

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.

dural events that took place in passing the ACA and citing the documents that make up one legislative history of the law. The article concludes with observations on how law librarians and other researchers can learn about congressional procedure to fully capture the legislative history of contemporary laws.

“Ad Hoc” Legislating

¶2 Legislative history is commonly understood as the collection of documents created by the process by which a legislature creates laws.² While the procedures that produce such information are generally acknowledged to be complex, the understanding most legal researchers have of the federal legislative process is that it is a systematic, linear route from introduction to passage.³ A bill is introduced and sent to a committee. The committee holds hearings and publishes a report. The bill is sent to a chamber floor where it is discussed by chamber members, and these debates are published for public review. When the bill is approved by one chamber, it is sent to the other chamber for committee consideration, floor debate, and a vote. If the chambers disagree on the legislation, they can reach agreement through a conference committee, which issues a report, and both chambers vote on this agreement. When the two chambers unite to pass a bill with the same text, it is then presented to the executive to be signed and afterward becomes law.⁴ This legislative process seems so elementary that it was successfully distilled into a whimsical three-minute cartoon—“I’m Just a Bill”—in the series *Schoolhouse Rock*.⁵ Compiling a legislative history typically consists of following the process’s trail, collecting the documents generated at each step along the way—committee reports, debates, hearings, draft bills, and so on.⁶ This conception of legislative history has been the standard for decades⁷ and continues to be how the practice is taught in law schools today.⁸ While a convenient generalization in many cases, it no longer reflects the modern process of lawmaking, and sole reliance upon it may now be more misleading than it is helpful.⁹

2. ROBERT C. BERRING & ELIZABETH EDINGER, *FINDING THE LAW* 166 (12th ed. 2005).

3. See, e.g., Peter A. Hook, *Creating an Online Tutorial and Pathfinder*, 94 *LAW LIBR. J.* 243, 254 fig.1, 2002 *LAW LIBR. J.* 18.

4. 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 48.4, at 566–67 (7th ed. 2007).

5. “I’m Just a Bill” was written by musician Dave Frishberg. Ken Ringle, *Frishberg, Tickling the Ivories: The Pianist’s Outlandish Odes to Lawyers and Whatnot*, *WASH. POST*, July 27, 1989, at C1. *Schoolhouse Rock* episodes were produced between 1973 and 1985, and continued to be shown on television in the 1990s. Wolfgang Saxon, *Thomas Yohe, 63, a Creator of TV’s “Schoolhouse Rock,”* *N.Y. TIMES*, Dec. 26, 2000, at C7.

6. One of the best reviews of legislative history and legislative history documents remains a guide published by the Law Librarians’ Society of Washington, D.C. Richard J. McKinney & Ellen A. Sweet, *Federal Legislative History Research: A Practitioner’s Guide to Compiling the Documents and Sifting for Legislative Intent*, *LAW LIBRARIANS’ SOC’Y OF WASH., D.C.*, <http://www.llsdc.org/Fed-Leg-Hist> (last updated Jan. 2008).

7. See, e.g., Clarence A. Miller, *United States Public Documents as Law Books*, 18 *LAW LIBR. J.* 7, 9 (1925).

8. See, e.g., BERRING & EDINGER, *supra* note 2, at 166–67; 2A SINGER & SINGER, *supra* note 4, § 48.4.

9. BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* 131–32 (2012).

¶3 The fundamental problem with the traditional approach to legislative history is that it imposes a static model on a dynamic process.¹⁰ Passing legislation has always been a procedural chess game where proponents try to move bills through both chambers while opponents attempt to kill or delay them.¹¹ Such maneuvers can determine what record is available—hearings may have been held in previous Congresses,¹² committee reports might not have been issued,¹³ and individual initiatives might have been attached to larger, unrelated legislation.¹⁴ Even so, the traditional model was able to accommodate those aberrations. However, as Congress has been buffeted by political, social, and technological forces—“hyper-partisanship,” the intense scrutiny of the 24-hour news cycle, deficits, the demands of campaign finance, and social media—the paradigm has shifted more dramatically away from the traditional model.¹⁵ Legislative processes have evolved to become less systematic and more “ad hoc.” Walter Oleszek of the Congressional Research Service has chronicled the evolution of the modern congressional process and describes it this way: “Members find new uses for old rules, employ innovative devices, or bypass traditional procedures and processes altogether to achieve their political and policy objectives.”¹⁶ These new practices can have a dramatic impact on legislative history, depriving researchers of some materials they would expect to find and making those that are available harder to locate. The traditional view of legislative history must now be modified to accommodate the practices of ad hoc lawmaking so that researchers will know what legislative history information is available and where it can be found.

¶4 The ACA is an excellent representative case of how ad hoc legislating works, how it differs from the traditional model, and how it impacts legislative history sources. Passed to provide health care coverage for virtually all Americans, the ACA is likely to dramatically reshape this country’s vast health care system and become one of the most significant pieces of legislation in American history. The debate over health care was contentious from the legislation’s inception, and enacting it required a variety of ad hoc procedures.¹⁷ Its path to becoming law is instructive on how legislative history actually happens in modern congressional procedure and what kinds of legislative history documents are generated by this process.

¶5 That the ACA does not fit into the traditional model of legislating is evident from the fact that it was not one single health care bill that became law, but two—

10. See BERRING & EDINGER, *supra* note 2, at 167.

11. See Larry Evans et al., *Congressional Procedure and Statutory Interpretation*, 45 ADMIN. L. REV. 239, 247–48 (1993).

12. STEVEN M. BARKAN ET AL., *FUNDAMENTALS OF LEGAL RESEARCH* 161 (9th ed. 2009).

13. This situation can occur if a chamber is trying to expedite legislation. See, e.g., Kathryn E. Hand, *Someone to Watch Over Me: Medical Monitoring Costs Under CERCLA*, 21 B.C. ENVTL. AFF. L. REV. 363, 386 n.219 (1994).

14. Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957, 972.

15. WALTER J. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* 372–77 (8th ed. 2011).

16. *Id.* at 375.

17. See Mark J. Oleszek & Walter J. Oleszek, *Legislative Sausage-Making: Health Care Reform in the 111th Congress*, in *PARTY AND PROCEDURE IN THE UNITED STATES CONGRESS* 253, 254 (Jacob R. Straus ed., 2012).

the initial health care legislation, the Patient Protection and Affordable Care Act (PPACA),¹⁸ and the Health Care and Education Reconciliation Act of 2010 (HCERA), passed almost immediately after the PPACA to amend that legislation.¹⁹ As a result, researching the legislative history of the ACA means navigating the legislative procedural cycle at least twice.

¶6 Another significant difficulty with the ACA and the traditional legislative history model is that the standard sources of compiled legislative history—*Statutes at Large*, THOMAS, West's *United States Code Congressional and Administrative News* (U.S.C.C.A.N.), and ProQuest Congressional (formerly LexisNexis Congressional, and before that the Congressional Information Service)²⁰—all provide different accounts of the legislative histories of both laws. The legislative history listed at the end of the PPACA in *Statutes at Large* contains a very short menu of the legislation's path through Congress, references pages of the *Congressional Record* for its floor debate, and notes a presidential statement.²¹ The session law of the HCERA contains similar information with the addition of a House Budget Committee report,²² which, as will be seen, is not actually relevant to either the PPACA or the HCERA.²³ THOMAS, the Library of Congress's legislative database, provides considerably more information, giving an apparently seamless time line of the health care bills' paths through Congress from introduction to debate in the House and Senate to final passage.²⁴

¶7 A careful reading of some of the legislative documents, though, poses numerous questions: Were there any committee reports besides the one produced by the House Budget Committee? What is "reconciliation" and why was it used in the ACA's passage? Why was the PPACA originally titled, and referred to in floor debate as, the Service Members Home Ownership Tax Act of 2009? U.S.C.C.A.N. adds nothing new and merely reprints the Budget Committee report referenced in the slip law for the HCERA.²⁵ ProQuest Congressional includes much more information, perhaps too much, including companion health care bills and lists of hearings and reports. Some of these are from earlier Congresses than the one that

18. Pub. L. No. 111-148, 124 Stat. 119 (2010).

19. Pub. L. No. 111-152, 124 Stat. 1029.

20. ProQuest acquired Congressional Information Service, one of the primary providers of legislative history information and finding aids, from LexisNexis in 2010. Barbie E. Keiser, *ProQuest Acquires Congressional Information Service (CIS) and University Publications of America (UPA) from LexisNexis*, INFO. TODAY (Dec. 6, 2010), <http://newsbreaks.infotoday.com/NewsBreaks/ProQuest-Acquires-Congressional-Information-Service-CIS-and-University-Publications-of-America-UPA-from-LexisNexis-72138.asp>.

21. 124 Stat. at 1024.

22. 124 Stat. at 1083.

23. See *infra* ¶ 76.

24. See *Bill Summary & Status, 111th Congress (2009–2010), H.R.3590*, THOMAS, <http://hdl.loc.gov/loc.uscongress/legislation.111hr3590> (last visited Feb. 24, 2013); *Bill Summary & Status, 111th Congress (2009–2010), H.R.4872*, THOMAS, <http://hdl.loc.gov/loc.uscongress/legislation.111hr4872> (last visited Feb. 24, 2013). During the writing of this article, Congress, the Library of Congress, and the Government Printing Office released a new database for searching legislative information, Congress.gov (beta.congress.gov). However, because the new database was (and is) still in beta form, THOMAS was used exclusively for researching the ACA.

25. H.R. REP. NO. 111-443, pt. 1 (2010), *reprinted in* 2010 U.S.C.C.A.N. 127.

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.*

¶10 In at least one case, legislation was incorporated into the ACA that bonded it with multiple prior and contemporary legislative histories. Members of Congress had been trying to pass a bill to encourage the study of postpartum depression for almost seven years before work started on the ACA.³¹ Practically every Congress between the 107th and 111th had bills on the issue introduced in the House and the Senate. The language of each did not differ dramatically from any of the others. The House bill introduced on the subject early in the 111th Congress—the Melanie Blocker Stokes MOTHERS Act—was reported out of the Committee on Energy and Commerce with a written report.³² Though this bill and its companion Senate bill appeared to have died in the 111th Congress, the language its proponents had been trying unsuccessfully to make into law was incorporated into the ACA, which did pass. The ACA potentially has many such histories under the umbrella of its own.³³

¶11 How far back can the legislative history of the ACA conceivably go? The history of health care legislation could be seen as taking place over the course of an entire century, from Theodore Roosevelt's advocacy for a health care system to Bill Clinton's failed effort in 1993.³⁴ While it hardly seems worthwhile to investigate the Murray-Wagner-Dingell bill—an effort to enact compulsory health care during Truman's presidency³⁵—the 2010 health care legislation did not emerge from a vacuum. Besides provisions that have their own history, such as those on postpartum depression mentioned above, documents from the 111th Congress provide some guidance on how far back in time a researcher needs to travel. For example, the House Committee on Education and Labor counted nineteen House and Senate hearings on health care in the 110th Congress.³⁶ The House Energy and Commerce Committee noted that its Health Subcommittee held seventeen hearings on health care access and the problems of the noninsured during that session.³⁷ All these hearings took place in the waning years of the George W. Bush administration, which had no inclination to pass comprehensive health care reform along the lines that the Democratic Congress desired. Congress still investigates issues even if the possibility of passing legislation is remote, and this was especially true for the session of Congress that preceded the one that passed the ACA. Nevertheless, the legislative history of enacted legislation provides the best information for determining what Congress intended the legislation to do, and thus it is best to focus on the actions of the 111th Congress when looking at the ACA.

v. Hunt, 475 U.S. 355, 368–69 (1986). However, use of the legislative history of bills that did not pass as direct proof of legislative intent is usually frowned upon. See Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 614 (2008).

31. Lindsey C. Perry, Note, *A Mystery of Motherhood: The Legal Consequences of Insufficient Research on Postpartum Illness*, 42 GA. L. REV. 193, 200–01 (2007).

32. See H.R. 20, 111th Cong. (2009); H.R. REP. NO. 111-48 (2009).

33. In fact, ProQuest Congressional includes the history of the Melanie Blocker Stokes MOTHERS Act in its history of the PPACA.

34. See Robert I. Field, *Regulation, Reform and the Creation of Free Market Health Care*, 32 HAMLINE J. PUB. L. & POL'Y 301, 305–24 (2011).

35. *Id.* at 311.

36. H.R. REP. NO. 111-299, pt. 3, at 57–60 (2009).

37. *Id.* pt. 1, at 328.

The House Crafts Its Health Care Bills

¶12 Health care reform was one of newly elected President Barack Obama's top domestic priorities, and he was determined to press forward with the effort early in his first term.³⁸ Rather than having the executive craft the bill that would ultimately be introduced in Congress, as had been done in President Clinton's failed effort more than fifteen years earlier, President Obama laid out the broad principles and goals that he wanted in a health care bill and left it to the House and Senate to provide the legislative details.³⁹ Both chambers began working on health care in the early months of 2009, with the House taking the lead.⁴⁰

¶13 In March 2009, the three chairmen of the House committees with jurisdiction over health care—Education and Labor, Energy and Commerce, and Ways and Means—agreed to harmonize their efforts to draft legislation, perhaps in an effort to avoid the committee “turf wars” that hampered President Clinton's health care efforts.⁴¹ After a series of hearings from March through early May 2009,⁴² the committee chairmen, with input and direction from Speaker of the House Nancy Pelosi, released a “discussion draft” proposal for health care reform on June 19, 2009.⁴³ It included provisions for a health insurance exchange, where consumers could “shop” for insurance; a public health insurance option; an expansion of those covered by Medicaid; a mandate for individuals to either have insurance coverage or pay a fee (with hardship exemptions); and a mandate for employers to provide insurance or pay a contribution fee (with some exemptions).⁴⁴ Funding details, however, remained vague.⁴⁵ This discussion draft was the first public incarnation of health care legislation. It does not appear in the more popular compiled histories, but it can be located on the Internet.⁴⁶

¶14 After additional hearings were held that June and early July,⁴⁷ on July 14 the committee leaders introduced House bill 3200—America's Affordable Health

38. Jeff Zeleny, *Obama Vows, “We Will Rebuild” and “Recover,”* N.Y. TIMES, Feb. 25, 2009, at A1.

39. See SINCLAIR, *supra* note 9, at 186; David M. Herszenhorn & Jackie Calmes, *Major Plans, Softer Stands*, N.Y. TIMES, Apr. 19, 2009, at A1.

40. Robert Pear, *Team Effort in the House to Overhaul Health Care*, N.Y. TIMES, Mar. 18, 2009, at A12.

41. SINCLAIR, *supra* note 9, at 187. House committee jurisdictions are defined in the rules. *Rules of the House of Representatives*, 111th Cong., R. X, in SULLIVAN, *supra* note 28, at 429.

42. See H.R. REP. NO. 111-299, pt. 3, at 61–64 (2009).

43. *Id.* pt. 1, at 328; House Discussion Draft, stamped F:\P11\NHI\MDCR\HRDRAFT1.XML (June 19, 2009, 3:50 P.M.), available at <http://waysandmeans.house.gov/media/pdf/111/HRdraft1xml.pdf>.

44. The House Tri-Committee Health Reform Discussion Draft Summary (June 19, 2009), available at <http://www.naco.org/legislation/policies/Documents/Health/HouseTriComHealthCareReformSummary.pdf>.

45. Robert Pear & David M. Herszenhorn, *House Unveils Health Bill, Minus Key Details*, N.Y. TIMES, June 20, 2009, at A1.

46. House Discussion Draft, *supra* note 43.

47. The House Education and Labor Committee held a hearing on the draft proposal on June 23, 2009. On June 24, 2009, the Committee on Ways and Means held its hearing. The Committee on Energy and Commerce's Subcommittee on Health held three days of hearings on June 23, 24, and 25, 2009. See H.R. REP. NO. 111-299, pt. 3, at 68–70. At the time of the writing of this article, the hearings were not yet available in ProQuest Congressional. Statements and video of the testimony are available at the web site of the Committee on Energy and Commerce's Democratic members. See, e.g., *Legislative Hearing on “Comprehensive Health Reform Discussion Draft (Day 1),”* COMM. ON

Choices Act of 2009.⁴⁸ House bill 3200 contained many of the provisions that were in the earlier draft, along with some additional features, one of the more notable of which was a surcharge on wealthier Americans to help pay for it.⁴⁹ This bill was subsequently referred to the same three committees whose chairmen had already had a hand in drafting it—Education and Labor, Energy and Commerce, and Ways and Means—and, in addition, to the committees on Oversight and Government Reform, and on the Budget, though these latter two were subsequently discharged from considering the bill.⁵⁰ Even so, each committee worked with a bill containing its own amendments, which made slight alterations to the legislation they had received.⁵¹

¶15 Congressional committees evaluate and shape legislation through the markup process, in which committee members debate, amend, and then vote on whether to report out legislation.⁵² Under the traditional model, the markup ranks highly as an expression of what Congress wanted to do and why because it contains one of the first intensive discussions of the legislation by members.⁵³ In the past, markups were not often used when compiling legislative histories because it was difficult to obtain proceeding transcripts.⁵⁴ Now, proceedings are recorded and displayed on committee web sites,⁵⁵ C-SPAN's web site,⁵⁶ and even YouTube.⁵⁷ Unfortunately, the accessibility to markup proceedings has coincided with a decrease in the substance of the deliberations that made them so valuable. Instead, committee leadership now usually drafts a bill outside the markup process, behind closed doors,⁵⁸ and this is what happened with House bill 3200.

