Perspectives: Teaching Legal Research and Writing | Vol. 27 | No. 1 | Spring 2019

Cite as: Jamie R. Abrams, *Legislative History on Trial*, 27 Persp. 28 (2019).

# Legislative History on Trial

"Teaching legislative history to students at any stage in law school is notoriously challenging for faculty."

By Jamie R. Abrams

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This article highlights a "Legislative History on Trial" simulation and its pedagogical value to a legislation course, administrative law course, or legal research and writing course. Teaching legislative history to students at any stage in law school in any course is notoriously challenging for faculty. It is a difficult topic to engage students. They do not yet have the context to understand the importance or relevance of the material they are learning. It can also be challenging to strike the proper level of coverage in classes containing a range of experiences from former Congressional staffers to international students.

Professors often construct assignments with "bumpers" (i.e. assignments that are guaranteed to lead students to successful results) in which they design a "scavenger hunt" to find various nuggets of legislative interpretive material. I spent nearly a decade designing, vetting, and executing such pre-canned assignments as an instructor of Legal Writing and as a Director of Legal Research Curriculum. These assignments are contained and manageable for students to stay on course, but their lasting educational effects are limited.[1] The students become myopically focused on finding the answers, losing sight of the big picture of how and why a lawyer might use legislative history, what the sources are, the limitations and benefits of each source, and the critiques in using each source as a statutory interpretation tool.

After years of watching students stumble through these assignments with minimal enthusiasm, I designed this "Legislative History on Trial" simulation to get students engaged more collaboratively.

This simulation involves a trial in which groups of students interrogate and then rehabilitate various sources of legislative history on the stand with students testifying as the source itself. Admittedly, the exercise is a bit of a fictional conflation between a criminal and civil trial. Another more concrete way to frame the exercise is to conduct a hearing on whether the United States should adopt the "exclusionary rule" that the United Kingdom uses to exclude legislative history as an interpretive tool in courts.[2] Regardless of the set-up, the context is a debate between those who support the expansive use of legislative history as an interpretive tool and those who oppose its use.

## The Learning Objectives

This assignment refocused my legislative history assessment goals entirely. The goals of the exercise are to (1) learn what the major sources of legislative history are; (2) understand the relative hierarchical values of different sources of legislative history; (3) identify the limitations and benefits of using legislative history as a tool of statutory interpretation; and (4) practice preliminary trial preparation skills. The simulation usually falls during a point in the semester in which I am heavily engaged in grading and the students are awaiting feedback. This gives students a much-needed break from drafting and writing exercises. It is a well-received shift in class preparation for the professor as well, requiring facilitation and guidance, but little podium teaching.

In preparation for this exercise, students are divided into groups by source of legislative history. These sources might include sponsor statements, legislative deliberations, committee reports, and amendments and related bills. The students complete source-specific assigned readings prior to class to prepare for their first block of

1 *See generally* Christopher G. Wren & Jill Robinson Wren, Using Computers in Legal Research: A Guide to Lexis and Westlaw 7 (1994) (critiquing the effectiveness of "treasure hunt" research assignments).

2 *See generally* Holger Fleischer, *Comparative Approaches to the Use of Legislative History in Statutory Interpretation*, 60 Am. J. Compar. L. 401 (2012) (comparing English, American, and German approaches to the admissibility of legislative history).

in-class work. These readings might include excerpts from the following three sources:

- Annotation, *Resort to Constitutional or Legislative Debates, Committee Reports, Journals, etc., as Aid in Construction of Constitution or Statute*, 70 A.L.R. 5 (1931).
- Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901 (2013).
- Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 Hofstra L. Rev. 1125 (1983).

### The "Legislative History on Trial" Simulation

In class, students divide into defense and prosecution teams with a witness to prepare. For ease of preparation, both the defense team and the prosecution team have their own witness. A single witness per team allows the witness to be better prepared on the strands of questions that will likely be asked. The witness should remain objective, honest, and restrained in answering only the questions asked.

I invite a member of the law library faculty to serve as the judge. This leverages the experience of an expert who can refine or redirect the questions if any inaccurate content is introduced. It also frees the professor up to interject with additional questions and to take notes on themes and key points to reinforce the exercise's pedagogical purposes.

