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Should Reading Legislative History Be an Impeachable Offense?*

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Suppose Congress passes an omnibus revision of the Criminal Code. Hidden within the interstices of this massive bill is little-noticed 18 U.S.C. § 666 which provides as follows: "It shall be unlawful for any federal judge to consult legislative history in interpreting a federal statute. Anyone convicted of violating this section shall be imprisoned for a period not to exceed five years, fined a sum not to exceed $100,000, or both."

Where did this section come from? It turns out that Hamilton Madison, the United States Attorney for the Southern District of New York, joined the Federalist Society in law school and was persuaded there, upon reading the writings of Scalia, Easterbrook and Kozinski, that judges who rely on legislative history commit treason against the Constitution. He lobbied long and hard for such legislation; finally, he convinced a friend who worked for the Senate Judiciary Committee to slip it into the pending crime bill, where it stayed until the bill was voted out of Congress and signed into law by the President.

Shortly after the bill's passage, Judge Erudite Toe of the Southern District puts the finishing touches on what he considers to be his life's work—a multi-volume treatise on an obscure federal statute known as the Hamster and Gerbil Protection Act (HGPA). Naturally, Judge Toe cites long portions of the HGPA's legislative history in his treatise. Just as naturally, Judge Toe then issues an opinion dealing with the HGPA, citing nothing but his own treatise as a source of authority.

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* This article is based upon a speech that Judge Kozinski delivered on February 19, 1998 as part of the Donahue Lecture Series. The Donahue Lecture Series is a program instituted by the *Suffolk University Law Review* to commemorate the Honorable Frank J. Donahue, former faculty member, trustee, and treasurer of Suffolk University. The Lecture Series serves as a tribute to Judge Donahue's accomplishments in encouraging academic excellence at Suffolk University Law School. Each lecture in the series is designed to address contemporary legal issues and expose the Suffolk University community to outstanding authorities in various fields of law.

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Madison seizes this opportunity to strike a blow for textualism: With television cameras rolling and Klieg lights shining, Deputy United States Marshals break down the door to Judge Toe's chambers and put him in handcuffs. They also take large quantities of evidence, including several volumes of U.S.C.C.A.N., the Congressional Record and notes of Judge Toe's conversations with Committee staffers involved in passing the HGPA. Judge Toe is brought to trial and quickly convicted on two counts—one involving his treatise, the other his opinion.

On appeal, Judge Toe's lawyer, Professor Larry Wigwam of Harvard Law School, argues that the statute really doesn't mean what it appears to say. He starts by quoting from the report of the House Committee on the Judiciary, which contains only one reference to section 666: "We assume this section was intended as a joke by our mirthful colleagues in the other body and it will be deleted at Conference." The Senate Report is silent, but the Conference Report includes the following passage: "The Senate version of the bill contains section 666, but the House version of the bill does not. The Senate yields to the House and the section will be deleted." The bill reported out of committee, however, still included the section. Wigwam also cites a colloquy on the floor of the Senate between the Chairman of the Judiciary Committee and another senator. When that section is pointed out to him, the Chairman states that "since interpretation is the province of the courts, this section will have no effect whatsoever."

Naturally, the judges hearing Judge Toe's appeal refuse to look at all this legislative history. The per curiam opinion explains, rather, that the statute is crystal clear and there is no room for illumination by way of secondary materials such as legislative history; for that reason none of the judges or their staffs, or anyone connected with them in any way, has read the legislative history. A concurrence by one judge notes that whether the statute is clear or not, legislative history (which this judge has not read in years and never inhaled) can be used only to clarify a statute, not to negate its effect altogether.

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Judge Toe and his troubles may seem entirely fanciful, but the problem his case presents is not all that different from the close questions of statutory interpretation federal courts—and I am sure the state courts as well—face every day. In an age when legislation is passed by the pound, when congressional staff numbers something like 18,000,[1] and when

1. *See* THE WORLD ALMANAC OF U.S. POLITICS 61 (Robert J. Wagman & Angela E. Lauria eds., 1997-1999). The House and Senate had a combined total staff of 2,030 in 1947. *See id.* By 1997, this number increased to 11,500 in the House and about 6,500 in the Senate. *See id.*

elected officials spend inordinate chunks of time raising funds for their next election, it is not at all unusual that absurd, inconsistent, vague or contradictory provisions make their way into the statute books.[2] It is easy to see how this happens when you consider Congressman Chris Cox's description of the Budget Reconciliation Act of 1989:

> Last Wednesday . . . [l]iterally in the dark of night, the House and Senate rushed through their final recorded vote on the massive Budget Reconciliation Act. . . . So voluminous was this monster bill that it was hauled into the chamber in an oversized corrugated box. Its thousands of pages, which the clerk hadn't even time to number, had to be tied together with rope, like newspapers bundled for recycling. While reading it was obviously out of the question, it's true that I was permitted to walk around the box and gaze upon it from several angles, and even to touch it.[3]

Mammoth bills, the press of time, the complexity of modern life, have made it more and more difficult for Congress to produce legislation that provides a clear and unambiguous solution to all the problems it is seeking to address.[4] The problem of drafting ambiguity is as old as statutory law itself, but it is fair to say that it has become more serious in the last half century.[5] Congress has tried to deal with this problem by giving the courts guidance on how to interpret the statutory text through extensive

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2. *See* David Lauter, *Inouye Creates Refugees, Aids Them: Bizarre Riders Added to Vital Spending Bills*, LOS ANGELES TIMES, Jan. 9, 1988, at 23 (reviewing absurdity of congressional spending). One such example can be found in the fine print of the 1988 appropriations bill. *See id.* Without anyone noticing until weeks later, Senator Inouye of Hawaii allocated $8 million in federal funds "to help a group of Jews from North Africa run private schools in France." *Id.* After public outcry, Congress went back and repealed the provision. *See* Janet Hook & Glen Craney, *Until 1980s Congress Rarely Repealed Its New Laws*, 48 CONG. Q. WKLY. REP. 2681, 2681 (1989) (noting negative publicity forced Senator Inouye to request repeal of $8 million appropriation).

