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INTERBRANCH RELATIONS

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STATEMENT OF THE HONORABLE ALEX KOZINSKI OF THE UNITED STATES COURTS OF APPEALS FOR THE NINTH CIRCUIT BEFORE THE JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS

Mr. Chairman, Members of the Committee, Distinguished Fellow panelists:

I thank the Committee for inviting me to express my views on a subject so critical to the balance of powers in our government. I suspect, however, I may have been invited because I'm rumored to believe that the only legitimate use of legislative history is to prop open heavy doors or to put under the seats of little children not quite tall enough to reach the table. I hope I will not disappoint you by taking a slightly more moderate position today.

I do believe there are some theoretical and practical difficulties in deriving wisdom from the legislative record of a complex statute. Some of the problems include figuring out whose views are embodied in a committee report; determining whether floor statements reflect the views of anyone except the particular speaker; and accounting for the President's role, if any, in making or approving the legislative record.

At the same time, I'm ready to admit that legislative history can be an immensely valuable tool for resolving certain types of problems in statutory interpretation. First and foremost, legislative history helps courts understand what problem the legislature way trying to solve. Especially where some time has passed between a statute's enactment and its interpretation, legislative history can provide insights into the statute's historical context. And it can expose assumptions shared by both proponents and opponents of the legislation -- especially where the assumptions

seemed so obvious that no one bothered to articulate them in the statute. These are just a few examples of ways legislative history can help courts make sense out of statutes that don't make sense by themselves.

The problem is, in recent years, courts have allowed legislative history to do much too much of the work of interpretation and this has had adverse effects on the legislative drafting process. Because my time is limited, I will offer only two examples -- each illustrating somewhat different aspects of this problem. The first involves a totally boring housekeeping statute -- something few people even in Washington know or care much about. As you've probably guessed, I'm talking about 28 U.S.C. § 1491(a)(3), enacted by the Federal Court Improvements Act of 1982. Because one or two of you here may have forgotten the precise language of this section I will quote it:

> To afford complete relief on any contract claim brought before the contract is awarded, [the United States Claims Court, now the Court of Federal Claims] shall have exclusive jurisdiction to grant declaratory judgments and . . . equitable and extraordinary relief . . . .[1/]

Note that I emphasized the word exclusive. I think it's a pretty important word. Just reading this language, one would think Congress vested the awesome power of equitable relief in pre-award contract cases with the judges of the Court of Federal Claims and nowhere else.

Enter the legislative history. In discussing this section, the House and Senate Reports explain that exclusive doesn't mean exclusive, but sort of exclusive:

1/ 28 U.S.C. § 1491(a)(3) (1982).

> This enlarged authority [of the Court of Federal Claims] is exclusive of the Board of Contract Appeals and not to the exclusion of the district courts.[2/]

Now, this presents a classic example of what, in my book, is a misuse of legislative history. The Senate and House Judiciary Committees agreed on language that -- apparently -- did not reflect their intended purpose. Somehow they became aware of the problem but, for unknown reasons, they chose to leave it in the statute and issue a fix by way of legislative history. In such a case, the legislative history does not merely cast light on the statutory language; it recasts the language altogether.

A court faced with this situation is put in a difficult position. Even among judges who rely on legislative history, statutory language usually still comes first. Many are therefore reluctant to look past very clear statutory language to what may be equally clear, but utterly contradictory, legislative reports. Other courts take a more flexible view: They say that unambiguous statutory language cannot be contradicted by legislative history, but they look to the legislative history to see if the statute is ambiguous. The kicker is they then use the same legislative history that created the ambiguity to resolve it. Go figure.

Predictably enough, the courts that have interpreted section 1491(a)(3) have split along these lines. The Fourth[3/] and Ninth

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2/ H.R. Rep. No. 312, 97th Cong., 1st Sess. 43 (1981). See also S. Rep. No. 275, 97th Cong., 2d Sess. 23, reprinted in 1982 U.S. Code Cong. & Admin. News 11, 33.

