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TOOLS FOR UNDERSTANDING: PROBLEMS WITH LEGISLATIVE HISTORY IN ENVIRONMENTAL LAW

Seth A. Metsch*

INTRODUCTION

The term "legislative intent" is itself an oxymoron.¹ A collective legislative intent cannot exist in the minds of national legislators in Congress.² If Congress' collective intent could be determined readily, the relevance of legislative history would be obvious and its use would engender little controversy. "The real difficulty is not that the intent is irrelevant but that the intent is

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1. "An oxymoron is a two-word contradiction. The claim of this brief paper is that legislative intent, along with military intelligence, jumbo shrimp, and student athlete, belongs in this category." Kenneth A. Shepsle, *Congress is a "They," Not An "It": Legislative Intent As Oxymoron*, 12 INT'L REV. L. & ECON. 239, 239 (1992).

2. "[T]he legislature, being a composite body, cannot have a single state of mind and so cannot have a single intention." Douglas Payne, *The Intention of The Legislature In The Interpretation Of Statutes*, 9 CURRENT LEGAL PROBS. 96, 97-98 (1956). "A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs." Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930).

That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition. The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable are infinitesimally small. The chance is still smaller that a given determinate, the litigated issue, will not only be within the minds of all these men but will be certain to be selected by all of them as the present limit to which the determinable should be narrowed.

Id. at 870.

often undiscoverable, especially when the passer of statutes is . . . a representative assembly."³

Nonetheless, at present, United States Federal Courts often utilize legislative history to decipher the intent of Congress.⁴ Judges' attraction to legislative history is understandable; it may often assist in explaining the intended interpretation of statutory text.⁵ However, as judicial attention to legislative history has increased, so has the amount of legislative history of marginal worth.⁶

The problem is that courts often lack the tools to make this value determination. Consequently, the use of legislative history has become the subject of considerable controversy in all three branches of the federal government.⁷ Much of the literature on statutory interpretation "seems transfixed by the notion of treat-

3. James M. Landis, *A Note On "Statutory Interpretation"*, 43 *HARV. L. REV.* 886, 888 (1930).

4. See W. David Slawson, *Legislative History And The Need To Bring Statutory Interpretation Under The Rule Of Law*, 44 *STAN. L. REV.* 383, 383 (1992). Judge Charles E. Wiggins advises to the contrary that "[c]ourts seldom rely upon an attempt to garner the intention of Congress in adopting legislation. Their reluctance to overlook such research is as a consequence of its futility. Seldom will courts delve into this murky area unless their conclusions are otherwise supported in the record." Letter from Judge Charles E. Wiggins, Circuit Judge, U.S. Court of Appeals Ninth Circuit (Mar. 18, 1997) (on file with author). Judge Wiggins has served in his present position since 1984. His insight is of special value because he also served as a Member of Congress from 1967 to 1979.

5. See Reed Dickerson, *Statutory Interpretation: Dipping Into Legislative History*, 11 *HOFSTRA L. REV.* 1125, 1125 (1983) [hereinafter Dickerson, *Dipping Into Legislative History*]. "Using legislative history to help interpret unclear statutory language seems natural. Legislative history helps a court understand the context and purpose of a statute." Steven Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 *S. CAL. L. REV.* 845, 848 (1993).

6. See Orrin Hatch, *Legislative History: Tool Of Construction Or Destruction*, 11 *HARV. J.L. & PUB. POL'Y* 43, 44 (1988).

7. See LAWRENCE BAUM, *THE SUPREME COURT* 131, 132 (4th Ed. 1992); see also *Office of Legal Pol'y, U.S. Dep't of Justice, Using and Misusing Legislative History: A Re-Evaluation of the Status of Legislative History in Statutory Interpretation* ii (1989) [hereinafter USING AND MISUSING LEGISLATIVE HISTORY].

ing legislatures holistically, even when fallacy and sloppy thinking are pointed out.”⁸ This literature “is rich in references to the ‘intent’ or ‘purpose’ of the legislature, terms suggesting that a legislature may have subjective attitudes and drives such as those possessed by a human being.”⁹ “[I]t is unrealistic to talk about legislative intent because the notion of ‘the law maker’ is fictional; there is no such person.”¹⁰ Making legislation “is a group activity and it is impossible to conceive a group mind or cerebration.”¹¹

“Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard fought compromises.”¹² “Invocation of the ‘plain purpose’ of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents effectua-

8. Shepsle, *supra* note 1, at 249.

9. *Id.* at 249 (quoting Reed Dickerson, *Statutory Interpretation: A Peek into the Mind and Will of a Legislature*, 50 INDIANA L.J. 206, 206 (1975) [hereinafter Dickerson, *A Peek into the Mind*]).

10. Shepsle, *supra* note 1, at 249 (quoting Dickerson, *A Peek into the Mind*, *supra* note 9, at 207).

11. Gerald C. MacCallum Jr., *Legislative Intent*, 75 YALE L.J. 754, 764 (1966) (quoting ALBERT KOCOUREK, AN INTRODUCTION TO THE SCIENCE OF LAW 201 (1982)). “A composite body can hardly have a single intent.” *Id.* at 764 (quoting John Willis, *Statute Interpretation in a Nutshell*, 16 CAN. BAR. REV. 1, 3 (1938)). “[T]he legislature, being a composite body, cannot have a single state of mind and so cannot have a single intention.” *Id.* at 764 (quoting Payne, *supra* note 2, at 97-98). Nevertheless, “despite occasional protestations to the contrary, the typical lawyer or judge continues to refer to legislative intent, even though it remains a matter of inference and conjecture[.]” Shepsle, *supra* note 1, at 249 (quoting Dickerson, *A Peek into the Mind*, *supra* note 9, at 207, 216.)

12. *American Mining Cong. v. EPA*, 824 F.2d 1177, 1185 n.10 (D.C. Cir. 1987) (quoting *Board of Governors of Fed. Reserve Sys. v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986)). “[S]ometimes statutes are unclear as a result of legislative compromises that are struck to secure votes for the enactment of a statute. Compromises can be struck by an agreement to leave undefined a general word or phrase in order to protect a particular political position.” ABNER J. MIKVA & ERIC LANE, *LEGISLATIVE PROCESS* 769 (1995).

tion of congressional intent.”¹³ Thus, use of “[l]egislative intent is an internally inconsistent, self-contradictory expression”,¹⁴ because it erroneously presumes that viewing the pieces selectively can fairly represent the whole puzzle.

Additionally, “[o]ver the last twenty to twenty-five years, there has been a change in the style of statute drafting Our environmental statutes have become very much more detailed.”¹⁵ As Judge Easterbrook of the Seventh Circuit Court of Appeals has commented, “[n]o one who has read the environmental laws can avoid concluding that there is excess specificity designed to tie the hands of actors who might pull a switch.”¹⁶ Ironically, it is this very specificity that has triggered the need to resolve ambiguity.

The examination in this Note is necessary due to a lack of literature with regard to Congress’ interpretation of environmental statutes. Most literature in the area of environmental law focuses on agency interpretation. While the Supreme Court has spoken definitively on the issue of agency interpretation,¹⁷ no overarching federal procedure exists governing the use of Congress’ interpretations of the very legislation that it enacts.

“Concern with environmental issues in recent decades has generated a bevy of environmental statutes whose complexity and interrelationship have in turn generated a host of problems for administrators, courts and scholars.”¹⁸ These problems have

13. *American Mining Cong.*, 824 F.2d at 1185 n.10 (quoting *Dimension Financial Corp.*, 474 U.S. at 374).

14. Shepsle, *supra* note 1, at 239.

15. Richard B. Stewart, *Environmental Statutory Interpretation in China and The United States*, 5 N.Y.U. ENVTL. L.J. 556, 558 (1996).

16. Frank H. Easterbrook, *Text, History and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 63 (1994).

17. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); see also *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). See generally Simona Papazian, Comment, *Sweet Home’s Effect On The Chevron Doctrine And The Increased Role Of The Judiciary In Reviewing Agency Statutory Interpretations*, 7 FORDHAM ENVTL. L.J. 543 (1996).

18. David L. Shapiro, *Statutory Dilemmas In The Regulation Of The Environment*, 5 N.Y.U. ENVTL. L.J. 292, 292 (1996).

afforded courts the opportunity to look to legislative history in their quest to understand environmental statutes.

Proving that legislative history has been clearly misused in any judicial opinion would be an impossible task. If no collective intent exists, then one cannot show that any document did not reflect that lack of intent. Insofar as legislative history may be relied upon as an interpretive tool, however, this Note demonstrates that its reliability is uncertain at best, and that courts should turn to it only as a last resort.

In analyzing the interpretation of environmental law, this Note provides examples where courts did look to legislative history as an interpretive aid. This Note examines three types of congressional legislative history. Part I addresses Committee Reports; Part II addresses House of Representatives Floor Statements; and Part III addresses Conference Committee Reports. The discussion focuses on both the practical aspects of the creation of legislative history, the troubling consequences of its use, and possible alternative methods for the court to use when interpreting the statutes, without resorting to legislative history.

I. COMMITTEE REPORTS

The Supreme Court regards committee reports as the most reliable and persuasive type of legislative history.¹⁹ The practical attraction of these documents is their use of plain language to analyze a bill section by section. The details and guidance contained in this analysis often addresses matters subsidiary to the text.²⁰ These materials would be included in the text of the legislation if they were not subordinate to the enacted text.

Many judges also believe that Committee Reports represent the "considered and collective understanding" of the legislators who were involved in drafting the proposed legislation.²¹ Reports

19. See *Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986) ("We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill").

20. See James J. Brudney, *Congressional Commentary On Judicial Interpretations Of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 29-30 (1994).

