

USE OF LEGISLATIVE HISTORY: WILLOW WITCHING FOR LEGISLATIVE INTENT

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I. INTRODUCTION

The search for legislative intent in construing statutes sparks a great deal of discussion in case decisions and in legal literature. In Idaho, the use of legislative history arises consistently in appellate court decisions. An increased use of this approach to statutory con-

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struction suggests the need for an examination of this practice. Legislative history does not necessarily equate to legislative intent. It is the aim of this article to inform the reader of the uses made of legislative history by Idaho litigants and courts, and to advise and warn the reader of the positive and negative aspects of using legislative history materials in formulating arguments and rendering opinions.

A. Defining Legislative History

A brief refresher course may be in order for those to whom the phrase "legislative history" evokes little more than a vague recollection of first year law school. When faced with a statute whose language is ambiguous in a particular context, one examines case law for court interpretations of the language. But if there is no controlling case law on point, lawyers may decide to research the legislative history of the law and cite to it as persuasive authority to support their position. The legislative history of a law includes any and all public documents relating to the law when it was still a bill in the legislature.

B. Types of Legislative History

The type of available material varies in each state. In some states, like Texas, videotape of legislative floor debate is available;¹ in other states, like Rhode Island, no floor or committee debate records are available.² Idaho falls in the middle. While drafting records are confidential and not available to the public, and legislative floor debate is not recorded, a researcher in Idaho can find bill amendments, voting records, statements of purpose and fiscal impact, committee minutes and attachments (sometimes including testimony, reports or studies provided to the committees considering the bill), statements of legislative intent or minority reports from the journals of the House and Senate, and sometimes legislative interim study committee records and reports.

The oldest Idaho legislative history available is that of the *Constitutional Convention Proceedings of 1889-1890*. These debates are transcripts of the convention delegates' discussions on the floor. No committee records were preserved, but the floor discussion is very interesting and documents the development of various Idaho constitutional provisions (some of which have not changed in 117 years). After

1. See Texas Senate, <http://www.senate.state.tx.us/avarchive/?yr=2006> (last visited Mar. 23, 2007).

2. See, e.g., University of Rhode Island, Rhode Island Legal Sources, <http://www.uri.edu/library/guides/subject/govlaw/rilegal.html#leghist> (showing the unavailability of such documents) (last visited Mar. 23, 2007).

the *Constitutional Convention Proceedings of 1889-1890*, there is a long gap in legislative history until the 1960s, when House committee minutes begin to become available, and the 1970s, when Senate committee minutes and statements of purpose appear on the scene.³

All of these materials are available to the public in the Legislative Reference Library in the Statehouse in Boise. Some, though not all, of these materials are also available in the Idaho State Law Library in Boise and in the University of Idaho Law Library in Moscow. Further, many of these materials of recent vintage are also available on the Idaho Legislature's web site.⁴ Copies of legislative bills, their procedural history and statements of purpose/fiscal notes are available online from 1998 through the present.⁵ Committee minutes are available on the web site from 2003 through the present.⁶

C. Use by the Idaho Appellate Courts

Legislative history is cited in Idaho appellate court decisions as far back as 1908, when the court referred to congressional debate.⁷ However, references to state legislative records did not begin to appear in the Idaho Reports until 1965 and did not become routine until the 1980s. A statistical review of published Idaho cases reveals that, while the use of legislative history is consistent, overall use has not exceeded three percent of the decisions published in the Idaho Reports.

3%

3. What happened to Idaho legislative committee records prior to 1960 is a matter of some speculation. It appears likely that committee records existed at one point, because some miscellaneous legislative finance committee records from the early 1930s were found in the Historical Archives. However, no other records before 1960 have been found. They may have been lost accidentally or even deliberately destroyed. Modern ideas of sunshine laws and public access to governmental records did not sweep through the country until the 1970s. Some committee comments from early 1960s legislative records seem to imply that the committee records at that time were considered proprietary and confidential records.

