THE POLITICS OF ARCHAEOLOGY AND HISTORIC PRESERVATION: HOW OUR LAWS REALLY ARE MADE

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INTRODUCTION

The U.S. Congress publishes for its constituents a booklet, “How Our Laws Are Made” (Willett 1986). It is an informative treatise on the rules and procedures for the legislative process; however, it provides only part of the story. Lost between the lines are the tales of specific bills and real-life people who make our nation’s laws. Yet these stories are important, not just as entertaining vignettes for the historical record, but as a way to understand how laws are really made. They are especially useful to archaeologists and preservationists more familiar with scientific disciplines and scholarly pursuits. No scientific method is involved in making laws. The legislative process is often unpredictable and sometimes uncontrollable. It is also fascinating and — especially for archaeological and historical resources that depend so heavily on federal law for their protection and enhancement — indispensable.

This article will provide an archaeological perspective on how our laws are made. It will describe the legislative process, including information about people who helped make the laws possible. It will conclude with some insights about the political future of preservation as our nation looks forward to a new century (discussion of the history of preservation legislation can be found in Fowler, Friedman, and Cheek, this volume).

THE WORKINGS OF CONGRESS

To understand how laws are made, a few basic facts are helpful. The U.S. Congress, composed of the House of Representatives and the Senate, meets in 2-year terms starting in January of odd-numbered years. Congressional elections are held in even-numbered years. All members of the House are elected for 2-year terms. Senators are elected for 6-year terms; every 2 years only one third of the Senate is up for election. The political party with more than half of the members in the House or the Senate is called the “majority;” the party with less than half is the “minority.” The majority party holds the leadership posts, including the positions chairing committees (the minority party counterparts are called the “ranking members”). Since the early 1950s, the Democratic party has been the predominate majority party in both the House and Senate. The only exception was from 1981 through 1986, when the Senate majority was Republican.

Introduction of Legislation

Legislation may be prompted for several reasons: to remedy problems in a previous law or to establish new programs in response to emerging needs. A bill may be recommended in several ways: by the executive branch, by lobbyists, or by members of Congress and their staffs. Regardless of the reason or the source, only a member of Congress may actually introduce a bill. The following are some examples of why and how some recent preservation acts were initially introduced. (the term “bill” is used until legislation passes the House or Senate; after that, the term “act” is used).
1. ARPA was based on suggestions in the late 1970s by the Society for American Archaeology (SAA), through the efforts of Drs. Raymond Thompson, Charles McGimsey, Don Fowler, and other archaeologists concerned about the growing problem of looting and vandalism of archaeological sites. The proposal was in response to a federal court decision in 1974 (*United States vs. Diaz*), which held that the penalties section of the 1906 Antiquities Act was unconstitutionally broad and, therefore, largely ineffective. The SAA approached Representative Morris K. Udall (D-Arizona), chairman of the House Committee on Interior and Insular Affairs, and Senator Pete Domenici (R-New Mexico). The members’ staffs worked with the SAA, with other committee staffs, and with professionals in the Interior Department to develop the legislation that Representative Udall and Senator Domenici later introduced.

2. The 1980 NHPA Amendments began with legislation initially introduced in 1977 by Representative John F. Seiberling (D-Ohio). Meanwhile, President Carter’s administration proposed legislation to create a national heritage program combining historic preservation and natural resources conservation programs. In 1979, at the administration’s request, Representative Philip Burton (D-California) introduced legislation for such a new program. At about the same time, Seiberling introduced a new version of his bill which addressed solely historic preservation issues. It was Seiberling’s bill that later resulted in the NHPA Amendments of 1980.

3. The Abandoned Shipwreck Act was first introduced in the late 1970s by Representative Charles Bennett (D-Florida), who had a personal concern about the protection of historic shipwrecks. (He is the “Bennett” of the Moss-Bennett Act of 1974 and a long-time champion of archaeology and historic preservation.) He reintroduced versions of the legislation in succeeding Congresses. In 1984 Bennett introduced the bill again. A version of it was also introduced by Representative Walter Jones (D-North Carolina), chairman of the House Merchant Marine and Fisheries Committee; the Jones bill passed the House, but died in the Senate. Bennett reintroduced legislation in the next Congress, as did Senator Lowell Weicker (R-Connecticut), but again the bill was not enacted. In 1987 Bennett reintroduced the bill, and Senator Bill Bradley (D-New Jersey) introduced a similar one in the Senate. These bills, as amended, resulted in the final legislation enacted in 1988.