3. Rep. Christopher Cox, Editorial, *The Con Game We Call Congress: In The Still of the Night, Members Raised Pay, Raided Treasury*, THE ORANGE COUNTY REG., Nov. 26, 1989, at G03.

4. *See* Richard Doernberg & Fred McChesney, *Doing Good or Doing Well? Congress and the Tax Reform Act of 1986*, 62 N.Y.U. L. REV. 891, 895-96 (1987). Tax legislation provides just one example. In the past thirty years, Congress has revised, "fixed up", the Tax Code at an unprecedented rate. *See id.* In 1969, Congress changed only 271 subsections of the Internal Revenue Code; in 1984, Congress felt the need to revise 2,245 Code provisions. *See id.*

5. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 172-78 (1803) (construing ambiguous section 13 of Judiciary Act of 1789). Of course, the problem is much older than this. Consider the problems Moses must have run into interpreting the Ten Commandments: Does "Thou Shalt Not Kill" include mosquitos? Exactly how does one "Keep the Sabbath Holy?" When does keeping quiet count as "Bearing False Witness?" And, "Thou shalt not make *for yourself* . . . any likeness of anything that is in heaven . . . ," (emphasis added) but what if someone draws a bird for his neighbor? *See Exodus* 20:2-17. Pity Moses, who had to manage without any legislative history at all, and no possibility of clarifying amendments in later sessions of the legislature. His descendants had to come up with a different solution: The Talmud. The problem is more serious, but the consequences are—perhaps—less severe. According to *Exodus* 20:5, those who don't get the Commandments right risk iniquity for four generations. Harsh.

legislative histories. While committee reports and hearing transcripts are now so common that hardly a piece of federal legislation comes into being without its own printed legislative record, this was not always so. One given the thankless task of interpreting most statutes passed before the 1940s finds precious little legislative history to use for guidance: Committee reports are cursory or nonexistent, floor statements are unilluminating and there is hardly any indication whether there even *were* hearings, much less a list of who testified or a transcript of what they said.[6] Of course, very important pieces of legislation, such as the Civil Rights Act of 1871, were hotly debated, and the record of these debates gives important clues as to what concerned the legislators.[7] Even then, however, there was usually nothing specifically intended to influence the way courts would (or should) interpret the statute.

Times have changed. Committee reports are written and floor statements are often made for the very purpose of influencing the courts.[8] The practice of consulting legislative history was originally controversial,[9] but starting in the 1960s the Supreme Court threw caution to the wind and embraced legislative history as a concomitant of statutory interpretation. The language of the statute and the assembled legislative materials came to be treated as an important clue to divining legislative intent. In *Train v. Colorado Public Interest Research Group*,[10] the Court went so far as to hold that interpreting the Clean Water Act without looking at its legislative history was reversible error. Much of this, I believe, was driven by a genuine effort to figure out what the legislature had in mind when it

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6. *See* American Tel. & Tel. Co. v. M/V Cape Fear, 967 F.2d 864, 871 (3d Cir. 1992) (reviewing legislative history of Submarine Cable Act). Not too long ago, the Third Circuit bemoaned the "scant legislative history and little printed record of the evolution of the" Submarine [not Television] Cable Act of 1888, ch. 17, 25 Stat. 41 (codified as amended at 47 U.S.C. §§ 21-39 (1988)). *See id.* The Second Circuit confronted the same problem in interpreting the Carmack Amendment to the Interstate Commerce Act of 1887, passed as part of the Hepburn [no relation to Audrey] Act, ch. 3591, 34 Stat. 584 (codified at 49 U.S.C. § 11707(a)(1)), noting that "no legislative history accompanied the Amendment. It was adopted without discussion or debate." Cleveland v. Beltman North Am. Co., 30 F.3d 373, 377 (2d Cir. 1994). What a pity!

7. *See* CONG. GLOBE, 42d Cong., 1st Sess., 50 (statement of Rep. Kerr in opposition); *id.* at 68 (statement of Rep. Shellaburger in favor); *id.* at 74-77 (various statements in opposition).

8. *See* Mark Filip, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1007 (1992).

9. *See* Schwegmann Bros. v. Calvert Distillus Corp., 341 U.S. 384 (1951) (illustrating differing views of Justices Jackson and Frankfurter). Justice Jackson states: "For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation." *Id.* at 396 (Jackson, J., dissenting). Justice Frankfurter states (following an extensive discussion of the legislative history of the Miller-Tydings Amendment): "Where both the words of a statute and its legislative history clearly indicate the purpose of Congress, it should be respected. We should not substitute our own notion of what Congress should have done." *Id.* at 402 (Frankfurter, J., dissenting).