Another inference may be drawn from House and Senate rules on committee attendance. For example, from 1895 through 1947 only the House members and attaches were allowed to attend a committee, unless authorized by the Speaker or committee chairman. An example of that rule can be found in the House Journal of January 11, 1917. *Journal State H. 14, 1st Sess., at 48 (Idaho 1917)*. It was not until the mid-sixties that the House rules expressly allowed any House member to attend any committee meeting. That rule, however, allowed a committee to go into executive session, and exclude other members of the House from attendance. That process of exclusion may have impacted the adequacy or existence of certain committee records.

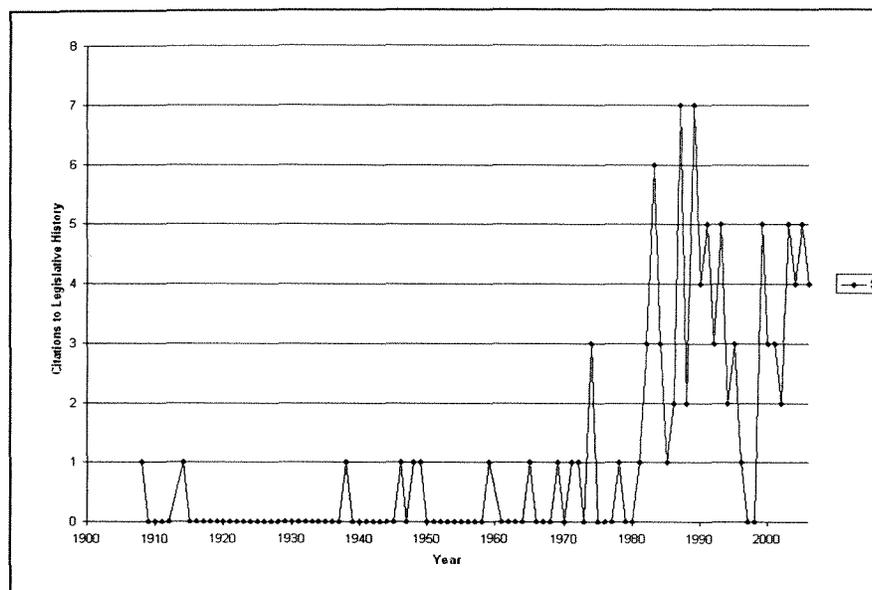
4. Idaho Legislature, <http://www.legislature.idaho.gov> (last visited Mar. 22, 2007).

5. *Id.*

6. *Id.* (follow "Committee Minutes").

7. *Green v. Wilhite*, 14 Idaho 238, 93 P. 971 (1908).

Citations to Legislative History in Idaho⁸



From 1967 to 1976, there was an average of 0.6 decisions per year citing to legislative history. There was an average of 1.7 decisions per year citing to legislative history from 1977 to 1986. A strong increase in use appeared between 1987 and 1996, with an average of 3.9 decisions per year citing to legislative history. For the last ten years (1997–2006), Idaho appellate decisions using legislative history averaged 3.1 decisions per year. These numbers are comparable to a 2005 study in the state of Washington, which found an increase in usage in the late 1980s, a subsequent drop, and an increase again in the early 2000s.⁹

II. STANDARD FOR JUDICIAL EXAMINATION

A. Generally

When may legislative history be examined by a court? The traditional rule provides that a court will not look to the legislative history

8. Our thanks to Brian Wonderlich, University of Idaho College of Law student, who performed this statistical analysis.

9. See William Bridges & Aldo Melchiori, Washington State Senate Staff, Address at the Annual Meeting of the National Conference of State Legislatures: The Judicial Misuse of Legislative History: Lessons from Washington State (Aug 16, 2005).

of a statute if the plain meaning of the law is clear.¹⁰ Only if the language is ambiguous will the court look beyond the language to the legislative history.¹¹ At first blush, this rule of statutory construction appears to be simple and straightforward—case law demonstrates that it is not.

The classic treatise on statutory construction states the following:

Generally, a court would look to the legislative history for guidance when the enacted text was capable of two reasonable readings or when no one path of meaning was clearly indicated. . . .

. . . .

