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# Role of Legislative History in Statutory Interpretation: A New Era after the Resignation of Justice William Brennan, The

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# The Role of Legislative History in Statutory Interpretation: A New Era After the Resignation of Justice William Brennan?

*Public Citizen v. Department of Justice*[1]

## I. INTRODUCTION

For many years courts have battled with the practice of consulting legislative history when interpreting statutes. In a quest for the "true intent" of the legislature, some judges routinely turn to the legislative history, while others believe that legislative history offers little guidance. This discord among the judiciary has sparked prolific commentary within the legal community over the appropriate use of legislative history in the judicial decision-making process.

In recent years, the United States Supreme Court has come under attack from Justice Antonin Scalia for excessive reliance on legislative history. Although the Supreme Court has never developed a uniform practice toward the use of legislative history in statutory interpretation, several Justices routinely rely on legislative history.[2] In particular, recently-retired Justice William Brennan was a staunch supporter of consulting legislative materials.[3]

This Comment uses *Public Citizen v. Department of Justice*, an opinion authored by Justice Brennan, as a vehicle for illustrating the sharp division within the Supreme Court over the appropriate role of legislative history in statutory interpretation. In *Public Citizen*, the majority avoided the plain language of a statute through selective analysis of legislative materials to interpret the statute without creating a constitutional conflict.[4]

As a basis for the discussion, this Comment will concentrate on past and present Supreme Court decisions highlighting general approaches in the use of legislative history in statutory interpretation. In particular, the Comment will focus on differing viewpoints within the present Supreme Court, including Justice Scalia, an outspoken critic of the use of legislative history in statutory interpretation. Finally, the Comment will discuss the current controversy between scholars on the benefits and dangers of consulting legislative history.

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1. 109 S. Ct. 2558 (1989).

2. Costello, *Reliance on Legislative History in Interpreting Statutes*, CRS REVIEW 29 (Jan.-Feb. 1990).

3. *Id.*

4. *See infra* notes 138-69 and accompanying text.

## II. FACTUAL OVERVIEW OF *PUBLIC CITIZEN*

Since 1952, the Department of Justice has obtained evaluations and recommendations of prospective federal judicial nominees from the American Bar Association Standing Committee, in an effort to aid the President of the United States in his constitutional duty of appointing federal judges.[5]

In 1988, the Washington Legal Foundation (WLF), a non-profit public interest law center, brought suit in the United States District Court for the District of Columbia, against the Department of Justice regarding its use of the American Bar Association Standing Committee (Standing Committee).[6] The WLF sought a declaratory judgment to determine whether the Standing Committee was an "advisory committee" as defined by the Federal Advisory Committee Act (FACA) and therefore subject to FACA regulations.[7]

The FACA was passed by Congress in 1972 to impose certain requirements on committees or other groups which are established or utilized by the President or federal agencies to obtain advice or recommendations.[8] Requirements of the FACA include: the filing of a charter, the keeping of meeting minutes, attendance at the meetings by an officer or employee of the Federal Government, advance notice and public openness of meetings as a rule, and the public availability of records consonant with the Freedom of Information Act.[9] Generally, the purposes of the FACA were to enhance the public accountability of advisory committees established by the executive branch, and to reduce wasteful expenditures on them.[10]

The American Bar Association Standing Committee on the Federal Judiciary is an incorporated association established by the American Bar Association.[11] The Standing Committee is a private organization which does not receive funds from any government agency.[12] Since 1948, the Standing Committee has reviewed qualifications of prospective federal judicial

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5. Washington Legal Found. v. United States Dep't of Justice, 691 F. Supp. 483, 488-89 (D. D.C. 1988).

6. *Id.* at 484-85. Plaintiff, Public Citizen, successfully intervened. *Id.* In 1986, the WLF brought suit against the American Bar Association Standing Committee and its individual members. The case was dismissed because FACA does not permit suit by one private party against another private party. Washington Legal Found. v. American Bar Ass'n Standing Comm. on Fed. Judiciary, 648 F. Supp. 1353 (D. D.C. 1986).

7. *Washington Legal Found. v. Dep't of Justice*, 691 F. Supp. at 484-85.

8. *Public Citizen*, 109 S. Ct. at 2562.

9. *Id.*

10. *Id.*

11. *Washington Legal Found. v. ABA*, 648 F. Supp. at 1354.

12. *Id.*

nominees "identified" by the President through the Department of Justice.[13] Specifically, the President's federal judicial selection committee, through the Department of Justice, requests the Standing Committee to investigate and evaluate potential nominees.[14]

In reviewing the judicial nominees, the Standing Committee conducts confidential interviews with various persons in the nominee's community and gives "close scrutiny" to the nominee's legal writings.[15] All information obtained through the review process is kept confidential by the American Bar Association (ABA).[16] At the end of the review process, a final report is submitted to the Standing Committee chairperson, and each Committee member votes on one of four ratings to be given the nominee: "'exceptionally well qualified,' 'well qualified,' 'qualified,' or 'not qualified.'"[17] The final rating is submitted to the Department of Justice, and the contents of the report are kept confidential by the ABA.[18]

