

GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL  
**GOVERNMENT LAW ONLINE**

---

**THE USE OF LEGISLATIVE HISTORY IN  
INTERPRETING NEW YORK STATE AND  
FEDERAL STATUTES**

*Symposium Sponsored by the  
New York State-Federal Judicial Council*

**March 24, 2003**



80 New Scotland Avenue  
Albany, NY 12208

[www.als.edu](http://www.als.edu)

© 2003 Albany Law School

GOVERNMENT LAW ONLINE publications are available at [www.governmentlaw.org](http://www.governmentlaw.org)

*Reprinted with permission from the Albany Law Review, Volume 68, at 723 (2003).*

**THE USE OF LEGISLATIVE HISTORY IN  
INTERPRETING NEW YORK STATE AND  
FEDERAL STATUTES**

*Symposium Sponsored by the  
New York State-Federal Judicial Council*

**March 24, 2003**

© 2003 Albany Law School

These materials are copyright by Albany Law School (ALS) on behalf of its Government Law Center or ALS licensors and may not be reproduced in whole or in part in or on any media or used for any purpose without the express, prior written permission of Albany Law School or the licensor. Neither Albany Law School, the Government Law Center or any licensor is engaged in providing legal advice by making these materials available and the materials should, therefore, not be taken as providing legal advice.

All readers or users of these materials are further advised that the statutes, regulations and case law discussed or referred to in these materials are subject to and can change at any time and that these materials may not, in any event, be applicable to a specific situation under consideration. The information provided in these materials is for informational purposes only and is not intended to be, nor should it be considered to be, a substitute for legal advice rendered by a competent licensed attorney or other qualified professional. If you have any questions regarding the application of any information provided in these materials to a particular situation, you should consult a qualified attorney or seek advice from the government entity or agency responsible for administering the law applicable to the particular situation in question.

## THE USE OF LEGISLATIVE HISTORY IN INTERPRETING NEW YORK STATE AND FEDERAL STATUTES

SYMPOSIUM SPONSORED BY THE NEW YORK STATE-  
FEDERAL JUDICIAL COUNCIL

*Albany Law School—March 24, 2003*

**HON. ROSEMARY S. POOLER:**<sup>1</sup> Good morning to everyone. My name is Rosemary Pooler. I sit on the Second Circuit and I am here representing the State-Federal Judicial Council, the group that is sponsoring this program. We are actually almost undone by our success. We are starting while people are still registering.

Just to do a few moments of welcome, I want to acknowledge Hank Greenberg who co-chaired this particular program with me and did yeoman's service. The members of the committee who are here, Marty Glenn, Marilyn Kunstler, Judge Barry Cozier, Judge Katzmann, who will be on the program; and Karen Milton who is staff to our Council. Most of all, I only take the microphone to say a word about our former chair, Howard Levine, who wanted us to move the programs around the state, who had the idea that in Albany we would get a good turnout, and who gave us the most inspired direction and leadership for two years that any committee could imagine, and we all wanted to thank him for that. We are happy to be in his stomping grounds and now, I will turn the program over to the new Dean of the Albany Law School, Dean Guernsey.

**DEAN THOMAS F. GUERNSEY:**<sup>2</sup> Good afternoon. We are overwhelmed by the turnout and the people who are still coming in. It is certainly an honor to welcome such a distinguished gathering

---

<sup>1</sup> United States Circuit Judge of the U.S. Court of Appeals for the Second Circuit.

<sup>2</sup> President and Dean, Albany Law School.

of judges, elected officials, professors, government lawyers and private practitioners to Albany Law School. It would be a daunting task to individually recognize all who are deserving here this afternoon. So, allow me to simply acknowledge and welcome again to our institution the Honorable Judith Kaye and all of her outstanding colleagues on the New York Court of Appeals. Chief Judge Kaye, Albany Law School always has had a special relationship with the Court of Appeals and it has been one of my true pleasures since I have been here to see that is a strong and growing relationship. It is a relationship that this school is very proud of and something that we do cherish. It is also particularly exciting to have with us today members of the federal bench, something that does not happen with enough regularity as a matter of fact, and we are doing more to try and develop those relationships as well. Chief Judge John Walker of the United States Court of Appeals for the Second Circuit, we welcome you and your colleagues on the federal bench in New York to Albany Law School. I also want to thank Judge Rosemary Pooler for all of her efforts in putting together what is, in my opinion, a stellar program of major significance. Of course, we owe a big thank you as well, as you have indicated, to the New York State Federal Judicial Council, who had the wisdom to bring this program from New York to Albany.

As you can tell from the crowd in this room and the fact that we have to beam it over to another classroom, we believe that holding the conference in Albany was an excellent decision and shows what kind of support and attendance you will get in the state capital. Of course, I want to personally acknowledge and thank the former head of the State Federal Judicial Council, the Honorable Howard Levine, who has joined the law school faculty here, and we greet him as a colleague. Lastly, I want to thank the Government Law Center and Patty Salkin, as well as the Institute for Legal Studies for their efforts in coordinating the many behind the scenes details to get us all here today.

And now it is my great pleasure to introduce Chief Judge Judith Kaye for some welcoming remarks. Thank you.

**HON. JUDITH S. KAYE:**<sup>3</sup> Thank you, all of you, especially Dean Guernsey and the Albany Law School for the wonderful attention and the warmth of your feeling, which I return in full to the Law

---

<sup>3</sup> Chief Judge of the State of New York; Chief Judge of the Court of Appeals of the State of New York.

School and to the Government Law Center. It is a pleasure for me to join in this welcome today. Sometimes I have difficulty finding my way to the fourth floor of the Law School, although as the Dean has noted, I have been here many, many times. But today I just followed the crowd. And I certainly understand why there is such a crowd. We have a great venue, a great subject, a great over-viewer (one of the outstanding voices on the subject of statutory interpretation), Professor Eskridge, fabulous moderators—Judge Wesley and Judge Katzmman—and terrific panelists. Have you seen a better group of panelists? I have not.

I would like to linger for just a moment on the subject of the State-Federal Judicial Council, one of the symposium sponsors. In all candor, I have to tell you that in some venues it is known as the Federal-State Judicial Council. I have puzzled over this long and hard and even done some research.

Actually, we have to go all the way back to the year 1971, when the Council began.<sup>4</sup> The State-Federal Judicial Council (I say as State Chief Judge) was a joint initiative of then-state Chief Judge Stanley Fuld and then-Second Circuit Chief Judge Henry Friendly. The idea was a fine one, because we are blessed in this nation with coordinate, independent, state and federal judicial systems. But the blessing is sometimes hard to appreciate—for example, if you are an attorney caught between two systems, expected to be present in both, or you are confused about where state jurisdiction and federal jurisdiction overlap. Maybe what really inspired Chief Judges Fuld and Friendly was the idea that together, collaboratively, each system could be a source of help for the other, and for the Bar and for the justice system. And so this great idea was launched thirty-two years ago. That I now know for sure, though I have no authoritative answer on the nomenclature.

Over the decades, the Council has had its ups and downs, but my goodness, we went soaring off into the universe when my colleague Judge Howard Levine took the reins as Chair. Since then, we have had the most wonderful conferences and the most wonderful collaboration.

This is actually the Council's fifth symposium. In the year 2000, at the Fordham Law School, we had the inaugural symposium of this organization, which was a potpourri of certification, habeas, juries and practice in both courts. In the year 2001, we had two

---

<sup>4</sup> Hon. George C. Pratt, *The State of New York's State-Federal Judicial Council*, 3 TOURO L. REV. 1, 2 (1986).

symposiums, one in Syracuse and one in New York City at the Appellate Division in Manhattan on post-conviction review—terrific. Last year, the year 2002, we had a session on expert testimony.