¶16 Once the committee draft is agreed upon, the primary goal of the majority during the markup is not to shape it, but to retain the agreed-upon form, or at least

ENERGY & COMMERCE: DEMOCRATS (June 23, 2009), <http://democrats.energycommerce.house.gov/index.php?q=hearing/legislative-hearing-on-comprehensive-health-reform-discussion-draft-day-1-subcommittee-on-he>.

48. 155 CONG. REC. H8099 (daily ed. July 14, 2009). See also SINCLAIR, *supra* note 9, at 188–89.

49. *Landmark Health Care Overhaul: A Long, Acrimonious Journey*, in 2009 CQ ALMANAC 13-3, 13-4 (Jan Austin ed., 2010) [hereinafter *Landmark Health Care Overhaul*]; Robert Pear & David M. Herszenhorn, *Surcharge Is Set in a Health Plan*, N.Y. TIMES, July 15, 2009, at A1.

50. 155 CONG. REC. 17,730 (2009); 155 CONG. REC. H11,383 (daily ed. Oct. 14, 2009).

51. These amendments were made available on the committees' web sites, although they can now be found only on the Wayback Machine of the Internet Archive. See, e.g., H. Comm. Educ. & Labor. Amendment in the Nature of a Substitute to H.R.3200, 111th Cong. (2009), available at http://web.archive.org/web/20090805174338/http://edlabor.house.gov/documents/111/pdf/markup/FC/HR3200-AmericasAffordableHealthChoicesActof2009/MILLCA_158.pdf.

52. CHARLES W. JOHNSON, HOW OUR LAWS ARE MADE, S. DOC. NO. 108-93, at 14–15 (2003).

53. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 202 (1983).

54. BERRING & EDINGER, *supra* note 2, at 178–79.

55. See, e.g., *Full Committee Markup of H.R. 3200, America's Affordable Health Choices Act of 2009 (Day 1)*, COMM. ON ENERGY & COMMERCE: DEMOCRATS (July 16, 2009), <http://democrats.energycommerce.house.gov/index.php?q=markup/full-committee-markup-of-hr-3200-america-s-affordable-health-choices-act-of-2009-july-16-2009>.

56. See, e.g., *House Ways and Means Cmte. Markup of Health Care Legislation*, C-SPAN, <http://www.c-span.org/Events/House-Ways-and-Means-Cmte-Markup-of-Health-Care-Legislation/14501/> (last updated Nov. 26, 2010).

57. See, e.g., *July 16, 2009—Markup “H.R. 3200, America's Affordable Health Choices Act of 2009, Day 1,”* YOUTUBE, http://www.youtube.com/watch?v=zXbD_Q9iDZY&feature=plcp&context=C3a04f6cUDOEgsToPDskK7VRBuQJ0LqmLLWK_hMKAa (last visited Jan. 3, 2013).

58. SINCLAIR, *supra* note 9, at 18.

a form that can pass on the chamber floor, and to keep any amendments to a minimum. The minority party, left out of the extra-committee consultations and usually unwilling to provide any positive input, is relegated to advancing futile amendments to embarrass the majority.⁵⁹ Thus, the intensive committee discussion of the form legislation should take no longer occurs.

¶17 This lack of public committee deliberation is clear in the House committee markups of the health care legislation. Having already drafted House bill 3200, the markups of the Education and Labor and Ways and Means committees represented housekeeping rather than robust debate. For example, the Education and Labor Committee passed an amendment in the nature of a substitute which simply fine-tuned and expanded coverage under the original bill and called for more consumer protection provisions.⁶⁰ Subsequent committee amendments included waivers of some of the bill's requirements for Hawaii's insurance program and Tricare (a health program for military families and states implementing a single-payer system) as well as temporary hardship waivers for small businesses that could not provide health insurance. Minority attempts to gut the legislation or restrict abortion procedures were voted down.⁶¹ Both the Ways and Means and the Education and Labor committees marked up the bills and reported them to the House floor on July 17, 2009.⁶²

¶18 More rancor emerged in the Committee on Energy and Commerce, where the fiscally conservative "Blue Dog" Democrats held sway and made known their unhappiness with the cost and size of the health care bill.⁶³ Withholding their votes as leverage, the Blue Dogs managed to win several changes to the bill in intense bargaining with Committee Chairman Henry Waxman, Speaker Pelosi, and White House Chief of Staff Rahm Emanuel, including reductions in its cost and limiting the public insurance plan so that private insurers could more easily compete against it.⁶⁴ But even this committee dispute was discussed outside of the markup, taking place behind the scenes or in the press.⁶⁵ The Energy and Commerce Committee finished its work on July 31, 2009, with a more scaled-back version of House bill

59. *Id.*

60. H.R. REP. NO. 111-299, pt. 3, at 73-77 (2009) (detailing all amendments considered by the committee); *Landmark Health Care Overhaul*, *supra* note 49, at 13-4 to 13-5.

61. Robert Pear, *House Committee Approves Health Care Bill*, N.Y. TIMES.COM (July 16, 2009), <http://www.nytimes.com/2009/07/17/us/politics/17cbo.html>.

62. Robert Pear & David M. Herszenhorn, *Democrats Grow Wary as Health Bill Advances*, N.Y. TIMES, July 18, 2009, at A1.

63. *Landmark Health Care Overhaul*, *supra* note 49, at 13-5.

64. See Robert Pear & David M. Herszenhorn, *House Democrats End Impasse on Health Bill*, N.Y. TIMES, July 30, 2009, at A18 [hereinafter Pear & Herszenhorn, *Impasse*]; Robert Pear & David M. Herszenhorn, *On Health, Consensus Lies Beneath the Chaos*, N.Y. TIMES, Aug. 1, 2009, at A10 [hereinafter Pear & Herszenhorn, *Consensus*]; Paul Kane & Shailagh Murray, *Lawmakers Cut Health Bills' Price Tag; Negotiators in House and Senate Move Toward Compromises on Reform Packages*, WASH. POST, July 30, 2009, at A1.

65. In fact, the Energy and Commerce Committee did not hold the markup until July 30, waiting until an agreement was hammered out. See Pear & Herszenhorn, *Impasse*, *supra* note 64. The *Congressional Record Daily Digest* shows that markup of H.R. 3200 was supposed to be continued on July 21, 2009. 155 CONG. REC. D872 (daily ed. July 20, 2009). It was not until July 29 that the *Daily Digest* reports the continuation of markup on July 30. 155 CONG. REC. D944 (daily ed. July 29, 2009).

3200, which also contained amendments to promote good health behaviors, create an approval process for generic drugs, and restrict premium increases.⁶⁶

¶19 The three versions of House bill 3200 were finally reported to the floor on October 14, 2009, many weeks after work on them had been completed.⁶⁷ The delay was apparently due to an agreement with the Blue Dogs not to rush a chamber vote as well as a general unwillingness to proceed until the Senate had produced its own bill.⁶⁸ Thus the history of House bill 3200 came to an end as its three versions languished on the House Union Calendar—a list of bills involving taxation or appropriations that are eligible to be heard by the whole House⁶⁹—and a new bill was introduced to carry the House’s health care provisions to the next legislative step. Though procedurally the bill was at a standstill, House leaders were working behind the scenes throughout the late summer and fall to “blend” the separate versions together.⁷⁰

¶20 On October 29, 2009, the House’s health care bill switched tracks with the introduction of House bill 3962, the Affordable Health Care for America Act.⁷¹ The new bill was the culmination of negotiation among different factions of House Democrats.⁷² House bill 3962 resembled its predecessor, House bill 3200, in many ways—it contained health exchanges, a public option, individual and employer mandates, Medicaid expansion, and a surcharge on those with high incomes.⁷³ It also included the negotiated Medicaid rates that the Blue Dogs wanted and had won in the Energy and Commerce Committee. Some elements were altered. For example, instead of the graduated high income surcharge, House bill 3962 as first introduced in the House had a straight 5.4% surcharge on taxpayers earning more than \$1,000,000.⁷⁴ Whole new sections were added as well, including a revocation of the McCarran-Ferguson Act, which exempts insurance companies from federal antitrust law, and an excise tax on medical devices.⁷⁵ Yet some issues had not yet been resolved, a major one inevitably being whether or not to cover abortion services.⁷⁶

66. Pear & Herszenhorn, *Consensus*, *supra* note 64.

67. H.R. REP. NO. 111-299 (2009).

68. See SINCLAIR, *supra* note 9, at 190; Lois Romano, *A Blue Dog with Time and Clout on His Side*, WASH. POST, July 30, 2009, at A17.

69. 155 CONG. REC. H11,383 (daily ed. Oct. 14, 2009); David M. Herszenhorn & Robert Pear, *White House Team Joins Talks on Health Care Bill*, N.Y. TIMES, Oct. 15, 2009, at A24.

70. Oleszek & Oleszek, *supra* note 17, at 259.

71. H.R. 3962, 111th Cong. (2009) (introduced by Rep. John Dingell of Michigan). Rep. Dingell was a symbolic presence for health care; he and his father, who had represented the same congressional district, introduced health care bills in twenty-seven consecutive sessions of Congress. Jennifer Haberkorn, *Dingell, in Father's Steps, Backs Health Care to End; Biennial Reform Reworked from Senior's '43 Bill*, WASH. TIMES, June 30, 2009, at A1.

72. Robert Pear & David M. Herszenhorn, *Buoyant House Democrats Unveil Overhaul Bill*, N.Y. TIMES, Oct. 30, 2009, at A20. See also SINCLAIR, *supra* note 9, at 193–95.

73. *Landmark Health Care Overhaul*, *supra* note 49, at 13–5.

74. H.R. 3962, 111th Cong., § 59C (2009) (as introduced in the House), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr3962ih/pdf/BILLS-111hr3962ih.pdf>.

75. *Id.* §§ 262, 552.

76. Robert Pear & Sheryl Gay Stolberg, *Obama Strategy on Health Care Legislation Appears to Be Paying Off*, N.Y. TIMES, Nov. 9, 2009, at A10.

¶21 While its predecessor, House bill 3200, generally followed a traditional legislative history track, House bill 3962 jumped that track. House bill 3962 was not referred to committee for any substantive review. It was not even listed on the House Union Calendar, which would make the bill eligible for consideration by the House. Yet it was called up on the House floor on November 7, 2009, less than two weeks after it had been introduced. The means to accomplish this feat were drawn from the many tools House leaders have to set agendas and advance legislation considered to be of greatest importance. Such agenda control procedures can have a significant impact on legislative history research, and those unaware of them may find themselves missing significant legislative history sources: for example, hearings that may have been held on another bill, such as House bill 3200.

¶22 One of the primary means of controlling the legislative agenda in the House is through a House Rules Committee resolution.⁷⁷ Students of legislation are probably more familiar with resolutions that lack substantive impact, such as acts expressing the sense of one or both congressional chambers, and that have little bearing on actual legislation.⁷⁸ House Rules Committee resolutions, on the other hand, have direct procedural and substantive effects on legislation.

¶23 As a procedural document, the rules resolution effectively lets a bill jump ahead in consideration. It also lays the parliamentary ground rules for its debate, often determining how many amendments can be made on the floor and the length of debate that will be allowed.⁷⁹ Rules resolutions fall into three different categories for this purpose: open, closed, and complex. Open rules resolutions allow for any amendments allowed under House rules. Closed rules forbid any amendments.⁸⁰ Complex rules operate in the area between the extremes, allowing for specifically designated amendments to be discussed.⁸¹

¶24 It is the potential substantive effect of the rules resolution, though, that produces more dramatic results, permitting changes to a bill that can range from small amendments to an entirely different text, such as a new consensus product that is more likely to pass.⁸² Such rules resolutions usually come in the form of self-

77. See *Rules of the House of Representatives*, 111th Cong., § 734, in SULLIVAN, *supra* note 28, at 463 (2009); OLESZEK, *supra* note 15, at 147.

78. However, resolutions are an integral part of the budget process. OLESZEK, *supra* note 15, at 71–72. A continuing resolution is employed to keep the government funded should Congress fail to pass appropriations bills for that purpose. *Id.* at 50–51.

79. *Id.* at 147–48; see also CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 269 (1989); Stanley Bach, *The Structure of Choice in the House of Representatives: The Impact of Complex Special Rules*, 18 HARV. J. ON LEGIS. 553, 554–55 (1981).

80. Bach, *supra* note 79, at 554.

81. TIEFER, *supra* note 79, at 269.

82. See OLESZEK, *supra* note 15, at 148, 157–58. A noteworthy example of the considerable power of the House Rules Committee to shape legislation took place in 1987, during the debate over long-term care legislation. Expanding Medicare to cover long-term care was a cause célèbre for Rules Committee chairman and legislative veteran Rep. Claude Pepper. Pepper was opposed in his efforts for a more expansive plan by powerful Ways and Means chairman Dan Rostenkowski. To avoid having a long-term care bill go through Rostenkowski's committee, Pepper used his power in the Rules Committee to take a reported bill, H.R. 3436, which dealt with technical corrections to the Older Americans Act of 1965, and substitute its language with his own long-term care bill. A frustrated Rostenkowski quipped, "When you own the umpire, chances are you're going to win the ballgame." *Long-Term Care Legislation*, in 1987 CQ ALMANAC 535, 535 (Christine C. Lawrence ed., 1988).

executing rules, which state that certain language is “considered adopted” and automatically incorporated into the bill once the rules resolution is passed.⁸³ This tool is now frequently used to avoid direct votes on measures that would be controversial if discussed individually or are too significant to risk being held up by the traditional legislative process.⁸⁴ More important for the purposes of legislative history, it provides an opportunity to incorporate eleventh-hour changes into a bill in order to attract the floor votes necessary for passage.⁸⁵

¶25 The rules resolution also generates its own legislative history. The House Rules Committee holds a hearing to deliberate the resolution, with votes on amendments as well as the final product, and issues the resolution with a report that defines how the procedure will be employed on the House floor, the changes that have been made to the bill, and some commentary on those changes.⁸⁶ The history of a rules resolution, often existing outside the limits of traditional legislative history, explains what parliamentary procedure was used to debate a bill.⁸⁷ This explanation, in turn, can help researchers understand what kind of legislative history will be available in the floor debate. For example, bill consideration under a closed rule can explain the lack of any amendments made from the floor.⁸⁸

¶26 Here, the House Rules Committee moved the health care bill to the floor via House resolution 903, a special rule with both procedural and substantive components. First, House resolution 903 played the traditional role of a rules resolution, providing a procedural road map for how House bill 3962 would be considered on the House floor. It waived all points of order, set the time of debate for several hours, and called for a vote once debate was concluded.⁸⁹ As a structured rule, House resolution 903 allowed for debate and vote on only two amendments.⁹⁰ One was from Representative Thomas “Bart” Stupak, prohibiting any federal funding of abortion under the health care bill. The second essentially contained Republican health care proposals.⁹¹

¶27 The substantive components of House resolution 903 incorporated myriad changes to House bill 3962, which had been crafted during the ongoing negotiations between House Democratic leaders and various factions of the Democratic party. Part A of the resolution was a “self-executing rule,” containing automatic changes to House bill 3962, such as rewriting the repeal of the McCarran-Ferguson Act’s antitrust exemption for health insurance companies.⁹² Part B was a perfecting

83. WALTER J. OLESZEK, CONG. RESEARCH SERV., 98-710, “SELF-EXECUTING” RULES REPORTED BY THE HOUSE COMMITTEE ON RULES 1 (2006), available at <http://democrats.rules.house.gov/archives/98-710.pdf>.

84. See *id.* at 2.

85. OLESZEK, *supra* note 15, at 157–58.

86. See, e.g., H.R. REP. NO. 111-330 (2009).

87. See, e.g., *id.* at 1–2.

88. Opponents of the closed rule sometimes call it a “gag rule.” TIEFER, *supra* note 79, at 292. See also 17 LEWIS DESCHLER ET AL., DESCHLER-BROWN-JOHNSON PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 94-661, at 11 (2011).

89. H.R. RES. 903, 111th Cong. (2009).

90. H.R. REP. NO. 111-330, at 1–2. See also Michael Doran, *The Closed Rule*, 59 EMORY L.J. 1363, 1366 (2010).

91. H.R. REP. NO. 111-330, at 1–2.

92. *Id.* at 7–8; H.R. 3962, 111th Cong., § 262 (as passed by the House, Nov. 7, 2009), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr3962pcs/pdf/BILLS-111hr3962pcs.pdf>. See also Shailagh

amendment—an amendment that makes changes only to parts of legislation, not the whole.⁹³ This made changes to Part A's self-executing rule, effectively amending the amendment. For example, one of the sources for funding the House bill was closing a loophole in a biofuel tax subsidy. Part A included a substantial portion of language on this measure, but it was amended by Part B, which merely excluded unprocessed fuels from the tax credit.⁹⁴ These changes are not in House resolution 903 itself; they are in the report that went with it when it was reported out of committee.⁹⁵ The resolution incorporated these changes by reference.⁹⁶ House resolution 903 passed the House in the early afternoon of November 7, 2009, after an hour of debate.⁹⁷ House bill 3962 was passed at 11:15 that same evening, after four hours of scheduled debate.⁹⁸ It was received in the Senate three days later.⁹⁹

¶28 Under traditional legislative history, the Senate should have sent the House bill to committee for consideration and markup, after which it would have been reported to the floor for a vote. If the Senate approved the House bill as passed, it would then go on to the President for his signature. If not, the bill would be returned to the House for its concurrence or to request a conference. None of these events took place. As it would turn out, the Senate would take the lead in shaping the form the ACA was to take.