What all of this shows, of course, is that once an issue gets popular, other members want to get involved. They can do so by “co-sponsoring a bill,” which means that their name is added to the bill, with the original sponsor listed first. In the case of the 1980 NHPA amendments, 80 members of the House joined Representative Seiberling in co-sponsoring the bill. Members can also introduce identical bills or completely different ones addressing the same issue. For example, the two 1988 ARPA amendments amend the same statute, although in quite different ways, and were introduced separately by Senator Domenici and Representative Sam Gejdenson (D-Connecticut).

**Committee/Subcommittee Consideration**

Once a bill is introduced, it is referred to one or more committees. Legislation to authorize archaeological and historic preservation programs and regulations (such as the NHPA and ARPA) are handled by the Committee on Interior and Insular Affairs in the House of Representatives, and the Committee on Energy and Natural Resources in the Senate. Since 1977 the chairman of the Interior Committee has been Representative Udall, the only member now serving who preceded the last one, Senator B. H. (Bud) Winter of Idaho).

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serving who was on the committee in 1966 when the NHPA was passed. In the Senate, the chairman of the Energy Committee is Senator Bennett Johnston (D-Louisiana); his Democratic predecessor was Senator Henry (“Scoop”) Jackson, who died in 1983. At his death, Jackson was the last member of the committee who had served in 1966 when the NHPA was passed. The chairman of the Energy Committee from 1981 through 1986 was Senator James McClure (R-Idaho).

Legislation sometimes gets referred to more than one committee. For example, while both ARPA and the NHPA were referred in the House only to the Interior Committee, the Abandoned Shipwreck Act was referred both to the Interior Committee (because of its jurisdiction over historic preservation law) and to the Merchant Marine and Fisheries Committee (because of its jurisdiction over maritime and admiralty law). Both committees held hearings and took action on the bill before it went to the House floor. In the Senate the bill was referred only to the Energy Committee.

Subcommittees are usually the first forum for consideration of legislation. In the House, the Interior Committee’s Subcommittee on National Parks and Public Lands has jurisdiction over archaeology and historic preservation. The subcommittee has been chaired by Representative Bruce Vento (D-Minnesota) since 1987, when his predecessor, Representative Seiberling, retired. Seiberling’s subcommittee had jurisdiction over such legislation from 1981 through 1986. Seiberling’s predecessor was Representative Philip Burton (D-California), who switched his chairmanship to another committee in 1981. Burton, who died in 1983, was a close friend of Seiberling’s — so much so that he allowed Seiberling to chair the hearings and handle the details of the NHPA of 1980 (including writing the committee report) while Burton was still chairman of the subcommittee.

In the Senate, the Energy Committee’s Subcommittee on Public Lands, National Parks and Forests has jurisdiction over preservation legislation. The chairman, since 1987, has been Senator Dale Bumpers (D-Arkansas). From 1981 through 1986, the subcommittee was chaired by Senator Malcolm Wallop (R-Wyoming).

Bills normally receive their most thorough consideration by subcommittees. Usually at that level, hearings are held to give witnesses a chance to express their views. In the House, but less often in the Senate, a subcommittee holds a “mark up” on the bill, where subcommittee members review a bill, line by line, and offer amendments to it. If a majority of the subcommittee approves, the bill is then referred favorably to the full committee. In full committee, the bill must again be marked up and approved by majority vote before it goes to the floor. In the Senate, usually mark up occurs only in the full committee, after a subcommittee hearing.

Many things can happen to a bill during a mark up. The original ARPA bill was changed to exempt arrowheads taken from the surface of the ground; this was the result of an amendment in the full House Interior Committee by then-Representative James Santini (D-Nevada). During consideration of the NHPA Amendments of 1980, the so-called “owner consent” provision was added in full committee at the urging of former Representative Richard Cheney (R-Wyoming). The intent was to require the consent of an owner before a property could be listed on the National Register. In subsequent negotiations the provision was modified simply to provide an owner with notification and an opportunity to object to such a listing. If the owner objected, the Secretary of Interior would still be required to determine whether the property was “eligible” for the Register and, if so, it would still receive the same protections of federal law, although it would not be formally listed.