I know today's session will follow in the great tradition that has been established since Judge Levine became Chair, assisted by terrific Council members and a great Advisory Group. Advisory Group co-chairs Marilyn Kunstler and Marty Glenn are here today, along with several members of the Council, including my former law clerk, Hank Greenberg, who chaired the subcommittee that put today's program together.

Above all, there are really two people who deserve credit for the phenomenal ascension of a great idea, the State-Federal Judicial Council. One is Howard Levine and the other is the final welcomer, the really fantastic Chief Judge of the Second Circuit, John M. Walker, Jr.

**HON. JOHN M. WALKER, JR.**<sup>5</sup> Thank you so much Judith for your very kind remarks. I will be brief. Judith covered everything that I would have covered and so I am going to amend my remarks and reduce them a little bit. I will not quibble about the name of our Council, but in Albany it is the State-Federal Judicial Council. This is the seat of the New York State Court of Appeals and as far as I am concerned, it is State-Federal when we are in Albany. We will worry about New York City later.

This Council is a remarkable body. I think in the last few years we have really tapped into something here because, in New York, we have two vital parallel systems, staffed with great judges, with great lawyers appearing before each one of them at all times, and we have a lot in common. We also interact and we have covered those interactions in a number of our conferences—conferences on habeas corpus, on certification and abstention, and the like. So, we depend on each other and we relate to each other that way, but we also have parallel systems which are essentially trying to achieve the administration of justice in the fairest, most intelligent, and most competent way that we can, exercising the greatest wisdom that we can, and so we can learn from each other. We in the federal system can learn from the state system, and I hope that the state system can learn from the federal system and, together, I think we have really hit on something. This conference on the use of

---

<sup>5</sup> Chief Judge of the United States Court of Appeals for the Second Circuit.

legislative history is just one more example.

Judith has outlined the other conferences that were so successful in the past. So I just want to thank, once again, Dean Guernsey for making this venue at Albany Law School available to us. We are very happy to do this in Albany and look forward to an interesting conference. I am not going to keep you any longer.

#### PANEL DISCUSSION ON THE STATE COURTS' PERSPECTIVE

##### MODERATOR

##### **HON. RICHARD C. WESLEY**

*Associate Judge, New York Court of Appeals (Judge Wesley is now a Judge of the U.S. Court of Appeals for the Second Circuit)*

##### PANELISTS

##### **HON. JAMES J. LACK**

*Judge, New York State Court of Claims and former Chair, Judiciary Committee, New York State Senate*

##### **HON. HELENE WEINSTEIN**

*Chair, Judiciary Committee, New York State Assembly*

##### **EVAN A. DAVIS, ESQ.**

*Cleary Gottlieb Steen & Hamilton and former Counsel to Governor Mario M. Cuomo*

**HON. RICHARD WESLEY:** It is always hard when you are following someone from Yale and you went to Cornell, although I am not a Cornell apologist by any stretch of the imagination. My name is Richard Wesley. I am an Associate Judge of the New York Court of Appeals and, as my biography points out, I stand with both feet firmly planted in state service, but presently undergoing a bit of a lean towards federal service, the President having nominated me for the Second Circuit. So, I have my current boss and my prospective boss in front of me, and I must say that it is a little bit nerve-racking thinking of that. Professor, legislative history, seductive. If I told my wife that I was coming to a session of court a day early to engage in a seductive adventure, I think that I would still be in Livonia, New York. But our purpose here today, with my panel members in this portion of this program, is to put a little meat on the bones of the argument about the use of legislative history.

In my opinion, I have the pantheon of great stars of legislative endeavors sitting on the state panel today. We have a current Court of Claims judge who was a State Senator. I am going to call

him Senator Lack at least half of the time today, the Honorable James Lack, now sitting on the Court of Claims, who chaired for many years the Judiciary Committee, and from the standpoint of the courts, we felt that we never had a finer champion or greater friend on the Senate side than Jim Lack. Seated immediately to his left is a former colleague of mine, Assemblywoman Helene Weinstein, with whom I had the great pleasure to serve in the Assembly from 1983 to 1986. We served on the Codes Committee together and enjoyed a close working relationship over those years. She is also a prolific legislator. If you run her name in Lexis or Westlaw, you will find more hits under “Weinstein Member of Assembly” than any other member of the Assembly. You will have no hits, by the way, if you look for “Wesley Member of the Assembly.” A little bit about the political realities about why I went to the bench and left the Assembly. To her left is Evan Davis, former counsel to Mario Cuomo for a portion of the time that I served with Helene and Jim in the legislature, now at Cleary Gottlieb Steen & Hamilton LLP, a former president of the Association of the City Bar of the City of New York, an outstanding appellate advocate, and also married to a former clerk of Judith Kaye. So, there you have it—those are the credentials.

What I propose today to do with my panel, knowing them all to be shy and retiring folk, is to propose a few questions to them, directed at what I consider to be a stunning outline by Professor Eskridge to point-counterpoint the arguments between the two camps and to try and pull away the curtain, if you will, a little bit on the legislative process and how this thing called legislative history is made. It is great to have another fellow judge, who has also served there, because it is interesting to be a legislator one day and to become a judge the next.

When I was first on the bench, a young fellow came in to argue a motion about the applicability of Section 11-100 of the General Obligations Law, which says that if you supply intoxicating liquors to someone under the age of twenty-one and someone is injured as a result of that, the individual is liable.<sup>6</sup> The statute repealed the social host doctrine with regard to a very small portion of that common law principle. What had happened is that the young fellow had gotten intoxicated and assaulted someone. The young lawyer came in and said: “Your Honor, very clearly the legislature did not intend to include intentional torts. But the statute doesn’t say

---

<sup>6</sup> N.Y. GEN OBLIG. LAW § 11-100 (McKinney 2001 & Supp. 2005).

‘negligently,’ it just says causes injury.”<sup>7</sup> I asked him if it would change his mind if he knew that I was one of the prime sponsors of that legislation. He said: “It might change my answer but I am not certain that it is going to help me, Your Honor.” So, Judge Lack and I have a little bit of a different perspective, but let me put it to the panel.

One of the criticisms about the use of legislative history is that the legislature is not of one mind—it is not that the enactment of legislation is not particularly one intent, but perhaps 150 different intents, and perhaps the bills don’t always pass 150 to nothing—sometimes it is seventy-six to seventy-four, or thirty-one to thirty in the Senate. What is your view of that Judge Lack, now that you are a judge, what is your view of the consideration that the legislature doesn’t have one particular intent but perhaps is a reflection of a myriad of considerations when legislation is enacted into law?

**HON. JAMES J. LACK:** Well, the answer to that is, of course, it is. Legislation, by definition, is a compromise, even though the vast majority of legislation passes by overwhelming numbers, not seventy-six to seventy-four, in the Assembly by any means—ninety percent of our bills pass on consensus as it were. But, of course, legislation is a product of compromise and, quite frankly, because of that the judiciary then has to try and figure out what the legislature meant. I listened very carefully to Professor Eskridge and what he was saying, but as a former president of the National Conference of State Legislators, I can think of many states to which the point-counterpoint arguments would certainly be pertinent, but not so much in New York. If legislative history in New York can be compromised so greatly, and I see there are many in this room who are lobbyists, I think you have a whole new calling that you can indulge yourself in for the next few legislative sessions—that is, creating legislative history.

One of the greatest problems that I had as a legislator, particularly at that time talking to judges, was talking about legislative history. Judge Kaye, who is not only our Chief Judge, but an excellent scholar who has written on this subject, knows as well as I do that, quite frankly, finding legislative history in New York can sometimes be the hardest thing for anyone to do—legislator or member of the judiciary. While in many states it is a well planted field, in New York it can be a barren field. Very little

---

<sup>7</sup> *Id.*

legislation is considered actively as a product of hearings through committees. There are no committee notes or hearing structures from which to learn. I can only speak of, and will confine myself to, the Senate, where I first was first elected in 1978. Much more senior members looked at me and said: "You know you don't talk much here." If you want to get yourself in trouble, stand up and start debating your bills a lot. They clap when you pass your first bill, and they clapped harder if you didn't say anything and you passed your first bill. That obviously, of course, changed in the last quarter century, but it gives you an idea of at least what the Senate thought of "making legislative history."

