

JUDGES ON JUDGING

Statutory Interpretation: Getting the Law to Be Less Common

ABNER J. MIKVA*

Our judicial system, indeed our entire legal system, was forged in the age of the common law. Most judges still function in the mold of their common law predecessors. I have long maintained that *Marbury v. Madison*¹ was not so much a triumph for judicial supremacy as it was a triumph for the processes of the common law. The “judicial activism” reflected by *Marbury* and so criticized by today’s conservatives (and yesterday’s liberals) is really “judicial naturalism”—judges doing what comes naturally—what most of them were taught to do. That is why the crime of judicial activism is always reputed to be rampant in somebody else’s neighborhood. It should not seem remarkable that a “conservative” judge is just as likely to tease out different meanings from the written word as are “liberal” judges.

In discussing judicial activism, labels are both largely unhelpful and wholly unavoidable. Before anyone fixes too closely on my labels, I ought to define them. Perhaps the least useful way to describe a judge is as a “liberal” or as a “conservative.” If dictionary definitions of those words are applied, almost all judges are conservative. Almost all of them think of their jobs as conserving a set of values. Most judges are very uncomfortable with change of any kind. (If you think this is an exaggeration, try walking into a courtroom in blue jeans some time.) I don’t propose to use dictionary definitions; I use the words more as the shorthand that the press uses to describe politicians. To be more precise, I use the words “liberal” and “conservative” to distinguish between those federal judges appointed by Presidents Carter and Kennedy and those appointed by Presidents Reagan and Nixon. If that lumps a Cornelia Kennedy with a George Edwards or a Justice Harry Blackmun with a Chief Justice William Rehnquist, it only proves that labels, even as shorthand, are frequently wide of the mark.

“Judicial activism” is another phrase that lacks precision in its use. For purposes of this essay, I use it to describe the decisional process by which judges fill in the gaps that they perceive in a statute or the ambiguities that they find in a constitutional phrase. Under that definition, *all* judges are activists. How else can a judge behave when confronted with phrases such as “due process of law” or “cruel and unusual punishment” from the Constitution or “arbitrary or capricious” from the Administrative Procedure Act?²

A few politicians (usually *not* lawyers) yearn wistfully for a system in which

* Judge Mikva is a member of the United States Court of Appeals for the D.C. Circuit.

Numbered citations appear in the margin. They cite only to authority and they are not essential to comprehension of the text. See Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647 (1985).

1. 5 U.S. (1 Cranch) 137 (1803).

2. 5 U.S.C. § 706(2)(A) (1982).

judges are not required to use judgment. Instead they desire a judiciary that will merely apply the law or the Constitution as written. Former Attorney General Meese (who *is* a lawyer) insisted that even the vaguest constitutional phrases could be cabined into precision if only the judges would look at the "original intent" of the framers of the Constitution. Like other observers who either abhor or do not understand the legislative process—and specifically, the dynamics of finding suitable words to express a diverse group's general agreement—General Meese assumed the inestimable. Most legislators, constitutional or otherwise, do not agree on all the consequences of a legislative result. Many consequences have not been foreseen; other consequences are fused into a hybrid result where the specific concern is neither consciously approved nor disapproved. In sum, for most law, there is no original intent.

Justice William Brennan used a delightful example in his recent Holmes lecture, delivered at Harvard Law School in 1986.³ He described the legislative debate surrounding the eighth amendment to the Constitution. This debate is far more susceptible to original intent analysis than other constitutional provisions, because unlike the body of the Constitution which was drafted and debated in secret, the Bill of Rights was adopted by the First Congress and hence has a relatively complete legislative history. At the very least, the debate has more legitimacy as a *legislative* debate than the political essays which comprise the Federalist Papers or the private notes of James Madison or others who described events from their perspective. The phrase "cruel and unusual punishment" was taken from some obscure English manifesto; it had not been used in any previous statute. An opponent in the First Congress complained that the language was so vague that it might subsequently be used to strike down state statutes which ordained "ear-cropping" or "capital punishment." Since the proponents of the eighth amendment had the votes, nobody bothered to answer the opponent, and the language was adopted notwithstanding the ambiguity. While Justice Brennan uses the example to advance his position against capital punishment, even the most ardent hanging judge would find ear-cropping a cruel and unusual punishment today. Seeking out the "original intent" of the First Congress is hardly a useful quest.

I had a similar experience during my congressional career. The infamous RICO⁴ provisions of federal law⁵ were adopted as part of the Organized Crime Control Act of 1970.⁶ There were fewer than forty of us who opposed it in the House of Representatives. In an effort to dramatize the ambiguities of the bill, I described the RICO provisions in the most hyperbolic terms I could imagine. I conjured up a parade of horrors for my colleagues to contemplate. As in the case of the debate on the eighth amendment in the First Congress, the proponents had the votes to pass RICO

3. Brennan, *Constitutional Adjudication and the Death Penalty: A View From the Court*, 100 HARV. L. REV. 313 (1986).

4. Racketeer Influenced Corrupt Organizations.

5. See 18 U.S.C. §§ 1961–1968 (1982 & Supp. V 1987) (as amended by the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181 (1988)).