3/ Rex Systems, Inc. v. Holiday, 814 F.2d 994, 998 (4th Cir. 1987).

Circuits,[4/] plus the Second[5/] and Federal Circuits[6/] by way of dicta, have interpreted the language as giving exclusive jurisdiction to the Court of Federal Claims -- that is, to the exclusion of the district courts. The Third[7/] and First Circuits[8/] and the Claims Court itself[9/] have adhered to the legislative history and given the CFC nonexclusive jurisdiction; the Sixth Circuit[10/] and again the Federal Circuit[11/] have agreed in dicta.

The Judiciary Committees' attempt to preempt this confusion by means of committee reports rather than statutory language just hasn't worked and has had several unfortunate consequences:

1. It has created a split among the federal circuits that will eventually have to be corrected by the Supreme Court or Congress.

4/ J.P. Francis & Assoc. v. United States, 902 F.2d 740, 741-42 (9th Cir. 1990).

5/ B.K. Instrument, Inc. v. United States, 715 F.2d 713, 721-22 (2d Cir. 1983).

6/ F. Alderete Gen. Contractors, Inc. v. United States, 715 F.2d 1476, 1478 (Fed. Cir. 1983).

7/ Coco Bros. v. Pierce, 741 F.2d 675, 678-79 (3d Cir. 1984).

8/ Ulstein Maritime, Ltd., v. United States, 833 F.2d 1052, 1058 (1st Cir. 1987); In re Smith & Wesson, 757 F.2d 431, 435 (1st Cir. 1985).

9/ National Steel & Shipbuilding Co. v. United States, 8 Cl. Ct. 274, 275 (1985).

10/ Diebold v. United States, 947 F.2d 787, 805-06 (6th Cir. 1991).

11/ United States v. John C. Grimberg Co., Inc., 702 F.2d 1362, 1374-76 (Fed. Cir. 1983).

2. It has caused long-term uncertainty in the law, which in turn wastes time, money, lots of paper and other judicial resources. By my count there have now been at least twenty published opinions in the federal courts wrestling with this problem.[12/]

3. There has been shift of authority away from Congress and toward the federal courts. When Congress speaks with a clear, purposeful voice, judges seldom ignore it, no matter how much they may disagree with the result (barring unconstitutionality, of course). The more wavering the voice of Congress -- as when there is a square conflict between text and legislative history -- the more likely it is that policy preferences of the individual judges will prevail.

4. The confusion surrounding 1491(a)(3) may have legitimized, to some extent, a fuzzy reading of other portions of the same statute. "Look," a judge might say, "it's clear from section

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12/ Diebold, 947 F.2d at 805-06; Cubic Corp. v. Cheney, 914 F.2d 1501, 1503 (D.C. Cir. 1990); J.P. Francis & Assoc., 902 F.2d at 741-42; Price v. United States Gen. Serv. Admin., 894 F.2d 323, 324 (9th Cir. 1990); Ulstein Maritime Ltd., 833 F.2d at 1058; Rex Systems, Inc., 814 F.2d at 998; In re Smith & Wesson, 757 F.2d at 435; Coco Bros., 741 F.2d at 678-79; B.K. Instrument, Inc., 715 F.2d at 721-22; F. Alderete Gen. Contractors, Inc., 715 F.2d at 1478; John C. Grimberg Co., 702 F.2d at 1374-76; Alaska Airlines v. Austin, 801 F. Supp. 760, 763 (D.D.C. 1992); North Shore Strapping Co. v. United States, 788 F. Supp. 344, 345-47 (N.D. Ohio 1992); Neeb-Kearney & Co. v. United States Dep't of Labor, 779 F. Supp. 841, 844 (E.D. La. 1991); Commercial Energies, Inc. v. Cheney, 737 F. Supp. 78, 79-80 (D. Colo. 1990); Arrow Air, Inc. v. United States, 649 F. Supp. 993, 997-98 (D.D.C. 1986); Caddell Constr. Co. v. Lehman, 599 F. Supp. 1542, 1546 (S.D. Ga. 1985); Rubber Millers, Inc. v. United States, 596 F. Supp. 210, 211 (D.D.C. 1984); ACME of Precision Surgical Co. v. Weinberger, 580 F. Supp. 490, 499-501 (E.D. Pa. 1984); Aero Corp. v. Dep't of the Navy, 558 F. Supp. 404, 409-10 (D.D.C. 1983); National Steel & Shipbuilding Co., 8 Cl. Ct. at 275.

