

COMMENT

Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation

At oral argument in *Carr v. United States*,¹ Justice Alito surprised petitioner's counsel by questioning him on two authorities that neither party had briefed: the Senate Legislative Drafting Manual (Senate Manual)² and the House Legislative Counsel's Manual on Drafting Style (House Manual).³ The parties were doubly surprised because these manuals had appeared in only one prior Supreme Court opinion.⁴

Drawing on these manuals, Justice Alito posited that there is a "universally accepted modern legislative drafting convention that statutes should . . . [a]lways use the present tense unless the provision addresses *only* the past, the future, or a sequence of events that requires use of a different tense."⁵ In light of this drafting convention, Justice Alito questioned whether the present-tense language of the Sex Offender Registration and Notification Act of 2006

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1. Transcript of Oral Argument at 4, *Carr v. United States*, 130 S. Ct. 2229 (2010) (No. 08-1301). I am indebted to Brian Barnes and Jacob Scott for introducing me to these materials, and to Professor William Eskridge for his many thoughtful comments.
 2. OFFICE OF THE LEGISLATIVE COUNSEL, U.S. SENATE, LEGISLATIVE DRAFTING MANUAL (1997), available at [http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual\(1997\).pdf](http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual(1997).pdf) [hereinafter SENATE MANUAL].
 3. OFFICE OF THE LEGISLATIVE COUNSEL, U.S. HOUSE OF REPRESENTATIVES, HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE (1995), available at <http://www.thecapitol.net/Research/images/HOLC.Manual.on.Drafting.Style.1995.pdf> [hereinafter HOUSE MANUAL].
 4. See *infra* notes 16-21 and accompanying text (describing *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50 (2004)).
 5. Transcript of Oral Argument at 4, *Carr*, 130 S. Ct. 2229 (No. 08-1301) (emphasis added).

(SORNA) limited the Act's application to postenactment conduct or merely reflected the default drafting style.⁶

Citation to the manuals notwithstanding, the majority found that present-tense language usually does not apply to past conduct and held that the Act applies only to postenactment conduct.⁷ Specifically, the majority ruled that, under SORNA—which allows conviction if an individual (1) is required to register under SORNA, (2) “travels in interstate or foreign commerce,” and (3) “knowingly fails to register or update a registration”⁸—interstate travel prior to the passage of SORNA cannot be a basis for conviction.⁹

Justice Alito, joined by Justices Thomas and Ginsburg, argued that the majority employed the wrong frame of reference. The dissent made even greater use of the manuals to argue that the majority's position “flies in the face of the widely accepted modern legislative drafting convention that a law should *not* be read to speak as of the date of enactment” but instead “as of any date on which it is read.”¹⁰ Combining this convention with the premise that all laws should be drafted in the present tense, the dissent reasoned that when one reads SORNA “as of the time when such a pre-SORNA conviction takes place, every subsequent act, including movement from State to State, occurs in the future and is thus properly described using the present tense.”¹¹

Even though the manuals did not carry the day in *Carr*, the question of whether they should be accorded substantial weight remains open.¹² The

6. *Id.*

7. *Carr*, 130 S. Ct. at 2229.

8. 18 U.S.C. § 2250 (2006).

9. *Carr*, 130 S. Ct. at 2229.

10. *Id.* at 2244 (Alito, J., dissenting). As Justice Alito points out, both the Senate Manual and the House Manual support this proposition. HOUSE MANUAL, *supra* note 3, at 2 (“Your draft should be a movable feast—that is, it speaks as of whatever time it is being read (rather than as of when drafted, enacted, or put into effect).”); SENATE MANUAL, *supra* note 2, at 4 (“A legislative provision speaks as of any date on which it is read (rather than as of when drafted, enacted, or put into effect).”).

11. *Carr*, 130 S. Ct. at 2246 (Alito, J., dissenting).

12. Neither side takes a hard position for or against relying on the manuals. Writing for the majority, Justice Sotomayor stated that she does not reject the drafting conventions in other contexts. *See id.* at 2236 n.4 (majority opinion) (“[E]ven if the dissent is correct that legislative drafters do not invariably use the moment of enactment to mark the dividing line between covered and uncovered acts, they have clearly done so here.”). The other interpretive principles cited by the majority simply overcame the drafting conventions. Justice Alito, on the other hand, disclaimed any intent to convert the contents of the manuals into default rules. *See id.* at 2247 n.8 (Alito, J., dissenting) (“I do not suggest that the ‘default’ rule is that provisions written in the present tense apply to past conduct. To the

United States federal government, the majority of states, and the District of Columbia have compiled manuals of this type to offer guidance to drafters. To date, no scholar has examined these manuals in any detail, and they are seldom cited in the federal courts.¹³

This Comment pursues two aims. First, it provides a brief overview of the types of advice contained within the House and Senate manuals. The contents of these manuals range from advice on what language to use so that an act will be properly interpreted to directions for formatting—including requirements for font size and line justification. Interestingly, federal courts have relied on drafting manuals in only three instances. In these instances, the courts ignored references to specific rules of construction or precedent and, instead, took note of advice aimed more generally at structure and the use of language.