The WLF argued that under the requirements of the FACA the Standing Committee was required, *inter alia*, to give advance notice of its meetings, to open meetings to the public and to provide public access to the Committee's records.[19] In response, the Standing Committee argued, *inter alia*, that the WLF's construction of the FACA was too broad. They argued the Standing Committee did not constitute an "advisory committee" within the FACA, and furthermore, the application of the FACA to the Standing Committee violated the separation of powers doctrine by limiting the President's freedom to nominate federal judges.[20]

The district court dismissed the WFL claim, holding that although the Department of Justice utilizes the Standing Committee as an advisory committee within the meaning of the FACA, the FACA could not be constitutionally applied to the Standing Committee because art. II, section 2, cl. 2 of the Constitution requires that "the President alone shall nominate candidates for federal judgeships."[21]

On appeal, the United States Supreme Court affirmed the district court in a 5-3-0 decision in which Justice Scalia did not participate.[22] The Court held that the Standing Committee did not constitute an advisory committee

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13. *Id.* at 1355.
14. *Washington Legal Found. v. Dep't of Justice*, 691 F. Supp. at 486.
15. *Washington Legal Found. v. ABA*, 648 F. Supp. at 1354.
16. *Id.*
17. *Id.* at 1355.
18. *Id.*
19. *Public Citizen*, 109 S. Ct. at 2562-63.
20. *Id.* at 2563.
21. *Washington Legal Found. v. Dep't of Justice*, 691 F. Supp. at 496.
22. *Public Citizen*, 109 S. Ct. at 2558.

within the meaning the FACA because, although a literal reading of the FACA would encompass the advisory relationship of the Standing Committee, the legislative history of the FACA did not reveal an intent by Congress to widen the scope of the FACA to include such a relationship.[23] Furthermore, the Court stated that to construe the FACA to apply to the Standing Committee would create serious constitutional difficulties regarding the separation of powers doctrine.[24] The Court refused to address such a question when the text and legislative history of the FACA revealed competing arguments that Congress did not intend the FACA to encompass such a relationship.[25]

Justice Kennedy, joined by Chief Justice Rehnquist and Justice O'Connor, concurred in judgment only, claiming that the plain language of the statute compelled the inclusion of the Standing Committee.[26] Furthermore, he criticized the Court's willingness to use legislative history because the language of the statute was clear.[27] Justice Kennedy would have found that the FACA applied to the government's use of the Standing Committee but that such an application was unconstitutional.[28]

## III. APPROACHES TO THE USE OF LEGISLATIVE HISTORY

In the judicial decisionmaking process, the primary and constitutional role of the court is to ascertain the meaning of a statute as intended by the legislative body responsible for its enactment.[29] While many "canons" of statutory construction exist to guide a court in the direction of the legislative intent, there fails to be a consensus as to the correct theory of statutory interpretation.[30] When the specific issue of whether to consult legislative

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23. *Id.* at 2573.
24. *Id.* at 2572.
25. *Id.* at 2573.
26. *Id.* at 2574.
27. *Id.* at 2580.
28. *Id.* at 2580-84.
29. R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 13 (1975). The constitutional role of the judiciary in interpreting statutes is mandated by the separation of powers doctrine in article I of the United States Constitution. *Id.* at 7-8. As a forum to resolve ambiguities in the statutes, the judicial branch "must remain appropriately deferential to the properly promulgated views of the legislature." *Id.* at 8. Therefore, "any conflict between the legislative will and the judicial will must be resolved in favor of the former," unless the statute is held to be unconstitutional. *Id.*
30. *Id.* at 1. "The hard truth of the matter is that American Courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation." *Id.* (quoting H. HART, JR. & A. SACKS, THE LEGAL PROCESS 1201 (tentative ed. 1958)).

history arises, the decisionmaking process is commonly hampered by controversy and lack of uniform agreement between the deciding judges.

This section will focus on several principles of interpretation utilized by the Supreme Court, and problems that arise with the use of legislative history. In the primary stage of statutory interpretation, the initial problem faced by most courts is the question of when it is appropriate to consult legislative materials. Secondly, assuming the legislative history of a statute should be analyzed, which materials are relevant and reliable sources of information?

### *A. Should Extrinsic Materials Be Consulted?*

Probably the most controversial area of statutory interpretation is deciding at what point, if at all, it is appropriate to consider extrinsic materials in interpreting a statute. As a guideline for interpretation, the judiciary has fashioned a well-known maxim called the "plain-meaning rule."[31] The "plain-meaning rule" requires that if the words of a statute are clear, and the construction of those words will not lead to an absurd result, the words are assumed to be the "final expression of the meaning intended."[32]

In *Caminetti v. United States*,[33] the Supreme Court refused to consult legislative materials in construing the apparently clear words of the Mann Act.[34] The question was whether the Mann Act, which prohibited taking a woman across state lines for "prostitution or debauchery, or for 'any other immoral purpose'," was intended to cover non-commercial acts.[35] Although there was clear evidence in the legislative history that Congress was targeting "white slave traffic" and not non-commercial activities, the Court upheld the convictions based on the plain language of the statute.[36] The Court refused to consult the legislative materials stating:

> when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source.[37]

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31. United States v. Missouri Pac. R.R., 278 U.S. 269, 277-78 (1929).
32. *Id.* at 278.
33. 242 U.S. 470 (1917).
34. *Id.* at 485.
35. *Id.* at 484-85.
36. *Id.* at 489-90.
37. *Id.* at 490.

