View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Indiana University Bloomington Maurer School of Law

Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Articles by Maurer Faculty | Faculty Scholarship

1991

United States v. McGoff: Can Lawyers Be Taught How to Read Statutes

Reed Dickerson
Indiana University School of Law

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub

Part of the Legal Profession Commons, and the Legislation Commons

Recommended Citation
Dickerson, Reed, "United States v. McGoff: Can Lawyers Be Taught How to Read Statutes" (1991). *Articles by Maurer Faculty.* Paper 1534.
http://www.repository.law.indiana.edu/facpub/1534

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

UNITED STATES v. McGOFF: CAN LAWYERS BE TAUGHT HOW TO READ STATUTES?

*By Reed Dickerson**

Introduction

Early in February 1988, a Federal court judge whom I highly esteem told me about a case involving a fascinating problem of statutory interpretation. The case was *United States v. McGoff*.[1] What intrigued me was the question that he then asked: "How would you have voted?" After reading the case, I thought I should at least give it a try. I did and got more problems than I bargained for.

Having vented my prejudices with much satisfaction later in this article, I have tried to follow through by writing what, by my lights, would be the "ideal" opinion. I have most certainly failed, even though as a retiree I have more time to review and criticize than is accorded most lawyers, judges and law clerks. I place my opinion next, because it offers a simpler introduction to my more sweeping critique, which would have been confusing without it.

Altogether, I found the exercise worthwhile because it confirmed reservations that I have long entertained about the state of statutory interpretation in this country.

Following is my estimate of what a full court should say on rehearing.

The "Ideal" Opinion

UNITED STATES OF AMERICA, APPELLANT v. JOHN PETER McGOFF, RESPONDENT

PETITION FOR REHEARING (LET US SUPPOSE) IN THE

---

* Professor Emeritus of Law, Indiana University School of Law (Bloomington). A.B., Williams (1931); LL.B., Harvard (1934); LL.M. (1939), J.S.D. (1950), Columbia; LL.D. (hon), Indiana University (1987). Author, The Interpretation and Application of Statutes (1975), The Fundamentals of Legal Drafting (2d ed 1986). Commissioner for Indiana, National Conference of Commissioners on Uniform State Laws. Founding Director, Institute for Legal Drafting (Indiana University). This effort benefitted from comments by Judge Eugene A. Burdick; Professors Patrick L. Baude, Craig M. Bradley, Daniel O. Conkle, James Willard Hurst, F. Thomas Schornhorst, and David M. Skover; and attorney Frederic P. Houston.

[1] 831 F.2d 1071 (D.C. Cir. 1987).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 87-3005 Argued (let us suppose) August 17, 1990
Decided (let us suppose) November 4, 1990

Judge Meant:

This concludes a rehearing by the full court on the issues resolved by the three-judge panel (one judge dissenting) that first heard the appeal from the judgment of the District Court.[2] It presents an issue of first impression. The facts are simple and the statutory text in question, consisting of two short provisions of the Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611-621, is relatively simple. The legal problems are not.

John Peter McGoff is charged with violating sections 612(a) and 618(e) of the Act by failing to register with the Department of Justice as an agent of a foreign nation when he served the Republic of South Africa from 1974 to 1979.[3] The following facts are stipulated:

1. McGoff served as an agent until June 13, 1979.
2. He never registered as an agent.

---

2 *Id.*

3 The Act states:

Any person who—

(1) willfully violates any provision of this subchapter or any regulation thereunder, or

(2) in any registration statement or supplement thereto or in any statement under section 614(a) of this title concerning the distribution of political propaganda or in any other document filed with or furnished to the Attorney General under the provisions of this subchapter willfully makes a false statement of a material fact or willfully omits any material fact required to be stated therein or willfully omits a material fact or a copy of a material document necessary to make the statements therein and the copies of documents furnished therewith not misleading, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both, except that in the case of a violation of subsection (b), (e), or (f) of section 614 of this title or of subsection (g) or (h) of this section the punishment shall be a fine of not more than $5,000 or imprisonment for not more than six months, or both.