1491(a)(3) that Congress didn't mean everything it said in the Federal Court Improvements Act of 1982, so I can be just a little bit creative in interpreting other parts of the statute."

5. It promoted the view that legislative histories -- particularly committee reports -- deserve the same level of respect as the statutes themselves. After all, here is a case where two respected committees of Congress have gone about amending the statute by saying so in the committee report.

Before I turn to my second illustration -- involving a statute much different than 28 U.S.C. § 1491 -- I want to say just a few more words about committee reports. As everyone here is aware, committee reports have long been treated by the judiciary as the Rolls Royces of legislative history. Even curmudgeonly judges like me will occasionally be caught sneaking a peek at a committee report. More recently, though, the pedigree of committee reports has become suspect. I can do no better than to quote from a speech given a couple of years ago by Professor Martin Ginsburg to the Tax Section of the New York Bar Association. I should note, for the record, that these are Professor Ginsburg's views alone, and should not be attributed to anyone else with the same name:

> It is no doubt appropriate to consult legislative history to grasp broad outlines of purpose, but everyone in this room knows it is totally unreasonable to pretend that any of the details that appear in a committee report ever came to the attention of, much less were approved by, any elected body.
>
> The strange notion that the Joint Committee Staff bluebook, published some months after the tax bill is enacted, merits the status of legislative history, can only

derive from a cynical recognition that, after all, the committee reports are written by staff and never read or approved by members of Congress, so how's the bluebook any different?[13/]

Now let me turn to what I see as the second, and more serious, problem: The case where legislators -- well aware that statutes will be interpreted by judges in light of their legislative histories -- purposely leave the statutory language vague and then take every opportunity to salt the legislative record with hints, clues, nudges and shoves, all intended to influence later judicial interpretations of the statute. In a concurring opinion in 1987, I wrote the following passage, which I believe expresses the moral hazard involved here: "The propensity of judges to look past the statutory language is well known to legislators. It creates strong incentives for manipulating legislative history to achieve through the courts results not achievable during the enactment process. The potential for abuse is great."[14/]

While this manipulation has generally been subtle, it struck with a vengeance during the enactment of the Civil Rights Act of 1991. Given its wide recognition, I need not detail the crafty lobbying and procedural maneuvering involved not in drafting the language of this historic statute, but in planting legislative

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13/ Martin D. Ginsburg, Luncheon Speech at Annual Meeting of New York Bar Association Tax Section (Jan. 24, 1991), at 8 (attached).

14/ Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986).

history land mines designed to explode with full-fledged rationales and interpretive methods, if stepped on by a black robe.[15/]

What I do want to discuss, briefly, are the implications of this development. Here I must give credit to an excellent piece, authored by Harvard student Mark Filip, titled Why Learned Hand Would Never Consult Legislative History Today.[16/] The central thesis of Filip's piece -- a thesis I wish to endorse -- is that whatever one's initial view of legislative history as an aid to interpretation, that value is destroyed once the participants in the legislative process become aware that it will be used by judges as an aid to -- sometimes as a substitute for -- interpretation. Legislative history, if it is to be of any help at all, must provide the type of background information that is descriptive, that helps the judge step into the shoes of the legislator. It cannot -- should not -- provide answers to specific questions. Once legislative history becomes simply another field of skirmish for the political process, it ceases to serve any legitimate purpose. The statutory war is then won not by those who garnered the most votes, but by those who outmaneuvered their colleagues in fortifying the legislative record.

