Secrecy*, 9 INT'L TAX & BUS. L. 277, 277-300 (1991).

legislative action. Finally, as Dr. Krauskopf points out, each topic is ripe for international efforts at mutual assistance.

Moreover, several coherent themes emerge from a careful reading of the piece *qua* piece. The rest of this *Foreword* examines these general themes and their implications for Swiss and American law.

The first theme that arises in these *Regents' Lectures* is the inherent difficulty of the process of drafting and interpreting legislation on any subject. In his first lecture on insider trading, for example, Dr. Krauskopf discusses the difficulty involved in defining the phrase "confidential fact" under the Swiss Insider Bill ("Bill").[2] Dr. Krauskopf notes the dangers involved of merely enumerating the factual contexts of insider trading, particularly emphasizing the possibility of changed circumstances and future developments. He offers at least two plausible solutions to this legislative dilemma.

First, Dr. Krauskopf argues for a definition of "confidential fact" based on the concerns which the Bill is supposed to address.[3] Second, he seeks to define this and other terms in the Bill by reference to a form of legislative history. Specifically, he refers to a Message from the drafters of the Bill to the Swiss parliament in interpreting the Bill.[4]

Elsewhere in the article, however, Dr. Krauskopf examines and embraces more express definitions of statutory terms. In connection with insider trading, he describes the explicit definitions of persons covered by the Bill.[5] In fact, Dr. Krauskopf demonstrates that such an express definition of offenders is required by civil law traditions. Later in the piece, he offers four theoretical definitions of "money laundering," all of which are fairly direct.[6]

What is one to make of this mixture of textual, historical, and purposivistic definition in Swiss legislation and interpretation? If Dr. Krauskopf offers no clear and comprehensive answer to this question, it is not a condemnation of his commentary. Instead, the morass of definitional choice in Swiss fiscal legislative and interpretive efforts is simply reflective of a growing conflict amongst different methods of drafting and interpreting any statute.

Nowhere is this debate of drafting and interpreting statutes more evident than in the United States government, particularly the United States Supreme Court. Until several years ago, what I have described elsewhere as a "traditional model of statutory interpretation"[7] dominated the American legal culture. This conventional method embodied, in effect, a "more is better"

2. *Id.* at 277 n.1.

3. *Id.* at 279.

4. *Id.* at 279 n. 5.

5. *Id.* at 281.

6. Id. at 286.

7. Stone, *The Use of Congressional and Executive History in Statutory Interpretation: A New Synthesis* 6-12 (1990) (unpublished) (manuscript on file with ITBL)

approach, recommending the use of a variety of historical materials[8] and ready recourse to concepts of legislative purpose[9] in interpreting statutes. Critics of this methodology could be found only on the outliers of legal scholarship.[10]

This traditional method, however, has come under recent attack in the hallowed halls of American government and law. In the United States Supreme Court, Justice Antonin Scalia and several of the other Justices have led a resurgence of a simpler method of interpretation.[11] These "textualists"[12] have offered both persuasive criticisms of the traditional interpretive regime and an alternate, affirmative method of construction based largely, though not entirely, on the "plain-meaning" of statutory text. This development has led one commentator who had previously declared the "plain-meaning rule" a dead letter[13] to recently write that "my funeral ceremony in 1983 for the Plain Meaning Rule was premature . . . there now exists a fully articulated and quite aggressive assault in the Supreme Court on the use of legislative history in construing statutes."[14]

Underlying the *Regents' Lectures*, therefore, is a serious tension between different visions of legislative drafting and interpretation. The *Regents' Lectures* are not an attempt at solving this conflict; rather, they are significant as an example of this debate and its comprehensive and international character. Moreover, Dr. Krauskopf's commentary demonstrates how these theories of interpretation play out in the real world of politics. In particular, the piece

8. For a discussion of the different types of historical materials used in statutory interpretation, see Costello, *Average Voting Members and Other "Benign Fictions:" The Relative Reliability of Committee Reports, Floor Debates and Other Sources of Legislative History*, 1990 DUKE L.J. 160; Dickerson, *Statutory Interpretation: Dipping Into Legislative History*, 11 HOFSTRA L. REV. 1125 (1983); Note, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 COLUM. L. REV. 157 (1989).

9. The case for the use of statutory purpose in construction is best made in H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW 1144-47 (tent. ed. 1958).

10. *See, e.g.*, R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (1975).

11. *See, e.g.*, Green v. Bock Laundry Mach. Co., 109 S. Ct 1981, 1994 (1989) (Scalia, J., concurring); Public Citizen v. U.S., 109 S. Ct. 2558, 2573 (1989) (Kennedy, J., dissenting). Judicial advocates of strict construction are not limited to the Supreme Court, but can also be found in the United States Court of Appeals for the Seventh, Ninth, and District of Columbia Circuits. *See, e.g.*, U.S. v. Nofziger, 878 F.2d 442, 447-49 (D.C. Cir.) (Buckley, J.) cert. denied 110 S. Ct. 564 (1989); In re Sinclair, 870 F.2d 1340 (7th Cir. 1989) (Easterbrook, J.); Wallace v. Christensen, 802 F.2d 1539, 1559-60 (9th Cir. 1986) (Kozinski, J.). Other branches of American government are also reexamining their processes of statutory construction. *See* UNITED STATES DEPARTMENT OF JUSTICE OFFICE OF LEGAL POLICY, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION (1989).