I can probably count on the fingers of one hand of the more than 400 chapters of law of which I have been the Senate sponsor, where I actually stood up on the floor of the Senate in a cognizant attempt to put something into the record for judicial interpretation. I can think of a couple of hundred times that I might have wanted to but didn't, because, quite frankly, it might open up the floor to a whole discourse with respect to the legislation. Judge Wesley, it is just what you were talking about. In effect, it would then be more of a product of a compromise than it already was if suddenly we started haranguing every comma and semicolon on the floor. So you tend to let it go, and sometimes breathe a sigh of relief if the most controversial part of whatever the legislation is does not get subjected to questioning—now it will be up to the judiciary.

I will tell you, if I can for a moment or so, having made the transition from legislature to judiciary, what happened to me the first time I sat on the bench—and I mean literally the first time I sat on the bench. I had gotten my robe just the day before and I had this hearing the next morning. I, of course, put my robe on and looked to see what the case was and Judge Susan Phillips Read, who was then the presiding judge of the Court of Claims and, of course, is now an Associate Judge of the Court of Appeals, had decided that, in examining the employee records of court officers, a hearing should be held pursuant to statute as to whether or not they should be disclosed. I had a little knowledge of that in the back of my mind, and I said: "Gee, that is great." I went and took out Civil Rights Law, Section 50-a which is the statute on personnel records of uniformed services—police officers, firefighters, and corrections officers—I will read to you a very quick excerpted version.<sup>8</sup> It says: "All personnel records...shall be considered

---

<sup>8</sup> N.Y. CIV. RIGHTS LAW §50-a(1) (McKinney 1992).

confidential and not subject to inspection. . . except as . . . mandated by lawful court order.”<sup>9</sup> “Prior to issuing [a] court order the judge must review all such requests and give interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review.”<sup>10</sup> Well, even for a judge of one day, that is fairly clear. These are confidential records and you should not disclose them unless there is a really good reason to do so. I can handle this. One problem is that the section doesn’t apply to *court officers*. The original statute was passed in 1976, before I got into the legislature.<sup>11</sup> For some reason, in 1992, the legislature passed Section 50-d of the Civil Rights Law which says: “Personnel records of court officers shall be disclosed. . . only after the court has notified the subject of such record that such record may be disclosed in a court action and the court has given the subject of such record an opportunity to be heard. . . .”<sup>12</sup> They are not confidential, they are public records. Now remember, I have been a judge for about two weeks. I said: “What? Who passed this?” Yes, the lawyer had checked and I voted for it. As a matter of fact, it passed unanimously in both houses. Now what was I supposed to do?

Plaintiffs in the Court of Claims are claimants. A claimant is bringing an action for damages against the State. There was an altercation with court officers and claimant wants to examine the court officers’ records. The claimant’s attorney stands up in the middle of my hearing, and I asked: “For what purpose do you want to see these records?” He said: “It is a fishing expedition, Your Honor. I want to see information about these court officers and whether or not they have a record of harassing people and how they have been evaluated.” I adjourned the hearing. You probably want to know what I did about this, and I don’t know if I want to tell you.

Having only been a judge for a couple of weeks, and still a politician as far as I was concerned, with the claimant attorney’s permission, I called the Assistant Attorney General into my chambers and said: “Excuse me, have you read the difference between Section 50-a and 50-d?” He said: “No.” I said: “Read them. I don’t want to know what is in those court officers’ records, but if you want me to write, I will do so without any trepidation. So without my knowing what is in these records, you might now want

---

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* §50-a(2).

<sup>11</sup> *See id.* §50-a.

<sup>12</sup> N.Y. CIV. RIGHTS LAW §50-d(2) (McKinney Supp. 2005).

to make a decision on what to do.” He excused himself, came back in about fifteen minutes and said: “Your Honor, we will move to release those records immediately to the claimant.” Helene, you can take 50-d and put it into 50-a. I checked the whole legislative history, with permission of both parties, and there are two letters from the sponsors (not me) who are very good friends of both Helene and myself, who said: “The purpose of this legislation is to outlaw fishing expeditions.” It is in both letters. There is also a comment from the Office of Court Administration saying we have no comment on Section 50-d and that is the end of that. No, I didn’t have to write on it, and I have no intention to do so because I am fully, fully confident that the legislature is going to repeal the section and put court officers into 50-a before the end of this session.<sup>13</sup>

In any event, my whole point is that I came into the court system as a judge after twenty-four years as a legislator, nine of which were spent chairing the Judiciary Committee. One should be cognizant of what it is that the legislature does and be very careful. It is a product of compromise. There really shouldn’t be judge-made law. That was my first experience.

**HON. RICHARD C. WESLEY:** Let me turn to Assemblywoman Weinstein who, as I said before, appears regularly in our decisions at the Court of Appeals and in the Appellate Division decisions because of the frequency with which her legislation is passed. In *Cassano v. Cassano*,<sup>14</sup> Chief Judge Kaye wrote the decision for the Court of Appeals. The problem was one of legislative purpose and trying to give some meaning to an aspect of the statute that had an ambiguity in it. In that statute, you had inserted a very clear and specific declaration of legislative intent. You followed up that declaration with a specific reference to the concerns which the statute addressed. If the legislature has both of those capabilities, why isn’t it that the legislature enacts a specific declaration of legislative intent in all of its legislative endeavors? Clearly we are not talking about items of local interest or chapter amendments with regard to commas and other things, but major pieces of legislation. Why doesn’t the legislature do that?

**HON. HELENE WEINSTEIN:** That’s a very interesting question. First of all, I am delighted you bring up *Cassano v. Cassano* where

---

<sup>13</sup> As of the publication of this transcript, court officers have not been added to Section 50-a.

<sup>14</sup> 651 N.E.2d 878 (N.Y. 1995).

the court, I thought very wisely, followed legislative history. It's a case where the court looked at the declaration of legislative intent for direction, studied my legislative memo and my letter to then-Governor Cuomo, and looked through the bill jacket assembled by the Governor's staff and came to what I think was clearly our legislative intent.<sup>15</sup> I think the inclusion in a statute of a section declaring the legislative intent tends to be limited to major changes in the law, such as the enactment of the 1989 Child Support Guidelines bill which was at issue in *Cassano*. In the overwhelming majority of bills that just make minor changes in the law, a declaration of legislative intent is rarely included. It is something that if you go back in history, even just the twenty-two years that I have been in the legislature, is very rare indeed. A declaration of legislative intent gets added a little bit more now. Also, the only place you can find the legislative intent section of a new law is in those first McKinney Session Laws. It doesn't show up in subsequent editions. When you look at the chapter law, it is not there and so you have to go back to the session laws.

**HON. RICHARD C. WESLEY:** Except the footnotes in McKinney will reference you that, so I guess step one would be take a look and see if the legislature did so declare.

**HON. HELENE WEINSTEIN:** Correct. But, as I said, you will find legislative intent provisions exist only in very limited circumstances.

To go back to your original question: does the legislature speak in one voice? Obviously, as Jim noted, we don't speak in one voice in that the overwhelming majority of the members who have voted for a particular piece of legislation generally have had very little to do with the form that it has taken. They have had very little to do with the negotiations or discussions that got us to the final draft that is presented to the entire House. On the other hand, the individual sponsors of that legislation have, in fact, spent a tremendous amount of time and effort on their bills. For example, Jim and I have spent hours on certain pieces of legislation, particularly I am thinking of some extensive amendments to the Uniform Commercial Code, where we made very specific changes unique to New York law in the language and commentary. We knew it was going to be a fifty or sixty page bill and that the

---

<sup>15</sup> See *id.* at 880.

overwhelming majority of the members—I don't think that I am telling any secret to say—except for Jim and myself, I doubt any member had read through that bill from cover to cover before they voted on it. Instead, they relied upon us, as the sponsors, to provide a very detailed discussion and detailed memorandum of what the legislation was intended to accomplish and did in fact accomplish. In voting, the members relied upon the sponsors' presentation of what the legislation did, and by their votes acquiesced in the sponsors' legislative intent.