Second, this Comment addresses the puzzle that these authorities pose for textualists. While these manuals generally support the textual canons and other textual tools of interpretation, it is unclear whether these manuals, which few people read, illuminate the ordinary meaning of the text or obscure it. In weighing the manuals' authority, it is instructive to contrast the manuals with other types of extrinsic sources, particularly dictionaries and legislative history.

The Comment concludes by arguing that the manuals are compatible with textualism because they are a credible form of extrinsic legislative material. They provide evidence of what drafters mean when they employ certain language.

1. CONTENTS OF THE MANUALS

The House and Senate manuals provide several types of instruction to the drafters of legislation, ranging from the template that drafters should use to format and structure legislation to the substantive conventions that drafters should employ to choose language. The substantive conventions can be further divided into those that explicitly reference established canons or precedent and those that merely imply the established rules by directing drafters to write in a certain way.

contrary, I had thought it an uncontroversial proposition of statutory interpretation that statutes must be interpreted in context.”).

13. Justice Alito's opinion is a watershed in the deployment of drafting manuals. It not only relies on the Senate and House manuals, but also cites the drafting manuals of Colorado, Hawaii, Kentucky, Maine, Massachusetts, New Mexico, Texas, West Virginia, and (with reservation) Ohio to confirm the ubiquity of the drafting convention favoring use of the present tense. *See id.* at 2245.

A. Legislative Boilerplate

A significant portion of each manual instructs drafters on how to format a bill or amendment. Most of this material is of only passing interest to courts and attorneys. For example, the House Manual devotes two full pages to the proper font size and alignment for various section headings,¹⁴ and both manuals devote substantial space to describing the formatting options for bills and amendments.¹⁵

Even though these sections deal merely with the structure of legislation rather than its substance, they have proven important in one Supreme Court case and its progeny. *Koons Buick Pontiac GMC, Inc. v. Nigh* addressed the interpretation of the Truth in Lending Act (TILA) as amended in 1995.¹⁶ Prior to the amendment, clause (i) of 15 U.S.C. § 1640(a)(2)(A) allowed an individual to recover twice the finance charge for a civil violation of the Act with respect to a consumer loan, while clause (ii) imposed liability for violations of the Act with respect to leases and established a \$1000 cap on “liability under this subparagraph.”¹⁷ Courts had construed this limitation to apply to consumer loan actions under clause (i).¹⁸ This construction made sense because clause (ii) limited liability under subparagraph (A), to which clauses (i) and (ii) belonged.

The settled understanding of this cap was disturbed by the addition of a new clause in 1995. Clause (iii) provided a cause of action for certain transactions secured by real property or a dwelling and specified that damages would be “not . . . greater than \$2,000.”¹⁹ In the lower courts, Nigh successfully sued Koons under clause (i) for over \$1000. His argument proceeded in two parts. First, it made no sense to apply the \$1000 cap to liability under clause (iii), because it had a separate \$2000 cap. Second, since the cap did not apply to clause (iii), it should not apply to clause (i), which contained no cap of its own.

14. HOUSE MANUAL, *supra* note 3, at 13-14.

15. *Id.* at 11-18, 23-32, 34-47; SENATE MANUAL, *supra* note 2, at 8-35. Over half the material in the manuals is devoted to matters of form or style that shed little light on drafting conventions. Setting aside title pages and tables of contents, forty out of eighty Senate Manual pages (50%) and forty-five out of sixty-four House Manual pages (70%) make no reference to substantive drafting conventions.

16. 543 U.S. 50 (2004).

17. 15 U.S.C. § 1640(a)(2)(A) (1994).

18. *Koons*, 543 U.S. at 55-56.