It is said that extrinsic aids may be considered only when a statute is ambiguous and unclear. However, ambiguity is not always considered a prerequisite to the use of extrinsic aids. Thus it has been said, "Usually a court looks into the legislative history to clear up some statutory ambiguity . . . but such ambiguity is not the sine qua non for a judicial inquiry into legislative history;" "the plain meaning rule . . . is not to be used to thwart or distort the intent of Congress by excluding from consideration enlightening material from the legislative files;" there is no rule which forbids anything that might aid in the construction of words used in a statute no matter how clear they may be.¹²

A review of case law confirms that courts, and even individual judges and Justices sitting on the same bench, have different ideas as to when it is appropriate to review legislative intent to interpret a statute.

B. Federal Courts

Small wonder that state judges cannot agree, when this issue is an ongoing bone of contention among the U.S. Supreme Court Justices. Take the case of *Koons Buick Pontiac GMC, Inc. v. Nigh*,¹³ in which the majority opinion of the Court examines the history of a

10. NORMAN J. SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION § 46.01 (6th ed. 2000).

11. *See id.* § 48.01.

12. *Id.* § 48.01, at 410–13 (footnotes omitted).

13. 543 U.S. 50 (2004).

statute, as well as other extrinsic aids such as government bulletins and congressional drafting guides. In their concurrence, Justice Kennedy and Chief Justice Rehnquist stated that the Court was properly choosing "not to rest its holding solely on the words of the statute" even if the words were not ambiguous and did not lead to an absurd result.¹⁴ Justices Stevens and Breyer went on to say the following in their concurring opinion:

In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product.¹⁵

Justices Thomas and Scalia concluded that the language was ambiguous.¹⁶ Justice Scalia dissented from the opinion, saying the following:

Needless to say, I also disagree with the Court's reliance on things that the sponsors and floor managers of the 1995 amendment *failed* to say. I have often criticized the Court's use of legislative history because it lends itself to a kind of ventriloquism. The Congressional Record or committee reports are used to make words appear to come from Congress's mouth which were spoken or written by others (individual Members of Congress, congressional aides, or even enterprising lobbyists).¹⁷

Justice Scalia went on to say that the legislative history available on the particular bill was not helpful, anyway.¹⁸

In another U.S. Supreme Court case,¹⁹ a majority of the Justices found that the language of the statute was plain and did not lead to absurd results. "We should prefer the plain meaning since that approach respects the words of Congress. In this manner we avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history."²⁰ Interestingly, however, and even though the Court decided it was unnecessary to examine the legislative history of the law in question, it went on to do so anyway!

14. *Id.* at 66 (Kennedy, J. & Rehnquist, C.J., concurring).

15. *Id.* (Stevens & Breyer, JJ., concurring).

16. *Id.* at 67 (Thomas, J., concurring); *see id.* at 70-76 (Scalia, J., dissenting).

17. *Id.* at 73 (Scalia, J., dissenting).

18. *Id.* at 74.

19. *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004).

20. *Id.* at 536.

Though we find it unnecessary to rely on the legislative history . . . we find it instructive that the history creates more confusion than clarity about the congressional intent. History and policy considerations lend support both to petitioner's interpretation and to the holding we reach based on the plain language of the statute.

....

These competing interpretations of the legislative history make it difficult to say with assurance whether petitioner or the Government lays better historical claim to the congressional intent. . . .

These uncertainties illustrate the difficulty of relying on legislative history here and the advantage of our determination to rest our holding on the statutory text.²¹

The Ninth Circuit Court of Appeals has also paid lip service to the plain meaning rule and then looked at legislative history anyway. In a recent case, the court held that an unambiguous statute did not merit an examination of the legislative history because "legislative history, even when clear, may not overcome or displace the textual mandate of a statute."²² However, in a footnote, the court commented on what the legislative history records indicated.²³

C. Idaho Courts

The Idaho appellate courts, like their federal counterparts, also consider and cite legislative history in their decisions. The Idaho Supreme Court reiterated the standard in Idaho in 2006:

This Court must construe a statute to give effect to the intent of the legislature. When construing a statute, this Court "will not deal in any subtle refinements of the legislation, but will ascertain and give effect to the purpose and intent of the legislature, based on the whole act and every word therein, lending substance and meaning to the provisions." However, if the language of a statute is capable of more than one reasonable construction it is ambiguous. "When a statute is ambiguous, 'it must be construed to mean what the legisla-

21. *Id.* at 539, 541-42.

