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## Legislatures, Agencies, Courts and Advocates: How Laws are Made, Interpreted and Modified

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## Legislatures, Agencies, Courts, and Advocates: How Laws Are Made, Interpreted, and Modified

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This chapter explains the nature and practice of lawmaking, legal advocacy, and legal research as they relate to the field of work and family. Through reference to the Family and Medical Leave Act of 1993 as a case study, we explain the dynamic processes by which laws are made, interpreted and modified by legislatures, administrative agencies and courts, with the help of legal advocates. Our goal is not to provide substantive analysis of laws related to work and family, but rather to enable researchers from a range of disciplines to understand and access the legal system, as it currently exists and as it is evolving. In addition, for those inclined to change the current system through legal advocacy, this chapter provides a window into how advocates may use the lawmaking process to promote their preferred work and family policies.

### BACKGROUND: THE STRUCTURE OF THE U.S. LEGAL SYSTEM

To make use of legal resources in research or to effect change through the lawmaking process, it is necessary first to understand the framework in which our laws are created and shaped. We begin with the Constitution, which provides both the structure and the boundaries of our government and laws. Since its ratification in 1788, the U.S. Constitution has been the supreme law of our land; no law and no governmental action may run afoul of its precepts.

Many Americans think of the Constitution as establishing and safeguarding their basic individual rights. That is correct. But, the rights that the Constitution provides to individuals are actually somewhat limited. They provide a certain number of rights as against the *government*. Thus, for example, the government is not permitted to restrict our freedom to speak or to travel or to practice our religion absent certain compelling circumstances. But, the Constitution offers us very limited rights against private parties, such as private employers.

Americans do, however, enjoy a number of additional legal rights in the private employment sector. These are rights that have been created by federal or state legislatures. Thus, many rights that Americans might think of as their “constitutional” rights are really their “statutory” rights—that is, rights created by statutes passed by legislatures.

The Constitution, however, remains key in creating the framework in which the three branches of government together create this statutory law. The Constitution establishes a national government with three branches—legislative, executive, and judicial—and enumerates the respective powers of each. The powers of these branches are both fluid and fixed: The Constitution establishes certain limits beyond which each branch must not pass, but allows the specific meaning of those limits to change over time and to be determined through a process of constant negotiation among the three branches.

The Constitution imposes no particular system of government on the individual states; it merely provides that “the United States shall guarantee to every State in this Union a Republican Form of Government.” Thus, each state is left to adopt its own constitution and create its own government. Today, there are perceptible and at times important differences among the constitutions of the 50 states, but their systems of government are alike in that their basic contours mirror those established at the national level by the federal Constitution.

While all three branches are bound to enforce and to uphold the Constitution, each fulfills a distinct role within the legal system—the legislature drafts statutes, the executive carries out laws through regulations and enforcement orders, and the judiciary interprets laws through case decisions. Thus, when we speak of “the law” we refer to many types of legal authority, each associated primarily with one branch of the government and resulting from the legal process unique to that branch.

## LAWMAKING AND THE FAMILY AND MEDICAL LEAVE ACT

This section uses the example of the Family and Medical Leave Act (FMLA) to describe the three branches of government, their processes, and the type of legal authority that each creates. As we examine each in turn, note that the functions of each branch are essentially the same at both the national and the state levels. While specific practices, inter-branch relationships, and intra-branch structures may vary from state to state, or between a state government and the national government, the basic structures are the same: The Maine legislature works much like Montana’s, and both work like the federal Congress.

### THE FAMILY AND MEDICAL LEAVE ACT OF 1993

The Family and Medical Leave Act is a federal law that guarantees certain workers the right to take up to 12 weeks of unpaid, job-protected leave per year to care for a sick relative or new child (born, adopted, or fostered) or if they themselves have a serious health condition. The Act contains an exception for small and medium-sized businesses (those with fewer than 50 employees) and limits coverage to those employees who have worked at least 1,250 hours in the 12 months before leave is taken.

With its passage, the FMLA represented the culmination of nearly a decade of work by a diverse coalition of advocates and policymakers. Before it was passed by the House and Senate on February 3rd and 4th and finally signed into law by President Clinton on February 5, 1993, the FMLA had been passed by Congress twice before. Both times the bill had been vetoed by President George H.W. Bush. The story of the bill’s final passage into law reflects a number of compromises that were reached along the way and also directly informs the continuing debate about the meaning of the law, as seen in the bill’s subsequent application by the executive branch and interpretation by the courts (Elving, 1995).

Given these complexities, the FMLA provides a thorough illustration of the processes of legislative drafting, executive rulemaking, judicial interpretation, and legislative modification.

As is true in most cases of lawmaking and legal advocacy, the FMLA is an unfinished story. The practical impact of this law for workers, for businesses, for families, and for society continues to develop in federal and state legislatures, agencies, and courts. As we will see, lawyers and other work-family advocates are critical in shaping this impact.

## THE LEGISLATIVE BRANCH: CONGRESS AND THE FMLA

### Background: The United States Congress

The U.S. Congress is established in Article 1 of the Constitution and vested with “all legislative powers,” meaning that only that body has the power to “write” federal law. The Congress is bicameral, with a Senate and a House of Representatives. Each state sends two delegates to the Senate and some number of delegates to the House, depending on its population. The House is considered the most direct link between the people and the national government for two reasons: First, proportionality allows representatives to be elected from relatively small districts, while senators speak for an entire state. Second, all representatives are elected every 2 years, while senators are elected every 6 years in staggered elections.

The laws passed by Congress are called **statutes**, and thus the body of law generated by legislators is called **statutory law**. With a few exceptions, laws may be initiated in either congressional house and ultimately must be passed in identical form by a majority of both houses (51 in the Senate and 218 in the House) in order to go to the president for signature and to become law.

### Bill Introduction (and Reintroduction and Reintroduction . . .)

The bill that ultimately became the FMLA was introduced in the House on January 5, 1993 and in the Senate on January 26, 1993, a remarkably short time before its passage on February 4th. But, as noted above, this was not the first time that the bill had been introduced—in fact, the bill had been introduced in some form 10 *times* over the preceding 9 years. Why was it introduced so many times?

The reason for such repeated reintroduction stems from the requirement that passage of any bill must occur within a single “Congress.” Because the makeup of the Congress (the entire House of Representatives and one third of the Senate) can change every 2 years, each 2-year period is considered a distinct legislative cycle, called a “Congress.” Every Congress consists of two 1-year sessions, beginning in January. A bill must pass *within* the Congress in which it has been introduced. Otherwise, the bill expires and must be reintroduced in the next Congress (Oleszick, 2004; Dove, 1997; Johnson, 2003).

For example, the FMLA was first introduced in 1985, which was the first session of the 99th Congress. When the bill was introduced (or “dropped”) in the House, and then when a companion bill was later introduced in the Senate, the bill was assigned a number within each chamber based on its chronological place among the bills introduced during that Congress—in this case, H.R. 2020 in the House and S. 2278 in the Senate. Because the bill was not passed by both houses and signed into law before the 99th Congress ended in January of 1987, the bill expired. In order to be considered again, it had to be reintroduced as a separate bill in the 100th Congress. Thus, in the 9 years from its first drafting to its final passage, the FMLA was introduced in five separate Congresses, each time with new bill numbers in each chamber.

Such a prolonged history is not unusual. Indeed, for significant bills that need time to build public and hence legislative support, the entire first stage of a bill’s life may consist solely in its consistent reintroduction over a period of Congresses, with each introduction simply

displaying the addition of some new cosponsors of the bill. Usually, as in the case of the Family and Medical Leave Act, the content of the bill will stay relatively the same through the early years of this process. The few changes in the bill—in select substantive provisions and/or in the title—usually will reflect “deals” that have been made to bring on specific new sponsors, or will include clarifications or changes that have been made to rebut or respond to arguments against the bill.

The potential for compromises at this stage also will depend on the purpose of the bill. For example, if the sponsors of a bill primarily want a “message bill,” they will not try to make significant compromises in the bill prior to introduction. Conversely, if the sponsors want a bill that has significant momentum and broad coalition support upon introduction, important compromises will be made in the bill’s substantive provisions before the bill is introduced.

For example, the FMLA was first conceived and drafted in 1984 and 1985, when Ronald Reagan was president and the Senate was under Republican control. Under these circumstances, proponents of the bill knew that passage was impossible. In light of that political reality, advocates did not attempt to negotiate the details of the bill with opponents, but instead used the bill primarily to raise awareness about the need for the law. At the same time, because the House was controlled by Democrats throughout the FMLA’s consideration, it was possible to get attention for the bill in the form of House committee hearings. These hearings provided a chance to spark debate on the issue of family and medical leave while advocates built support for the bill within Congress and among interest groups and the public at large.

### Referral to Committee

Once a bill is introduced, the House or Senate Parliamentarian “refers” the bill to one or more committees or subcommittees whose areas of concern relate to the substance of the proposed law. These are known as the “committees of jurisdiction.” While the name and jurisdiction of committees in each house are largely parallel, they do vary in significant respects. In addition, a bill might be sent to several committees in the House, while it might be sent to only one committee in the Senate. This is primarily because there are far fewer senators to conduct the business of lawmaking than representatives, and hence senators must limit the focus of their work.

