

From the Editor

In the course of teaching legal research (and sometimes writing) to first-year law students, I gradually have come to agree with those commentators on the law school curriculum who worry about the curriculum's apparent overemphasis on case law subjects and reasoning processes at a time when the bulk of the "law" that students and attorneys work with is statutory in origin.¹ During the spring 1985 semester at Duke, I took the opportunity to pursue this interest by offering a two-credit seminar on Legislation for second- and third-year students. In addition to its substantive interest, the Legislation seminar provided a chance to think about some of the issues raised for librarians by the courts' continued reliance on legislative history documents in answering questions of statutory interpretation.²

Legislation courses in American law schools are taught with a variety of emphases, including drafting, legislative process, and statutory interpretation. To the extent that problems of interpretation are emphasized (as they were in my seminar), it is necessary for the instructor to present and analyze the various issues involved in the courts' use of materials of legislative history. Of course, whether and how legislative history documents should be used by the courts in statutory interpretation cases are questions that have been debated for years in the literature. The debate is usually framed in terms of the relative reliability of particular types of legislative documents as evidence of the legislature's intention regarding the meaning or applicability of statutory language. Another issue regarding the appropriate uses of these materials has to do with the accessibility of legislative history information, not only to the courts, but to anyone having to rely upon or interpret the language of a particular statute.

The accessibility issue was brought into focus around 1950 in several opinions and articles written by Supreme Court Justice Robert H. Jackson. In remarks delivered before a meeting of the American Law Institute in 1948, Jackson broached his tentative objections to the Court's increasing resort

1. See generally Williams, *Statutory Law in Legal Education: Still Second Class After All These Years*, 35 *MERCER L. REV.* 803, 813-816 (1984); Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 *U. CHI. L. REV.* 800, 800-805 (1983).

2. Posner, incidentally, makes note of the difficulties involved in researching legislative history. Not only does he call research into legislative documents "a formidable subspecialty of library science," Posner, *supra* note 1, at 804, but he finds that library science is itself "a recognized field of learning at first-class universities, and it would not demean the law schools to offer formal instruction in a highly relevant aspect of it." *Id.* at 805.

to legislative history as a guide to interpretation.³ After noting that the preferable criterion of interpretation was the meaning of the language to its reader, rather than the intention behind the language, and that documents of legislative history are unreliable sources of the legislators' intent,⁴ Jackson entered what he termed a "practical" objection to legislative history:

[A] formal Act, read three times and voted on by Congress and approved by the President, is no longer a safe basis on which a lawyer may advise his client, or a lower Court decide a case....The lawyer must consult all of the committee reports on the bill, and on all its antecedents, and all that its supporters and opponents said in debate, and then predict what part of the conflicting views will likely appeal to a majority of the Court. Only the lawyers of the capital or the most prosperous offices in the large cities can have all the necessary legislative material available. The average law office cannot afford to collect, house and index all this material. Its use by the Court puts knowledge of the law practically out of reach of all except the Government and a few law offices.⁵

Jackson reiterated these views in a concurrence to the Supreme Court's 1951 decision in *Schwegmann Brothers v. Calvert Distillers Corp.*⁶ There he noted again the problem of the small town lawyer's lack of access to legislative materials, and the difficulty of anticipating which parts of them are likely to impress a court.⁷ Two years later, he found the Court's use of legislative history in deciding *United States v. Public Utilities Commission of California* to be "a dramatic demonstration of the evil" of the practice he had written of in *Schwegmann*.⁸ As Jackson described the case, neither counsel for the California Public Utilities Commission nor the California Supreme Court had access to the documents relied on by the U.S. Supreme Court in its decision. The necessary material apparently was unavailable in San Francisco⁹ and could not be obtained through interlibrary loan.¹⁰ Jackson compared the situation to that in the well-known case of *Panama Refining Co. v. Ryan*,¹¹ which contributed to the establishment of the *Federal Register*.

Although it is debatable whether the California attorneys pursued their legislative history research as effectively as they might have,¹² it is apparent that the materials of legislative history were much less widely available in

3. Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A.J. 535, 537-38 (1948).

4. "It is a poor cause that cannot find some plausible support in legislative history...." *Id.* at 538.

5. *Id.*

6. 341 U.S. 384.

7. *Id.* at 396 (Jackson, J., concurring).

8. 345 U.S. 295, 319 (1953) (Jackson, J., concurring).

9. *Id.* at 319.

10. *Id.* at 319-20.

11. 293 U.S. 388 (1935).