The dissent in *Caminetti* illustrated a common problem plaguing statutory interpretation—judges often disagree over whether a word is unambiguous.[38] The dissent claimed that the purpose of the phrase "for any other immoral purpose" was not a clear and unambiguous phrase, and therefore, the use of legislative materials was necessary in order to interpret the Act.[39] This debate over the ambiguity of words highlights the obvious problem that a single word may have several meanings, or provide inconsistent inferences depending on the perception of an individual judge.[40]

Although the "plain-meaning rule" provides a guideline for the limitation of the use of legislative history, most courts have not strictly applied the principle.[41] A critic of the "plain-meaning rule," Judge Learned Hand, noted that although the words of a statute are the most "decisive evidence" of what Congress intended, "[t]here is no surer way to misread any document than to read it literally."[42]

A 1940 Supreme Court decision attacked the plain-meaning approach.[43] In *United States v. American Trucking Association*,[44] the Supreme Court fashioned a new standard for the use of legislative history in statutory interpretation. In this case, the Court had to determine whether the word "employee" in the Motor Carrier Act gave power to the Interstate Commerce Commission to establish reasonable requirements for qualifications and maximum hours for employees whose duties did not affect the safety of operations.[45] The Court noted that although the meaning of the words were plain, application of the literal meaning of the words would be "[a]t variance with the policy of the legislation as a whole."[46] As a result, the Court disregarded the plain meaning approach by stating "when aid to construction of the meaning of words, as used in the statute, is available, there certainly

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38. *Id.* at 496-503.

39. *Id.* at 496-97.

40. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (Powell, J., dissenting) (finding the language much more ambiguous than the Court); Nutting, *The Ambiguity of Unambiguous Statutes*, 24 MINN. L. REV. 509, 509-14 (1940).

41. Jones, *Extrinsic Aides in the Federal Courts*, 25 IOWA L. REV. 737, 737 (1940) (the plain-meaning rule has been "greatly relaxed" in practice); Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 197-98 (1983) (Although the words "'plain meaning' linger[] on in Court opinions, . . . its spirit is gone".).

42. Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944).

43. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 U. COLO. L. REV. 1298, 1301 (1975).

44. 310 U.S. 534 (1940).

45. *Id.* at 538.

46. *Id.* at 543-45 (quoting Ozawa v. United States, 260 U.S. 178, 195 (1922)).

can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"[47]

A famous 1892 Supreme Court decision which advocated the liberal use of legislative history was the vintage case of *Church of the Holy Trinity v. United States*.[48] In this case, the Court faced the issue whether the Act of February 26, 1885, which prohibited the importation of foreigners to perform labor in the United States, applied to an ordained minister.[49] In looking to the legislative purpose of the statute, the Court rejected the literal words by claiming "[i]t is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."[50]

Although decisions like *Holy Trinity* and *American Trucking* opened the door to the use of extrinsic materials in statutory interpretation, subsequent Supreme Court decisions reaffirmed various forms of the plain-meaning approach.[51]materials Particularly, the Supreme Court in *United States v. Public Utilities Commission*[52] stated in dictum that the use of legislative history was only "proper" when the language of the statute is ambiguous or the result is absurd.[53] Furthermore, in *Gemsco Inc. v. Walling*,[54] the Supreme Court restricted the use of legislative history by stating that "[t]he plain words and meaning of a statute cannot be overcome by a legislative history which, through strained process of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."[55]

### *B. What Materials Should Be Consulted?*

Once the court establishes the need to resort to extrinsic materials, it must then answer the question of which materials the court should consult for guidance of legislative intent. The materials most commonly considered include committee hearings and reports, floor debates, and post-enactment legislation. As a general rule, one scholar expressed three standards for

47. *American Trucking*, 310 U.S. at 543-44 (citations omitted).

48. 143 U.S. 457 (1892).

49. *Id.* at 457-58.

50. *Id.* at 459.

51. Murphy, *supra* note 43, at 1302.

52. 345 U.S. 295 (1953).

53. *Id.* at 315-16. *See also* United States v. Oregon, 366 U.S. 643, 648 (1961); *Ex parte* Collett, 337 U.S. 55 (1949) (finding no need to resort to the use of legislative history because the provisions of the statute were clear and unequivocal).

54. 324 U.S. 244 (1945).

55. *Id.* at 260.

measuring the extent such materials should be used: "relevance, competence, and probative value."[56]

The most reliable form of legislative history in determining legislative intent is the committee report.[57] Other materials such as testimony during committee hearings or floor debates are considered less reliable sources of information.[58] Despite the criticism and questionable reliability of the different types of legislative history available, however, courts regularly consult a wide range of legislative materials.[59]

Most courts agree that the legislative materials consulted should be reliable and relevant, but few agree as to which materials meet the criteria. In the decision of *Schwegmann Bros. v. Calvert Distillers*,[60] Justice Jackson expressed his view that legislative history should only be used where the face of the Act is "inescapably ambiguous."[61] He further stated that the use of extrinsic materials should not reach beyond Committee reports.[62] In criticizing the use of other type of materials, he warned that "to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions."[63]

In *North Haven Board of Education v. Bell*,[64] the Supreme Court relied heavily on the legislative history of Title IX of the Educational Amendments of 1972 to determine whether the words "no person" included employees as well as students.[65] The Court focused on various forms of legislative

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56. R. DICKERSON, *supra* note 29, at 140 (citing F. NEWMAN & S. SURREY, LEGISLATION—CASES AND MATERIALS, 669-71 (1955) (suggested standards by Henry M. Hart, Jr.)).