19. Pub. L. No. 104-29, § 6, 109 Stat. 271, 274 (1995).

Justice Ginsburg, writing for the majority, rejected Nigh’s argument. She directly referenced both the House and Senate manuals for their explication of the difference in subsections, paragraphs, subparagraphs, and clauses—which are nested in this order—to support her argument that “Congress ordinarily adheres to a hierarchical scheme in subdividing statutory sections.”²⁰ Under this scheme, any reference to subparagraph (A) includes clauses (i)–(iii). In light of this structure and the lack of evidence that Congress intended to upset the prior understanding of the statute, she concluded that the \$1000 limitation still applies to clause (i).²¹ This deployment of the manuals is particularly interesting because, despite the fact that the analysis is textual and structural, it does not neatly map onto traditional canons of construction in the same way as the substantive conventions described next.

B. Substantive Conventions

1. Direct References to Canons, Precedent, and Code

A few provisions from the manuals are written in anticipation of judicial interpretation. These provisions are self-conscious because they reflect an awareness of statutory language as the object of the courts’ attention. They reference established canons of construction, Supreme Court precedent, and the United States Code to advise drafters on how courts are likely to interpret certain language. There are few provisions of this nature, and no courts have cited them.

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20. *Koons*, 543 U.S. at 60; see HOUSE MANUAL, *supra* note 3, at 24; SENATE MANUAL, *supra* note 2, at 10. Several federal courts have cited *Koons* for its analysis of the hierarchical structure of statutory subdivisions. See, e.g., *United States v. Spagnuolo*, 469 F.3d 39, 44 (1st Cir. 2006) (delineating “sections”); *Perry v. First Nat’l Bank*, 459 F.3d 816, 820 (7th Cir. 2006) (quoting *Koons*); *Barnette v. Brook Rd., Inc.*, 429 F. Supp. 2d 741, 746 (E.D. Va. 2006) (quoting *Koons*); *Putkowski v. Irwin Home Equity Corp.*, 423 F. Supp. 2d 1053, 1061 (N.D. Cal. 2006) (citing *Koons*); *Harris v. Fletcher Chrysler Prods., Inc.*, 458 F. Supp. 2d 748, 751–52 (S.D. Ind. 2006) (citing *Koons*); *White v. E-Loan, Inc.*, 409 F. Supp. 2d 1183, 1185 (N.D. Cal. 2006) (quoting *Koons*). *Koons* and its progeny (including unreported cases not listed here), *Carr v. United States*, 130 S. Ct. 2229 (2010) (No. 08-1301), and three United States Tax Court cases, see *infra* notes 34–36 and accompanying text, are the only federal cases that have referenced the drafting manuals.
21. Justice Scalia dissented in *Koons*. He agreed with the majority’s understanding of subparagraphs and clauses, but argued that the type of “liability” being referenced was “indeterminate” and that, structurally, only “the consumer-lease cases covered by clause (ii)” were so restricted. *Koons*, 543 U.S. at 70 (Scalia, J., dissenting) (emphasis omitted).

Each manual makes reference to how courts will apply one or more canons. Section 316 of the Senate Manual discusses *ejusdem generis*.²² The manual explains that the inclusion of “but is not limited to” in a list is redundant “because *ejusdem generis* relates only to the kind or class of persons or things that are unspecified and does not preclude the inclusion of other unspecified persons or things.”²³ Section 314 of the Senate Manual alerts drafters to the canon against implied repeals by advising that courts are likely to interpret statutes that are arguably inconsistent as being consistent, even “at the risk of reaching a far-fetched interpretation of 1 or both of the provisions.”²⁴ Section 201 of the House Manual cites the “doctrine that variations within a law are designed to convey meaning”—a way of phrasing the canons of consistent usage and meaningful variation—as the reason to employ a uniform drafting style.²⁵ More bluntly, Section 105 of the Senate Manual states that “[a] court presumes that different words have different meanings” and “that every word is there for a reason.”²⁶

The manuals also advise drafters on Supreme Court precedent with respect to two issues. Both manuals identify the legal precedent on severability, citing *INS v. Chadha*²⁷ and *Buckley v. Valeo*,²⁸ to advise drafters that a “severability clause is unnecessary” unless Congress intends to make certain portions of a statute unseverable.²⁹ Additionally, the manuals cite *United States v. Lopez*³⁰ to advise drafters that congressional findings must be included to justify certain legislation under the Commerce Clause.³¹

In addition, both manuals make occasional reference to Title 1, Chapter 1 of the United States Code to describe certain basic conventions, including the

22. See *infra* Table 1 for explanations of each canon listed here.

23. SENATE MANUAL, *supra* note 2, at 76-77.

24. *Id.* at 73-74.