21. See, e.g., *Zuber v. Allen*, 396 U.S. 168, 186 (1969). See also *Garcia v. United States*, 469 U.S. 70, 76 (1984). Even the skeptical Judge

"tend to emphasize the main thrusts of the legislation, which are usually not too hard to infer from general context."²²

In fact, Members of Congress are often more familiar with the information in Committee Reports than the legislative language itself.²³ Senator Arlen Specter reasons that the "prose of a report is easier to understand, and because a bill usually amends an existing statute, it is impossible to follow without referring to the U.S. Code."²⁴ Others also look to Committee Reports for voting cues and rely on the information they provide. James L. Buckley, a former Senator and D.C. Circuit Judge, has commented, "[M]y understanding of most of the legislation I voted on was based entirely on my reading of its language and, where necessary, on explanations contained in the accompanying report."²⁵

In Congress, deliberation occurs primarily at the committee and subcommittee levels.²⁶ There, the formative process of debate and drafting takes place. Both committees and subcommittees conduct hearings where legislators gain insight from expert testimony. Legislators make compromises with other committee members to gain support. This section uses FIFRA to address both the judicial use of Committee Reports and the process of

Mikva is convinced, explaining that a committee report is "the bone structure of the legislation. It is the road map that explains why things are out of the statute." Abner J. Mikva, *Reading and Writing Statutes*, 28 *TEX. L. REV.* 181, 184 (1986).

22. Dickerson, *Dipping Into Legislative History*, *supra* note 5, at 1131-32.

23. ERIC REDMAN, *THE DANCE OF LEGISLATION* 140 (1973).

24. Joan Biskupic, *Scalia Takes A Narrow View in Seeking Congress' Will*, 48 *CONG. Q.* 913, 917 (1990).

25. *Statutory Interpretation and the Uses of Legislative History: Hearing before Subcommittee on Courts, Intellectual Property and the Administration of Justice of the Committee on the Judiciary*, 101st Cong., 2d Sess. 1, 21 (1990).

26.

[T]he intent of Congress is largely produced by a few members of the legislative committees. The general membership ordinarily does not participate in debate in which they are not personally interested. It would be difficult therefore to ascribe an intent to Congress based upon the random comments of a few members.

Letter from Judge Wiggins, *supra* note 4, at 1.

their creation, which makes this use risky, and consequently undesirable.

A. *The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)*

1. The Use Of Committee Reports To Interpret FIFRA

Congress enacted the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)²⁷ to regulate the use of pesticides. In *Wisconsin Public Intervenor v. Mortier*,²⁸ the Supreme Court ruled that a local ordinance regulating the use of pesticides was not preempted by FIFRA. In this decision the Court examined, but did not resolve, the issue of what role a statute's legislative history should play in a court's interpretation. The Court found that FIFRA contained no clear pre-emptive intent, and that its legislative history was ambiguous.²⁹ The Court's use of legislative history in *Mortier* provides insight into some of the troublesome aspects of Committee Reports.

The ambiguity at issue in *Mortier* concerned the statute's definition of the word "State."³⁰ Because FIFRA nowhere referred to political subdivisions, the Court's analysis was needed to review FIFRA's impact on the ability of local governments to regulate the use of pesticides. To determine whether Congress intended to preclude political subdivisions from exercising any regulatory authority under FIFRA, the Court turned to the legislative history of the statute.

When initially proposed in the House, FIFRA contained a section providing that "nothing in this Act shall be construed as limiting the authority of a State or political subdivision thereof

27. 7 U.S.C. §§ 136-136y (1990). For a more detailed discussion, see Timothy A. Quarberg, Note, *Getting The Bugs Out: The Role of Legislative History In Determining The Pre-Emptive Effect of FIFRA Upon Local Regulation Of Pesticides In Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991), 15 HAMLINE L. REV. 223 (1991).

28. 501 U.S. 597 (1991).

29. See *id.* at 616 (Scalia, J. concurring).

30. FIFRA defines a "state" as "a state, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa." 7 U.S.C. § 136v(a) (1990).

to regulate the sale or use of a pesticide within its jurisdiction."³¹ The House Agriculture Committee deleted the reference to political subdivisions "on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions."³² In its report, the Senate Committee on Agriculture and Forestry agreed with the House Committee and stated that:

it is the intent that Section 24,³³ by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides.³⁴

The Senate Commerce Committee offered an amendment authorizing local regulation, but subsequently withdrew it after conferring with the Agriculture and Forestry Committee.³⁵ Together, the two committees offered a compromise measure, which did not include a provision concerning local regulation.³⁶ The conference committee failed to address the issue of local regulation because both versions lacked any provision on the matter.³⁷

Ultimately, the Supreme Court determined that local authority to regulate pesticides was not pre-empted.³⁸ Before the issue reached the Supreme Court, some courts had found the legislative history clear,³⁹ while others had found it ambiguous.⁴⁰ Instead of clarifying the weight to be given to the legislative history, the Supreme Court simply dismissed the history as "at best

31. *Maryland Pest Control Ass'n v. Montgomery County*, 646 F. Supp. 109, 111-12 (D. Md. 1986).

32. *Id.* at 113.

33. 7 U.S.C. § 136v.

34. S. REP. NO. 92-838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4008, *quoted in Maryland Pest Control*, 646 F. Supp. at 112.

35. *See Quarberg, supra* note 27, at 229.

36. *See Maryland Pest Control*, 646 F. Supp. at 113.

37. *Id.* at 113.

38. *See Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991).

39. *See, e.g., Mortier*, 501 U.S. at 617 (Scalia, J., concurring); *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929, 935 (6th Cir. 1990) (Nelson, J., concurring); *Maryland Pest Control*, 646 F. Supp. at 113.

40. *See, e.g., Mortier*, 501 U.S. at 611-12; *People ex rel. Deukmejian v. County of Mendocino*, 683 P.2d 1150, 1160-61 (Cal. 1984).

ambiguous.”⁴¹ In response to a footnote in Justice Scalia’s concurrence the Court offered some guidance: “[T]he meaning a committee puts forward must at a minimum be within the realm of meanings that the provision, fairly read, could bear.”⁴² The Court observed that Congress cannot “take language that could only cover ‘flies’ or ‘mosquitoes,’ and tell the court that it really covers ‘ducks.’”⁴³

A “clear and manifest purpose” to pre-empt state law may be (1) expressed explicitly in the statute; (2) implied by the comprehensive nature of the statute; or (3) caused by actual conflict between state and federal law.⁴⁴ Here, the Court’s problem was not with (1) or (3), but with (2). Pre-emption by implication occurs when federal legislation occupies an entire field of regulation, leaving no room for states to supplement federal law.⁴⁵ Because courts have allowed the “clear and manifest purpose” of Congress to be inferred from legislation, many pre-emption cases deal with ambiguous statutes where Congress has expressed no clear pre-emptive intent. In *Mortier*, the Court decided to turn to the Committee Report to clarify the ambiguity with regard to the definition of “State”. This decision is problematic and unnecessary. The Court unnecessarily complicated its analysis of the statute by using -albeit rejecting -un-enacted text in order to interpret relatively unambiguous legislative language.

Alternatively, the Court could have clarified the ambiguity simply by turning to the United States Code. When Congress has sought to include reference to political subdivisions, it has often done so explicitly. A statute dealing with pipeline safety defines a municipality as a political subdivision of a State.⁴⁶ In the Air Pollution Prevention and Control Act, the definition section includes the following:

(13) The term “municipality” (A) means a city, town, borough, county, parish, district, or other public body created pursuant to State law, with responsibility for the planning or administration of solid waste management, or an Indian tribe or authorized tribal organization or Alaska Native village or organization,

41. *Mortier*, 501 U.S. at 609.

42. *Id.* at 611 n.4.

43. *Id.*

44. See, e.g., *Mortier*, 501 U.S. at 604-05; Louisiana Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 368 (1986).

45. See *Louisiana Pub. Serv. Comm’n*, 476 U.S. at 368.

46. See 49 U.S.C. § 60,101(a)(1)(B)(15) (1994).

and (B) includes any rural community or unincorporated town or village or any other public entity for which an application for assistance is made by a State or political subdivision thereof.⁴⁷

Both statutes contain definitions of the term "State" that are similar to FIFRA.⁴⁸ It is clearly Congressional practice to include specific reference to political subdivisions when the body intends it to be included in a regulation. Here Congress did not enact such language, and the inquiry should have ended with an examination of statutorily-enacted language.

While the Court's legal decision here was significant, in terms of its environmental impact, the process that the justices used in arriving at their holding is cause for concern. Legislation can only cover topics that are addressed directly in the enacted text. The bounds of legislative text can only be expanded by legislative enactments. Clearly, the Court did not have to resort to the Committee Reports in determining the meaning of FIFRA.

2. Additional Considerations

In dealing with the specific wording in *Mortier*, the Court did not address the fact that Committee Reports are not written by the legislators themselves, but by members of their staffs.⁴⁹ Additionally, there are many cases where Members do not read the Committee Report or have only a superficial familiarity with their contents.⁵⁰ As a result, Committee Reports "often fall in the

47. 42 U.S.C. § 7602 (1994).

48. "'State' means a State of the United States, the District of Columbia, and Puerto Rico." 49 U.S.C. § 60,101(a)(1)(B)(20) (1994). "The term 'State' means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands." 42 U.S.C. § 7602 (1994).

49. It is common knowledge on Capitol Hill that legislators tend to negotiate the broader aspects of legislation, while the staff is left to draft and explain it. See Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375 (1987) ("Even in the setting of the congressional committee, in many cases the report adopted will likely not even have been reviewed, much less written or studied, by all members.").