The Senate Takes Up Health Care

¶29 At the time the House began crafting its legislation in the spring of 2009, two Senate committees—the Committee on Health, Education, Labor and Pensions (HELP) and the Committee on Finance—had already been charged with the task of producing that chamber's version of health care legislation.¹⁰⁰ The initiation of

Murray & Lori Montgomery, *House Democrats Pull Together on Health Care; Bill Similar to Senate's Months of Talks Yield \$894 Billion Package*, WASH. POST, Oct. 30, 2009, at A3.

93. See CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., 98-995, *THE AMENDING PROCESS IN THE HOUSE OF REPRESENTATIVES 3* (2007), available at <https://openncrs.com/document/98-995/>.

94. H.R. REP. NO. 111-330, at 25; Steven Mufson, *An Elixir for Health Reform? Lawmakers Offer "Black Liquor,"* WASH. POST, Nov. 8, 2009, at A2. This provision ultimately made it into the HCERA. Pub. L. No. 111-152, § 1408, 124 Stat. 1029, 1067.

95. H.R. REP. NO. 111-330.

96. This introduction of new language into the bill seems to have gone unnoticed even by the Congressional Information Service. Though the CIS Legislative History does include H.R. Rep. No. 111-330 with the history of the PPACA, it does not list the provisions included in the document as it does with other reports generated by traditional committee review. CIS does not list this report in the legislative history of the HCERA even though the biofuel provision can be traced to this report. A minor point to be sure, unless you are a researcher tasked with understanding the history of the biofuel provision.

97. 155 CONG. REC. H12,622 (daily ed. Nov. 7, 2009); *Bill Summary & Status, 111th Congress (2009–2010), H.RES.903, All Congressional Actions*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.RES.903:@@X> (last visited Jan. 11, 2013).

98. 155 CONG. REC. H12,967 (daily ed. Nov. 7, 2009); *Bill Summary & Status, 111th Congress (2009–2010), H.R.3962, All Congressional Actions with Amendments*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.3962:@@S> (last visited Jan. 11, 2013).

99. 155 CONG. REC. S11,343 (daily ed. Nov. 10, 2009).

100. SINCLAIR, *supra* note 9, at 187. The latter was no easy task since HELP's chairman, Edward M. Kennedy, favored a substantial health care program, while the chairman of the Finance Committee, Max Baucus, was inclined toward a more conservative approach. Robert Pear, *2 Democrats Spearheading Health Bill Are Split*, N.Y. TIMES, May 30, 2009, at A7.

the legislative process in the Senate began in much the same way as it had in the House. Hearings and discussions, following on proceedings from previous Congresses, were held to delve into the issue. Though the committee chairmen had somewhat different positions, the staffs of both committees communicated with each other as they designed their legislation.¹⁰¹ Their eventual goal was the same as it was for the House committees—to produce legislation that could be merged together into a single bill that could be brought to the floor.¹⁰²

¶30 The paths of the Senate's effort and that of the House began to diverge with the introduction of the Senate bills through their respective committees. The traditional model of the legislative process ignores the power of House and Senate committees to generate legislation on their own, tending to imagine all bills as being initially introduced on the chamber floor.¹⁰³ This is not necessarily the case, and one way to introduce a bill in committee is via the markup process. A committee does not actually need to use a bill introduced on the chamber floor and referred to it for markup. Instead, it can come up with statutory language of its own, such as the chairman's mark—a committee chairman's draft of what the legislation should look like.¹⁰⁴ Senate committees have even greater flexibility than those in the House because they can report out original bills, and this was the case with the health care bills that came out of HELP and Finance.¹⁰⁵ While this power may seem a mere technicality, it can create a vexing annoyance for legislative history researchers, especially those tracking legislation as it is being debated in Congress.

¶31 Bills are numbered as they are introduced.¹⁰⁶ Bills that originate in committee have not yet been introduced in the technical sense and, as a result, are not numbered until after they are reported out of committee.¹⁰⁷ This can make the original committee-generated bills hard to find. The Library of Congress's THOMAS database does not acknowledge the committee bill until it has been introduced on the floor, nor are such bills printed by the Government Printing Office (GPO). This is troublesome for those researching pending legislation, as it can take some time for a bill to be debated, marked up, and then finally reported to the floor, making THOMAS useless for their research.¹⁰⁸ Researchers are also deprived of the original bill's language to compare with the version that was reported out of committee. Fortunately, there are other alternatives for such information—committee or press

101. SINCLAIR, *supra* note 9, at 187.

102. *Id.* at 187–88.

103. See JOHNSON, *supra* note 52, at 8–9.

104. OLESZEK, *supra* note 15, at 120.

105. See FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 101-28, at 408 (1992).

106. HAROLD G. AST, SENATE LEGISLATIVE PROCEDURAL FLOW AND RELATED HOUSE ACTION 2 (1978).

107. BETSY PALMER, CONG. RESEARCH SERV., 98-279, SPONSORSHIP AND COSPONSORSHIP OF SENATE BILLS 1 (2008), available at <http://www.judiciary.senate.gov/legislation/upload/CRS-Sponsorships.pdf>.

108. This process can cause considerable confusion. See, e.g., Josh Tauberer, *When Do Bills Get a Number?*, GOVTRACK.US BLOG (Oct. 14, 2009), <http://www.govtrack.us/blog/2009/10/14/when-do-bills-get-a-number/>.

web sites.¹⁰⁹ Of course, the problem with relying on these sources, as with any Internet source, is that documents are frequently moved or removed, especially as the political cycle goes on to the next contentious issue.¹¹⁰

¶32 The Senate HELP Committee completed its health care bill first.¹¹¹ One of the defining aspects of HELP's work was the review of the legislation's cost by the Congressional Budget Office (CBO) and the committee's response to it. The HELP Committee introduced an unnumbered draft on June 9, 2009, with elements that were intended to be filled in during markup.¹¹² Under the draft bill, uninsured persons would be required to purchase insurance through state exchanges or make payments to the government. Those in lower and middle incomes would receive subsidies to help them purchase policies, as would small businesses to offer insurance to their employees. No public option was included in the proposal.¹¹³ The bill was submitted to the CBO for an estimate of the legislation's cost.¹¹⁴

¶33 The initial CBO review of the incomplete bill determined it would cost \$1 trillion and decrease the uninsured by a net sixteen million people.¹¹⁵ The bill

109. For example, the chairman's mark that the Senate Finance Committee used for markup is located on the committee's web site. *Health Care Reform from Conception to Final Passage*, U.S. SEN. COMM. ON FINANCE, <http://www.finance.senate.gov/issue/?id=32be19bd-491e-4192-812f-f65215c1ba65> (last visited Feb. 17, 2013) (follow "Read the Chairman's Mark" link under listing for Sept. 16, 2009).

110. For example, the Senate HELP Committee's original draft bill was available via a link in a press release on the committee's web site shortly after it was released on June 9, 2009. The press release is now buried within HELP's site, and the link to the bill no longer works. See Press Release, Kennedy, HELP Committee Democrats Announce the "Affordable Health Choices Act" Bipartisan Talks Continue on Outstanding Key Issues (June 9, 2009), <http://www.help.senate.gov/newsroom/press/release/?id=a7af68bd-d7b3-4c7a-b40d-41871f0fb929&groups=Chair>.

111. Its role was also particularly poignant because its chairman, Senator Edward M. Kennedy, had made health care a personal cause throughout his career. At the time, he was battling cancer and was forced to surrender the chairmanship. Though Kennedy had started work on drafting a bill, completing the legislation and shepherding it to the floor fell to his named deputy on the issue, Senator Christopher Dodd. David M. Herszenhorn, *Senate Feels an Absence on Health Bill*, N.Y. TIMES, June 9, 2009, at A14; Robert Pear, *Sweeping Health Plan Is Drafted by Kennedy*, N.Y. TIMES, June 6, 2009, at A13. The bill was reported out by Senator Tom Harkin because Dodd did not want to give up chairmanship of the Banking Committee. Paul Kane, *Dodd Said to Decline Kennedy Post*, WASH. POST, Sept. 9, 2009, at A6.

112. [Unnumbered S. bill], 111th Cong. (2009) (on file with author). Senator Kennedy and his staff compiled "a draft of a draft" of the Affordable Health Choices Act before the draft produced for the HELP Committee was issued. Ceci Connolly, *Kennedy Readies Health-Care Bill*, WASH. POST, June 6, 2009, at A3 (quoting Kennedy spokesman Anthony Coley). One commentator, noting the incompleteness of the measure, wrote that Democrats had released "most of" their health care bill. Ezra Klein, *The Senate HELP Committee Releases (Most of) Its Health Reform Bill*, WASH. POST.COM (June 9, 2009), http://voices.washingtonpost.com/ezra-klein/2009/06/the_senate_help_committee_rele.html.

113. A Summary of the Key Provisions of the HELP Committee's Proposal, add. to Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Sen. Edward M. Kennedy (June 15, 2009), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/103xx/doc10310/06-15-health-choicesact.pdf>.

114. Sheryl Gay Stolberg, *Capital Holds Breath as He Crunches Numbers*, N.Y. TIMES, Nov. 17, 2009, at A1.

115. *Id.*

drafters then added more details and fine-tuned the existing language,¹¹⁶ releasing an amendment to the chairman's mark on July 2, 2009.¹¹⁷ The new language scaled back subsidies and included a public option called the Community Health Insurance Option, to be run by the Department of Health and Human Services and offered through the exchanges.¹¹⁸ These changes won a more palatable estimate from the CBO.¹¹⁹

¶34 Markup occurred between June 17 and July 14, 2009, during which approximately five hundred amendments were made.¹²⁰ The final vote on the HELP Committee's bill was held on July 15, 2009, but the legislation, titled the Affordable Health Choices Act, was not reported until months later, on September 17, 2009, by which time it had been numbered Senate bill 1679. It went to the floor without a committee report.¹²¹

¶35 The Senate Finance Committee's work was distinguished by two conversations that took place as it tried to complete the bill, as well as by its long delay in finally reporting one. The first conversation was between a group of three Democratic senators—Finance Committee chairman Max Baucus, Jeff Bingaman, and Kent Conrad—and three Republican senators—Mike Enzi, Chuck Grassley, and Olympia Snowe. This “group of six” met throughout the late spring, summer, and early fall of 2009 but could not reach an agreement.¹²² Despite the group's failure, some of the ideas it generated were incorporated into the Finance Committee bill.¹²³ There is no official record of their discussions, which were apparently conversational in nature, though they were covered in the press. Senator Grassley is said to have tweeted about some of the meetings after they were held, raising the titillating prospect that social media could now be a source of legislative history.¹²⁴

¶36 Baucus was not only talking with senators across the aisle, he was also negotiating with the pharmaceutical industry with the blessing of the White

116. David M. Herszenhorn & Robert Pear, *Democrats Work to Pare Cost of Health Care Bill*, N.Y. TIMES, June 17, 2009, at A15; Letter from Douglas W. Elmendorf, *supra* note 113, at [4].

117. [Unnumbered S. Amend.], 111th Cong. (2009) (on file with author).

118. *Id.* at § 3106; *see also* Jackie Calmes, *Revisions to Health Bill Are Unveiled by Democrats*, N.Y. TIMES, July 3, 2009, at A16.

119. A Preliminary Analysis of the HELP Committee's Health Insurance Coverage Provisions, add. to Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Sen. Edward M. Kennedy (July 2, 2009), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/104xx/doc10431/07-02-helpltr.pdf>. *See also* Calmes, *supra* note 118.

120. SINCLAIR, *supra* note 9, at 188.

121. Robert Pear & David M. Herszenhorn, *Health Care Bill Passes First Test on Capitol Hill*, N.Y. TIMES, July 16, 2009, at A1; *Bill Summary & Status, 111th Congress (2009–2010)*, S.1679, All Congressional Actions, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN01679:@@X> (last visited Feb. 17, 2013).

122. According to a Finance Committee time line on the health care law's passage, the group met thirty-one times, for a total of sixty hours, between June 18, 2009, and September 14, 2009. *Health Care Reform from Conception to Final Passage*, *supra* note 109. *See also* David M. Herszenhorn & Robert Pear, *Health Policy Is Carved Out at Table for 6*, N.Y. TIMES, July 28, 2009, at A1.

123. Senator Baucus stated that his chairman's mark was largely based on the group's discussions. 156 CONG. REC. S1823 (daily ed. Mar. 23, 2010).

124. Perry Bacon Jr., *Back in Iowa, Grassley Is the Talk of the Town Halls*, WASH. POST, Aug. 15, 2009, at A3.

House.¹²⁵ On June 20, 2009, President Obama announced a deal between the pharmaceutical industry and Senator Baucus for an \$80 billion commitment to make drugs more affordable for older Americans and to reduce the price tag of health care reform.¹²⁶ The deal was not completely altruistic—the drug companies were promised that health care reform would not involve government-negotiated prices of drugs or the importation of drugs from Canada.¹²⁷ In a similar deal, the White House also negotiated with hospital associations for \$155 billion in savings.¹²⁸ Neither the full terms of these deals nor any record of them was made public,¹²⁹ though apparently their provisions did have an impact on the Finance Committee's health care bill.¹³⁰

¶37 The Finance Committee also had the unfortunate distinction of taking the most time to produce its bill, as its work dragged on into September after a contentious summer during which public support for the health care overhaul fell precipitously.¹³¹ Unable to reach an agreement through the group of six, Senator Baucus ended the negotiations and finally introduced a chairman's mark for health care legislation. This version enjoyed three incarnations before it was considered by the committee. First, a Baucus draft proposal was circulated when President Obama spoke on the health care issue before a joint session of Congress on September 9, 2009.¹³² A week later, on September 16, Baucus introduced a chairman's mark, the America's Healthy Future Act of 2009.¹³³ This met with withering criticism not only from health care reform opponents but from proponents as well, who protested the legislation for not covering enough people and not providing a public option.¹³⁴ A

125. STAFF OF THE WASHINGTON POST, *LANDMARK: THE INSIDE STORY OF AMERICA'S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL* 19–22 (2010).

126. *Drug Makers Agree to Offer Medicare Discounts*, N.Y. TIMES, June 21, 2009, at A20.

127. David D. Kirkpatrick, *White House Affirms Deal on Drug Cost*, N.Y. TIMES, Aug. 6, 2009, at A1.

128. David M. Herszenhorn, *Democrats Divide over a Proposal to Tax Health Benefits*, N.Y. TIMES, July 9, 2009, at A19. Hospitals and pharmaceutical companies were not the only groups that offered concessions for promises about what the eventual health care bill would contain. Insurers agreed to end rate-setting practices that charged higher rates to sick people if the legislation required all Americans to carry insurance. Robert Pear, *Insurers Offer to Soften a Key Rate-Setting Policy*, N.Y. TIMES, Mar. 25, 2009, at B1. Walmart apparently agreed not to oppose provisions mandating that employers cover workers as long as it was not required to pay part of the cost of workers on Medicaid. David M. Herszenhorn & Sheryl Gay Stolberg, *Health Deals Could Harbor Hidden Costs*, N.Y. TIMES, July 8, 2009, at A1.

129. The *Huffington Post* claimed to have a memo detailing the deal with drug manufacturers, although it was said to have been obtained from an unnamed lobbyist who received a copy from an unnamed participant in the negotiations. Ryan Grim, *Internal Memo Confirms Big Giveaways in White House Deal with Big Pharma*, HUFFINGTON POST (updated May 25, 2011), http://www.huffingtonpost.com/2009/08/13/internal-memo-confirms-bi_n_258285.html.

130. For example, an attempt to require drug manufacturers to provide steeper discounts on drugs offered under Medicare was rejected in the Finance Committee. Robert Pear & Jackie Calmes, *Senate Panel Rejects Bid to Add Drug Discount*, N.Y. TIMES, Sept. 25, 2009, at A18.

131. SINCLAIR, *supra* note 9, at 191.

132. Sheryl Gay Stolberg & Jeff Zeleny, *Obama, Armed with Details, Challenges Congress*, N.Y. TIMES, Sept. 10, 2009, at A1.

133. See Robert Pear & David M. Herszenhorn, *Senator Unveils Bill to Overhaul U.S. Health Care*, N.Y. TIMES, Sept. 17, 2009, at A1.

134. SINCLAIR, *supra* note 9, at 192.

week later, Baucus introduced an amended version that increased the number of people covered.¹³⁵ Again, none of these chairman's mark versions of the bill were included on THOMAS or are available through GPO.