25. HOUSE MANUAL, *supra* note 3, at 9-10. Note that elsewhere the House Manual also presents these rules in a more subtle way. See *infra* notes 34-36 and accompanying text.

26. SENATE MANUAL, *supra* note 2, at 6.

27. 462 U.S. 919, 931-32 (1983) (“[I]nvalid portions of a statute are to be severed [u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)) (internal quotation marks omitted).

28. 424 U.S. 1, 108 (1976).

29. HOUSE MANUAL, *supra* note 3, at 32-33; SENATE MANUAL, *supra* note 2, at 49-50.

30. 514 U.S. 549, 562-63 (1995) (suggesting that the Court will look to congressional findings to evaluate whether a given activity has a substantial enough effect on interstate commerce to be regulated under the Commerce Clause).

31. See HOUSE MANUAL, *supra* note 3, at 28 n.3; SENATE MANUAL, *supra* note 2, at 19.

statutory definitions of the word “person” and the rule that the singular includes the plural.³²

Even though courts have not cited these direct references to canons, precedent, and statutes, these provisions have the potential to serve two valuable functions. First, they show that drafters are aware of specific conventions of statutory interpretation. Second, they explain the drafters’ understanding of how these rules function.

2. *Restated and Implied Conventions*

Most of the substantive provisions of the manuals direct the drafter to employ certain conventions in the language and structure of a bill without naming canons or specific cases.

These provisions frequently restate existing canons. Judge Chabot of the United States Tax Court seized upon two such restatements in his dissent in *Rochelle v. Commissioner*.³³ His argument was that the majority had erred by failing to give “shall” the same meaning in each of its occurrences in the statute under scrutiny.³⁴ He cited the House Manual because, without saying as much, it restates the canons of consistent usage and meaningful variation:

(4) USE SAME WORD OVER AND OVER. — If you have found the right word, don’t be afraid to use it again and again. In other words, don’t show your pedantry by an ostentatious parade of synonyms. Your English teacher may be disappointed, but the courts and others who are straining to find your meaning will bless you.

(5) AVOID UTRAQUISTIC SUBTERFUGES. — Do not use the same word in 2 different ways in the same draft (unless you give the reader clear warning).³⁵

32. See HOUSE MANUAL, *supra* note 3, at 61, 63 n.16; SENATE MANUAL, *supra* note 2, at 5, 7.

33. 116 T.C. 356 (2001) (Chabot, J., dissenting).

34. *Id.* at 367 & n.2. Curiously, even though Judge Chabot was criticizing the majority for giving “shall” a mandatory effect in some places but not others, he did not cite the directly on-point provision, present in both manuals, instructing drafters that “shall” is mandatory while “may” is permissive. See sources cited *infra* note 39.

35. HOUSE MANUAL, *supra* note 3, at 3. Judge Chabot cited the 1989 manual, but as the introduction to the 1995 edition explains, “only the most minor of technical revisions have been made to the text of the manual.” *Id.* at III.

Judge Chabot's approach has gained some traction, as two subsequent United States Tax Court majority decisions cite the House Manual as supplemental authority to support the canon of consistent usage.³⁶

In addition to the canons of consistent usage and meaningful variation, the manuals restate or imply the following rules: the and/or rule,³⁷ the dictionary rule,³⁸ the may/shall rule,³⁹ the plain meaning rule,⁴⁰ the punctuation rule,⁴¹ the rule against surplusage,⁴² and the repeal-of-a-repeal rule.⁴³ These canons, along with those described above in Subsection I.B.1, appear in tabular form at the end of this Section, along with descriptions of the rules.

Like the explicitly referenced rules featured in Subsection I.B.1, these restated and implied rules establish that the drafters are aware of certain conventions. These rules differ because they relate the instructions that drafters should follow rather than purport to describe the rules that courts will follow.