57. Wald, *supra* note 41, at 201 (citing Schwegmann Bros. v. Calvert Distillers, 341 U.S. 384, 395 (1951) (Jackson, J., concurring)); J. HURST, DEALING WITH STATUTES 42-43 (1982) (the committee is the "workplace in which members have hammered out the particular content of the measure"). For an in depth discussion on various types of legislative history and their respective importance in the judicial decisionmaking process, see Costello, *Sources of Legislative History As Aides to Statutory Construction*, CRS Report for Congress (January 27, 1990).

58. J. HURST, *supra* note 57, at 43 (Debates are "fragmentary, subject to members' off-floor 'amendment' of their remarks, and blurred by diversity of views which may go without ordered challenge or review".).

59. Wald, *supra* note 41, at 203.

60. 341 U.S. 384 (1951).

61. *Id.* at 395.

62. *Id.*

63. *Id.*

64. 456 U.S. 512 (1982).

65. *Id.* at 520-22.

materials such as the prepared remarks by Senator Bay during debate which were a summary of the amendment introduced after its passage.[66] The Court also used the Conference Committee report noting that the House withdrew from an amendment that expressly excluded employees.[67]

Another hotly debated topic is whether post-enactment statements are a reliable source of legislative intent.[68] The use of postenactment statements is questioned because the legislative "intent" to be inferred comes from an entirely different group of legislators, and under different circumstances.[69]

While the reliability of subsequent history is questionable,[70] courts give some deference to such postenactment materials.[71] For example, in *Bobsee Corp. v. United States*,[72] the Fifth Circuit commented on the use of post-enactment statements stating that "these subsequent legislative statements are not part of the history. . . . However, [they are] entitled to some consideration as a secondarily authoritative expression of expert opinion."[73] Likewise, in *General Electric Co. v. Gilbert*,[74] the Supreme Court faced the issue whether EEOC guidelines, issued eight years after the passage of the statute, were entitled to any consideration in determining legislative intent.[75] Although the Court conceded that the agency guidelines were entitled to some consideration, the guidelines warranted "less weight" because they were post-enactment statements.[76] In other cases, post-enactment statements were completely disregarded as having no probative weight in statutory interpretation.[77]

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66. *Id.* at 531.

67. *Id.* at 527-30.

68. R. DICKERSON, *supra* note 29, at 179.

69. *Id.*

70. *Id.* at 180.

71. Wald, *supra* note 41, at 204.

72. 411 F.2d 231 (5th Cir. 1969).

73. *Id.* at 237 n.18 (citation omitted).

74. 429 U.S. 125 (1976).

75. *Id.* at 141.

76. *Id.* at 141 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); Espinoza v. Faroh Mfg. Co., 414 U.S. 86, 94 (1973); Standard Oil Co. v. Johnson, 316 U.S. 481, 484 (1942)).

77. *See, e.g.*, Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987); Bread Political Action Comm. v. FEC, 455 U.S. 577, 582 n.3 (1982) (majority rejected an affidavit regarding the intent of the original amendment as having little probative weight; the views were made public after the passage of the Act and were regarded as merely personal).

## IV. ANALYSIS

### *A. Some Viewpoints on the Present Supreme Court*

Before the resignation of Justice Brennan, the Supreme Court generally maintained a fair balance of viewpoints on the use of legislative history. The Justices most likely to support a literalistic approach and to avoid reliance upon legislative materials are Chief Justice Rehnquist and Justices White, Scalia, Kennedy and sporadically, Justice O'Connor.[78] At the same time, Justices Marshall, Blackmun, Stevens and the now-retired Justice Brennan more consistently turned to legislative history regardless of the ambiguity of the statute in question.[79]

Leading the charge against unnecessary use of legislative history is Justice Scalia.[80] Justice Scalia advocates relying on only the statutory text when possible because he believes legislative history is an inadequate record of legislative intent.[81] In his view, legislators abuse the political process when they use legislative history as a vehicle to foster the views of private interest groups and as a means to mislead judges.[82] Furthermore, he criticizes the legislators for delegating their responsibilities to unelected staff members.[83]

Although Justice Scalia's view on legislative history has been highlighted by his appointment to the Supreme Court, his views were formed at the appellate level when he sat with the District of Columbia Circuit.[84] In *Hirschey v. FERC*,[85] then-Judge Scalia discussed a House Committee Report which noted a split in the court of appeals in the interpretation of a statute.[86] The Committee Report criticized the Ninth Circuit interpretation of the statute, labeling it erroneous.[87] In rejecting the use of the Committee Report in

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78. Costello, *supra* note 2.

79. *Id.*

80. Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 437 (1988).

81. *Id.*

82. *Id.* at 437-38.