For example, when the final version of the FMLA was introduced in the Senate, it was referred solely to the Committee on Labor and Human Resources (now the Committee on Health, Education, Labor and Pensions, or the “HELP” Committee). By contrast, when the bill was introduced in the House, it was referred to the Committee on Education and Labor (the counterpart to the Senate labor committee) *and* to the Post Office and Civil Service Committee and the House Administration Committee.

This difference was not because there were not equivalent civil service and congressional administration committees in the Senate; there were. Instead, it reflected the reality that there was already too much work for too few senators to do. Thus, the Senate civil service and congressional administration committees were ready to let the Senate labor committee deal with the FMLA, while they focused on other pieces of legislation.

The dominant party in each house appoints the chair of each committee and subcommittee; the nondominant party in each house appoints the “ranking minority member” of each committee and each subcommittee. Each committee and subcommittee also includes a majority of members from the dominant party. In this way, the dominant party ensures effective control over the outcome of most full and subcommittee actions. For example, during the first several years of the FMLA’s consideration in Congress, both the Senate and the White House were Republican. As we discuss below, this control by Republicans during the early years of the bill effectively kept the FMLA from moving forward. What little progress the bill made had to

happen in the House, which was controlled by Democrats throughout the period. Only when the Senate came under Democratic control in 1987 did the bill have a real chance for success. Even then, it was not until 1993 when the White House was again occupied by a Democrat that the bill became law.

Once a bill has been referred to the appropriate committee (or subcommittee), the chair of that committee (or subcommittee) decides whether or not to give the bill any attention. The vast majority of bills never progress past the stage of committee referral. The reason for “committee constipation” is simple. Many more bills are introduced each year than a committee possibly has time to consider. On average, thousands of bills are introduced in each Congress while a scant few hundred make it through the whole process. For instance, in the 107th Congress (2001–2003), 7,439 bills and joint resolutions were introduced. Only 377 of these bills became public law. Furthermore, a great number of the bills that passed were relatively small and inconsequential, serving only to rename a federal building or designate a national day of awareness on some uncontroversial topic.

For these reasons, as a veteran congressional observer has noted: “Time is the most precious commodity on Capitol Hill.” This includes the time to engage the attention of a staff person or member of Congress as well as the legislative time needed for a committee and a full house to consider and vote on a bill. Lawmakers on each committee are busy with their own legislative priorities; rarely do they have time to advance the legislative priorities of their colleagues. If a bill actively conflicts with the priorities of a lawmaker on the committee, he and she certainly will not be interested in moving that bill forward.

While the chairs of committees retain the most power to block a bill, a committee chair often will seek to accommodate the wishes of other members of the committee from his or her political party with regard to blocking or moving a bill. Thus, advocates who wish to promote action on their legislative priorities in Congress always try to find congressional champions who have a position (and, if possible, a senior position) on the relevant committee of jurisdiction. Indeed, sometimes lawyers will draft a bill in a certain manner simply to ensure that it is sent to a particular committee of jurisdiction where the advocates have a strong champion. The “dream team” for a bill is sponsorship by a committee chair *and* the ranking minority member of that committee. Achieving that level of sponsorship usually means advocates have succeeded in building a coalition and making compromises prior to introduction of the bill.

Two cosponsors particularly important to passage of the FMLA because of their committee status (as well as their party affiliation and gender) were Senator Chris Dodd (Democrat of Connecticut) and Representative Marge Roukema (Republican of New Jersey). In 1986, Senator Dodd was the ranking minority member of the Senate Subcommittee on Children, Family, Drugs and Alcoholism (now the Subcommittees on Children and Families and Substance Abuse and Mental Health Services), which had jurisdiction over the FMLA. Dodd was a staunch supporter of family leave, and when Democrats gained control of the Senate in 1987, making Dodd Chair of the subcommittee, he used his position to raise public awareness of the issue by holding numerous hearings around the country and devoting significant subcommittee time to the bill. Driven by his personal ideology and dedication to families, Dodd became a committed and tenacious advocate of the bill. Ultimately, his role as chair of the subcommittee was critical to the bill’s success (Lenhoff & Bell, 2002).

Throughout consideration of the FMLA, Representative Roukema was the ranking minority member of the House Subcommittee on Labor–Management Relations and a member of the Education and Labor Committee, which had jurisdiction over the main portions of the bill in that chamber. In contrast to Dodd’s ideological motivations, Roukema’s support was rooted in her experiences as a stay-at-home mother and caregiver for her elderly mother as well as the death of her teenage son from leukemia. These experiences motivated her to consider supporting the bill when it was expanded to cover leave for purposes of caring for an ill parent or

child. Because Roukema's support on the committee was so critical to moving the bill forward, proponents of the bill eventually acceded to many of her demands on the bill. Even when it meant a significant compromise in the content of the bill, Roukema's cosponsorship of the bill was seen as worth its price: In becoming a supporter of the bill, Roukema agreed not only to help move it through her subcommittee but also to recruit Republican support for the bill, particularly among women. With Roukema's conversion in the fall of 1987, the bill suddenly had gained three new Republican women cosponsors and had regained its momentum in the House at a critical stage. Thus, even as a minority member of the committee of jurisdiction, Roukema played an important role in ensuring the FMLA's success (Elving, 1995; Lenhoff & Bell, 2002).

Upon introduction and referral to committee, a bill gets its first public showing. Groups who feel they will be adversely or positively affected by the bill, but who were not invited to participate in the crafting of the bill, will now get their first look at the legislative proposal and will decide how much attention to pay it. Again, the controlling mantra of Washington is: "Time is the most precious commodity on Capitol Hill." This includes the time of those who advocate on Capitol Hill. Thus, advocates will decide how much time to spend reacting to a bill based on how directly the bill affects their constituents' interests and based on who has sponsored the bill.

For the first several years of its history, the FMLA suffered the same fate as thousands of other bills that die in committee—as noted above, the Republican Senate refused to devote attention to a bill that was fiercely opposed by business interest groups. While the Democratic House gave some attention to the bill in the form of hearings, representatives of both parties did not feel sufficient pressure, either from advocates or from constituents, to schedule a vote on the bill until 1990, 5 years after its first introduction. Over time, advocates used sophisticated media and grassroots strategies to raise public awareness of the bill and to educate and influence members of Congress. In this way the bill garnered additional cosponsors and broader support among diverse interest groups, all of which increased the pressure on congressional leadership to give the bill attention.

So who does all this work behind the scenes? In most cases, there is a group of two to five organizations that forms the core of a legislative advocacy effort. That core group is not always readily discernible to non-Washington ("outside the Beltway") players. When such core groups exist, they usually are surrounded by a larger coalition that can include anywhere from 10 to 40 or more groups, depending on the magnitude and scope of the effort. The more major the effort, however, the more likely it is that there is a core group of two to five organizations that is the stabilizing and constant force behind sustained legislative activity (Feldblum 2003).

In the case of the FMLA, the coalition was led by the efforts of the Women's Legal Defense Fund (now the National Partnership for Women and Families), whose staff worked persistently over the years to identify and persuade congressional champions and to create the public support for the bill that would convince those members to devote time to the bill. Their strategy also included framing the issue in broad terms that appealed in some way to both political parties, uniting diverse and unlikely allies (such as pro-choice feminist groups and the United States Catholic Conference) behind a common, value-based theme. Likewise, by extending the message and the content of the bill beyond new mothers, advocates brought in the support of key constituency groups like the American Association of Retired Persons and various labor unions. Ultimately, this diverse coalition and creative framing made it hard for lawmakers to oppose the bill, even in the face of powerful opposition by business interests (Lenhoff & Bell, 2002).

While a success story in many respects, this history nonetheless hints at one of the ugliest truths of legislative process, that is, that lawmaking truly is a "sausage factory"—it is messy inside, and for many, the process is one that they would rather never see. But for policy

advocates, the inside of this process is absolutely critical. Indeed, this phase of the legislative cycle—before the text of the bill is finalized, before positions are staked out beyond retreat—may offer the *single greatest point of influence on the formulation of policy*. An effective advocate knows that if she sets the terms of the debate, she is much more likely to win. The Women’s Legal Defense Fund knew this when it spent countless hours negotiating language and building broad support for the bill, well before it reached the floor of either house for debate and, in some cases, before hearings were held. Even with such negotiation, the FMLA took nearly a decade to pass into law and its proponents had to accept significant compromises along the way. As this demonstrates, it is crucial always to consider the “back story” to a legislative win or loss and to be present in writing that story from the very beginning.

### Hearings

If and when a bill does get attention, it will receive its first “public” legislative activity: a hearing on the bill, held by the chair of a subcommittee or committee of jurisdiction. In the case of the FMLA, the first hearings were held on October 17, 1985 as Joint House Oversight Hearings by the Subcommittees on Labor–Management Relations and Labor Standards, of the Committee on Education and Labor, and the Subcommittees on Civil Service and Compensation and Employee Benefits, of the Post Office and Civil Service Committee. Eight years later and in a far different political climate, the bill underwent its final hearings on January 26, 1993. As with any hearings, all of these constitute important pieces of legislative history, but not in the ways one might expect.