The witnesses and advocates then brainstorm together the key points they want to come out of their questioning. The student-advocates are instructed to focus on building a record. They need to clarify what the source of legislative history is that they are interrogating and what the critiques are of that source. They cannot just jump in and start asking critical questions without establishing a foundation for the source, its content, its location, and its method of publication. Students quickly learn then that it could take several questions to make a single point during the exercise. For example, to make the larger point that the committee report might not reflect the conclusions of the legislature as a whole, students might need to ask who sits on a committee, whether the committee is bicameral, when the committee report is published, who reads the committee report, and who writes the committee report.

The next class involves approximately one hour conducting the trial simulation itself. Each team has approximately five minutes to conduct its questioning. No evidentiary objections are allowed. The trial goes in order of the legislative process beginning with sponsor statements, then committee hearings, then legislative deliberations, then related bills or amendments.

The defense is effectively the rehabilitating party. The defense seeks to rehabilitate the source and remind the court how and when the particular source of legislative authority can be a useful interpretive tool.[3] This can include some specific examples of when legislative history has been used helpfully (there are ample examples in the short reading excerpts). It can also include critiquing the alternatives. If legislative history is not used for statutory interpretation, then what tools will the court rely on instead to answer the interpretive question before it?

### Summary of Substantive Themes to Develop

Some general themes emerge from the exercise as a whole. Plaintiffs will emphasize how legislative history can be a "grab bag" of content selectively chosen for persuasive purposes in ways that can distort the realities of the legislative process (e.g., who is involved and when). Plaintiffs might emphasize how legislative history drives up the costs of litigation disproportionate to its efficacy. Its use also promotes the "smuggling in" of useful legislative history in ways that might manipulate the legislative process.

The defense will emphasize how legislative history allows for judicial understanding of the context and circumstances in which a bill was passed. The text, its objectives, and its purposes are all helpful context to address ambiguities in the statute. Looking to legislative history can also

"If legislative history is not used for statutory interpretation, then what tools will the court rely on instead to answer the interpretive question before it?"

3 *See generally* Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 Harv. J. Leg. 369, 374–76 (1999) (providing a survey of the scholarly literature in support of legislative history).

avoid absurd results. The defense might emphasize how these sources are a better alternative than judicial consideration without these materials.

*Sponsor Statements*

Plaintiffs arguing in opposition to sponsor statements will explain how these are just the remarks of one person (or group) and cannot necessarily reflect the legislative body as a whole. To empower sponsor statements as an interpretative tool invites members of Congress to legislate from the floor with targeted statements in the Congressional Record. Relying on sponsor statements can distort the political process and obscure the compromises and coalitions that emerged to support the bill's enactment. Its timing at the beginning of the legislative process is a powerful reason for plaintiffs to critique its use because it fails to reflect the deliberations that follow the bill's initial introduction.

The defense might emphasize how the legislators who sponsor legislation are often the most knowledgeable about the subject matter and the objectives of the legislation. Thus, the sponsor statements can shape how the bill progresses through to enactment.

*Legislative Deliberations*

Legislative deliberations can include debates and explanatory remarks made on the floor of either chamber. Plaintiffs opposing its use as an interpretative tool may highlight how legislative deliberations only reflect the views of one member. Real questions can be raised about just how informed that speaker was on the floor regarding the substance of the bill rather than reflecting her political posturing. Some legislators may not have even read the legislation. Notably, many of these remarks also occur too early in the process to carry much weight before the vote by either chamber.

In support of its use as an interpretive tool, Defendants can highlight the particular value that remarks made by informed supporters and authors of the bill might offer to statutory interpretation. Floor debates at the end of the process might also be particularly relevant. They can show the social conditions and context in which a piece of legislation is passed. Often times these are spirited and direct exchanges on the floor that can help shed light on the negotiations and decisions that lead to the final legislation. Considerable costs and efforts are made to record and publish these remarks, so it might seem unusual to not admit this evidence if it is relevant and publicly available. It might do more to suppress political participation to not allow the use of legislative history.

*Committee Reports*

Committee reports are a particularly strong source for students to consider when it comes to legislative history. Students can go online and review actual committee reports for specific examples of useful source content. Students should differentiate between committee reports from one chamber and from the conference committee, if applicable, because the latter reflects the participation of both chambers making it more persuasive.