¶38 Committee markup began on September 22, 2009, with members having to contend with 564 proposed amendments.¹³⁶ The committee's work was completed in the early morning hours of October 2, but the vote was postponed until after the CBO completed its analysis of the legislation, which was published on October 7.¹³⁷ Finally, on October 13, the full committee voted to report out Senate bill 1796, the America's Healthy Future Act, along with a committee report.¹³⁸

¶39 Senate bill 1796 included elements common to its predecessors. Individuals would be required to obtain insurance.¹³⁹ Those in lower and middle income brackets could do so through nonprofit cooperatives and would have the benefit of subsidies.¹⁴⁰ Medicaid would be expanded to cover those with the lowest incomes.¹⁴¹ Larger employers would be penalized if their employees received insurance through the cooperatives, and tax credits would be available to some employers to provide employee insurance.¹⁴² One of the means to pay for the bill was a tax on plans with premiums above \$8000 for individuals and \$21,000 for families, one of the proposal's most controversial provisions—though the premium limit was \$5000 higher for retirees and those in high-risk professions.¹⁴³ Other funding came from limiting flex plan spending accounts to \$2500 and fees on segments of the medical industry.¹⁴⁴ Perhaps the most significant feature of the Finance Committee's bill was what it did not contain—a public option. Democratic senators had attempted to include one, but their proposals were voted down with the assistance of Chairman Baucus, who did not believe the public option could muster the sixty votes necessary for passage on the Senate floor.¹⁴⁵

135. Robert Pear & David M. Herszenhorn, *Parties Clash on Long-Awaited Day for Health Bill*, N.Y. TIMES, Sept. 23, 2009, at A21.

136. David M. Herszenhorn, *Shepherding a Bill with 564 Amendments*, N.Y. TIMES, Sept. 21, 2009, at A16.

137. Robert Pear & David M. Herszenhorn, *Finance Panel Wraps Up Its Work on Health Care Bill*, N.Y. TIMES, Oct. 3, 2009, at A16; Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Sen. Max Baucus (Oct. 7, 2009), available at http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/106xx/doc10642/10-7-baucus_letter.pdf. The text of the amended bill was not available until almost a week after the version was approved. David M. Herszenhorn, *1,502 Pages of Details*, N.Y. TIMES, Oct. 20, 2009, at A22.

138. S. REP. NO. 111-89 (2009). Only one Republican, Olympia Snowe, voted in favor. Robert Pear & David M. Herszenhorn, *A Senate Health Bill Gains with One Republican Vote*, N.Y. TIMES, Oct. 14, 2009, at A1.

139. Letter from Douglas W. Elmendorf, *supra* note 137, at 2.

140. *Id.*; *Landmark Health Care Overhaul*, *supra* note 49, at 13-6.

141. Letter from Douglas W. Elmendorf, *supra* note 137, at 4.

142. *Id.*

143. David M. Herszenhorn & Robert Pear, *Congress Split on a Health Tax on Costly Plans*, N.Y. TIMES, Oct. 13, 2009, at A1; Pear & Herszenhorn, *supra* note 137.

144. *Landmark Health Care Overhaul*, *supra* note 49, at 13-9. Abortion was a contentious issue as well. Robert Pear, *Panel Rejects Tighter Abortion Limits in Health Bill*, N.Y. TIMES, Oct. 1, 2009, at A21.

145. David M. Herszenhorn, *Counting Votes*, N.Y. TIMES, Sept. 30, 2009, at A20; Robert Pear & Jackie Calmes, *Senators Battle over Two Public Insurance Proposals and Reject Both*, N.Y. TIMES, Sept. 30, 2009, at A18.

¶40 After the Senate committee bills were both finally reported out to the floor, Senate Majority Leader Harry Reid led the effort by prominent Democratic senators and the White House to merge the HELP and Finance Committee bills into one. The path Reid's bill would have to take to passage in the Senate is only fully understandable with a basic primer on that chamber's rules.

¶41 On paper, the Senate lacks many of the procedural mechanisms to expedite floor debate that House leaders enjoy. Senate rules, compared to those of the House, are extraordinarily brief, and those rules that do exist favor individual action at the expense of majoritarian control.¹⁴⁶ Senators can engage in unlimited debate and are barely limited in the number of amendments they can offer to legislation.¹⁴⁷ There is no requirement that amendments be germane to the legislation they alter, nor is there any priority of germane amendments over those that are not.¹⁴⁸ Further, the Senate has no comparable institution to the House Rules Committee, which can set rigid limits on floor debate.¹⁴⁹ Combining this lack of control with the supermajorities needed to conduct many important matters of business, and the availability of other obstructionist tactics, small minorities of senators, and sometimes even individual senators, have the potential to frustrate legislation they oppose by grinding the chamber's work to a halt.¹⁵⁰

¶42 The rule that had the greatest effect on the Senate's consideration of Reid's bill, as with any contentious matter before that chamber, was Rule XXII, which governs cloture, or how debate can be closed.¹⁵¹ Again, the Senate's rules generally empower each member with the right to speak for an unlimited amount of time, a power that can be used to obstruct consideration of, or filibuster, a measure.¹⁵² This right can only be circumscribed on debatable questions by the invocation of cloture—a vote to limit debate to no more than thirty hours—which requires a supermajority of sixty votes.¹⁵³ Cloture also has the effect of limiting amendments to the bill under consideration. Only amendments submitted before cloture may be considered and, of these, only those that are germane to the legislation.¹⁵⁴

¶43 Typically, two invocations of cloture are necessary to get to a vote on a bill. The first is for closing debate on a motion to proceed that calls a bill up for consideration. The second is for closing debate on the bill itself.¹⁵⁵ The Senate's voting

146. Matthew Mantel, *Researching House and Senate Rules and Procedures*, 24 LEGAL REFERENCE SERVICES Q., nos. 3/4, 2005, at 67, 77.

147. RIDDICK & FRUMIN, *supra* note 105, at 1311.

148. Steven S. Smith & Marcus Flathman, *Managing the Senate Floor: Complex Unanimous Consent Agreements Since the 1950s*, 14 LEGIS. STUD. Q. 349, 358 (1989).

149. OLESZEK, *supra* note 15, at 243.

150. A practice perhaps best popularized by the climax to the movie MR. SMITH GOES TO WASHINGTON (Columbia Pictures 1939).

151. *Standing Rules of the Senate* R. XXII, in SENATE MANUAL, S. DOC. NO. 112-1, at 20–22 (2011).

152. RICHARD S. BETH & VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RL30360, FILIBUSTERS AND CLOTURE IN THE SENATE 1 (2012), available at http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C*PLW%3D%22P%20%200A.

153. *Id.* at 9, 12.

154. *Id.* at 14.

155. *Id.* at 10. A filibuster of a motion to proceed is less effective than a filibuster of a bill because the former does not allow amendments to the motion. However, it does provide an

duality creates a complexity for researchers. The motion to proceed is focused solely on procedure. Following this vote, the battle over the substance of the bill, such as modifying it with germane and nongermane amendments, runs until the cloture motion vote closes it off. Knowing where the battle over substance begins and ends helps screen out, or otherwise put into context, hours of debate that a researcher must comb through for legislative history.

¶44 Given the united Republican opposition to Democratic health care legislation, Reid would have to make sure his proposal could count on the votes of all fifty-eight Democrats and the two independent senators who caucused with them—no easy task considering there were disagreements on such complicated matters as the public option, employer mandates, taxing high-priced plans, and the need to keep the legislation's price tag below the President's \$900 billion limit.¹⁵⁶ This reality narrowed what form the final proposal could take, since one unhappy senator could derail the entire bill. It also shaped the debate that would take place and the information that would be generated from it.

¶45 Majority Leader Reid's proposal was unveiled on November 18, 2009, after the CBO provided an estimate of its cost.¹⁵⁷ The legislation included a tax on "Cadillac health plans," had less restrictive provisions regarding abortion, and was less punitive to those who did not obtain insurance.¹⁵⁸ In addition, this legislation was paid for, in part, through a tax on elective cosmetic surgery; fees on insurance companies, makers of medical devices, and drug companies; and by delaying its implementation to 2014, a year later than the House bill.¹⁵⁹ The Reid proposal was cheaper than the House's version—\$821 billion over ten years versus \$1.03 trillion over that same time frame—but would also leave several million more people uninsured.¹⁶⁰ Unlike the Finance Committee bill, it contained a public option, a modified version of the Community Health Insurance Option from HELP's Senate bill 1679 with an opt-out provision for states that did not wish to participate.¹⁶¹ The Reid proposal did not become a new piece of legislation but rather was inserted as an amendment to an existing one. With this decision, the legislative history of health care merged with that of the Service Members Home Ownership Tax Act of 2009.

¶46 The association between these unrelated bills is inexplicable without an understanding of a "cut and paste" procedure used to forge the necessary chamber agreement—"amendment between the houses." In the House, the procedure works

opportunity to delay that might influence the Senate to move on to other business. JUDY SCHNEIDER, CONG. RESEARCH SERV., RL30850, MINORITY RIGHTS AND SENATE PROCEDURES 3 (2005), available at http://assets.opencrs.com/rpts/RL30850_20050822.pdf.

156. David M. Herszenhorn, *Merging the Senate Bills*, N.Y. TIMES, Oct. 20, 2009, at A22; David M. Herszenhorn & Robert Pear, *Reid Decision Yields No Unity on Public Option*, N.Y. TIMES, Oct. 28, 2009, at A20.

157. Robert Pear & David M. Herszenhorn, *Senate Leaders Unveil Measure on Health Care*, N.Y. TIMES, Nov. 19, 2009, at A1.

158. Robert Pear, *Senate Health Bill Covers Fewer than House Version, but Would Cost Less*, N.Y. TIMES, Nov. 20, 2009, at A24.

159. *Id.*

160. *Id.*

161. S. AMEND. 2786, 155 CONG. REC. S11,607, S11,628–30 (daily ed. Nov. 19, 2009).

like this: the House first passes its own bill, then it takes up a Senate bill, strikes that bill's text, and replaces it with the House bill's language.¹⁶² The Senate can then accept the House version of its bill, make amendments of its own, and send it back to the House, or it can go into conference to hammer out differences with the House. Alternatively, the two chambers can keep sending the legislation back and forth until complete agreement is achieved, avoiding a conference altogether. The process is similar in the Senate.

¶47 For example, earlier in the 111th Congress, House bill 1586 started off as a bill to tax bonuses received by recipients of the Troubled Asset Relief Program (TARP).¹⁶³ After the Senate received it, text below the enacting clause was struck and replaced by the FAA Air Transportation Modernization and Safety Improvement Act.¹⁶⁴ This was returned to the House, which made amendments of its own,¹⁶⁵ and sent it back to the Senate, which amended it again and returned it to the House.¹⁶⁶ The House agreed with the Senate amendments, and the bill was sent on to the President to be signed into law.¹⁶⁷ Though it is typical to select a bill on the same subject passed by the other chamber, examples such as this one demonstrate that there is no requirement to do so.

¶48 Amendment between the houses, also known as ping-ponging, is the increasingly common, some would even argue exclusive, method through which chamber differences are now resolved.¹⁶⁸ There are numerous reasons for its popularity. Avoiding conferences with select panels from the House and Senate provides the chamber leadership more control, and affords lawmakers the opportunity to decide what provisions can be kept in, kept out, or added.¹⁶⁹ In the Senate, request-

162. This has been described as a "hook-up" procedure. ELIZABETH RYBICKI, CONG. RESEARCH SERV., R41003, AMENDMENTS BETWEEN THE HOUSES: PROCEDURAL OPTIONS AND EFFECTS 3 n.6 (2010), available at http://assets.opencrs.com/rpts/R41003_20100104.pdf.

163. H.R. 1586, 111th Cong. (as introduced in House, Mar. 18, 2009), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr1586ih/pdf/BILLS-111hr1586ih.pdf>.

164. H.R. 1586, 111th Cong. (as engrossed in Senate, Mar. 22, 2010), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr1586eas/pdf/BILLS-111hr1586eas.pdf>.

165. Aviation Safety and Investment Act of 2010, H.R. 1586, 111th Cong. (as engrossed as amendment in House, Mar. 25, 2010), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr1586eah/pdf/BILLS-111hr1586eah.pdf>.

166. H.R. 1586, 111th Cong. (as passed by House and Senate), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr1586enr/pdf/BILLS-111hr1586enr.pdf>.

167. Pub. L. No. 111-226, 124 Stat. 2389 (2010). This is the strangely named "_____ Act of _____" discussed in Renata E.B. Strause et al., *How Federal Statutes Are Named*, 105 LAW LIBR. J. 7, 25, 2013 LAW LIBR. J. 1, ¶ 33.

168. An excellent description of the procedures and increased popularity of amendments between the houses is found in Walter J. Oleszek, *Whither the Role of Conference Committees, or Is It Wither?*, LEGIS. STUDS. SECT. NEWSL. (Jan. 2010), <http://www.apsanet.org/~ls/Newsletter/jan2010/Oleszek.pdf> (last visited Jan. 1, 2013). One commentator has suggested that the conference committee is endangered: "While it is too early to declare House-Senate conferences as extinct as the dodo, it is not too early to move them onto the parliamentary endangered-species list." Donald Wolfensberger, *Have House-Senate Conferences Gone the Way of the Dodo?*, WILSON CTR. (Apr. 28, 2008), <http://www.wilsoncenter.org/publication/have-house-senate-conferences-gone-the-way-the-dodo>. Another wrote, "Don't expect to see any more conference committees on controversial party-line bills. Ever." Jeff Davis, *The Other Reason to Skip Conference* (Jan. 5, 2010, 10:18 A.M.), NEW REPUBLIC, <http://www.tnr.com/blog/the-treatment/the-other-reason-skip-conference>.

169. See Davis, *supra* note 168; Wolfensberger, *supra* note 168.

ing a conference committee with the House requires unanimous consent. If that unanimity does not exist, opponents of a bill have many opportunities to frustrate getting to that stage.¹⁷⁰

¶49 What this reliance on amendment between the houses means for researchers is that one of the most important documents of legislative history, the conference committee report, may not be available. It also means that the legislative histories of two different bills intersect, and the researcher has to be aware of this junction to follow the detours. Staying on track may not be a problem in cases where the bill used for the ping-ponging has the same subject matter.¹⁷¹ But when it does not, amendment between the houses may detour the unwary researcher onto unanticipated and unwanted paths.

¶50 For the health care legislation, Majority Leader Reid used a vehicle with a completely different subject matter, and those unfamiliar with congressional decision making may want to know why. For a bill to be considered by the Senate, it must be on the Senate Calendar of Business or be brought into consideration through unanimous consent,¹⁷² something again impossible to achieve without full chamber agreement. At the time Reid was preparing the blended health care bill, the Senate had a handful of House bills available to use for an amendment between the houses on the Senate Calendar of Business, including House bill 3962, the House's health care bill,¹⁷³ and House bill 3590, the Service Members Home Ownership Tax Act of 2009.

¶51 At this point, it is worth noting that House bill 3962 was never referred to a Senate committee. While Senate rules provide that House bills go to the Senate committee with jurisdiction for review after two readings, there are exceptions to this procedure. If a senator objects to further proceedings on the bill after two readings, the legislation bypasses committee review and goes on the Senate Calendar of Business, where it can be called up for floor consideration.¹⁷⁴ That was the case with both House bill 3590 and House bill 3962.

¶52 The main attraction of using House bill 3590 (as opposed to the House's health care bill) was that it was obsolete by the time Majority Leader Reid was blending the Senate health care bills. Its tax credits for service persons had been included in the Worker, Homeownership, and Business Assistance Act of 2009, which had already been passed by Congress and signed by the President almost two

170. See Oleszek, *supra* note 168, at [5]–[10].

171. For example, in 2004, the House and Senate were working on a spending bill for the Department of Homeland Security. The House measure was House bill 4567. The Senate's was Senate bill 2537. After the House passed its version, the Senate took it, struck its language, inserted that of Senate bill 2537, passed it, and sent it back to the House. *Homeland Bill Sheds Some Baggage*, in 2004 CQ ALMANAC 2-26, 2-28 to 2-29 (Jan Austin ed., 2005).

172. BETSY PALMER, CONG. RESEARCH SERV., 98-429, THE SENATE'S CALENDAR OF BUSINESS 1 (2008), available at http://assets.opencrs.com/rpts/98-429_20080711.pdf.

