

Senate Materials and Treaty Interpretation: Some Research Hints for the Supreme Court

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Source: *The American Journal of International Law*, Jul., 1989, Vol. 83, No. 3 (Jul., 1989), pp. 546-550

Published by: Cambridge University Press

Stable URL: <https://www.jstor.org/stable/2203314>

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ally enacted into *statutes*, and most were the object of no executive objection.¹⁵

Why the practice should continue is not hard to guess. Congress, without the assurance that statutorily conferred discretion will not be abused, will not grant the Executive unconditional flexibility. The executive branch would prefer conditional flexibility to no flexibility at all. Consequently, when Congress says, "Take it or leave it—this or nothing," the Executive is inclined, at least sometimes, to go along.

That *Chadha* is the subject of "open defiance and subtle evasion"¹⁶ is a result of the *Chadha* Court's anachronistic conception of appropriate legislative-executive interaction. Congress and the President, today, can arrive at functional accommodations well suited to the exigencies of contemporary life—even though the form of the particular adaptation may not have been expressly anticipated, let alone disapproved, by the Framers.

This development counsels circumspection on the part of the judges who tend to favor mechanical, ivory-tower abstraction over a practical framework sculpted by Presidents and legislators through years of political conflict and cooperation. *Chadha* needs to be rethought; the sooner, the better. The Court may be moving in that direction, as is suggested by the new live-and-let-live approach to separation disputes outlined in *Morrison v. Olson*,¹⁷ where the Court upheld the validity of the independent counsel statute, and *Mistretta v. United States*,¹⁸ where it upheld the validity of the Sentencing Reform Act.

In the meantime, far from being extended to a realm it was never intended to govern—political understandings and policy undertakings—*Chadha* is properly confined to the realm delineated by its own bright-line test: the arena of law, the domain where *legal* rights, duties or relations are altered. Because their review procedure fails that test, the Good Friday accords lie beyond legal terrain. They are thus clearly constitutional.

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SENATE MATERIALS AND TREATY INTERPRETATION: SOME RESEARCH HINTS FOR THE SUPREME COURT

In his concurring opinion in the recent tax treaty case *United States v. Stuart*, Justice Scalia reports that "I have been unable to discover a single case in which this Court has consulted the Senate debate, committee hear-

¹⁵ Most were of the committee-veto variety. L. FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 225 (1988). For specific examples, see Fisher, *Judicial Misjudgments About the Law-Making Process: The Legislative Veto Case*, 45 PUB. AD. REV. 705, 706-07 (1985).

¹⁶ L. FISHER, *supra* note 15, at 225.

¹⁷ 108 S.Ct. 2597 (1988).

¹⁸ 109 S.Ct. 647 (1989).

ings or committee reports” to interpret a treaty.¹ Even more sweepingly, he says that two 1988 opinions in a district court are the “first (and, as far as I am aware, the only) federal decisions relying upon pre-ratification Senate materials for the interpretation of a treaty.”² He moves from there to conclude that the “Restatement (Third) of the Foreign Relations Law of the United States §314, Comment *d* (1986); *id.*, §325, Reporter’s [*sic*] Note 5 . . . must be regarded as a proposal for change rather than a restatement of existing doctrine.”³ Those are the paragraphs in which the *Restatement* approves the use of such materials.

Since there are in fact several cases in the categories mentioned, and they are relatively easy to find, these statements read almost as a cry for assistance and guidance, which this note sets out to give. It seems likely that not only the Court, but also other professionals, have been experiencing difficulties in this research area. I feel a particular obligation to give this guidance, since apparently our failure as reporters to give such citations left the Justice helpless to find them on his own. Incidentally, it would not be inappropriate for a *Restatement* to make a proposal for change going further than the case law; the Institute’s purpose, reiterated in the volume in question, is “the clarification and simplification of the law and its better adaptation to social needs.”

This note will suggest six different ways in which the matter could have been researched, methods that would have turned up the missing category of Supreme Court cases and all sorts of other interesting and probative materials as well.

1. *Use modern technology.* The easy way to get into these materials is by use of such technological assistance as LEXIS or WESTLAW. This is apt to be the case when one searches for something that the courts, and hence the compilers of the digests, did not regard as important and for which, therefore, no key number exists.⁴ Under the guidance of Alan Diefenbach of our library staff, we entered “treaty” and “S. Exec. Rep.” (the usual modern citation form for reports of the Senate Foreign Relations Committee) into LEXIS. We then asked it for Supreme Court cases using those terms. LEXIS delivered seven citations, including the *Stuart* case itself.⁵ If one had

¹ 109 S.Ct. 1183, 1195 (1989).