83. *Id.*

84. *See, e.g.*, Consumers Union, Inc. v. FTC, 801 F.2d 417 (D.C. Cir. 1986); Brock v. Cathedral Bluffs Shale Oil, 796 F.2d 533 (D.C. Cir. 1986); Church of Scientology v. IRS, 792 F.2d 146 (D.C. Cir. 1986); Hirschey v. FERC, 777 F.2d 1 (D.C. Cir. 1985); City of Cleveland v. FERC, 773 F.2d. 1368 (D.C. Cir. 1985); Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985).

85. 777 F.2d 1 (D.C. Cir. 1985).

86. *Id.* at 7 (discussing H.R. REP. No. 120, 99th Cong., 1st Sess. 17 (1985)).

87. *Id.*

interpreting the statute, Judge Scalia was unpersuaded of its authoritative nature because he "doubt[s] that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by the house which enacts the committee's bill."[88] To evidence the lack of knowledge of members of Congress regarding the details of legislation, Judge Scalia cited a colloquy between two senators during a floor debate on a tax bill.[89] It was apparent that the senator who was the tax bill committee chairman had not

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88. *Id.*

89. *Id.* at 7 n.1 (citing 128 CONG. REC. S8659 (daily ed. July 19, 1982)). The footnote read, in part:

> Mr. ARMSTRONG. . . . My question, which may take [the chairman of the Committee of 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. . . .
> 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 best seller, 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: . . . . [F]or any jurist, administrator, bureaucrat, tax practitioner, or others who might happen to 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.

*Id.*

written much less read all of the committee report that was on the floor for debate.[90]

In speeches given at several law schools between 1985 and 1986, Justice Scalia advocated the selective use of legislative history.[91] If legislative history must be consulted, he believes the most reliable sources of information are amendments defeated on the floor, and the least reliable sources are the committee reports.[92]

As a Supreme Court Justice, Scalia criticized the Court's use of legislative history in *Immigration and Naturalization Service v. Cardoza-Fonseca*.[93] In this case, although the plain language of the statute apparently settled the question,[94] the Court looked to the legislative history to determine whether there was legislative intent contradicting the language.[95] Although concurring in judgment, Justice Scalia criticized the Court's use of legislative history, warning "[j]udges interpret laws rather than reconstruct legislators intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."[96]

In a recent decision, *Green v. Bock Laundry Machine Co.*,[97] the Court was faced with construing a Federal Rule of Evidence which, if read literally, would produce an absurd result.[98] Justice Scalia would have advocated the use of legislative history only to confirm that the absurd result was never contemplated by Congress.[99] Instead, the majority relied on the legislative and historical background of the Rule to determine precisely what the Rule meant.[100] Justice Scalia criticized the majority's approach because he believed that few members of Congress were aware of the historical evolution of the Rule, much less voted on the Rule with knowledge of the details of the Committee Reports or floor debates.[101]

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90. *Id.*

91. *See* Farber & Frickey, *supra* note 80, at 442 (citing Address by Judge Antonin Scalia, *Speech on Use of Legislative History* (copy on file with the Virginia Law Review Ass'n)). Justice Scalia noted that if he were starting over again, he might reject any use of legislative history in statutory construction. *Id.*

92. *Id.* at n.64.

93. 480 U.S. 421 (1987).

94. *Id.* at 430.

95. *Id.* at 432 n.12.

96. *Id.* at 452-53.

97. 109 S. Ct. 1981 (1989) (Scalia, J., concurring).

98. *Id.* at 1994 (Scalia, J., concurring).

99. *Id.*

100. *Id.* Justice Scalia was concerned that the majority devoted nearly four-fifths of their analysis to interpreting the legislative history. *Id.*

101. *Id.*

Although Justice Scalia firmly supports a literal approach to statutory construction, his views have come under fire by scholars on the subject.[102] Critics concede that if the statute were unambiguous Justice Scalia's strict approach would have merit.[103] The scholars contend, however, that there are many more cases where the language is ambiguous or is susceptible to more than one meaning.[104] In this more common situation, they argue that Justice Scalia's method offers little guidance for interpretation.[105]

Following in the footsteps of Justice Scalia, Justice Kennedy has indicated his support for a literalistic approach to statutory interpretation. For example, in *Patterson v. McLean*,[106] Justice Kennedy narrowly construed a civil rights statute to prohibit an action for racial harassment pertaining to conditions of employment.[107] Without the aid of legislative history, Justice Kennedy applied a literalistic approach in holding that the phrase "same right to make and enforce contracts" only applied to conduct which impaired the right to "make" or "enforce" contracts, not conduct which occurred after the formation of a contract.[108] In angry dissents, Justices Brennan, Marshall, Blackmun, and Stevens criticized the majority's strict reliance on the text of the statute, while ignoring the available legislative history.[109]

Justice O'Connor has also shown support for the plain-meaning approach to statutory interpretation. In *Hallstrom v. Tillamook*,[110] Justice O'Connor strictly applied the plain language of the Resource Conservation and Recovery Act of 1976 to bar a cause of action because the petitioner failed to comply with a sixty-day notice requirement.[111] Justice O'Connor rejected petitioner's claim that a literal interpretation would defeat Congress' intent by noting "'[a]bsent a clearly expressed legislative intention to the contrary,' the words of the statute are conclusive."[112] Only Justices Marshall and Brennan expressed an opposing view in the decision. In their dissent, they attacked the

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102. Farber and Frickey, *supra* note 80, at 443-52.