173. See 155 CONG. REC. S11,382 (daily ed. Nov. 16, 2009).

174. MICHAEL L. KOEMPEL, CONG. RESEARCH SERV., RS22299, ROUTES TO THE SENATE FLOOR: RULE XIV AND UNANIMOUS CONSENT 2–3 (2005), available at <http://www.llsdc.org/attachments/wysiwyg/544/CRS-RS22299.pdf>. A House bill can also be put on the Senate calendar through unanimous consent. *Id.* at 4.

weeks earlier.¹⁷⁵ When it came time to select the health care “vehicle” legislation, Reid believed House bill 3590 was a “non-controversial” choice for amendment between the houses.¹⁷⁶ Therefore the original text of House bill 3590 was struck and replaced with the Reid health care proposal, Senate amendment 2786.¹⁷⁷

¶53 This act of legislative expediency is an example of the perils that an amendment between the houses poses to the unwary researcher of legislative history. It creates the illusion that one bill emerged from the other and that their histories are related—that is, that the PPACA originated from the Service Members Home Ownership Tax Act—an illusion enabled by no less an authority the Library of Congress’s THOMAS database.¹⁷⁸ Furthermore, it obscures the fact that the original content of the Service Members Home Ownership Tax Act actually did pass. Because the Service Members Home Ownership Tax Act became intertwined with health care, it requires more sophisticated searching to divine its actual fate.¹⁷⁹

¶54 Once Reid had a vehicle to use, the first phase of its consideration went relatively smoothly. On November 21, cloture on the motion to proceed passed on a party-line vote. Majority Leader Reid then called up his amendment to House bill 3590, and the process moved on to a debate of the proposal.¹⁸⁰ The second cloture vote, effectively ending debate on Reid’s bill, would prove to be more of a hurdle

175. Pub. L. No. 111-92, 123 Stat. 2984.

176. “[B]asically, we needed a non-controversial House revenue measure to proceed to, so that is why we used the Service Members Home Ownership Tax Act. It wasn’t more complicated than that.” E-mail from Kate Leone, Senior Health Counsel, Office of Sen. Harry Reid, to author (Apr. 21, 2011, 3:25 P.M.) (on file with author). The importance of H.R. 3590’s status as a revenue measure is due to the constitutional requirement that such bills originate in the House. ROBERT KEITH & BILL HENIFF JR., CONG. RESEARCH SERV., RL33030, THE BUDGET RECONCILIATION PROCESS: HOUSE AND SENATE PROCEDURES 68 (2005), available at http://assets.opencrs.com/rpts/RL33030_20050810.pdf. It has also been suggested that the choice may have been made to create a facade through which Democrats would appear to be voting for something more popular than health care, i.e., veterans benefits. SINCLAIR, *supra* note 9, at 201–02. However, at least one witness to the events doubted this interpretation. Letter from Sen. Arlen Specter to author (Feb. 20, 2012) (on file with author).

177. S. AMEND. 2786, 155 CONG. REC. S11,607 (daily ed. Nov. 19, 2009).

178. See *Bill Summary & Status, 111th Congress (2009–2010), H.R.3590, All Congressional Actions*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR03590:@@X> (last visited Jan. 11, 2013). THOMAS gives a chronological record of a bill’s progress through Congress in its “Bill Summary & Status” view. A researcher of H.R. 3590 following this record would begin with H.R. 3590’s initial incarnation as a bill providing tax credits for homeownership for service members and end with the PPACA as passed into law.

179. For example, THOMAS reports that House bill 3590 became the vehicle for health care, but it also shows that similar legislation, Senate bill 1728, the Service Members Home Ownership Tax Act of 2009; House bill 3573, the Call to Service Homebuyer Credit Act of 2009; and House bill 3780, the Service Members’ Homebuyer Tax Credit Extension Act 2009, all died in committee. *Bill Summary & Status, 111th Congress (2009–2010), S.1728*, THOMAS, <http://hdl.loc.gov/loc.uscongress/legislation.111s1728> (last visited Jan. 21, 2013); *Bill Summary & Status, 111th Congress (2009–2010), H.R.3573*, THOMAS, <http://hdl.loc.gov/loc.uscongress/legislation.111hr3573> (last visited Jan. 21, 2013); *Bill Summary & Status, 111th Congress (2009–2010), H.R.3780*, THOMAS, <http://hdl.loc.gov/loc.uscongress/legislation.111hr3780> (last visited Jan. 21, 2013). OpenCongress.org and Govtrack.us also show all this legislation as having died (and in only some cases show it as linked to the health care bill). The confusion created the impression that the service person tax credit extension legislation had not passed; my colleague Lyndsey Steussy was able to find that the tax credit extension had passed by using the text of one of the failed bills as terms for a search in the *U.S. Code*.

180. 155 CONG. REC. S11,967 (daily ed. Nov. 21, 2009).

than the first. Democrats unhappy with the legislation's initial form were unwilling to block its path to consideration, but they threatened to filibuster if changes were not made.¹⁸¹ Reid had to have the support of each one to get to a vote. While Republicans had not dug in their heels to fight the motion to proceed, hoping to tarnish vulnerable Democrats by forcing them to vote in a way that could be characterized as a substantive vote for the health care bill, they would not be so accommodating with the next cloture motion, and they were united in their opposition.¹⁸²

¶55 Senate consideration of House bill 3590 as amended proceeded on two parallel tracks. The first was a traditional one, involving floor debate and votes recorded in the *Congressional Record*. THOMAS lists 506 offered amendments to Majority Leader Reid's amendment to House bill 3590—Senate amendment 2786—suggesting a vigorous effort to alter the bill's final form on the Senate floor.¹⁸³ But this number is deceptive. In actuality, only a tiny fraction of these amendments has any significance to the PPACA's legislative history.¹⁸⁴ The ability to separate the few relevant amendments from the many immaterial ones requires an understanding of how the Senate regulates its floor debate through uniform consent agreements (UCAs).¹⁸⁵

¶56 A UCA allows senators to temporarily waive existing rules and make new ones, creating a structure for debate that might not otherwise exist.¹⁸⁶ For example, UCAs can be used to set debate time limits and the number and type of amendments that can be offered during floor consideration of a bill.¹⁸⁷ They arise from negotiation, usually between the majority and minority leadership. Since any objecting senator can derail these agreements, discussions can include individual senators with a keen interest in the debate as well.¹⁸⁸ As the products of negotiation, UCAs involve the same processes as any contract—give and take, quid pro quo, benefit, and cost. The complexities in arranging them often require several UCAs during debate rather than any one comprehensive agreement.¹⁸⁹ Whatever their form, “they are formally recorded in the *Congressional Record*, the [Senate] *Calendar of Business*, and the *Senate Journal*.”¹⁹⁰

181. SINCLAIR, *supra* note 9, at 202–03.

182. Oleszek & Oleszek, *supra* note 17, at 269.

183. *Amendments for H.R.3590*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.03590>: (click on “Amendments” link) (last visited Jan. 15, 2013).

184. Determining the number of amendments actually considered and rejected or passed requires an analysis of THOMAS's “All Congressional Actions with Amendments” view for H.R. 3590. *Bill Summary & Status, 111th Congress (2009–2010), H.R.3590, All Congressional Actions with Amendments*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR03590:@@S> (last visited Jan. 15, 2013).

185. PALMER, *supra* note 107, at 1.

186. *Id.* See also VALERIE HEITSHUSEN, CONG. RESEARCH SERV., 98-310, SENATE UNANIMOUS CONSENT AGREEMENTS: POTENTIAL EFFECTS ON THE AMENDMENT PROCESS (2009), available at <http://www.fas.org/spp/crs/misc/98-310.pdf>; WALTER J. OLESZEK, CONG. RESEARCH SERV., RL33939, THE RISE OF SENATE UNANIMOUS CONSENT AGREEMENTS 1–2 (2008), available at <https://openers.com/document/RL33939/>.

187. RIDDICK & FRUMIN, *supra* note 105, at 1311.

188. OLESZEK, *supra* note 15, at 232–33.

189. *Id.* at 236–37.

190. *Id.* at 236.

¶57 Given that Democrats and Republicans were polarized on the health care issue, agreement on any UCA seems incredible. But the impetus for UCAs is that they expedite the business of the Senate, especially consideration of a bill. Their appeal, even for those opposing the legislation, is that they create predictability where none would otherwise exist, guaranteeing senators that they will be heard on a matter. Once concluded, they are enforceable and can be changed only by unanimous consent.¹⁹¹

¶58 Thus, both parties reached a UCA after the cloture vote and before adjourning on November 21, 2009, and they continued to do so on a nearly daily basis until December 14, 2009.¹⁹² These UCAs set debate time limits and determined which amendments would be considered, usually allowing for debate on an amendment offered by a Democratic senator, which was set off by a side-by-side amendment or a motion offered by a Republican senator.¹⁹³ A key component to these agreements was that an amendment could only pass if it had a sixty-vote majority.¹⁹⁴ These agreements were beneficial for both sides. Democrats were able to get the bill debated and amended in a form guaranteed to reach the sixty votes needed for cloture. Republicans were given the chance to voice their concerns and draw distinctions between themselves and their opponents concerning a bill that they believed was losing public support.¹⁹⁵

¶59 While the UCAs limited which amendments could be considered, senators offered additional ones for symbolic purposes. This practice accounts for the vast majority of amendments proposed during the Senate debate on Reid's amendment to House bill 3590. All of those amendments not covered by UCAs were ordered to lie on the table as soon as they were introduced and had no parliamentary standing at all.

¶60 From a legislative history perspective, the challenge with the Senate amendments to Majority Leader Reid's own amendment to House bill 3590 is separating the handful covered by the UCAs from the hundreds that had no effect on the legislation. THOMAS is the best source for this task, but the researcher should not be deceived by the "Amendments" link on the *Bill Summary and Status* web page.¹⁹⁶ This leads to a full list of all amendments offered, with no distinction between

191. OLESZEK, *supra* note 186, at 2.

192. The major UCAs governing debate and amendment of H.R. 3590 can be found at 155 CONG. REC. S11,977 (daily ed. Nov. 21, 2009), 155 CONG. REC. S12,016 (daily ed. Nov. 30, 2009), and 155 CONG. REC. S12,090 (daily ed. Dec. 1, 2009). Many, but not all, of the UCAs were reported in the *Daily Digest* for the day they were agreed upon.

193. SINCLAIR, *supra* note 9, at 204.

194. The rationale behind the sixty-vote requirement is that it allows bill proponents to avoid obstacles created by cloture, i.e., the inability to vote on a measure through a failure to end debate as well as the time requirements to get to that vote even if cloture is achieved. There are incentives for opponents to agree to this term. They are assured of the supermajority requirement for a final vote and often are granted the right to offer competing proposals for debate and vote. MEGAN SUZANNE LYNCH, CONG. RESEARCH SERV., RL34491, UNANIMOUS CONSENT AGREEMENTS ESTABLISHING A 60-VOTE THRESHOLD FOR PASSAGE OF LEGISLATION IN THE SENATE 2 (2008), available at <https://opencrs.com/document/RL34491/>.

195. See Oleszek & Oleszek, *supra* note 17, at 269.

196. See, e.g., *Bill Summary & Status, 111th Congress (2009–2010), H.R.3590*, THOMAS, <http://hdl.loc.gov/loc.uscongress/legislation.111hr3590> (last visited Jan. 13, 2013).

amendments allowed by UCAs and those that were not. The link for “All Congressional Actions with Amendments” has a time line with the amendments that were debated and voted upon. In addition, pending amendments and votes are also included in the *Congressional Record Daily Digest* for the days when they were before the Senate.¹⁹⁷

¶61 The fragile truce on side-by-side amendments began to unravel over difficulties in reaching a UCA for a motion by Senator Mike Crapo of Idaho to commit the bill to the Senate Finance Committee.¹⁹⁸ The agreement completely fell apart on December 16, 2009, when Republican Senator Tom Coburn insisted, as a delaying tactic, that a lengthy amendment by Independent Senator Bernie Sanders for a public option be read on the floor.¹⁹⁹ The process of amending the bill on the floor of the Senate had come to an end.

¶62 A second deliberative track was taking place elsewhere and was arguably more important. This included negotiations between Majority Leader Reid, representatives from the White House, and a group of ten senators—five moderates and five liberals.²⁰⁰ The satisfaction of the moderates was key, as they had not been completely happy with the bill that had been reported to the floor. Over the course of December, provisions began to be added or eliminated to placate the recalitrants. In some cases it was to please a single senator. The Senate’s public option was dropped due to opposition from Senators Joe Lieberman and Ben Nelson.²⁰¹ A compromise to allow persons between the ages of 55 and 64 to buy into Medicare was likewise jettisoned due to Senator Lieberman’s opposition.²⁰² Opposition to funding the proposal through taxes on elective cosmetic surgery led to a change

197. For example, the *Daily Digest* for November 30, 2009, lists as pending the Reid Amendment No. 2786, the Mikulski Amendment No. 2791 to the Reid Amendment, and a McCain motion to commit H.R. 3590 to the Committee on Finance. 155 CONG. REC. D1373 (daily ed. Nov. 30, 2009). The *Daily Digest* for December 3, 2009, notes that the Mikulski Amendment passed (61 to 39) and the McCain motion was withdrawn after a negative vote (42 to 58). 155 CONG. REC. D1395 (daily ed. Dec. 3, 2009). That same day an additional amendment was unanimously approved—Bennet Amendment No. 2826. Another—Murkowski Amendment No. 2836—was rejected (41 to 59) and withdrawn. The Reid amendment was still pending, as were Whitehouse Amendment No. 2870 and a motion by Orrin Hatch to commit the bill to the Finance Committee. *Id.*

198. Republicans complained that Democrats were blocking consideration of amendments, as did Senator Chuck Grassley: “On this side of the aisle, we have been waiting for a long period of time to vote on some amendments that are now before the Senate, such as the Crapo motion which would send the bill back to committee to take out the tax increases that are in it.” 155 CONG. REC. S12,878 (daily ed. Dec. 10, 2009).

Democrats objected that Republicans were the ones stalling. “How many times do we have to ask for permission to call amendments for a vote, run into objections from the Republican side, and then hear the speech: Why aren’t you voting for amendments?” 155 CONG. REC. S12,981 (daily ed. Dec. 11, 2009) (statement of Senator Dick Durbin).

199. Sanders was outraged: “We have two wars, we have global warming, we have a \$12 trillion national debt, and the best the Republicans can do is try to bring the U.S. Government to a halt by forcing a reading of a 700-page amendment.” 155 CONG. REC. S13,290 (daily ed. Dec. 16, 2009).

200. SINCLAIR, *supra* note 9, at 203; E.J. Dionne Jr., Editorial, *The Best Holiday Gift: The Senate Must Pass the Health Bill by Year’s End*, WASH. POST, Dec. 7, 2009, at A19.

201. David M. Herszenhorn, *Things That Changed, and Stayed the Same*, N.Y. TIMES, Dec. 21, 2009, at A22.

202. Carl Hulse & Robert Pear, *Senate Democrats Likely to Drop Medicare Expansion*, N.Y. TIMES.COM (Dec. 15, 2009), <http://www.nytimes.com/2009/12/15/health/policy/15health.html>.

that taxed “indoor tanning services” instead.²⁰³ Senator Nelson won a major concession limiting abortion coverage.²⁰⁴ Under the agreement with Nelson, states could choose to prohibit abortion coverage in the insurance markets, or exchanges, where most health plans would be sold. But if a health plan did cover the procedure, subscribers would have to make two separate monthly premium payments: one for all insurance coverage except for the abortion coverage and one for the abortion coverage.²⁰⁵ Finally, concessions were made to benefit the states of individual lawmakers.²⁰⁶ In two of the more famous examples, Ben Nelson’s Nebraska and Mary Landrieu’s Louisiana won substantial Medicaid dollars.²⁰⁷

¶63 Ultimately, the modifications made off the floor were combined into a manager’s package—Senate amendment 3276—introduced by Majority Leader Reid on December 19, 2009.²⁰⁸ To close down debate and start the clock running toward a final vote, Reid presented three successive cloture motions: one to close debate on the manager’s amendment; one to close debate on his original amendment, Senate amendment 2786; and, finally, one on the amended House bill 3590 itself.²⁰⁹ Setting the Senate on the path toward the final votes on the bill and its amendments also created some curious legislative history minutiae.

¶64 Immediately after the cloture motions, Reid made a number of amendments: Senate amendment 3280, a motion to commit, which required the Finance Committee to report back on the bill in two days after enactment; Senate amendment 3281, which changed that deadline to one day; and Senate amendment 3282, which changed it to “immediately.”²¹⁰ These amendments had no substantive value but had the significant procedural effect of “filling the amendment tree.” An amendment tree is one of several diagrams in Riddick and Frumin’s *Senate Procedure* that shows different “slots” which determine the order of precedence governing which amendments can be heard when one is disposed of under specific circumstances.²¹¹ Filling the slots limits any further amendments from being offered and serves as another control on floor action that the Senate rules otherwise lack.²¹² The Senate majority leader, given his or her right to priority in recognition

203. Robert Pear, *Negotiating to 60 Votes, Compromise by Compromise*, N.Y. TIMES, Dec. 20, 2009, at A37.

204. David M. Herszenhorn & Carl Hulse, *Hopes Dim, G.O.P. Still Vows to Fight Health Bill*, N.Y. TIMES.COM (Dec. 21, 2009), <http://www.nytimes.com/2009/12/21/health/policy/21health.html>.

205. Robert Pear & David M. Herszenhorn, *Democrats Face New Challenges in Merging Bills*, N.Y. TIMES, Dec. 22, 2009, at A1.

206. Robert Pear, *Buried in Health Bill, Very Specific Beneficiaries*, N.Y. TIMES, Dec. 21, 2009, at A1.

207. The deals were derided in the press and by Republicans with epithets such as the “Cornhusker Kickback” and the “Louisiana Purchase.” See, e.g., Dana Milbank, *Looking Out for Number One (Hundred Million)*, WASH. POST, Dec. 22, 2009, at A2.

