SUPREME COURT OF THE UNITED STATES

No. 91–1353

THOMAS F. CONROY, PETITIONER *v.* WALTER ANISKOFF, JR., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

[March 31, 1993]

JUSTICE SCALIA, concurring in the judgment.

The Court begins its analysis with the observation: "The statutory command in §525 is unambiguous, unequivocal, and unlimited." *Ante*, at 3. In my view, discussion of that point is where the remainder of the analysis should have ended. Instead, however, the Court feels compelled to demonstrate that its holding is consonant with legislative history, including some dating back to 1917—*a full quarter century* before the provision at issue was enacted. That is not merely a waste of research time and ink; it is a false and disruptive lesson in the law. It says to the bar that even an "unambiguous [and] unequivocal" statute can never be dispositive; that, presumably under penalty of malpractice liability, the oracles of legislative history, far into the dimmy past, must always be consulted. This undermines the clarity of law, and condemns litigants (who, unlike us, must pay for it out of their own pockets) to subsidizing historical research by lawyers.

The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: "The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself* . . . ." *Aldridge* v. *Williams*, 3 How. 9, 24 (emphasis added). But not the least of the defects of legislative history is its indeterminacy. If one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising

candidate than legislative history. And the present case nicely proves that point.

Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends. If I may pursue that metaphor: The legislative history of §205 of the Soldiers' and Sailors' Civil Relief Act[1] contains a variety of diverse personages, a selected few of whom—its "friends"—the Court has introduced to us in support of its result. But there are many other faces in the crowd, most of which, I think, are set against today's result.

I will limit my exposition of the legislative history to the enactment of four statutes:

1. The Soldiers' and Sailors' Civil Relief Act of 1918 (1918 Act), 40 Stat. 440;

2. The Soldiers' and Sailors' Civil Relief Act of 1940 (1940 Act or Act), 54 Stat. 1178;

3. The Soldiers' and Sailors' Civil Relief Act Amendments of 1942 (1942 Amendments), 56 Stat. 769;

4. The Selective Service Act of 1948, 62 Stat. 604.

That, of course, cannot be said to be the "*complete* legislative history" relevant to this provision. Compare *ante*, at 4. One of the problems with legislative history is that it is inherently open-ended. In this case, for example, one could go back further in time to examine the Civil War-era relief Acts, many of which are in fact set forth in an appendix to the House Report on the 1918 Act, see Appendix A, H. R. Rep. No. 181, 65th Cong., 1st Sess., 18–32 (1917) (hereinafter 1917 House Report). Or one could extend the search abroad and consider the various

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[1]The Court refers to this section as "§525," which corresponds to the unofficial codification of the section in the United States Code, 50 U. S. C. App. §525. I find it more convenient to use the actual statutory section number—"§205"—in discussing the history of the provision.

foreign statutes that were mentioned in that same House Report. See *id.*, at 4, 13–14 (discussing English and French enactments). Those additional statutes might be of questionable relevance, but then so too are the 1918 Act and the 1940 Act, neither of which contained a provision governing redemption periods. Nevertheless, I will limit my legislative history inquiry to those four statutes for the simple reason that that is the scope chosen by the Court.

The 1918 Act appears to have been the first comprehensive national soldiers' relief Act. See 55 Cong. Rec. 7787 (1917). The legislative history reveals that Congress intended[2] that it serve the same vital purpose—providing "protection against suit to men in military service"—as various state statutes had served during the Civil War. 1917 House Report 3; see also *id.*, at 18–32 (Appendix A) (setting forth text of numerous state soldiers' relief Acts from

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[2]When I say "Congress intended," here and hereafter in this excursus into legislative history, I am speaking as legislative historians speak, attributing to all Members of both Houses of Congress (or at least to a majority of the Members of each House), and to the President (or, if the President did not sign the bill in question, then to at least two-thirds of the Members of both Houses of Congress) views expressed by the particular personage, or committee of personages, whose statements are being described—in the case of the citation at issue in this sentence, a committee of the House of Representatives. It is to be assumed—by a sort of suspension of disbelief—that two-thirds of the Members of both Houses of Congress (or a majority plus the President) were aware of those statements and must have agreed with them; or perhaps it is to be assumed—by a sort of suspension of the Constitution—that Congress delegated to that personage or personages the authority to say what its laws mean.