103. *Id.* at 457.

104. *Id.*

105. *Id.* at 458.

106. 109 S. Ct. 2363 (1989).

107. *Id.* at 2374. Justice Kennedy was joined by Chief Justice Rehnquist, and Justices White, O'Connor and Scalia. *Id.* at 2368.

108. *Id.* at 2374.

109. *Id.* at 2386-88.

110. 110 S. Ct. 304 (1989).

111. *Id.* at 311.

112. *Id.* at 310 (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

majority's approach stating that it "[did] nothing to advance its analysis," and defeated Congress' intent.[113]

As illustrated by *Public Citizen*, the literalistic approach does not always win favor with the Supreme Court. In the past several years, however, conservative appointments to the Supreme Court have led to greater emphasis on the structure and text of a statute.[114] In its unanimous decision in *United Savings Association v. Timbers of Inwood Forest Associates, Ltd.*,[115] the Court interpreted a section of the Bankruptcy Code dealing with the rights of secured creditors, finding that an undersecured creditor is not allowed interest on its collateral pending the stay pursuant to 11 U.S.C. section 362(d)(1).[116] In writing the opinion for the Court, Justice Scalia noted "[s]tatutory construction . . . is a holistic endeavor."[117] He explained that although a statutory provision "may seem ambiguous in isolation," the disputed word or phrase may be clarified in the context of the entire statute.[118] After forming an interpretation from the structure of the statute, Justice Scalia rejected petitioner's reliance on the legislative history, claiming that generalizations from legislative history were "inadequate to overcome the plain textual indication" by Congress.[119]

### *B. The Scholarly Debate*

Through the years, scholars have argued about the dangers and benefits of relying on legislative history in the quest to determine the "true intent" of the legislature.[120] Although most courts defer the use of legislative history until a "significant uncertainty" is established,[121] widespread use of extrinsic materials continues.[122]

Several scholars documented the frequency of Supreme Court references to legislative history from 1938 to 1978, and found a steady increase in the

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113. *Id.* at 314-15.

114. Costello, *supra* note 2, at 30.

115. 484 U.S. 365 (1988).

116. *Id.* at 382.

117. *Id.* at 371.

118. *Id.*

119. *Id.* at 379-80.

120. Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125 (1983).

121. *Id.* at 1137.

122. Carro & Brann, *The U.S. Supreme Court and the Use of Legislative History: A Statistical Analysis*, 22 JURIMETRICS J. 294, 302 (1982) (a statistical survey of the number of citations to legislative history by the Supreme Court per year from 1938 through 1979).

use of legislative history over the years.[123] In 1938, the Supreme Court referred to legislative history in a total of nineteen cases.[124] From that year, the use of legislative history increased in a cyclical pattern to a maximum of 445 citations in 1974.[125] The types of legislative materials receiving the most citations during the period were House Reports, Senate Reports, and the Congressional Record, which together comprised over sixty-five percent of the total citations.[126]

Because the widespread use of legislative history has played such a major role in interpreting statutes, scholars have become concerned with the attendant dangers. Judge Starr, a noted critic of the use of legislative history, argued that the use of legislative history distorts the democratic process.[127] In his view, the vast amount of records available were only relevant to determine the intent of a small number of those in Congress.[128] Furthermore, the committees that compile the various reports tend to have a "narrow" focus, and are less balanced in their views than Congress as a whole.[129] As a result, courts run the risk of relying on materials that are unrepresentative and may not reflect the understanding of the entire Congress.[130]

Judge Starr also noted the "practical concerns" of using legislative history in that there is a great opportunity for manipulation of the materials by the courts.[131] Such reliance on the legislative history has permitted courts to conveniently "find" the answers they seek in legislative materials.[132] Furthermore, with pressures from lobbyists and other interest groups, the legislation is often a product fashioned to embrace the views of such

123. *Id.* In the 1981 Supreme Court Term, the Court discussed at least some aspect of legislative history in almost half of the opinions. Wald, *supra* note 41, at 196.

124. Carro & Brann, *supra* note 122, at 298, 309.

125. *Id.* at 303.

126. *Id.* at 299, 304. Between 1971-1979, Justices Brennan and Marshall cited to legislative history 436 and 464 times respectively. In contrast, Justice Burger cited to legislative history only 176 times within the same time period. *Id.* at 306.

127. Starr, *Observations about the Use of Legislative History*, 1987 DUKE L.J. 371, 375.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 376.