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The House and Senate Manuals impose order on the drafting process through a shared language and style. The manuals support the proposition that Congress uses language with the attention to text and structure imputed to it by courts. This authority is greatest for the canons that the manuals specifically support. The following table summarizes the canons specifically supported by the manuals:

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36. See *Robinson v. Comm'r*, 119 T.C. 44, 61 n.10 (2002); *Elec. Arts, Inc. v. Comm'r*, 118 T.C. 226, 242 n.9 (2002).
37. See SENATE MANUAL, *supra* note 2, at 64-67.
38. See HOUSE MANUAL, *supra* note 3, at 3 ("There is 1 best word to get across each thought. To find that word, use the dictionary . . ."); SENATE MANUAL, *supra* note 2, at 21 ("Do not ascribe to a term a meaning that departs greatly from the commonly understood meaning . . .").
39. See HOUSE MANUAL, *supra* note 3, at 61-62; SENATE MANUAL, *supra* note 2, at 76.
40. See HOUSE MANUAL, *supra* note 3, at 5 (stating that legislation "should be written in English for real people").
41. See *id.* at 56 ("It is expected that the traditional rules of grammar and usage will apply in the drafting of legislation."). The manuals also instruct drafters to utilize a comma before the last item in a series. *Id.* at 58; SENATE MANUAL, *supra* note 2, at 79.
42. See HOUSE MANUAL, *supra* note 3, at 4; SENATE MANUAL, *supra* note 2, at 6.
43. See SENATE MANUAL, *supra* note 2, at 37.

Table 1.
CANONS SUPPORTED BY FEDERAL LEGISLATIVE DRAFTING MANUALS⁴⁴

CANON	MEANING
<i>Textual Canons</i>	
And/Or Rule	“Or” means in the alternative; “and” requires that all listed criteria be met.
Consistent Usage/Meaningful Variation	A given term has a consistent meaning within a statute, while a different term must have a different meaning.
Dictionary Rule	Statutes should be read in light of dictionary definitions unless alternative definitions are given.
<i>Ejusdem Generis</i>	A list should be read to include things similar to those listed.
May/Shall Rule	“May” is permissive; “shall” is mandatory.
Plain Meaning Rule	A statute’s plain meaning should be followed.
Punctuation Rule	The legislature employs standard punctuation and varies it meaningfully.
Rule Against Surplusage	An act should be construed to give effect to each word.
Singular Includes Plural	The singular includes the plural.
<i>Substantive Canons</i>	
Presumption of Severability	Unconstitutional sections may be severed without invalidating the rest of the act.
Repeal-of-a-Repeal Rule	The repeal of a repealing act revives the original enactment.
Rule Against Implied Repeals	The courts will attempt to reconcile two conflicting acts rather than find that the latter repealed the former.

As noted above, however, the authority of these manuals remains contested.⁴⁵ The manuals pose a particular problem for textualists, who tend to

44. See *supra* notes 22-26, 35, 37-43 and accompanying text. This classification scheme for the canons is modeled after the system developed by Professors Eskridge, Frickey, and Garrett through their study of canons deployed by the Supreme Court in the 1986 through 1993 Terms. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* app. B (4th ed. 2007).

45. See *supra* note 12 and accompanying text.

be skeptical of extrinsic sources. The next Part examines the manuals' legitimacy from a textualist perspective.

II. SHOULD TEXTUALISTS READ THESE MANUALS?

A. Drafting Manuals Reinforce Textualist Methods

Textualism is a theory of statutory interpretation premised on the idea that the courts should act as faithful agents of Congress by interpreting each law to give effect to its ordinary meaning. To do so, textualists “look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of the words.”⁴⁶ The textual canons described in Section I.B assist them in this pursuit. On the other hand, textualists do not concern themselves with the legislature’s intent and give no weight to legislative history or other sources meant to divine the intent of an enacting legislature. Drafting manuals are a boon to textualist methodology because they support the foundational assumption that Congress and the courts share a set of linguistic conventions that includes the textual canons.⁴⁷

Critics of textualism argue that legislators are unaware of the canons and related rules⁴⁸ and that these supposedly neutral rules are mere window-dressing for judicial policymaking.⁴⁹ Textualism faces an existential crisis if it misunderstands the language of Congress by manufacturing meaning where none is intended.

46. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 65 (1988).

47. See Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Case Study*, 77 N.Y.U. L. REV. 575, 597 & n.42 (2002) (citing *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991), for the proposition that “the Court ‘presum[es] that Congress legislates with knowledge of [the] basic rules of statutory construction’”) (alterations in original).

48. Professors Nourse and Schacter note that “[i]t is evident” even among staffers—who are more likely to know and employ these rules of construction than the legislators they serve—“that canons of statutory construction are not systematically a central part of the drafting enterprise in which staffers participate, nor . . . is interpretive research more generally.” *Id.* at 614-15.

49. See James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005) (arguing that the canons do not provide impartial guidance and that courts sometimes rely on them in contradiction to the clearly expressed preferences of Congress); see also Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010) (noting that many state courts rank the substantive canons—though not necessarily the textual canons—not only below text but also below legislative history because the courts deem judge-made canons to be less probative of legislative will).