50. See *id.* at 375; see also *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) ("I find no reason to be-

'unreliable' category."⁵¹ Judges should assume that they were probably "not read by, let alone written by, an elected official unless they are referred to or quoted in debate."⁵² Accordingly, Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, warns, "these staff reports are often a portion of the legislative history that is only tangentially related to the actual legislative process. Courts ought to accord such reports very little, if any, significance."⁵³

In *Mortier*, the Court failed to reflect on the minimal involvement of legislators in the process of drafting report language, an area where legislators place heavy responsibility on their staffs. Because the courts rely so heavily on reports, some scholars argue that there may be incentive for staffers to load these sources.⁵⁴ "Thus, legislative history can be abused in the creation stage as well as in the interpretive stage."⁵⁵ The abuse of legislative history in the creation stage occurs when unelected staff members 'cook up' some language for a committee report or a speech on the Senate floor with an eye to influencing uninitiated or outcome-oriented judges."⁵⁶

Perhaps an overzealous staff member, or one susceptible to interest group influence, may include information in the Committee Report that contradicts the statutory language. If a judge

lieve that any more than a handful of the Members of Congress . . . [if any] voted . . . on the basis of the referenced statements in the Subcommittee, Committee, or Conference Committee Reports, or floor debates."); *Hirschey v FERC*, 777 F.2d at 1, 7 (D.C. Cir. 1985) (Scalia, J., concurring) ("I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purposes, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill.").

51. Hatch, *supra* note 6, at 45.

52. *Id.*

53. *Id.*

54. "[The] routine deference to the detail of Committee Reports, and the predictable expansion in that detail which routine deference has produced, are converting a system of judicial construction into a system of committee-staff prescription." *Hirschey*, 777 F.2d at 8 (Scalia, J., concurring).

55. Hatch, *supra* note 6, at 44.

56. *Id.*

later relies on this report language it could effectively change the meaning of the enacted statute.⁵⁷ Justice Scalia asserts that it must be "a heady feeling . . . for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself."⁵⁸

It is possible the legislators voting on FIFRA did not read the Committee Reports at all. In fact, a legislator is more likely to read a one-page summary written by the bill's sponsor in the form of a "Dear Colleague" letter,⁵⁹ or a summary prepared by the Republican Study Conference or the Democratic Study Group.⁶⁰ In *Mortier*, the Court had no way of knowing how individual Members of Congress got their information about FIFRA. A general familiarity with the Committee Report cannot be assumed.

B. *The Endangered Species Act (ESA)*

1. The Use of Committee Reports

Problems also arise where an Appropriations Subcommittee, who did not draft the legislation originally, attempts to reinterpret legislation through a subsequent Committee Report. In *Tennessee Valley Authority v. Hill*,⁶¹ the Supreme Court needed to de-

57. See *American Mining Cong. v. EPA*, 824 F.2d 1177, 1192 n.22 (D.C. Cir. 1987); *Hirschey*, 777 F.2d at 7-8.

58. *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring in part).

59. "Dear Colleague" letters are often sent by the sponsor of a bill to all other Members of Congress. They usually contain a one or two page summary of what the sponsor intends the bill to do. These letters are relied on heavily by staffers as well.

60. The Republican Study Conference and Democratic Study Group were previously Legislative Service Organizations (LSOs) within the House of Representatives. As part of its reform package at the start of the 104th Congress, the Republican majority eliminated funding for LSOs. As a result, the Republicans absorbed their organization into the office of the Speaker of the House, whose office currently produces the reports. The Democrats, lacking similar financial resources, tried to found an external organization which was soon taken over by Congressional Quarterly Magazine, which now produces the reports.

61. 437 U.S. 153 (1978).

termine whether the Endangered Species Act required a court order to enjoin the operation of the Tellico Dam and Reservoir Project, which was virtually complete. This predicament arose because the Secretary of the Interior had determined that operation of the dam would eradicate endangered species.⁶² Additionally, the Court needed to determine whether the continued Congressional appropriations for the Tellico Dam after the advent of the ESA constituted an implied repeal of the ESA with regard to this particular project.⁶³

Construction on the Tellico Dam and Reservoir Project began in 1967.⁶⁴ In 1973, the snail darter, a previously unknown species of perch, was discovered in the waters of the Little Tennessee River.⁶⁵ It was possible that any alteration of the snail darter's habitat could endanger the survival of the species. Four months later, Congress passed the ESA.⁶⁶ The legislation authorizes the Secretary to declare species of animal life to be "endangered" and to identify their "critical habitat".⁶⁷ In 1975, the Secretary officially listed the snail darter as an endangered species.⁶⁸ Since the Little Tennessee River was the "critical habitat" of the Snail

62. *See id.*

63. *See id.* at 156.

64. *See id.* at 157.

65. *See id.* at 167.

66. *See id.* at 159.

67.

The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species pursuant to section 1533 of this title and by taking such action necessary to insure [sic] that actions authorized, funds or carries out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction of modification of habitat of such species which is determined by the Secretary, to be critical.

Endangered Species Act of 1973, 16 U.S.C. § 1536.

68. *See Tennessee Valley Auth.*, 437 U.S. at 161.

Darter, the Secretary declared that the completion or operation of the Tellico Dam should be halted.⁶⁹

However, in 1975, the House Committee on Appropriations continued to earmark money for the project.⁷⁰ These appropriations bills eventually became law.⁷¹ In its June 2, 1977, Report, the House Appropriations Committee stated:

It is the Committee's view that the Endangered Species Act was not intended to halt projects such as these in their advanced stage of completion, and [the Committee] strongly recommends that these projects not be stopped because of misuse of the Act.⁷²

The Senate Appropriations Committee expressed similar views.

This committee has not viewed the Endangered Species Act as preventing the completion and use of these projects[,] which were well under way at the time the affected species were listed as endangered. If the act has such an effect, which is contrary to the Committee's understanding of the intent of Congress in enacting the Endangered Species Act, funds should be appropriated to allow these projects to be completed and their benefits realized in the public interest, the Endangered Species Act notwithstanding.⁷³

It is doubtful that Congress intended to protect endangered species only where it was a matter of convenience. The Court understood that the "plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."⁷⁴

69. *Id.* at 162.

70. *Id.* at 164.

71. *Id.*

72. *Id.* at 170 (quoting H.R. REP. NO. 95-379, 95th Cong., 1st Sess., at 104 (1977)).

73. *Id.* at 171 (quoting S. REP. NO. 95-301, 95th Cong., 1st Sess., at 99 (1977)).

74. *Id.* at 184. Ironically, this understanding came from a floor statement, an even less reliable source. See *infra* Part II.

Once this bill is enacted, the appropriate Secretary, whether of Interior, Agriculture or whatever, will have to take action to see that this situation is not permitted to worsen, and that these bears are not driven to extinction. The purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and every agency of government is committed to see that those purposes are carried

The Court correctly refused to honor the Appropriations Committees' "understanding".⁷⁵ In doing so, the Court pointed to House Rule XXI(2),⁷⁶ which provides:

No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such works as are already in progress. Nor shall any provision in any such bill or amendment thereto changing existing law be in order.⁷⁷

In this case, it appears that Congress attempted to legislate through an appropriations measure. The proper process would be for the House Committee responsible for authorizing the ESA to consider legislation exempting the Tellico Dam. If such legislation were passed, the continued appropriations would have been proper. However, here, the Appropriations Committees lacked the authority to unilaterally decide that the Tellico Dam did not violate the ESA.

Additionally, the relevant legislative history, in the form of Committee Reports, was not written concurrently with the ESA's journey through the legislative process. The proponents of the Tellico Dam would have had a better case had the ESA or its accompanying reports provided an exemption for the Dam. The Court was not fooled here. The decision was correct in disregarding the statements of the Appropriations Committees. As a result, the Court provides a positive example of an instance where reliance on certain legislative history would have distorted the outcome by leading to an erroneous interpretation of a statute.

out [T]he agencies of Government can no longer plead that they can do nothing about it. They can, and they must. The law is clear.

Id. (quoting 119 CONG. REC. 42,913 (1973) (emphasis added)).

75. *Id.* at 191.

76. CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 39-A (4th ed. 1991).

77. *Tennessee Valley Auth.*, 437 U.S. at 191 (quoting House Rule XXI (2)).

2. Additional Considerations

a) Rules of The Environmental Committees

In understanding the potential problems with the Committee Reports in *Tennessee Valley Authority*, it is necessary to grasp the fact that all committees do not have identical rules regarding the structure and contents of Committee Reports. As long as courts continue to rely on these Reports, it is necessary to understand that Reports from different committees can not be subject to uniform examination. The inquiry must be tailored to the rules of the individual committee that proffered the Report. This section addresses the procedures adopted by three House Committees: the House Committee on Resources,⁷⁸ the House Committee on Agriculture, and the House Committee on Transportation and Infrastructure.⁷⁹ These committees are responsible for the bulk of environmental legislation that is introduced in the current House of Representatives. While the explanations following do not encompass all of the rules for these House Committees, they illustrate many of the differences present. The descriptions are relevant to show why courts must look at the rules of a committee before undertaking any analysis of that committee's Reports.

When the House Committee on Resources approves a measure,⁸⁰ the Committee Report must be filed within seven calendar days after the day on which a written request is filed with the Committee Clerk for the reporting of the measure.⁸¹ Any Member may, if notice is given at the time a bill or resolution is approved by the committee, file supplemental, additional, or minority views.⁸² Members must be given at least two additional

78. This committee was known as the House of Representatives Committee on Natural Resources prior to the 104th Congress.

79. This committee was known as the House of Representatives Committee on Transportation prior to the 104th Congress.

80. See generally *Rules Of Procedure For The Committee On Resources 105th Congress*, 143 CONG. REC. H331-01 (1997).

81. 143 CONG. REC. H332 (1997). Days in which the House of Representatives is not in session do not count against the seven day deadline. See *id.* The request must be signed by a majority of the members of the committee. See *id.*

82. See *id.*

calendar days to file these views.⁸³ Each Member of the committee is given the opportunity to review each proposed Committee Report before it is filed with the Clerk of the House of Representatives.⁸⁴ Committee Reports are available in government depository libraries. Committee documents are not yet available over the Internet but will be soon.⁸⁵

When the House Committee on Agriculture approves a measure,⁸⁶ a report must be filed within seven calendar days after the day on which a written request is filed with the Majority Staff Director for the reporting of the measure.⁸⁷ Members are entitled to at least two subsequent calendar days to file supplemental, minority, or additional views.⁸⁸ The Agriculture Committee also specifies what is to be included in a Report. In separately identified sections, the Report must contain, among other things, a statement of intent or purpose and a statement describing the need for the measure and oversight findings.⁸⁹ A court is likely to seize upon this information in the Committee Report without realizing that these statements often represent only the views of a fraction of the committee's membership.