In reality, I think in New York there is very little legislative intent to look at. We rarely have committee hearings. At committee meetings there is often very little discussion and if there is discussion, it is not recorded. And on the House floor, as Jim said, very infrequently are there debates that are very specific. Rather than actual back and forth debate, there is more likely to be an explanation of the provisions of the bill.

What we do have are sponsors' memoranda that accompany the legislation, and those memos are relied upon. Some memos are more detailed than others. Perhaps the reason why the memos on the various legislation that I have worked on over the years have the amount of detail that they do is because of my first visit to Albany, and my first encounter with legislation. I was two years out of law school and working on a case, an appellate case, interpreting the informed consent provisions that had been enacted by the legislature in 1976. I was asked by a partner in the firm to go look at the bill jacket and read up on the legislative intent. I was surprised at how little information there was on the point that we were looking to address. So when I was elected to the legislature, I made a conscious decision that if any legislation that I worked on was going to be the subject of someone's efforts to figure out what we did, or what we intended to do, then at least my thoughts and my intentions and the intentions of the other drafters would be there on paper.

**HON. RICHARD C. WESLEY:** Wouldn't you say though Assemblywoman Weinstein, and I will give you your due—wouldn't you say that you are the exception to the norm? I have had the pleasure of serving with you and I have also seen a number of instances where your memos to the Governor made a difference in a case. But wouldn't you say that is so probably because of the nature of the things that you did—and the same would be true of Senator Lack and the committee assignment that he had—required

2005]

Legislative History in Interpreting Statutes

735

particularization and care with regard to the issues that you were identifying? Wouldn't you say that your memos are perhaps more complete than many of the memos that you have seen of chapters that were enacted by your colleagues?

**HON. HELENE WEINSTEIN:** Oh, no question about it.

**HON. RICHARD C. WESLEY:** None of whom are present here.

**HON. HELENE WEINSTEIN:** Correct. I think it clearly is a conscious choice to put forward as much information as possible. Every memo is required to have the title of the bill, the purpose, the summary of provisions, and justification clause. If you look at bills that I have drafted, that Jim has done, the memos tend to take up a whole page if not several pages. I sometimes will see a letter from a colleague requesting that I join them in co-sponsoring a bill they are planning on introducing. If I want to know more about the proposed bill, I will ask my colleague for a copy of the accompanying legislative memo. In some cases, the memo tends not to give much more information. For example, the summary may simply be "an act to amend sections whatever of the Family Court Act." And then you look for what the proposed bill does and that is not there.

**HON. RICHARD WESLEY:** The memo was a contemporaneous document created at the time of the filing of the draft of the legislation which you proposed.

**HON. HELENE WEINSTEIN:** Correct.

**HON. RICHARD C. WESLEY:** So, it avoids some of the arguments that we may hear on the federal side about memos or the [Justice] Scalia argument that memos post-enactment have no business in understanding legislative interpretation. This is a document that is part of the legislative bill, isn't it?

**HON. HELENE WEINSTEIN:** It is. However, there is still the issue that while the memo describes the sponsor's intention, the non-sponsoring legislators voting on it may not have read every provision of that memo, even though it's on their desk when they vote on the bill. Of the large number of bills coming up for a vote, most of them pass on consent without debate. That means that on bills that aren't hot button issues where everybody reads every

provision, you may, in fact, have people voting that don't really fully appreciate or comprehend some of the controversial positions that may be in that memo.

**HON. RICHARD C. WESLEY:** Helene, can you recall, in your own instance, if situations where you decided to literally create an ambiguity—I am not going to ask you to be specific—but lay the card on the table for me. Are there instances where you or your colleagues, not you personally, created an ambiguity?

**HON. HELENE WEINSTEIN:** There are certainly times where language may be a little bit more general than the individual sponsors would like it to be because that is the only way you can get agreement. When the word that is in dispute or the section that is in dispute is a very small part of a much larger proposal, you don't want to jeopardize an entire proposal just to get exact clarification of the specific provision. Here's a case on point—the case of the Worker's Compensation Law. In 1996, there was a dramatic change in the Worker's Compensation Law. One specific provision related to limiting the applicability of the *Dole* rule.<sup>16</sup> There had originally been some suggestion of language, which I believe had come from the Governor's office, saying that when the new law shall take effect, it shall cover all cases prior to the effective date.

**HON. RICHARD C. WESLEY:** Prospective or retroactive?

**HON. HELENE WEINSTEIN:** Correct, our house did not support retroactivity. Instead, we wanted specific language about prospective application. We weren't able to get agreement on specific language on prospective application and, at our insistence, the proposed retroactive language was dropped. The language ultimately merely said that the statute shall take effect immediately. It was clear in my understanding in talking with the drafters that it was our intention that the law be prospective. Since there was this ambiguity or potential ambiguity in the legislation (even though New York's statutes are generally construed to be prospective, not retroactive, unless retroactivity is specifically delineated), I stood up at 2:00 in the morning on the floor of the Assembly and asked very specific and pointed questions to the

---

<sup>16</sup> See *Dole v. Dow Chemical Co.*, 282 N.E.2d 288 (N.Y. 1972). See also N.Y. WORKERS' COMP. LAW § 11 (McKinney Supp. 2005); Gary Spencer, *Worker's Comp Reforms Limited: Law to Be Applied Prospectively Only*, N.Y.L.J., May 13, 1998, at 1.

sponsor to make sure that what I had been told privately by the drafters was in fact the intention of the sponsor and the drafters. That was done for the sake of clarifying, in my own mind, the sponsor's intention. It was also so that my colleagues would know what this very specific provision was. Also, somewhere in my head I had the thought that this might ultimately wind its way through the courts. If you put my name in Lexis, you will see my debate cited numerous times in decisions regarding this issue.<sup>17</sup> We certainly knew what we believed the law to be, and the debate really was to put on the record what it was that we in the Assembly intended regarding the effective date.

**HON. RICHARD C. WESLEY:** Let's presume that the Weinstein-Lack or Lack-Weinstein bill has passed both houses in the legislature unanimously and now it is headed down to the cramped offices of an overworked Counsel to the Governor, who is well known for his brilliance and his thoroughness, but just doesn't have enough time in the day to sift through all of the documents that are coming in. We walk into Evan Davis' office in 1985 (a time when I had the pleasure to serve there and actually enacted a couple of things, such as some new sidewalks in Wellsville New York), and Evan, being the cordial fellow that he is, says: "What the hell do you want?" Evan, what is this bill jacket stuff? You are the gatekeeper of this stuff. Who decides that—the judges at the Court of Appeals are all looking at a lifeline here? Who decides this bill jacket stuff? Do you have to know somebody to get something in a bill jacket?

**EVAN A. DAVIS:** First, I have to defend the beautiful office that the Counsel to the Governor occupies.

**HON. RICHARD C. WESLEY:** I am sorry?

**EVAN A. DAVIS:** It is one of the nicest spots on the second floor. We are here as sort of fact witnesses to give you testimony about how things really work. You all heard of three men in the room. Well we are the proxy, because we have here Senate majority, Assembly majority and Governor. No Senate or Assembly minority. You know, they generally don't count.

---

<sup>17</sup> See, e.g., *Knapp v. Consol. Rail Corp.*, 655 N.Y.S.2d 732, 733 (N.Y. Sup. Ct. 1997) (discussing Hon. Weinstein's debate as evidence of intent to leave the prospective/retrospective question unanswered).