This process diminishes the power of Congress in relation to that of the Executive and the courts. The Executive branch, as its name suggests, has only the power to execute the laws; its range of discretion involved is inversely proportionate to the

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15/ See, e.g., Robert Pear, With Rights Act Comes Fight to Clarify Congress's Intent, N.Y. Times, Nov. 18, 1991, at A1.

16/ 105 Harv. L. Rev. 1005 (1992).

statute's precision. So, too, the courts, who have much broader leeway in interpreting statutes when they are vague and fuzzy. The more legitimate options Congress leaves to the courts and to the executive, the less likely it is that the outcome will reflect the will of Congress.

If this process continues, it will dramatically and detrimentally affect the delicate balance of power among the branches of our government, leaving Congress the weakest of the three. To anyone who believes -- as I do -- that the public interest is best served by three strong bodies that can provide checks on each other, this is unwelcome news indeed.

Thank you.

NYSBA TAX SECTION
Annual Meeting Luncheon
Thursday, January 24, 1991

LUNCHEON SPEECH

Martin D. Ginsburg

I live in fear that someone in Arthur's spot, some day, is going to announce that I need no introduction, sit down, and give me no introduction. Whereupon no one will have a clue who I am.

I was led to this thought earlier today when I ran into one of the now more senior partners in the Weil, Gotshal firm, along with one of the firm's newer lawyers. I had practiced with the firm for some twenty years before becoming a school teacher. The young lawyer was amazed to learn this. When I joined the firm back in the 1950s it had fewer than 20 lawyers. When I left there were about 275 lawyers. My former partner proudly announced that the firm now has some 575 lawyers, and cheerfully added that this enormous growth, post-Ginsburg, showed how much I had held the firm back while I was with it.

I was hurt and amazed to hear this view of my tenure. It is quite wrong. I have not previously mentioned it in public, but the explanation of the firm's enormous growth over the past twelve years is evident to me, and I am sure it is evident to all of you. The Weil firm grew from 275 lawyers to 575 lawyers, after I left, because it took 300 lawyers to replace me.

Over the 20 years I was at it, I thoroughly enjoyed practicing in New York City as a tax lawyer. I owe a great debt of gratitude to the Internal Revenue Code just a single provision of which, section 341 as it happens, put both of my children through college and one of them through two graduate schools. Indeed, taken as a whole the 1954 Code allowed me to take up a luxurious early retirement, improve my cooking, tell students how it used to be before General Utilities was killed in the Battle of Bull Run, and write nasty letters to the Government for reproduction in Tax Notes.

It is not clear to me which of these activities led to my selection as today's luncheon speaker. Nor, as a matter of fact, have I been able to find anyone on the Executive Committee of the Tax Section who admits to having voted me this honor. But a great honor I do account it. I am, to the best of my knowledge, the first Tax Section Chairman ever promoted to luncheon speaker. Carr Ferguson, when he took office as Assistant Attorney General in the Tax Division of the Department of Justice, noted with great pride that he was the first in that job who earlier had served as a line attorney in the Tax Division. It is hardly the same, but I do understand his good feeling.

School teachers, certainly those who teach in the tax field, have ample opportunity to teach in places other than the home law school. A couple of years ago a sizable accounting firm -- not one of the big eight, now the shrinking six, but one of the next dozen with offices in 70 or so smaller cities -- invited me to teach a corporate tax seminar at the annual summer retreat of the firm's tax partners and senior tax managers. Three days in the company of 99 tax accountants -- 99 is what I recall it turned out to be -- may not seem to you an exciting way to spend time, but it emerged so.

The firm's clients, in the main, are small to moderate size business entities, corporations and partnerships. The tax accountants, in the main, were serious, hard-working, professional, reasonably experienced, and intelligent. They were clearly quite good dealing with day to day operating tax problems of the small business entity. Most of them were not quite so good dealing with the corporate reorganization provisions, the principal focus of our seminar, but most of the reorganization rules have been in place a long time and the participants had accrued experience sufficient to avoid total failure.