Congressional hearings ostensibly are designed to gather information and to engage in fact-finding; members of Congress, at least according to our high school government texts, use hearings to decide whether a bill is necessary, whether it is correctly drafted, and whether they should vote for or against the bill.

In reality, hearings in Washington are highly choreographed theater. The testimony of the majority of witnesses called to the hearing will be remarkably consistent with the current views of the committee chair. The ranking minority member of the committee is usually given a few slots for which he or she can propose additional witnesses. The views of these witnesses will tend to be remarkably consistent with the views of the ranking member of the committee. In this way, hearings serve primarily to justify a bill that is already supported by the chair or another member of the dominant party. Surprises are not the norm in Washington hearings.

This does not mean that members of Congress have not engaged in fact-finding and sophisticated analysis about whether a bill is necessary, how the bill should be drafted, and whether they should support the bill. On the contrary, staff to members (and sometimes the members themselves) often engage in extensive research and consideration. But they tend to do so before, rather than during, a hearing. For instance, as noted above, advocates for the FMLA spent countless hours before any hearings were held—discussing the issues with congressional staff, explaining why federal legislation was necessary, considering what provisions should be included in the bill and even proposing how those provisions should be written, down to the last word. In this process, decades of research and analysis on families, the changing workforce, workplace management, and early child development were relied on, both on and off Capitol Hill. This research is evidenced in the extensive findings and purpose of the law as well as in the committee reports that accompanied the final versions of the bill.

After introduction and hearings, the analysis, fact-finding, and decision making that have occurred behind the scenes up to that point often continue, again outside of public view. Thus, another stage at which negotiations and compromises on a bill may occur is after a hearing on the bill has been held or announced. The hearing will bring to the fore the supporters and opponents of a bill. While it is a rare sight in Washington for witnesses opposing a bill ever

to equal or outnumber witnesses supporting a bill, hearings will serve to focus attention on a bill and to highlight what provisions of a bill might need to be modified in order to gain the requisite political support to actually pass the bill.

Of course, in the case of the final bills that became the FMLA, the relevant subcommittees held hearings and the committees of jurisdiction voted to approve the bill within weeks of its introduction. Such quick action is *not* the usual course; as noted earlier, the speed with which Congress acted in 1993 was the direct result of the bill having successfully passed both houses of Congress twice before, only to be vetoed by President Bush. With a Democrat in the White House for the first time in 12 years, Congress knew that the FMLA would not be vetoed and acted quickly to ensure that the FMLA would be the first bill signed into law by President Clinton.

By contrast, in previous years, the content of the FMLA had changed significantly after hearings to reflect compromises that would enable its passage. For instance, in 1988, after multiple Senate hearings had been held on the FMLA bill in the form of S. 249, Senator Dodd introduced an entirely new version of the bill—S. 2488—that provided significantly shorter periods of leave but broader coverage than the earlier bill. This modification by the bill's lead sponsor reflected his conclusion that the bill simply would not move in its current form. Most important, the new bill succeeded in garnering the key cosponsorship of two Republicans on the Senate Labor Committee, whose support would be pivotal (Elving, 1995).

True to Washington form, the hearings held on the FMLA in 1993 were a surprise to absolutely no one. Particularly after the previous passage of the bill on two separate occasions, these hearings represented the reenactment of years of well-rehearsed debate, rather than the formation or exchange of new ideas. Indeed, the witnesses at the 1993 hearings—the president of the Women's Legal Defense Fund, which had led the fight for family leave protections, and the president and CEO of the Society for Human Resource Management, an association of human resources professionals that had raised concerns about the bill—had testified at *nine* previous hearings on similar legislation, making their cases for and against the same proposals.

### Committee Markup and Voting

After a hearing, if a bill is simple and noncontroversial, the committee usually proceeds directly to a vote on the bill. The session in which this occurs is called a "markup." For complicated or controversial bills, however, there is often an interim period, following one or more hearings, in which significant legislative activity can occur. (As you might guess, the FMLA saw both versions of this process over the course of its history.) As noted, there are few surprises at a hearing. But, hearings can help to crystallize changes that will be needed to move a bill forward. In addition, once a hearing has been held, members of the committee who were not involved in the drafting of the bill will focus on the legislation and decide if they would like to ask for changes in the bill.

Thus, following a hearing, the sponsor of a bill may engage in additional negotiations and agree to certain changes in the bill. These changes will be designed either to secure necessary votes for the bill's passage or to address an issue and/or a request made by a member already inclined to support the bill. These negotiations will occur outside of public view and with no official record.

For example, in 1988, the House Committee on Education and Labor voted to approve an amendment to the pending version of the FMLA by Representative Roukema, the ranking minority member whose support was key. As we have described, Roukema was committed to the idea of family leave but insisted that the impact of the bill on small businesses be softened. In her own version of the bill, introduced in 1987, Roukema had included an exemption for businesses employing fewer than 50 employees, as opposed to the five-employee threshold set by the original bill. Before markup, the bill's champions struck a deal with Roukema,

agreeing to many of her demands. As a result of this deal, the committee approved a Roukema amendment during markup “in the nature of a substitute,” meaning that the amendment replaced the original provisions of the bill and substituted new provisions. The changes to the bill were substantial—in addition to raising the small business threshold, the amended bill reduced the period of leave from 18 weeks to 10 weeks for family care and from 26 weeks to 15 weeks for one’s own medical condition.

In many markup sessions, each amendment to a bill is offered by the member seeking the change. If a majority of the members on the committee vote to accept the amendment, the original provision of the bill will be modified to reflect that amendment.

In certain situations, however, all of the changes accepted by the sponsor of a bill will be incorporated into a new version of the bill. This version is called the “chairman’s mark.” The chairman’s mark retains the same bill number that the bill received upon introduction and simply strikes all the original language of the bill and substitutes entirely new text.

If a chairman’s mark has been prepared, the first vote at the markup is on accepting the chairman’s mark. As one can imagine, members of a committee are always happier to have their policy proposals adopted by the chair and rolled into the chairman’s mark. Since the dominant party holds a majority of seats on each committee and subcommittee, the chairman’s mark almost invariably passes.

If the chair has not prepared a new version of the bill, or after the initial vote on the chairman’s mark if she has prepared a new version, members of the committee will move through each section of the bill, offering amendments to various provisions. If the chair has refused to accept a change offered by a member of her own party, this is the opportunity for that member to try to get his or her proposal adopted by winning enough votes through a cross-party vote on the committee. In most cases, however, amendments at markups are offered by members of the nondominant party and fail relatively consistently on party-line votes. For instance, when the final version of the FMLA was marked up by the House Education and Labor Committee, Republicans offered five amendments and suggested nine other modifications, each aimed at softening, delaying, or derailing the bill. All five amendments failed, mostly along party lines. The only amendment passed by the committee was a substitute text offered by the chair of the relevant subcommittee (a Democrat), which contained technical changes and a few specific revisions authored by the proponents of the bill (Elving, 1995).

If a bill has been referred to a subcommittee, the subcommittee members will mark up the bill and then vote on whether to forward it to the full committee. If the subcommittee does so, the chair of the full committee then decides whether to schedule a markup on the bill. (The chair of the full committee also can choose to hold a hearing, but rarely does so if a subcommittee chair has already held one or more hearings on the bill.) Markup in full committee provides yet another opportunity to modify the bill, or to express partisan opposition to the bill, by offering amendments to significantly alter the bill. Again, these amendments usually are defeated in party-line votes. Of course, if a bill is not particularly controversial, hearings usually will reflect the unanimity on the bill and the markup will be similarly courteous and swift.

The final step in a markup session is a vote by the full committee on whether to forward the bill to the full chamber with a recommendation that it be passed. If this vote is successful, the bill is forwarded to the full chamber for consideration.

### Committee Reports

When a committee votes to recommend a piece of legislation, it almost always issues an accompanying report. Such reports often include a summary of the bill, explanation of any changes to the text of the bill made during markup, the background and need for legislation, and the views of the committee on its action.

Committee reports often become the basis for judicial interpretation of a law after its passage, since courts may look to these documents as evidence of legislative intent when the language of a statute is not plainly clear or specific. Because of this ability to influence judicial interpretation, the content of these reports is extremely important.

The drafting of a committee report is typically closed to most of the outside world; the committee staff is charged with writing the report. However, as noted above, two to five organizations tend to form the core of any legislative advocacy effort. In most situations, committee staff will share an early version of the committee report with this smaller group of advocates to receive input and suggestions. The report is also an opportunity for those with dissenting views to reiterate their opposition—almost all reports will include a statement of the minority's views. As a result, members of Congress (and advocates working with them) may use the report as a chance to repeat arguments that did not prevail during markup or to state their understanding of the committee's action, where they believe that the meaning may be subject to dispute.