12. See R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 149 (1975).

1953 than they are today. Now, not only are there more than 1,300 selective depositories of federal government publications and over fifty regional depositories,¹³ but governmental and commercial publication of congressional material in microform makes it much easier for libraries of all types to collect and retain congressional documents. As librarians, we take pride in making this mass of material available and in providing the comprehensive print and on-line indexes that have developed around it. As a profession, we have supported activities to improve access to legislative history information. Our association's publication series includes an excellent guide to sources of compiled legislative histories,¹⁴ and we have engaged in projects to promote further compilations.¹⁵

In light of such commercial and professional efforts to promote the availability of legislative history materials, Judge Patricia Wald of the D.C. Circuit recently pronounced that "[t]echnology has made an anachronism of Justice Jackson's lament."¹⁶ Despite the appeal of that statement, I think that we have to ask ourselves, as librarians, if it is true. Have the widespread availability of congressional materials and the creation of better indexing and tracking systems really resolved the problem Jackson identified?

Certainly, given the courts' continuing penchant for using extrinsic aids in statutory interpretation, the citizen (or attorney) can rely on the apparent meaning of the text of a law no more now than when Jackson wrote. In addition, although Congress may have enacted fewer public laws in recent years, individual public laws have been longer in recent sessions than they were in the 1950s,¹⁷ and the subject matter and treatment arguably are more complex. Certainly more legislative documentation accompanies each law than at that time.

This material may be under better bibliographic control than before, but it is not clear that the information it contains is much more accessible for purposes of researching legislative intent. Even if we assume (as Jackson probably would not) that the average citizen should have to rely on an attorney to tell him or her what the law in the statute book really means and, further, that the legislative history materials are available in a nearby library, we cannot assume that the lawyer can use that material effectively to advise a client on how to go about his or her business in light of the law. Anyone who has worked with legislative history documents to answer questions of

13. J. MOREHEAD, *INTRODUCTION TO UNITED STATES PUBLIC DOCUMENTS* 73 (3d ed. 1983).

14. N. JOHNSON, *SOURCES OF COMPILED LEGISLATIVE HISTORIES* (1979-).

15. *See, e.g.*, Government Documents Special Interest Section, *Annual Report*, 72 *LAW LIBR. J.* 720 (1979).

16. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 *IOWA L. REV.* 195, 200 (1983).

17. *VITAL STATISTICS ON CONGRESS*, 1984-1985 EDITION 150 (1984).

legislative intent knows how difficult it is to locate specifically relevant portions and to estimate which items will be deemed important by the courts.¹⁸ The commercial indexes are helpful in locating published documents relevant to a piece of legislation, but they don't provide that much detailed analysis of the individual documents themselves, which remain as poorly indexed internally as in the past. Commercial indexes that make it easy to locate hearings on a piece of legislation are less useful in analyzing several hundred pages (or more) of testimony and exhibits. Using this material is a particular problem for the attorney who is counseling a client as to the likely applicability of the law to the client's situation. Reed Dickerson has noted in this context that it is difficult enough to do legislative history research when a conflict has arisen and the statutory issues are framed, but that it is "usually impracticable to search all aspects of the legislative history as they relate to the myriad of *potentially* troublesome problems that the lawyer would like to anticipate."¹⁹

The legislative history problem is representative of the larger information problems facing attorneys and other professionals. After a collection of bulky material is located, it still must be read, analyzed, and evaluated. Technological developments may have made locating legislative history documents and providing for their distribution less difficult than in the past. Yet, Justice Jackson's concern with accessibility to the law for the average citizen is not answered simply by placing more microform in the library and more indexes on the reference shelves. Making effective use of legislative history information continues to be a problem because of the difficulties involved in working with the materials and in predicting what parts of the information a court will find relevant.

As librarians, our professional interest in the location and distribution issues remains well-placed and necessary as long as the courts rely on legislative history to interpret statutes. Significant progress has been made in organizing and making available legislative history material. We need to remain aware, however, that larger collections of legislative materials do not of themselves provide substantially greater access to the meaning of statutory law for the average citizen or for an attorney who lacks the time or financial resources necessary to comb them. The answer to that problem lies in indexes that analyze the documents to a degree not yet available, or perhaps in our courts taking a more disciplined approach to the uses of legislative history in questions of statutory interpretation.

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18. Judge Wald noted an apparent trend toward increased reliance on materials (such as hearings) that traditionally have been found relevant only for background information and on such things as transcripts of committee markup sessions that are not widely published or distributed. Wald, *supra* note 16, at 202.

19. R. DICKERSON, *supra* note 12 at 151 (emphasis added).