22. *Powers v. Wells Fargo Bank NA*, 439 F.3d 1043, 1045 (9th Cir. 2006).

23. *Id.* at 1045 n.2.

ture intended it to mean. To determine that intent, we examine not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history."²⁴

The Court in this instance found the key term in the statute to be ambiguous and went on to examine the law's legislative history.²⁵ The Idaho Supreme Court has made critical use of legislative history to assist it in interpreting Idaho constitutional provisions,²⁶ as well as statutory provisions. And, the Idaho Court of Appeals also regularly uses legislative history in its opinions.²⁷

As judges and Justices know, the trouble with the plain meaning rule is that real life is not black and white. Language that appears clear and plain to one judge may appear ambiguous to another judge. Even worse, language that appears clear and plain to one judge may also appear clear and plain to another judge—only with the opposite conclusion!²⁸

To some extent, judges are caught between a rock and a hard place. Absent questions of constitutionality, a statute is unlikely to be the subject of argument before a judge if the statute's plain meaning really is plain. When a judge is confronted with a statute whose meaning is unclear in the context of the facts laid before her, some advocate that she should ignore the legislative history and construe the statute in light of the public policy implications.²⁹ Such judges are quickly labeled "activist judges." The alternative is for the judge to re-

24. *Carrier v. Lake Pend Oreille Sch. Dist.*, 142 Idaho 804, 807, 134 P.3d 655, 658 (2006) (citations omitted).

25. *See, e.g., Paolini v. Albertson's, Inc.*, 143 Idaho 547, 149 P.3d 822 (2006); *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 109 P.3d 161 (2005); *Ada County Bd. of Equalization v. Highlands, Inc.*, 141 Idaho 202, 108 P.3d 349 (2005); *Idaho Cardiology Assocs., P.A. v. Idaho Physicians Network, Inc.*, 141 Idaho 223, 108 P.3d 370 (2005).

26. *Idaho Press Club, Inc. v. State Legislature*, 142 Idaho 640, 132 P.3d 397 (2006).

27. *See, e.g., State v. Morrison*, 143 Idaho 459, 147 P.3d 91 (Ct. App. 2006); *State v. Dickerson*, 142 Idaho 514, 129 P.3d 1263 (Ct. App. 2006); *State v. Mercer*, 143 Idaho 123, 138 P.3d 323 (Ct. App. 2005).

28. Fritz Snyder describes such a situation when the interpretation of the same federal law arose in two different cases, one before the Ninth Circuit Court of Appeals, and another before the U.S. Supreme Court. Judge Kozinski on the Ninth Circuit and Justice Scalia both agreed that the meaning of the statute was so clear that it was unnecessary to look at the legislative history. However, they had each come to opposite conclusions on the interpretation of the statute. *See Fritz Snyder, Legislative History and Statutory Interpretation: The Supreme Court and the Tenth Circuit*, 49 OKLA. L. REV. 573, 575 (1996) (citing *United States v. Phelps*, 895 F.2d 1281, 1283 (9th Cir. 1990); *Smith v. United States*, 508 U.S. 223, 242-46 (1993) (Scalia, J., dissenting)).

29. *See Jason M. Horst, Comment, Imaginary Intent: The California Supreme Court's Search for a Specific Legislative Intent That Does Not Exist*, 39 U.S.F. L. REV. 1045 (2005).

view the legislative history of the statute and try to glean the legislative intent from those materials. So, is not gleaning legislative intent a good thing? Well, yes and no.

As Washington D.C. Circuit Court Judge Harold Leventhal declared, the use of legislative history is like "looking over a crowd [of people] and picking out your friends."³⁰ Despite this warning, lawyers continue to cite the legislative history of statutes in attempts to influence statutory construction in their favor. Here is why this practice should be given a critical examination.



