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A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*

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Using the health care legislation passed in 2010 as a model to show how legislative procedure shapes legislative history, this article posits that legislative procedure has changed, making the traditional model of the legislative process used by law librarians and other researchers insufficient to capture the history of modern legislation. To prove this point, it follows the process through which the health care legislation was created and describes the information resources generated. The article concludes by listing resources that will give law librarians and other researchers a grounding in modern legislative procedure and help them navigate the difficulties presented by modern lawmaking.

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¶1 We, as law librarians, are "doing" legislative history incorrectly. We tend to view and teach legislative history as a static process, generating a specific series of documents that can be used to understand legislation and divine legislative intent. But legislative history is a reflection of legislative procedure, a dynamic process that constantly evolves as politicians create, change, and adapt the rules according to which they conduct their business. This dynamic process may not generate legislative history documents that researchers expect to find and may make those that do exist difficult to locate. This article uses the federal health care legislation passed in 2010, hereinafter referred to as the Affordable Care Act (ACA), as an example of how legislative procedure works now and how this procedure can shape legislative history in unexpected ways.¹ It is also a bibliographic essay, describing the proce-

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1. The ACA is composed of two separate pieces of legislation, the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010. References to the ACA will be to the full law and references to its component parts will be used when discussing their individual passage into law.

passed the health care legislation. How are these related to the legislative history of the PPACA and HCERA?

¶8 To understand which compiled legislative history, if any, is the correct one, the researcher must know something about the procedure that produced the legislative history information being reported. This requires an explanation of the ad hoc legislating that created the ACA as well as much other legislation generated today.

Legislative Histories, Not History

¶9 A fundamental flaw of legislative history is that the phrase itself is a misnomer, presuming as it does that legislation has just one history—the product of one bill's passage through a particular Congress.²⁶ In reality, the passage of legislation often involves multiple attempts to pass multiple bills over multiple Congresses. Similar legislation and, sometimes, several pieces of similar legislation can be introduced during the span of a particular Congress.²⁷ The legislative clock to pass any legislation is only two years, a deadline set by custom and congressional procedure.²⁸ That is not a particularly long time to create a bill, hold hearings on it, fashion a consensus (especially if the issue is complex or contentious or both), and then push it through all the necessary votes in both the House and Senate in the midst of competing priorities.²⁹ And failure to pass legislation does not signify a failure to generate legislative history. Each attempt generates its own legislative history, history that may be important to understanding the law that is finally enacted.³⁰ The history of any legislation is more likely to be a tapestry of many histories woven together than a single thread.

26. See, e.g., Michael D. Bruckman, Note, *The Thickening Fog of "Substantial Abuse": Can 707(a) Help Clear the Air?*, 2 AM. BANKR. INST. L. REV. 193, 198 n.34 (1994) (discussing the problematic legislative history of the Consumer Credit Amendments).

27. For example, an attempt to pass an Anti-Atrocity Alien Deportation Act, restricting immigration to this country by individuals who participated in atrocities, generated several bills over several Congresses. See, e.g., H.R. 2642, 106th Cong. (1999); H.R. 3058, 106th Cong. (1999); S. 1375, 106th Cong. (1999); H.R. 1449, 107th Cong. (2001); S. 864, 107th Cong. (2001); H.R. 1440, 108th Cong. (2003); S. 710, 108th Cong. (2003). The legislation was finally enacted as an amendment to the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1551, 118 Stat. 3638, 3740.

28. The authority for this is found not in the Constitution, but in the manual of parliamentary practice written by Thomas Jefferson. See JOHN V. SULLIVAN, CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED TWELFTH CONGRESS, H.R. DOC. NO. 111-157 § 588, at 306 (2011). One author has suggested that it may even be possible for the Senate to take up a bill passed in a previous Congress. Seth Barrett Tillman, *Noncontemporaneous Lawmaking: Can the 110th Senate Enact a Bill Passed by the 109th House?*, 16 CORNELL J.L. & PUB. POL'Y 331 (2007).

29. For example, a hearing on the anti-atrocity provisions discussed in note 27 *supra* was held four years before the legislation was finally passed. *Adopted Orphans Citizenship Act and Anti-Atrocity Alien Deportation Act: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. (2000). Rep. Mark Foley, who wrote the provisions that were enacted into law, testified at the hearing. *Id.* at 7–11.

30. See 2A SINGER & SINGER, *supra* note 4, § 48.3, at 561. The Supreme Court, for example, has used prior versions of a bill to reinforce its interpretation of the one that passed. See, e.g., *Exxon Corp.*