In developing one of the hypothetical cases in the seminar I strayed to section 338, ever so briefly, and that is when things got interesting. I had not given an advance assignment under section 338 and so the students brought with them only their background practice experience. In the discussion I commented that, in light of General Utilities repeal, unless a section 338 election is in fact intended, the practitioner ought not rely upon the so-called affirmative action carryover basis election, but should instead make an explicit "protective carryover election."

The response seemed to me somewhat doubting. Attempting to be clearer, I restated the position this way. If there has been a qualified stock purchase of one corporation by another, and if a section 338 election would be tax disadvantageous, and if you fail to instruct your client to file a protective carryover election, the only interesting question is whether you have committed malpractice.

Never in my life have I said anything to attract so warm a response. Consternation everywhere.

You see, the prior response of these 99 decently able tax accountants had not been "doubt," as I had thought. It turned out, in that summer of 1989, that only two of the 99 practitioners in the room had ever heard of the "protective carryover election" that is provided in the endless temporary regulations under section 338.

For whose use and whose consumption are the tax rules written these days?

Would I have done better with a more sophisticated class of tax practitioners, accountants or lawyers, from New York City? Sure. Or

Chicago or Atlanta or Boston or maybe even Washington, D.C.? Sure. But their clients are not inevitably the small, usually family owned, corporations whose tax advisors were in the room with me that summer.

Suppose instead of 99 accountants from 70 small cities, participating in my seminar were 99 lawyers conducting a business oriented practice in those cities? I suspect the number of the knowledgeable would have dropped from 2 to 0. Outside the large metropolitan areas, in most of this country, tax is the accountants' domain and lawyers are not expected to enjoy an informed relationship with protective tax elections of any sort.

At the administrative level, and at the legislative level surely, the tax process has thoroughly lost touch with sense and with reality.

Would I have done better, in my summer sojourn, to deliver a subchapter K seminar, perhaps "living and dying under the section 704(b) substantial economic effect regulations" or perhaps "six different ways to exit the partnership: the tax treatment of those who leave and those who remain"?

In fact, Gordon Henderson of this Tax Section and Jack Levin of Chicago and I delivered exactly that "exiting the partnership" seminar to a rapt audience of lawyers and accountants, some 300 strong, in a warm climate location this past October 31. October 31 is of course Halloween and that turned out to be strikingly appropriate. In the seminar we pursued 7 very simple example cases -- in each there were never more than three partners and never more than half-a-dozen assets in the partnership -- and by varying one term of the deal at a time -- exit by substitution of a new partner, exit by retirement, exit by departing this world -- we produced a nightmare of amazingly different tax consequences to everyone in sight.

In preparing the Halloween seminar Gordon and Jack and I had anticipated a high level of audience hostility. It is after all an ancient and honorable tradition that when bad news is delivered, you shoot the messenger. But in truth there was no hostility at all, just some nods, occasional smiles, notetaking once in a while.

It all became clear when we asked some questions and took a poll. Don Lubick, testifying before the Ways & Means Committee a dozen years ago, was absolutely right when he announced, "there are no collapsible corporations in Buffalo!" He simply did not take that brilliant perception far enough. In at least one warm climate, we learned, quite a number of Code provisions and more than a few regulations have been declared inoperative by default. Nullification, it seems, remains a viable political concept in America, if only in the tax field.

How about the substantial economic effect regulations under section 704(b)? In particular, what about the regulations' firm contemplation that the partnership agreement at all times will require proper maintenance of capital accounts, liquidating distributions made in accordance with positive capital account balances, and either deficit makeup or some other designated mystery?

We received from our warm climate friends a variety of responses. None was entirely satisfactory. All were interesting. I group them for you.

The class A response -- "What regulations are those?" Happily, there were only a few class A responses.

The class B response -- Magic litany. "We always put those three sentences in our partnership agreements, right at the beginning." There were a lot of class B responses. On further inquiry they broke down into two very distinct subclasses.