* * *

Failure to file any such registration statement or supplements thereto as is required by either section 612(a) or section 612(b) of this title shall be considered a continuing offense for as long as such failure exists, notwithstanding any statute of limitation or other statute to the contrary.

22 U.S.C. §§ 618(a), (e) (1983).

3. The Government has been investigating his relationship with South Africa since August 1979.
4. He has not waived his right to be protected by the statute of limitations.
5. No discernible event has tolled the running of that statute.

The Department of Justice learned about McGoff's arrangement with the South African government late in 1978. After investigation, the Department filed a criminal information in 1986. McGoff pleaded the 5-year statute of limitations.

The issue on rehearing is: When did the statute of limitations begin to run? The meaning of the statute of limitations being clear, our answer depends on how we read sections 612(a) and 618(e) of the Registration Act, which define the crimes and thus regulate their duration.[4] The District Court found for McGoff. The three-judge panel of this court affirmed, with one judge dissenting.

We have evaluated the arguments on both sides and conclude that the matter cannot be satisfactorily resolved until further information has been obtained and evaluated.

Section 612(a) of the Act provides:

> No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a . . . registration statement . . . as required by subsection [] (a) . . . . [E]very person who becomes an agent . . . shall, within ten days thereafter, file with the Attorney General . . . . a registration statement . . . as required by subsection (a) . . . . The obligation of an agent . . . to file . . . shall, after the tenth day of his becoming such agent, continue from day to day, and termination of such status shall not relieve such agent from his obligation to file a registration statement for the period during which he was an agent of a foreign principal.[5]

Section 618(e) provides:

> Failure to file any such registration statement . . . as is required by . . . section 612(a) . . . shall be considered a continuing offense for as long as such failure exists, notwithstanding any statute of limitation . . . .[6]

When does the statute of limitations begin to run? For a "continuing crime," which is how section 618(e) characterizes section

---

[4] *Id.*
[5] *Id.* § 612(a).
[6] *Id.* § 618(e).

612(a), the statute runs from the last day of the crime.[7] Here there are two widely overlapping crimes: (1) the crime of acting as agent without registering the relationship; and (2) the crime of failing to register. These crimes extensively overlap, because during the life of an agency they produce for most agents almost identical results. But there is a critical difference.

The first crime, which begins at the end of the 10-day grace period, can trigger the statute of limitations no later than the last day of the agency, because it is impossible to act (without registering) under an agency that no longer exists. So far as McGoff is concerned, there is no basis for contention here. Whatever questions might otherwise have arisen respecting the crime of acting as an unregulated agent, they were mooted by the running of the statute of limitations.

The second crime, which also begins at the end of the grace period, appears capable of continuing beyond termination of the agency status, as expressed by the provision creating an obligation to file a statement covering the period during which he was such an agent. The remaining questions are: (1) Does the statute so provide for the crime of non-filing; and (2) if it does, how long is the crime intended to continue?

The wording of section 612(a) (second sentence) leans strongly toward a registration requirement that continues beyond the life of the agency. This interpretation is correct, not only because of the language used, but because it is highly plausible to assume that an agent's actions during the agency may portend future difficulties well within the legitimate concerns of the Government. This assumption is supported by section 615, which requires an agent to preserve prescribed records for 3 years following termination of the agency.[8] We see nothing in the statutory language to suggest otherwise.

The panel majority's reasoning to the contrary is unconvincing. This is well illustrated by its treatment of the modifier in section 612(a) ("for the period during which he was an agent of a foreign principal").[9] The rule of lenity requires that reasonable doubts be resolved in favor of the accused.[10] A reasonable doubt may consist

---

[7] *Id.*; *see also* Fiswick v. United States, 329 U.S. 211 (1946).

[8] 22 U.S.C. § 615 (1983).

