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LEGISLATIVE
PROCESS

*Fourth
Edition*



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Legislative Process

Fourth Edition

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To Edward H. Levi, my law school teacher and friend, who made me think about the legislative process, but who bears no responsibility for the thoughts.

— Abner J. Mikva

In memory of my father, Jesse Lane, an intellectual and advocate, who instilled in me a cautious trust in representative government.

To my wife, Joyce Talmadge, whose love and encouragement nurtured my efforts and whose incisiveness helped limit their excesses.

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— Eric Lane

To my wonderful family.

— Michael J. Gerhardt

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Preface to the Fourth Edition

At the time you are reading the Fourth Edition of our casebook, Congress has been receiving its lowest approval ratings since Gallup and other companies began measuring. At the beginning of 2014, Congress' average approval rating was 12.4, and over 80% of those polled disapproved its performance. For the year 2013, Congress averaged only 14% approval. It averaged below 20% in each of the previous four years. In one poll, Congress was less popular than cockroaches. In no poll has either of the other branches—the President and the Supreme Court—ever had lower approval ratings than Congress.

Given these poor ratings, we are grateful for your interest in the legislative processes. It is important, though, not to confuse, or equate, attitudes about Congress with an understanding of the legislative process. Indeed, we cannot think of a more important time to study how the legislature works. Much has happened during the six years since the publication of our third edition. The national government has twice shut down because of sharp disagreements over the debt ceiling; Congress enacted with the President's approval and support the most significant reform of the health care system in decades; the Supreme Court upheld the most controversial provision of that health care reform but struck down a key provision of the landmark Voting Rights Act of 1965; Congress had its least productive year in its history; two new justices were appointed to the Supreme Court including the nation's first Hispanic justice and the third and fourth woman, respectively; the Senate deployed an unusual parliamentary maneuver to end filibusters of judicial nominations; Congress implemented some of the most significant reforms of financial institutions since the Great Depression; several States enacted controversial voter identification and redistricting laws; and the Supreme Court struck down the

President's effort to make recess appointments in the midst of a legislative session.

This edition includes material on each of these important subjects as well as other developments and topics, much of which is unique in legislative process casebooks. We include basic descriptions of how Congress makes laws and discharges its other functions, how the legislative process relates to other subjects in the law school curriculum, critiques of the legislative process, legislators' conceptions of their duties, Congress's relative institutional competency to interpret the Constitution, how the legislative and judicial processes differ, the structural design of Congress, and the President's role in law-making (including vetoes and signing statements). This new edition also provides in-depth updates on gerrymandering, campaign finance, and electoral reform in the wake of the Supreme Court's landmark decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). Other new materials focus on legislative ethics, statutory construction, impeachment, executive privilege, the Senate confirmation process, and congressional rulemaking.

We are pleased to acknowledge those who have helped with this edition. Both Hofstra and the University of North Carolina Law Schools provided generous support. A number of students also proved generous with their time, enthusiasm, and energy, including Ashley Berger, David Goldberg, Andrew Alfano, and Matthew Klein. In spite of the wonderful assistance we have received, only we bear responsibility for its substance and expression.

A.J.M.
E.L.
M.J.G.

April 2015

Preface to the Third Edition

Seven years have elapsed since the publication of our second edition. During those years the United States has fallen victim to domestic terrorist attacks, engaged in two wars abroad and a global war against terrorism, watched its economy fall to a point lower than most of us have ever known, and, on the hopeful side, elected its first African-American President. Congress' institutional role during this period not only has been overshadowed by the executive, but has also, to a degree, deteriorated. Congressional scholars Thomas E. Mann and Norman J. Ornstein have labeled it "the broken branch," in reference to Congress's all but total abrogation of its constitutional obligation to check a president's drive toward war. Beyond that, a number of scandals involving lobbyists further challenged Congress's legitimacy. In this new edition we address these issues through an increased focus on legislative oversight and executive privilege, and a look at the Honest Leadership and Open Government Act of 2007.

This edition also updates the law in a number of areas. For example, *Davis v. Bandemer* is replaced with *Vieth v. Jubelirer*, as the Court continues to evidence uncertainty about the justiciability of gerrymandering. We also take a look at *Wisconsin v. City of New York* for an update on the census, sampling, and statistical tools for redistricting. Finally, we address developments in campaign finance reform — this time through an exploration of the Bipartisan Campaign Reform Act of 2002 and *McConnell v. FEC*.

At the suggestion of a number of law professors we also have made an organizational change to the text. For the last edition we had moved our introductory chapter on statutory interpretation to the front of the book, for some long-forgotten reason that seemed to make sense at the time. In practice it didn't. So we have moved that chapter back to Part IV of the book.

These changes reflect our continuing and unwavering commitment to providing both teacher and student with a broad range of material that

allows them to fully explore and evaluate the legislative process. And, through this exploration and evaluation, we hope to spur more direct involvement by lawyers in the legislative process and in its never-ending need for improvement.