10. 426 U.S. 1 (1976).

passed statutes, but some of it was certainly the machinations of an activist judiciary seeking to expand the scope of federal statutes well beyond, and often contrary to, the expectations of the drafters.[11]

There is a well-known theory in economics called the tragedy of the commons which predicts that every time you build a new freeway you actually increase congestion because people are encouraged to buy more cars.[12] So too with legislative history. When legislators realized that courts would pay attention to the legislative record in interpreting statutes, they became somewhat promiscuous in using it as a tool for influencing the interpretive process.[13] Soon, it became quite common to have legislative history used in lieu of statutory language. One scenario: During the course of the legislative process a legislator becomes aware that the statutory language under consideration does not do exactly what he had hoped it would—perhaps it even does the precise opposite. Rather than going through the rigors of amending the statutory language, he will insert language into a committee report, or even just make a floor statement, that if given effect, severely limits or contradicts the statutory language. I could give dozens of examples of this, but I will limit myself to two.

The first involves a totally boring housekeeping statute—something few people even in Washington know or care much about. As you've probably guessed, I am talking about 28 U.S.C. § 1491(a)(3), enacted by the Federal Court Improvements Act of 1982[14] (and repealed by the Administrative Dispute Resolution Act of 1996,[15] but that comes later). This section provides: "To afford complete relief on any contract claim brought before the contract is awarded, [the United States Claims Court] shall have *exclusive* jurisdiction to grant declaratory judgments and . . . equitable and extraor-

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11. *See, e.g.*, Ruiz v. INS, 838 F.2d 1020 (9th Cir. 1988). *In Ruiz*, the court wanted to award attorney's fees to prevailing parties in deportation hearings. *See id.* at 1022-23. Unfortunately, the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 and 28 U.S.C. § 2412, allowed fees only for adversary adjudications under 5 U.S.C. § 554, and deportation proceedings are not governed by section 554. *See id.* The court surmounted this minor obstacle by noting, "[W]e may still look to the legislative history if the plain meaning of the words is at variance with the policy of the statute as a whole or to see if there is clearly expressed legislative intention contrary to the language." *Id.* at 1023 (internal citations and quotation marks omitted). Not surprisingly, the court found what it was looking for, and concluded that EAJA's legislative history and general purpose both supported a broad grant of attorney's fees, and allowed them. *See id.* at 1023, 1026. The Supreme Court flatly rejected this holding three years later: "In this case, the legislative history cannot overcome the strong presumption that the legislative purpose is expressed by the ordinary meaning of the words used." Ardestani v. INS, 502 U.S. 129, 136 (1991) (internal quotation marks omitted); *see also* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 218-19 (1994).

12. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244-45 (1968) (introducing theory of increased congestion).

13. *See* Filip, *supra* note 8, at 1015-17 (discussing this phenomenon).

14. Pub. L. No. 97-164, 96 Stat. 25, 39 (1982).

15. Pub. L. No. 104-320, 110 Stat. 3870 (1996).

dinary relief . . . ."[16]

Note that I emphasized the word exclusive. I think it is a pretty important word. Just reading this language, one would think Congress vested the awesome power of stopping the government from awarding contracts in the judges of the Claims Court and nowhere else. Enter the legislative history. In discussing this section, the House and Senate Reports explain that exclusive does not mean totally exclusive, but only sort of exclusive. This enlarged authority of the Claims Court "is exclusive of the Board of Contract Appeals and not to the exclusion of the district courts."[17]

Note that the committee reports here do not merely cast light on the statutory language; they recast the language altogether.

My second example is far more exciting, involving farmer bankruptcy conversions.[18] The Family Farmer Bankruptcy Act of 1986[19] established chapter 12 bankruptcies for farmers. The Sinclairs, farmers in chapter 11 bankruptcy when the statute was passed, petitioned the court to convert their proceeding to chapter 12. The plain language of the Act flatly prohibited conversion of any pending case;[20] however, the Conference Committee report said something entirely different: "[C]ourts will exercise their sound discretion in each case, in allowing conversions only where it is equitable to do so."[21] What is a court to do?

In light of these real-life examples, the hypothetical case of poor Judge Toe doesn't seem quite so far-fetched. Nor are these unusual cases; they are more or less typical. Nevertheless, they strike me as illegitimate uses of legislative history; they are efforts to make a substantive change in the law by means other than changing the statutory language. Not surprisingly, widespread misuse of legislative history to achieve substantive ends has precipitated a backlash. Led by Justice Scalia, a number of federal judges—I among them—have foresworn the use of legislative history as an interpretive tool.[22] The reasons for this have been examined at length elsewhere,[23] so I will only summarize them here:

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16. 28 U.S.C. § 1491(a)(3) (emphasis added) (repealed 1996). Stat. 3870, 3874-75 (1996).

17. H.R. REP. NO. 97-312, at 43 (1981). *See also* S. REP. NO. 97-275, at 23 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 33.

18. *See in re* Sinclair, 870 F.2d 1340 (7th Cir. 1989).

19. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (1986).

20. "The amendments made by [this Act] shall not apply with respect to cases commenced under title 11 of the United States Code before the effective date of the Act." Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 302(c)(1), 100 Stat. 3088, 3118 (1986).

21. *In re* Sinclair, 870 F.2d at 1341 (citing H.R. CONF. REP. NO. 99-958, at 48-49 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5227, 5249-50).

