

Reading the Mind of Congress

Legislative History Research on the Internet

Kurt X. Metzmeier

Anyone with a passing knowledge of the activities of the United States Congress would not be surprised that, on rare occasions, the language of its statutes tends to mystify more than to enlighten. When this occurs, lawyers typically resort first to the application of rote rules of textual analysis known collectively as the “canons of construction.” Favorite dictionaries are hauled out, sentences are parsed, and there is liberal use of the standard text *Sutherland Statutory Construction*, now in its sixth edition.



When this method fails or leads to an absurd result, the advocate tries to determine the purpose of the provision by examining the documents created by Congress on its way through both houses to the desk of the president. This method of analyzing the legislative history of a law is not without controversy. Supreme Court Justice Antonin Scalia, a strict “textualist,” despises the approach, while his colleague Justice Stephen Breyer argues it is a necessary tool for avoiding judicial results clearly contrary to the purpose of Congress.

While the Scalia-Breyer clash is interesting, it shows that both methods are still valid and that due diligence requires lawyers to research a statute’s legislative history whenever its meaning is in doubt. This task once involved thumbing through government reports, reading stacks of microfiche, or accessing expensive databases. Now, however, at least the most recent statutes can be researched for free on Congress’s award-winning Thomas *thomas.loc.gov* website.

The key documents for legislative history research are committee reports, which encapsulate the thinking of the committee or committees that most closely considered a piece of legislation, and the *Congressional Record*, which records the debates on the floor of Congress. Thomas has congressional reports going back to 1995 and the *Congressional Record* back to 1989. More importantly, the Thomas website has search

engines and guide pages that make researching legislation relatively easy.

The best way to research a statute’s legislative history is to search by its Public Law (P.L.) number (found in parentheses after the text of the statute in U.S. Code) by following the PUBLIC LAWS link on the Thomas main page under the header FIND MORE LEGISLATION. The search will take you to a main page that provides access to a wealth of information, including sponsors, related bills, the text of the law, and, more importantly, links to all committee reports. Most useful is the ALL INFORMATION page, which has a detailed listing by date and time of every action on a bill from its introduction to its signing. There are links to every text created in the process, whether it be a committee report, an amendment, a related resolution, a debate in the congressional record, or a conference report.

While the ALL INFORMATION page is the most direct approach, you can also independently search the *Congressional Record* from a link on the front page under the OTHER LEGISLATIVE ACTIVITY header. Like most Thomas search pages you can only search one congressional session at a time, but within that restraint you have many options. You can limit by house of congress, date or by the name of a member of congress. For example, to find what former Rep. Romano Mazzoli (D-Ky.) was saying about immigration in 1989, I searched the keyword “immigration,” choosing Mazzoli from a drop down menu and limiting to the 101st Congress. I found a number of relevant documents.

Congressional reports can also be searched on their own from a link on the Thomas home page. That link takes you to a search page where you can run a keyword search of all reports from a particular congress, or you can limit to a specific committee. You can also browse all reports of a house. However, you cannot search for a House or Senate report by report number (for example, something like H. Rep. No. 108-34 or S. Rep. No. 104-98). One workaround is to browse the reports of the house indicated by the citation. Because the results list is sorted sequentially by report number, you can then scroll through to find your cited report. Since

there are only 50 results on each page, this can take a lot of clicking the FORWARD link.

Of course, the Thomas website was designed primarily to provide citizens with access to the current activities of Congress. To research laws in their embryonic stage, search by either bill number or topic under the LEGISLATION IN CURRENT CONGRESS header. Alternately, you can search legislation proposed by a particular member of Congress. For example, a search of Sen. Jim Bunning (R-Ky.) shows 40 sponsored bills, one concerning distilled spirits, several related to coal and two regarding integrity in professional sports, an unremarkable result for a Kentucky legislator who also happens to be a member of the baseball Hall of Fame.

While Justice Scalia may furrow his brow at the thought, researching the legislative history of federal statutes is still a necessary part of the research process when a lawyer

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deals with new statutes whose language has yet to be fully interpreted by the courts. With good coverage back to 1995, and excellent summary pages for enacted legislation, Thomas is a valuable tool for the dirty work of exploring the sometimes disordered but always relevant mind of Congress.

Update: Unpublished Decisions

With the release of Order 2006-09, the Kentucky Supreme Court has accepted a proposed change to SCR 76.28 to allow lawyers to cite to unpublished decisions of the Court of Appeals and Supreme Court as persuasive but not mandatory authority. The order (published in the November 2006 issue of the *KBA Bench and Bar*) is effective January 1, 2007. The language of the final order differs from the proposed rule, allow-

ing only citation of cases rendered since 2003 and limiting citation of unpublished decision to situations when “no published opinion [exists] that would adequately address the issue.” The new SCR 76.28(4)(c) now reads:

Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document, and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action.

Diana Skaggs, a member of the rules committee that suggested the change, writes in a December 7, 2006, post on her blog *Divorce Law Journal* that she “suggested making the rule prospective so all we thought we knew about the law wouldn’t have to be revisited, all our treatises wouldn’t have to be updated with old unpublished cases, and we wouldn’t have to do legal research on every issue even if we think we know the law just to see whether in the past there was some old unpublished case.” She sheds no light on the reason behind the addition of the “adequate published decision” requirement, but it was likely intended to try to keep lawyers whose research has turned up good, on-point published decisions from feeling they need to read all the relevant unpublished decisions. My guess is that most lawyers will want to read those cases anyway, and I’ll likely advise my students to do so, because they will never know what decisions a particular judge or panel thinks “adequately address[es]” the issue before them.

Kurt X. Metzmeier is the acting director of the Law Library and Associate Professor of Legal Bibliography at the University of Louisville Brandeis School of Law. He is the editor and principal author of the Kentucky Legal Research Manual, 3d. ■