The first subclass, B-1 if you like, marches to the tune of Regulations Triumphant. These practitioners have convinced their clients that arrangements among partners must conform to tax regulations. If the partners, for business reasons however good, prefer a different arrangement, tough luck. Perhaps because there are not that many supine clients, there were not that many practitioners in subclass B-1.

Subclass B-2 had many members. Informed of the Treasury's magic rules by the practitioner, the clients replied, "That's fine Sam, you put into the partnership agreement any damn fool thing you want, we know what our deal really is." Whether they will still know later on, after the death of a partner for example, is another matter. Right now, in what is no doubt conceived to be a rational response to irrational tax rules, these folk are writing one agreement for the revenue agent, a different agreement for themselves. It's like keeping two sets of books. We used to give that sort of thing a nasty label.

Finally, there was a class C response. If the parties' negotiated deal does not fit the Treasury's magic rules, the partnership agreement should reflect the deal and not the magic rules. This seemed to us remarkably sensible. Are you surprised to hear that there were very few class C responses?

Last year's grand event in subchapter K, however, was neither the partnership allocation regulations nor the supporting temporary regulations under section 752 on partnership liabilities. But we are getting close. The great event in 1990 was Gordon Henderson's brilliant simplification of those section 752 regulations. It was, I thought then and still do, the most promising document produced by the Tax Section during the year, probably the decade. A convincing demonstration that the prolixity and complexity of the "modern" tax regulation can be substantially reduced at an affordable cost in coverage and detail.

Was Henderson's effort greeted with the universal enthusiasm it deserved? Of course not. After all, if you are institutionally in the business of writing endless impenetrable regulations, how likely are you to applaud english?

You will think that not fair comment, and likely you are right. But I remind you that a principal objection to Henderson's slimmed-down basic principles was this. After reading Henderson's regulation, goes the objection, you would not understand the partnership liability rules nearly as well as you do had you not first studied and mastered the Treasury's awesome, intricate, technical, endlessly dull temporary regulation.

What amazes me about this argument -- and the argument really is advanced, I have not made it up -- is the astonishing assumption that underlies it.

The unstated assumption is that when Treasury produces one of its dense endless masterpieces, practitioners the country over race to read and reread, and after a while all those practitioners understand these full blown regulations and can and do properly apply them in practice.

But that of course is nonsense. The section 338 temporary regulations, to take a fair example not exactly at random, surely qualify as a triumph of endless exposition, but I know of a certainty that, in the summer of 1989, in one firm 97 out of 99 tax accountants did not understand those regulations.

In truth, the pattern of comprehension seems to me no better than a sensible pessimist would anticipate. The average practitioner in the tax field has a good grasp of some regulations, usually material of a certain antiquity and obvious relevance to her practice; an uncertain grasp of a fair number of other regulations; and anything from a nodding acquaintance to no acquaintance at all with the rest. I am suggesting that the average tax practitioner, hard-working but drowning in detail and watching the flood rise, has never read many of the Treasury's regulations and never will, and has not adequately understood a goodly part of the regulations that have been read.

The issue is not whether a practitioner would be better off mastering the Treasury's detailed section 752 temporary regulations or would be better off mastering Henderson's abridgement. That is not the choice. In the real world, I suggest, when the Treasury publishes one of its "modern" regulations, for many and probably most, it is Henderson or nothing.

To be fair, the Service and Treasury did publish during the past couple of years some regulations that everyone could understand. Most recently, the proposed one-class-of-stock subchapter S regulations.

The carefully implemented purpose of these proposed regulations, as I had occasion to suggest earlier this month in an intemperate submission to the Service, "is to make it as difficult as possible for ordinary taxpayers to make use of subchapter S and to disqualify retroactively as many S corporations as possible."

Let me tell you why I wrote that angry letter fully two months after the proposed regulations were published. I wrote an angry letter because you didn't. By "you" I do not refer only to this Tax Section. I mean that over a period of more than eight weeks, while dozens of submissions were filed and everyone was negative, submissions on behalf of clients narrowly focused on the client's specific concern, and submissions by professional groups were the usual technician's triumph, picking issues and propounding lapidary solutions not merely tree by tree but leaf by leaf.

