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The New Legislative History: Researching Legislation in Difficult Times

Kurt Metzmeier

In an era where high school civics classes have been devalued compared to the core-subjects tested in the national standardized tests, ABC's "Schoolhouse Rock!" has been the most enduring tutor of the legislative process. The YouTube-friendly "I'm Just a Bill" is so universally well-known that it has been parodied on the trinity of TV comedy, Saturday Night Live, The Simpsons, and The Daily Show with Jon Stewart. However, in recent years those lessons—often refined in law school research and writing classes—have been little assistance in understanding the increasingly dysfunctional course of federal law-making.

Like much else in Washington, politics has rendered the process unrecognizable. All major bills are developed in secret and sprung on lawmakers at the last possible minute. Hearings and committee reports are absent. Often debates begin and end without lawmakers having read the text of laws they are discussing. Lawmakers of both parties despair at the absence of "regular order." In its place is a resort to arcane rules and maneuvers all undertaken with the assumption that bipartisanship is both impractical and politically dangerous.

Lawmaking and Hyper-Partisanship

Much of the problem is due to an extreme form of partisanship that has moved from Republican-Democratic conflict to factionalism within the parties. Senate Majority Leader Mitch McConnell (R-KY) is not well-liked among Senate Democrats but he is loathed by Tea Party Republicans in the House. The effects of the hyper partisanship is compounded by the use of arcane Congressional rules never contemplated by the Founders.

In the Senate, McConnell must have 60 votes to pass legislation because of the filibuster rule he himself honed into a powerful tool as

minority leader. Holding a razor thin majority in the 115th Congress, this has made passing legislation difficult. The only exception involves another arcane rule, the "budget reconciliation" rule which requires only 51 votes

Connell reach across the aisle to Democrats? While it is easy to condemn McConnell for his lack of bipartisanship, to pass laws he needs to consider their fate in the House of Representatives. Because, as Schoolhouse Rock

sonable calculation that anything bipartisan enough to pass the Senate with Democratic votes would be killed by the Tea Party caucus in the House. He resolved early on to try to pass everything via the budget-reconciliation rules. To hold his tiny 52 (now 51) GOP members together, he resorted to secret meetings with key party members. The Schoolhouse Rock method went out the window. The results of the strategy have been mixed. McConnell's attempt to "repeal-and-replace" the Affordable Care Act failed with a dramatic "thumbs down" by Sen. John McCain (R-AZ).

Case Study: The Tax Act of 2017

The GOP was more successful using this method to pass its tax bill, a story which serves as a good case-study for lawyers trying to research (and understand) legislative history during this Congress. Even the bill's name, an "Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018," provides a lesson. The Republicans wanted to change it to the "Tax Reform Act" but because it was being passed under the budget reconciliation rules, the Democrats had the Senate parliament strike the change as a "non-fiscal measure." A rose by any other name will not reduce the federal deficit.

To pass the act, Republicans enforced maximum stealth and internal discipline. After secret talks, the House unveiled its tax bill on November 2, sped it through committee a week later, and passed it on November 16 without hearings, a committee report, or a single Democratic vote. After that vote, the body sent it to the Senate which passed its own secretly devised bill on December 2.

The Democrats were so frozen out of the process that they had to follow *Bloomberg News* for details (which had excellent coverage based on the leaks from the lobbyists helping write the bill). On the morning of the vote, Senate leadership dumped a PDF version of the bill on the Senate website. The draft was a mess. Sen Dick Durbin of Illinois tweeted one page that had a handwritten change that itself was amended by another handwritten change. Nonetheless, the bill passed after a few hours of debate.

The chambers formed a pro forma "bipartisan" reconciliation committee to hash out a compromise version of the House and Senate bills but in fact another secret group drafted the reconciliation bill which was released on December 15 and rushed to a House vote on the December 19. The Senate passed it the next day, December 20. Then, the House had to stage a "do-over" vote again that night because in their haste they had violated their



to pass fiscal legislation that can be rationally characterized as bringing the government spending into alignment with the last passed budget. Through logical contortions, things like healthcare legislation and comprehensive tax reform can be passed with a rule originally designed for prudent Congressional oversight of the deficit.

At this point you might ask, why doesn't Mc-

Connell instruct us, a bill must pass both chambers to find its way to the president's desk.

And Speaker of the House Paul Ryan (R-WI) has his own problems. First, his GOP caucus is split between traditional Republicans, Tea Party caucus members, and a small group of Republicans elected from increasingly Democratic districts. Second, he has a small, 45 member majority and thus two dozen members who shift to the Democratic position can kill it. Finally, Ryan is hampered by the Republican caucus's "Hastert rule."

This internal rule "prevents" the Speaker from bringing up for a vote any legislation opposed by a majority of Republicans. Although former Speaker John Boehner (R-OH) occasionally broke the rule (it can only really be enforced if the GOP caucus taking the extreme measure of ousting the Speaker), Ryan has been reluctant to do so. The effect has been that measures with the support of big majorities in the House (all Democrats and a little less than 50 percent of Republicans) never get a chance to be voted on.