We are pleased to acknowledge those who have helped with this edition. Dean Nora Demleitner and the Hofstra Law School have provided generous support for this effort. A number of students also proved generous with their time, enthusiasm, and energy. Mimi Alinikoff, Ella Govshtein, Gariel Nahoum, and Joshua Wolf all explored sections of the book for possible updates and, where needed, researched and drafted proposals. These proposals then went through an iterative editing process. At the end of that process, some of their writing remained intact. In that sense, they all deserve credit for some portions of the new text, but only we bear responsibility for its substance and expression.

A.J.M.
E.L.

February 2009

Preface to the Second Edition

The law has changed or been clarified with respect to many of the topics we addressed in the first edition in 1995. For example, the United States Supreme Court has limited Congress's Commerce Clause jurisdiction, added an equal protection screen over its voting rights jurisprudence, and placed political party spending under the protection of the First Amendment. It has also found federal term limits, scarlet letter initiatives, and a balanced budget statute unconstitutional. Additionally, Congress has enacted a new lobbying act and, as this edition is being published, is struggling to restructure the regulation of campaign finance. These changes and more have been incorporated into the second edition.

The second edition includes one substantial organizational change. We have rewritten and relocated our introduction to statutory interpretation from Chapter 10 to Chapter 3. We made this change first because of the chapter's introductory nature and second because many of the cases we use to illustrate various aspects of the legislative process involve statutory interpretation. The earlier placement of the primer will make those cases easier to understand.

These changes reflect our unaltered commitment to providing teachers and students with a broad range of materials that will allow them to fully explore and evaluate the legislative process. And, through this exploration and evaluation, we hope to spur more direct involvement by lawyers in the legislative process and its never-ending need for improvement.

We are pleased to acknowledge and thank those who have helped with this edition. Dean David Yellen and former dean, now president, Stuart Rabinowitz have provided generous support for this effort. A number of students have also participated. Melissa A. Siegel has been the mainstay of this effort, doing not only research, but the grinding work of indexing the text. Others whose aid has proved invaluable are Angel M. Anton, Laurie

Berberich, Nicole Maglio, June D. Reiter, and Allison J. Weisman. Finally, the people at Aspen also improved this effort.

A.J.M.
E.L.

February 2002

Preface to the First Edition

This book is about American legislative institutions and the processes they employ to consider and enact legislation. There are close to 40,000 legislative bodies in the United States: two for the nation, ninety-nine for the states (Nebraska has a unicameral legislature), and the remainder for the multitude of counties, cities, towns, villages, and other municipalities that demark this country's political landscape.

Each year these legislative bodies pass thousands of laws that regulate or affect our lives. Through their processes, substantially similar in every legislature, these representative bodies imprint on our lawmaking the emblems of this country's democracy: the establishment of a legislative agenda by measuring and sifting infinite individual and group demands; the slowness, deliberateness, and often redundancy of the process, all aimed at protecting against legislative intemperance (but which also lead to inefficiencies); and the representation of diverse views and moderation of these views through compromises.

This cascade of legislative activity has effected a significant change in the practice of law. Thousands of lawyers are now involved in the consideration of legislation as legislators, legislative staff, and lobbyists. Many more spend their time interpreting and applying these statutes in government agencies and in private practice. And finally, the work of the courts has followed this change, as they have been called on increasingly to settle conflicting interpretations of statutory language. Consequently, there has been an evolving recognition on the part of most law schools that the education of law students must include an awareness of the significance of statutory lawmaking and a critical understanding of legislative institutions and their processes.

Each of us has taught courses in the legislative process using a variety of different materials. We have found that the best way to make students privy to the legislative process is through the extensive use of primary legislative materials. We do not abjure cases, however. We use them to explore the judicial role in the legislative process. In the best of the common

law tradition, cases are about judicial thinking and judicial processes, not about legislative thinking and legislative processes.

This book is a product of our teaching experiences as well as our respective experiences participating directly in the legislative process. Using materials such as bills, committee reports, legislative rules, debates, statutes, constitutional provisions and cases, and other legislative authorities, we hope to provide teachers and students with a range of materials that will allow them to fully explore and evaluate the legislative process in its various contexts.

While much of the material deals with the United States Congress, the many similarities between the congressional process and the processes of other American legislative bodies, as well as the considerable materials from and references to these other processes, expose the student to all of the varieties of the legislative species.

Notwithstanding our criticisms in this book of the failings and imperfections of the legislative process, it would be disingenuous of us not to acknowledge our admiration for the legislative process as the model of government closest to the ideals of representative democracy. We hope that by writing this book we share an informed enthusiasm with teachers and students and spur some of them to direct engagement with the process and its needed improvements.

A.J.M.
E.L.

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