When the House Committee on Transportation and Infrastructure approves a measure,⁹⁰ the committee must file a Report

83. *See id.*

84. *See id.*

85. *See* Committee on Resources Home Page (last modified Mar. 21, 1997) <<http://www.house.gov/resources/>>. While committee publications are not yet available, one can access information regarding the committee schedule, membership, meetings, oversight activities and press releases. The Committee on Resources can also be reached via e-mail at <resources.committee@mail.house.gov>.

86. For a list of approving procedures, see generally *Rules Of Procedure For The Committee On Agriculture 105th Congress*, 143 CONG. REC. H363-01 (1997).

87. *See id.*

88. *See id.*

89. *See id.*

90. For a list of approving procedures, see generally, *Rules Of Procedure For The Committee On Transportation And Infrastructure, 105th Congress*, 143 CONG. REC. H328-01 (1997); *Amendment To The Rules Of Procedure For The Committee On Transportation And Infrastructure 105th Congress*, 143 CONG. REC. H929-01 (1997).

within seven calendar days⁹¹ after the day on which it has been filed with the Clerk of the House for reporting.⁹² The committee rules contain no specifications for Committee Reports. As a result, a thorough examination of a Committee Report would require a court to determine the reasons why certain information might have been excluded.

b) The Stage at Which Committee Reports are Created

A Senate Committee Report reflects an interpretation of a Senate bill before it reaches the floor, and a House Committee Report reflects an interpretation of a House Bill before it reaches the floor. Neither becomes law in its original form. The bills may be changed significantly on the floor of each chamber.⁹³ The resulting law is a compromise between the House and Senate versions.

Thus, in *Tennessee Valley Authority*, the law that eventually was passed certainly could not live up to all the intentions of either report because compromises had been made as part of the legislative process. The report language could at most represent the intent of one chamber, before it reached agreement with the other.

C. *Additional Problems with Judicial Use of Committee Reports*

While many scholars maintain that Committee Reports are a credible source for determining the intent of Congress when a bill is enacted,⁹⁴ often legislators are unaware of the importance that courts attribute to Committee Reports.⁹⁵ This is evidenced

91. This excludes days which the House is not in session. See 143 CONG. REC. H328-01 (1997)

92. See *id.*

93. Usually, there is the opportunity to offer amendments when a bill initially reaches the floor. An amendment may even take the form of a "substitute," which if passed, replaces the entire text of a bill with new text. Additionally, further amendments are made in conference committee.

94. See RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 269-70 (1985).

95. Mikva, *Reading and Writing Statutes*, *supra* note 21, at 184 ("I also wish that Congress would realize how central Committee Reports

by the frequency with which courts turn to reports in published decisions. Committee Reports are the frequent victims of "political horse trading and individual ego trips."⁹⁶ As a result, "[t]he Committee Report's central explanatory function is clouded when it is called upon to serve other purposes."⁹⁷ Thus, an examining judge cannot discern which part of a report serves a legitimate legislative function.

The analysis provided in congressional Committee Reports usually consists of "mere paraphrases of the statute, and the deviations from statutory text are not likely to be helpful."⁹⁸ The analysis simply takes legislative language and provides a plain English summary. In sum, this explanatory material is intended to illustrate, but not "to resolve ambiguities that [may] have consciously been included or retained by the authors."⁹⁹

Finally, problems also may result from "joint referrals": a process in which the House often referred legislation to two different committees with overlapping jurisdiction, and which existed until the end of the 103rd Congress.¹⁰⁰ Thus, the possibility arose of there being reports from separate committees on the same bill. This creates an opening for judicial misinterpretation if the separate committees take contradicting views.

II. FLOOR STATEMENTS IN THE HOUSE OF REPRESENTATIVES

Not only do the courts turn to the *Record* to interpret what statutes might mean in the cases of ambiguity, but historians not only in this century but in the next century will turn to these very *Records* when they come to pass judgment on what we have all done in these times.¹⁰¹

Representative Charles Pashayan

As you know, the *Record* has often been subject to criticism for its lack of accuracy in relation to the actual floor proceedings

are to any rational search for 'legislative intent.'").

96. *Id.*

97. *Id.*

98. Dickerson, *Dipping Into Legislative History*, *supra* note 5, at 1132.

99. Brudney, *supra* note 20, at 29-30.

100. See 139 CONG. REC. H17 (1993).

101. 131 CONG. REC. 11074 (1985) (statement of Rep. Pashayan).

which it was meant to report. I have always supported the notion of greater compliance with the rules and the restrictions associated with revisions to Members' statements. I firmly believe that the *Laws and Rules for Publication of the Congressional Record*, if properly enforced, would result in a more accurate publication. I also believe that Members should be subject to stricter limitations on the length, content, and location of their remarks in the daily Record¹⁰²

Senator Charles Mathias

This section shows the dangers of judicial use of congressional floor statements in interpreting environmental law. It presents both technical and political reasons why legislative debates and other Floor Statements are ill-suited for reliance by courts. Legislative debates "are not a safe guide . . . in ascertaining the meaning and purpose of the law-making body" because they are merely "expressive of the views and motives of individual members."¹⁰³ The analysis also addresses the rules governing the content of the *Congressional Record*, specifically explaining how Members of Congress can delete, add, and modify statements from their original form.

A. *The Surface Mining Control And Reclamation Act (SMCRA)*

1. The Use of Legislative History

Representative Morris Udall, a Congressman from Arizona, had previously passed versions of SMCRA¹⁰⁴ through the House,

102. 136 CONG. REC. 37,126-7 (1990) (Letter of Feb. 4, 1986 from then Chairman of the Joint Comm. on Printing, Sen. Charles Mathias, to Rep. Frank Annunzio, Chairman Comm. on House Admin.).

103. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1921).

104. For a more comprehensive discussion, see Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380 (1987) [hereinafter Mikva, *A Reply to Judge Starr*]. While Judge Mikva identifies the legislation as the "Strip Mining Law," the actual title is the Surface Mining Control And Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1994). The House of Representatives debated the Conference Report on July 21, 1977. See 123 CONG. REC. 24, 419-30 (1977). While the recorded debate does not precisely match Judge Mikva's recollections, there was debate involving Congressmen Udall (the floor manager), Rahall (of West Virginia) and Tsongas (the pro-environmental congressman). The theme of their discussion parallels Judge Mikva's story. See *id.* at 24,424-26. However, for illustrative purposes, I have utilized Judge

but failed on his first attempt to move it through the Senate.¹⁰⁵ In his second attempt, Udall succeeded in passing the legislation through both chambers before President Ford vetoed it.¹⁰⁶ Representative Udall “finally got a Democratic president who committed himself to signing a bill if Representative Udall could get it through Congress.”¹⁰⁷

Surface mining is a controversial topic when it comes to natural resources conservation and management.¹⁰⁸ The expected opposition to Representative Udall’s goals indicated that there “were directly opposing views to reconcile in fashioning a bill.”¹⁰⁹ “The miners and mine owners, the ‘states’ righters,’ and the environmentalists each have very strong views on what the strip mining laws should be.”¹¹⁰

This controversy gave rise to the following events, which are recounted by Judge Abner Mikva:¹¹¹

Representative Udall fashioned a compromise and got it out of the committee and onto the floor. At one point, in his effort to shepherd the compromise through the House of Representatives, Udall, as floor manager, was explaining why it was a great bill and why it ought to be passed. One of the congressmen from West Virginia, a strip-mining state, arose and asked if the gentleman from Arizona would assure him that this bill would carefully protect states’ rights and state sovereignty and that the states would continue to perform their role in managing strip mining within their borders. Representative Udall solemnly assured the gentleman that he was absolutely correct, that the bill very carefully preserved the role of the states in the process — state sovereignty was not impinged upon in any form.

Mikva’s recollections.

105. Mikva, *A Reply To Judge Starr*, *supra* note 104, at 380-81.

106. *Id.*

107. *Id.*

108. See generally Uday Desai, *The Politics Of Federal State Relations: The Case of Surface Mining Regulation*, 31 NAT. RESOURCES J. 785 (1991).

109. Mikva, *A Reply To Judge Starr*, *supra* note 104, at 380-81.

110. *Id.*

111. Abner Mikva served five terms in the Illinois Legislature, followed by five terms in the U.S. House of Representatives; he was Circuit Judge on the United States Court of Appeals for the D.C. Circuit from 1979 to 1994; he served as counsel to the President of the United States from 1994 to 1996. He is currently a Visiting Professor of Law at the University of Chicago Law School.

Twenty minutes later a pro-environmentalist congressman arose and asked if the gentleman from Arizona would assure him that the bill, once and for all, set single standards for strip mining and ensured that one federal law would cover strip mining throughout the country. Representative Udall assured the gentleman that he was absolutely correct, that this bill, once and for all, set uniform federal standards.

Some of us were sitting in the cloakroom during this exchange; when Representative Udall came out for a drink of water one of the congressmen who has been listening in told him that both positions could not be right. Udall then assured that gentleman that he was absolutely correct.¹¹²

Because of political circumstances, Representative Udall had few options. Perhaps he could have "spen[t] another twenty years trying to find more precise words to set forth his ideas concerning proper strip-mining law, even though he might never get 218 of his colleagues to agree with him again."¹¹³

According to Judge Mikva, "[i]t is not surprising that when the statute came before the courts there were some ambiguities. It simply was not as clear as it might have been in describing when the state was supposed to act and when the federal government was supposed to act."¹¹⁴

This ambiguity is clearly demonstrated in *In re Surface Mining Regulation Litigation*.¹¹⁵ The court looked to statements made by Congressmen Ruppe¹¹⁶ and Tsongas¹¹⁷ to explain a clause within the legislation:¹¹⁸ "[t]he statement of Congressman Tsongas directly conflicts with other indications of the legislative history . . . and also contradicts the words of the statute. . . ." ¹¹⁹ Unfortunately, the court opted to weigh the relative strengths of floor statements and decided that, "the interpretations of the . . . clause expressed in the Senate are better evidence of its true

112. Mikva, *A Reply To Judge Starr*, *supra* note 104, at 381.

113. *Id.*

114. *Id.*

115. *In re Surface Mining Regulation Litigation*, 627 F.2d 1346 (D.C. Cir. 1980).