**HON. RICHARD C. WESLEY:** I am a throw-away.

**EVAN A. DAVIS:** And, the bill jacket, you have to understand that it is created for a very particular purpose, which is to help the Governor decide whether to sign or veto a bill. That is its only purpose from the point of view of our putting it together. When the bill passes both houses in the legislature, Counsel's office sends out postcards inviting people to comment on the bill. The assistants do that; they use a checklist. They check a lot of boxes and the postcards automatically go out. And other people write too, but the ones that are addressed to the Counsel typically are people that are answering one of these postcards asking for their comment. Then, it is all put together, all of the answers and anything else that has come in to the Governor about whether he should sign or veto the bill. The bill is put on the front of the bill jacket. Inside is a memo that no one in this room, I suspect, except another former Counsel to the Governor and Assistant Counsel has ever seen—which is a memo from the counsel to the Governor talking about the pros and cons of the bill from a multitude of points of view—legal issues, policy issues, even sometimes political issues. So then the Governor, before he signs the bill, will get the bill jacket and have a couple of days to study it. Then, when he is ready to meet with the Counsel, [he] will meet with the Counsel and talk about the bills and actually sign them in some cases [or] edit (as was quite often the case with Governor Cuomo) a proposed approval message or veto message. So the bill jacket has this very specific purpose. It is not a good idea to leave something out because the Governor needs to know what all of these people writing in think about the bill and what they want him or her to do. If you left something out, and the Governor was at a function a few days later and was totally oblivious to the letter that had been sent, you could find yourself in big trouble. So, if you look at this a little bit like the catch-all exception to the hearsay rule in trying to think about the accuracy of the bill jacket, if you take that limited function, it has a fairly high degree of accuracy for that purpose. But that also means that most everything in it is generated after the bill is enacted, before it is signed, but after the bill is enacted.

That is not always the case. I remember an occasion during the debate at the leaders meetings on the Child Support Guidelines Bill. One day, Senator Anderson walks in waving a report from the New York State Bar Association Matrimonial Law Committee recommending that this bill not be enacted. The next day, Speaker

Miller walked in waving a report from the Executive Committee of the State Bar, urging that the bill should be enacted. So, those were documents that existed before enactment. Sponsor's memos are there to help the Governor and those exist before enactment, but generally, it is things after enactment.

There is one area of possible manipulation, which I have seen happen. Every so often, an assistant will be bound and determined that a bill should be vetoed. So, rather than sending out 20 postcards, he or she will send out 300 postcards all to groups likely to oppose the enactment of the bill and probably also put the sponsor's address in there somewhere as well. There was a bill I remember to allow the breeding in captivity of the Peregrine Falcon. The assistant was bound and determined that this bill was not going to go anywhere and so sent it to groups all over the country and all over the world, and veto recommendations came in and in and in. The problem was that the bill was really very much backed by Robert Kennedy Jr., who happens to be a Peregrine Falcon aficionado and, of course, Andrew [Cuomo] was married to Bobby Kennedy Jr.'s daughter. So, at one point the phone rang and Andrew called up and said what in the world is going on here? What happened, by the way—it was in the days when the legislature could recall a bill—the bill was recalled by the sponsor and never was presented to the Governor for signature. Apart from that, there is high integrity and everything that came in absolutely went in the bill jacket.

**HON. RICHARD WESLEY:** Let me ask you a question and then I want to go to Jim for a second. The truth, though, is that these are policy position papers that are not necessarily analytical of legal issues that might become determinative with regard to interpreting functioning language of the statute?

**EVAN A. DAVIS:** Right. I would say, with some exceptions, that if you find in the bill jacket a highly particular answer to a particular statutory phrase, that would be a little bit suspect. However, the bill jacket will give you a good sense of who was for it, who was against it, what their reasons were that they articulated, what the problem was that was trying to be addressed and, in New York State in particular, where we have the Senate controlled by one party and the Assembly controlled by another party, we have often a very high degree of ambiguity in the legislation that is passed. We have two phenomena—one is the phenomena of papering over.

Papering over is when there is a disagreement. It is not going to go away and you choose a word that includes equally both alternatives, and say, as Jim said before, "leave it to the courts." What are the courts to do? If it is ambiguous and you could interpret it either way, they need a little bit of background information, it seems to me, otherwise they are just resolving ambiguity based on personal predilection, which is not a good thing. The other thing that we do in New York State is pass bills that I call horse and cow bills. It is half a horse and half a cow. We have language from the Senate and we put it in; we have language from the Assembly and we put it in.

**HON. RICHARD C. WESLEY:** That is a really ugly animal you know.

**EVAN A. DAVIS:** Right. The Governor has got language and we put all of the language in. Sometimes this language is entirely inconsistent. They are speaking on two different planes, two different topics. What again is a court supposed to do with the horse and cow and maybe camel bill? The court, it seems to me, can glean from the bill jacket an overall sense. Also, the one place where I would say I would credit a specific answer to a legislative history question found in the bill jacket is if a particular trade association urges the Governor to veto the bill because it does X. And then they come to court and say, the same group says, guess what, the bill doesn't do X. I think they made their decision when they asked the Governor to veto it because it does X. That was the right reading of the bill and I would go with that judgment.

**HON. RICHARD C. WESLEY:** We have got about five minutes and I want to shift the focus just for a second, but I want to touch on the ambiguity because I think that is something that is important many times by folks that are facing this. You have a contentious bill and—this is to Weinstein/Lack—you have a very contentious bill, not something of the magnitude of the contention of the death penalty and some of the other monumental issues that the two of you have had going on, but an issue within the confines of your committee that has interest groups lined up on both sides and you both are not of the same mind. Is it the fact that, as Evan Davis suggests, that there are times where to get the bill—to get the compromise—that you latch upon a word and say the general structure of the sketch is good enough. If this creates an ambiguity, we will let the court work it out. Judge, we will let you go first and

we have just a few minutes.

**HON. JAMES J. LACK:** The answer to that is yes, but it dovetails into what I wanted to say in response to Evan, because Evan knows as well as I do that there is also another procedure that is never in the bill jacket. He mentioned the internal Counsel's memo that goes to the Governor. There are phone calls that take place in which Counsel or Assistant Counsel to the Governor will call the legislator and say, "well you know we got a bunch of whatever in the bill jacket, what you do you think and why?" There is a discourse that takes place, usually over the telephone, sometimes in person down in Counsel's office—no it should be this or that. That will never show up in the bill jacket. It conceivably will show up in the Counsel's memo that goes to the Governor. The other way to interpret it is the Governor used to be able to send bills back to the legislature for aging time, as it were, for things to cool down. That, of course, is a practice no longer allowed by the Court of Appeals,<sup>18</sup> but you can still see some of it in terms of the process when a bill goes to the Governor. Now, normally, in order to give the Governor's office enough time to decide on bills, bills are held and sent up way after the legislature has left in order for the Governor to have his ten-day period,<sup>19</sup> but some bills are also held, never having gone to the Governor because there is some controversy that everyone knows exists to allow time to settle out. Many things do not get into the bill jacket while that bill settles out. It will have to go to the Governor, maybe for a veto on December 31st, but if it starts going in October and November, and the legislature is long out of session, obviously there has been no change in it, but the bill gets signed and that is because there has been a post-legislative process of several months in which questions have been answered, even though the Governor has never gotten the bill and that has been true of any governor. It has nothing to do with politics. Again, from a judiciary standpoint, there is no way for anybody in the judiciary to be able to evaluate what has gone on in that process, other than the fact that you can look at a date and say, hmm there is a possibility with the controversy in this bill that if it didn't go to the Governor until October that somebody between (I will make it up) June and October, there has been a lot of talk that there are no records of.