[9] *Id.* § 612(a).

[10] *See, e.g.*, United States v. Universal Corp., 344 U.S. 218, 221-22 (1952).

of a significant ambiguity.[11] Is there such an ambiguity here? One plausible alternative is to read the concluding clause as modifying "statement" to spell out a continuing obligation to register even beyond termination of the agency.

The competing alternative, honored by the panel's majority opinion, is to read the concluding clause as modifying, not "statement," but the earlier conceivable referent "obligation." This was rationalized as preventing anyone from reading the concluding clause to provide that an agent's failure to register during his agency would automatically be forgiven by the mere expiration of the agency. Otherwise, the clause is surplusage and therefore presumably unintended.

This reading fails substantively because the "problem" that it solves imputes to Congress the intent to deal with an alternative so implausible as to render the matter a non-problem. It fails textually because it works only if "for" is read as "during" in a context in which the close proximity of "for" to "during" creates the powerful implication that the draftsman, knowing the difference, was signifying that "for" referred, not to duration, but to a functional relationship between foreign agents and the Government with respect to which people such as McGoff were obligated to register.[12] This forestalls the ambiguity.

Assuming that the panel's analysis is sound, the final problem is duration. There is ambiguity here, but the main problem is ultimately one of vagueness. Respecting ambiguity, one possibility is that the crime continues in perpetuity and that the statute of limitations is thereby tolled forever for the person who never registers. For the literalist, this is arguably persuasive. Literalism, however, should yield to the forces of context, which strongly suggest that the Government's interests in surveillance do not normally pursue the agent to his grave. But this analysis may take us beyond the existing evidence.

The alternative is to explore the possibility of fixing a day ap-

[11] *Id.*

[12] Ironically, if "during" is substituted for "for," the former introduces new redundancy ("during the period during which . . ."). Why fight surplusage with further surplusage? Actually, making express what is probably implied is not necessarily surplusage if it serves the purpose of greater clarity. In any event, any presumption against it is too weak to override otherwise clear, plausible language, especially in a drafting tradition that is laced with surplusage.

propriate to the purposes of the statute. The clue is the common-law principle that "continuing offenses do not, in general, continue indefinitely."[13] This easily suggests the plausible legislative assumption, grounded in external context, that tolling the statute need not be delayed any longer than is appropriate to the Government's need to know. Here is vagueness.

Resolving this vagueness involves only a conventional exercise in judicial line-drawing (or zone-of-uncertainty sketching) involved in applying the concept of a reasonable post-agency period during which the Government needs to know about past agencies. Accordingly, the trial court should take evidence from the Government respecting what it needs to know about foreign agents generally, or perhaps this kind of agent, and how long it prudently needs to continue surveillance. But a word of caution: To prevent governmental bootstrapping, the trial court should insist on a clear and persuasive presentation by the Government.

Is this law-making rather than law-finding? The case probably straddles a borderline which may be drawn only loosely. If we have otherwise exhausted the resources of meaning, we must now exercise our broad judicial power to make law in areas where meaning has failed. Here, the law-making is clearly ancillary to our law-finding function. This is the kind of judicial activism of which not even the most conservative jurisprudent can complain. Specifically, we must dovetail a continuing, but not necessarily perpetual, crime with the statute of limitations. If a literal reading is appropriately rejected, we must either (1) draw a line beyond which the Government is presumed to have no significant interest in knowing about a registered foreign agent (which probably constitutes modest *ex post facto* law-making); or (2) find that, wherever such a line could reasonably be drawn, McGoff would or would not, under the circumstances, be protected by it.

For constitutional purposes, the significant question is not whether the action taken is *ex post facto* (which it obviously is) or whether it involves some element of judicial creativity (which it obviously does), but whether it unfairly surprises the persons to whom the rule is addressed.