12. This is the term used by Professor William Eskridge of Georgetown to describe this methodology. *See* Eskridge, *The New Textualism*, 37 U.C.L.A. L. REV. 621 (1990).

13. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983).

14. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U.L. REV. 277, 281 (1990).

shows that different statutes (and even different provisions within a single statute) may embody different approaches of drafting and interpretation.

A second recurring theme in the *Regents' Lectures* is a comparison of the Swiss civil law and the American common law traditions. As the first theme I have described emphasizes the similarity of drafting and interpretation in Switzerland and the United States, this second theme concentrates on systemic differences between the two nations. Dr. Krauskopf expressly details these differences in his discussion of mutual assistance and Swiss banking secrecy.[15] He concludes that "there are fundamental differences between continental-European law and Anglo-Saxon common law . . . [t]hese differences make mutual assistance difficult between the United States and Switzerland."[16]

Differences between the two systems are also presented implicitly throughout the piece. For example, the secret nature of the civil law based Swiss banking system can be compared with the more open banking system of the United States. As Dr. Krauskopf points out, Swiss banking secrecy can be lifted primarily by way of governmental action.[17] In contrast, American law does not differentiate as much between governmental and private requests for disclosure, at least in the context of a lawsuit. This difference may be due, at least in part, to the fact that civil law itself differentiates between governmental and private interests, while the distinction is less dramatic in common law nations.

Thus, the *Regents' Lectures* demonstrate both similarities and differences in American and Swiss law and policy. The universal difficulties of statutory drafting and interpretation are presented in the piece. At the same time, the work illustrates significant differences between the Swiss civil law and the American common law schemes.

Finally, a third general theme underlies the *Regents' Lectures* and is worthy of note. Clearly emerging from the commentary is the idea that these pieces of Swiss legislation are a unique blend of national practices and historical experiences with international concerns. Dr. Krauskopf speaks directly to this national and transnational admixture in his concluding remarks on insider trading.[18] In that lecture, Dr. Krauskopf notes that the Bill is not merely a *lex americana*, but rather, embodies many uniquely Swiss concepts. Still, he acknowledges that the international community had some influence on the Bill.[19] Furthermore, Dr. Krauskopf describes the influence of international concerns on both Swiss money laundering and mutual assistance provisions.[20]

15. *See* Krauskopf, *supra* note 1, at 291.
16. *Id.*
17. *Id.* at 298.
18. *Id.* at 285.
19. *Id.*
20. *Id.* at 290, 299-300.

In addition to direct influences on Swiss legislative efforts, the *Regents' Lectures* also show some ways in which the international community has had an indirect effect on Swiss law. Specifically, American law concepts can be found in many of the Swiss provisions described by Dr. Krauskopf. For example, the "personal benefit" concept contained within the Swiss Insider Bill[21] can be traced directly to American securities law.[22] Similarly, the liability imposed on tippees by article 161(2) of the Insider Bill requires both a breach by the tipper and knowledge of that breach by the tippee.[23] This concept, too, mirrors American case law on insider trading.[24] Thus, a third theme emerging from the *Regents' Lectures* is the extent to which American law and American government have influenced the Swiss legal system.

In conclusion, I am quite pleased to introduce to our *International Tax and Business Lawyer* readers Dr. Krauskopf's *Regents' Lectures*. Taken separately, these lectures constitute an informative exposition on three significant topics of national and international law. Dr. Krauskopf's discussion of insider trading, money laundering, and mutual assistance and banking secrecy is both detailed and coherent. As such, this piece forms a strong, steady bridge for understanding these legal subjects.

Taken as a whole, the *Regents' Lectures* reflect three themes that are important for any scholar. First, the piece proves to be a valuable example of the difficulty of statutory drafting and interpretation in a variety of legal contexts. Second, the work helps to illustrate and explore the differences between the civil law and common law systems. Finally, the *Regents' Lectures* show the influence, both direct and indirect, that the international community and international law can have on the formation of national law. Thus, the *Regents' Lectures* demonstrate that our world is simultaneously similar and different, independent and interdependent.

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21. *See id.* at 282.

22. *See* Dirks v. Securities and Exchange Commission, 103 S. Ct. 3255 (1983) (holding that a tipper breached his duty and violated Rule 10b-5 by disclosing material, non-public information with the purpose of obtaining a "personal benefit"). *See also* Securities and Exchange Commission v. Texas Gulf Sulphur, 401 F.2d 833, 848 (2d Cir. 1968), *cert. denied* 394 U.S. 976 (1969).

23. Krauskopf, *supra* note 1, at 282-83.

24. *See, e.g., Dirks*, 103 S. Ct. at 1360-67; United States v. Chestman, 903 F.2d 75 (2d Cir. 1990).