---

<sup>18</sup> King v. Cuomo, 613 N.E.2d 950, 953–54 (N.Y. 1993).

<sup>19</sup> N.Y. CONST. art. IV, § 7 (permitting the governor ten days after the legislature adjourns to approve a bill).

**HON. RICHARD C. WESLEY:** We are going to close now, because our time is up. But that last example, I think, is a good starting point if you want to do some reading. The reason why it is a good starting point is because it has a very specific case which has, if you want to see what I think is a very good clear example of some of the jurisprudence from our court that the New York Court of Appeals and our view of statutory interpretation, I suggest that you read *Majewski vs. Broadalbin-Perth Central School District*.<sup>20</sup> I believe that it is in your materials, the opinion by Judge Smith, a unanimous opinion of the court. It is in the bibliography. I suggest that you read that because indeed the rule is in New York that unless you specifically make a statute retroactive, it is prospective and so I am pleased to hear that you are aware of that, Assemblywoman Weinstein.

Lastly, also, I find enormously helpful the website which is listed at the end of the materials, Robert Allen Carter's *Legislative Intent in New York State, Materials, Cases and Annotated Bibliography*.<sup>21</sup> That will give you a very good example of how the legislative documents are generated and cross-references to a number of great cases.

Thank you so much to my panel. Thank you for having us.

---

<sup>20</sup> 696 N.E.2d 978 (N.Y. 1998).

<sup>21</sup> Robert Allan Carter, *Legislative Intent in New York State: Materials, Cases and Annotated Bibliography* (2d ed. 2001), available at <ftp://unix2.nysed.gov/pub/state.lib.pubs/legint/legint01.pdf>.

PANEL DISCUSSION ON THE FEDERAL COURTS'  
PERSPECTIVE

MODERATOR

**HON. ROBERT A. KATZMANN**

*Judge, United States Court of Appeals, Second Circuit*

PANELISTS

**HON. JOHN M. WALKER, JR.**

*Chief Judge, United States Court of Appeals, Second Circuit*

**HON. NICHOLAS G. GARAUFIS**

*Judge, United States District Court,  
Eastern District of New York*

**SARA M. LORD, ESQ.**

*Assistant United States Attorney, Northern District of New York*

**HON. ROBERT A. KATZMANN:** The last panel was a fascinating one, and having spent many years in Washington D.C., I think there could be a really intriguing study comparing the institutional cultures of the national Congress and the state legislature in New York and the relationship between legislatures and courts. I believe that what we would find is a tale of two cultures, so that when we talk about the federal system, we are considering a different system than the state system we have just heard such a wonderful discussion about.

The panelists today are very rich in experience. We have our Chief Judge of the Second Circuit, John Walker, who will be batting in the clean-up position. We have District Court Judge Nicholas Garaufis and we have Assistant U.S. Attorney Sara Lord. What I thought would be interesting would be to explore the question of the uses of legislative history materials from an institutional perspective. That is, if you are a legislator in Congress, how do you approach legislative history materials? If you are an agency administrator, how do you use those legislative materials? If you are a litigant in the courts, how do you use those legislative materials? Then, if you are a judge, how do you approach legislative materials?

Consider the following typical pattern. Congress enacts a law and the statute becomes the object of litigation. The court must then interpret the meaning of the words of the statute, yet the language is unclear. How should the court, the federal court proceed? Whether judges restrict themselves to the words of the statute or

look to other statutes or consult the materials that constitute legislative history affects the judicial task.

In the Congress of the United States, there are a variety of materials. There are published hearings. There are published committee reports and conference committee [reports]. There are committee votes, and conference committee votes. There are statements by bill sponsors on the floor, and of the managers on the floors of the Congress. There are published floor debates. These all constitute legislative history in the national system. The court, if it looks at legislative history, will then have to penetrate these various layers of materials. Sometimes legislative history can be virtually non-existent or ambiguous. In particular cases, Congress does not address the specific problem before the court, and the court may feel obliged to fill in the gaps. Complicating the task of a judge in looking at legislative history is the problem of congressional organization. Over the last thirty years, there has been a proliferation of committees and subcommittees trying to figure out what Congress actually means. Therefore, the task of discerning legislative meaning has arguably become more complicated. The task is obviously very important because, as a former legislator and judge, Abner Mikva, pointed out, when courts interpret legislation and say what Congress meant, they become, in a sense, as much a part of the legislative process as any other part of that process.<sup>22</sup>

I would like to begin first with the legislative perspective. We were supposed to have Congressman Nadler here, and unfortunately he was not able to join us. So, I would like, as best I can to not fill in for him, but at least to offer some thoughts as to how a member of Congress views legislative history. In so doing, I draw upon some of my experience with the Hill. I organized the hearings of the Joint Committee on the Organization of Congress on Statutory Interpretation and I believe I have testified at every hearing that looked at the issues of statutory interpretation and legislative history. I have also been much involved in a project of the Governance Institute, along with Judge Frank Coffin, that seeks to provide a routinized means whereby statutory opinions of the courts of appeals identifying perceived—largely technical problems in statutes—are routed to Congress for its information. My own views on judicial-legislative relations are distilled in my

---

<sup>22</sup> See Abner J. Mikva, *Statutory Interpretation: Getting the Law to Be Less Common*, 50 OHIO ST. L.J. 979 (1989); Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627 (1987).

book, *Courts and Congress*.<sup>23</sup>

To make the point that when Congress thinks about legislative materials, it is thinking of [them] in terms of an institutional vantage point, rather than a political or ideological vantage point, I am going to draw upon a variety of legislators. Let me begin with Senator Orrin Hatch, chair of the Senate Judiciary Committee. “Text without context,” Orrin Hatch observed, “often invites confusion and judicial adventurism.”<sup>24</sup> Senator Hatch has noted the example of a bail law that did not specifically incorporate a reference to the Speedy Trial Act.<sup>25</sup> There, the legislative history imparted the additional information needed to preserve the basic goal of pretrial detention. In support of the view that one needs a sense of context in order to understand the meaning of words and statutes, Stephen Breyer, former counsel to the Senate Judiciary Committee and now [Supreme Court] Justice, said no one claims in any strong sense that legislative history is “the law,” but rather that it is useful in ascertaining the meaning of words in statutes.<sup>26</sup> Legislative history in the view of members of Congress can be useful in a variety of circumstances.

As one judge looking at legislative history put it:

What does the judge do when faced with the question whether the Bevill Amendment to Subtitle C of the Resource Conservation and Recovery Act applies to lightweight aggregate air pollution dust? Legislative history may be useful in filling the gap. The history can supply information about how the statute is expected to operate, what subjects it addresses, what problems it seeks to solve, what objectives it tries to accomplish. . . .<sup>27</sup>

For legislators, the committee report is the most useful document in the legislative history. James L. Buckley, a former Senator, a Republican Senator from New York and a judge on the D.C. Circuit, remarked that as senator, “my understanding of most of the legislation that I voted on was based entirely on my reading of its language [that is the committee report] and, where necessary, on

---

<sup>23</sup> ROBERT A. KATZMANN, *COURTS AND CONGRESS* (1997).

<sup>24</sup> Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL’Y 43, 43 (1988).

<sup>25</sup> *Id.* at 46 (citing the 1984 Comprehensive Crime Control Act).

<sup>26</sup> See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992).