116. 123 CONG. REC. H7591 (daily ed. July 21, 1977) (statement of Rep. Ruppe).

117. 123 CONG. REC. H7599-89 (daily ed. July 21, 1977) (statements of Rep. Tsongas).

118. *In re Surface Mining Regulation Litigation*, 627 F.2d at 1362.

119. *Id.*

meaning than the inconsistent pronouncements in the House. . . ."¹²⁰ This is a prime example of misuse. While the court was in a position to acknowledge the ambiguity, it had no real way of knowing which floor statements were "better evidence" of the statute's "true meaning." Sadly enough, a majority of the Members of Congress in the House may not have understood the legislation they were discussing.

Judge Mikva explains that he "would have gone back to the Committee Report, as [he] think[s] most of the judges who were involved in the various disputes [over SMCRA] did."¹²¹ Finally, he "would have resolved most of the disputes in favor of federal supremacy —on the ground that most of the fight over this statute was about whether there was going to be a set of federal standards superimposed on the states."¹²² Predictably, Judge Mikva held true to his word, in *In re Permanent Surface Mining Regulation Litigation*,¹²³ where he held that the Secretary of Interior possessed the authority to "specify by regulation criteria necessary for his approval of a proposed state program."¹²⁴

Certainly, a review of Representative Udall's statements would not have been enlightening in an effort to clarify ambiguity. Judge Mikva's recollection shows that Members may not understand legislation to mean the same thing reflected in a transcription of a floor exchange.

2. Additional Considerations

Whenever a court makes use of floor statements, it must question the accuracy of the printed word. Such a rule is especially relevant with regard to SMCRA, because Judge Mikva's recollection does not entirely coincide with the picture presented by the printed word. For the following reasons, there is great uncertainty as to whether the printed legislative history or Judge Mikva's recollections are more accurate.

The Constitution requires that "Each House shall keep a Journal of its proceedings, and from time to time publish the

120. *Id.*

121. Mikva, *A Reply To Judge Starr*, *supra* note 104, at 382.

122. *Id.*

123. 653 F.2d 514 (D.C. Cir. 1981).

124. *Id.* at 527.

same."¹²⁵ Additionally, federal statute requires that the *Congressional Record* "shall be substantially a verbatim report of proceedings[.]"¹²⁶ According to *Our American Government*, an introductory pamphlet to the United States Government, "[t]he *Congressional Record* contains a record, taken stenographically, of everything said on the floor of both Houses, including roll-call votes on all questions."¹²⁷ However, the text of this pamphlet, which is itself issued by Congress, is, in itself, quite misleading.¹²⁸

The *Congressional Record* is not a verbatim report of what occurs on the floor of either chamber, but only reflects a substantial record of the proceedings.¹²⁹ In 1984, several Members of Congress brought an action for declaratory relief, alleging that the *Congressional Record* contained improper material.¹³⁰ The complaint demanded that "the court order the Congressional Reporters, and the Joint Committee on Printing to stop printing a corrupt *Congressional Record*."¹³¹ The case was subsequently dismissed,¹³² and the plaintiffs appealed.¹³³

In concluding that there was no First Amendment right to receive a verbatim transcript of congressional proceedings, Judge Mikva wrote:

For 200 years, Congress has institutionally determined and re-determined the question of what kind of printed (and electronic) record should be kept of proceedings of that body. It is most unlikely that any procedure has ever fully satisfied every member of the Congress or their constituents. This court cannot provide a second opinion on what is the best procedure. Notwithstanding the deference and esteem that is properly ten-

125. U.S. CONST. art. I, § 5.

126. 44 U.S.C. § 901 (1997).

127. *OUR AMERICAN GOVERNMENT*, H.R. DOC. NO. 102-192, at 21 (1993).

128. *Our American Government* is printed by authority of H.R. Con. Res. 172, 102d Cong. "Resolved by the House of Representatives (the Senate concurring), that a revised edition of the booklet entitled "Our American Government" shall be printed as a House Document. *Id.* at II.

129. J. KERNOCHAN, *THE LEGISLATIVE PROCESS* 46-47 (1981).

130. *Gregg v. Barrett*, 594 F. Supp. 108 (D.D.C. 1984).

131. *Id.* at 109.

132. *Id.* at 111.

133. *Gregg v. Barrett*, 771 F.2d 539 (D.C. Cir. 1985).

dered to individual congressional actors, our deference and esteem for the institution as a whole and for the constitutional command that the institution be allowed to manage its own affairs precludes us from even attempting a diagnosis of the problem.¹³⁴

Thus, the problem was left to Congress to solve on its own; unfortunately, a palpable solution is not imminent.

"As it goes into the Record, House debate is thus a curious melange of the opening lines of many speeches never heard on the floor, coupled with revised, sometimes totally new, remarks. . . . [M]embers in both houses rearrange the facts and rewrite bits and chunks of historical record."¹³⁵ Furthermore, the *Congressional Record* does not reflect how many Members were present on the floor of the chamber when a statement was made. Thus, even if a statement is reported verbatim, there is no assurance that anyone ever heard it.

Some 20 million C-SPAN viewers know what is really said on this floor. Why should we maintain a fictional *Congressional Record* when we now have a factual electronic record that tells it like it is rather than how we wish we had said it?¹³⁶

Representative Trent Lott

Conversely, one of the chief problems with the *Congressional Record's* reporting of House floor debates is that not all statements are necessarily included. As a result, the record of activity may be incomplete. "Remarks made on the floor by a Member after he has been called to order, without recognition by the Chair, or without consent of the Member occupying the floor, are frequently deleted from the Record by the House, the Speaker, or the Member in revising his remarks."¹³⁷

Additionally, "the House frequently excludes from the *Record* remarks made out of order or unparliamentary remarks which reflect unfavorably upon the House, its committees or individual Members."¹³⁸ In such a situation, the Member immediately regrets what she said. She "may request the unanimous consent of

134. *Id.* at 549.

135. W. KEEFE & M. OGUL, *THE AMERICAN LEGISLATIVE PROCESS* 258 (5th ed. 1981).

136. 131 CONG. REC. H6893-04 (1985) (statement of Rep. Lott).

137. DESCHLER'S PRECEDENTS ch. 5, § 17 ff; *see also* 136 CONG. REC. E3626-01.

138. DESCHLER'S PRECEDENTS ch. 5, § 17 ff; *see also* 136 CONG. REC. E3626-01.

the House that they be deleted from the *Record* or such request may be made by another Member. The House frequently agrees to these requests made in the spirit of apology."¹³⁹

Finally, a Member of Congress may demand that words spoken by another Member be "taken down." If the Speaker determines that the words reflect unfavorably on the House and consequently rules the words unparliamentary, a resolution may be made to delete the unparliamentary remarks from the *Record*.¹⁴⁰ On some occasions, the Speaker, by unanimous consent, will immediately order the unparliamentary remarks deleted from the *Record*, without awaiting action by the House.¹⁴¹

Mr. Speaker, having received unanimous consent to extend my remarks in the *Record*, I would like to indicate that I am not really speaking these words. Try as I might, I could not get to the floor to deliver my plea on behalf of the coal miners disabled by pneumoconiosis. I do not want to kid anyone into thinking that I am now on my feet delivering a stirring oration. As a matter of fact, I am back in my office typing this out on my own hot little typewriter, far from the madding crowd, and somewhat removed from the House Chamber. Such is the pretense of the House that it would have been easy to just quietly include these remarks in the *Record*, issue a brave press release, and convince thousands of cheering constituents that I was in there fighting every step of the way, influencing the course of history in the heat of debate.¹⁴²

Representative Ken Hechler

When a Member of Congress rises to speak in front of the House of Representatives, the first thing she does is seek permission to "revise and extend" her remarks. The general authority provided to "revise and extend" is subject to limitations established in rules and precedents.¹⁴³ It has long been the practice of the House for a Member to edit and revise his remarks before

139. DESCHLER'S PRECEDENTS ch. 5, § 17 ff; *see also* 136 CONG. REC. E3626-01.

140. DESCHLER'S PRECEDENTS ch. 5, § 17 ff; *see also* 136 CONG. REC. E3626-01.

141. DESCHLER'S PRECEDENTS ch. 5, § 17 ff; *see also* 136 CONG. REC. E3626-01.

142. 117 CONG. REC. 36,506 (1971).

143. *See* LAWS AND RULES FOR PUBLICATION OF THE CONGRESSIONAL RECORD 4.

publication in the *Record*.¹⁴⁴ A Member has until 9:00 P.M. to edit a manuscript before it is printed in the daily edition of the *Congressional Record*, issued on the following day.¹⁴⁵

The permanent edition of the *Congressional Record* is made up for printing and binding thirty days after each daily publication is issued.¹⁴⁶ The Rules provide that a Member may only make one set of revisions to a statement.¹⁴⁷ These revisions are limited to correction of "grammatical or technical matters that do not alter in any material way the substance of the remarks."¹⁴⁸ Revisions in excess of this are improper and may be challenged.¹⁴⁹ Adherence to the rules permitting only technical corrections also minimizes potential mischief from revisions.¹⁵⁰ Some have alleged, however, that substantive changes can be made under the guise of technical corrections.¹⁵¹ Because of the huge amount of printed material, it is unlikely that violators will be caught.

There are additional limitations on the authority to revise. A Member may not delete proceedings by which his words are taken down, remarks interjected by another Member to whom he has yielded, or to whom he has responded.¹⁵² Additionally, a

144. *See id.*

145. *See id.*

146. *See id.* at 9.