Forget the trees and leaves. There was a forest out there, and a bunch of mad people in your Government, in furtherance of no conceivable policy, was proposing to burn it down.

The sensible response to arson is not to file a report with the arsonist addressing the technical merits of alternative fuels. When there is good reason to be angry, then be angry and be vocal about it. A careful technical report is no help. If anything it misleads those people in Washington into believing that a little cutting and stitching will effect a cure, when in fact the need is for a heart transplant.

One of the valued members of this Section's Executive Committee for many years was Cliff Porter, a wonderful tax lawyer and a wonderful person. At Executive Committee meetings Cliff would identify the case, fortunately rare, in which a member seemed to be promoting a narrow client interest rather than a broad public interest. Cliff would rise, shame those who deserved it, and remind the rest of us why we were there. Invariably our reports were much the better for this.

I suggest the Executive Committee of the 1990s ought to include at least one member whose job it is to rise up and get angry when anger, and not lawyer-like reticence, is called for. Our reports will be much the better for this.

If one is going to be perverse and critical, one ought not disregard very long the legislative product and process.

This afternoon I propose to begin, not with the statute but with committee reports. This seems proper since it has been said, probably not in jest, that in the tax field today one consults the statute only if the committee report is unclear. And that is the very problem I wish to focus.

Half-a-dozen years ago Justice Scalia, then Judge Scalia in the D.C. Circuit, wrote a concurring opinion to disassociate himself from the majority's reliance on legislative history. Scalia was concerned that "routine deference to the detail of committee reports, and the predictable expansion of that detail which routine deference has produced, are converting a system of judicial construction into a system of committee-staff prescription."

The case in which Scalia wrote was not a tax case, but he buttressed his concurrence with the lengthy footnote from which I am about to quote:

> Several years ago, the following illuminating exchange occurred between members of the Senate, in the course of floor debate on a tax bill:
>
> MR. ARMSTRONG (the Senator from Colorado). My question, which may take the chairman of the Finance Committee by surprise, is this: Is it the intention of the chairman that the Internal Revenue Service and the Tax Court and other courts take guidance as to the intention of Congress from the Committee Report which accompanies this bill?
>
> MR. DOLE (the then chairman of the Finance Committee). I would certainly hope so.
>
> MR. ARMSTRONG. Mr. President, will the Senator tell me whether or not he wrote the committee report?
>
> MR. DOLE. Did I write the committee report?
>
> MR. ARMSTRONG. Yes.
>
> MR. DOLE. No; the Senator from Kansas did not write the committee report.
>
> MR. ARMSTRONG. Did any Senator write the committee report?
>
> MR. DOLE. I have to check.
>
> MR. ARMSTRONG. Does the Senator know of any Senator who wrote the committee report?
>
> MR. DOLE. I might be able to identify one, but I would have to search.
>
> MR. ARMSTRONG. Mr. President, has the Senator from Kansas, the chairman of the Finance Committee, read the committee report?
>
> MR. DOLE. I am working on it. It is not a bestseller, but I am working on it.
>
> MR. ARMSTRONG. Mr. President, did members of the Finance Committee vote on the committee report?
>
> MR. DOLE. No.

> MR. ARMSTRONG. Mr. President, the reason I raise the issue is not perhaps apparent on the surface, and let me just state it. The report itself is not considered by the Committee on Finance. It was not subject to amendment by the Committee on Finance. It is not subject to amendment now by the Senate.
>
> If there were matter within this report which was disagreed to by the Senator from Colorado or even by a majority of all Senators, there would be no way for us to change the report. I could not offer an amendment tonight to amend the committee report.
>
> For any jurist, administrator, bureaucrat, tax practitioner, 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.
>
> 128 Cong. Rec. S8659 (Daily Ed. July 19, 1982). Hirschey v. FERC, D.C. Cir. Nov. 15, 1985.