In the case of the FMLA, the final Senate Committee report offers insight into the political and policy reasoning behind the bill's success. In voting to recommend the FMLA, the committee had to walk a fine political line. On the one hand, the law had to seem important, solving a pressing problem; otherwise there was no need for federal legislative action. On the other hand, the solutions offered by the law could not be seen as a radical departure from existing policy or they would be seen as a potentially destabilizing departure from the status quo.

In explaining the necessity of the FMLA, the committee's report stated that changes in the makeup of the workforce, the demographics of the population, and the structure of the family had created a profound need for the protections afforded by the law. Specifically, the committee noted that the increased number of women in the paid labor force meant that more families consisted of two working parents, with no parent available to provide unpaid caregiving. In addition, the committee explained that the aging of the population meant that working adults increasingly had to care not only for their young children but also for their elderly parents. Finally, the right to unpaid, job-protected family and medical leave was desperately needed to support the increasing number of single-parent households, often led by women, who struggled to remain above the poverty line and for whom an unexpected illness could mean disaster.

In describing these factors, the Senate Committee cited several sources of data and policy analysis, including a guide issued by the Families and Work Institute and a report by Columbia University's National Center for Children in Poverty. These references reveal that advocates had successfully connected lawmakers with the body of research justifying the law and ensured that courts would consider such research in later interpretations of the law.

While the report made clear that changes within American society required a federal policy response in the form of a new law, the committee's report also made the counterbalancing point that the law sat "squarely within the tradition of the labor standards laws that have preceded it" (Senate Report, 1993). In this way, the law was framed not as groundbreaking and thus potentially destabilizing, but rather as the next logical step in a series of well-tested federal responses to changes in the workplace, dating back to the New Deal. This framing was critical, not only for the senators who later would vote to pass the bill, but also for the executive branch charged with implementing the law and the judicial branch ultimately charged with resolving its ambiguities.

### Floor Debate, Amendments, and Voting

If a bill is approved by the relevant committee, it goes to the full chamber for debate and consideration, but its scheduling is at the discretion of the chamber's leader, who is chosen by the majority party. In 1993 both the House and the Senate were controlled by Democrats, who

had pushed family and medical leave legislation for years and considered it a priority. Thus, the bill approved by the Senate Labor and Human Resources Committee on January 27, 1993 had a great deal of momentum. That momentum carried it to the floor of the Senate a short 6 days after its approval by the committee. Not surprisingly, the FMLA had seen very different treatment at other points in its long history.

In the House of Representatives, almost no bill is given access to the House floor without first receiving a “rule” from the House Rules Committee. The House Rules Committee is effectively governed by the leadership of the party in control of the House. This committee decides when, how, and for how long any bill will be considered on the floor, giving it an extraordinary power over the outcome of the debate. Thus, as a veteran Hill watcher has often observed: “The Rules Committee can do anything.”

For instance, in 1990, when the FMLA got its first floor vote in the House, the Democratic leadership was so determined not to have the bill derailed by floor amendments that it placed the bill on the calendar with remarkably short notice to members, giving them little time to draft and propose amendments or to gather forces for debate. During debate itself, the committee allowed only a bipartisan substitute (agreed to by the bill’s sponsors) and four carefully selected Republican amendments. In refusing to allow a number of other amendments, specifically those seen as most threatening to the bill, the Rules Committee exercised its absolute power with little more than a nod to its malcontents. One disgruntled representative described both parties in the debate as “straightjacketed” by the rule, but ultimately the tactic was successful: The bill passed by a vote of 237 to 187.

There is no comparable rules committee in the Senate; the majority leader in the Senate sets the calendar and virtually all business in the Senate is conducted by “unanimous consent.” Under this procedure, Senate business may proceed according to the decisions of the leadership in control, in negotiation with the minority leadership. However, because there is no requirement in the Senate, like that in the House, that an amendment be “germane” (that is, related in subject matter) to the underlying bill, a Senator whose bill has not been approved for consideration by the Majority Leader may decide to offer her bill as an amendment to an unrelated bill that is on the floor. This is not, however, the best circumstance under which to offer a bill if one hopes for passage.

For instance, in March 2004, advocates seeking to broaden the FMLA to cover leave for those dealing with domestic violence tried to achieve this goal by amending the Unborn Victims of Violence Act. These advocates (and the members of Congress with whom they worked) had met with resistance from the Republican leadership in the past and had not been able to get floor consideration for such an expansion of the FMLA. Because the underlying bill concerned the issue of family violence and had considerable momentum, advocates hoped that they could end the stalemate on their proposal by attaching it to that bill.

During floor debate, Republicans and Democrats spoke adamantly on the amendment, raising the same vehement arguments for and against the FMLA that emerge whenever changes to the Act are proposed. The amendment failed by a vote of 53 to 46, but its near passage confirms the potential for using the amendment process to achieve one’s goals.

If a bill does reach the floor, it is an opportunity for both opponents and advocates of the bill to build the record in favor of their position. Consequently, members of Congress may use the opportunity to present many of the arguments that they made behind the scenes at earlier stages or publicly at hearings.

Floor debate on the final FMLA demonstrates this point. During the nearly 10 years in which it had considered different forms of family and medical leave legislation, the Senate had heard arguments for and against such legislation many times. Nonetheless, the floor debate that occurred on February 2, 1993 was rich and extended; the official record of the debate spans over 90 pages. To a large extent, this debate was more show than substance—few Senators’

minds were likely to change in response to their colleagues' statements. Yet the content of the debate was critically important, since it would stand as prominent evidence of congressional intent once the bill passed.

For instance, several senators described the medical leave that would be allowed under the law as a way for workers to deal with "critical illness" in themselves or a family member, providing a necessary safeguard for situations of "crisis" created by a sick child or parent. The urgency in the senators' language suggests that they understood the FMLA to cover only severe and extreme medical needs, not routine health care or something as common as an everyday cold. At the same time, the debate did not clearly resolve the meaning of the statute's term "serious health condition." In this way, the debate left open the precise scope of the term to be articulated by the Department of Labor in its regulations.

The lesson for the advocate to take from this illustration is that this moment in the legislative process—when senators take the floor to voice their opinions not only on the wisdom of the bill at issue but also on the very *meaning* of that bill—can be used as a critical chance to influence the making of law.

Congressional statements are also likely to be used in implementation of the law. As described below, executive agency officials often will look at these statements to guide their interpretations of the law in regulations and those interpretations will be enforced by the courts as long as they are "reasonable" interpretations of the law (*Chevron*, 1984). What this means is that members of Congress from each party often will make statements that display their particular (and often differing) interpretations of the bill's provisions.

Another critical aspect of floor debate is the potential for amendments. As noted above, bills frequently are subject to a number of amendments at this stage. The rules for debate and voting on these amendments are complex and detailed; suffice it to say that amendments can be used to clarify a bill, to change a bill, to "kill" a bill, or (in the Senate) to use the bill purely as a vehicle for attaching an unrelated bill. Thus, advocates must be in constant contact with key congressional staff, working to introduce and promote or to fend off and defeat amendments as necessary.

For instance, during final Senate debate of the FMLA, 22 separate amendments were offered, of which four passed. Amendments that sought to change the bill radically—for example, by providing only tax credit incentives for businesses instead of mandated leave—tended to fail on party-line votes. Other amendments—such as one to prohibit the new President Clinton from lifting the ban on the service of openly gay service members for 6 months while the Senate held hearings on the issue—passed.

Debate on most of these amendments served primarily to reinforce the arguments for and against the FMLA previously articulated in the hearings and in the committee reports. While the FMLA was not significantly changed by these amendments, it is important to note that the outcome of votes on such amendments, both germane and nongermane, often is not clear until the votes are cast and counted. Thus, while a bill is "on the floor," advocates must remain vigilant and ready to adjust to a potentially derailing amendment at any time.

Both legislative houses must approve a bill if it is to become law. Sometimes bills will proceed relatively simultaneously in both the House and the Senate. In many cases, however, advocates of a bill will not have the resources to tend to active movement of the bill in both houses. When those circumstances occur, advocates will make a strategic decision as to which house offers a better chance for the bill to progress. Advocates then will focus their active attention on that house, while simply trying to garner additional cosponsors for the bill in the other house.

Once a bill makes it through the first house, the process then begins all over again in the other house. As changes to the bill are almost inevitably made in the second chamber, advocates try to

keep the bill's sponsors in the first chamber apprised of the changes and comfortable with them. If and when the bill finally makes its way through the second chamber's full consideration, it usually will look somewhat different from how it looked when it emerged from the first chamber. At this point, the two bills will be sent to a "conference committee."

### Conference Committees and Final Voting

To reconcile two different versions of a bill, each house appoints several members to the conference committee, who will revise the bill and return it to the full bodies for approval or rejection. In the case of the final version of the FMLA, both houses passed identical forms of the bill, such that a conference was not necessary. Again, this efficiency reflected the fact that the bill had passed twice before; legislators had reached agreement on the bill and now were intent on advancing the FMLA without further delay.