Drafting manuals offer a powerful rebuttal to this critique because they demonstrate that legislators, their staff, and the Office of Legislative Counsel (OLC) share a set of linguistic conventions that conform to the canons. On a broad level, the manuals support the contention that the legislature adheres to the traditional rules of grammar that substantiate many of the textual canons,⁵⁰ as well as the further contention that drafters are aware of the canons.⁵¹ The manuals provide the strongest support for the conventions that are specifically described.

The fact that an individual legislator may be unaware of a technical rule is not fatal to this understanding because Senators and Representatives typically do not draft bills themselves. Instead, the task of drafting falls on staff members who are charged with translating policy into legislative language.⁵² The manuals were drafted by OLC to assist drafters, including OLC attorneys and congressional staffers, with this translation process.⁵³ These manuals will continue to provide a shared vocabulary among staffers at least as long as OLC maintains its active role in assisting Congress.

Another effect of the manuals may be to increase reliance on textualist methods even among judges who would not identify themselves as textualists. Some judges currently favor legislative history over the canons because they are uncertain that Congress is aware of the canons, much less reliant on them.⁵⁴ These manuals help to remove the uncertainty by providing evidence that drafters know certain canons.

B. Weighing the Manuals from a Textualist Perspective

The drafting manuals may be a boon for textualists because they endorse textualist methods and shed light on the shared understandings of the enacting

50. See HOUSE MANUAL, *supra* note 3, at 56 (“It is expected that the traditional rules of grammar and usage will apply in the drafting of legislation.”).

51. See *supra* Section I.B (describing canons named in the manuals, the manuals’ understanding of how the courts interpret certain language, and conventions that are essentially restatements of existing canons).

52. See generally Nourse & Schacter, *supra* note 47, at 585-87 (describing a case study in which staff members reported having “principal responsibility for producing bill drafts”).

53. See HOUSE MANUAL, *supra* note 3, at 12 (“The attorney should use [stylistic] devices to the extent their use . . . helps in expressing the client’s message and in carrying out the client’s policy.”).

54. Cf. Gluck, *supra* note 49, at 1839-42 (describing “modified textualism” as a methodology that considers legislative history ahead of substantive canons because it is better evidence of the legislature’s, rather than a court’s, understandings and policy decisions).

legislature. However, textualists can only make use of the manuals if the manuals can withstand the standard textualist objections to the use of sources other than the text of a statute.

The Senate and House manuals can meet this challenge. The following Subsections evaluate the legitimacy of drafting manuals from a textualist perspective by contrasting drafting manuals with dictionaries, which textualists consider an acceptable form of extrinsic evidence, and legislative history, which textualists do not consider legitimate.

1. *Manuals Are Less Available and More Technical than Dictionaries*

Textualists do not reject all deployment of extrinsic sources in the search for statutory meaning. For example, reliance on dictionaries has exploded due to their use by Justice Scalia.⁵⁵ This explosion in the use of dictionaries is the result of textualism's inquiry into the ordinary meaning of statutes, as evidenced by their text.⁵⁶ Dictionaries aid textualist interpretation because they reflect ordinary meaning: they are widely available to drafters and subsequent interpreters and they communicate a shared understanding of what words mean.⁵⁷

Yet drafting manuals cannot share the privileged status of dictionaries until they enter wider circulation. Because they are narrowly read and infrequently cited, they are more liable to be understood as a secret code than a source of shared meaning.⁵⁸ This basic deficiency is only temporary and can be easily remedied by greater awareness and circulation of these documents.

55. Deployment of dictionaries has not been limited to questions of statutory interpretation. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2791-93 (2008), in which Justice Scalia cites six dictionaries, some published as early as 1771, to establish the meaning of "keep," "bear," and "arms" under the Second Amendment. See also Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1438-39 (1994) (noting a "fourteen-fold increase" in the use of dictionaries in the 1992 Supreme Court Term as opposed to the 1981 Term, and further noting that "[a]lthough Justice Scalia has been the most willing to employ dictionaries, all nine of the Justices on the Court during the 1992 Term have prominently cited dictionaries" (internal citations omitted)).

56. The House Manual provides additional support for this approach by advising drafters to write in "English for real people" and to use dictionaries as a guide. HOUSE MANUAL, *supra* note 3, at 3, 5.

57. *But see* *Smith v. United States*, 508 U.S. 223, 241-42 (1993) (Scalia, J., dissenting) (advising the interpreter that the specific context in which a phrase is used is sometimes a better indicator of the shared meaning of a word than is its dictionary definition).

