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Legislative History: A (Sometimes) Persuasive Tool for Federal Practitioners

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Statutory interpretation is a foundational part of federal administrative law. Federal agencies are entitled to deference when interpreting the statutes that Congress has tasked the agencies with administering, and thus agency lawyers craft specific regulatory actions to align with the agency's interpretation of the statute. Those who challenge regulatory actions often argue that the agency's interpretation is not consistent with the statute's plain text, is not reasonable, or that the agency has acted beyond the boundaries prescribed to it by Congress.[1]

When the meaning of a statute is at issue, courts apply a well-known rule: The starting point of statutory construction is always the language of the statute itself. As the Supreme Court stated, "time and time again … courts must presume that a legislature says in a statute what it means and means in a statute what is says there."[2] Some judges are inclined to stop their inquiry there. For example, the late Justice Antonin Scalia and his successor, Justice Neil M. Gorsuch, are known "textualists"—i.e., those who believe courts should not look beyond the language and structure of a statute to determine its meaning. Criticizing those who look beyond the statutory text to understand congressional intent, Justice Scalia wrote, "The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators…. If one were to search for an interpretive technique that, on the whole, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history."[3] Similarly, then-Judge Gorsuch wrote, "The fact is that statutes are products of compromise, the sort of compromise necessary to overcome the hurdles of bicameralism and presentment. And it is [the judges'] obligation to enforce the terms of that compromise as expressed in the law itself."[4]

Still, the fact remains that courts frequently look beyond the words of the statute at issue to its legislative history to determine what Congress intended in a particular statutory provision.[5] The Supreme Court has stated that "the plain-meaning rule is 'rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists.'"[6] Indeed, the Supreme

Court consulted legislative history over Justice Scalia's objections[7] and, in fact, did so in order to confirm the Court's interpretation of statutory text even when the Court concluded that the meaning was clear from the text and structure of the statute.[8] Likewise, the D.C. Circuit, which is the court of appeals that most frequently reviews federal administrative actions, stated that reference to "pertinent legislative history may often shed new light on congressional intent, notwithstanding statutory language that appears superficially clear."[9] Thus, legislative history can be a powerful tool of persuasion for federal advocates.

But what is legislative history, exactly? And are some kinds of legislative history more persuasive than others?

Black's Law Dictionary defines "legislative history" as: "The background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates."[10] Such information is persuasive to courts because the legislators who participated in the hearings and debates and read the committee reports presumably voted on the statute's enactment with the understanding of the meaning and purpose of the statute gleaned from those sources.[11] Importantly, courts generally give little weight to statements written after a statute is passed because such post-enactment statements could not have influenced the congressional vote.[12]

To understand the relative value of the different kinds of pre-enactment legislative history, it is important to have a basic understanding of how a bill becomes a law. Remember that School House Rock song, "I'm Just a Bill"? A few verses colorfully sum up the enactment process:

I'm just a bill

Yes I'm only a bill,

And I got as far as Capitol Hill

Well now I'm stuck in committee

And I sit here and wait

While a few key congressmen discuss and debate

Whether they should let me be a law.

Oh how I hope and pray that they will,

But today I am still just a bill.

Boy: Listen to those congressmen arguing! Is all that discussion and debate about you?

Bill: Yes. I'm one of the lucky ones. Most bills never even get this far. I hope they decide to report on me favorably, otherwise I may die.

Boy: Die?

Bill: Yeah, die in committee. Oooh! But it looks like I'm gonna live. Now I go to the House of Representatives and they vote on me.

Boy: If they vote "yes," what happens?

Bill: Then I go to the Senate and the whole thing starts all over again…

I'm just a bill

Yes I'm only a bill

And if they vote for me on Capitol Hill

Well then I'm off to the White House

Where I'll wait in a line

With a lot of other bills

For the president to sign

And if he signs me then I'll be a law.

Oh, how I hope and pray that he will,

But today I am still just a bill.[13]

Of course, the legislative process is much more complex than the song reflects. But for the purpose of understanding how to use legislative history persuasively, the song suffices to illustrate at least two sources of legislative history—committee reports from either house and debate transcripts from either house. Generally, when a member of Congress proposes a bill, the bill is assigned to the standing committee or committees with jurisdiction over the subject-matter of the bill. The standing committee then conducts hearings on the bill and allows an opportunity for committee members to make amendments. Next, the standing committee writes a committee report, which explains the background of the bill and its contents. When the bill is out of committee, it is subject to debate and amendment on the relevant house floor. When a final version of the bill is adopted, the bill is sent to the other house with the accompanying report where the process of committee review, report, and floor debate is repeated.[14]

Once each house has adopted a version of the bill, a conference committee made up of members from both houses reconcile the two versions and produce a report similar to those produced by the standing committees. Each house then votes on the conference version and the approved bill is sent to the president for signature. Thus, in addition to standing committee reports and debate transcripts, conference reports and a comparison of the enacted provision to prior versions are additional sources of legislative history to which courts may look in order to interpret a statute.[15]