In its passage the previous year, however, the FMLA had gone through a conference committee. In that process, members of the two bodies had negotiated their differences in the bill's provisions, each receding on certain provisions and prevailing on others. For instance, the Senate bill had provided that an employer could recover health insurance premiums paid for employees who never returned to work after taking FMLA leave, while the House bill had no such provision. During conference, the House version prevailed. By contrast, the Senate won out in the definition of "serious health condition." While the two versions shared the basic definition, the House had prefaced the definition with the word "disabling," thus narrowing the range of conditions covered. On this point, the Senate carried the day.

After the conference committee reaches a successful compromise, it will issue a "conference report" containing the new text of the bill and send that report back to each chamber for final approval.<sup>1</sup> This report and its accompanying explanation usually offer great insight into the negotiations and compromises that took place in conference. Thus, for example, the 1992 report is a key tool for understanding the compromises that paved the way for passage of the FMLA, even though it is not controlling legislative history, since the final bill was passed into law as a new piece of legislation in the next Congress.

If a conference report fails to pass either chamber, the bill is dead. In that event, the bill must be reintroduced and must undergo the process all over again.

### Presidential Signature or Veto

If a bill successfully passes both houses of Congress, there is one final step before it can become law: presidential signature. The president has 10 days in which he may sign or veto a congressionally approved bill; he also can do nothing at all, which is tantamount to a veto and thus is referred to as a "pocket veto." If he signs the bill, it becomes law. If he vetoes the bill or does nothing, it goes back to Congress.

In such a case, Congress has one final option for enacting its will through passage—a two thirds majority vote in both houses will override a presidential veto. Such overwhelming consensus in Congress is difficult to achieve but not impossible; there have been several veto overrides in the past 2 decades.<sup>2</sup> As noted above, the FMLA was subject to two presidential vetoes before its signature by President Clinton in 1993. In neither case was the Congress able to override the veto, making amply clear the critical power of the White House at this stage.

Of course, the president and others in the executive branch are usually active in the development of legislation well before the moment of action noted in the Constitution. Indeed, President Clinton's commitment to the FMLA was the very reason for its swift passage in

1993—Congress acted quickly in order to ensure that the FMLA would be the first law signed by the president at the beginning of his term. Thus, advocates need to seek support from the administration well before a bill is passed—either to help pass a bill or to stop the passage of an unwanted bill.

This last point reinforces a key principle that applies throughout our story of the legislative process: *It is much easier to stop a bill than to pass a bill.* As we explore the roles of the other two branches of the federal government and the states, bear in mind that this principle informs legislative advocacy and ultimately the entire legal system, serving to motivate both the executive and the judiciary as they act in relationship with Congress.

## THE EXECUTIVE BRANCH: AGENCIES AND THE FMLA

### Background: Administrative Agencies

The executive branch is established by Article 2 of the Constitution. Its power is invested in the sole person of the president, who is also the commander-in-chief of the Armed Forces. The president's cabinet, whose members (appointed by the president) correspond to the various departments that work under the auspices of the executive branch, helps the president in the vast undertaking of executing the laws passed by Congress. For example, the Secretary of Labor heads the Department of Labor and advises the president on issues related to labor, including implementation of the FMLA. Thus, the executive's most powerful role in the lawmaking process (aside from signature or veto, of course) is in implementation and enforcement of the laws.

All agencies are created by congressional mandate to carry out specific statutes, and while agencies often play an advisory role to Congress (and sometimes a leading role) in the formulation of law, the bulk of the agencies' work takes place after a bill becomes law. Because Article 1 of the Constitution vests all legislative power in Congress, the Secretary of Labor cannot issue regulations without "enabling legislation" from Congress. Similarly, Congress does not have the Article 2 enforcement powers that the Constitution provides the executive branch. Thus, the meaning of a statute often depends on the separate but mutually influenced efforts of both branches, while the precise role of an agency varies depending on the statute that it is implementing. As discussed below, that role has been extremely significant in the case of the FMLA.

Rules issued by agencies are known as *regulations*. Agencies are required to follow a specific procedure when they develop and issue these regulations, known as "notice and comment." As its name suggests, the notice and comment period provides a key opportunity for advocates to influence the rulemaking process. This influence is critical, because once regulations have been promulgated under this procedure, they carry the full force of law and constitute a central mechanism by which many laws are applied and implemented. Moreover, if an individual brings a lawsuit to enforce some aspect of a law, the courts will defer to an agency regulation interpreting that law as long as the regulation is a *reasonable* interpretation of the law (*Chevron*, 1984).

Agencies are subject to two significant checks on their power to apply and enforce the law—one judicial and one legislative. In the case of many controversial regulations, parties affected by the regulations will challenge the validity of the regulations in court as soon as the final regulations are published. The courts then must decide whether the regulations were *substantively* within the statutory authority Congress gave the agency when it passed the law. The courts also will decide whether the agency followed all the necessary *procedural* rules in promulgating the regulations. Even if agency regulations are not challenged immediately,

parties subsequently affected by the regulations can challenge the regulations on both substantive and procedural grounds when the regulations are applied against them in a specific case.

The role of the legislature in checking agencies' power is more blunt and straightforward: Because Congress is the author and originator of the laws, it has the authority to restrict or revise actions taken by the agencies in enforcing those laws. Such legislative interference is, however, predictably uncommon. Congress has neither the time nor the political will to micromanage agency action on a regular basis. Such reprimands do happen, however, and this exercise of legislative power serves as an important reminder that agencies are charged to apply and enforce laws only within the bounds of the laws as written by Congress. Thus, advocates should be aware of this option and should pressure Congress to monitor and respond to agency action as necessary.

### The Department of Labor and the FMLA

Like other labor laws to which it was compared during consideration, the FMLA contains a provision empowering the Secretary of Labor to set forth regulations necessary for its enforcement. As we have discussed, Congress can direct the manner in which the executive branch applies the law, but the executive necessarily enjoys some degree of power in the regulatory process. In the case of the FMLA, Congress gave the implementing agency, the Department of Labor, some guidance for its enforcement. For example, Congress explicitly placed the new law within the preexisting legal and regulatory framework of other labor laws, such as the Fair Labor Standards Act (FLSA), stating that the FMLA "relies on the time-tested FLSA procedures already established by the Department of Labor" (Senate Report, 1993). In making this reference, Congress signaled that the Department should adopt many of the definitions and enforcement mechanisms already used to enforce the FLSA. Of course, the FMLA also introduced a number of new terms and standards that the Department would have to interpret without reliance on preexisting law.

To implement the FMLA, the Department of Labor in 1995 set forth regulations on a wide array of issues under the Act, explaining in specific terms which employers were covered, what constituted a "serious health condition" that would justify leave, and whether or not FMLA leave could be taken in increments. As is the normal procedure for significant regulations, the Department published proposed regulations first (in this case called "Interim Regulations"), to which interested groups and parties responded by submitting comments within a certain time period. After consideration of those comments, the Department issued final regulations. Needless to say, advocates' comments were critical at this stage, both to influence the content of the regulations and simply to ensure that all arguments were considered and recorded by the Department of Labor. The preamble to the final regulations recounts and responds to many of these arguments, forming a major part of the regulatory history on which courts may rely in interpreting the regulations.

In the case of the FMLA, the regulations did not change substantially between the proposed and final versions, but it is important to note that this is not always the case. The requirement of public notice and comment is meant to ensure public influence on the drafting of regulations, and many times the final version is significantly changed from the proposed version.<sup>3</sup>

The impact of the FMLA regulations has been extremely significant. In particular, the definitions of "serious health condition" and "treatment" under the 1995 regulations have invoked tremendous opposition in the business community and extensive litigation, even resulting in legislative proposals to change these definitions by statutory amendment. As this example demonstrates, agency regulations can be extremely important and advocates should carefully craft comments on proposed regulations to exert the greatest influence.

## THE JUDICIAL BRANCH AND THE FMLA

## Background: The Judicial Branch

Article 3 of the Constitution establishes the judicial branch of the federal government. Judges on the federal bench are nominated by the president and confirmed by the Senate and have life tenure. In both federal and state judiciaries, the courts operate at three levels: a trial court, an intermediate court of appeals, and a final court of appeals.

Federal trial courts are called United States District Courts. Each state, as well as Puerto Rico, the District of Columbia, and several other U.S. territories, has at least one federal district in the state; some states have several districts. Each district has a number of federal trial judges.

The intermediate courts in the federal system are called United States Courts of Appeals. Currently there are 13 such courts, each of which is responsible for a designated geographic region called a “circuit.” (This is what people mean when they refer to “a decision from the First Circuit” or “an appeal to the Ninth Circuit.”) Any party that loses a case in a district court has an automatic right of appeal to a court of appeals. The decisions from the court of appeals of a particular circuit are binding on the trial courts of that circuit.

The United States Supreme Court, which consists of nine Justices, is the court of last resort. It agrees to hear only a fraction of the cases that are appealed to it each year; the few cases heard each year are chosen based on a number of factors, including the importance of the issue, whether the courts of appeals have split on a question of law, and whether the Solicitor General of the United States (the top lawyer in the Department of Justice) advises the Court to take the case. Once the Supreme Court takes a case and decides it, that decision is binding on all federal and state courts.