Is such an approach fair to the defendant? We have here a crime *malum prohibitum*, and elementary wisdom tells us that people

[13] United States v. McGoff, 831 F.2d 1071, 1079 (D.C. Cir. 1987).

accused of such a crime should be given "the benefit of the doubt." But the benefit of *what* doubt? What relevant considerations are unconstitutionally "*ex post facto*" here?

We take for granted that potential criminals do not ordinarily read the relevant statutes before they act. Rather, the test of fairness is the potential criminal's opportunity to know. What would the potential criminal learn *if* he or his representative, relying on accepted methods of communication, read the relevant statute?

The critical information, of course, is the scope of the crime, spatially and temporally, as he can glean it from the statute by the standards of cognition that inhere in communication and therefore makes its potential impact before he acts. More specifically, the danger of unfair surprise arises from judicial *law-making* only with respect to matters that the potential criminal would reasonably be expected to take into account.

A curious agent, actual or potential, would naturally want to know what is forbidden and what, inferentially, is permitted. Here, the statute makes clear that an agent has a duty to register that outlasts the agency. The only doubt is its duration. Any reasonable person, knowing what is decently clear, could not conscientiously contend that the Government lost all interest in him immediately upon termination of his agency. He would either accept the possibility of a perpetual duty to register or anticipate that a line marking its termination would be drawn. Precisely where the line would be drawn in his case is not the kind of information on which people normally rely before they act.

Ordinarily, where a judicial attempt is made to estimate with precision, people who tread close to the line of ultimate criminality tread at their own risk. No such problem exists here. We have only its converse: an acknowledged criminal who may be treading close to the line of ultimate *non*-criminality. Surely, there is no constitutional interest in protecting criminals against the risk that they may unwittingly become law abiding. In any event, McGoff was adequately warned, through an arguably plausible literal reading of section 612(a), that his continuing duty to register might even be permanent. The greater risk includes the lesser.

No threat to constitutional protection against self-incrimination exists here, because the criminal information rests wholly on information gathered independently of any disclosure required by sec-

tion 612(a). What the result would otherwise be need not concern us here.

In this case, seven years elapsed between the end of the agency and the criminal information. After deducting five years for the statute of limitations, we are left with a period of two years, following termination of the agency, within which the Government may or may not have lost legitimate interest. Can it establish that two years was within the agency's normal span of significant interest in post-agency surveillance? If so, the Government wins. If not, McGoff wins. If there is significant doubt, the "rule of lenity" applies. Unfortunately, critical facts relating to normal Governmental needs are missing. Again, a word of caution: To prevent governmental bootstrapping, the trial court must insist on a persuasive presentation. It is possible, of course, that on further investigation of the Government's needs the trial court may find that the Government's legitimate concern is permanent.

What about the third stipulation of fact, that the Government "has been investigating McGoff's relationship with South Africa since August 1979," when it discovered the agency relationship and perhaps additional information from other sources? The stipulation does not provide the information we need, which is the duration of its probable continuing interest in a hypothetical agent who failed to disclose the kind of information required by the statute. The total information actually gleaned from the other sources may have generated a legitimate interest of far greater duration than that normally generated by the minimum requirements of formal registration. If this point is invalid, the statute of limitations was effectively tolled by the stipulation and the District Court's decision should simply be reversed.

What about section 615, which requires an agent to keep "such books of account and other records" as the Attorney General specifies and preserves them for three years following termination of the agency?[14] This, too, may be inconclusive of the duration of the Government's general interest in keeping tabs on ex-agents with respect to the kinds of information required by the Act. Nevertheless, the trial court should take it into account.

The approach adopted here strikes a fair balance between the lower court's evisceration of what seems to be sound Government

14 22 U.S.C. § 615 (1983).

post-agency policy and the acceptance of a needlessly protracted tolling of the statute of limitations in the case of agents who never register. It does no violence to what the statute makes reasonably clear and it requires only the mildest kind of supplemental judicial activism. Finally, it imposes no danger of unfair surprise, because it operates in an area of information that is highly remote from anything that could upset the expectations of any but the most exceptional potential criminal.