Plaintiffs opposing committee reports' use as a tool of statutory interpretation might highlight how committee reports are not systemically or regularly created.[4] The report might not highlight negotiations or events that are relevant, possibly reflecting instead a victor's version of history "smuggling in" language as part of legislative history.[5] At best, it only represents a single committee of a single house of Congress offered as evidence of the intent of the full body. Further, legislators do not write committee reports generally, instead staffers often write the reports. Committee reports are not subject to amendment or put to a vote. Finally, the committee report itself can also be just as ambiguous as the statute itself when it comes to discerning legislative intent.

There are also pragmatic points to highlight regarding the use of committee reports. They are only actually read by a small proportion

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4 This can also be an opportunity to discuss differences in the resources and infrastructure available for producing searchable legislative history. There may be notable differences between the legislative history infrastructure of the federal government and large states, like California or New York, compared to smaller state legislatures, like Kentucky or Montana, which may produce fewer sources of legislative history in print or searchable formats.

5 *See e.g.*, James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 Berkeley J. Emp. & Lab. L. 117, 124 (2008) (quoting judicial concerns that "legislators are in effect 'encouraged to salt the legislative record with unilateral interpretations of statutory provisions they were unable to persuade their colleagues to accept'").

of legislators. Sometimes the report is not even published at the time of the legislative vote. These points undermine the notion that the report reflects congressional intent.

Defendants can highlight how some judges who ordinarily object to the use of legislative history will allow committee reports as evidence in a statutory interpretation dispute.[6] Most legislation is written in committee or subcommittee, so these are likely the most informed accounts of legislative events.[7] These documents are also highly accessible for researchers. They notably come at the end of the process in one or both chambers following a state of consensus.

### *Amendments and Related Bills*

Amendments and related bills show the progression of enacted legislation through the legislative process. It might include legislative inaction, related bills that were introduced, and proposed amendments not enacted. Here, plaintiffs can highlight how these legislative events were explicitly or implicitly rejected, or critique the role of inaction on the part of legislators as evidence of their intent. Plaintiffs can emphasize the importance of relying on the plain meaning of a text from its words and structure.[8] On the other hand, the defense can highlight how amendments and bills show the evolution of the final text and points of negotiation along the way.

## Conclusion

This "Legislative History on Trial" simulation offers an experiential and dynamic way to engage students in studying legislative history. After conducting this simulation at multiple law schools in both first year and upper-level courses, I have found it to be a real highlight of the semester. Students engage in a relevant, political, and provocative discussion about statutory interpretation while mastering the fundamentals of key sources of legislative history. For readers interested in using this exercise in their own classes, additional teaching materials are available from the author by email at jamie.abrams@louisville.edu.

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6 *See e.g.*, Koby, *supra* note 3, at 388 (stating that forty-eight percent of all legislative history citations from 1939-1978 were to House and Senate committee reports).

7 Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 Harv. J.L. & Pub. Pol'y 401 (1994) (summarizing how Justice Antonin Scalia "harshly criticized the Court's reliance on legislative history as an aid in interpreting statutes").

8 *See e.g., id.* at 421 (quoting Judge Patricia Wald arguing that to disregard committee reports "is to second-guess Congress' chosen form of organization and delegation of authority, and to doubt its ability to oversee its own constitutional functions effectively") (citations omitted).

## Micro Essay

In 2011, IBM's Watson was showcased on Jeopardy. Despite decimating the humans in preliminary rounds, IBM was infamously embarrassed when Watson incorrectly answered the question in the Final Jeopardy category of "U.S. Cities." The question was: "Its largest airport is named for a World War II hero; its second largest airport is named for a World War II battle." Watson answered, "What is Toronto?????" The two humans answered correctly: Chicago. Programmers later explained that Watson could only process "data," but had no judgment concerning ambiguity. According to the programmers, Watson associated the U.S. with "America," and thus, to Watson, all of the Americas (North and South) provided the data pool for possible answers. The Watson episode underscores a major flaw with increased reliance on AI research. Although use of AI research is inevitable and is essential as a tool for data compilation, we must take even more time than ever to teach our students the importance of human judgment in sorting through data and evaluating multiple suggestions for the correct "law" while conducting legal research.

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