6. Pub. L. 91-452, § 901, 84 Stat. 922, 941–48 (1970).

and nobody even bothered to answer my criticism. Much to my chagrin, I am widely quoted in current lawsuits as proof that Congress intended to give RICO the broad meaning that has been attributed to it. Had I known then what I know now, I would have skipped the hyperbole and negotiated a dialogue with my Committee Chairman to deny the very meanings that have been given to RICO. The Chairman would have agreed to almost any dialogue that I would have proposed simply to avoid the acrimony of debate and the possibility that my arguments might have enlarged the opposition to the bill. Obviously, neither the arguments that I made nor the dialogue that I might have proposed would have shed any legitimate light on the “original intent” of the Congress that passed RICO.

What does that say about the legitimacy of the use of legislative history in the interpretation of statutes? Some judges, past and present, would say that it proves the silliness of looking at legislative history generally. One of the distinguished former judges of my court once opined that using legislative history was like “looking over a crowd and picking out your friends”—every judge could find something or other to buttress a particular position.⁷ Justice Scalia recently took an even less charitable view, speculating that the purpose of congressional committee reports is “not primarily to inform the Members of Congress what the bill meant . . . , but rather to influence judicial construction.”⁸

I do not agree that seeking legislative intent is a fool’s errand. I think that the quest is difficult and will never provide the holy grail that General Meese envisioned would result from the “original intent” crusade. There will still be room for judges to fill in blanks, with all the attendant dangers and problems that result from unelected officials making policy choices. But I think that an informed, careful use of legislative history can limit the number of interstices that judges plug.

Most judges, conservative or liberal, don’t aspire to be policymakers; many deny that they are making policy even when they do fill in the gaps. I have no doubt that most of us, conservative and liberal, end up making some policy decisions despite our aspirations or self-analysis. The beginning of a new discipline about the way judges interpret statutes is to put aside the mindset of our common law predecessors. We are not supposed to remodel or remold or update or untangle the statutes of this country. We should not try to do to the statutory tort law what Judge Cardozo and others did to the tort law in the famous cases we learned about in law school. That is why suggestions like those of Dean Calabresi to allow judges to “update” the law and eliminate the obsolete laws are dangerous.⁹ The age of statutes in which we live clearly assigns those tasks elsewhere. If they are not performed, the solution must be found through elections, not litigations.

Judges ought to look at the “plain meaning” doctrine not as a set of handcuffs but as the given first rule of our interplay with the legislative branch. I do not view the plain meaning canon as a conservative invention or a liberal constraint. If the

7. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting a conversation with Judge Harold Leventhal).

8. *Blanchard v. Bergeron*, 109 S. Ct. 939, 947 (1989) (Scalia, J., concurring).

9. See Mikva, *The Shifting Sands of Legal Topography* (Book Review), 96 HARV. L. REV. 534 (1982).

words are capable of a clear meaning that can be applied to the case at hand, we ought to look no further. As Judge Leventhal said, one can always find some friends in the legislative history. Judges ought not tilt the result by looking unnecessarily. Unfortunately, the plain meaning doctrine does not answer many of the interpretation disputes that judges are called upon to resolve. For many reasons, including original sin, legislators do not always speak plainly, and certainly not comprehensively. There will be numerous occasions in which the judges must look to the legislative history to decide the cases before them.

Because legislative history must be used in a large number of cases involving statutory interpretation, one could wish that the users and the makers were on the same wave length. Judges apply "canons of construction" that legislators never knew (or have forgotten). Legislators use communication and bargaining techniques that judges do not know or understand. As an example, judges are quick to turn to the floor debate to decipher meaning. Seldom is the floor debate the vehicle by which the legislative branch resolves its wording disputes. Those arguments are much more likely to be resolved in committee and reflected in the committee report. Nevertheless, some judges think that the committee report is "unreliable" because it is written by staff rather than by Members of Congress. Other judges do not think about the committee report at all. I think it ought to be the first place that judges look to find out what Congress meant. The enemy is not legislative records—only *bad* legislative records.

Unfortunately, misuse of legislative history by the courts has led to its widespread misuse by the Congress. I would wince when my former colleagues would get up and announce that they took the floor to make some "legislative history." I wince even more when I read that some of my present colleagues accept that self-serving exercise as useful to the task of interpreting a statute. For example, for better or worse, courts created the doctrine of implied remedies to resolve the dilemma of statutes that set up elaborate protective devices without sufficient enforcement devices. Individual Members of Congress who failed to convince Congress to include express language now seize on the opportunity to make some "legislative history" announcing either the presence or absence of implied remedies in statutes during legislative debate. Legislators will frequently use the easy access to the Congressional Record as a device to confuse the plain meaning of a statute. Judges will frequently get gulled by this device.

Despite these problems, it would be foolish for judges to ignore legislative objectives or to pretend that original intent is always discernible. Rather we must bridge the gulf between those who produce legislative history and those who digest it. Promising efforts are already underway. Robert A. Katzmann and the Brookings Institution are trying to develop a common language by encouraging more dialogue between the two branches and describing the functions of each branch in a way that will inform the other.¹⁰ The task is monumental, however, and will not be accomplished easily. Ultimately it may be as difficult as persuading current judges that the good old common law and the good old common law judges are ancient history.

10. See THE BROOKINGS INSTITUTION, JUDGES AND LEGISLATORS (R. Katzman ed.) (1988).