22. Mind you, U.S.C.C.A.N. volumes can be used as tools for other purposes: to prop open heavy doors, raise the seats of little children not quite tall enough to reach the table, even serve as firewood in a pinch. So there *are* legitimate uses of legislative history.

23. *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 137-95 (1975);

1. The two Houses and the President agree on the text of statutes, not on committee reports or floor statements. To give substantive effect to this flotsam and jetsam of the legislative process is to short-circuit the constitutional scheme for making law.

2. Collective intent is an oxymoron. Congress is not a thinking entity; it is a group of individuals, each of whom may or may not have an "intent" as to any particular provision of the statute. But to look for congressional intent is to engage in anthropomorphism—to search for something that cannot be found because it does not exist.

3. Even if there were such a thing as congressional intent, and even if it could be divined, it wouldn't matter. What matters is what Congress does, not what it intends to do. So, in our hypothetical case, it matters not that Congress intended to delete section 666 from the crime bill; what matters is what it did, and what it did was to pass the bill with the section included.

4. Even if the other obstacles could be overcome, reliance on legislative history actually makes statutes more difficult to interpret by casting doubt on otherwise clear language. This makes it much more difficult for people to conform their conduct to the law, as no one can tell what the law is until a court has weighed the language, the legislative history, the policy considerations, and other relevant information. This increases litigation costs and undermines the rule of law.

5. Legislative history is often contradictory, giving courts a chance to pick and choose those bits which support the result the judges want to reach. In Judge Leventhal's immortal phrase, consulting legislative history is like "looking over a crowd of people and picking out your friends."[24] This shifts power from the Congress and the President—who, after all, are charged with writing the laws—to unelected judges. The more sources a court can consult in deciding how to interpret a statute, the more likely the interpretation will reflect the policy judgments of the judges and not that of the political branches.

6. Allowing legislative history to do work that should be done by statutory language leads to political unaccountability. Members of Congress who reach an impasse can agree on murky language, then salt the legisla-

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U.S. DEP'T OF JUSTICE OFFICE OF LEGAL POLICY, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 45-57 (1989); Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161 (1996); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383 (1992); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371.

24. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

tive record with clues and hints hoping to shift the process of interpretation their way. Elected officials can thus achieve substantive results without having to take the political responsibility that would come from passing clear-cut statutory language.

7. Shifting important policy judgments to the courts brings the judiciary into disrepute and undermines the notion that judges apply the law objectively. When the public comes to understand that judges are simply unelected, life-tenured bureaucrats dressed in black, making policy decisions just like other government officials, the moral authority of the courts will be seriously undermined and popular obeisance to the courts' constitutional judgments will be jeopardized.

Alarmed by the reputation of what they see as a very useful—perhaps indispensable—tool for interpreting legislation, some judges and academics have launched a counterattack. The arguments in favor of relying on legislative history are discussed at length elsewhere,[25] so again I will merely summarize:

1. Legislative history is useful. Many statutes try to solve complex problems. In figuring out what a statute does, it is not merely helpful but downright crucial for a court to understand the problem the legislators were trying to solve.

2. To ignore legislative history is to thwart the will of Congress. Since Congress has chosen to communicate its intent through legislative history, courts are bound to take its direction in interpreting the statute.

3. There is no adequate substitute. There is no such thing as totally clear language; courts must always make judgments during the interpretation process. If those judgments are not made consistent with legislative intent, they will be made according to the judge's own personal predilections. Canons of construction are mutually contradictory and thus place no real constraint on judicial policymaking.

4. Congress depends on courts to correct drafting errors and avoid absurdities. By turning a blind eye to the legislative history, judges must rely entirely on their own judgment about whether a result is absurd. Forcing Congress to correct drafting errors before it passes statutes—or to go back and fix errors in earlier statutes—is useless formalism and puts an unwarranted burden on Congress.

5. Legislative history does, indeed, reflect the will of Congress. While

25. *See, e.g.*, ESKRIDGE, *supra* note 11, at 230-38; Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Patricia M. 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 (1990).

members of Congress are not involved in drafting committee reports, neither do they draft statutory language. The entire legislative package, consisting of the statutory text and the legislative record, is produced by congressional staff under the supervision of elected officials.

6. Using legislative history to correct shortcomings or errors discovered during the drafting process is an entirely legitimate way for Congress to deal with late discovered problems. The alternative would be to go through the difficult process of amending statutory language, thereby possibly jeopardizing the entire bill.

7. Statutes are complex, making it virtually impossible to come up with language that will satisfy everyone's concerns. It is far easier for Congress to note the problem and give general direction by way of legislative history than to come up with precise language that may or may not take care of all the cases that arise under the statute.

8. It is unfair to change interpretive methods when Congress has been counting on courts to interpret statutes with reference to legislative history.