208. 155 CONG. REC. S13,490 (daily ed. Dec. 19, 2009). Republicans insisted that the bill be read on the Senate floor, which took seven hours. Shailagh Murray & Lori Montgomery, *Deal on Health Bill Is Reached: Democrats Win over Nelson, GOP Senate Leader Calls Measure a “Monstrosity,”* WASH. POST, Dec. 20, 2009, at A1.

209. 155 CONG. REC. at S13,477–78 (daily ed. Dec. 19, 2009).

210. *Id.* at 13,478.

211. See, e.g., RIDDICK & FRUMIN, *supra* note 105, at 74.

212. See CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., RS22854, FILLING THE AMENDMENT TREE IN THE SENATE 2 (2008), available at <https://openocrs.com/document/RS22854/>.

on the chamber floor, can, and often does, fill the amendment tree for procedural purposes,²¹³ as Senator Reid did in the health care debate. Researchers should be aware of these amendments because although they are symbolic, they do appear in the record just like any other pending amendment to be voted upon.²¹⁴ Further, they serve as a signpost that changes from the floor were limited.²¹⁵

¶65 The three cloture votes fell into place as Christmas neared. Senate amendment 3276 passed on December 22;²¹⁶ Senate amendment 2786 passed on December 23;²¹⁷ and House bill 3590 finally passed on December 24.²¹⁸ One of the final acts of housekeeping was to rename the bill the Patient Protection and Affordable Care Act.²¹⁹

¶66 Conventional legislative history would suggest that the next step in the consideration of the health care bill would be a conference committee. The committee report from the conference committee would then be one of the most valued documents of legislative history, particularly because it would provide a statement of the conferees' views of the legislation and why certain provisions were added, changed, or deleted.

¶67 As has been noted, however, the conference committee is not the only device through which agreement between the houses can be obtained, nor is it the most

213. *Id.* The import of the tactic was not lost on Republicans, as an exchange between Senator Coburn and the Senate's presiding officer showed:

Mr. COBURN. Mr. President, reserving the right to object, and I do not intend to object, but I want to make a parliamentary inquiry prior to us doing that. And the inquiry is this: Based on the second-degree amendments just filed by the majority leader, as well as the elimination of their language, is it, in fact, the effect that no other amendments will be allowed on this bill?

The PRESIDING OFFICER. There are no available amendment slots at this time.

Mr. COBURN. Further in my parliamentary inquiry, if there were amendments available, could they be filed on this bill?

Mr. REID. I am sorry, I could not hear my friend.

Mr. COBURN. If, in fact, amendments were available, could amendments be filed to this bill and made pending?

I will restate my inquiry to the Chair. Is it, in fact, a fact that because of the filling of the tree by the majority leader, the opportunity to amend the bill before us will be limited?

The PRESIDING OFFICER. The Senator is correct.

155 CONG. REC. S13,478–79 (daily ed. Dec. 19, 2009).

Republicans were not completely thwarted from trying to offer amendments. Senator Jim DeMint made an unsuccessful motion to suspend the rules to offer an amendment banning the trading of earmarks for votes. 155 CONG. REC. S13,832–33 (daily ed. Dec. 23, 2009).

214. For example, Senate amendments 3277 through 3282, introduced on December 19, 2009, appear as pending in the *Daily Digest* for December 20, 2009. 155 CONG. REC. D1503 (daily ed. Dec. 20, 2009). Senate amendments 3280, 3281, and 3282 “fell” with the vote to close debate on Senate amendment 2786 on December 21, while the others remained pending. 155 CONG. REC. D1506 (daily ed. Dec. 21, 2009). Senate Amendment 3278 was tabled and Senate Amendment 3277 was withdrawn on December 22. 155 CONG. REC. S13,715–16 (daily ed. Dec. 22, 2009). Senate amendment 2878 was withdrawn on December 23. 155 CONG. REC. S13,833 (daily ed. Dec. 23, 2009).

215. Reid filled the tree on December 22 to pass his manager's amendment and quickly refilled it after the vote. 155 CONG. REC. S13,716 (daily ed. Dec. 22, 2009). *See also* Oleszek & Oleszek, *supra* note 17, at 271.

216. 155 CONG. REC. S13,716 (daily ed. Dec. 22, 2009).

217. 155 CONG. REC. S13,834 (daily ed. Dec. 23, 2009).

218. 155 CONG. REC. S13,891 (daily ed. Dec. 24, 2009).

219. This was done by unanimous consent. *Id.* at S14,140.

avored.²²⁰ In the case of health care, it does not appear to have been seriously considered as an option.²²¹ The primary reason lay, again, with the contra-majoritarian rules of the Senate. For the Senate to request a conference and appoint conferees would require overcoming potential filibusters, giving Republicans more opportunities to stall, if not thwart, the legislation.²²² Democrats were eager to pass a bill as soon as possible, preferably by the President's State of the Union address on January 20, 2010, but by early February at the latest.²²³ So, instead, Democratic congressional leaders and White House officials met in what one article described as a "substitute for a Congressional conference committee" to draft a proposal that could pass both houses.²²⁴ The negotiations were held behind closed doors, which raised transparency concerns and meant that this important stage would leave no record aside from what was reported in the press.²²⁵

Reconciliation

¶68 Even had a conference committee been considered, a politically earth-shattering event outside of Washington, D.C., would have doomed its prospects just as it threatened to derail health care reform as a whole. On January 19, 2010, Massachusetts voters elected Republican Scott Brown in a special election to fill the seat formerly held by the late Democratic Senator Ted Kennedy, subtracting one crucial vote from what had been the Democrats' sixty-vote, filibuster-proof majority. Since the Democrats had no hope of winning any Republican support for their health care proposal, Brown's election cast a pall on the health care bill's prospects for passage.²²⁶ A conference committee, which had been unlikely before, was now impossible.

¶69 Health care reform was not dead after Scott Brown's election, but it was on life support. There were procedural options for moving ahead, though they were limited. The easiest solution would be for the House to pass the Senate bill, but House Democrats were uneasy with several provisions in that legislation.²²⁷ Another option was to strip the legislation down to its most popular components and pass those either individually or as a single bill.²²⁸ Ultimately, the Democratic leadership, concluding that giving up on health care reform would be more politi-

220. See *supra* ¶ 48.

221. David M. Herszenhorn, *Bypassing a Roadblock*, N.Y. TIMES, Jan. 5, 2010, at A12.

222. *Id.*; see also ELIZABETH RYBICKI, CONG. RESEARCH SERV., RS20454, GOING TO CONFERENCE IN THE SENATE (2011), available at <http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270DP%2BPLK%3E%23P%20%20%0A>.

223. Shailagh Murray, *Democrats Begin Their Last Talks on Health-Care Reform; Leaders Seek to Iron Out Major Policy Differences Within Party's Ranks*, WASH. POST, Jan. 6, 2010, at A2.

224. Robert Pear & Sheryl Gay Stolberg, *Obama and Lawmakers Seek Accord on Overhaul*, N.Y. TIMES, Jan. 14, 2010, at A26.

225. C-SPAN requested to televise the health care negotiations, but the request was denied. See Katharine Q. Seelye, *A Request to Open Up*, N.Y. TIMES, Jan. 6, 2010, at A14.

226. Shailagh Murray, *Democrats Reluctant to Move Forward with Senate Bill*, WASH. POST, Jan. 21, 2010, at A1.

227. David M. Herszenhorn & Robert Pear, *Democrats in Congress Put Lower Priority on Health Care Bill After G.O.P. Victory*, N.Y. TIMES, Jan. 27, 2010, at A17.

228. See David M. Herszenhorn, *Health Care, Step by Step*, N.Y. TIMES, Jan. 30, 2010, at A14; Sheryl Gay Stolberg & David M. Herszenhorn, *Obama Weighs a Paring of Goals for a Health Bill*, N.Y. TIMES, Jan. 21, 2010, at A1.

cally expensive than passing expansive legislation, went ahead with a complicated but often used parliamentary practice that would enable them to avoid the sixty-vote obstacle in the Senate—reconciliation, an optional deficit control step in the congressional budget process laid out in the Congressional Budget Act of 1974.²²⁹

¶70 Understanding reconciliation and its effect on legislative history requires a background in the procedure of the Congressional Budget Act. By May 15 of every year, Congress is required to agree upon a concurrent resolution, setting forth a spending blueprint for the next fiscal year and at least the following four years.²³⁰ The resolution can control discretionary spending—funding for authorized federal activities for a specific year; for example, the programs of the Department of Agriculture or the Environmental Protection Agency—by setting limits to which the appropriation committees should adhere. Alterations in direct spending—that which the government must, under law, automatically spend each year—are handled differently.²³¹ If Congress wants to bring direct spending under control, it can issue instructions in the concurrent resolution to the committees with jurisdiction, requiring them to find savings of a certain amount, through either changes in existing law or tax increases. These committees report legislation to their chamber's Budget Committee, which bundles them, without changes, together into an omnibus reconciliation bill.²³²

¶71 The critical point about reconciliation legislation is that in both chambers it is considered under slightly different rules than traditional legislation. The rules for House consideration limit the types of amendments that can be made.²³³ In the Senate, amendments to reconciliation bills must be germane to budgetary matters.²³⁴ More important, reconciliation has features that circumvent the Senate's traditional supermajority requirements. Closing of debate on a reconciliation bill is not a debatable motion and only requires a simple majority to pass.²³⁵ Further, debate is automatically limited in the Senate to twenty hours.²³⁶

¶72 Reconciliation's relative lack of procedural obstructions has transformed it from a step in the budgetary process into a major policy implementation tool. Since the Reagan administration, both Republican and Democratic Congresses have used reconciliation for laws tangentially related to the budget: Medicare reform,²³⁷ portability of health insurance,²³⁸ penalizing hospitals for “dumping”

229. David M. Herszenhorn, *A Handy Road Map for the Final Weeks*, N.Y. TIMES, Mar. 8, 2010, at A13.

230. BILL HENIFF JR. & JUSTIN MURRAY, CONG. RESEARCH SERV., RL30297, CONGRESSIONAL BUDGET RESOLUTIONS: HISTORICAL INFORMATION 1 (2012), available at http://www.senate.gov/CRS/Reports/crs-publish.cfm?pid=%270E%2C*PLS2%23%20%20%20%0A.

231. Most direct spending is for entitlement programs, such as Social Security, Medicare, and Medicaid. It also includes interest on the national debt. Currently, direct spending accounts for most of the federal budget. OLESZEK, *supra* note 15, at 51.

232. OLESZEK, *supra* note 15, at 76.

233. SINCLAIR, *supra* note 9, at 124.

234. Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 216 (1996–1997).

235. KEITH & HENIFF, *supra* note 176, at 2.

236. *Id.*; Charles Tiefer, *How to Steal a Trillion: The Uses of Laws About Lawmaking in 2001*, 17 J.L. & POL. 409, 427 (2001).

237. Adam Clymer, *House Is Critical of Medicare Plan by Senate Panel*, N.Y. TIMES, June 20, 1997, at A1.

238. Debra L. Dalton, *COBRA Continuation Insurance: Is Pre-existing Coverage Under a Spouse's Group Health Plan a Terminating Event?*, 22 J. CORP. L. 747, 751 (1997).

emergency room patients who cannot pay for care,²³⁹ and the tax cuts of 2001²⁴⁰ and 2003.²⁴¹ Understandably, perceptions of reconciliation change depending upon who is using it and who opposes its use.²⁴² For example, Senator Judd Gregg defended using reconciliation to allow drilling in the Arctic National Wildlife Refuge in 2005:

Reconciliation is a rule of the Senate set up under the Budget Act. It has been used before for purposes exactly like this on numerous occasions.

The fact is, all this rule of the Senate does is allow a majority of the Senate to take a position and pass a piece of legislation, support that position.

Is there something wrong with majority rules? I don't think so.²⁴³

Four years later, though, when his party was in the minority, Gregg decried the maneuver in no uncertain terms: “If you are going to talk about reconciliation, you are talking about something that has nothing to do with bipartisanship; you are talking about the exact opposite of bipartisanship. You are talking about running over the minority, putting them in cement, and throwing them in the Chicago River.”²⁴⁴

¶73 The use of reconciliation with health care would necessarily be complex. The same version of legislation has to be passed by both chambers to become law, but the Democratic House was unwilling to accept the Senate version of PPACA, House bill 3590, “as is,” and the full Senate was unlikely to muster the sixty votes to pass any changes the House made to that bill. Therefore, in order to use reconciliation, an entirely separate bill amending House bill 3590 had to be negotiated between the various Democratic constituencies with a nod toward what could command a Senate majority.²⁴⁵ Passage required something of a procedural dance: the House would first pass House bill 3590 as received from the Senate. With both chambers in agreement on that bill, PPACA would be eligible to be presented to the President for his signature. Next the House would pass the reconciliation legislation amending the PPACA, send it to the Senate for a majority vote, and, if it passed, it would go on to the President to be signed as well.²⁴⁶

¶74 If reconciliation provided the way forward for passage of health care, it also introduced a new layer of complexity to ACA’s legislative history by adding an additional bill, with its own legislative history, to the process—House bill 4872.²⁴⁷

239. Spencer Rich, *Emergency Room Access May Widen; Congress Would Forbid Hospitals to “Dump” the Poor, Uninsured*, WASH. POST, Mar. 29, 1986, at A1.

240. Glenn Kessler & Helen Dewar, *Tax Cut Hits Senate Snag; Angry Democrats Offer Amendments to Slow Bill’s Progress*, WASH. POST, May 23, 2001, at A1.

241. David Firestone, *\$350 Billion, 100 Senators and, Oops, One Mistake*, N.Y. TIMES, May 13, 2003, at A25.

242. Jackie Calmes, *As Senate Majority Shifts, So Does View of a Procedural Power Play*, N.Y. TIMES, Feb. 25, 2010, at A21.

243. 151 CONG. REC. 4968 (2005).

244. 155 CONG. REC. 7388 (2009). Senator Gregg’s about-face was noted by the press. See, e.g., Ezra Klein, *Judd Gregg: “If You’ve Got 51 votes, You Win,”* WASHINGTONPOST.COM (Feb. 26, 2010, 1:33 P.M.), http://voices.washingtonpost.com/ezra-klein/2010/02/judd_gregg_if_youve_got_51_vot.html.

245. SINCLAIR, *supra* note 9, at 215–16.

246. See Robert Pear & David M. Herszenhorn, *Democrats Ask, Can This Health Care Bill Be Saved?*, N.Y. TIMES, Feb. 6, 2010, at A9.

247. H.R. 4872, 111th Cong. (2010) eventually became the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

Though it was the final stage in the procedure used to pass the ACA, the history of House bill 4872, or the HCERA, actually began at the same time the President and Democrats in Congress were making their initial moves on health care a year earlier.

¶75 The genesis of the reconciliation measure began with the budgetary resolution that Congress had debated and passed in the spring of 2009.²⁴⁸ Senate Democrats had considered using reconciliation as a means to pass health care, but yielded to objections that this would ruin any chances for a bipartisan compromise and deny to the minority party any input on health care legislation.²⁴⁹ Still, House Democrats were unwilling to completely surrender reconciliation as a tool to achieve health care, and provisions for its use were included in their version of the concurrent resolution.²⁵⁰ The resolution went to a joint conference, where the House's call for a fallback position, in case a bipartisan compromise could not be achieved, won out.²⁵¹ The concurrent resolution called on the House Energy and Commerce, Ways and Means, and Education and Labor committees to each come up with changes in law that would reduce the deficit by \$1 billion.²⁵² These recommendations were to be submitted to the House Budget Committee by October 15, 2009.²⁵³ The Senate Finance and HELP committees were under a like charge, being required to reduce the deficit by \$1 billion between 2009 and 2014. Their recommendations were to be reported to the Senate Budget Committee, which would also have to report out a reconciliation bill by October 15, 2009.²⁵⁴

¶76 The concurrent resolution's procedure generated the only conference report in health care's legislative history. Even as a conference report, it is not a helpful document in interpreting health care legislation, but it does have value in describing the process that would be used the following year and explaining how health care came to be linked to higher education.²⁵⁵ Besides health care, one of President Obama's early signal initiatives was reform of the student loan program for higher education. Controversial even for members in the President's own party, inclusion of the student loan program in reconciliation ensured that it too could get through the Senate, where it had powerful opponents, with just a majority vote.²⁵⁶

¶77 As the health care debate crawled along through the spring, summer, and fall of 2009, the procedural mechanics were in place to ensure that reconciliation remained an option. Two days before their deadline, the Ways and Means and

248. S. CON. RES. 13, 111th Cong. (2009).

249. John Harwood, *Alternate Route: Bypassing the G.O.P.*, N.Y. TIMES, Mar. 16, 2009, at A15.

250. See Lori Montgomery, *A Budget Watcher's Guide to the Action*, WASH. POST, Mar. 30, 2009, at A15.

251. Lori Montgomery, *Congress Approves Obama's \$3.4 Trillion Spending Blueprint*, WASH. POST, Apr. 30, 2009, at A14.

252. S. CON. RES. 13 § 202(a).

253. *Id.* § 202(c).

254. *Id.* § 201.

255. H.R. REP. NO. 111-89, at 107-08 (2009).

256. See Lori Montgomery & Amit R. Paley, *Democrats Back Shortcut on Budget; As GOP Blasts Tactic, Obama Welcomes Fight on Health and Education Initiatives*, WASH. POST, Apr. 25, 2009, at A2.