² *Id.* at 1196. The two opinions are *Rainbow Navigation, Inc. v. Department of Navy*, 686 F.Supp. 354, 699 F.Supp. 339 (D.D.C. 1988).

³ 109 S.Ct. at 1196–97.

⁴ The computer is particularly useful in searches to prove a negative. *Compare State ex rel. Grant v. Brown*, 39 Ohio St. 2d 112, 118, 313 N.E.2d 847, 851 (1974), *appeal dismissed*, 420 U.S. 916 (1975): “In fact, nowhere in the recorded decisions of the Ohio Supreme Court has any justice ever used the term ‘homosexual’ or ‘homosexuality[]’” Footnote 3 reads: “Computerized research, using LEXIS, discloses this fact.”

⁵ The cases before *Stuart* are, starting with the most recent, *Volkswagenwerk A.G. v. Schlunk*, 108 S.Ct. 2104, 2110, 2113, 2115–16 (1988); *Societe Nationale Industrielle Aero-spatiale v. United States Dist. Court for the S. Dist. of Iowa*, 107 S.Ct. 2542, 2549, 2559 (1987); *Air France v. Saks*, 470 U.S. 392, 397, 403 (1985); *Immigration & Naturalization Service v. Stevic*, 467 U.S. 407, 417–18 (1984); *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 250, 257 (1984); *Warren v. United States*, 340 U.S. 523, 527 n.5 (1951).

to choose a single example, it would probably be *INS v. Stevic*, which heavily uses those materials, including Senate floor debates. But all six of the prior cases appear to meet Justice Scalia's criterion of "consulting."

We did not perform the more burdensome exercise of running the cases from the lower federal courts through LEXIS. It would clearly have delivered more cases. Memory of my own work on the Mexican prisoner transfer treaty turned up the very thorough consultation of legislative materials, both as to the treaty and as to the implementing legislation, that appears in *Rosado v. Civiletti*.⁶ The case also reminded me that in the early stages of the process I enjoyed a pleasant association with the then Assistant Attorney General, Office of Legal Counsel, Antonin Scalia.

2. *Do it the old way.* One can approach this exercise by simply reading treaty interpretation cases until one finds opinions that use Senate materials. This route is slow and unreliable. But I did find that working back, one quickly picked up two significant cases, *Volkswagenwerk* and *Aerospatiale*, since they are the Court's latest major treaty decisions. Rather randomly, I found an old case, *Factor v. Laubenheimer*,⁷ that used a document that would now probably be in a committee report. LEXIS would not have turned it up since it did not use the modern citation form. Doubtless a small research army would find more cases.

Traditional research outside the cases also turned up this item of history, which represents the only prior statement, by Charles Evans Hughes, that I have found supporting the view that Senate debates should *not* be used:

In a diplomatic interchange concerning the question whether the Treaty of Berlin automatically gave the United States rights accorded by the Treaty of Versailles, Germany referred to statements made by Senator Lodge in debate in the Senate upon the Treaty of Berlin. Concerning this, Secretary Hughes wrote the Ambassador to Germany:

"Should occasion arise, you may orally explain to the German Foreign Office that expressions of opinion as to the meaning of the treaty of August 25, 1921, such as those to which the Foreign Office refers, occurring in general debate, cannot be regarded as affecting the interpretation of that treaty."⁸

Interestingly, the Hughes episode provides some support not only for the view that Senate history should not be used, but also for the suspicion of the *Stuart* majority that sophisticated foreign states are quite aware of what is said during the advise-and-consent process.

3. *Consult one's (institutional) memory.* Two of the cases retrieved, *Volkswagenwerk* and *Aerospatiale*, date from the term of Justice Scalia's service,

⁶ 621 F.2d 1179 (2d. Cir.), *cert. denied*, 449 U.S. 856 (1980).

⁷ 290 U.S. 276, 299 n.6 (1933).

⁸ 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 262 (1943). Just possibly, the German official's response was, "I understand your problems with the Senate because I remember Bismarck using the aphorism that 'No man should see how laws or sausages are made.'" Cited by Scalia, J., in *Community Nutrition Inst. v. Block*, 749 F.2d 50, 51 (D.C. Cir. 1984).

though he wrote neither of them. Have the caseload of the Court and the bureaucratization of research through the clerks become so oppressive that nobody's personal memory retrieved this? Why did the authors of the four separate opinions in those cases not point out this misstatement of the Court's own practice?