132. *Id.* One scholar claims that there is "the danger of inventing fictitious and fanciful legislative purposes" when a court is attempting to interpret a statute. R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 93 (1975).

groups.[133] In the end, the benefits gained from the use of legislative materials are far less than the potential for abuse of such materials.[134]

In contrast, other scholars have revealed the necessary realities of turning to legislative history for guidance when legislative intent is at issue. As Judge Mikva noted, there are many instances where Congress uses ambiguous or "fuzzy" language. Therefore, the judge must look to the appropriate legislative history to determine what Congress meant.[135] Likewise, as another scholar argued, with the "frailty of language" and the "hectic and compromising nature of the legislative process" there is often a discrepancy between what the legislators intended and what was codified in the language of the statute.[136] The reality is that the words of the statute are "conditioned by the context in which they are uttered," and legislative history is a part of that context.[137]

### *C. The Public Citizen Decision*

#### 1. Majority

In *Public Citizen*, the Washington Legal Foundation (WLF) sought a declaratory judgment that the Standing Committee was an "advisory committee" within the meaning of the FACA, and therefore subject to FACA regulation.[138] In delivering the opinion of the Court, Justice Brennan relied heavily on an interpretation of legislative history to find that the plain language of the FACA did not encompass the Standing Committee advisory relationship to the President.[139]

Section 3(2) of the FACA, defines advisory committee:

> For the purposes of this Act—
> . . . .
>
> (2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . , which is—
>
> (A) established by statute or reorganization plan, or
>
> (B) established or utilized by the President, or

133. Starr, *supra* note 127, at 377.
134. *Id.* at 379.
135. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 382.
136. Dickerson, *supra* note 120, at 1126.
137. *Id.*
138. *See supra* note 6 and accompanying text.
139. *Public Citizen*, 109 S. Ct. at 2573.

> (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President.[140]

In construing the bare words of the statute, the Court noted an ancient decision, *Church of the Holy Trinity v. United States*,[141] which stated:

> [F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.[142]

The Court in *Public Citizen* agreed that the Standing Committee furnished "advice or recommendations" to the President through the Justice Department. The Court claimed, however, that for purposes of the FACA, whether the ABA Committee was an "advisory committee" depended on whether the Committee was "utilized" by the President as intended by Congress.[143]

Although the Court admitted that without a doubt the President "utilizes" the Standing Committee in "one common sense meaning of the term," the Court claimed that the word "[u]tilize is a woolly verb" with "its contours left undefined by the statute."[144] The Court explained that if the statute were read literally, the FACA would encompass almost any organization which the President formally or informally consults for advice, including his own political party.[145] Applying the rationale of *Holy Trinity*, the Court concluded that this was surely a result unintended by Congress when the FACA was enacted.[146]

With the doctrine of *Holy Trinity* at its disposal, the Court swiftly discarded the traditional "plain meaning" approach to statutory construction. Citing several opinions critical of the "plain meaning" doctrine,[147] the Court turned to their recent decision of *Green v. Bock Laundry Machine Co.*[148]

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140. 5 U.S.C.S. App. § 3(2) (Law. Co-op. 1987).

141. 143 U.S. 457 (1892).

142. *Id.* at 459.

143. *Public Citizen*, 109 S. Ct. at 2565.

144. *Id.*

145. *Id.* at 2565-66.

146. *Id.* at 2572.

147. *Id.* at 2566 (citing Cabell v. Markham, 326 U.S. 404 (1945); Boston Sand & Gravel Co. v. United States, 278 U.S. 41 (1928); United States v. American Trucking Ass'n, 310 U.S. 534 (1940)).

148. *Id.* (citing *Bock Laundry*, 109 S. Ct. at 1981).

In *Bock Laundry*, the Court stated that "[w]here the literal meaning of a statutory term would 'compel an odd result,' we must search for other evidence of congressional intent to lend the term its proper scope."[149] Therefore, although the Court agreed that the word "utilize" was unambiguous on its face, the Court felt it necessary to consider the congressional intent of FACA's legislative history before applying the FACA to the Standing Committee.[150]

Looking to the extensive records of the FACA legislative history for guidance, the Court found few, if any, answers to the problem. In arguing that Congress did not intend that FACA apply to the Standing Committee, the Court relied mainly on Executive Order 11,007, issued by President Kennedy, which governed the function of advisory committees until the FACA passage.[151]

According to the Court, the term "utilized" in the Order applied to advisory committees formed by the government, or if the committee was not formed by the government, then "'only during any period when [the committee] is being *utilized* by a department or agency in the same manner as a Government-formed advisory committee.'"[152] The Court claimed that because the Standing Committee was formed privately instead of by the government, and because the Committee received no federal funds from the government, the Committee was not "utilized" the same as a Government-formed advisory committee.[153]

Secondly, although the Court noted that there was direct legislative history which evidenced Congress' intent to widen the scope of the Executive Order,[154] the Court argued there was still little reason to believe Congress intended to encompass the ABA Committee.[155] In the Court's opinion, the principal purposes of the FACA, which were to make those committees established by the government publicly accountable and to reduce any waste of government expenditures, were not served by application to a private organization receiving no federal funds.[156]

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149. *Id.* (citing *Bock Laundry*, 109 S. Ct. at 1984).

150. *Id.* at 2567.

151. *Id.* at 2567-69.

152. *Id.* at 2567.

153. *Id.* at 2568.

154. *Id.* (citing H.R. REP. No. 1731, 91st Cong., 2d Sess. 9-10 (1970); H.R. REP. No. 1017, 92d Cong., 2d Sess. 4 (1972); S. REP. No. 1098, 92d Cong., 2d Sess. 3-5, 7 (1972)).