Education and Labor committees submitted their versions of House bill 3200, passed the previous summer, to the Budget Committee.²⁵⁷ These were reprinted in the Budget Committee's report, *The Reconciliation Act of 2010*, issued on March 17, 2010.²⁵⁸ This is the report listed in the legislative history of HCERA in *Statutes at Large* and published in U.S.C.C.A.N.²⁵⁹ Its inclusion in the legislative history of health care is understandable, as it was the last traditional report issued on the health care legislation and conceivably could contain congressional views on the final form of the legislation that passed. Unfortunately, it does not.

¶78 The conference report actually creates a serious wrinkle for legislative history researchers of the health care legislation because it does not provide any substantive analysis of the legislation or reasoning behind the committee's actions. The purpose of the Budget Committee's report, *The Reconciliation Act of 2010*, is simply to comply with the 1974 Budget Act and Senate concurrent resolution 13, that is, bundling together the reconciliation bills sent from the committees authorized to produce them under the resolution and transmitting them to the House "without any substantive revision."²⁶⁰ For the health care portion of the report, the committee merely reprinted the reports of the House Ways and Means and Education and Labor committees on House bill 3200, the predecessor of the final House health care bill that died in the Senate, House bill 3962.²⁶¹ These reports on House bill 3200 had no, or very little, relevance to the version of House bill 4872 that was voted on in the House and Senate. Consequently, the House Budget Committee report also has very little relevance to the legislative history of health care that passed. The House Budget Committee could not shape the reconciliation bill, but the House Rules Committee certainly could, and this body became the conduit that took House bill 4872 from being a reincarnation of House health care proposals from the previous year and made it into something completely different.

¶79 As it turned out, the actual language of House bill 4872 did not emerge from any committee. The reconciliation legislation was born from negotiations between White House officials and Democratic congressional leaders, again working outside of the traditional legislative process. Though Democrats would rely on their majorities for success, differences between party factions, especially the anti-abortion and fiscal conservative blocs, influenced what they would be able to accomplish.²⁶² President Obama helped initiate discussions in February 2010 with his proposal of what reconciliation should look like.²⁶³ Negotiations continued throughout early March as the House leadership assembled the necessary votes in

257. The bills are contained in H.R. REP. NO. 111-299, pts. 2-3 (2009).

258. H.R. REP. NO. 111-443 (2010).

259. 124 Stat. 1083; 2010 U.S.C.C.A.N. 123.

260. H.R. REP. NO. 111-443, at 2 (2010).

261. *Id.* at 6, 898.

262. Sheryl Gay Stolberg & Robert Pear, *Wary Centrists Pose Challenge in Health Vote*, N.Y. TIMES, Feb. 28, 2010, at A1.

263. The President's Proposal, Feb. 22, 2010, available at http://www.c-span.org/pdf/obama_prop022210.pdf. See also Sheryl Gay Stolberg & David M. Herszenhorn, *Obama Lays Out His Health Plan*, N.Y. TIMES, Feb. 23, 2010, at A1.

their chamber. At the same time, drafters sought an estimate from the CBO and the Joint Committee on Taxation on how much PPACA would cost.²⁶⁴

¶80 House bill 4872 began to take shape through amendments published by the House Rules Committee. The initial version of the reconciliation legislation was unveiled on March 18, 2010, as an “Amendment in the Nature of a Substitute.”²⁶⁵ The draft contained 153 pages of changes to the Senate version of House bill 3590, such as increased subsidies for exchange-offered insurance; a phaseout of the “doughnut hole” in Medicare’s drug benefit; a delay on the tax on expensive, employer-sponsored plans; inclusion of Medicare tax on investment income above \$200,000 for joint returns and \$250,000 for individual returns; an information-sharing program between the Center of Medicaid and Medicare Services (CMS) and the Internal Revenue Service (IRS); and reinclusion of a provision from House bill 3962 that closed a loophole in a biofuel tax subsidy.²⁶⁶ The CBO published a draft cost estimate the same day the amendment went public.²⁶⁷ Two days later, the Rules Committee published additional and final changes to the reconciliation bill in a manager’s amendment titled “Amendment to the Amendment in the Nature of a Substitute to House Bill 4872.”²⁶⁸ This included additions, deletions, and changes to some provisions already published in its predecessor—for example, a last-minute deal to address disparities in Medicare reimbursements to rural doctors and hospitals, the renaming of the Medicare tax to “Unearned Income Medicare Contribution,” the removal of the CMS-IRS information sharing program, and modification of some of the tax provisions.²⁶⁹ The CBO published a cost estimate of the reconciliation bill as revised which came in under the budget target set for it.²⁷⁰ So the House had negotiated its fix outside of the floor and committee, and now a Rules Committee resolution would bring it up to a vote.

¶81 The Rules Committee issued House resolution 1203, which provided for gutting the Budget Committee’s version of House bill 4872 and adding the agreed-

264. SINCLAIR, *supra* note 9, at 216; David M. Herszenhorn & Robert Pear, *Showdown Near, Health Overhaul Gains Two Votes*, N.Y. TIMES, Mar. 18, 2010, at A1.

265. Amendment in the Nature of a Substitute to H.R. 4872, as Reported, stamped F:\P11\NHI\RECON3\HCEARA_001.XML (Mar. 18, 2010), http://housedocs.house.gov/rules/hr4872/111_hr4872_amndsub.pdf. The draft did not appear on THOMAS.

266. *Id.* See also H.R. 4872, The Health Care & Education Affordability Reconciliation Act of 2010, Section-by-Section Analysis (Mar. 18, 2010), available at http://web.archive.org/web/20100320002137/http://www.rules.house.gov/111_hr4872_secbysec.html; David M. Herszenhorn, *The Numbers Come out Just Where Obama Wanted, with No Magic Involved*, N.Y. TIMES, Mar. 19, 2010, at A16.

267. H.R. 4872, *Reconciliation Act of 2010*, CONG. BUDGET OFFICE (Mar. 18, 2010), <http://www.cbo.gov/ftpdocs/113xx/doc11355/hr4872.pdf>.

268. Amendment to the Amendment in the Nature of a Substitute to H.R. 4872, stamped F:\P11\NHI\RECON3\MANAGERS_006.XML (Mar. 20, 2010), http://housedocs.house.gov/rules/hr4872/111_managers_hr4872.pdf.

269. H.R. REP. NO. 111-448, at 21 (2010); Noam N. Levey & Kim Geiger, *Stage Is Set for Historic Health Vote; House Democrats Today Expect to Pass the Biggest Change Since Medicare*, L.A. TIMES, Mar. 20, 2010, at A1. The House bill, H.R. 3962, had included a section authorizing the National Academy of Science’s Institute of Medicine to study geographical disparities in Medicare payments to doctors and hospitals and use the report’s findings to alter Medicare rules to address those disparities. The Senate version of the health care legislation did not include such a provision.

270. Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Nancy Pelosi, Speaker, U.S. House of Reps. (Mar. 20, 2010), reprinted in CONG. BUDGET OFFICE, SELECTED CBO PUBLICATIONS RELATED TO HEALTH CARE LEGISLATION 2009–2010, at 3 (2010), available at <http://www.cbo.gov/publication/21993>.

upon provisions as an amendment in the nature of a substitute.²⁷¹ The actual text of what would go into House bill 4872 was found in the accompanying report, House report 111-448—Part A of the report was the original amendment and Part B was the manager’s amendment to the amendment in Part A.²⁷² Under the Rules Committee’s plan, the House would first vote to concur with the Senate version of PPACA and, if that passed, would immediately move on to the House’s reconciliation package in House bill 4872 under a closed rule.²⁷³ Debate was limited to two hours, divided evenly between the parties, and there was no opportunity to make amendments.²⁷⁴ On the evening of March 21, 2010, the Senate version of House bill 3590 passed the House.²⁷⁵ Previously approved by the Senate and now by the House, the bill was enrolled for the President’s signature. House bill 4872 was passed soon afterward and was engrossed for further action by the Senate.²⁷⁶ Congress had now essentially passed a health care program, but the process was not yet over because the fate of House bill 4872 was still in play, even if its outcome was not in doubt.

¶82 While reconciliation was politically expedient for health care reform advocates, it presented some procedural pitfalls that had to be navigated to achieve an up or down vote. The referee over how to proceed in the Senate was that chamber’s parliamentarian, a normally obscure post which had temporarily risen in prominence thanks to the health care debate.²⁷⁷ On March 11, the Senate Parliamentarian had ruled that the House had to pass House bill 3590, and it had to be signed by the President into law, before the Senate could even take up the reconciliation bill. After the President signed House bill 3590 on March 23, the reconciliation bill had to negotiate several potential obstacles before passage. The first was the Byrd Rule, a procedural rule passed into law as an amendment to the Congressional Budget Act of 1974.²⁷⁸ Named after its leading advocate, Senator Robert C. Byrd, it was created to block use of the Senate’s expedited reconciliation process as a means to pass measures unrelated to the budget.²⁷⁹ If a significant enough feature of House bill 4872 could be found to be extraneous, it might doom the overall bill.

¶83 The second obstacle was the offering of amendments. Though debate was limited to twenty hours, senators could offer unlimited amendments, even after debate ended.²⁸⁰ The votes on these amendments, whimsically called “vote-a-rama,” are offered on a rapid basis, with proponents having a brief time to make their case for their amendment and opponents having the same amount of time to respond.²⁸¹

271. H.R. RES. 1203, 111th Cong. (2010).

272. H.R. REP. NO. 111-448, at 1–2 (2010).

273. *Id.*

274. *Id.* at 1 (2010).

275. 156 CONG. REC. H2153 (daily ed. Mar. 21, 2010).

276. *Id.* at H2169.

277. Sheryl Gay Stolberg, *Going from Under the Radar to Under a Capitol Microscope*, N.Y. TIMES, Mar. 14, 2010, at A1.

278. 2 U.S.C. § 644 (2006).

279. ROBERT KEITH, CONG. RESEARCH SERV., RL30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE’S “BYRD RULE” 1 (2010), available at http://assets.opencrs.com/rpts/RL30862_20100702.pdf.

280. KEITH & HENIFF, *supra* note 176, at 75–77.

281. *Id.* at 77.

While debate in the Senate over House bill 4872 may not have differed in substance from that on House bill 3590, it was significantly different in its form.

¶84 The procedure in the Senate was subtly different as well. Engrossed House bills go to the appropriate Senate committee for review after two readings.²⁸² Budget reconciliation measures, in particular, are sent to the Senate Budget Committee for its recommendations.²⁸³ But there are exceptions to these procedures. If a senator objects to further proceeding on the bill after two readings, the legislation bypasses committee review and goes on the Senate Calendar, where it can be called up for floor consideration.²⁸⁴ Majority Leader Reid employed this rule, objecting to the second reading of House bill 4872, bringing it onto the Senate Calendar, and moving it onto the floor for consideration.²⁸⁵

¶85 The Senate, unlike the House, could not control attempts to amend the legislation within the twenty-hour time limit set by reconciliation rules, and Republicans were eager to offer changes in the hopes of embarrassing Democrats, who had pledged to their House counterparts that they would not make any changes.²⁸⁶ Though THOMAS lists 149 offered amendments, most of these were ordered to lie on the table—the most likely reason for this being that they failed to meet reconciliation’s germaneness requirement. Only thirty-four of these amendments met the requirements for a vote. The subsequent debate was orchestrated through mutual agreement of the parties under UCAs and took place over two days.²⁸⁷ The “vote-a-rama” occurred immediately afterward under a UCA that allowed one minute by a proponent to explain the amendment to be voted on and a minute by an opponent who disagreed.²⁸⁸ This expedited debate-and-vote ran into the afternoon of March 25. Armed with a significant majority, the Democrats were easily able to vote down each amendment.²⁸⁹

¶86 House bill 4872 finally passed in the Senate on March 25,²⁹⁰ but even then the legislative history of House bill 4872 did not end. Prior to the Senate vote, the Parliamentarian had advised that there were two points of order against two minor provisions in the student loan portion of the bill, and these had to be struck from the text.²⁹¹ This meant the Senate could not pass the exact same legislation as the House, and the bill would have to be returned to the lower chamber for its approval. This then created more legislative history as the bill was immediately reported back to the House, which had been kept in session specifically for this contingency. The

282. *Standing Rules of the Senate* R. XIV(3), *supra* note 151, at 11–12.

283. KEITH & HENIFF, *supra* note 176, at 1.

284. KOEMPEL, *supra* note 174, at 2–3.

285. 156 CONG. REC. S1821 (daily ed. Mar. 23, 2010). Minority Leader Mitch McConnell quickly noted that this was the first time a reconciliation bill had been sent to the floor without first going to committee. *Id.*

286. Shailagh Murray & Lori Montgomery, *In Senate, GOP Has Last Chance to Change Health-Care Overhaul; Debate Begins on Package of “Fixes” to New Law*, WASH. POST, Mar. 24, 2010, at A6.

287. Oleszek & Oleszek, *supra* note 17, at 277–88.

288. 156 CONG. REC. S1991–92 (daily ed. Mar. 24, 2010).

289. David M. Herszenhorn & Robert Pear, *Final Votes in Congress Cap Battle over Health*, N.Y. TIMES, Mar. 26, 2010, at A17.

290. 156 CONG. REC. S2087 (daily ed. Mar. 25, 2010).

291. *Id.* at S2085.

House Rules Committee generated another rules resolution, House resolution 1225, setting House bill 4872 back before the House for a vote to concur with the version that emerged from the Senate.²⁹² Only ten minutes of debate was allowed. Finally, at 9:02 P.M. on March 25, the House voted to concur with the Senate on House bill 4872, allowing it to be forwarded to the President, who would sign it into law.²⁹³

¶87 The legislative history of ACA continued even after its approval by both chambers. The President can also have a role, albeit a controversial one, in generating documents important to legislative history. The most familiar legislative history source from the executive branch is the “signing statement,” a statement by the President upon the signing of a bill in which he makes some determination on how the law will, or will not, be implemented.²⁹⁴ In the health care reform saga, an executive document did just that on the subject of abortion.

¶88 Abortion had proved a contentious issue throughout the health care debate, and threatened to be an obstacle to getting the majority House leaders needed to pass the bill. The Senate version of PPACA excluded the provisions Representative Stupak had managed to include in the House bill, but did include a provision denying the use of federal tax credits to purchase the part of a health policy that covered elective abortion services.²⁹⁵ Stupak and other anti-abortion Democrats were not convinced that this language upheld the Hyde Amendment, the long-standing ban on federal abortion funding.²⁹⁶ To win their support, President Obama agreed to dispel the ambiguity with an executive order that stated that the Hyde Amendment’s abortion restriction applied to the new health care legislation.²⁹⁷ While often legislative history from the executive and legislature conflict, in affirming the control of the Hyde Amendment over health care, they were working in concert. On the House floor, Representative Stupak and Representative Henry Waxman had a discussion explicitly to insert this understanding into the bill’s legislative history:

Mr. STUPAK. I wish to engage the chairman in a colloquy, if I may.

Throughout the debate in the House, Members on both sides of the abortion issue have maintained that current law should apply. Current law with respect to abortion services includes the Hyde amendment. The Hyde amendment and other similar statutes to it have been the law of the land on Federal funding of abortion since 1977 and apply to all other health care programs—including SCHIP, Medicare, Medicaid, Indian Health Service,

292. H.R. RES. 1225, 111th Cong. (2010).

293. 156 CONG. REC. H2439–40 (daily ed. Mar. 25, 2010).

294. See Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363, 366 (1987); I-Wei Wang, *Schoolhouse Rock Is No Longer Enough: The Presidential Signing Statements Controversy and Its Implications for Library Professionals*, 100 LAW LIBR. J. 619, 620, 2008 LAW LIBR. J. 32, ¶ 4.

295. Paul Kane et al., *Late Push Yields More Votes for Health Bill; Four Democrats Change Sides, GOP Says Measure Still Lacks Support in House*, WASH. POST, Mar. 20, 2010, at A1.

296. *Id.* The Hyde Amendment was originally passed in 1976. Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976).

297. Rob Stein, *Order on Abortion Angers Core Backers; Women’s Advocates Bristle as President Signs Health Proviso*, WASH. POST, Mar. 25, 2010, at A8. Apparently this agreement was reached between Rep. Stupak and then White House Chief of Staff Rahm Emanuel in a chance meeting at the House gym. Shailagh Murray & Lori Montgomery, *Divided House Passes Health Bill; Measure Goes to Obama; No Republicans Join 219 to 212 Majority*, WASH. POST, Mar. 22, 2010, at A1.

Veterans Health Care, military health care programs, and the Federal Employees Health Benefits Program.

The intent behind both this legislation and the Executive order the President will sign is to ensure that, as is provided for in the Hyde amendment, that health care reform will maintain a ban on the use of Federal funds for abortion services except in the instances of rape, incest, and endangerment of the life of the mother.

Mr. WAXMAN. If the gentleman will yield to me, that is correct. I agree with the gentleman from Michigan that the intent behind both the legislation and the Executive order is to maintain a ban on Federal funds being used for abortion services, as is provided in the Hyde amendment.²⁹⁸

This was the same interpretation advanced in President Obama's executive order on the topic, "The Act maintains current Hyde Amendment restrictions governing abortion policy and extends those restrictions to the newly created health insurance exchanges."²⁹⁹ With the signing of the executive order, the legislative history of the ACA, whenever it might have begun, came to a close.