According to the courts, there is a rough hierarchy of persuasive value among these categories of legislative history. First, comparisons of the enacted version to prior versions, including the statute prior to amendment, are most persuasive. In fact, the Supreme Court stated that "there is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged."[16] Such comparisons are so persuasive that they may even convince a court that "Congress did not intend words of common meaning to have their literal effect."[17]

Next, conference reports carry significant weight since they are a product of collaboration by the entire Congress. According to the D.C. Circuit, "Because the conference report represents the final statements of terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent."[18] Committee reports, statements by the committee chair, and statements by a bill's sponsor also can be persuasive because they reflect the rationale for the bill.[19]

Debate colloquies and statements by individual legislators, however, are unlikely to be persuasive. These sources of legislative history are often scripted and inserted into the record in an attempt to influence later interpretations of the bill. Thus, debate colloquies and statements reflect the views of the writers only (who may be staff attorneys or interest group attorneys rather than a member of Congress), not the views of any kind of collaboration or compromise.[20] Additionally, since individual statements may conflict with each other, they may actually muddy the meaning of a statutory provision rather than clarify it.[21] Statements by opponents of a bill similarly are not reliable because, "in their zeal to defeat [the] bill, they understandably tend to overstate its reach."[22] Accordingly, courts view debate colloquies, individual statements, and opponent statements as untrustworthy for purposes of statutory interpretation.

In conclusion, the use of legislative history is an important aspect of federal practice despite the views of some textualist judges. In particular, issues of statutory interpretation frequently arise in the administrative law context, and legislative history can be a persuasive tool in that context. Thus, federal practitioners are best served by understanding the legislative process and utilizing the sources of legislative history that are most persuasive to the bench when litigating issues of statutory interpretation. ⊙

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Endnotes

[1]*See Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837 (1984).

[2]*Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

[3]*Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

[4]*TransAm Trucking Inc. v. Admin. Review Bd., U.S. Dep't of Labor*, 833 F.3d 1206, 1217 (10th Cir. 2016) (Gorsuch, J., dissenting).

[5]A Westlaw search for the phrase "legislative history" in the D.C. Circuit alone returned 9,512 decisions as of the date of this article.

[6]*Watt v. Alaska*, 451 U.S. 259, 266 (1981) (quoting *Boston Sand Co. v. United States*, 278 U.S. 41, 48 (1928)).

[7]*See, e.g.*, *Samantar v. Yousuf*, 560 U.S. 305, 326-27 (2010) (Scalia, J., concurring).

[8]*Id.*; *see also Mohamed v. Palestinian Auth.*, 132 S. Ct. 1702, 1710 (2012).

[9]*Natural Res. Def. Council Inc. v. Browner*, 57 F.3d 1122, 1127 (D.C. Cir. 1995) (quotations omitted).

[10]Black's Law Dictionary 919 (8th ed. 2004).

[11]*Dist. of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

[12]*Id.* ("'[P]ostenactment legislative history' [is] a deprecatory contradiction in terms."); *see also Consumer Prod. Safety Comm. v. GTE Sylvania Inc.*, 447 U.S. 102, 118, n.13 (1980) (explaining that while subsequent legislation has great weight in determining what an earlier statute meant, a mere statement in a subsequent conference report is less weighty).

[13]Jack Sheldon, *I'm Just a Bill*, *on* School House Rock! Soundtrack (Rhino Records 1996), *available at* http://www.schoolhouserock.tv/Bill.html.

[14]Nathan Oman, *Statutory Interpretation in Econotopia*, 25 Pace L. Rev. 49, 61 (2004).

[15]ProQuest is a useful source of legislative history and provides full text searches. See ProQuest Legislative Insight, https://congressional.proquest.com/legislativeinsight (last visited Nov. 15, 2017).

[16]*United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 112 (1948); *see also United States v. St. Paul, M & M. R.R.*, 247 U.S. 310, 318 (1918) (changes made to the bill during the course of the legislative process are helpful "under proper qualifications").

[17]*Watt*, 451 U.S. at 265.

[18]*Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981).

[19]*See, e.g.*, *United States v. United Mine Workers of Am.*, 330 U.S. 258, 277-82 (1947); *Am. Airlines v. Civil Aeronautics Bd.*, 365 F.2d 939, 949 (D.C. Cir. 1996); *Envtl. Def. Fund Inc. v. Costle*, 636 F.2d 1229, 1243 (D.C. Cir. 1980).

[20]Oman, *supra* note 14, at 63.

[21]*See N.L.R.B. v. SW Gen. Inc.*, 137 S. Ct. 929, 943 (2017) (providing an example of two conflicting statements and stating, "This is a good example of why floor statements by individual legislators rank among the least illuminating forms of legislative history.").

[22]*N.L.R.B. v. Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964); *see also Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 288 (1956) ("An unsuccessful minority cannot put words into the mouths of the majority and thus, indirectly, amend a bill.").