147. *See id.*

148. 136 CONG. REC. E3627-01 (1990).

149. *Id.*

150. Under the governing rule issued by the Joint Committee on Printing, revisions "shall consist only of corrections of the original copy and shall not include deletions of correct material, substitutions for correct material, or additions of new subject matter." *See generally* JOINT COMM. ON PRINTING, LAWS AND RULES FOR PUBLICATION OF THE CONGRESSIONAL RECORD. Similar restrictions also appear in a House Supplement. "The Congressional Record shall contain a substantially verbatim account of remarks actually made during proceedings of the house, subject to technical, grammatical, and typographical corrections authorized by the Member making remarks involved. HOUSE SUPPLEMENT TO LAWS AND RULES FOR PUBLICATION OF THE CONGRESSIONAL RECORD (Mar. 10, 1980) [hereinafter HOUSE SUPPLEMENT].

151. *See, e.g.,* Gregg, 771 F.2d at 540 (dismissing complaint by several members alleging that Congressional Record "is not a faithful transcript of what is actually said on the floor of the House and Senate").

152. 136 CONG. REC. E3627-01 (1990). "Any revision shall consist only of corrections of the original copy and shall not include deletions

Member may not revise remarks that alter the text of colloquies with other Members without their consent.¹⁵³ “The consent of the House is required, for the correction of major errors or the deletion of unparliamentary remarks or remarks made out of order.”¹⁵⁴ Certainly, these technical rules alone are enough to discourage reliance on any floor statements, for fear that the printed word may portray the actual record inaccurately.

B. *Jurisdiction of The District Courts Under CERCLA*

In *United States v. Princeton Gamma-Tech*,¹⁵⁵ the Third Circuit dealt with conflicting legislative history regarding the citizen’s suit provision of Superfund.¹⁵⁶ With regard to jurisdiction, CERCLA provides that the “United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy.”¹⁵⁷ This general grant of jurisdiction is limited, however by a section titled “Timing of Review”.¹⁵⁸ The restrictions provide that

[n]o Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under section 9604 . . . in any action except . . . :

(1) An action under section 9607 of this title to recover response costs or damages for contribution . . .

. . . [and]

(4) An action under section 9659 of this title (relating to citizens’ suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under 9606 of this title was in violation of any requirement of this chapter. Such an

of correct material, substitutions for correct material, or additions of new subject matter.” JOINT COMM. ON PRINTING, *supra* note 150, at 9.

153. 136 CONG. REC. E3627-01 (1990).

154. *Id.*

155. 31 F.3d 138 (3d Cir. 1994), *overruled by* Clinton County Comm’rs v. EPA, 116 F.3d 1018 (3d Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 687 (1998).

156. For more detailed discussion about this case, see Paul H. McConnell, Note, *CERCLA Wrestling —Grappling With Conflicting Legislative Intent And The Citizens’ Suit Provision* —United States v. Princeton Gamma-Tech, 14 TEMP. ENVTL. L. & TECH. J. 115 (1995).

157. 42 U.S.C. § 9613(b).

158. *Id.* § 9613(h).

action may not be brought with regard to a removal where a remedial action is to be undertaken at the site

As Paul H. McConnell notes:

Thus, section 9613(h) is a broadly-worded provision that forecloses judicial review of CERCLA cleanups unless the review action falls within one of several narrowly defined exceptions. Notwithstanding the terms of the provision foreclosing review, litigants have turned to the courts, asserting various theories in order to gain immediate review.¹⁵⁹

CERCLA enumerates a specific statutory scheme for judicial review of lawsuits arising under CERCLA's provisions.¹⁶⁰ In *Princeton Gamma-Tech*,¹⁶¹ the court held that:

[B]ased on review of the statute, its legislative history, and the procedural posture of th[e] suit, where a bona fide allegation of irreparable injury to public health or the environment is made, injunctive relief is available in a cost-recovery action under subsection 9613(h)(1) and/or 9613(h)(4).¹⁶²

The Third Circuit noted that the legislative history concerning when a citizens' suit may be entertained was "confusing."¹⁶³ To support its finding the Third Circuit compared conflicting statements made on the floor by individual conferees.¹⁶⁴ Initially the court quoted Senator Thurmond's statement which stands for the proposition that a federal court will not have jurisdiction under citizens' suit challenges until the EPA has totally completed its cleanup activities:¹⁶⁵

'Taken or secured' [in section 9613(h)(4)], means that all of the activities set forth in the record of decision which includes the challenged action have been completed The section is designed to preclude lawsuits by any person concerning particular segments of the response action . . . until those segments of the response have been constructed and given the chance to operate and demonstrate their effectiveness in meeting the requirements of the act. Completion of all of the work set out in

159. McConnell, *supra* note 156, at 116.

160. See 42 U.S.C. § 9607(a).

161. 31 F.3d 138 (3d Cir. 1994).

162. McConnell, *supra* note 156, at 116 (citing *Princeton Gamma-Tech*, 31 F.3d at 148).

163. 31 F.3d at 144.

164. See *id.* at 145-46.

165. McConnell, *supra* note 156, at 120 (quoting *Princeton Gamma-Tech*, 31 F.3d at 145).

a particular record of decision marks the first opportunity at which review of that portion of the response action can occur.¹⁶⁶

The Third Circuit then contrasted these statements with those made by other conferees.¹⁶⁷ For example, Senator Stafford, the Chairman of the Committee on Environment and Public Works, (the Senate committee primarily responsible for the bill) stated:

It is crucial, if it is at all possible, to maintain citizens' rights to challenge response actions, or final cleanup plans, before such plans are implemented even in part because otherwise the response could proceed in violation of the law and waste millions of dollars of Superfund money before a court has considered the illegality Citizens asserting a true public health or environmental interest in the response cannot obtain adequate relief if an inadequate cleanup is allowed to proceed¹⁶⁸

The court also considered "similar statements by Senator Mitchell¹⁶⁹ and Representative Florio,¹⁷⁰ which also stood for the

166. *Princeton Gamma-Tech*, 31 F.3d at 145 (citing 132 CONG. REC. 28,441 (1986) (statements of Sen. Thurmond)). For comments along similar lines in the House debate, see *Princeton Gamma-Tech*, 31 F.3d at 145 (citing 132 CONG. REC. 29,736 (1986) (statements of Rep. Glickman)).

167. *See id.* at 145-46.

168. *Id.* at 145 (citing 132 CONG. REC. 28,409 (1986) (statement of Sen. Stafford)).

169.

Clearly the risk to the public health is more of an irreparable injury than the momentary loss of money The public, however, has no recourse if their [sic] health has been impaired. For this reason, courts should carefully weigh the equities and give great weight to the public health risks involved.

Id. at 145 (citing 132 CONG. REC. 28,429 (1986) (statement of Sen. Mitchell)).

170.

A final cleanup decision, or plan, constitutes the taking of action at a site, and the legislative language makes it clear that citizens' suits under [Sec. 9659] will lie alleging violations of law and irreparable injury to health as soon as — and these words are a direct quote [from subsection 9613(h)(4)]— "action is taken."

Id. at 145 (citing 132 CONG. REC. 29,472 (1986) (statement of Rep. Florio)).

idea that subsection 9613(h)(4) maintains citizens' rights to challenge EPA response plans before they are implemented when their [sic] is risk of harm to the public health."¹⁷¹ As McConnell notes further:

It is from these conflicting views of the members of Congress who directly participated in the drafting of the statute, that the Third Circuit determined that the legislative history was confusing. The court than [sic] opined that a statement by Senator Stafford provided a pragmatic guideline to interpreting subsection 9613(h)(4).¹⁷²

Senator Stafford stated:¹⁷³

[T]he courts must draw appropriate distinctions between dilatory or other unauthorized lawsuits by potentially responsible parties involving only monetary damages and legitimate citizens' suits complaining of irreparable injury that can be only addressed only [sic] if a claim is heard during or prior to [a] response action.¹⁷⁴

McConnell comments: "After determining that the language of the statute, and its legislative history was inconclusive as to when a citizen's suit may be entertained, the Third Circuit opted to follow the objectives of CERCLA and allow the right to the remedy envisioned by the citizens suit provision."¹⁷⁵ The Third Circuit held that "by differentiation between compensatory and irreparable injury, a District Court has jurisdiction to hear a citizens' suit brought under section 9613(h)(4) even before the completion of a distinct phase of the cleanup, when irreparable harm to public health or the environment is threatened."¹⁷⁶

The *Princeton Gamma-Tech* court was not the last to examine the legislative history of this provision. In *United States v. NL Indus., Inc.*,¹⁷⁷ a district court in Illinois approached the meaning of section 9613(h) by examining the reports of the House Public Works and Transportation Committee and the House Judiciary

171. McConnell, *supra* note 156, at 120.

172. *Id.* at 120-21.

173. McConnell, *supra* note 156, at 120-21 (citing *Princeton Gamma-Tech*, 31 F.3d at 144-45).

174. *Princeton Gamma-Tech*, 31 F.3d at 146 (citing 132 CONG. REC. 28,409 (1986) (statement of Sen. Stafford)).

175. McConnell, *supra* note 156, at 122.

176. *Id.* at 122 (citing *Princeton Gamma-Tech*, 31 F.3d at 148-49).

177. 936 F. Supp. 545 (S.D. Ill. 1996)

Committee.¹⁷⁸ Utilizing these sources, the court concluded that section 9613(h) “does not provide federal courts with jurisdiction to enjoin an ongoing remedial action.”¹⁷⁹ Thus by using Committee Reports, instead of floor statements, the court arrived at a holding opposite to that of the court in *Princeton Gamma-Tech*. Notably, in *Clinton County Comm’rs v. EPA*,¹⁸⁰ the Third Circuit reversed its earlier holding in *Princeton Gamma-Tech*; in this instance, the court relied on both the Committee Reports and the House floor statements.¹⁸¹

Princeton Gamma-Tech is an example of a court looking at legislative history simply for the exercise of the process. This is a problem because it lends credibility to certain legislative history, even though it was not crucial to the court’s decision. By using legislative history in this roundabout way, the court assumes there is some legitimacy in its examination. As a result of their citing the legislative history, it is likely the discussion of the floor statements, although they are not crucial to the holding, are likely to retain some precedential value. This will have the negative effect of leading future courts to believe the legitimacy of these statements as the collective opinion of Congress.