The main task of courts today is to interpret and enforce statutory law, that is, the laws passed by state or federal legislatures. In this endeavor, the most critical factor is the *text*—the actual words passed by the legislature. Thus, for example, to apply and interpret the FMLA, courts turn first and foremost to the words of the statute itself.

Of course, the meaning of the words in a law is not always apparent. Sometimes words are ambiguous; sometimes the text is too general to answer the specific issue that the court has been asked to resolve; and sometimes the text is clear but seems to be contrary to the underlying purpose of the statute. Hence, the job of the court is to engage in “statutory interpretation”—that is, to determine what a legislature actually *meant* when it used certain words in a statute. There are a number of different methods of interpretation, but most judges rely to some extent on legislative intent, as evidenced through the legislative history and context of the statute, in order to interpret text that is not clear or is quite broad.

There are some basic restrictions on the power of the courts to interpret a statute. Courts cannot interpret a statute in a manner that is clearly inconsistent with the plain meaning of the text of the statute. (In rare cases, a judge faced with a “plain meaning” that seems clearly inconsistent with the intent of Congress will interpret a statute consistent with its understood purpose, rather than its text, but such cases are unusual.) But, the constraints of the text are less forceful than one might think—in the FMLA, as in most other statutes, there are plenty of terms and provisions that are general and that can be narrowed or expanded through court interpretations.

Courts often consider a statute within the context of preexisting statutes and regulations. For example, the FMLA explicitly adopts the definition of “employee” found in the FLSA. When courts determine whether or not a specific person is eligible for the protections afforded by the FMLA they can rely on extensive case law interpreting the FLSA definition of employee. This makes it easier for judges to reach decisions and provides for consistency in how statutory terms are interpreted and enforced. Courts also may look at preexisting laws even if there is no explicit adoption of terms. Because the FMLA is so similar in its terms and enforcement

mechanisms to the FLSA, courts tend to look at FLSA precedent even in areas where the laws are not identical. For example, the FMLA does not explicitly provide a plaintiff with the right to a jury trial. Yet when faced with this question, courts have relied on cases finding such a right under the FLSA to find a similar right under the FMLA.

The task of interpretation is somewhat different if a federal agency has interpreted a statutory term in its regulations. In such a case, regardless of the judge's preferred methodology, the court first will determine whether Congress has "spoken clearly" on the issue. If it has, the court will apply that clear interpretation, regardless of what the regulations say. (Of course, deciding whether a word is sufficiently "clear" itself requires a judicial determination. Some judges have less difficulty discerning the "clear" meaning of words than do others.) If the court determines that Congress has not been clear, the court then will defer to the agency regulation as long as it is a *reasonable interpretation* of the statutory term. Courts will do this even if the legislative history of the law indicates that most members of Congress probably would *not* have intended that particular result. This is called *Chevron* deference, after a 1984 case, *Chevron, U.S.A. v. Natural Resources Defense Council*, in which the Supreme Court announced this rule.

In any case in which a court has engaged in statutory interpretation, including cases in which courts have deferred to agency interpretations, the legislature always has the final word. Congress may overrule the court simply by revising its laws to make its original intent clear; in effect, the legislature says: "You, the court (and/or the agency) got what we meant by this law wrong." State legislatures can do the same with regard to decisions from state courts.

Of course, the realities of the legislative process—including the constraints of time, political will, and the fact that "it is always easier to stop a bill than to pass a bill"—will prevent such revision in most cases.<sup>4</sup> Thus, the judiciary has a powerful role in deciding the practical meaning and impact of laws. Advocates should seek to influence this judicial stage of lawmaking just as they have influenced the legislative and administrative stages.

### The FMLA in the Courts

Whole treatises could be written on judicial interpretations of the FMLA and related regulations, and these case decisions tell a fascinating story. For our purposes, it is sufficient to note the most prominent theme of these decisions, that is, that employers and employees have litigated the meaning of the FMLA down to the last word. For instance, employers have used court challenges to argue that the definition of a "serious health condition" is very narrow; to debate the nuances of adequate "notice" by employees taking leave; and even to belabor what it means to be an employer that "employs" over 50 workers. As of July 2004, a search of a legal database uncovered 942 published cases concerning the FMLA in federal district courts and 290 published cases in federal courts of appeals; there were another 69 published cases concerning the FMLA in state courts.

The volume and tenacity of employer challenges to the FMLA in court may be due to the fact that many in the business community view the mandates of the statute as unfair and burdensome. By narrowing the reach of the statute through interpretations by courts, employers have sought to minimize the impact of the statute on their businesses. Similarly, advocates for workers and families view the statute as a vital protection against employer abuse and thus fight to ensure that it applies to as many workers as possible and in as many situations as possible.

## THE STATES

As noted earlier, the legal systems of the 50 states are microcosms of the federal system. Each state has its own legislative, executive, and judicial branches that perform the same essential functions as their counterparts in the federal system and exhibit similar features of dynamism

and fluidly balanced powers. Thus, states may be a powerful force for change. Indeed, advocates for the FMLA relied on state family and medical leave laws as evidence of public support for such policies as well as their practical feasibility and affordability for businesses (Lenhoff & Bell, 2002). More recently, states have been critical in working toward paid leave, where California has led the way with a system of wage replacement for leave purposes, instituted in 2004.

When the federal government does act within proscribed bounds, the Constitution provides for preemption of state law by federal law, meaning that when federal law speaks to a certain matter, the states may not contradict that law through their own action. However, in many areas of civil rights and employment law, Congress explicitly allows states to legislate in the same area and to provide broader protection than provided by federal law.

### BACK TO THE BEGINNING: LEGISLATIVE MODIFICATION

Finally, another force in lawmaking, and another point for influence by stakeholders and advocates, occurs when the process returns to where it began, in Congress. Whether it is to correct an enforcing regulation, to overrule a judicial interpretation or to repeal a law entirely, Congress always has the option to revisit its actions.

With respect to the FMLA, proposals to modify the law have been introduced virtually since the day of its passage, with some seeking to extend its guarantees (for example, ensuring paid leave for covered workers, rather than unpaid leave) and others seeking to restrict them severely (for example, limiting the law's application to businesses with over 500 employees, rather than 50). In the 108th Congress, such proposals numbered over 30 in total, including the Family and Medical Leave Expansion Act, the Family and Medical Leave Clarification Act, the Family and Medical Leave Inclusion Act, and the Family and Medical Leave Enhancement Act. While this proliferation of bills speaks primarily to the rancor surrounding the FMLA, it speaks also to the importance of continued advocacy in the legislative realm, long after a bill is enacted. Ultimately, this is both the beauty and the burden of lawmaking—the story is never finished.

### LAWMAKING, THE THREE BRANCHES, AND THE ROLE OF THE LEGAL ADVOCATE

As the story of the FMLA demonstrates, there are multiple sources and types of legal authority that govern our society. The complex system in which these forces interact is both dynamic and knowable. Legislatures draft laws within what they perceive to be the bounds of their authority, relying on the courts to correct them if they go too far and on the executive to give specific meaning to the policies announced in statutes. The president and other executive actors apply and enforce the laws as written, subject to overruling by both the legislative and the judicial branches. And, courts interpret and apply all kinds of law, providing the final word on matters of constitutional interpretation, deferring to the executive on regulatory matters, and facing outright reversal by the legislature on matters of statutory interpretation.

Against this backdrop, a legal advocate can influence the drafting, passage, application, interpretation, and modification of law on issues relevant to her goals. Advocates can do this by using any and all points of entry into the process of lawmaking—legislative, executive, and judicial. Thus, in order to achieve broad-based policy change through law, an effective advocacy campaign must engage with lawmaking in all of its dimensions.

## FINDING AND USING LEGAL MATERIALS IN RESEARCH

With the structure and dynamics of the legal system as background, this section now provides a basic sense of how to find and use the materials that are created through the lawmaking process. We cover five types of legal authority, roughly in descending order of their superiority: constitutional law, statutory law, administrative law, case law, and legislative history. For a general overview of doing legal research, see *The Legal Research Manual: A Game Plan for Legal Research and Analysis* (Wren & Wren, 1986).

### Constitutional Law

The United States Constitution is available in printed form through a number of sources, but is perhaps most readily accessed on the Internet. Numerous Web sites post the text of the federal constitution, including the U.S. House of Representatives, at [www.house.gov/Constitution/Constitution.html](http://www.house.gov/Constitution/Constitution.html). State constitutions are indexed at [www.findlaw.com/11stategov/indexconst.html](http://www.findlaw.com/11stategov/indexconst.html). FindLaw is a legal research Web site with search tools available to the general public.

The practical meaning of the federal and state constitutions, of course, is determined on a continuing basis by the courts through their judicial opinions. These opinions form a body of constitutional “case law.” Information on how to find and use case law is described below.