Which of these two views is persuasive and which is bogus? To tell the truth, both sides express legitimate concerns. Though I ultimately come down on the side of the textualists, I recognize that many excellent illustrations support—and refute—each of the points made by both sides. Take, for example, the disagreement about whether committee reports reflect the intent of the full Congress or just the staff members who drafted the report. I remember very well when Congress passed the Federal Courts Improvement Act in 1982. As Chief Judge of the court in question (the court with the power to stop federal contracts dead in their tracks) I had numerous discussions with members of Congress and their staffs about the new statute. On the basis of those discussions it became pretty clear to me that the committee report told the truth—there was no one I could find who disagreed. Exclusive was, after all, not exclusive. And, in fact, 14 years later, after extensive controversy in the courts, resulting in a major circuit split and no fewer than twenty published opinions,[26] Congress did the

26. *See* Diebold v. United States, 947 F.2d 787, 805-06 (6th Cir. 1991); Cubic Corp. v. Cheney, 914 F.2d 1501, 1503 (D.C. Cir. 1990); J.P. Francis & Assoc., Inc. v. United States, 902 F.2d 740, 741-42 (9th Cir. 1990); Price v. United States Gen. Servs. Admin., 894 F.2d 323, 324 (9th Cir. 1990); Ulstein Maritime, Ltd. v. United States, 833 F.2d 1052, 1057-58 (1st Cir. 1987); Rex Sys., Inc. v. Holiday, 814 F.2d 994, 998 (4th Cir. 1987); *In re* Smith & Wesson, 757 F.2d 431, 435 (1st Cir. 1985); Coco Bros., Inc. v. Pierce, 741 F.2d 675, 678-79 (3d Cir. 1984); F. Alderete Gen. Contractors, Inc. v. United States, 715 F.2d 1476, 1478 (Fed. Cir. 1983); B.K. Instrument, Inc. v. United States, 715 F.2d 713, 721-22 (2d Cir. 1983); United States v. John C. Grimberg Co., Inc., 702 F.2d 1362, 1374-76 (Fed. Cir. 1983); Alaska Airlines v. Austin, 801 F. Supp. 760, 763 (D.D.C. 1992); North Shore Strapping Co., Inc. v. United States, 788 F. Supp. 344, 345-47 (N.D. Ohio 1992); Neeb-Kearney & Co. v. United States Dep't of Labor, 779 F. Supp. 841, 844 (E.D. La. 1991); Commercial Energies, Inc. v. Cheney, 737 F. Supp. 78, 79-80 (D. Colo. 1990); Arrow Air, Inc. v. United States, 649 F.

right thing and amended the statute to say exactly what it meant.[27]

Consider, on the other hand, this exchange on the floor of the Senate between Senator Armstrong and Senator Dole, the then-Chairman of the Senate Finance Committee on the Tax Equity and Fiscal Resposibility Act of 1982 (H.R. 97-4961):

> MR. ARMSTRONG: . . . My question, which may take [the chairman of the Committee on Finance] by surprise, is this: Is it the intention of the chairman that the Internal Revenue Service and the Tax Court and other courts take guidance as to the intention of Congress from the committee report which accompanies this bill?
> MR. DOLE: I would certainly hope so. . . .
> MR. ARMSTRONG: Mr. President, will the Senator tell me whether or not he wrote the committee report?
> MR. DOLE: Did I write the committee report?
> MR. ARMSTRONG: Yes.
> MR. DOLE: No; the Senator from Kansas did not write the committee report.
> MR. ARMSTRONG: Did any Senator write the committee report?
> MR. DOLE: I have to check.
> MR. ARMSTRONG: Does the Senator know of any Senator who wrote the committee report?
> MR. DOLE: I might be able to identify one, but I would have to search. I was here all during the time it was written, I might say, and worked carefully with the staff as they worked. . . .
> MR. ARMSTRONG: Mr. President, has the Senator from Kansas, the chairman of the Finance Committee, read the committee report in its entirety?
> MR. DOLE: I am working on it. It is not a bestseller, but I am working on it.
> MR. ARMSTRONG: Mr. President, did members of the Finance Committee vote on the committee report?
> MR. DOLE: No.
> MR. ARMSTRONG: Mr. President, the reason I raise the issue is not perhaps apparent on the surface, and let me just state it: . . . . The report itself is not considered by the Committee on Finance. It was not subject to amendment by the Committee on Finance. It is not subject to amendment now by the Senate.

Supp. 993, 997-98 (D.D.C. 1986); Caddell Constr. Co., Inc. v. Lehman, 599 F. Supp. 1542, 1546 (S.D. Ga. 1985); Rubber Millers, Inc. v. United States, 596 F. Supp. 210, 211 (D.D.C. 1984); ACME of Precision Surgical Co., Inc. v. Weinberger, 580 F. Supp. 490, 499-501 (E.D. Pa. 1984); Aero Corp. v. Department of the Navy, 558 F. Supp. 404, 409-10 (D.D.C. 1983); National Steel & Shipbuilding Co. v. United States, 8 Cl. Ct. 274, 275 (1985).

27. In the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870, Congress repealed 28 U.S.C. § 1491(a)(3) and replaced it with § 1491(b)(1), explicitly giving both the Court of Federal Claims and district courts jurisdiction over the relevant cases.

> . . .
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> If there were matter within this report which was disagreed to by the Senator from Colorado or even by a majority of all Senators, there would be no way for us to change the report. I could not offer an amendment tonight to amend the committee report.
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> . . .
>
> [F]or any jurist, administrator, bureaucrat, tax practitioner, or others who might chance upon the written record of this proceeding, let me just make the point that this is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute.[28]

In this case it is fair to say that the committee report did not reflect the views of all those who voted on the bill.