<sup>27</sup> A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL’Y 71, 77 (1994).

explanations contained in the accompanying report.”<sup>28</sup> Senator Charles Grassley, often thought of as a conservative member of Congress, said this in a colloquy with Justice Scalia: “[A]s one who has served in Congress for 12 years, legislative history is very important to those of us here who want further detailed expression of that legislative intent.”<sup>29</sup> Senator Arlen Specter has similarly said so. “Ignoring legislative history, objected former congressman Robert W. Kastenmeier, “is an assault on the integrity of the legislative process.”<sup>30</sup> In other words, when the courts say that they will not look at legislative history even in those situations where the words of the statute are ambiguous—we are not talking about situations where the words of the statute are clear, and it is not necessary to look at the legislative history—that, from the institutional perspective of the Congress, is an example of judicial “arrogance,” as Senator Grassley put it.<sup>31</sup>

Justice Ginsburg, noting the problems of securing reliable legislative history, said that she approached it with “hopeful skepticism.” I think most legislators would agree that the problem with legislative history is not its use, but its misuse. The challenge is how to figure out what is reliable and authoritative legislative history, to separate reliable from unreliable legislative history. So, I think in broad brush that is the legislative perspective of Capitol Hill.

Now, I would like to turn to Nick Garaufis. Nick was General Counsel of the Federal Aviation Administration (“FAA”) in Washington, D.C., and has had a lot of experience from an agency perspective and now, of course, as a judge. I would like to ask Judge Garaufis, as General Counsel, when you were interpreting a statute, did you ever look at legislative history and under what circumstances?

**HON. NICHOLAS G. GARAUFIS:** Thank you very much. I had five wonderful years in Washington working with 200 very talented lawyers at the FAA and another sixty at the Department of

---

<sup>28</sup> *Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Property and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 21 (1990) (statement of James L. Buckley, Judge, U.S. Court of Appeals for the District of Columbia Circuit).

<sup>29</sup> 13 *The Supreme Court of the United States: Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee, 1916–1986: Antonin Scalia* 159–60 (Roy M. Mersky & J. Myron Jacobstein eds., 1989) (testimony of Antonin Scalia, Aug. 5, 1986).

<sup>30</sup> KATZMANN, *supra* note 23, at 64.

<sup>31</sup> *Id.* at 7.

Transportation, and much of what I did was to interpret legislation so that the other 50,000 people in the FAA could do their job of enforcing the country's civil aviation, safety and security laws and regulations. My experience at the FAA was colored by the fact that the agency, while not a political agency, was heavily politicized by the industry which it supervised, and which it, in effect, served, and the constituencies that industry had on Capitol Hill. So any interpretation of the statute, or a regulation pursuant to a statute, became a rather complicated process of figuring out whether the plain meaning of the statute and the regulation under the statute—if there was such a regulation—could be used to reach a conclusion. [The question was] whether we needed more, and if we did need more, where to look.

Frankly, for those statutes that were passed in recent years, we tended to go to and look at the committee reports, any floor debate that occurred on the enactment in the two houses and also to have discussions with the committee counsel, the majority counsel and minority counsel if we really thought that our interpretation might be erroneous or that the written legislative history might be somewhat unclear. Then, of course, we also, for those statutes which had a long life, we also went to the committees and asked the committee counsel whether our interpretation, the interpretation that we had tentatively reached, was at odds with the understanding of the then members of the committee, both majority and minority sides. Because this was not a political agency, meaning that the issues had to do with public safety and security and did not have to do with a question of whether to change the Medicare laws or whether to change the gun laws, these were not hot button issues for the different political interests, right and left and so on. We felt that by touching base with committees, we would get a sense of where the committees thought the legislation had ended up. Now, there were times when we simply disagreed and we went our own way, but we always gave the committee leadership the opportunity to opine on their view of how the statute ought to be enforced.

**HON. ROBERT A. KATZMANN:** Did you ever have any concern that you were essentially asking unelected staff people the meaning of legislation and were depending on the interpretation of staff people who do not have to stand for election?

**HON. NICHOLAS G. GARAUFIS:** The staff people are, at least in

the committees that I worked with, the staff people are extremely intelligent, extremely accomplished. They constituted the institutional memory of the committee. Chairs come and go, but staff members tend to be resilient. I think it is a little different from the state legislative committees where the new chair of the committee will bring his or her own staff counsel to the committee. In the Congress, you have, at least in the aviation area, you had staffers who continued along at one level or another with the committee for a good number of years. So, I certainly did not have the feeling that the staffers would be misleading us or misunderstanding the statute. They tended to be a reservoir of knowledge about the statutes which Congress passed during their tenure.

**HON. ROBERT A. KATZMANN:** Okay, thank you. Sara, from the perspective of a litigator, how do you use legislative history?

**SARA M. LORD:** Well, one thing that I think is probably worth noting is the fact that as a general rule, I am not even thinking about the legislative history until I am in the Second Circuit. However, the fact that we—as prosecutors or litigators—come late or perhaps too late to the question of legislative history does not mean that we are not thinking about statutory interpretation. In fact, we think about statutory interpretation all the time and, in fact, we interpret statutes every day, and make decisions based on statutory interpretation whenever we bring a case. As a criminal lawyer, of course, I am analyzing criminal statutes and seeking to have criminal charges brought, but the anatomy of that decision is similar to the decision a litigator makes in deciding to bring a civil action.

I am presented at the outset with a fact pattern or a set of circumstances, most of which may be known to me, but some of which remain unknown to me even up to and after a jury verdict is rendered in the case. Based on what I understand the facts to be, I must select a statute and fit the facts to that statute. I was a little surprised and disconcerted when I began to think about this question to realize that this process, in effect, makes me a new textualist, because I am, essentially, looking at the words of the statute and at that point in the game, I am analyzing the statute literally and looking at the vocabulary.

When I bring a dictionary to bear, it is not Blackstone, it is Webster. When I think about fraud, I am thinking of it in a

common, ordinary, garden-variety sense, not in an ancient, archaic or time-hallowed way. I am certainly not thinking at that point about whether or not the legislators were thinking of the definition of fraud that was in effect during the time of Blackstone or the definition of fraud that was the common understanding in 1946 when the statute was passed, or whether or not the definition of fraud should be considered to have evolved since then. I am simply thinking this is a fraud, this feels like a fraud, I know this is a fraud, I think I can get a jury to buy it as a fraud. The challenge to the statute, in my experience, is really likely to come after the verdict and when I am in the Court of Appeals, and that is when I begin to look at the legislative history.

**HON. NICHOLAS G. GARAUFIS:** Before there is a trial, when a district judge throws you out of court because he or she disagrees.

**SARA M. LORD:** Yes, but that happens very seldom.

**HON. NICHOLAS G. GARAUFIS:** You may find things changing.

**SARA M. LORD:** I do think, actually, I should amend that. I do think about it in the context of jury instructions. That, I think you could say, would be the first time that we start to panic about the thinking and the decisions that we made back when we decided to bring the case. But, the jury instructions put the onus on the district judge, although we do what we can in that area. When I end up in the Court of Appeals, and I go to look at the statute, then the question arises, well I do look at the legislative history, but what do I do with it? Well, I am an advocate and so any answer really involves any discussion of what the advocate's role is. The answer is, I am going to find the language and the argument that suits me best and I am going to hope that it is in the strongest and firmest form that I can find, but even if it is in the form of a report that was submitted by an interest group, I am going to use it. Then I am going to argue that the issue was squarely presented to the Congress because surely all the legislators read the report and considered it when they voted on the legislation.

**HON. ROBERT A. KATZMANN:** If the report of the interest group is not in the committee report, it is not mentioned in the committee report, you would still assume that because it was presented to the Congress it would have to be considered?

**SARA M. LORD:** I would make the argument, but I would obviously—

**HON. ROBERT A. KATZMANN:** Even legislators, I think, would probably not buy that one.

**SARA M. LORD:** I think the point, however, is that I am going to look for the words and language that help me best, and I am going to hope that they fit within a priority of sources that will also serve my interests best. I am going to recognize that there is a hierarchy of authorities, but I am going to look at the words first, and then at the hierarchy or priority of the authorities. I am going to hope that they will support my interpretation. That is from my vantage point as an advocate because that is the role that I occupy and the function that I perform. What happens, however, is that the decision is obviously made way above my pay grade and so the acceptance of the legislative history argument is not going to come from me.