### Statutory Law

Statutory law consists of the statutes passed (and not repealed) by a federal or state legislature and signed by the president or by a governor of a state. Statutory law is found in two kinds of collections: (a) *session laws*, which catalogue the statutes in the chronological order of their enactment (and are found in the series called *Statutes at Large*, abbreviated as “Stat.”), and (b) *statutory codes*, which place all statutes according to subject matter in an overall code. Thus, for example, all criminal laws are grouped together regardless of the date on which individual criminal statutes were passed.

Most lawyers research and cite statutes through the codified version of the law. When you see a citation that reads: **29 U.S.C. §2601** you know you are dealing with a citation to a *federal statute*. U.S.C. stands for *United States Code*, the official compilation of the federal code.

Thus, for example, the citation **29 U.S.C. §2601** refers to volume 29 of the United States Code, which deals with all labor and employment issues. Section 2601 of volume 29 is where the first provision of the Family and Medical Leave Act is codified. The citation **29 U.S.C. §2601 et. seq.** refers to the entire FMLA as codified in volume 29.

By the way, you may also see the same cite listed as **29 U.S.C.A. §2601**, or more rarely, as **29 U.S.C.S. §2601**. These simply refer to two commercially published editions of the federal code: U.S.C.A. stands for *United States Code Annotated* and U.S.C.S. stands for *United States Code Service*.

Watch out for any citation that gives only a section number and the popular name of a law. That citation, often used as an informal reference among those familiar with a particular law, will not give you sufficient information to find the provision in question. If given such a citation, search around in the paragraph where that section number appears. Find out whether the author is referring to the section of a bill, as passed by *Congress*, or the section of the federal code where the enacted bill has been *codified*. You will need to know that information in order to find the right provision.

For example, Section **504** of the Rehabilitation Act (which prohibits discrimination based on disability by entities receiving federal funds) is codified at Section **794** of Chapter 29 of

the U.S. Code (abbreviated as 29 U.S.C. §794). If you try to find “section 504” by looking at Section 504 of Chapter 29 in the code, you will come to something wholly unrelated to disability discrimination. Thus, in general, if the nature of a section number reference is not clear from its context, you may want to check both possibilities—the relevant section of the law itself and the relevant section of the code where the law is codified—to be sure that you have the right provision.

The Office of the Law Revision Counsel of the U.S. House of Representatives, which prepares and publishes the U.S. Code, hosts a Web site through which researchers may search and download the entire U.S. Code: <http://uscode.house.gov/uscode.htm>. Researchers also should check out (and bookmark) the Legal Information Institute hosted at Cornell University. This site has been a favorite one among lawyers for many years due to its easy-to-use online source of statutory law; researchers may access both state and federal statutes at <http://www.law.cornell.edu/statutes.html>.

Finally, statutory law can be searched through several commercial electronic databases. The most prominent ones are Westlaw ([www.westlaw.com](http://www.westlaw.com)) and LexisNexis (<http://lexisnexis.com/>). These are available both online and in CD-ROM form. But, users of these commercial databases must register and pay fees, although discounted rates may be available through academic institutions.

States maintain copies of their laws both in session law compilations and in statutory codes but vary in their practice in organizing and publishing these. The Cornell site, <http://www.law.cornell.edu/statutes.html>, provides a helpful way to navigate state statutes, organizing them both by topic areas and by state.

### Agency Regulations (Administrative Law)

As described above, much of “the law” actually exists in the form of regulations and decisions issued by the president (or a governor) and by various national (or state) executive agencies interpreting or enforcing the statutes that have been passed by the legislature. These regulations, like statutes, are catalogued in two ways: in *administrative registers*, which are organized chronologically, and in *administrative codes*, which are organized according to subject matter.

Regulations from all federal agencies are collected chronologically in the *Federal Register* (abbreviated as “Fed. Reg.”). The *Federal Register* is published daily in hard copy. It also can be accessed electronically at <http://www.gpoaccess.gov/executive.html>.

All regulations are also gathered in a federal regulatory code, organized by subject area. When you see the citation **42 C.F.R. §213(a)**, you know that you are dealing with a **federal regulation**. C.F.R. stands for the *Code of Federal Regulations*.

The CFR is available online at the same site as the *Federal Register*: <http://www.gpoaccess.gov/executive.html>. Numerous other executive rules, decisions, and publications—including the federal budget—can be accessed here as well. In addition, in 2003, all agencies began to post proposed regulations (known as NPRMs, for Notice of Proposed Rulemaking) and a heads-up that a NPRM would be coming (known as an ANPRM, for Advanced Notice of Proposed Rulemaking) on this Government Printing Office Web site.

State regulations are more difficult to find; many states do not regularly publish their administrative rules. In some states, a commercial publisher has stepped in to provide copies of regulations, but where no publication is available, researchers can contact the state agencies directly. In those states that do publish their regulations, the format and quality of publication vary widely.

Administrative law also includes the rulings of administrative law judges, arbitrators, and other agency officials who decide specific disputes. These officials are not federal or state judges, but instead are employees of an executive or independent agency such as the National

Labor Relations Board (NLRB). The easiest way to find these decisions is through the Web site of each agency. For example, the NLRB's website, [www.nlr.gov](http://www.nlr.gov), contains a searchable database of the Board's decisions as well as lower rulings by the agency's administrative law judges and regional directors. Most administrative rulings also can be accessed through commercial databases, such as Westlaw and LexisNexis. In addition, hard copies of such decisions are available in many law libraries, often in official reporters published by the agency itself.

### Case Law

Case law consists of the decisions issued in specific cases by courts throughout the federal and state systems. Case law determines much of the practical impact of both constitutional and statutory law. We doubt that researchers in nonlaw fields will want to spend very much time reading through opinions. Nevertheless, a basic knowledge in recognizing what case law citations refer to, and how to find specific cases, may be helpful.

Not all opinions are published or even available in written form. Many rulings, particularly those by the lower state courts, are delivered orally and without extensive explanation, while those issued in writing are too numerous to publish automatically. Decisions with any public or legal significance, however, are published in collections known as case reporters, in which court decisions are compiled chronologically by date of issuance.<sup>5</sup>

For every court opinion, the case name, the date of the opinion and its location in a case reporter are the official "citation," usually in this basic format: case name, volume and page in the reporter, court (unless the case is a Supreme Court opinion, which will be clear from the name of the reporter), and date of issuance.

One important note about case names: As a case moves from the initial (trial) court to the first appellate court and to the final appellate court, you may notice that the order of the parties' names reverses. This is because the party seeking relief from the court *at each particular stage* is always named first. Thus, at the initial stage of a case, the party that brought the suit is listed first. But, if that party wins and the other side then files an appeal asking the next level of the court system for relief, then that other party will be listed first for the appellate court purposes.

For example, in the *Hibbs* case, William Hibbs originally sued the Nevada Department of Human Resources. So the initial case name was *Hibbs v. Nevada Department of Human Resources*. Because Hibbs lost at the first stage and sought appeal from the court above, the case name stayed the same at the next level. When Hibbs won in the court of appeals, however, it meant that the Nevada Department of Human Resources had to appeal to the Supreme Court for relief. So, in the Supreme Court's decision in the case, the names in the title were reversed and the case is cited as *Nevada Department of Human Resources v. Hibbs*.

Each level of the federal courts has one or more case reporters that publish its decisions. Decisions issued by the Supreme Court are collected in *United States Reports* (abbreviated as "U.S."), which is the official, government-approved reporter of these decisions. When you see the citation *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), it means that this 2003 decision of the Supreme Court is published beginning on page 721 of volume 538 of the *United States Reports*.

There are also 2 commercial reporters of Supreme Court decisions. These are extremely useful, given that the official reporter in print tends to lag 2 or more years behind real time in its publication. The West Publishing Company publishes the *Supreme Court Reporter* ("S. Ct."), and the Lawyers Cooperative Publishing Company publishes the *United States Supreme Court Reports, Lawyers' Edition* ("L.Ed." and "L.Ed.2d"). So, one Supreme Court case will have three different citations. For example, the cite for *Hibbs* is: 538 U.S. 721, 123 S. Ct. 1972, and 155 L.Ed.2d 953.

Decisions from all 13 U.S. Courts of Appeals (the “Circuit Courts”) are collected in a commercial reporter, published by West. This is called the *Federal Reporter*. The Reporter is abbreviated as “F.,” “F.2d,” and “F.3d,” depending on when the case was decided. The *Federal Reporter* is currently in its third series (hence F.3d), with 999 volumes in each series. The cite for the *Hibbs* case is 273 F.3d 844 (9th Cir., 2001). That means that the Ninth Circuit Court of Appeals issued an opinion in this case in 2001 that begins on page 844 of the 273rd volume of the third series of the *Federal Reporter*.<sup>6</sup>

Opinions from the federal trial courts, the U.S. District Courts, also are collected in a commercial reporter. This reporter is called the *Federal Supplement* and is abbreviated as “F.Supp.” and “F.Supp.2d”. So, for example, 296 F.Supp.2d 946 (E.D. Wis., Dec. 23, 2003) refers to a decision by the Eastern District of Wisconsin published beginning at page 946 of the 296th volume of the second series of the *Federal Supplement*.