Good for Armstrong, who can have my vote any time, and good for Scalia who never needed it.

It is no doubt appropriate to consult legislative history to grasp broad outlines of purpose, but everyone in this room knows it is totally unreasonable to pretend that any of the details that appear in a committee report ever came to the attention of, much less were approved by, any elected body.

The strange notion that the Joint Committee Staff bluebook, published some months after the tax bill is enacted, merits the status of legislative history, can only derive from a cynical recognition that, after all, the committee reports are written by staff and never read or approved by members of congress, so how's the bluebook any different?

Suppose the millennium arrives. Armstrong and Scalia carry the day. Stripped of detail, committee reports now confirm only the congressional purpose underlying the enactment. Would the tax system be better for it?

I do think so.

I suspect you may think so too after you look again at some recent committee reports, replete with announcements that "the committee intends" that the regulations, likely to emerge ten years hence, will reflect this or that exquisite technicality — when you know perfectly well that the Committee had no such thought in its head. It is yet another member of the

staff, one who knows right from wrong, leaving his (or her) mark on the world. For some reason I recall the man who, desperate to have his name remembered in history but blessed with no special merit or talent, went out and burned the Parthenon.

If you are still with me you may be slightly puzzled. I began this afternoon by bashing recent tax regulations and those who wrote them. Now I complain of the congressional staffers who only want to guide those who must write the regulations. Is it simply that I hate everyone?

At times, perhaps, but not here. The guidance Treasury needs from the Hill is not in the detail. It is in a proper appreciation of the objective informing the legislation. Concentration on a host of secondary matters, on notes but not music if you will, risks disregarding the statute's essential purpose. The Service and Treasury are quite capable of committing that sin without help -- witness the recent one-class-of-stock subchapter S proposed regulations.

I suppose the reason why I prefer to go with the Treasury, informed as to policy and legislative purpose but not directed in a hundred details, relates to accountability.

Everywhere you look, in Government and out, you will find good people and arrogant people.

It is not that the arrogant people are "bad," as in "evil beings." It is that they care too much about turf, position, sometimes authority, and somehow have come to believe that, in this precise area of the tax law or that one, they have cornered wisdom.

I have come to the conclusion, which I suspect is controversial, that arrogant staffers writing regulations and other administrative ukase are a serious concern, but arrogant staffers engaged in the formulation of tax legislation and the writing of committee reports are a far more serious concern. It has something to do with the frequency and success of repair.

When you scream at the Service or the Treasury for having self-generated a gross misfortune, they may hate you but there is a reasonable chance someone with sense in higher authority sooner or later may listen. Not always, unfortunately, but reasonably often.

When you scream about a lunatic proposed or recent amendment to the Code or an awful committee report directive, the chance that someone in high authority -- they are called "Senators" and "Representatives" on the tax-writing committees -- will listen is rather remote. And if complaints are heeded and action ultimately is taken, the legislative correction is likely to prove incomplete at best.

Without taking time to detail a familiar story, I remind you of the 1984 revision of the tax treatment of divorce, sensible in the House and

sabbotaged in the Senate Finance Committee, and the 1986 legislative changes that undid part but by no means all of the damage.

Twenty years ago, in this Tax Section's Complexity Report, we concluded that Congress should write purposive rather than intensely precise tax statutes, and the Service and Treasury, responsive to the congressional purpose, should manage the detail. Our reasons of twenty years ago were a little different. They did not squarely reflect the perhaps controversial concern I have expressed -- one bunch is a problem but the other bunch is more of a problem -- or reflect at all the "legislation by revenue estimate" concern Arthur mentioned earlier.

Whatever the reasons advanced in support of it, the proposal has not changed. If, as Justice Frankfurter almost said in Portland Oil, "wisdom should not be denigrated merely because it comes late, since it comes so seldom," then surely wisdom that is consistently advanced deserves, sooner or later, a slightly more positive response.

It was great of you to have me for lunch. Thank you.