III. CRITICAL EXAMINATION

In the past decade, the percentage of attorney-trained legislators serving in the Idaho Legislature never exceeded ten percent, and often was closer to five percent.³¹ It follows that many bills are written by "lay" legislators or lobbyists. When you fold politics into legislative wordsmithing, and mix in a circuitous road to adoption, the result yields a work product that frequently frustrates judges and lawyers.

Legislation is often written with one eye toward adoption and the other eye toward judicial interpretation. This can lead to a visual imbalance between legislative intent and judicial application. As a result, legal professionals search for meaning or purpose in the legislation, but such searches assume a consensus of purpose that, put simply, rarely exists.



A. Legislative Intent Sections of a Bill

The legislative intent section of a bill that is passed and published in the Idaho session laws has the full force and effect of law. As such, they do not fall in the category of legislative history materials over which judges may exercise discretion, unlike the materials we will be discussing in the remainder of this article. However, it is worth pointing out to the reader examples of bills in which the Legislature deliberately sets forth an expression of legislative intent. Such an expression may be codified in the Idaho Statutes with its own section number,³² or they may appear in the publisher's "complier's notes" (Lexis) or in "historical and statutory notes" (West Publish-

30. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

31. Calculations made by the Legislative Reference Library based upon legislators' biographical information from IDAHO SECRETARY OF STATE, IDAHO BLUE BOOK (2005), along with data obtained from legislators to make the most current and not yet published IDAHO BLUE BOOK, which are on file with the authors.

32. See, e.g., IDAHO CODE ANN. § 22-5201 (Supp. 2006).

ing).³³ Unfortunately, legal publishers sometimes fail to print the legislative intent sections in the notes following the statute,³⁴ so it is a good idea to examine the session law behind a statute if intent is in question.

B. Statements of Purpose

In 1972, Idaho's legislature adopted Joint Rule 18 (JR18), which requires each bill to have attached to it a "concise statement of purpose."³⁵ This concise statement is referred to as the bill's statement of purpose. This rule, in relevant part, still exists.³⁶ A statement of purpose is not a part of the bill, is not printed in the Session Laws, and does not have the force and effect of law; however, it does accompany a bill as it circulates through the legislature. Idaho courts cite more frequently to statements of purpose, as an expression of legislative intent, than to any other single type of legislative history material.³⁷ But who authors these documents? Idaho's Legislative Services Office (LSO) has a full-time staff of excellent bill drafters, but these non-partisan professionals are not policy makers. They prepare bill language as directed, but they are prohibited from writing a statement of purpose. Instead, the statement of purpose is frequently written by

33. See, e.g., *id.* § 33-1613A (Supp. 2006).

34. *Id.*

35. IDAHO J. S. & H. R. 18 [hereinafter JR 18], available at <http://www.legislature.idaho.gov/about/joinrules.htm>.

36. The statement of purpose and fiscal notes for JR 18 states the following:

No bill shall be introduced in either house unless it shall have attached thereto a concise statement of purpose and fiscal note. The contact person for the statement of purpose and fiscal note shall be identified on the document. No bill making an appropriation, increasing or decreasing existing appropriations, or requiring a future appropriation, or increasing or decreasing revenues of the state or any unit of local government, or requiring a significant expenditure of funds by the state or a unit of local government, shall be introduced unless it shall have attached thereto a fiscal note. This note shall contain an estimate of the amount of such appropriation, expenditure, or change under the bill. The fiscal note shall identify a full fiscal year's impact of the legislation. Statements of purpose and fiscal notes may be combined in the same statement. All statements of purpose and fiscal notes shall be reviewed for compliance with this rule by the committee to which the bill is assigned. A member may challenge the sufficiency of a statement of purpose or fiscal note at any time prior to passage, except upon introduction.

Id.

37. See, e.g., *Carrier v. Lake Pend Oreille Sch. Dist.*, 142 Idaho 804, 143 P.3d 655 (2006); *State v. Dickerson*, 142 Idaho 514, 129 P.3d 1263 (Ct. App. 2006); *State v. Mercer*, 143 Idaho 123, 138 P.3d 323 (Ct. App. 2005); *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 109 P.3d 161 (2005); *Idaho Cardiology Assocs., P.A. v. Idaho Physicians Network, Inc.*, 141 Idaho 223, 108 P.3d 370 (2005).

the sponsor with a focus on legislative passage rather than judicial interpretation.