You could argue that Congress should show bolder leadership but, politicians being politicians, that has not happened during the 115th Congress. McConnell has made the not unrea-

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own rules. Bill from Schoolhouse Rock was no doubt winded by the mad rush, but the Republicans were able to put the bill on President Trump's desk to sign on December 22.

In summary, the legislative history of the new tax law, Public Law 115-97, shows no hearings, no true committee reports (the only such reports were "mark-up" reports with the law's text and no commentary), and limited and not exactly well-informed debates (because the legislators were not given time to read the final draft of the bill). And yet, because of the breakneck speed of enactment, textual issues are bound to occur as the new bill is applied and litigated.

Researching Legislative History in the Post-Schoolhouse Rock Era

So, what is a researcher to do when the normal tools of legislative history are lacking? These interpretive tools would typically be (1) bills filed normally and openly, (2) published hearings with experts commenting on the proposed law, (3) committee discussions and reports of their findings on each section of the bill, (4) similar documents from the other chamber, and (5) recorded debates of the bill in both houses that are informed by a careful reading of the bill.

Of course, for bills like the tax bill (as well as the recent budget law passed in February 2018), there will be none of these traditional sources. However, there are methods a researcher can do to better understand the law. Some are more orthodox than others.

Micro-Legislative History

First, a researcher should collect and read all versions of the bill on *Congress.gov* (search by the public law number to find the bill summary and links to key documents). Compare provisions across all versions of the bill, remembering always that courts will interpret measures removed in the final draft as intentional abandonment of those earlier versions. Also, textually variant but substantially similar provisions can inform the final version—especially if the later version appears to linguistically corrupted. (For example, if it is missing a key verb or modifier).

Another example: suppose a short paragraph-long provision makes it into the final law, seemingly without context. That context might be suggested by the structure of the original bill where that provision is grouped with other provisions that, for whatever reason, don't make it into the final bill. A lawyer can have no idea whether these clues will sway a judge, but they are foolish to not have them in their toolbox.

Insights from Press Coverage

Secondly, read the press about the bill as it moved through the legislative process using leading newspapers like *New York Times*, *Washington Post*, *Wall Street Journal*: inside DC sources like *Roll Call*, *The Hill*, and *Po-*

litico; and the business and trade press like *Bloomberg News*. Lots of details get leaked during the drafting and passage of big legislation and they can be a big help in giving life to the bill summaries on *Congress.gov*. And, in an era where federal courts are determining intent from presidential tweets, citing to *The Hill* and *Bloomberg News* isn't going to be unheard of.

While much of this material is still available on the Internet, the UofL library subscribes to databases providing access to papers like the *Wall Street Journal* that have paywalls, and these databases are available to anyone who walks into the law library.

Evidence of Prior Congresses

Third, often you can recover legislative history from failed bills from prior Congresses. Sometimes a Congressperson will offer a bill in multiple Congresses, hold hearings and get them through a committee with a report, all to see them fail before that Congress ends. Then, when there is a new president of their party pushing major legislation in the same subject area, the intrepid Congressperson gets their language attached to the main bill.

Since most of Congress remembers prior discussion of this member's pet bill, it is possible that no specific hearings are held, and the committee report gives it somewhat short shrift. In this case, a legislative history researcher who is fixated solely on the session where the bill was passed will see no published hearings or reports—inadvertently missing

pages of useful material available from prior sessions.

There are many ways to find this kind of material, the cheapest being to use the public *Congress.gov* site. If you know the sponsor of the provision, you can see the summaries of all the bills they have sponsored. Or you can search key language across all congresses.

For example, Sen. John Cornyn is sponsoring a conceal-carry license reciprocity bill. By clicking "Members" on the top of the *Congress.gov* homepage, and searching "Cornyn," you can see all bills he's sponsored. There you can further limit it to "conceal-carry," to find he's sponsored this bill back to 2012. Or, if you didn't know the sponsor, you could set the search bar to search "All Legislation" and run the query "conceal-carry." The results show that similar legislation has been introduced every year back to 2004.

However, if you really want to be thorough, you could come to the UofL law library and search two powerful databases: The HeinOnline Legislative History Library and ProQuest Congressional. (Visitors to law library should bring an empty USB drive because they might find thousands of pages of documents to read).

HeinOnline hosts a type of resource that is a legacy of the print age: the compiled legislative history. Put together by scholars, they have all the basic materials about a law (bills, hearing testimony, committee reports and debates), along with relevant reports from prior con-

gresses. Once sold in multi-volume book sets, they now are released as long PDFs.

ProQuest Congressional is even easier to use. You can search the legislative history database by public law number, popular-name or keyword. Once you find your enacted law, there will be links to relevant bills, hearings and reports going back for decades. And you can search within the results by keyword to pinpoint the exact language you are researching.

Conclusion

At least until the end of the 115th Congress this year, legal researchers should expect that what little major legislation passes will follow the lines laid out in this article. The recent Bipartisan Budget Act had only one report and that related to the "Honoring Hometown Heroes Act," a harmless bill that was hijacked, hollowed out, and replaced with the budget deal—another arcane trick to avoid procedural hurdles. The schoolhouse is boarded up and Bill is riding for Uber, both waiting for less difficult times.

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