¶89 The ACA, though, was destined to have one more phase—judicial review. Vehement opposition to the law ensured immediate challenge to its provisions on constitutional grounds.³⁰⁰ Disparate federal trial and appellate opinions made a decision by the U.S. Supreme Court almost inevitable.³⁰¹ The Court heard five and a half hours of argument over three days, each day covering a particular issue: whether a pre-enforcement action could be brought under the Anti-Injunction Act, whether the individual mandate was constitutional, and whether the individual mandate was severable from the rest of the law.³⁰² During oral argument the ACA's legislative history was never discussed in depth. In fact, some of the Justices appeared eager to avoid delving into it.³⁰³ The Court reached a final decision in

298. 156 CONG. REC. H1859–60 (daily ed. Mar. 21, 2010).

299. Exec. Order No. 13,535, 3 C.F.R. 201 (2010).

300. The Supreme Court noted in its opinion upholding the ACA that a suit was brought the very day the President signed the bill into law. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012).

301. See, e.g., *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011); *Florida ex rel. Atty. Gen. v. U.S. Dept. of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (finding individual mandate unconstitutional but severable from legislation); *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) (holding the ACA constitutional under Commerce Clause). Other circuits heard challenges but dismissed them without an opinion on constitutional issues. *New Jersey Physicians, Inc. v. President of U.S.*, 653 F.3d 234 (3d Cir. 2011); *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 266 (4th Cir. 2011), cert. den., 133 S. Ct. 59 (U.S. 2012) (holding that the State of Virginia lacked standing); *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391 (4th Cir. 2011) (finding the act could not be challenged until it was enforced).

302. Adam Liptak, *Justices to Hear Health Care Case as Race Heats Up*, N.Y. TIMES, Nov. 15, 2011, at A1.

303. Justice Kennedy said on the third day of argument: "[W]e don't want to go into legislative history, that's intrusive." Transcript of Oral Argument at 17, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (Nos. 11-393 & 11-400). Justice Scalia invoked the Eighth Amendment when Deputy U.S. Solicitor General Edwin S. Kneeder suggested the Court could look to the legislative history to make a determination on severability. *Id.* at 38.

The record does show that Justice Roberts understood the transactional dynamics that created the ACA:

The reality of the passage—I mean, this was a piece of legislation [where there] had to be a concerted effort to gather enough votes so that it could be passed. And I suspect with a lot of these miscellaneous provisions that Justice Breyer was talking about, that was the price of a vote: Put

June 2012, upholding the ACA's individual mandate, but striking down its expansion of Medicaid.³⁰⁴ Although legislative history was not referred to in the majority opinion, in sustaining the law, the Court ensured that its history would remain relevant.³⁰⁵

Researching Legislative Procedure to Research Legislative History

¶90 Clearly, the ACA's passage shows that the traditional model and understanding of legislative history is insufficient to describe the complexity of today's legislative process and, more important, to capture all the information generated by it. Legislative history researchers must adapt to this new reality. Doing so is essential not only to compiling a legislative history, but also to judging the worth of a history that has already been compiled. The best legislative histories provided by THOMAS or ProQuest are a catalog of documents—potentially hundreds of documents for more complex bills. The only guide to the importance of each document is the type of resource under which it is cataloged—"report," "hearing," "bill," and so on. Knowing legislative procedure allows researchers to make judgments about how documents are interrelated and which are more important. For example, with of all the bills listed for the PPACA and HCERA in THOMAS and Proquest, procedural knowledge enables the researcher to separate the important ones from those that played a more ancillary role.³⁰⁶ Understanding the reconciliation process allows researchers to avoid reliance on the House Budget Committee's reconciliation report and focus on more important information, like the House Rules Committee's resolution and the report that brought House bill 4872 to the House floor. Procedural knowledge not only enhances legislative history research skill, it improves research efficiency as well. Acquiring this procedural knowledge is not difficult—there are ample resources available on congressional procedure, and most of them are now digital and freely available on the web.

in the Indian health care provision and I will vote for the other 2700 pages. Put in the black lung provision, and I'll go along with it.

Id. at 27.

304. *Sebelius*, 132 S. Ct. at 2600, 2608.

305. Constitutional challenges to the law have not ended. A few months after the Supreme Court upheld the ACA, the Pacific Legal Foundation brought a lawsuit alleging the law violated the constitutional requirement that revenue bills originate in the House. Jack M. Balkin, *The Right Strikes Back: A New Legal Challenge for Obamacare*, THE ATLANTIC (Sept. 17, 2012, 12:49 P.M.), <http://www.theatlantic.com/national/archive/2012/09/the-right-strikes-back-a-new-legal-challenge-for-obama-care/262443>.

306. For example, with the PPACA, THOMAS's list of companion bills includes measures dealing with tax credits for those in military service. *Bill Summary & Status, 111th Congress (2009–2010), H.R.3590*, THOMAS, <http://hdl.loc.gov/loc.uscongress/legislation.111hr3590> (last visited Jan. 18, 2013). Though CIS is more thorough, it lists the Senate Finance Committee's S. 1796 as a companion bill to H.R. 3590, and it relegates the HELP Committee's S. 1679, the bill blended with S. 1796 to create the PPACA, to the category of "Other Senate Bills." The placement of 1679 has been upgraded to Bills Versions in Proquest Congressional. Legislative History of PL111-148, PROQUEST CONGRESSIONAL, http://congressional.proquest.com/congressional/docview/t33.d34.111_pl_148 (last visited Feb. 18, 2013) (subscription required for access).

¶91 The fundamental components of congressional procedure are, of course, the standing rules of each chamber. The rules of the House are in the Constitution and in *Jefferson's Manual and Rules of the House of Representatives*, which is referred to as the "House Manual" and published as a House document for each Congress.³⁰⁷ *Jefferson's Manual* is a guide to parliamentary procedure written by Thomas Jefferson while he was vice president during the John Adams administration.³⁰⁸ Though Jefferson wrote the *Manual* with the Senate in mind, the House incorporated it into its own rules, and its provisions still govern except where they conflict with modern House rules.³⁰⁹ The House rules benefit from substantial annotations and references that help explain their provisions.³¹⁰ The Senate rules are printed in the *Senate Manual*.³¹¹ The Senate, ironically, does not make use of Jefferson's work.³¹² Not only does the Senate have many fewer rules than the House, its *Senate Manual* lacks the interpretive information available for the House rules. Resources for both chambers are available from *FDsys*³¹³ as well as chamber web sites.

¶92 Application of the House and Senate rules is fleshed out by collections of precedential rulings from their respective chambers. House precedents are collected in several volumes covering different historic periods and are best known by their respective authors. *Hinds' Precedents of the House of Representatives of the United States* and *Cannon's Precedents of the House of Representatives of the United States* together constitute one eleven-volume set. The Hinds portion, volumes 1 through 5, covers House rulings from 1789 to 1907.³¹⁴ Volumes 6 through 8, by Cannon, supplement the Hinds period and bring coverage of precedents up to 1935.³¹⁵ Volumes 9 through 11 are indexes. *Deschler-Brown-Johnson Precedents of the United States House of Representatives* is an eighteen-volume effort begun in 1974 to bring the precedents up to date.³¹⁶ The Senate's precedents form a single volume—*Riddick's Senate Procedure*.³¹⁷ All of these are also available on *FDsys*.

¶93 The main obstacle to obtaining procedural knowledge is not the availability of procedural resources but that the body of literature contains complexities that even legislators find it hard to understand. Such difficulties are easily surmounted with a large body of secondary source literature that helps explain procedural mechanisms. The Congressional Research Service (CRS)—the research arm of Congress—has published numerous reports on chamber rules and procedures for

307. See, e.g., SULLIVAN, *supra* note 28. One of the several idiosyncrasies of the House Manual is that its printing is authorized by the previous Congress. As a result, its document number also relates to the previous Congress. JUDY SCHNEIDER, CONG. RESEARCH SERV., 98-262, HOUSE RULES COMMITTEE: SUMMARY OF CONTENTS 1 (2007).

308. OLESZEK, *supra* note 15, at 7.

309. *Id.*; JOHNSON, *supra* note 52, at 28.

310. See SCHNEIDER, *supra* note 307, at 2.

311. S. DOC. NO. 1, 112th Cong., 1st Sess. (2011).

312. OLESZEK, *supra* note 15, at 7.

313. *FDsys*, <http://www.gpo.gov/fdsys/> (last visited Jan. 2, 2013).

314. ASHER C. HINDS, *HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES* (1907).

315. CLARENCE CANNON, *CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES* (1936).

316. 1 DESCHLER ET AL., *supra* note 88, at iii.

317. RIDDICK & FRUMIN, *supra* note 105.

the benefit of legislators. Though these reports are not publically available from CRS, many have found their way onto the Internet and are published on sites such as Open CRS³¹⁸ and Wikileaks.³¹⁹ The Law Librarians' Society of Washington, D.C., has done a great service by publishing many of the CRS reports on congressional procedure on one web page.³²⁰

¶94 There are many books on congressional procedure, and the better ones acknowledge the dynamism of the legislative process. Foremost among these is *Congressional Procedures and the Policy Process* by Walter J. Oleszek.³²¹ Barbara Sinclair's *Unorthodox Lawmaking* is also helpful and covers new uses of congressional procedure in specific examples of major legislation.³²² Charles Tiefer's *Congressional Practice and Procedure*, though published in 1989 and currently out of print, remains one of the most exhaustive examinations of this topic.³²³ Researchers doing frequent studies of legislative history should ensure that they have access to these books.

¶95 Context, while always helpful in sifting through legislative material, now plays an even more important role now in at least two ways. First, more legislating may be taking place away from committee meetings and chamber floors, requiring more reference to sources reporting on the deliberations that are taking place behind closed doors. Second, since political realities often dictate procedural choices, knowledge of the opportunities or limitations of a specific Congress provides guidance as to what method it might have used to pass a law and, thus, what ingredients of legislative history may be available.³²⁴

318. OPEN CRS, <https://opencrs.com> (last visited Jan. 21, 2013).

319. See Editorial, *Change You Can Download: A Billion in Secret Congressional Reports*, WIKILEAKS (Feb. 8, 2009), http://wikileaks.org/wiki/Congressional_Research_Service (containing links to alphabetical and chronological lists of reports).

320. Rick McKinney, *Selected Congressional Research Service Reports on Congress and Its Procedures*, LAW LIBRARIANS' SOC'Y OF WASHINGTON, D.C., <http://www.llsdc.org/crs-congress> (last updated Feb. 27, 2012).

321. OLESZEK, *supra* note 15.

322. SINCLAIR, *supra* note 9.

323. TIEFER, *supra* note 79.

324. Perhaps one of the more byzantine uses of procedure to pass legislation took place in February 2012. Speaker John Boehner was attempting to pass a spending bill for highway projects, House bill 7. To gather support from his own party for the legislation, Boehner used a Rules Committee resolution, House resolution 547, to break House bill 7 into three different bills: the transportation bill and two measures to pay for it—revenues from new arctic and offshore oil and gas leases, and offsets from increasing federal employee contributions to retirement funds. In addition, the new natural resources leases were linked to approval of the controversial Keystone XL pipeline. The separate measures were then to be merged into House bill 7 once they passed. To make matters even more confusing, instead of using House bill 7 as reported from committee, the resolution referred to a committee print for this cutting and pasting. H.R. REP. NO. 112-398 (2012). Mercifully, researchers were spared having to deal with this complex procedure, as Boehner's plan unraveled. Matters went awry when the provision for federal employee retirement contributions was used in offsetting continuation of payroll tax cuts in another bill, House bill 3630. Kathryn A. Wolfe et al., *Highway Bill Delayed in Both Chambers*, CQ WEEKLY, Feb. 20, 2012, at 361. Only House bill 3408 passed. Jan Austin, *2012 Legislative Summary: Drilling, Energy Regulation*, CQ WEEKLY, Jan. 14, 2013, at 86. This was never engrossed for consideration in the Senate. *Bill Summary & Status, 112th Congress (2011–2012), H.R.3408*, THOMAS, <http://hdl.loc.gov/loc.uscongress/legislation.112hr3408> (last visited Feb. 18, 2013).

¶96 Legislative history researchers are probably already familiar with some key contextual information sources. The *Congressional Quarterly Almanac* is a helpful annual digest of congressional activity, with summaries of action on the most significant legislative initiatives of a particular year.³²⁵ Newspapers with substantial political coverage, for example the *New York Times* and the *Washington Post*, offer coverage of procedural maneuverings and on the debate taking place outside hearings and chamber floors. Periodicals with good political coverage include Congressional Quarterly publications such as *Roll Call* and *Congressional Quarterly Weekly*, the *National Journal*, and *The Hill*. Of course, there are an enormous number of blogs covering political issues, many of which are too partisan to be useful.

¶97 Occasionally, significant legislation may have a documented history that provides background about why and, more important, how it was passed. Two of the leading representatives of this type of work are *Showdown at Gucci Gulch*, which chronicles the passage of the 1986 revisions to the U.S. tax code,³²⁶ and Charles Tiefer's law review article detailing the use of reconciliation to pass the 2001 tax cuts.³²⁷ The passage of the ACA already has some brief chronicles of its history: *Landmark: The Inside Story of America's New Health Care Law and What It Means for Us All*, written by journalists at the *Washington Post*, as well as a chapter in Sinclair's *Unorthodox Lawmaking*.

¶98 One unintended consequence of researching legislative history is the discovery of how important nontraditional sources currently are. C-SPAN and YouTube are both sources of committee markups. Committee web sites are, of course, valuable sources of information on committee action, especially for chairman's marks, which may not be available elsewhere. CBO scoring letters can also provide some explanation of legislative text, in addition to clarifying why it was used or added. Reputable interested organizations may also provide some helpful background information. For the health care legislation, the Henry J. Kaiser Foundation provided brief analyses of what the different health care bills offered in the House and Senate contained.³²⁸ The disappearance and breaking of web links, especially on committee web sites after a change in party control, often requires use of the Internet Archive's Wayback Machine to locate important documents.³²⁹

¶99 For law librarians, the requirement of additional research into the legislative process is not without benefit—it provides an important opportunity to demonstrate and increase our relevance. Congressional procedures are changing at a time when civics education is nearly extinct at the primary and secondary levels, and the civics knowledge of college students is drastically poor.³³⁰ As a result, citi-

325. Since the creation of, consideration of, and voting on health care legislation began in 2009 and spilled into 2010, the *CQ Almanac* for both of those years must be consulted for full coverage of its passage.

326. JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH* (1987).

327. Tiefer, *supra* note 236.

328. See, e.g., *Side-by-Side Comparison of Key Medicare Provisions in 2009 Health Reform Legislation*, HENRY J. KAISER FAMILY FOUND. (last modified Oct. 20, 2009), <http://www.kff.org/healthreform/upload/7948-3.pdf>.

329. *Wayback Machine*, INTERNET ARCHIVE, <http://www.archive.org/web/web.php> (last visited Dec. 13, 2012).

330. See Sam Dillon, *Civics Education Called National Crisis*, N.Y. TIMES, May 5, 2011, at A23; James Warren, *Sitting Out the Chance to Exercise a Freedom*, N.Y. TIMES, Nov. 5, 2010, at A21; Diane Auer Jones, *Where Did All the Young People Go?*, CHRON. HIGHER EDUC.: BRAINSTORM (Nov. 4,

zen understanding of how Congress works is rudimentary at best and nonexistent at worst. The complexities of congressional procedure are apt to be especially confusing to the uninitiated when they are forced to confront them during the debate on a significant legislative initiative.³³¹ Law librarians can use their specialized knowledge to dispel part of this confusion among members of the interested public.

Conclusion

¶100 The factors that have propelled the ad hoc legislating that is shaping legislative history are increasing. The only certainty law librarians and other researchers can have is that the traditional model of legislation can serve just as the most basic introduction to the legislative process. Far more understanding is required of procedure than in the past. In this sense, ACA's passage serves as an illustrative example of modern lawmaking, especially for major initiatives. It is the rule now, not the exception.

2010, 1:11 A.M.), <http://chronicle.com/blogs/brainstorm/where-did-all-the-young-people-go/28260>.

331. For example, tax attorney and blogger Kelly Phillips Erb, a.k.a. Taxgirl, was confused by the Senate's use of the Service Members Home Ownership Tax Act of 2009 in an amendment between the houses to produce its own health care bill:

So, um, wow. Now the bill is even longer. And better yet, it's attached to popular items like modifying the first-time homebuyers credit for members of the Armed Forces. Who'd vote no to that?

Which brings me to my cynical question du jour: was the health care reform bill amended to another bill for purposes of consolidation and simplification? Or something else?

Me? I don't know.

Kelly Phillips Erb, *Plastic Surgery Takes a Tax Hit and Other Ramblings About the Health Care Bill*, TAXGIRL (Nov. 23, 2009), <http://www.taxgirl.com/plastic-surgery-takes-a-tax-hit-and-other-ramblings-about-the-health-care-bill>.