

## Legislative History

### A. **Constitutional Problems with Using Legislative History** (note that these are a small part of the arguments for or against legislative history)

1. **Presentment Clause** – Constitution forced Congress to settle on a compromise that could get enough votes to pass
2. **Bicameralism Requirement** – Again, the forced compromise gets undermined, can give one house too much control over application of a statute
3. **Nondelegation Doctrine** – requires Congress to be clear; using legislative history suggests there is too much ambiguity for a court to determine its meaning, and therefore too much discretion given to the courts or the executive
4. **Separation of Powers** – (this point argues both ways) – on the one hand, using legislative history instead of relying solely on the text allows the court to usurp the legislative function, adding meaning to what was enacted. On the other hand, advocates of legislative history always justify it as an outgrowth of judicial deference to Congress' intent, a sign of judicial restraint.
5. **Notice requirement** (part of due process) – citizens cannot predict their legal rights or liabilities based on the laws themselves, but rather must predict based on murky legislative history that is inaccessible to most non-lawyers.

### B. **Friendly Faces Problem with Legislative History** – It's not that there is TOO MUCH, although that is sometimes a problem – more often the opposite is a problem, there's very little. Leventhal's phrase referred instead to the fact that anyone can find SOMETHING to support their own side, used selectively. He was talking about the ease of using legislative history selectively to suit one side in litigation.

### C. In the course, we talked about **other problems with legislative history**, apart from the constitutional issues above:

1. It undermines the enacted text itself, which can sometimes be ignored completely in the search for legislative history
2. It creates a **costly "arms race"** for litigants, as each must compile more and more legislative history, include history of other related statutes, post-enactment legislative comments, history of previous versions of the law or the same law on previous unsuccessful attempts at passage, etc.
3. It allows courts to be activist, to get the result they want in a case, which is unfair because the law may not be applied the same way consistently

4. It is a **myth or legal fiction to talk about a “collective intent”** for a disparate body of hundreds of people from different political parties. Philosophically, there is simply no such thing as a “legislative intent,” but rather, only the individual subjective intentions of each legislator, which are unknowable.
5. There are two **evidentiary problems** with legislative history. The first is the documents’ reliability as a record of what in fact occurred at committee hearings and floor debates. It is easy for legislators who have thought through the potential litigation issues to **manipulate** the record or history to produce specific outcomes in upcoming cases, without making this clear to the others in Congress. They can insert or amend statements (and sometimes lengthy reports or studies) into the records after the votes.
6. The second **evidentiary problem** is whether the legislative history, even when accurately recorded and preserved, do not necessarily reflect the thinking of most members present, whether at a committee or the floor debates and final vote.
7. We assume in other contexts that statutory ambiguity is intentional and a means of legitimate delegation by Congress to the decisionmaker (courts or agencies). Could it be that Congress **WANTED** the court or the executive (prosecutor, etc.) to determine the best range of meanings for given words in the statute? If so, resorting to legislative history is regressive, thwarting what Congress wanted to have happen.
8. **BUT** – it also allows the courts to defer to the legislature, to give full force to its intended purposes, to resolve genuine ambiguities and disagreements by referring to a relevant outside source rather than those who already have a bias toward producing a certain outcome in a case. It is consistent with our assumptions about everyday communication and language to think that we should strive to know the subjective intended meaning of the communicator, **AND** that more information can’t hurt, but can only help.

#### **D. Ranking Types of Legislative History: issues to consider**

1. Think about **whether all the legislators who voted on the law had access to this form of legislative history**. Some, like floor debates, are very public, done in front of the entire chamber. Others, like amended statements, might be clandestine.
2. Think about how much **deliberateness** it evinces regarding specific meanings of words or specific applications. If one of the potential interpretations under consideration was previously explicit and then rejected or removed in favor of other language, this suggests very deliberate rejection of that position. Similarly, while prepared statements or alterations to statements may be clandestine, they are more likely to be well-thought,

precise, and carefully-worded than spontaneous oral statements, where the person may have been fumbling for the right words. On the other hand, “the mouth shows what is in the heart...” Think about whether **reliability** of a source means that it accurately represents a legislator’s views, or the views of the whole body, or simply the “best meaning” for the courts.

3. Think about how **knowledgeable** the person speaking or writing was about the law. Some comments during floor debates are by people who have NOT READ THE BILL ITSELF yet (partly overlaps with first point above).
4. Think about how **representative** this source probably is of the intent of the whole group.
5. Think about **CHEVRON** and its policy rationale – not that the rule applies to legislative history, but what does it suggest about who is best at interpreting the law, who is the law’s intended audience, to whom should judges defer?
6. Think about the **actual impetus** for individual laws, the cause for their origination. Do they really originate in the minds of legislators? Are individual citizens (unelected) sometimes primarily responsible for a law, like M.A.D.D., victims of special crimes or harms, or even lobbyists? Should we ignore these instigators in interpretation, or look to them for clues about the law’s purpose? How many laws are “sent over” from the White House, and if so, should this be given weight, or countered, or ignored?
7. Think about **partisanship** and its role in forming legislation. Should highly partisan motivations for statements in the legislative history be a discrediting factor, or a critical component of Congressional intent?
8. Think about how often legislation is either **responsive**, i.e., reverses a wayward court decision or agency action, or is **extensive**, that is, is passed in the context of knowing what existing court precedents or agency interpretation is, and builds on that.