the Civil War era). Congress intended, however, that the 1918 Act should differ from the Civil War statutes "in two material respects." 55 Cong. Rec. 7787 (1917) (statement of Rep. Webb). The first was that, being a national statute, it would produce a disposition "uniform throughout the Nation." 1917 House Report 3; see also 55 Cong. Rec. 7787 (1917) (statement of Rep. Webb). But it is the second difference which has particular relevance to the Court's ruling today:

> "The next material difference between this law and the various State laws is this, and in this I think you will find the chief excellence of the bill which we propose: Instead of the bill we are now considering being arbitrary, inelastic, inflexible, the discretion as to dealing out even-handed justice between the creditor and the soldier, taking into consideration the fact that the soldier has been called to his country's cause, rests largely, and in some cases entirely, in the breast of the judge who tries the case." *Id.*, at 7787 (statement of Rep. Webb).[3]

This comment cannot be dismissed as the passing remark of an insignificant Member, since the speaker was the Chairman of the House Judiciary Committee, the committee that reported the bill to the House floor. Moreover, his remarks merely echoed the House Report, which barely a page into its text stated: "We cannot point out too soon, or too emphatically, that the bill is not an inflexible stay of

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[3]In quoting this floor statement, I follow the convention of legislative history, which is to assume conclusively that statements recorded in the Congressional Record were in fact made. That assumption of course does not accord with reality. See 117 Cong. Rec. 36506–36507 (1971) (supposed floor statement shown by internal evidence never to have been delivered).

all claims against persons in military service." 1917 House Report 2. Congress intended to depart from the "arbitrary and rigid protection" that had been provided under the Civil War-era stay laws, *ibid.*, which could give protection to men "who can and should pay their obligations in full," *id.*, at 3. It is clear, therefore, that in the 1918 Act Congress intended to create flexible rules that would permit denial of protection to members of the military who could show no hardship.

The 1918 Act expired by its own terms six months after the end of the First World War. See 1918 Act, §603, 40 Stat. 449. The 1940 Act was adopted as the Nation prepared for its coming participation in the Second World War. Both the House and Senate Reports described it as being, "in substance, identical with the [1918 Act]." H. R. Rep. No. 3001, 76th Cong., 3d Sess., 3 (1940); S. Rep. No. 2109, 76 Cong., 3d Sess., 4 (1940). Moreover, in *Boone* v. *Lightner*, 319 U. S. 561, 565 (1943), we acknowledged that the 1940 Act was "a substantial reenactment" of the 1918 Act, and looked to the legislative history of the 1918 Act for indications of congressional intent with respect to the 1940 Act. Relying on that legislative history, we found that "the very heart of the policy of the Act" was to provide "judicial discretion . . . instead of rigid and undiscriminating suspension of civil proceedings." *Ibid*.

Although the Court never mentions this fact, it is clear that under the 1918 and 1940 Acts a redemption period would not be tolled during the period of military service. In both enactments, §205 governed only statutes of limitations and did not mention redemption periods.[4] Moreover, in *Ebert* v.

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[4]Section 205 of the 1918 Act provided:

"That the period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by

Poston, 266 U. S. 548 (1925), this Court held that neither §205 nor §302, which provides protection from foreclosures, conferred on a court any power to extend a statutory redemption period. Congress overturned the rule of *Ebert* in the 1942 Amendments, a central part of the legislative history that the Court curiously fails to discuss. Section 5 of those amendments rewrote §205 of the Act to place it in its current form, which directly addresses the redemption periods. See 56 Stat. 770–771; *ante*, at 1, n. 1 (setting forth current version of §205). The crucial question in the present case (if one believes in legislative history) is whether Congress intended this amendment to be consistent with the "heart of the policy of the Act"—conferring judicial discretion—or rather intended it to confer an unqualified right to extend the period of redemption. Both the House and Senate Reports state that, under the amended §205, "[t]he running of the statutory period during which real property may be redeemed after sale to enforce any obligation, tax, or assessment is *likewise* tolled during the part of such period which occurs after enactment of the [1942 Amendments]." H. R. Rep. No. 2198, 77th Cong., 2d Sess., 3–4 (1942); S. Rep. No. 1558, 77th Cong., 2d Sess., 4 (1942) (emphasis added). The Reports also state that "[a]lthough the tolling of such periods is now within the spirit of the law, it has not been held to be within the letter thereof" (citing *Ebert*). H. R. Rep. No. 2198, *supra*, at 4; S. Rep. No. 1558, *supra*, at 4. These statements

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or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service." 40 Stat. 443.

