PANEL III: TEXT AND HISTORY IN STATUTORY CONSTRUCTION

INTRODUCTION

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The next two articles address the topic "Text and History in Statutory Construction."[1] It is interesting how, in those few words, there are already interpretive problems; many of us think that the text *is* the statute, not just evidence of the statute for construction purposes.[2] Be that as it may, it is my pleasure to introduce briefly this panel's contributors.

In the case of Judge Easterbrook, there is really no need for an introduction because he holds the world record for the most appearances before the Federalist Society. In Judge Randolph's case, there is again little need for an introduction because he is well known for his many achievements. Judge Easterbrook is a distinguished graduate of the University of Chicago Law School, where he later taught full time and still teaches part time, though to him it probably seems like full time. Judge Randolph made the quickest trip from college to law school possible: He walked two blocks from Drexel University, where he was a science student, to the University of Pennsylvania, where he graduated first in his law school class.

The three of us might have met in 1969 when we all happened to be in the Philadelphia area. Judge Easterbrook was a junior at

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1. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994); A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71 (1994).

2. "The eagerness of many courts to examine congressional materials prompted the joke that under the 'American rule,' examination of statutory text is permissible only when legislative history is ambiguous." George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39 (1990). The judiciary's use of legislative history has come under increasing scrutiny lately, primarily at the instigation of Justice Scalia. *See, e.g.*, Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2487 (1991) (Scalia, J., concurring); Blanchard v. Bergeron, 489 U.S. 87, 97 (1989) (Scalia, J., concurring). Justice Scalia prefers that judges limit themselves to the "plain meaning" of statutes, and encourages interpreting ambiguous language only in the context of the specific statute and the text as a whole. Should this fail to illuminate the meaning of the language, he believes that the judge should use common sense to "rationalize the law" into its elements. This technique is discussed further in Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, n.6 (1992).

Swarthmore College, Judge Randolph was finishing law school, and I was a young prosecutor. We were all there, but we never met. We might again have met at various times in the 1970s when the two of them were stars, working together on many cases in the Solicitor General's Office. They worked with Judge Robert Bork on many important cases and were widely renowned within the department, in the halls of the Supreme Court, and elsewhere. We did not meet then, either.

I am very happy to be included with them now, despite the lost opportunities of the past, because we presently share the common profession of trying to discern the meaning of statutes. Let us not forget to mention the need to interpret regulations as well. Congress has delegated so much of governance to innumerable regulatory agencies that the texts they produce also provide interpretive grist for the daily mill.[3]

I must immediately make one confession. I was once a cook in the sausage factory of legislative history. I spent seven years working in the Senate, and actually produced some of this stuff myself. I assure you, however, that I was never guilty of any of the behaviors I describe below—but I did see others doing it! Here, then, is my quick critique of legislative history.

First, many of the committee report authors view their handiwork essentially as a selling document, not as guidance for courts in the future. At this stage the bill has not yet passed, after all, and passage is the authors' main concern. So the report may deliberately fuzz and fudge to provide the legislators with the bargaining room they will need to ensure that the measure is passed.[4]

Second, the committee report, and other forms of legislative history, may be deliberately misleading. For instance, the authors may misrepresent how much each contending side had to sacrifice, to create the illusion that, contrary to zero-sum theory, everybody got about sixty percent of what they sought. Often the

3. *See generally* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in an Administrative State*, 89 COLUM. L. REV. 452 (1989); Morris B. Fiorina, *Legislative Choice of Regulatory Forums: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982).

4. *See Blanchard*, *supra* note 2, at 98-99 (Scalia, J., concurring):

> As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative,and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant. . .but rather to influence judicial construction.

result is what intelligence agencies call "disinformation," imbedded in legislative history.[5]

Finally, the part of the committee report that ought to be the most helpful, the section-by-section analysis of the bill, is almost invariably written in terms that merely mimic the statute itself. Thus, the "analysis" usually provides very little enlightenment. These are just some of the quandaries we judges face every day.[6]

As I mentioned earlier, before Judges Easterbrook and Randolph acquired their present titles, they were both stars in the Solicitor General's Office, so they have great insight into the process of statutory construction from many perspectives. The following articles explore these insights and perspectives in much greater detail.

5. *See Mortier, supra* note 2, at 2489-90 (Scalia, J., concurring) (examining three committee reports that confused the state court):

> If I believed, however, that the meaning of a statute is to be determined by committee reports, I would have to conclude that a meaning opposite to our judgment has been commanded three times over—not only by one committee in each house, but by two committees in one of them. Today's decision reveals that, in their judicial application, committee reports are a forensic rather than an interpretive device, to be invoked when they support the decision and ignored when they do not. To my mind that is infinitely better than honestly giving them dispositive effect. But it would be better still to stop confusing the Wisconsin Supreme Court, and not to use committee reports at all.

6. For more on the role of committee reports in legislative history and statutory construction, see Costello, *supra* note 2; Jared T. Finkelstein, In re Brett: *The Sticky Problem of Statutory Construction*, 52 FORDHAM L. REV. 430 (1983); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647 (1992); John P. Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373 (1992); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990); Elizabeth A. McNellie, Note, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 COLUM. L. REV. 157 (1989); Note, *supra* note 2.