APPENDIX A

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RATIFICATION OF THE SIXTEENTH AMENDMENT

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May 20, 1985

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RATIFICATION OF THE SIXTEENTH AMENDMENT

This report has been prepared in response to recent allegations that the sixteenth amendment is unconstitutional because it was improperly ratified by a number of states. Specifically, it is said that the resolutions of these states contained variations in punctuation, capitalization, or wording and that, for this reason, the sixteenth amendment is null and void. The report does not attempt to rebut specific factual allegations, but is focused on the conclusions of law. While much of our discussion centers around cases involving statutes, the central issue is also common to the issue of proper ratification of a constitutional amendment. When the appropriate officials have by the appropriate formal means indicated that a statute has been passed or a constitutional amendment ratified, what is the effect of that enrollment or certification of ratification? The reasoning of the judiciary in statutory cases is applicable and has been, as our discussion below indicates, applied to ratification challenges.

The basic rule under both English and American common law has been that "the enrolled bill was conclusive evidence of statutory enactment and that no other evidence was admissible to establish that the bill was not lawfully enacted."[1] That basic rule has long been applied in our (CRS-2) federal courts,[2] as well as a substantial number of

[1]Sutherland Statutory Construction § 15.03.

[2]*Field v. Clark*, 143 U.S. 649 (1892); *United States v. Ballin*, 144 U.S. 1 (1892); *Harwood v. Wentworth*, 162 U.S. 547 (1896).

state courts.[3] The rationale for this conclusive presumption is outlined in the Supreme Court's opinion in *Field v. Clark*. There the Court noted that an enrolled bill is signed by the Speaker and President of the Senate, an attestation that it has passed Congress as signed, and when the President signs, it also indicates his attestation that the measure was properly passed by Congress. "The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated."[4] Generally, because of the manner in which legislative journals have been kept, the courts have considered them less reliable than authenticated, enrolled bills.[5] Further, it was believed that allowing the journal to be used to authenticate the passage of bills would encourage manipulation of the journals and lead to uncertainty.[6]

The conclusive presumption rule of *Field v. Clark* has also been applied when attempts were made to have the nineteenth amendment declared invalid on various grounds, including a claim that it had not been pro- (CRS

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[3] *See, e.g.*, California—*Sherman v. Story*, 30 Cal. 253 (1866); *Spaulding v. Desmond*, 188 Cal. 783 (1922); *Taylor v. Cole*, 201 Cal. 327 (1927); Delaware—*Wilmington Savings Fund Society v. Green*, 288 A.2d 273 (Del. Super. 1972); Maine—*Weeks v. Smith*, 81 Me. 538 (1889); Mississippi—*Riley v. Ammon*, 143 Miss. 861 (1926); Washington—*Citizens Council Against Crime v. Biork*, 84 Wash. 2d 891 (1975).

[4] 143 U.S. 649, 672 (1892).

[5] *Id.* at 673-674.

[6] *Id.* at 674-675.

-3) perly ratified by a number of states. In rejecting this contention the Supreme Court said:[7]

> . . . The proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed Amendment was ratified by the legislatures of thirty-six States, and that it "has become valid to all intents and purposes as a part of the Constitution of the United States." As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so was conclusive upon him, and being certified to by his proclamation, is conclusive upon the courts. The rule declared in *Field v. Clark*, 143 U.S. 649, 669-673, is applicable here. See also *Harwood v. Wentworth*, 162 U.S. 547, 562.

Present federal law as interpreted and applied by the judiciary conclusively presumes the validity of ratification, where that ratification has been authenticated by the appropriate official, now the Administrator of General Services and formerly the Secretary of State. That certification is conclusive upon the courts and the courts will not consider external evidence, including legislative journals, on the question of authenticity. Thus, in the context of the present day dispute over the sixteenth amendment, if the rule applied in *Field v. Clark* and *Leser v. Garnett* is followed, the ratification would be held valid, and evidence of variations in form, spelling etc. taken from state legislative journals could *not* be used to dispute its validity. The ratification of the sixteenth

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[7] *Leser v. Garnett*, 258 U.S. 130, 137 (1922). *See also: Coleman v. Miller*, 307 U.S. 433 (1939), especially the concurring opinion of Justice Black at 456.

amendment was certified by Secretary of State Philander C. Knox on February 25, 1913.[8]

(CRS-4) Even if one accepts the view taken in more recent years in some state courts,[9] that an enrolled bill is *prima facie* and not conclusively valid, there is little reason to believe that after enforcing and applying the sixteenth amendment for nearly three-quarters of a century the courts would find persuasive, arguments based on differences in punctuation, capitalization, spelling or wording. The basic rule is:[10]

> Variations in spelling of immaterial and unimportant words which occur between the journal and the enrolled bill do not invalidate the act. In such cases the rule of de minimis applies in favor of the enrolled bill. Likewise the fact that references in the journal are confused or inconsistent will not invalidate the act.

Acceptance of the argument that the sixteenth amendment is null and void because of these types of differences could lead to legal and constitutional chaos. It seems probable, for instance, that the same argument could be made against the validity of the Constitution

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[8] 37 Stat. 785.

[9] See, e.g., *Lafferty v. Huffman*, 99 Ky. 80 (1896), applying the conclusive presumption rule which was followed until *D & W Auto Supply v. Department of Revenue*, 602 SW2d 420 (Ky. 1980), when the prima facie view was accepted. In making the change the Kentucky court expressed its view that with modern communications equipment and techniques, keeping an accurate record of legislative activity was not as big a problem as it had been when the conclusive presumption was adopted.

[10] 1 Sutherland Statutory Construction § 15.17, footnotes omitted.

itself. We examined the Department of State, *Documentary History of the Constitution of the United States of America 1786-1870* (1894). While these are reprints and not the originals, nevertheless, there appear to be sufficient variations in spelling, punctuation, and capitalization among reprinted documents of the ratifying states to find the Constitution null and void, if the law (CRS-5) adopted the view of those urging the sixteenth amendment's invalidity. Where the reprinted documents included a copy of the Constitution,[11] a number of differences appear. For example, while in the original the word powers in Article I, § 1 was capitalized, the versions contained in the reprinted ratification documents of Pennsylvania, New Jersey, Georgia, and South Carolina did not capitalize powers. The Maryland version of Article I, § 1 capitalized legislative, whereas the original apparently did not. A comparison of the first clause of Article I, § 2 also shows considerable variation in capitalization. Thus, for example, in the reprinted Georgia version a number of words capitalized in the original were not capitalized, including members, people, electors, branch, states and state. The New Jersey version of this clause did not capitalize member, people, states, electors, and its version of the preamble contains a different spelling of the words insure and domestic (ensure and domestick). These examples illustrate the potential basis for finding ratification of the Constitution itself invalid if form is exalted over substance and the acquiescence of

[11] In some cases, e.g. Connecticut, the reprinted documents did not include a copy of the constitution. We conducted only a limited examination of some of those where the constitution was reproduced in the documents.

history ignored. The entire legal system could be jeopardized because of clerical errors, none of which suggests that in ratifying the Constitution or the sixteenth amendment the participants did not know what they were doing; that they did not know in ratifying the sixteenth amendment that they were giving Congress constitutional power to tax in(CRS-6)come from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

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May 20, 1985