Section 205 of the 1940 Act was identical, except that the word "That" at the beginning of the section was omitted.

surely indicate an intention to provide a tolling period for redemptions similar to that already provided for statutes of limitations—which, on the basis of the legislative history I have described, can be considered discretionary rather than rigid. The existence of discretionary authority to suspend the tolling is also suggested by the House floor debates. Responding to questions, Representative Sparkman (who submitted the Report on behalf of the House Committee on Military Affairs) agreed that, while the bill "pertains to all persons in the armed forces," a man "serving in the armed forces for more money than he got in civil life . . . is not entitled to any of the benefits of the provisions of this bill." 88 Cong. Rec. 5364, 5365 (1942). In response to that last comment, another representative inquired further whether "[t]his is to take care of the men who are handicapped because of their military service." *Id.*, at 5365. Representative Sparkman answered affirmatively. *Ibid.* He confirmed that Congress did not intend to abandon the discretionary nature of the scheme: "With reference to all these matters we have tried to make the law flexible by lodging discretion within the courts to do or not to do as justice and equity may require." *Ibid.* And finally, at a later point in the debates, Representative Brooks made clear that the Act was intended to remedy the prejudice resulting from compelled military service: "We feel that the normal obligations of the man contracted prior to service induction should be suspended as far as practicable during this tour of duty, and that the soldier should be protected from default in his obligations due to his inability to pay caused by reduction in income due to service." *Id.*, at 5369.

The final component of the legislative history that I shall treat is the extension of the 1940 Act in the Selective Service Act of 1948, 62 Stat. 604. The Court misconstrues Congress's intent in this enactment in two respects. First, it asserts that

"because Congress extended the life of the Act indefinitely in 1948, well after the end of World War II, the complete legislative history confirms a congressional intent to protect all military personnel on active duty, just as the statutory language provides." *Ante*, at 4. It is true enough that the War was over; but the draft was not. The extension of the 1940 Act was contained in the *Selective Service Act of 1948*, which *required* military service from citizens. And it would appear to have been contemplated that the "life of the Act" would be extended not "indefinitely," as the Court says, *ante*, at 4, but for the duration of the draft. See H. R. Rep. No. 1881, 80th Cong., 2d Sess., 12 (1948) (extension was intended to "continu[e] the Soldiers' and Sailors' Civil Relief Act of 1940 in its application to the personnel inducted or entering the armed forces during the life of this act"). The legislative history states that Congress intended to extend the provisions of the 1940 Act "to persons serving in the armed forces *pursuant to this act*." S. Rep. No. 1268, 80th Cong., 2d Sess., 21 (1948) (emphasis added). Career members of the military such as petitioner would not have been serving "pursuant to" the Selective Service Act, since they were expressly excepted from its service requirement. See Selective Service Act of 1948 §6(a), 62 Stat. 609. In this focus upon draftees, the legislative history of the 1948 extension merely replicates that of the 1940 Act and the 1942 Amendments. The former was enacted on the heels of the Selective Training and Service Act of 1940, 54 Stat. 885, and was introduced on the Senate floor with the explanation that it would provide "relief . . . to those who are to be *inducted* into the military service for training under [the Selective Training and Service Act of 1940]." 86 Cong. Rec. 10292 (1940) (statement of Rep. Overton) (emphasis added). In the debate on the 1942 Amendments, Representative Sparkman noted that "hundreds of thousands, and

even millions, have been called" into military service since the enactment of the 1940 Act, and admonished his colleagues to "keep uppermost in your mind at all times the fact that the primary purpose of this legislation is to give relief to the boy that is called into service." 88 Cong. Rec. 5364 (1942). In other words, the legislative history of the 1948 extension, like that of the Act itself and of the 1942 Amendments, suggests an intent to protect those who were *prejudiced* by military service, as many who were drafted would be.