Let's consider one other set of countervailing examples. Justice Breyer in his 1990 article[29] discusses *Local Division 589 v. Massachusetts*.[30] The *Local Division 589* Court considered whether regulations requiring equitable treatment of certain transit employees implemented pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964[31] preempted state law.[32] As Justice Breyer notes,[33] the text of the statute did not answer the question, but there were two suggestive bits of legislative history: First, Secretary of Labor Willard Wirtz had testified about the draft bill and noted that, when drafted by the Department of Labor, it was not meant to be preemptive. Second, various senators raised the question of preemption on the floor; senators hostile to the bill asked whether it would be preemptive and senators supporting the bill responded that it would not. When it came time to decide the question, the First Circuit held against preemption. In Justice Breyer's words, "Secretary Wirtz's testimony, and the floor debate, seemed clear and definite, and they helped our court decide that the provision did not preempt the [state] law."[34]

Now in this case, the court seems to have accepted the representations in the legislative record, but a different court might have taken a more skeptical view. If preemption was an issue—something which the proponents and opponents cared about—why not embody it in a floor amendment? What assurance is there that members of the other body would be aware of this exchange at the time it voted; perhaps the people there had made just the opposite assumption? How about the President? Can he be

28. 128 CONG. REC. S16,918-19 (1982) (statements of Sens. Dole and Armstrong).
29. *See* Breyer, *supra* note 25, at 856.
30. 666 F.2d 618 (1st Cir. 1981).
31. 49 U.S.C. § 1609(c) (1994).
32. *See Local Division 589*, 666 F.2d at 620.
33. *See* Breyer, *supra* note 25, at 856-57.
34. *Id.* at 857.

deemed to be on notice as to this tiny exchange within the voluminous Congressional Record? Finally, even if everyone were aware of the facts, what mechanism is there for enforcing this off-the-cuff understanding; i.e., what assurance is there that a court will accept it as a definitive or even a persuasive interpretation of the statute?

The most famous counterexample here involves many statements made by Senator Hubert Humphrey during the debate on the part of the 1964 Civil Rights Act which eventually became Title VII.[35] Strong opposition to the bill arose from senators who suggested it would be interpreted so as to call for quotas and preferences, and that it would be used to upturn union seniority systems.[36] Senator Humphrey, the bill's principal sponsor, made numerous statements flatly contradicting those suggestions: "Title VII prohibits discrimination. In effect, it says that race, religion, and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion."[37] "Race shall not be a basis for making personnel decisions."[38] Fifteen years later, after Senator Humphrey was dead, his words played a pivotal role in the Supreme Court's decision in *United Steelworkers of America v. Weber*.[39] The *Weber* court examined whether Title VII prohibits private employers from implementing affirmative action plans; the majority, per Justice Brennan, said it does not.[40] In a strongly-worded dissent, Justice Rehnquist cited Senator Humphrey's floor statements extensively[41] and concluded that the majority was not faithful to Senator Humphrey's representations as to what Title VII means.[42]

Was the First Circuit right in *Local Division 589* to rely on floor statements the bill's sponsors made in response to criticism from opponents? Was the Supreme Court in *Weber* right in relegating such statements to a footnote?[43] It's hard to tell. And that, precisely, is the problem. The process of statutory interpretation has no fixed rules and no agreed-upon standards. It is as if the various participants—the 535 members of Congress, the President, the 900 or so federal judges and justices—all speak a

35. *See* 110 CONG. REC. 5092, 5094, 5423, 6547, 6548, 6549, 6552, 6553, 7204, 11,848 (1964) (statements by Senator Humphrey).

36. *See id.* at 5094.

37. *Id.* at 6549.

38. *Id.* at 6553.

39. 443 U.S. 193 (1979).

40. *See id.* at 208 (holding Title VII "does not condemn all private, voluntary, race-conscious affirmative action plans."); *id.* at 202, 203, 204 & n.4, 207 n.7, 208 (citing statements of Senator Humphrey).

41. *See id.* at 228, 236 & n.15, 237 & n.17, 238, 242 n.20, 243, 248 n.28 (Rehnquist, J., dissenting).

42. *See id.* at 254-55 (Rehnquist, J., dissenting).

43. *See id.* at 207 n.7.

somewhat different language. In this Babel-like atmosphere it is difficult to tell just what Congress wants the courts to hear, and whether, if they hear it, they will interpret the message as Congress intended. Right now there are one, perhaps two, Supreme Court Justices who refuse to join any opinion that relies on legislative history.[44] Other justices revel in it.[45] Some federal judges think it is an abomination; others the holy grail. This is not a question of ideology or bad faith—as is sometimes alleged by the two sides when they point fingers at each other—any more than using English as a common language is a matter of ideology or bad faith. It is a matter of convention. And when it comes to legislative interpretation we do not have, and may never have had, a universally-shared convention.

A big reason for this is the common misconception that statutory interpretation ought to be left to the courts.[46] This is not so. Adjudicating the facts and circumstances of cases—the who, what, where and when—is a judicial function. But determining what law ought to apply to a particular set of facts, once they are established, is a question of policy, i.e. a legislative function. If it were possible to write statutes with crystal clarity, and one could predict all the possible ways in which a statute will apply, one would hope that Congress would come up with phrasing that would make it obvious how the statute should apply to every case that comes before the court. This is not possible—or at least it is very rare—so one would hope that Congress would do the next best thing: instruct the courts how to resolve the close cases. This would not usurp the judicial function in any way; it would merely give judges instructions how to go about discovering the statute's fine nuances.[47]

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44. *See* National Credit Union Admin. v. First Nat'l Bank and Trust Co., 118 S. Ct. 927, 930 (1998) (indicating Justice Scalia joined opinion of Court except as to footnote 6 where Court relied on legislative history); Atherton v. Federal Deposit Ins. Corp., 117 S. Ct. 666, 676 (1997) (O'Connor, J., concurring in part and concurring in the judgment, in which Scalia and Thomas, JJ., joined) (taking exception to Court's reliance on legislative history where statute's text unambiguous); Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 621-23 (1991) (Scalia, J., concurring) (rejecting use of legislative history for "purpose of giving authoritative content to the meaning of a statutory text").