58. Compare this view on drafting manuals to the contention that one reason to disfavor legislative history is its inaccessibility, *infra* Subsection II.B.2. Drafting manuals differ because, even if they are not immediately or widely accessible, there are few enough of them

Drafting manuals also differ in substance from dictionaries because they do not purport to aid the court in ascertaining the plain meaning of the words employed in a statute. Instead they illuminate certain legal presuppositions and legislative conventions. The manuals assert legal presuppositions when they reference a canon or precedent with an eye toward how a court will rule, as described in Subsection I.B.1. The presuppositions themselves should carry little weight with textualists. Consider Justice Scalia's protest in *Blanchard v. Bergeron*, a case in which the Court had to decide whether an attorney's fee award was allowed under 42 U.S.C. § 1988.⁵⁹ In *Blanchard*, Justice Scalia criticized the Court for deciding the question by treating a Fifth Circuit case and three district court cases as authoritative because they had been referenced approvingly in a set of Senate and House Reports on the statute in question.⁶⁰ As he stated, "Congress is elected to enact statutes rather than point to cases."⁶¹ Justice Scalia's analysis strongly suggests that, from the textualist perspective, Congress's interpretation of judicial opinions does not bind the Court even if Congress has relied on the interpretation.

In light of this perspective, the House and Senate manuals' advice that a "severability clause is unnecessary" because of *INS v. Chadha* and *Buckley v. Valeo*⁶² would lack authority insofar as the manuals purport to tell the Court how to apply the law. Nonetheless, these provisions are valuable because they establish that drafters are aware of certain rules. The courts should not defer to the understanding of a canon or precedent given in a manual, but they should take such a description as evidence that the convention was present in the context in which the drafter worked.

Descriptions of legislative conventions, on the other hand, do not raise the same problem. Most provisions in the manuals do not speak to what courts do, but instead serve like a dictionary or grammar book to tell drafters what they should do. Accordingly, the manuals have helped courts to understand Congress's handiwork in cases like *Koons*, which presented a question of how

that each litigant need not make large expenditures of time or money to research them. At the time I first researched this topic in March 2010, the House Manual was available for download as a PDF file, but the Senate Manual existed in only three locations: the Supreme Court Library, the Federal Circuit Library, and the Paul L. Boley Law Library of Lewis & Clark Law School. This search may be duplicated by visiting WorldCat.org and searching for the title "Legislative Drafting Manual" and author "Legislative Counsel." Court libraries display their holdings only to subscription WorldCat users.

59. 489 U.S. 87 (1989).

60. *Id.* at 97-98 (Scalia, J., concurring).

61. *Id.* at 98 (Scalia, J., concurring).

62. HOUSE MANUAL, *supra* note 3, at 32-33; SENATE MANUAL, *supra* note 2, at 49-50.

drafters organize a statute, as well as in cases like *Carr* and *Rochelle*, which presented questions of verb tense and word choice. In each of these cases, the manual helped flesh out the context in which drafters work.

2. *Manuals Are More Easily Publicized and Less Susceptible to Tampering than Legislative History*

Textualists should scrutinize drafting manuals because they are extrinsic legislative materials. In doing so, however, they should find drafting manuals more reliable than legislative history.

One critique of legislative history is that it is not public and accessible in the way the law should be.⁶³ It is buried in committee reports and other documents that are not read by most legislators, let alone by most interpreters of statutes or the public at large. In this sense, legislative history may fail to reflect accurately the intent of the enacting Congress, let alone the ordinary meaning of the text.

Drafting manuals face a similar but easily surmountable problem. Even if drafting manuals might be criticized because it is unlikely that legislators or the general public consult them in order to understand a bill, the manuals are unlike legislative history because the covert nature of the manuals is simply a product of a lack of awareness. The problem can be overcome by improved circulation of the manuals across the branches of government and among potential litigants.

Another reason to be skeptical of legislative history is that staffers draft it rather than elected officials. This arrangement raises the specter of tampering, by which staffers or lobbyists might smuggle false clues into the legislative history to mislead courts in the task of interpretation.⁶⁴ Such planted statements are illegitimate because they fail to reflect any legislative consensus.

63. See, e.g., *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396-97 (1951) (Jackson, J., concurring) (“[T]here are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. . . . To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.”).