The Court also errs in mistaking the probable effect of Congress's presumed awareness of our earlier opinions in *Ebert* and *Boone*. See *ante*, at 5–6. In *Boone*, we stated that the Act "is always to be liberally construed to protect those who have been *obliged* to drop their own affairs and take up the burdens of the nation," 319 U. S., at 575 (emphasis added), but that discretion was vested in the courts to insure that the immunities of the Act are not put to "unworthy use," *ibid*., since "the very heart of the policy of the Act" was to provide "judicial discretion . . . instead of rigid and undiscriminating suspension of civil proceedings," *id.*, at 565. Awareness of *Boone* would likely have caused Congress to assume that the courts would *vindicate* "the very heart of the policy of the Act" by requiring a showing of prejudice. The Court argues, however, that Congress would *also* have been aware that *Ebert* recognized the "carefully segregated arrangement of the various provisions" of the Act, *ante*, at 5. It is already an extension of the normal convention to assume that Congress was aware of the precise reasoning (as opposed to the holding) of earlier judicial opinions; but it goes much further to assume that Congress not only knew, but expected the courts would continue to follow, the reasoning of a case (*Ebert*) whose holding Congress had repudiated six years earlier. See *supra*, at 6. In any event, the

Court seeks to use *Ebert* only to establish that Congress was aware that this Court was aware of the "carefully segregated arrangement" of the Act. That adds little, if anything, to direct reliance upon the plain language of the statute.

After reading the above described legislative history, one might well conclude that the result reached by the Court today, though faithful to law, betrays the congressional intent. Many have done so. Indeed, as far as I am aware, *every court* that has chosen to interpret §205 in light of its legislative history rather than on the basis of its plain text has found that Congress did not intend §205 to apply to career members of the military who cannot show prejudice or hardship. See, in addition to the court below, *Pannell* v. *Continental Can Co.*, 554 F. 2d 216, 224–225 (CA5 1977); *Bailey* v. *Barranca*, 83 N. M. 90, 94–95, 488 P. 2d 725, 729–730 (1971); *King* v. *Zagorski*, 207 So. 2d 61, 66–67 (Fla. App. 1968). The only scholarly commentary I am aware of addressing this issue concludes: "An examination of the legislative history of the Act shows that the prevailing interpretation of section 205 [*i.e.*, the Court's interpretation] is not consistent with congressional intent." Folk, Tolling of Statutes of Limitations under Section 205 of the Soldiers' and Sailors' Civil Relief Act, 102 Mil. L. Rev. 157, 168 (1983). Finally, even the Government itself, which successfully urged in this case the position we have adopted, until recently believed, on the basis of legislative history, the contrary. See *Townsend* v. *Secretary of Air Force*, No. 90–1168, 1991 U. S. App. LEXIS 26578, *5–*7 (CA4, Nov. 12, 1991); Brief for United States as *Amicus Curiae* on Pet. for Cert. 17, n. 19 (noting Government's position in *Townsend* that §205 requires a showing of prejudice); see also *Bickford* v. *United States*, 656 F. 2d 636, 640 (Ct. Cl. 1981) ("The Government argues that the statute does not mean what it says because the legislative history evinces

Congress' intent to limit the applicability of [§205] to those servicemen engaged in battle or who are otherwise handicapped from asserting their legal claims").

I confess that I have not personally investigated the entire legislative history—or even that portion of it which relates to the four statutes listed above. The excerpts I have examined and quoted were unearthed by a hapless law clerk to whom I assigned the task. The other Justices have, in the aggregate, many more law clerks than I, and it is quite possible that if they all were unleashed upon this enterprise they would discover, in the legislative materials dating back to 1917 *or earlier*, many faces friendly to the Court's holding. Whether they would or not makes no difference to me—and evidently makes no difference to the Court, which gives lipservice to legislative history but does not trouble to set forth and discuss the foregoing material that others found so persuasive. In my view, that is as it should be, except for the lipservice. The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it. We should not pretend to care about legislative intent (as opposed to the meaning of the law), lest we impose upon the practicing bar and their clients obligations that we do not ourselves take seriously.