In the legislature, a bill's sponsor may downplay a bill's impact, suggesting that minor or "housekeeping" changes are being made, when in fact a substantial change in Idaho's public policy may result.

Other problems with relying on a statement of purpose include flawed assumptions that statements of purpose are amended to reflect a bill's amendment or that a majority of legislators read and agreed with the statement of purpose.

Although JR18 requires committees to review each bill's statement of purpose to ensure compliance with the rule's requirements, experience teaches that is infrequently done. And, while statements of purpose are occasionally scrutinized, this scrutiny is infrequently conducted with thoughts of potential judicial interpretation.

Admittedly, JR18 allows any legislator to "challenge the sufficiency of a statement of purpose."³⁸ But it is important to note that a legislator's challenge to a statement of purpose's "sufficiency" is never voted on. Further, no vote is ever taken on the statement of purpose itself. Bills are voted on. Titles are corrected. Statements of purpose are "attached." A legislator's challenge of a statement of purpose is a tool in debate and is useful for debate almost exclusively, although on occasion a challenge results in a revised statement of purpose. Neither the Senate President nor the Speaker of the House is empowered by the body to rule on the adequacy of a statement of purpose. Further, the legislature is not likely to empower one person with the ability to deny or enhance passage of the bill itself with this procedural challenge. Finally, the concise and sufficient standard, even if it is complied with, offers little legislative assurance of a comprehensive, concise statement of legislative intent to Idaho's courts.

C. Committee Minutes

Idaho legislative committee minutes are the closest a researcher can come to actual discussion and debate on a bill, since floor debate is not preserved. These minutes vary a great deal and may be very scant as to detail (for example, "a discussion period followed"), or they may be quite detailed, including questions given and answers received from a bill's sponsor. Courts cite to committee minutes as well.³⁹

38. JR 18, *supra* note 35.

39. *See, e.g.*, *State v. Doe*, 140 Idaho 271, 274, 92 P.3d 521, 524 (2004); *Canty v. Idaho State Tax Comm'n*, 138 Idaho 178, 184, 59 P.3d 983, 989 (2002); *State v. Broadway*, 138 Idaho 151, 152-53, 59 P.3d 322, 323-24 (Ct. App. 2002).

Problems with relying on comments made in committee minutes include the questionable wisdom of attributing a comment heard by a handful of legislators in a hearing to an entire body of legislators who did not attend the hearing, or assuming that one frequently quoted legislator reflects an entire body's thoughts and judgments. Even a sponsor's statement made in a hearing may not have anything to do with why or how 105 legislators eventually voted on the bill. Nor would it be safe to assume that a majority of legislators reviewed a committee's minutes after they were prepared. Further, reports or studies provided by persons testifying in committee, even if copies were provided to all committee members, may not have been reviewed by any or all of the members, much less by the rest of the legislative body, prior to voting.

D. Journal Statements of Legislative Intent

Other than the plain language of the legislation, perhaps the best way to express legislative intent when litigation seems certain is to prepare and publish a written statement of legislative intent. A statement of legislative intent differs from a statement of purpose. This historic practice is done at the time of a bill's passage or shortly thereafter. Procedurally, a written statement of legislative intent is spread, word-for-word, on the pages of the body's journal with the consent of the body. Sometimes this written intent consists of a brief statement to a department, agency, or commission directing that body how to perform a certain task.⁴⁰ At other times, substantial historical analysis of and legislative intent behind a particular bill are expressed.⁴¹ While this type of statement is only the intent of that legislative body in whose journal it appears, it better reflects legislative consensus than singular, often unilateral, statements made in committee meetings. Judicial reliance on such expressions exists,⁴² and is more appropriately warranted since, unlike a statement of purpose, this written expression of intent is voted on by the body in whose journal the statement is printed.