155. *Id.*

156. *Id.*

Finally, the Court analyzed the preliminary House and Senate bills in reference to the final version of the FACA as approved by Congress.[157] The earlier version of the House Bill applied only to advisory committees "established" by statute or by the President.[158] The House Committee Report defined "advisory committee" to also include committees that were formed before the President sought advice, but which were used by the President in the same manner as a committee formed by the President.[159] Despite the apparent inclusiveness of the language, the Court chose to draw an inference from an earlier House Report to determine that it was questionable whether the authors of the House Report believed the Standing Committee was used in the same way as other advisory committees.[160]

The Senate Bill, containing similar language to that used in the House Bill, stated that the words "established or organized" by statute or the President should be read in a liberal sense so as not to confine the inclusion to only Government-funded committees.[161] The Court argued, however, that the list of examples given by the Senate Report inferred that the FACA included only those groups that were "quasi-public" in nature.[162]

In the end, the Court admitted that the final version of the FACA contained the phrase "established or utilized," but suggested that the "genesis" of the FACA defined its scope.[163] Therefore, the majority concluded that the word "utilized" was merely added to clarify that the FACA applies only to committees established by the government and committees formed indirectly by "quasi-public" organizations.[164]

After a review of the FACA legislative history, the majority could only conclude that it was a "close question" as to whether the FACA could be construed to encompass the Standing Committee.[165] Although the statute's broad language was inclusive, the Court believed the evidence of congressional intent to the contrary was sufficient to conclude with fair confidence that Congress did not intend the FACA to apply to the Standing Committee.[166]

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157. *Id.* at 2569-72.

158. *Id.* at 2569 (citing H.R. 4383, 92d Cong, 2d Sess. § 3(2) (1972), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3491, 3504).

159. *Id.* (citing H.R. REP. NO. 1017, 92d Cong., 2d Sess. 4 (1972)).

160. *Id.* (citing H.R. REP. NO. 1731, 91st Cong., 2d Sess. 15 (1970)).

161. *Id.* (citing S. REP. NO. 1098, 92d Cong., 2d Sess. 8 (1972)).

162. *Id.* at 2569-70.

163. *Id.* at 2570.

164. *Id.* at 2570-71.

165. *Id.* at 2572.

166. *Id.*

As a final and determining factor in its decision, the majority's reluctance to address the constitutional question tipped the scale in their favor.[167] According to *Crowell v. Benson*, the Court held that when the constitutional validity of an Act by Congress is in question, the general rule is that the "'Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"[168]

In this case, the Court chose not to address the constitutional question regarding the separation of powers doctrine because their review of the legislative history revealed that Congress "probably did not intend" the FACA to encompass the ABA Committee.[169]

### 2. Justice Kennedy's Response

In his concurring opinion, Justice Kennedy asserted that the plain language of the FACA should have been both the starting and stopping point of the analysis.[170] He believed that the Court's approach to construe the statute was an unhealthy attempt to amend the statute by judicial interpretation.[171] In his opinion, the unwillingness of the Court to work within the boundaries of the plain meaning of the words consequently "undermines the legal process."[172]

It is a basic rule of law that if the words of a statute are clear, the court should be bound by those words unless such a construction would lead to "patently absurd consequences."[173] Justice Kennedy argued that this "narrow exception" to the rule does not give the Court power to intrude on the law making process of the Legislative Branch.[174]

In this case, Justice Kennedy argued that the Court could not convincingly show that the plain meaning of the words produced an "absurd" result. Thus, the majority turned to the legislative history to prove that the Congress could not have intended such a result.[175] Utilizing this approach, the Court employed the classic *Holy Trinity* doctrine which allows the court to look beyond the plain meaning of the statute.[176] The *Holy Trinity* argument states that "a thing may be within the letter of the statute and yet not within

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167. *Id.*
168. *Id.* (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)).
169. *Id.* at 2572-73.
170. *Id.* at 2574.
171. *Id.*
172. *Id.*
173. *Id.* (citing United States v. Brown, 333 U.S. 18, 27 (1948)).
174. *Id.*
175. *Id.* at 2575-76.
176. *Id.* at 2576.

the statute, because not within its spirit, not within the intention of its maker."[177]

Justice Kennedy criticized the *Holy Trinity* doctrine because such an approach allows a court to consult legislative materials to find the "spirit" of the statute in order to discover an interpretation that better satisfies the court's will.[178] In his view, the "spirit" of a statute reflects the view of the court more than the view of the legislature that created the statute.

## V. CONCLUSION

As illustrated by the *Public Citizen* decision, the role of legislative history in statutory interpretation can draw a sharp dividing line in statutory analysis within the Court. Ironically, Justice Scalia did not participate in the *Public Citizen* decision—a decision which would have provided him an excellent sounding board for his views on the use of legislative history.

With the resignation of Justice Brennan, the Supreme Court will undoubtedly lose a controversial figure in the area of statutory interpretation. As noted in several opinions, Justice Brennan divided the Court with his analysis of legislative history of the particular statute. Although the departure of Justice Brennan will not end the debate over the proper use of legislative materials, his absence will undoubtedly alter the balance of viewpoints on the new Court.

With the prolific amount of statutes enacted at both the state and federal levels, the importance of predicting the interpretation of those statutes becomes crucial to the legal profession. As a result, the changing composition of the Supreme Court may ultimately prove to have a significant impact in the area statutory interpretation.

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177. *Id.* (citing Church of the Holy Trinity v. United States, 143 U.S. 457 (1892)).
178. *Id.*