The U.S. Supreme Court As Fact Finder?

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Allison Orr Larson, Confronting Supreme Court Fact Finding, 98 VA. L. REV. 1255 (2012).

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Chief Justice John Roberts, Jr. made headlines during his confirmation hearings by comparing judges to baseball umpires. Now imagine that umpires had the ability to secretly obtain expert and other opinions about whether a pitch is a ball or strike. That is the question raised by Allison Orr Larson's important new article, *Confronting Supreme Court Fact Finding*. Larson's article shows how U.S. Supreme Court justices are actually doing more of their own fact-finding, rather than just acting as the nation's highest appellate court of law. Following Kenneth Culp Davis, she calls these findings "legislative facts," to contrast them with "adjudicative facts." The article usefully explores the causes and consequences of this significant development.

Larson shows that some justices have used "in house" fact finding, beyond the crucible of the adversary process and cross examination, in 90 of 120 of the most important cases decided in the last 15 years. Of those 90 cases, 47% cite to 4 or more sources outside of the briefs. Larson says that the Internet has been instrumental in permitting such fact finding. The Internet allows each justice to bolster an opinion, counter a scathing dissent, or justify overturning previous case law.

Larson highlights how several justices went treasure hunting in *Brown v. Entertainment Merchant Assoc.*, 131 S.Ct. 2729 (2010). There, Justice Breyer's dissent compiled an exhaustive appendix of the social science research on how violent video games affect children. Justice Thomas' very different dissent referenced 57 sources, not cited by either party or the amici, to establish that parents had plenary legal authority over their children during the founding generation. In addition to its use of the Internet, Larson argues that this pattern of independent judicial fact finding reflects a trend favoring empirical evidence. These citations give the ruling a veneer of authority. Justice Scalia, however, often chides his counterparts for including material outside the record—even though he himself included supplemental research in *D.C. v. Heller*, 554 U.S. 570 (2008).

Larson also provides a limited taxonomy of the Court's "in house" fact finding. She notes that the Justices have answered questions such as the emotional impact of prison, and how obesity helps cause other diseases. This research even sometimes bolstered important constitutional interpretations. Larson notes that no federal procedural rules bar use of legislative facts, though their use does not fit neatly into an adversarial system.

Larson then discusses her concerns about this development. First, such material can perpetuate bias since it is not subject to the same kind of attack as trial evidence. Moreover, Google is a wonderful tool, but its search engine depends upon user preferences. Second, the Internet contains many untruths. It would be disastrous if erroneous information became the basis for binding precedent.

Larson also raises fairness and legitimacy questions. The parties may feel sandbagged if the Court renders a decision based on facts that neither party presented. In addition, the Court's ability to use such policy oriented material could lead it to render broader decisions than it would otherwise, which would tread on the prerogatives of the democratically elected branches.

Larson concludes by suggesting that there are two alternatives. Either the Justices should have free rein in this area, or they should be "minimalist" and stop engaging in their own research. She briefly explains the pros and cons of each approach without drawing a definitive conclusion. As legal scholars debate questions such as strict versus flexible textual interpretations, Larson has shed light on the eclectic practical components that actually make up U.S. Supreme Court decisions. Perhaps in the future, she will proceed in a more normative direction and provide her own set of recommendations.

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