. Contingent on the Government's offer of proof, the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion. If the Government does not make this offer, the judgment is affirmed.

General Comments on the District of Columbia Circuit's Opinion

The striking aspect of the *McGoff* case is that at the outset neither judge stated a resolvable central issue. The agreed-on issue was a non-issue, because it rested on only one viable option: The statute of limitations starts to run when the agency ends.

The competing option? Both opinions said that it was that the statute starts to run when the agent ultimately registers. That option does not exist here, because McGoff never registered. The option *cannot* exist, because, with the facts having been disclosed from other sources, it is certain that he never will register. As a result, the parties in effect tried the wrong issue.

Both opinions are far too long. The majority opinion is repetitive, contradictory, badly organized, and loaded with irrelevant case law and discussions that ornament rather than advance the reasoning.[15]

Both opinions illustrate the chronic failure of the judiciary to understand the realities of statute making and especially of the cognitive process from drafting to interpretation. This is revealed most clearly in the handling of legislative history.

There is also significant want of ability to explicate rigorously. This inability to read statutes and regulations is traceable ultimately to an inability to draft adequately.

Lawyers are trained thoroughly in the art of persuasion.

---

[15] Also, its attempt to summarize the relevant principles of interpretation seems highly simplistic. *See McGoff*, 831 F.2d 1071 at 1076-77.

They are trained meagerly in the legal disciplines that require systematic thinking unencumbered by the exigencies of advocacy or by a preoccupation with making social policy, which is foreign to a professional drafting tradition that, with respect to policy making, plays only the role of midwife.

What we conventionally call legal "reasoning" is often, if not usually, reasoning deformed. The faults in this instance lie not so much with two well-intentioned, thorough, and (by current legal standards) well-equipped judges, as with the inertia of a warped legal tradition. The ultimate lack rests with the law schools, which still handle the problem with benign neglect, a neglect that also extends throughout the broad field of legislation.

Somehow the majority opinion also manages to find, in section 611(c)'s prescriptions for registration statements, a negative implication arising out of the section's "focus on *ongoing* relations between agents and principals," to the effect that the statute is unconcerned with the static state of post-agency failure to register.[16] Context does not support this reading. The opinion then concedes that section 612(a) "cuts in favor of the Government's interpretation."[17] The only thing that the majority can find to "muddy the interpretive waters" is the "dangling" phrase, "for the period during which."[18] Its whole rationale breaks down there.

In trying not to "eviscerate" the concluding termination clause, the majority opinion eviscerates the very plausible (and at least otherwise clearly expressed) Government interest in post-agency surveillance.

The phrase "notwithstanding any statute of limitations," which concludes section 618(e), is explained as heading off any notion that the statute of limitations might be triggered when the offense first began.[19] Instead, the "notwithstanding" clause was simply a drafting ineptitude that states the obvious: that the statute of limitations (which is inherently incapable of controlling the event that triggers it) did not curtail the duration of the continuing offense of failing to register.

---

16 *Id.* at 1082 (emphasis in original).

17 *Id.*

18 *Id.*

19 *Id.*

The majority tried to reinforce its position by reasoning that, because the statute referred only to "agents," it excluded persons who were no longer agents.[20] A more precise text might have said "ex-agents,"but in this context "agent" is a plausible synonym for "ex-agent."

The dissent is shorter and includes fewer things to carp about.

The dissent first recognizes that section 612(a) formulates two crimes: (1) action as an agent without registering (first sentence); and (2) the failure to register after becoming an agent (second sentence).[21] This seems accurate. Then it declares, "[T]hese two sentences are not redundant."[22] This is true if (and so far as) they differ. How do they differ? This is worth exploring.

Despite almost complete substantive redundancy as far as persons such as McGoff are concerned, the second sentence does not create it, because a formulation in terms of registration is necessary to create something that can survive into the post-agency period to carry out the purposes of section 612(a). That leaves the question whether, instead, the *first* sentence is redundant.