2. Additional Considerations

Both floor statements and colloquies represent the views of only a minority of members. Assuming that a statement was actually uttered on the floor, there is no guarantee that anyone heard it. There may have been few or no other members on the floor at the time. Additionally, if there had been others on the floor, they may not have been paying attention, or may not have known enough about the bill to participate in debate. Furthermore, they may not have been invited to participate in a scripted exchange.

Often, legislative history is manufactured by Members of Congress who believe such practice to be easier than attempting to amend the legislation to incorporate their views. “All it takes is

178. *Id.* at 550 (citing H.R. REP. NO. 99-253(V), at 22, 25-26 (19__)).

179. *Id.* at 551.

180. 116 F.3d 1018 (3d Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 687 (1998).

181. *See id.* at 1023-24.

one [m]ember of Congress declaring on the floor his or her 'understanding' of what some vague portion of the bill is 'intended to mean.'¹⁸²

It is not uncommon for a Member to go to the floor and make a statement on an issue not currently in debate, simply to satisfy an unhappy constituent or interest group.¹⁸³ This type of gesture is often demanded by politics, and its result should not be considered a meaningful part of the legislative process. Unfortunately, a judge could potentially use such an unreliable statement from the *Congressional Record* and arrive at an incorrect result.¹⁸⁴

C. Hirschey v. FERC¹⁸⁵

A colloquy is an exchange on the House floor, intended to flesh out the meaning of some particular part of a bill. In the usual scenario, the two members involved in the colloquy, the sponsor of the bill and another member, cooperate in this exchange. "The second member asks the sponsor what the bill is intended to mean, and the sponsor answers."¹⁸⁶

Colloquies are not spontaneous eruptions of debate; they are staged exchanges. "Frequently . . . the colloquy is written by just one of the members, not both. It is handed to the other actor and the two of them read like a grade B radio script."¹⁸⁷ Most often, colloquies are not designed to persuade or inform other members. These exchanges are targeted for a judicial audience, which later will examine these debates to gauge what the institution itself actually "intended" when it enacted the legislation.¹⁸⁸ According to Judge Mikva, "that is the material that judges later will solemnly pore over, under the guise of 'studying the legisla-

182. Slawson, *supra* note 4, at 397.

183. See Hatch, *supra* note 6, at 45.

184. See *id.*

185. 777 F.2d 1 (D.C. Cir. 1985).

186. Slawson, *supra* note 4, at 397.

187. Mikva, *A Reply To Judge Starr*, *supra* note 104, at 384.

188. See William S. Moorhead, *A Congressman Looks at the Planned Colloquy and Its Effect in the Interpretation of Statutes*, 45 A.B.A. J. 1314 (1959).

tive history.'¹⁸⁹

In his concurring opinion in *Hirschey v. FERC*, Judge Scalia used a Senate colloquy to show that "members may be divided on whether [legislative] history reflects their understanding"¹⁹⁰ of legislation. In the quoted exchange, Senator Armstrong challenged whether Senator Dole had actually read a Committee Report.¹⁹¹ He further questioned whether any Senator had actually done so.¹⁹² Senator Armstrong clarified:

[F]or any jurist, administrator, bureaucrat . . . or others who might chance upon the written record of this proceeding, let me just make the point that this is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute.¹⁹³

In this situation, the court used one type of legislative history, a colloquy, to prove the illegitimacy of another type, the Committee Report. When reading the *Congressional Record*, there is no way for a court to distinguish between " 'hot debate' which really tells a reviewing court what was troubling the Congress and what the majority wanted to achieve, and the *pas de deux* where two members get up and read a congressional version of a psychodrama from a prepared script."¹⁹⁴ By using a colloquy to undercut the value of some other legislative history, the court shows that it does not understand the severity of the problem. If a Committee Report is not appropriate for a court to use, then why is a colloquy?

D. *Additional Problems With Judicial Use of Floor Statements*

The "extensions of remarks" is an appendix that contains material that has not been spoken on the floor, but is subsequently inserted in the *Congressional Record* with permission.¹⁹⁵ The rules require that the lead item among the extensions be "desig-

189. Mikva, *A Reply To Judge Starr*, *supra* note 104, at 384.

190. 777 F.2d 1, 7 n.1 (D.C. Cir. 1985) (Scalia, J., concurring).

191. *Id.*

192. *Id.*

193. *Id.* (citing 128 CONG. REC. S8659 (daily ed. July 19, 1982)).

194. Mikva, *Reading and Writing Statutes*, *supra* note 21, at 185.

195. OUR AMERICAN GOVERNMENT, H.R. DOC. NO. 102-192, at 21 (1993).

nate[d] and distinctly mark[ed]."¹⁹⁶ The procedures for inserted statements differ in each chamber.

When a Senator submits an unspoken statement for insertion into the body of the *Congressional Record*, she must personally bring the printed copy of the remarks to the Legislative Clerk in the Senate chamber.¹⁹⁷ The usual practice is that it will be "editorially gathered" and placed under the heading "Additional Statements."¹⁹⁸ However, statements may be printed at other locations in the *Congressional Record*, when in "the editorial judgment of the Chief of Official Reporters, it is essential to do so in the interest of continuity and germaneness."¹⁹⁹ Allowing the unspoken statement to be printed in other locations is certainly a great way to fool courts into believing that the statement was actually made.

A representative may insert material in a section marked "General Leave," following the debate of the legislation it concerns, as long as he has permission of the bill's floor manager.²⁰⁰ A representative may have any "extraneous matter" printed in the *Congressional Record*, by merely obtaining the permission of the Acting Speaker.²⁰¹ Furthermore, the representative need not present the remarks personally, as in the Senate; it simply must be submitted to the Official Reporter of Debates with the actual signature of the member.²⁰²

The problem of identifying statements that have not been actually spoken is addressed by the requirement that they be preceded by a bullet symbol.²⁰³ This certainly represents an improve-

196. JOINT COMM. ON PRINTING, *supra* 150, at 11.

197. Senate Supplement To "Laws and Rules for Publication of the Congressional Record" -Effective February 10, 1970, at 1.

198. *Id.* at 2.

199. *Id.* at 3.

200. HOUSE SUPPLEMENT, *supra* note 150, at 3.

201. *Id.* at 1-3.

202. *Id.* at 6. In the words of the Rules, the term signature is italicized for emphasis. However, it is common in most Congressional offices for staff members to sign the Representative's name on the printed copy of remarks.

203. "Only as an aid in distinguishing the manner of delivery in order to contribute to the historical accuracy of the Record, statements or insertions in the Record where no part of them was spoken will be

ment over the days when all insertions were included in the stream of actual debate, without being distinguished in any way.²⁰⁴

While the practice of bulleting unspoken remarks would seem to provide a useful demarcation, Judge Mikva explains that "most judges think that 'bullets' relate only to guns. The hard-fought reform that requires a small dot (called a 'bullet') to appear before any speech in the Congressional Record that was not delivered in person is a meaningless symbol to most judges."²⁰⁵ Furthermore, "[t]his still permits a Member to utter just one sentence of his speech, and it will appear in the RECORD without a bullet, as if he delivered it all."²⁰⁶

Legislative history is by nature incoherent. No institutional authority controls its making. Any legislator who can get him or herself recognized can stand up on the floor and make legislative history at any time. There is no requirement that the history of one part of a bill be consistent with other parts of the bill, or even with the part to which it relates. There is no requirement that it conform to a bill's basic purposes. In fact, a point made by legislative history is likely not to conform to a statute's basic purposes, because there would be less reason to make it if it did. Most manufactured legislative history is defensive—it is motivated by a fear that in its absence the statute will be interpreted differently.²⁰⁷

Judge Wiggins does not put much reliance in floor statements and other legislative materials.²⁰⁸ He explains that "[f]loor statements, colloquies and Committee Reports are the product of individual legislators or their committee staff. They do not repre-

preceded and followed with a 'bullet' symbol, i.e., •" JOINT COMM. ON PRINTING, *supra* 150, at 3.

204. 131 CONG. REC. H2972-03 (1985) (statement of Rep. Lott).

205. Mikva, *Reading and Writing Statutes*, *supra* note 21, at 183. One suggestion to alleviate this problem is to print remarks that were not spoken in a different typeface. See 131 CONG. REC. H11,948-03 (1985) (statement of Rep. Foley).

206. 131 CONG. REC. H2972-03 (1985) (statement of Rep. Lott).

207. Slawson, *supra* note 4, at 407.

208. Letter from Judge Wiggins, *supra* note 4. Judge Wiggins' insight is of special value because he served as a Member of Congress from 1967 to 1969. He has served as a judge on the United States Court of Appeals for the 9th Circuit since 1984.

sent the will of Congress.”²⁰⁹ Judge Fuster-Berlingeri concurs. These statements and reports “often reflect the real purpose of legislation only in limited ways. They are sources that should be used with great caution.”²¹⁰

Once legislation reaches the House floor most Members of Congress are unaware of the detailed content of the bill. Instead, it is likely that a legislator will condition her vote on recommendations of colleagues who have taken leadership roles on the particular bill.²¹¹ Additionally, advice is sought from lobbyists and constituents who may possess an expertise in the subject that the bill addresses. In short, Congress is a bureaucratic institution that does not fit the image held by most judges or the general population.²¹²

Judge Kenneth Starr²¹³ argues that only the record of speeches on the floor of either chamber should be considered even minimally probative of Congress’ intent.²¹⁴ He explains that at least Members of Congress had the opportunity to hear these remarks.²¹⁵ He undermines his argument by noting that only a minority of Members usually hears these remarks, and their comprehension is usually quite superficial.²¹⁶

There are also many times when Members speak to mostly an empty House.²¹⁷ This takes place every night that the House is in

209. *Id.* at 2.