64. Professors Nourse and Schacter offer two observations that complicate the question of tampering: first, that staffers are also usually the ones drafting the bills (which the legislators frequently do not read), Nourse & Schacter, *supra* note 47, at 585-86, 608, and second, that the staffers have strong incentives to be faithful agents lest the Representatives and Senators for whom they work fire them, *id.* at 609.

These statements are also disruptive because they may purport to contradict or alter the meaning of a statute that is clear on its face.

The reality of legislative drafting is that the majority of drafting work—both public, like bills, and private, like drafting manuals and legislative history—is completed by staff rather than by legislators. Yet drafting manuals are more reliable than legislative history because manuals are not susceptible to tampering. There is little risk that a staffer, let alone a lobbyist, has attempted to smuggle false advice into these manuals in order to mislead courts. This risk is mitigated because, unlike legislative history, these manuals are not suited for use as Trojan Horses—they are not drafted in anticipation of a particular policy decision, and it would be impossible for the attorneys who first drafted these content-neutral manuals in 1989 to game the system to achieve specific legislative outcomes. Given the dearth of citation to these manuals since their publication, these attorneys probably never contemplated that courts would cite the manuals.

These manuals also differ from legislative history because they do not purport to reflect the opinions of legislators on the meaning of any given law. Instead, they blend stylistic directions with practical advice of general applicability on how to draft a statute so that it will be interpreted to yield a legislator's desired effect.⁶⁵ Due to the nature of the content, it is unlikely that a litigant could cite a drafting manual for material to contradict the plain meaning of a statute.

Another factor in favor of drafting manuals is that the conventions contained therein are integral to the legislative process. When a legislator requests a certain bill, she endorses staffers' use of the shared conventions of drafting, like those encompassed in the manuals, in order to complete the fundamental legislative task of drafting laws. Members vote on bills with confidence that the same conventions apply to every bill, even if they do not know the exact conventions described in the manuals.

Legislative history, on the other hand, is tangential to the legislative process. Most members who are voting on a bill do not know its legislative history, no member can reject or amend it, and it changes with every

65. These aims might be critiqued as an attempt to undermine the judicial role of interpreting the law. Despite this concern, such a method of informing the courts of congressional understandings is surely more deferential and collaborative than the explicit codification of canons and other interpretive methodologies. See Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010) (describing express codification of canons); see also Gluck, *supra* note 49 (describing power struggles in states like Connecticut, Michigan, and Texas, in which courts refused to follow codified canons).

bill.⁶⁶ Legislative drafting manuals provide a shared frame of reference to members and their staff in a way that legislative history cannot.

CODA: DRAFTING MANUALS SHOULD BE READ FOR WHAT THEY ARE

This Comment seeks to make the federal drafting manuals more accessible by describing their contents and then puzzles through the implications of these manuals for textualism.

As a descriptive matter, the manuals contain a range of advice—stylistic and substantive, explicit and implicit—that fleshes out the legislative conventions that factor into the drafting process. The federal manuals, as well as the many existing state manuals, deserve further attention so that courts and attorneys can better understand the context in which drafters work.

The question of how textualists should handle these manuals remains difficult. The reward for embracing these manuals is substantial because they validate textual canons and textualist methods. The barriers to their acceptance are also surmountable. Wider circulation could eliminate the apparent secrecy of these manuals. Moreover, courts can distinguish these manuals from objectionable forms of extrinsic evidence because the manuals are not subject to manipulation. These manuals are nonetheless drafted by OLC, not enacted by Congress. Textualists may also worry about the fine line between telling drafters how to write and telling courts how to interpret.

The question is easier for “newer” textualists like Justice Alito, who cited the manuals in *United States v. Carr*. This newer brand of textualism is willing to engage with extrinsic sources, even legislative history, “to establish the context in which the statute should be read.”⁶⁷ This use is the type for which the manuals are best suited. Drafting manuals provide the shared stylistic framework that OLC and Hill staffers employ to draft a bill, making the manuals particularly credible for establishing the context in which a statute should be read.

BJ ARD

66. A well-known colloquy between Senators Armstrong and Dole regarding a committee report brings this point to life. See 128 CONG. REC. 16,918-19 (1982). In the exchange, Senator William Armstrong forced Senator Robert Dole to admit that he had not drafted, read, or voted on the contents of the report, and Senator Armstrong concluded in no uncertain terms that the report “is not the law, it was not voted on, [and] it is not subject to amendment.” *Id.*

67. Elliott M. Davis, Note, *The Newer Textualism: Justice Alito’s Statutory Interpretation*, 30 HARV. J.L. & PUB. POL’Y 983, 984 (2007).

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