**HON. ROBERT A. KATZMANN:** I am just curious, when you are preparing for oral argument and learn the identity of the panel, do you try to get a sense of what the panel's views might be on legislative history?

**SARA M. LORD:** Historically or recently? I think that it has been a more recent development that legislative history has become a factor in both our advocacy and the decisions that we are making at the inception of the case. So, I think today much more than fifteen years ago.

**HON. ROBERT A. KATZMANN:** We are honored to have the Chief Judge of our circuit batting cleanup, Judge Walker.

**HON. JOHN M. WALKER, JR.:** Well, as a judge, one is frequently asked to look at legislative history and, in doing so, I think you have to consider really what is the proper role of a judge in connection with statutory interpretation. I think that it relates to two conceptions. In one conception, the law becomes final and takes its real form at the end of the legislative process. That is what was passed by Congress in the federal situation and by the state legislature in the state situation and what the executive approved.

In the other conception, the law does not really manifest itself until after the judge has looked at it and interpreted it. It is the judge who then gives form to the law. I think that second conception is optimized by Judge Mikva's statement that Judge Katzmann read a minute ago, in which courts become part of the legislative process. The idea is that we do not really know what the law is until the judge has spoken. I think the new textualists lean toward the first conception, and probably the people who are more interested in the legislative purpose and intent lean towards the second. The second gives the courts greater authority in the whole function of statutory interpretation, it seems to me. I think that the theories that one can read about on legislative intent and legislative purpose—the various schools of legislative interpretation—can be grouped or clustered around these two major conceptions.

In any event, as a practical matter, as a judge—even a judge who is sympathetic with the new textualist's approach, which I am—I am not about to just read the text of the statute or read that part of the brief which deals with the text of the statute and stop reading the brief. Every judge, I think, reads everything that the lawyers put before him. I do so with the idea of trying to understand broadly what the whole problem is—to gain a holistic kind of understanding of an area of law, perhaps that I am unfamiliar with. I will look for every piece of material that can contribute to that understanding. How I might apply it or play it out in the actual writing of the opinion might be a different matter. So it is not a static enterprise, statutory interpretation.

You read the brief, you read the statute, you think about the case and you go back and read more. You look at the legislative history, you try to get a feel for the entire case. But then you come down to actually interpreting the statutory phrase that is before you and we are hypothesizing here that we are dealing in ambiguities, because if it is plain then probably you will just apply the plain meaning and the text is clear. Normally those cases are not before us. We usually are dealing with ambiguities with unclear language. Then the question comes down as to exactly what do we do? What approach should we take in discerning a meaning here? Professor Eskridge has talked about a larger conception—imaginative reconstruction that was espoused by Learned Hand,<sup>32</sup> a larger view

---

<sup>32</sup> “Such [ambiguous] statutes. . . should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them.” *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1914). *See also* *Shea v. Commissioner*, 112 T.C. 183, 208–09 (1999) (Beghe, J., concurring) (citing the “imaginative reconstruction’ applied by Judge

of what the purpose is, the congressional intent.

I think that is problematic for several reasons. First of all, in discerning what legislative intent is, judges may, in fact, infuse their own conception of what they think the law ought to be as opposed to what was actually passed by the Congress. So, one has to be very careful about using legislative history to sort of discern broad legislative intent. My own feeling is that most questions that come before us deal with complex, reticulated statutes from which it is very difficult to discern a broad legislative purpose. We are dealing with a specific problem in the statute. There may or may not be legislative history addressed to that particular point. But, if you are going to use legislative history to discern a broad legislative intent and then deduce from that what the legislature must have meant in this particular case, it seems to me at that point that the judge is injecting himself or herself right into the legislative process in a way that poses a problem from a counter-majoritarian viewpoint, from a democratic values viewpoint. So, leaving legislative history aside when it comes to discerning broad legislative intent, the role, it seems to me, for legislative history, is to help to discern what the words in the text mean. What did Congress mean when it used the words that it did, and there I think that legislative history may properly bear directly on that question.

Now, that still leaves lots of problems associated with legislative history. In the first place, it isn't the law. The legislative history was not passed by the legislature, it was not signed by the executive. In fact, most legislators never even read the legislative history. Obviously, some conscientious ones do, but in the busy work of Congress not all legislative history is read, particularly that part of the legislative history that deals with the particular problem at hand.

Another problem with legislative history is its reliability as an expression of the legislative will. Why does legislative history have a claim to a high value in the democratic process when, in fact, it can be created by special interests who may write the legislative history, or by staffers who may put in the legislative history in a way that is not really reviewed or part of the legislative process as participated in under the Constitution or by the legislature directly. So it can be created to deal with special situations that may interest or further the goals of special interests. I am not sure that it has a claim to legitimacy as far as democratic processes are

concerned.

It is one thing for legislators to say that legislative history is wonderful because it helps their understanding of what they are voting for, and that is certainly a legitimate function for legislative history. Historically I think that legislative history was designed for that purpose, but now it does seem that legislative history is being created for the benefit of the judiciary. I spent some time myself actually working on legislation when I was in Washington in the early 1980s and I can recall being involved in legislative negotiations in which the senator involved would say: "Well I will never get that provision passed. It won't work in the text of the statute, but we can stick it into the legislative history and hope that the courts will pick up on it." So, you lose the battle in the Congress for the text, but maybe you win it in the courts based on the legislative history and the ultimate objective can be achieved that way. One wonders exactly how such a process comports with Article I, Section 7 of the United States Constitution.<sup>33</sup>

Finally, the point that Bill Eskridge pointed out is that legislative history is subject to manipulation and I spoke with Sara Lord before we started and she told me that there were twenty volumes of legislative history now associated with the Racketeer Influenced and Corrupt Organizations ("RICO") statute.<sup>34</sup> Now in those twenty volumes, there has to be something there for just about everybody. So, I think Judge Harold Leventhal was quite right to say that when you need something to support your interpretation, you might be able to just pick your friend out from the crowd at the cocktail party. So, these are some of the problems with legislative history. That said, I think that some legislative history can be useful in deciding what the words used mean, depending on its place in the hierarchy of legislative history. Some of it has a greater value than others; committee reports versus floor debates, versus hearings, versus statements at hearings, versus letters to the committee. Of all of these myriad forms of legislative history, which ones are more reliable or have a claim to reliability? In fact, I have discussed with Bob Katzmann the fact that he attaches greater reliability to committee reports from some committees rather than other committees because he happens to know from his Washington

---

<sup>33</sup> U.S. CONST. art. I, § 7, cl. 2 (providing the process in which a bill becomes law).

<sup>34</sup> 18 U.S.C. §§ 1961–68 (2000) (enacted to combat and prevent the illegal activities involved with organized crime by providing the government with stronger evidentiary tools, and by establishing new penalties and tougher remedies to deal with those engaged in organized crime).

experience that some are more direct, honest and faithful to what Congress really wanted to do and less susceptible to interest group manipulation. That is a whole other area of concern, what committee's legislative history are you going to rely on.

I also would draw a distinction between legislative history and statutory history. Statutory history, namely, proposed statutes voted on and not passed, or passed and vetoed by the President, or other statutes that may be part of the mix of a body of law that you are looking at, may have a higher value because, after all, they do comport with Article I, Section 7 and can be considered in that context. Statutory history is different from floor debates or colloquies that are prearranged between legislators, which other legislators may be totally unaware of and have not adopted as their own. So, these are some of the considerations here. I think that legislative history has its place, but I am skeptical of it in many ways. I am skeptical of it because it is anti-democratic and because I believe it is not the judge's role to be a legislator. So, again, it goes back to what the role of the judge is and what one considers the appropriate role of the judge to be. Is the judge the faithful interpreter of the law as it has been passed by the legislature or is the judge, him or herself, to be the law giver?

**HON. ROBERT A. KATZMANN:** Thank you.