*LEGISLATIVE INTENT SERVICE, INC.* *Summer/2007*

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## Making a "Federal" Case Out of It!

This issue of Engrossment is dedicated to federal-related topics that we have recently encountered. The topics will address "**earmarks**"; **federal legislative intent research strategy**; and **federal points and authorities for legislative history and intent research**.

## ~EARMARKS~

One controversial aspect of federal appropriations bills are "earmarks." There has been an increased interest by our clients to have federal budget bills researched with a focus on specific earmarks within these large bills. Tracing a small part of any large appropriations bill presents interesting research challenges, especially when these earmarks are placed in a bill at the last minute. These challenges have compelled us to develop a successful strategy for pursuing legislative history for earmarks.

According to the Office of Management and Budget (OMB), "earmarks" are funds provided by Congress for projects or programs where the congressional direction circumvents the merit-based or competitive allocation process, or specifies the location or recipient, or otherwise curtails the ability of the Executive Branch to properly allocate funds.

The OMB stated further that the distinction between "earmarks" and "unrequested funding" is programmatic control, or not, in the allocation process. So, it is an "earmark" if the congressional direction for the project or program or funding in an appropriations bill affects the ability of the Administration to control critical aspects of the awards process for the project or program or funding. But, if Congress adds funding and the Administration retains control over the awards process for the project or program or funding, then it is *not* an earmark – it is an "unrequested funding."

However, this OMB definition is a moving target: The Congressional Research Service (CRS) stated that "[t]here is not a single definition of the term *earmark* accepted by all practitioners and observers of the appropriations process, nor is there a standard earmark practice across all appropriation bills." [Jan. 26, 2006 CRS Memorandum] The CRS noted that in practice, earmarks often reflect procedures established over time that may differ from one appropriations bill to another. Thus, in its Memorandum on earmarks in appropriation acts for the years 1994 through 2005, the CRS could maintain a consistent definition of earmarks only within each entry because of the varying ways that earmarks are defined and applied in appropriations bills. [Id.]

## Federal Legislative History Research Strategy

There are less than a handful of document *types* to research on a federal public law than most states legislation. These federal documents are: the bill, committee reports, transcripts, congressional debate and prints or studies. Indices and serial sets provide help in locating specific hearings and reports. What makes federal legislative history research a challenge is that most public laws are omnibus or comprehensive bills in nature, with the individual subjects within these bills likely to have been a product of a long prior history of failed legislation. Between voluminous bills, reports by committees (i.e., whole, sub- or select-), and the lengthy transcripts of hearings and debates, a once-simple federal legislative history becomes a voluminous effort to collect, organize, review and excerpt the materials for the enacting bill and the relevant failed predecessor bills where language may have originally developed over time.

Most of our clients in need of federal bill history have a focus in a code section or a term within a subdivision, which helps us cull out the nonrelevant materials in federal bills. By looking at committee reports, one can find prior bills, legislative history, and a section-by-section analysis. Once relevant prior bills are identified, we gather only relevant reports and debates generated on these earlier measures. We find it helpful to excerpt for relevant commentary to lessen our clients' time spent reviewing these materials.



* Final draft of a legislative proposal

## Federal Points and Authorities

As long ago as 1601, the court in the case of *William v. Berkeley*, Plow 223, 231, stated that: "Whoever would consider an act well ought always have particular regard to the intent of it, and accordingly as the intent appears, he ought to construe the words." Justice Oliver W. Holmes put it more succinctly when he said "a page of history is worth a volume of logic." *New York v. Eisner* (1921) 256 U.S. 345, 349.

From our new draft of Federal Courts Points and Authorities on Legislative History and Intent, we provide below three points raised by the federal courts.

**1.** When questions arise concerning the applicability of a statute, a decision can be reached only by applying some kind of a *criterion*. For the interpretation of statutes, "intent of the legislature" is the criterion that is most often recited. *U.S. v. Harvey*, 814 F.2d 905 (4th Cir. 1987), on reh'g in part, 837 F.2d 637 (4th Cir. 1988), cert granted, 488 U.S. 940, 109 (1988) and judgment aff'd, 491 U.S. 617 (1989). In construing the meaning of a statute the courts must consider the history of the subject matter involved, the end to be attained, the mischief to be remedied and the purpose to be accomplished. *Frillz, Inc. v. Lader*, 925 F. Supp. 83 (D. Mass. 1996), judgment aff'd, 104 F.3d 515 (1st Cir. 1997), cert. denied, 522 U.S. 813 (1997)

**2.** The Plain Meaning Rule and the Need for Ambiguity: If a statute is clear and unambiguous on its face, there cannot be interpretation by a court. *Jay v. Boyd* 351 U.S. 345, 76 S Ct. 919, 927 (1956) That is, "where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." *United States v. Missouri Pac. Ry*. 278 U.S. 269, 278 (1929) *However*, the Court has disregarded the plain meaning and used extrinsic sources: *Helvering v. New York Co.* 292 US 455, 464 (1934); *Texas & Pacific Railway v. United States* 289 US 627, 658 (1933) Justice Butler wrote:

> The rule that where the statute contains no ambiguity, it must be taken literally and given effect according to its language is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose… But the expounding of a statutory provision according to the letter without regard to the other parts of the Act and legislative history would often defeat the object intended to be accomplished. *Helvering v. New York Co.* 292 US 455, 464, (1934)

**3**. Avoiding An Absurd Result: In *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989), Justice Antonin Scalia, a vocal critic of the use of legislative history, wrote that this kind of use was proper. (Id., page 527) He said that a judge will, and presumably should, consult history "to verify that what seems … an unthinkable disposition… was indeed unthought-of, and thus to justify a departure from the ordinary meaning of the word[s]" in the statute. (Id.) Also see *Pritker v. Yari*, 42 F.3d 53 (1st Cir. 1994) [45:12 p92fn]; *U.S. v. Alpers*, 338 U.S. 680 (1950); *U.S. v. Public Utilities Commission of Cal.*, 345 U.S. 295, (1953); *Rod Warren Ink v. C.I.R.*, 912 F.2d 325 (9th Cir. 1990) [46:07, p 194+]

## Federal Public Law Research Projects

Over these past 30 years, we have researched a **long** list of federal bills, ranging from federal lands and management; water rights; patents, copyrights and trademarks; Indian affairs; veterans affairs; consumer rights; and voting rights, just to name a few, and clients continue to call for new legislation never before researched by us. So, ***call us*** if you have any questions about any federal legislative history research project.

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