

BOOK REVIEW

In Search of Congressional Intent

THE COMMUNICATIONS ACT: A LEGISLATIVE HISTORY OF THE MAJOR AMENDMENTS, 1934-1996, Max D. Paglin ed., Pike & Fischer, Inc., 1999, 438 pages.

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A second volume of the important literary legacy of the Golden Jubilee Commission on Telecommunications has recently appeared beside the well-thumbed copy of its sister volume, *A Legislative History of the Communications Act of 1934*,¹ in the library of every diligent practitioner of communications law. The first volume documents the legislative history of the Communications Act of 1934 ("1934 Act"), which combined the common carrier jurisdiction of the Interstate Commerce Commission with the radio jurisdiction of the Radio Commission to create the Federal Communications Commission ("FCC").² The recently released companion volume, *The Communications Act: A Legislative History of the Major Amendments, 1934-1996*,³ brings the legislative history forward to late summer 1998, including the Telecommunications Act of 1996.⁴

The first volume was produced under the editorship of the late Max

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1. *A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934* (Max D. Paglin ed., 1989).

2. 47 U.S.C. § 151 *et. seq.* (1994).

3. *THE COMMUNICATIONS ACT: A LEGISLATIVE HISTORY OF THE MAJOR AMENDMENTS, 1934-1996* (Max D. Paglin ed., 1999) [hereinafter *LEGISLATIVE HISTORY OF THE MAJOR AMENDMENTS*].

4. Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. § 151 *et. seq.* (Supp. IV 1998).

D. Paglin, a former general counsel and executive director of the FCC, during his role as executive director of the Golden Jubilee Commission on Telecommunications from 1984-99.⁵ At the time of his death in mid-1999, work on the sequel had been largely completed, and Paglin had written the preface.⁶ Two leading members of the bar, Joel Rosenbloom and James R. Hobson, discharged the final editorial responsibilities.⁷

The formats of the two volumes differ. The first volume features photographically reproduced pages of legislative documents from the 1933-34 period, sandwiched between four commentaries on the various titles of the 1934 Act and a topical index. It became obvious to the editors of the sequel early on that the second volume could not be fashioned in the same way. If nothing else, the sheer bulk of the legislative documents—some 20,000 pages—economically prohibited such an approach. Moreover, the formal legislative documents leading to the Cable Act of 1984, which became Title VI, had already been published under the auspices of the National Cable Television Association.⁸

In *The Communications Act: A Legislative History of the Major Amendments, 1934-1996*, the editors opted to cover the amendments in a number of essays. The volume opens with Margaret L. Tobey's chapter, *Procedures for Awarding, Transferring, Renewing, and Revoking Licenses*;⁹ followed by William J. Byrnes's comprehensive chapter on Title II (Common Carriers), *Telecommunications Regulation: Something Old and Something New*;¹⁰ and Joel Rosenbloom's exegesis, *Cable Television Amendments*.¹¹ More than a half dozen other essays cover the high points of the remaining amendments: public broadcasting, political broadcasting, sports broadcasting, mobile radio, etc.

The change in format has two advantages beyond practicality. Byrnes's chapter addresses the first volume's omission of the crucial legislative history of Title II.¹² Rosenbloom's chapter describes some of the

5. LEGISLATIVE HISTORY OF THE MAJOR AMENDMENTS, *supra* note 3, at v.

6. *Id.* at v, vi.

7. *Id.* at ii.

8. NATIONAL CABLE TELEVISION ASSOCIATION, LEGISLATIVE HISTORY OF THE CABLE COMMUNICATIONS POLICY ACT OF 1984 (1984).

9. LEGISLATIVE HISTORY OF THE MAJOR AMENDMENTS, *supra* note 3, at 1.

10. *Id.* at 31.

11. *Id.* at 213.

12. Byrnes deals with this omission by tracing the origins of key provisions of the 1934 Act back through S. 6 to the antecedent Interstate Commerce Act of 1887 as amended by the Hepburn Act of 1906, the Mann-Elkins Act of 1910, the Esch-Cummings Act of 1920, and the Willis-Graham Act of 1921. The Reviewer also noted this omission in William Malone, *A Legislative History of the Communications Act of 1934*, 42 FED. COMM. L.J. 319 (1990) (book review).

activities and motives underlying key provisions of the Cable Act signed by President Reagan in October 1984, including the scantily documented activity between the Senate floor debate in June of 1983 and the issuing of the House Committee's report the following summer.¹³

One might reasonably ask whether legislative histories such as these are jurisprudentially obsolescent. The Constitution does not sanction their use, although Article I requires that "[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same."¹⁴ Certainly, the judicial use of legislative history goes back at least to Lord Justice Hengham who, in the absence of an English counterpart to our separation of powers doctrine, admonished counsel, "Do not gloss the statute for we know better than you; we made it."¹⁵ *I.N.S v. Chadha*,¹⁶ however, reminds us that the Presentment Clause of the Constitution says that Congress may speak only through "bill[s] . . . presented to the President."¹⁷ Nonetheless, the utility of the legislative history of the 1934 Act has long been apparent:

The passage of [many] years, which have witnessed numerous trips to the Supreme Court, have not begun to settle the construction of the 1934 Act. A statute that is built around the touchstone of "the public interest, convenience, and necessity" is not a statute that holds out promise of a settled interpretation. Indeed, communications law, as Sir Henry Maine observed of the common law, gives the appearance of substance secreted through the interstices of procedure.

As long as the Commission is forced to wrestle with evolving technology and radical changes in industry structure, lawyers and scholars will need to revisit the legislative history of the Act to glean what grains of Congressional intent may be lodged there. Editor Paglin, his editorial advisory committee, and the commentators have produced an authoritative and workmanlike legislative history to which practitioners and academicians will have frequent resort in the next fifty-five years.¹⁸

As the 1934 Act is inevitably amended in the years to come, should the bar look to the Golden Jubilee Commission to publish a third volume? I think not. The evolution of freely available legislative documents in electronic form has surely marginalized printed legislative histories such as these for the future.

13. LEGISLATIVE HISTORY OF THE MAJOR AMENDMENTS, *supra* note 3, at 246-48.

14. U.S. CONST. art. I, § 5, cl. 3.

15. Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1, 44-45 (1998).

16. 462 U.S. 919 (1983).

17. *Id.* at 921; U.S. CONST. art. I, § 7, cl. 2.

18. Malone, *supra* note 12, at 322 (footnote omitted).