Decisions of state courts are collected in state case reporters. Each state has at least one official reporter for its highest court. Some have separate reporters for their intermediate appellate courts and only a few have reporters for trial level courts.

How easy it is for nonlawyers to access cases usually will depend on how recently the case has been decided. When a high-profile case is decided, newspapers such as the *New York Times* and the *Washington Post* often will provide links to the case itself. The Supreme Court now posts its opinions relatively quickly on its Web site, <http://www.supremecourtus.gov>. In addition, you can access many recent federal (and some state) court decisions through Web sites hosted by the courts. These websites are listed on the Cornell site, <http://www.law.cornell.edu/>. And, finally, organizational parties involved in high-profile cases often provide copies of case decisions and briefs (written arguments presented to the court) on their Web sites.

Doing research on (and getting access to) cases that have been decided over time, however, is more difficult. In the print world, case law is collected according to subject matter in multi-volume collections known as *case digests*. These effectively function as indexes to the case reporters. Researchers would do well to consult a law library in finding and using such digests.

As with statutory and administrative law, the published collections of case law are available in all legal libraries. With the advent of electronic media, however, many legal researchers no longer use the books themselves but rely instead on electronic databases such as Westlaw and LexisNexis. These systems provide far more timely reporting of opinions (it often takes less than a week for decisions to be added to the databases, as opposed to the months or years that it takes for publication of reporters) and also provide ready access to a number of decisions that are never included in the published reporters. These benefits move many lawyers to rely solely on electronic case reporting, but, as stated above, these databases require user registration and charge large fees for their use.

### Pending Bills and Legislative History: Reports, Debates, and Amendments

As discussed above, courts and agencies often rely on recorded legislative history as evidence of congressional intent as they interpret and apply a statute. Therefore, advocates and researchers should have some understanding of how legislative history is organized and where to find this history with respect to a particular statute or issue.

Committee reports are a key form of legislative history and are designated according to the year and order in which they were produced. For example, when you see the citation S. Rep. 104-351, it means that this conference report was the 351st report issued by any Senate committee during the 104th Congress, which ran from 1995 through 1996. When you look at the report itself, you will find more information about the report, such as the name of the committee issuing the report and the number of the related bill.

An excellent source of committee reports is <http://thomas.loc.gov/>, maintained by the Library of Congress and affectionately known as “Thomas.” This is an excellent site for following every public piece of legislative action on a bill; the site covers bills introduced from the 93rd Congress (1973–1974) through the present. Committee reports also are available through the Web site of the Government Printing Office, <http://www.gpoaccess.gov/legislative.html>.

Committee hearings, which comprise another important piece of legislative history, are not as easily accessible as committee reports. Hearings usually are not published until at least several months after they occur and are not made available on the Internet. Only hearings that are released by the committees are available through the Government Printing Office Web site at <http://www.gpoaccess.gov/legislative.html>.

Another significant form of legislative history, congressional debates, are recorded in chronological order in the Congressional Record, which is the official record of each day’s proceedings and debates within Congress. (The Constitution actually mandates that an official record be kept of these daily proceedings.) The Record relating to a particular bill (or Records, if debate occurs on more than one day) includes not only a transcript of what is said on the floor of the chamber but also any documents introduced into the Record by members during the course of debate.

Congressional Records for the current and preceding seven Congresses (1989 through the present) are publicly available and easily searchable through the Library of Congress Web site at <http://thomas.loc.gov/>.

The text of all amendments to a bill that are proposed in the full chamber of either house, together with their outcomes, is included in the Congressional Record. These amendments are available on the Library of Congress’ Thomas Web site, starting from 1977. Amendments offered during committee markup (or at any time before a bill reaches the full chamber) are not available on the Thomas Web site.

State legislative action is far more difficult to track but can be followed in some states through state-hosted Web sites. For instance, California’s Legislative Counsel provides extensive information on pending and recent bills through its Web site, <http://www.leginfo.ca.gov/bilinfo.html>.

At the state level, legislative history is extremely difficult to find. Tracking down the content of debates, amendments, and other significant actions is painstaking work and often impossible. While many states host Web sites devoted to tracking the legislative process (such as the California site mentioned above), these sites are usually far less comprehensive than the federal tracking system, making it all the more critical that advocates be present to inform and record the history of a bill. In the case of the FMLA, advocates and scholars have retold the 9-year saga of its passage (including some of the most important state legislative action), in hopes that the lessons of the story will not be lost (Lenhoff & Bell, 2002; Elving, 1995).

## CONCLUSION

As the continuing story of the FMLA demonstrates, our legal system is complex, dynamic, and open to influence on a number of levels. Legal advocates are active in identifying, analyzing and informing all relevant sources of law within a particular area, working equally in legislatures, agencies, and courts. Properly understood, no source of law is untouched by the others, and in order to be effective, advocates see and use the key points of entry into all three arenas. It is precisely because of this complexity that the cross-disciplinary approach envisioned by this handbook is so crucial. Bringing together the insights of scholarly research, focused legal analysis and targeted public campaigns, work-family advocates can have—indeed, already have had—a real and lasting impact on the laws and policies that shape the everyday lives of Americans.

## NOTES

<sup>1</sup>In most cases, a legislative “report” refers to the background legislative history and explanation provided by a committee. See section 5 on legal research. However, the text of the bill that comes out of the conference committee action is called a “conference report.” Any legislative history, explanation, or background to that text is called the conferees’ “joint explanatory statement.”

<sup>2</sup>For example, the Civil Rights Restoration Act of 1987 was enacted over President Ronald Reagan’s veto. See 134 Cong. Rec. H1037-03 (1988) and 134 Cong. Rec. S2730-02 (1988). The Civil Rights Act of 1866 and the 1947 Taft-Hartley Act (amending the National Labor Relations Act) also were enacted over presidential veto.

<sup>3</sup>For example, the revised regulations governing exemptions to the overtime provisions of the Fair Labor Standards Act changed substantially between their proposal in March of 2003 and their final issuance in March of 2004. Although the precise implications of the changes are subject to continued debate, it is undisputed that the Department of Labor significantly changed its revisions as a result of public and congressional response to the proposed regulations.

<sup>4</sup>The fact that a reaction by the Congress is rare does not mean that it never occurs. For example, the Pregnancy Discrimination Act, amending Title VII of the Civil Rights Act, was a response to the Supreme Court’s interpretation of sex discrimination under Title VII; the Civil Rights Restoration Act of 1997 was a reaction to the Supreme Court’s interpretation of Title IX of the Education Amendments of 1973; and the Civil Rights Act of 1991 was a response to several Supreme Court decisions interpreting Title VII and several other civil rights laws in a narrow fashion.

<sup>5</sup>The suitability of an opinion for publication is determined either by the judge, who may forward an opinion directly to the publisher, or by the publisher, who reviews opinions regularly for significance.

<sup>6</sup>The inevitable delay in publication necessitates a temporary form of citation, in which cases are cited without the precise reporter volume and page number. For example, a recent appellate decision might be cited as *Smith v. Jones*, \_\_\_ F.3d \_\_\_ (D.C. Cir., 2006). Whenever such a citation is given, the opinion is likely to be available on an electronic database (as described below) until its publication in the printed reporter.

## REFERENCES

- Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
- Lenhoff, D. R., & Bell, L. “Government Support for Working Families and for Communities: Family and Medical Leave as a Case Study,” in C. Beem & J. Heymann, eds., *Learning from the Past—Looking to the Future*, Work, Family and Democracy Project, 2002 available at [http://www.johnsonfdn.org/images/work\\_family\\_democracy.pdf](http://www.johnsonfdn.org/images/work_family_democracy.pdf).
- Elving, R. D. (1995). *Conflict and compromise: How congress makes the law*. Simon & Schuster, New York.
- Feldblum, C. R. (2003). The art of legislative lawyering and the six circles theory of advocacy. *McGeorge Law Review*, 34, 785.
- Final Rule on the Family and Medical Leave Act of 1993, 29 C.F.R. § 825.114.
- Oleszick, W. J., *Congressional Procedures and the Policy Process*, 6th ed. 22 (2004); Dove, R. B. *Enactment of a law* (1997) (describing Senate procedure); and Johnson, C. W. *How our laws are made* (2003) (describing House procedure), available through the Library of Congress Web site at <http://thomas.loc.gov/home/thomas.html>.
- Department of Labor. (2003). Regulatory Plan 2003, available at: <http://www.dol.gov/asp/regs/unifiedagenda/plan03.htm>.
- S. Rep. No. 103-3 (1993), reprinted in U.S.C.C.A.N. 3.
- The Family and Medical Leave Act of 1993, 29 U.S.C.A. §§ 2601–2654.
- The Fair Labor Standards Act of 1938, 29 USCA § 201–219.
- Wren, C. J., & Wren, J. R. (1986). *The legal research manual: A game plan for legal research and analysis* (2nd ed.). Madison, Wisconsin: Ambrose and Adams Pub.
- 137 Cong. Rec. S. 14154 (1991).
- 136 Cong. Rec. S. 7906 (1990).