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The Supreme Court's Continuing War Over **Legislative History**

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U.S. Supreme Court in Washington, D.C.

When the U.S. Supreme Court issued its opinion in *Digital Realty Trust v. Somers*, – U.S. –, 200 L. Ed. 2d 15 (2018), the main focus was on the court's unanimous conclusion that whistleblower protections under the Dodd-Frank Act extend only to employees who report violations to the Securities and Exchange Commission.

Buried in the two concurring opinions, however, was an entirely separate and important debate about the use of legislative history to interpret statutes. While not the first attack on the use of legislative history by conservative justices, the concurrences in *Digital Realty Trust* suggest a growing divide between the Justices that will lead to further battle over how the court will interpret statutes in the future.

In *Digital Realty Trust*, the majority relied largely on the plain language of Dodd-Frank's whistleblower provisions, but then cited a Senate Report as evidence of the statute's purpose and design. 200 L. Ed 2d at 28-29. A concurrence authored by Justice Clarence Thomas and joined by Justices Samuel Alito and Neil Gorsuch, however, dismissed the use of the report to discern "the supposed 'purpose' of" Dodd-Frank. Id. at 35. Justice Thomas's concurrence prompted a rebuttal concurrence from Justice Sonia Sotomayor, joined by Justice Stephen Breyer.

Justice Thomas's concurrence is intriguing for several reasons. First, it signals his willingness to take up Justice Antonin Scalia's mantle as the court's primary critic of the use of legislative history materials. For many years, Justice Scalia led this charge, sometimes alone and sometimes joined by Justices Thomas and Alito. See, e.g., *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 608-10 (2010) (concurrence by Justice Scalia alone); *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, __ (2010) (same); *Lawson v. FMR*, 571 U.S. 429, 134 S. Ct. 1158, 1176-77 (2014) (Justice Scalia concurrence joined by Justice Thomas); *ABC v. Aereo*, 573 U.S. __, 134 S. Ct. 2498, 2515 (2014) (Justice Scalia concurrence joined by Justices Thomas and Alito). With Justice Gorsuch now siding with the critics of legislative history, future appointments to the court could result in a complete abandonment of legislative history as a means to discern congressional intent.

Second, this attack on legislative history leaves unanswered an important

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question: Precisely how should federal courts interpret statutes when the statutory language is susceptible to competing interpretations? Justice Thomas's concurrence claims the majority opinion should not have "venture[d] beyond the statutory text[,]" but few people would dispute that statutory language is not always clear and unambiguous. When statutes are unclear, to refuse to consider contemporaneous statements about the legislation would remove a critical source of information to determine legislative intent.

Third, Justice Thomas's decision to challenge the use of legislative history in *Digital Realty Trust* is striking because the sole legislative history source cited by the majority is a committee report. As Justice Sotomayor points out in her concurrence, committee reports are considered a "particularly reliable source to which we can look to ensure our fidelity to Congress' intended meaning." *Digital Realty Trust*, 200 L. Ed 2d at 33 (Sotomayor, J., concurring) (citing *Garcia v. United States*, 469 U. S. 70, 76 (1984)). Justice Sotomayor's concurrence cites numerous sources—from legal treatises to statements of members of Congress—about the important role committee reports play in informing other members of Congress about the content and purpose behind pending legislation.

Indeed, jurists and scholars have emphasized that committee reports are the most reliable of legislative history sources. In *Garcia*, then-Associate Justice William Rehnquist wrote that "we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia*, 469 U.S. at 76 (quoting *Zuber v. Allen*, 396 U. S. 168, 186 (1969)). In *Schwegmann Bros. v. Calvert Distillers*, Justice Jackson suggested that only committee reports should be consulted, because they "presumably are well considered and carefully prepared." 341 U.S. 384, 395 (1951) (Jackson, J., concurring). Similarly, Profs. William Eskridge and Philip Frickey listed committee reports as the most authoritative source of legislative history in their well-recognized hierarchy of sources. William N. Eskridge Jr., "The New Textualism," 37 UCLA L. REV. 621, 636 (1990).

By contrast, Justice Thomas's argument against the reliability of committee reports rests almost entirely on a single colloquy from the Senate debate on Dodd-Frank that delves into the authorship of the report. *Digital Realty Trust*, 200 L. Ed 2d at 35 n*. The primary point of the exchange was to suggest that the report cannot be a valid expression of legislative intent because it was not personally authored by a Senator, but instead by staff. Of course, the same could be said about many statutes.

Moreover, as Justice Thomas makes clear, his attack on the use of the committee report does not rest on its reliability or lack thereof. He states that the majority should not have relied upon it, "[e]ven assuming a majority of Congress read the Senate Report, agreed with it, and voted for Dodd-Frank with the same intent … ." Id. at 35. This plainly suggests that courts should reject any consideration of legislative history as a guide to statutory interpretation, regardless of the source's reliability.

Fourth, it seems odd that Justice Thomas chose *Digital Realty Trust* as his vehicle for attacking the use of legislative history. The majority opinion's analysis rests on the plain language of the statute and only uses the committee report to "corroborate" the court's reading of the statute. Id. at *28-29. All references to the report could have been removed from the majority opinion, so why raise the issue in this case?

Interestingly, in both his decision to attack the use of committee reports and to do so in a case where legislative history played little actual role in the decision, Justice Thomas's concurrence parallels a concurrence Justice Scalia authored in *Zedner v. United States*, 547 U.S. 489 (2006). As in *Digital Realty Trust*, the *Zedner* majority opinion cited to committee reports, but only to confirm a textual analysis of a statute. *Zedner* was authored by Justice Alito, who appears to have made an about-face on this issue.

Fifth, how is it possible to reconcile Justice Thomas's concurrence's attack with his reliance on contemporaneous writings in his constitutional jurisprudence? Justice Thomas has relied upon the Federalist Papers, the drafting history and reports of the Constitutional Convention, and statements made at state ratifying conventions to support his constitutional interpretations. See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2099 (2015) (Thomas, J., dissenting) (citing Federalist Nos. 70 and 72 and multiple statements made at state ratifying conventions); *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 133 S. Ct. 2247, 2263-64 (2013) (Thomas, J., dissenting) (citing repeatedly to Federalist No. 52); *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 133 S. Ct. 2552, 2569-70 (2013) (Thomas, J., concurring) (citing the drafting history and reports of the Constitutional Convention and multiple statements made at state ratifying conventions). Why such sources are reliable for constitutional, but not statutory, interpretation is a mystery.

Ultimately, whether the reader supports or opposes judicial reliance on legislative history, the concurrences in *Digital Realty Trust* indicate that this debate is far from over.