4. *Read the Restatement understandingly.* Used with understanding, the *Restatement* can tell one much more about the problem than Justice Scalia could find. It is true that the reporters did not cite authority as to the use of legislative materials, but that was because it was thought to be well established. A check from the *Restatement (Third)* back to the *Restatement (Second)* would have shown that sections 314 and 325 were not Professor Henkin's "proposal for change" but a nearly word-for-word reproduction of comment *a* to section 151 of the *Restatement (Second)* as it was written in 1965 by a different set of reporters.⁹ Ironically, what causes Justice Scalia difficulty here is that he consulted the legislative history of the old *Restatement*, that is, its Proposed Official Draft, but not the completed product. The passage he quotes was dropped from the final version. Surely, it is a new move in interpretation not to consider the legislation but only the legislative history. A check of the cases that cited the *Restatement (Second)* provision would have revealed that it proved entirely noncontroversial, being cited only once, by a state court.¹⁰ All of this shows that the *Restatement* rule has passed the scrutiny of two sets of reporters and two sets of advisers, plus two rounds through the membership of the Institute, including representatives of all branches of the Government that are importantly concerned with the issues.

5. *Ask counsel.* One way to get research help is to stick with the issues that counsel have argued. In this tax case, it occurred to nobody that an important issue would be the use of Senate materials to construe the ABM Treaty. Had counsel been asked about it, they would probably have complied and put their LEXIS systems to work on the issue, thus saving the time and energy of the Court's clerks.

6. *Read widely in what one cites.* Justice Scalia devotes considerable attention to criticizing the testimony of Professor Henkin in the ABM controversy, characterizing it as, in effect, bootstrapping upon his work in the *Restatement*. I take it that this is what the Justice means by "self-exertion," but I cannot be sure since that word appears in none of the six dictionaries I consulted.¹¹ If the reading had included the testimony of others alongside Henkin's, the interesting fact would have appeared that the testimony of the

⁹ I am partly to blame for this. Because it involved a mere Reporters' Note, I did not in the cross-reference table, 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 477 (1987), cross-reference old §151 to new §325.

¹⁰ The case is *Japan Line Ltd. v. County of L.A.*, 20 Cal. 3d 180, 189 n.5, 141 Cal. Rptr. 905, 911 n.5, 571 P.2d 254, 260 n.5 (1977), *rev'd on other grounds*, 441 U.S. 434 (1979). Such citations can be found in *Shepards* or in pocket parts to the 1965 *Restatement*. It is worth reiterating that there was no "Restatement (First)."

¹¹ 109 S.Ct. at 1197 n.*.

Legal Adviser of the Department of State, Judge Sofaer, has a far more detailed and nuanced description of the practice of consulting Senate history in the course of construing treaties than does Henkin's.¹² In fact, it is by all odds the best account of the practice and its pitfalls yet to appear. Were I asked to do yet another draft of the *Restatement*, I would plagiarize from it with gratitude.

Another peculiarly narrow reading involves *Maximov v. United States*.¹³ While the Justice quotes from the text of one page at some length, a more comprehensive reading of that page would show in a footnote that the Court consulted hearings before a subcommittee of the Committee on Foreign Relations.

One notes that research into questions of international and foreign relations law and practice is somewhat novel and calls for some caution. But it is not impossible to do considerably better than was done in the opinion in question. One hopes that counsel will continue to research and cite Senate history in argumentation concerning the meaning of treaties, a practice of long standing that sometimes, but not always, produces illuminating guidance.

This note cannot conclude without a word to Justice Scalia's law clerks, who may find themselves in a somewhat uncomfortable position because of it. I am sure that when the Justice says, "I have been unable," he means, "My clerks have been unable." Under other circumstances, I would simply have contented myself with a letter to the Justice. But two considerations moved me to do this *coram publico*. First, other researchers may take the opinion at its word and not make investigations they ought to do. Second, the opinion goes on from these research errors to attack my long-time collaborator, Louis Henkin. I cannot let that attack on him and, by application of the principles of the Uniform Partnership Act, on myself go unanswered.¹⁴ Under the engraving of the porcupine in a French book on animals appears the legend "cet animal est bien méchant; quand on l'attaque il se défend." Loosely translated, that means that this very nasty animal, when attacked, has a tendency to defend itself.

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¹² *The ABM Treaty and the Constitution: Joint Hearings Before the Senate Comms. on Foreign Relations and on the Judiciary*, 100th Cong., 1st Sess. 351-64 (1987).

¹³ *Maximov v. United States*, 373 U.S. 49, 54 n.2 (1963), cited as to that very page in 109 S.Ct. at 1194.

¹⁴ Justice Scalia's misplacement of the apostrophe in "Reporters' Note" puts more blame or credit on Professor Henkin and less upon Professors Lowenfeld, Sohn and Vagts than is appropriate. Credit for detecting this typographical error goes to my research assistant, Carlo Kostka.