Notice that whereas the first crime is directed to a person who "acts" as agent, the second crime is directed to a person who "becomes" an agent. This distinction recognizes that a person can, by contract, become an agent without immediately, or ever, serving under it. Suppose McGoff had signed an agency contract but, for some reason, never served. Would this have prompted the Government to set up a surveillance mechanism? Because there are practical limits to which even the Federal Government can indulge its legitimate curiosity, it might not. On the other hand, what is usual should not jeopardize the Government's capacity for dealing with the unusual. There is no reason, therefore, to limit the reach of the second crime to the reach of the first. A restrictive reading of the second sentence would conform to neither the wording of, nor the policy behind, section 612(a).

---

[20] *Id.*

[21] *Id.* at 1098.

[22] *Id.*

Fortunately, these speculations are not directly relevant here, because McGoff's agency status was accompanied by agency action.

The discussion so far assumes that McGoff's actions throughout the agency were sufficiently continuous to constitute a single "continuing crime," which supports the conclusion that the statute began to run on his actions from the last day he acted as agent. This assumes that section 618(e), which applies to failure to register and *not* to agency action without registration, created no negative implication. The section could not have appropriately included the latter, because action under the agency might well have consisted of a series of discrete transactions, each of which was continuous. In such a case, prosecution for the first undisclosed continuous transaction, for example, would be killed off by the statute of limitations separately from, and of course earlier than, later undisclosed actions. These refinements are mooted, *a fortiori*, by the later running of the statute.

During the agency, "the duty to register" was a worse one of two ways of describing a unitary obligation. Accordingly, an application of the statute of limitations that is entirely appropriate to action-without-registration during the period of the agency inexorably applied to its corresponding obligation to register during that period. On the other hand, the post-agency duty, no longer serving as a back-up obligation, is sufficiently different, and therefore severable, to support an independent tolling of the statute.

So far, this tracks the reasoning of the dissent. Beyond, however, there is room for divergence, because the dissent may have misread legislative intent as envisioning an obligation-to-register in perpetuity.

The dissent says the "statute is silent on when the duty not to act as an agent without having registered ends . . . one might reasonably presume that . . . the obligation ends when the agent ceases acting."[23] But how could this be so? The statute makes clear that, except for the 10-day grace period, the obligation not to act without registering is permanently in place.[24]

---

[23] *Id.*

[24] 22 U.S.C. § 618 (e), (g) (1983).

The dissent refers to "the rule of the last antecedent,"[25] which is not a rule, but a syntactical rebuttable convention.

The dissent characterizes the interpretation as "logical."[26] That it uses the word four times in quotation marks suggests that it is warning the reader that the term is used in a special (and unexplained) sense. "Plausible" without quotation marks would have been more apt and less mysterious.

On the other hand, the dissent did see the futility of shifting an unchanged modifier to an earlier object and the implausibility of envisioning an intent to forestall the highly improbable risk that the statute could otherwise be read as dissolving criminal accountability (for undisclosed activity *during* the agency) merely by virtue of its termination. "No criminal statute works this way."[27]

The dissent's reliance on case law[28] that interprets other statutes involving continuing crimes merely begs the question whether the statute contemplated a crime that continued in perpetuity. Triggering the statute of limitations by late filing is simply a non-contingency in any case in which the defendant never discloses but the facts are otherwise disclosed.

In any event, cases that interpret statutes functionally unrelated to the statute being interpreted are rarely relevant during the search for statutory meaning.[29] Indeed, citing cases to establish principles of cognition is like citing cases to establish the location of Samarkand. Uniqueness is the rule here. In general, why are courts paranoid about dispensing with unneeded, even irrelevant case law? In this case, which involves 98 percent explication and 2 percent conventional law-making, I see little or no need to cite case law.