E. Minority Reports

As part of their duties, the standing, conference, and special legislative committees report back to the full body with their recommendations for action on bills, memorials, resolutions, and other specific

40. See, e.g., Journal State S. 55, 1st Sess., at 200 (Idaho 1999).

41. See, e.g., Journal State S. 48, 1st Sess., at 58-61 (Idaho 1985).

42. See, e.g., *Ada County Bd. of Equalization v. Highlands, Inc.*, 141 Idaho 202, 108 P.3d 349 (2005).

tasks assigned to them. The germane Senate committees also make a report, usually with recommendation, to the full Senate on the confirmation of gubernatorial appointments.

Where a legislative committee is required to report on a subject referred to it, the rules of both the Idaho House and Senate allow for the filing of a minority report by members of a committee who cannot agree on the recommendation of the majority.⁴³ This document can be thought of much like a dissenting opinion in case law.⁴⁴ An additional report can be filed if any member dissents "in whole or part with the reasoning" of both the minority and majority reports.⁴⁵ This second type of report is a sort of "concurring" opinion.⁴⁶ The committee reports contain a summary of the committee action, and normally do not contain any analysis of intent. So long as the minority report is "decorous in language and respectful" to the body, the report is published in the Senate or House journals, without having to obtain the consent of the other legislators.⁴⁷

Where they exist, and by virtue of their contrast, minority reports can provide texture or definition in explaining the intent behind the decision of the majority. A dissenting or concurring minority report could be used to somewhat reliably delineate what the majority decision *is* by defining what it *is not*.

Minority reports are only a reflection of the position and understanding of the authors themselves. However, because minority reports are rarely used, and because they are spread on the pages of the journal rather than contained in less formal archives, they can provide more solid evidence of legislative intent than some of the more casual discussion and documentation sometimes relied on.

IV. LEGISLATIVE EVALUATION OF LEGISLATIVE HISTORY

Legislatures around the country have tried to define legislative history in terms of reliability for the purposes of divining legislative intent. Some states have done this through statutes,⁴⁸ others through legislative rules.⁴⁹ These efforts are attempts by the legislative bodies

43. IDAHO S. R. 21(b); IDAHO H. R. 59.

44. See, e.g., Journal State S. 57, 2d Sess., at 42-43 (Idaho 2004).

45. IDAHO H. R. 59; see also IDAHO S. R. 21(b) (reading with a slight variation, "in whole or part of the reasoning").

46. See, e.g., Journal State S. 57, 2d Sess., at 68-69 (Idaho 2004).

47. See IDAHO S. R. 21(b); IDAHO H. R. 59.

48. See, e.g., VA. CODE ANN. §§ 1-247, 30-19.03:2 (2004); N.C. GEN. STAT. § 120-30.45(c) (2005); N.D. CENT. CODE §§ 1-02-12, -39(3) (1987).

49. See, e.g., PERM. R. MINN. S. 50.9; PERM. R. MINN. H. 2.15, 6.24.

to recognize the needs of the judiciary and better guide the courts in willow witching for legislative intent.

In 2006, the Idaho Senate adopted an amendment to JR18. Senate Concurrent Resolution 120, collectively sponsored by majority and minority leadership, did not receive a House committee hearing.⁵⁰ The 2006 rule amendment attempted to add the following language to the joint rules: “[t]he statement of purpose and fiscal note applies only to a bill as introduced, and does not necessarily reflect any amendment to the bill that may be adopted. A statement of purpose or fiscal note is not a statement of legislative intent.”⁵¹

Although not formally adopted by both bodies at the time of this article, this proposed amendment illustrates a legislative attempt to steer the judicial branch away from a reliance on statements of purpose for determining legislative intent.

Of course, as separate branches of government, courts are not obligated to follow a legislative rule’s guidance on what materials are indicative of legislative intent,⁵² but a legislative rule may help to advise the judiciary of the legislature’s own evaluation of the trustworthiness of the source.

V. CONCLUSION

The controversial nature of the judicial use of legislative history is exemplified by the differing viewpoints of the U.S. Supreme Court and Idaho Justices. Judicial inconsistency in the use of legislative history in statutory interpretation is well represented in the concurring

50. See S. Con. Res. 120, 58th Leg., 2d Sess. (Idaho 2006), available at <http://www3.state.id.us/oasis/2006/SCR120.html>.