210. Letter from Judge Fuster-Berlingeri, Justice, Commonwealth of P.R., Sup. Ct. 2 (on file with author). Judge Fuster-Berlingeri’s insight is of special value because he served as a Member of Congress from 1985 to 1992. He has served as a Judge on the Puerto Rico Supreme Court since 1992.

211. See Brudney, *supra* note 20, at 27.

212. See *id.* at 26-27; see also Breyer, *supra* note 5, at 858-59.

213. Judge Starr served as a judge on the United States Court of Appeals for the D.C. Circuit from 1979 to 1994. He is currently the independent prosecutor for the Whitewater investigation.

214. Starr, *supra* note 49, at 375-76.

215. *Id.*

216. *Id.*

217. See Mikva, *Reading and Writing Statutes*, *supra* note 21, at 185. For several years, C-SPAN did not pan the gallery when televising the House of Representatives. The cameras that televise the house are controlled by the House’s internal bureaucracy. During his tenure as speaker, Tip O’Neill quietly told Congressional camera operators to pan the empty chamber in order to show that few members, if any, at-

session in after-hours speeches known as "Special Orders." These speeches are made to an empty House once the legislative business for the day has been completed. If she is speaking to an empty House, a Member may verbally challenge someone to contradict her. The fact that there is no answer may simply be a result of the fact that nobody else is there. Again, this attacks the validity of floor statements as a credible form of debate, because it is quite possible that no one ever heard it.

III. CONFERENCE COMMITTEE REPORTS

This section deals with the role conference Committee Reports play in the legislative process. It will use an environmental example to illustrate the inherent problems when courts use Conference Committee Reports.

A. *The Alaska National Interest Lands Conservation Act and the Colorado Wilderness Act*

In the Alaska National Interest Lands Conservation Act,²¹⁸ Congress conferred a right of access to "inholdings" contained within national forest areas. The relevant part the statute reads:

Notwithstanding any other provisions of this Act or other law, in any case in which State owned or privately owned land, including subsurface rights of such owners underlying public lands, or a valid mining claim or other valid occupancy is within or is effectively surrounded by one or more conservation system units, national recreation areas, national conservation areas, or those public lands designated as wilderness study, the State or private owner or occupier shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned

tended the after hours speeches. Due to this change, television viewers were able to see if statements were made to an empty house. The attendance at a session, however, is indicated nowhere in the Congressional Record. As a side note, in 1994, as part of its reform package, the House Republican leadership ended the practice of panning the floor. C-SPAN Networks Home Page (visited _____, 19__) <<http://www.c-span.org>>.

218. Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended in scattered sections of 16 U.S.C. and 43 U.S.C.) [hereinafter the "Alaska Act"].

land by such State or private owner or occupier and their successors in interest. Such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such lands.²¹⁹

According to the Ninth Circuit, in *Montana Wilderness Ass'n v. U.S. Forest Serv.*, the statutory text was inconclusive as to whether the provisions affected all national forests or only those in Alaska.²²⁰

In evaluating this supposed ambiguity, the court observed that later in the same Congress, different versions of the Colorado Wilderness Act²²¹ were passed by each chamber and sent to a conference committee. The Senate version of the Colorado Act conferred a similar right of access to inholdings in Colorado, while the House version contained no provision on the subject.²²² The conferees agreed to delete the Senate language, on the express understanding that the Alaska Act already covered access to the national forests in Colorado.²²³ Thus, the final legislation contained no provisions with regard to access to inholdings.

According to Professor Brudney, the reliability of the Conference Report in this instance stems from the fact that there was a shared understanding reached by Congress as a whole.²²⁴ He explains that the Senate changed its position only because its designated representatives, the conferees, officially advised the Senate that this Congress had already conferred such access in the Alaska Lands Act.²²⁵ Professor Brudney concludes that by ac-

219. 16 U.S.C. § 3170 (1994).

220. See Alaska Act § 1323(a), 16 U.S.C. § 3210(1) (1988); see also *Montana Wilderness Ass'n v. U.S. Forest Serv.*, 655 F.2d 951 (9th Cir.1988) (finding ambiguity in both the text and the legislative history regarding the application outside of Alaska of the access provisions of the Alaska Lands Act, but determining that the text is most sensibly read to favor "Alaska-only" coverage and that the legislative history fails to overcome that reading).

221. Pub. L. No. 96-560, 94 Stat. 3265 (1980) (codified as amended at 16 U.S.C. §§ 192b-9, 1131-1133) [hereinafter the "Colorado Act"].

222. Compare H.R. 5487 as passed by the House, 125 CONG. REC. 35,133-34 (1979) (no provision on access), with H.R. 5487 as passed by the Senate, 126 CONG. REC. 27,280, 27,282 (1980) (§ 7 covers access).

223. See H.R. CONF. REP. NO. 1521 (1980), reprinted in 126 CONG. REC. 31,858, 31,864 (1980).

224. See Brudney, *supra* note 20, at 74.

225. See *id.* at 74.

cepting the House version on access, and receding from the Senate version, for the reasons explained in the conference report and reiterated on the Senate and House floors,²²⁶ Congress as a whole adopted the understanding that the previously-enacted Alaska Lands Act conferred a nationwide right of access.²²⁷

Professor Brudney's assessment that this was a valid use of legislative history is easily contradicted. If Congress believed that the Alaska Wilderness Act covered all inholdings in national forest areas, Congress may explain this interpretation in that legislative enactment, but not in subsequent reports. Here, the court clearly used legislative history where it was unnecessary. As observed above, the pertinent statutory text begins: "Notwithstanding any other provisions of this Act or other law, in any case in which State owned or privately owned land" ²²⁸ This section of the statute clearly pertains to this act and other laws. It provides an exception that will apply in any case where this situation arises. Courts should not use legislative history to validate their opinions when unnecessary. This is especially true here, where the statutory text was anything but ambiguous.

B. *Additional Considerations*

Referral to a conference committee is a critical stage in shaping legislation. Here, a bill takes on its final form,²²⁹ as differ-

226. See 126 CONG. REC. 32,403 (1980) (statement of Sen. Hart) ("The Conference Committee did not accept the Senate bill's provision on access to inholdings in Colorado wilderness areas, because Congress has recently enacted —as part of the Alaska lands bill—a similar provision to apply to access to inholdings in all public lands."); *id.* at 32,405 (statement of Sen. Armstrong) ("Access to privately owned inholdings . . . is especially important today[, and Senate access language] has been dropped from this final legislation only because even more comprehensive language is included in the Alaska Lands legislation . . ."); *id.* at 32,408 (printed comparison of House, Senate, and conference versions); see also *id.* at 31,882 (statement of Rep. Johnson) (inserting a "factsheet" into the record which states that the relevant access provisions are in the "Alaska Lands Bill").

227. See *Montana Wilderness Ass'n*, 655 F.2d 951 (withdrawing an earlier decision on the basis of the new statute and in particular its legislative history).

228. 16 U.S.C. § 3170 (1994).

229. The conference report represents the final form of legislation because of the congressional practice that reports be adopted or re-

ences between the House and Senate versions of the bill are reconciled. Like Committee Reports, Conference Reports contain both the legislative text and explanatory language. The explanatory language details whether the conference committee has adopted the House or Senate language, and often explains its meaning. It often duplicates the language from the House and Senate reports. When a conference report reaches the floor of each chamber, only the legislative text is considered for a vote.

Courts tend to use conference reports in much the same way that they use Committee Reports. Judges look to the explanations provided in the section-by-section analysis to determine intent behind particular statutory provisions. Judge Wiggins believes that conference reports are one of the better sources of legislative intent, but still offers some warning: "Conference reports are marginally different because they tend to speak for the [legislative] body, but, nevertheless, they are not truly reliable."²³⁰ Conference Reports are frequently enigmas. In many cases, the analysis fails to explain adequately the reasons why one chamber has acceded to the text of the other's bill.²³¹

Additionally, Conference Reports may provide "explanations of the legislation that are not corroborated by any other record of the process."²³² This results because the explanations may be different from those that were offered at the subcommittee and committee levels. Judges need also remember that the five delegates may be named to conference committees, while they are not permitted to vote on the House floor.²³³

Finally, the conference report may be very different from the bills that originally passed on the floor of either chamber. This scenario is particularly likely when the Democratic Party controls one chamber and the Republican Party the other.

jected as a whole without amendment. See CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 818 (1989).

230. Letter from Judge Wiggins, *supra* note 4, at 2.

231. See Patricia M. Wald, *Some Observations On The Use Of Legislative History In The 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 201 (1983).

232. *Id.* at 201.

233. C-SPAN Networks Home Page, *supra* note 217.

CONCLUSION

The legislative history of [the statutes] is ambiguous Because of this ambiguity it is clear that we must look to the statutes themselves to find the legislative intent.²³⁴

Thurgood Marshall

While use of legislative history by courts may provide certain benefits, these are marginal when weighed against the potential for improper use.²³⁵ The great attraction of legislative history is that it provides clues when other avenues fail.²³⁶ The problem is that legislative history has the potential to override or at least compromise the statute itself.²³⁷

"Legislative history . . . is unlikely to come to the attention of anyone not present in the room where it was made, until researchers come upon it years later while looking for justifications for interpreting the law to their liking."²³⁸ Courts should resist the temptation to use legislative history as an interpretive aid. The preceding environmental examples have shown that any use of legislative history is fraught with peril. In short, courts may use legislative history to support the rationale of a decision at the expense of remaining true to the enacted text of legislation. By applying only the enacted text, judges will be more truthful to the American legislative process.

234. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412 n.29 (1971).

235. Starr, *supra* note 49, at 379.

236. Easterbrook, *supra* note 16, at 61.

237. Starr, *supra* note 49, at 375.

238. Slawson, *supra* note 4, at 408.