Although the majority opinion expresses a wholesome skepticism of using legislative history to find meaning, it sifted a lot of it, only to find little of relevance or reliability. Certainly, as it points out,[30] the expressed intent of a single legislator carries lit-

[25] United States v. McGoff, 831 F.2d 1071, 1100 (D.C. Cir. 1987).

[26] *Id.*

[27] *Id.* at 1101.

[28] *See id.* at 1102.

[29] The majority's reliance on Young v. Community Nutrition Institute, 476 U.S. 974 (1986), is a prime example. *McGoff*, 831 F.2d 1071, 1083.

[30] *Id.* at 1090.

tle weight when what the court should be looking for is the intent to be inferred from an institutionalized consensus that is expressed in a constitutionally prescribed medium.

How a court should handle legislative history depends on what it is doing. If it is digging for whatever meaning can be quarried from the statute as it is read in context, legislative history should not be used to override perceived meaning, although it may be freely used merely to verify it. The majority seemed overly eager and maybe a little premature in its investigations. This risks unfair surprise. The dissent approached legislative history with healthier skepticism and a higher appreciation of the limits of verification.

As for using legislative history to make law resolving otherwise unresolvable uncertainty, most of the legislative history here contains the very uncertainties that the court was trying to resolve. For the most part, legislative history remains the junk food of hungry interpreters.

Perhaps the most important revelation that emerges from an examination of how the two opinions handled legislative history is their woeful lack of understanding of the legislative process. The majority opinion was comforted, for example, by the fact that the statute's history concentrated on what happens during the agency and not on the situation that exists after it ends.[31] Legislatures simply do not confine their statutory accomplishments to what they concentrate on or talk (or think) about. Available legislative history is inevitably incomplete and normally only an uneven smattering of evidence of intent and purpose. Indeed, the great bulk of the forces at work are often, if not usually, hidden from view. Also, it is an elementary fact of communication that the meaning of what is uttered on any occasion usually outruns what is consciously intended. As Holmes once said, meaning (rather than intent) must control.[32]

Both opinions cite the canons of interpretation as if they were rules of law, even though many of them are only factual presumptions of varying weights. The majority opinion also cites cases to support propositions that can safely be taken for granted.

---

[31] *Id.* at 1082.

[32] Holmes, *The Theory of Legislation*, 12 HARV. L. REV. 417 (1899).

What can we do about a system that produces and tolerates these conditions? What aspects of a legal education are currently confronting them or capable of confronting them? A good dose of legal dialectic could make a big difference. Except where the judge has shown that he is impervious to reason, the rhetoric of persuasion should rest on something better than pseudo rationality.

These comments are meant to indict, not the judges involved, but our woefully unbalanced system of legal education.[33]

What the Statute Might Better Have Said

Proposed Clarification of Sections 612(a) and 618(e), TITLE 22, U.S.C., CHAPTER 11 — FOREIGN AGENTS AND PROPAGANDA

§ 612(a) Unless exempted by this chapter, a person may act as agent of a foreign principal only if he files, as they respectively become due, the registration statement prescribed by this subsection and the supplements prescribed by subsection (b). He shall file the registration statement within 10 days after the day on which he becomes an agent. He shall file a supplement within 30 days after the end of each succeeding 6-month period following the last day of the period prescribed for filing the registration statement. Statements and supplements must be under oath in a form prescribed by the Attorney General. Each obligation to file continues from day to day and, if not met during the agency, it continues, after the agency terminates, for as long as reasonably necessary to serve the purposes of this Act . . . .

(b) Supplements filed under subsection (a) set forth . . . [conforming change]

§ 618(e) [Repeal]

---

[33] Much of what is missing here is described in my books, THE INTERPRETATION AND APPLICATION OF STATUTES (1975) and MATERIALS ON LEGAL DRAFTING (1981). *See also* U.S. DEPARTMENT OF JUSTICE, USING AND MISUSING LEGISLATION HISTORY: A REVALUATION OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION (1989).