51. S. Con. Res. 120, 58th Leg., 2d Sess. (Idaho 2006).

52. Courts can and have declined to heed legislative rules regarding indices of legislative intent. In Minnesota, the legislative rules cited in footnote 49, above, provide that recordings of committee meetings and floor debate are “not intended to be admissible in any court.” The Minnesota Supreme Court nevertheless considered and cited House floor debate. See *In re Matter of Handle with Care, Inc. v. Dep’t. of Human Servs.*, 406 N.W. 2d 518 (Minn. 1987). The court relied on a statute authorizing the consideration of “contemporaneous legislative history” in ascertaining legislative intent and stated that they did not feel the rules countermanded their consideration of the tapes. *Id.* at 522. Similarly, the Connecticut General Assembly has a joint rule stating that “any fiscal note” and “any analysis of a bill . . . shall not be construed to represent the intent of the General Assembly.” CONN. J. S. & H. R. 15(c). The Supreme Court of Connecticut decided to reject the common law plain meaning rule of statutory interpretation, and instead explicitly adopted an approach that requires courts to consider all relevant sources of meaning, such as legislative history, the “legislative policy it was designed to implement, and . . . its relationship to existing legislation and common law principles governing the same general subject matter.” See *Connecticut v. Courchesne*, 816 A.2d 562, 568 (Conn. 2003). This opinion so alarmed the Connecticut Legislature that they then enacted a statute codifying the plain meaning rule. See Conn. Gen. Stat. § 1-2z (2006 Supp.).

and dissenting opinions of Idaho Supreme Court Justices Eismann and Burdick in the case of *Big Sky Paramedics, LLC v. Sagle Fire District*.⁵³ Justice Burdick's (dissent) states that "[t]he Court's primary duty in interpreting a statute is to give effect to the legislative intent and purpose of the statute."⁵⁴ He then analyzes committee minutes and quotes from a legislator, fire chiefs, and another proponent. Justice Burdick views this history to achieve what he believes best represents legislative intent and purpose.⁵⁵

In the concurring opinion, Justice (Eismann) however, speaks to what he suggests may be judicial error by such reliance on legislative history:

The dissent argues that statements made during committee hearings by proponents of the 1974 amendment should restrict the scope of the language of the statute. Statements made by persons supporting legislation cannot modify the plain language of the legislation. Their expressed reasons for supporting the legislation are irrelevant when interpreting the wording used in the legislation. The proponents who attended the committee hearings were not the only ones entitled to vote on the bill. Their comments cannot limit the reasons why either they or others voted in favor of the amendment, particularly those who were not present at the committee meetings.⁵⁶

He further comments, "If comments by legislators can modify the language of the statute, is it comments by proponents or opponents that can do so? The proponents of legislation sometimes minimize the scope of its impact, while the opponents sometimes exaggerate it."⁵⁷

Legislation sprouts from a political process laced with a diversity of opinion, conflicting influences, and struggles to impact public policy. As a result, the record left behind may be a rich but internally contradictory legislative history. Further complicating matters is the fact that the record may contain the expressions of two different legislative bodies and the concurrence of the executive. Even if each body independently reached a consensus on what a bill meant, that does not speak for the intent of the other body, or the intent of the Governor.

53. 140 Idaho 435, 437-38, 95 P.3d 53, 55-56 (2004).

54. *Id.* at 438, 95 P.3d at 56 (Burdick, J., dissenting).

55. *Id.*

56. *Id.* at 437-38, 95 P.3d at 55-56 (Eisman, J., concurring).

57. *Id.* at 438, 95 P.3d at 56.

While the search for legislative history can assist a court in trying to uncover the Legislature's intent, the nature of the legislative process and the unreliability of the records as consensus documents, could make this a perilous quest. While legislators and legislative staff should make careful, accurate, and concise records, at the same time judges should use legislative history cautiously and sparingly. Modern technology is improving public access to government records. This can or should be a positive trend, as long as the reader understands the strengths, limits, and possible pitfalls of the records.