45. *See* Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 580-84 (1995) (Kennedy, J., joined by Rehnquist, C.J., Stevens, O'Connor, and Souter, JJ.) (relying on legislative history to construe § 12(2) of Securities Act of 1933); *Mortier*, 501 U.S. at 610-12 & n.4 (White, J., joined by Rehnquist, C.J., Marshall, Blackmun, Stevens, O'Connor, Kennedy and Souter, JJ.) (utilizing legislative history to construe reach of Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)); Breyer, *supra* note 25.

46. This misperception dates back to Chief Justice Marshall, who wrote, "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). He was, emphatically, wrong. Congress, the Legislative Branch, legislates, that is, says what the law is. The courts then apply that law to the facts of a particular case. But then again Chief Justice Marshall made a habit of saying wrong things very well. *See* Alex Kozinski, *That Unfortunate Immortal Phrase*, 1987 UTAH L. REV. 977.

47. *See Hearings Before the Joint Comm. on the Organization of Cong.*, 103d Cong., 1st Sess. 81-82 (1993) (statement of Hon. Patricia M. Wald, Judge, D.C. Circuit Court of Appeals). Judge Wald

Proponents of legislative history argue that Congress already does this by putting instructions in committee reports and floor statements. But it is pretty clear that not everyone abides by these conventions, and with good reason. A report by one committee of one house of Congress cannot in any realistic sense be said to bind other members in the same house who have no formal input in it, and certainly not members of the other house or the President. Furthermore, there may be contraindications between the various bits of legislative history and no way to reconcile them. Even canons of construction—default rules that apply absent more specific guidance—do not provide a safe haven. Few people agree on whether one turns to canons or to legislative history first; and then among canons, which one controls: Is it the one that says you apply statutes in derogation of the common law narrowly? Or the one that says remedial statutes are to be applied broadly?[48]

You are probably wondering right about now, "Why is Kozinski telling us all this? He is a federal judge and federal judges are in charge of interpretation. Why don't the courts get their act together and come up with a comprehensive guide for statutory interpretation?" The answer is that courts are institutionally ill-equipped to do this. Courts normally impart such wisdom as they have through opinions—spot applications of legal principles to particular fact patterns. In that medium it is virtually impossible to explicate a comprehensive set of principles describing how to interpret statutes. Then too, there is the question of institutional limitations: The courts can pick and choose among existing methods of statutory construction, e.g., we will follow the committee report where the statute is not clear. But they cannot come up with more revolutionary and innovative methods, such as including in every bill a Rosetta Stone as to how Congress expects it to be applied by the courts. No, for a truly comprehensive solution to the problem, it is Congress that must act.

How might Congress go about doing this? There are any number of ways, but perhaps the simplest is to pass legislation instructing the courts and administrative tribunals how it expects them to apply the statutes it passes. Or, it could appoint a commission, consisting of legislators, judges and lawyers, to study the problem. Such a commission might well suggest reforms in the congressional drafting process. One possibility might be to have an official legislative record—generated jointly by both houses—which contains the exclusive expression of congressional guidance as to how courts should apply the statute. If this sounds strange and different, it should not. There is already an excellent working model in operation.

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argues that Congress should instruct judges on how to resolve cases of statutory interpretation, but unfortunately Congress rarely does give such guidance. *See id.*

48. *See* Breyer, *supra* note 25, at 869-70.

The Joint Committee on Taxation is deeply involved in the drafting, amendment, and implementation of all tax legislation;[49] it oversees the Internal Revenue Service;[50] it approves settlement of all tax cases involving a sum over a million dollars;[51] and, perhaps most important, it issues something known as the Committee "Blue Book"[52] which is a detailed guide to interpreting the statute. Some have quarreled with the legitimacy of the Blue Book,[53] as it is often drafted long after the legislation is passed, yet it provides important guidance as to the congressional thinking behind the tax code.[54]

If Congress turns its attention to the interpretive process, it may come up with yet more radical proposals, among them the notion that some areas of the law are simply too complex for legislation to govern. Perhaps Congress should try to do so only in broad outlines, leaving the details of implementation to agencies to fill in by way of rulemaking. A congressional committee or commission might also figure out which canons of interpretation are still valid and in which order courts should apply them. Conceivably, the committee could go even farther and suggest adopting a system such as that in some European countries where a select group of government officials either drafts legislation or reviews it before it becomes law.[55]

Whatever the solutions Congress devises, they would have a distinct

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49. Created by statute, the Joint Committee on Taxation, as its name implies, works with both houses of Congress on tax issues. *See* 26 U.S.C. § 8022 (1994). The Joint Committee's duties include investigating the operation of the federal tax system, proposing methods for simplifying taxation, and publishing its investigations and recommendations. *See id*; *see also* Michael Livingston, *Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy*, 83 CORNELL L. REV. 365, 374 n.20 (1998) ("[T]he Joint Committee on Taxation . . . assists both the House and Senate in writing tax legislation . . . .").

50. *See* 26 U.S.C. § 8022(1)(B) (providing that the Joint Committee shall "investigate the administration of . . . taxes by the Internal Revenue Service").

51. *See* INTERNAL REVENUE MANUAL § 35, ch. 16(32) (1992).

52. "The Joint Committee issues general explanations, known as 'Blue Books,' interpreting major pieces of tax legislation." Alton A. Murakami, Note, *"Useful Life" Has Outlived Its Useful Life: Tax Depreciation After* Simon *and* Liddle, 72 N.Y.U. L. REV. 1211, 1242 n.38 (1997). *See also* JOINT COMM. ON TAXATION, 100TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986 (Comm. Print 1987); JOINT COMM. ON TAXATION OF CONGRESS, 97TH CONG., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981 (Comm. Print 1981).

53. *See* MARTIN GINSBURG, SPEECH AT THE NYSBA TAX SECTION ANNUAL MEETING LUNCHEON (Jan. 24, 1991), *reprinted in Hearings Before the Joint Comm. on the Organization of Cong.*, 103d Cong., 1st Sess. 295 (1993).

54. These explanations are important for another reason. It often takes years for the courts to interpret a new tax provision. Yet, as soon as tax legislation is passed, practitioners must begin to try and understand its effects and implications. The Blue Book—and other forms of legislative history—provide help and guidance early on, before judicial interpretations are available.

55. *See* Breyer, *supra* note 25, at 868 (describing work of English Parlimentary Counsel and French Conseil d'Etat). In England, professional drafters shape legislation to ensure that judges, whose interpretive tendencies they know well, will interpret statutes the way the drafters intend. *See id.*

advantage over the current system in that they would make explicit and bring up for discussion the assumptions made by the various players in this intricate process. I do not think there is a right or wrong way for Congress to communicate its will to those of us who must apply the law; there are merely different degrees of coherence. While this is truly an area where it is more important that the rule be settled than that it be settled any particular way, let me suggest some of the goals that any system might be designed to promote:

1. Except in the area of criminal law, the presumption should be against direct legislation and in favor of delegating details to an administrative agency. The more complex the statutory scheme, the less likely that Congress will provide precise enough statutory language so that courts can apply the law without making policy judgments.[56] Agencies, under careful congressional oversight and subject to normal notice and comment procedures, are in a much better position to provide useful guidance and make needed policy choices.

2. If Congress expects the interpretation process to take the legislative record into account, it should say so and explain exactly what materials the courts should consider.

3. If the courts should consider a legislative record, it must be complete and available some time before each House of Congress votes for final passage and the President signs the bill into law. This will ensure that interpretive clues found in the record do in fact reflect the intent of those voting on (or signing) it.

4. Those who disagree with the official legislative record ought to have a way to state their views. The legislature must give courts clear instructions regarding the appropriate weight to give those dissenting views.

5. To the extent Congress expects the courts to rely on canons of construction it should set forth what the applicable rules are and in which order the courts should apply them.

6. Congress ought to specify what inferences, if any, the courts should draw from congressional inaction, such as the failure to amend a bill after an interpretation is brought to its attention. And, what inferences courts normally should draw from the actions and inactions of subsequent Congresses.

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56. *See* GINSBURG, *supra* note 53, at 296. This has two other advantages: accountability and reparability. As Professor Ginsburg points out, the hapless citizen stuck in a legal Catch-22 may persuade agency powers to listen; that citizen's chances with Congress are much more remote. *See id.* And, assuming someone listens, it is much easier for an agency to revise an absurd or unclear regulation than for Congress to make the same patch. *See id.*

Will this solve all the problems of statutory interpretation? Avoid all disagreements? Of course not. But focusing attention on the problem and agreeing on a set of rules Congress and the courts should follow will surely result in greater consistency of application, reducing the expense of uncertainty to litigants and the burden on the courts. Most important, it would strengthen the political branches by ensuring that their will, not that of the courts, governs. In saying this, I make the assumption—which is borne out by my two decades in government service—that most public officials, including legislators, judges and members of the executive branch, generally act in good faith. They want to follow the rules and do the right thing, if only they can figure out what it is. I do not share the cynicism of those who say that no rules will constrain those in the bureaucracy and the courts who would twist the laws to advance their political agenda. There may be a few such people, but, in my experience, very few indeed.[57]

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So, I know the question that remains burning in your mind: What finally happened to Judge Toe? The Supreme Court granted cert and two days after oral argument issued a unanimous opinion authored by Justice Scalia. It reads as follows:

> Section 666 is clear on its face. It prohibits a judge from relying on legislative history in interpreting a statute. In his opinion, Judge Toe cited only his treatise, not the legislative history. And, while Judge Toe did rely on legislative history in drafting his treatise, it is abundantly clear that the statute does not purport to govern an individual's conduct when he is acting as a commentator or scrivener, rather than in his capacity as a judge. The judgment of the Court of Appeals is reversed and the case is remanded with instructions that the judgment of conviction be set aside.

Thank You.

57. No, I will not name names. *See* Thompson v. Calderon, 120 F.3d 1045, 1067-69 (9th Cir. 1997) (Kozinski, J., dissenting) (detailing actions of Judges X, Y, and Z).