After mark up, the full committee must approve the bill by majority vote before it goes to the floor. This is called “ordering the bill reported.” The committee’s action is then officially
brought to the attention of the House by the filing of a committee report, a separate document usually written by the subcommittee chairman and representing the official position of the committee. Among other things, a committee report states the purpose and effect of the bill and includes background information, a section-by-section analysis, cost estimates, views of the administration, legislative history, and proposed changes in existing laws, if any. Individual members of the committee may also include additional statements, under their own names, in support of, or opposition to, the legislation. An example is the committee report to the NHPCA amendments of 1980, which provides an overview of federal preservation laws as well as a description of the bill itself.

Floor Action

A House bill goes to the floor in one of three ways:

1. “Unanimous consent” is a way to bring up noncontroversial bills that do not authorize over $1 million. As the name of the procedure suggests, a single objection by any member can block the bill. The NHPCA amendments of 1980 were brought to the floor in this manner. In that case, the bill was more controversial than most largely because it contained several new provisions, such as the “owner objection” provision, described earlier. As part of the negotiations over this provision, Representative Cheney promised that if it were included in the legislation when it went to the floor, he would support the entire bill and urge other members not to object to it. The bill then passed without a dissenting vote.

2. “Suspension of the rules” is a legislative shortcut for considering relatively noncontroversial bills, usually with less than $100 million authorization. A two-thirds vote of members present and voting is needed to suspend House procedures and pass a bill. Debate on the bill is limited to 20 minutes for each party, and no floor amendments may be offered. Most relatively noncontroversial Interior Committee bills are brought to the floor in this manner, including the two amendments to ARPA passed in 1988.

3. A “rule” is a simple resolution prepared by the Rules Committee, which stipulates the length of floor debate time and whether or not amendments may be offered. The rule must be approved by a majority of those voting, the same as regular bills. Once the rule is approved, the bill itself can then be considered, amended, and voted upon. Again, only a majority of those voting is required. Sometimes bills that were defeated initially under suspension of the rules (because of the two-thirds vote requirement) later succeed under a rule with a simple majority vote. An example of this was the Abandoned Shipwreck Act, which fell a few votes short of the needed two thirds under suspension, but later passed under a rule by a vote of 340 to 64.

The Senate procedures for floor consideration are quite different from those of the House. As a practical matter, the Senate operates on the basis of “unanimous consent agreements,” whereby bills that are subject to any controversy are considered on the floor only after a unanimous consent agreement is achieved that limits debate. At that point they usually pass quickly by voice vote. A “hold” may be placed on a bill by one or more senators, which means they are not ready to consent to such an agreement. This can prevent its consideration by the Senate until the hold is removed.

In the case of the Abandoned Shipwreck Act, for example, several “holds” were put on the bill; when proponents of the bill were able to get one hold released, another senator would ask for a new hold. And intensive floor debate and passage that was unsuccessful at the House; the bill was amended by the Senate and passed both the House and the Senate and the President signed the bill into law.

None of the organizations or archaeological particular, are: State Historic Site, the NHA and the State Historic Preservation Office, NPS, SAA, NCSHP.

As Representative of the House, I have the privilege of speaking for the Abandoned Shipwreck Act, which I believe is a necessary and important piece of legislation. It is necessary to protect our national heritage and to ensure that these shipwrecks are properly preserved for future generations.
for a new hold. Fortunately, Senator Bradley finally prevailed, with much personal persistence and intensive lobbying from the supporters of the legislation. The bill was brought to the Senate floor and passed unamended. The bill then went to the House for action, where several unsuccessful amendments were offered on the floor. To be sent to the President, legislation must pass both the House and the Senate in identical form. Had the Abandoned Shipwreck bill been amended by the House, it would have either been returned to the Senate, where further action may have been difficult to achieve, or it would have been sent to a conference committee to iron out the differences, in which case both the House and Senate would have been required to pass the bill again.

Presidential Action

After final passage by both the House and Senate, a bill then is sent to the President for action. Once it reaches the White House, the President has 10 days (Sundays excluded) to act on the bill. If the President does not act on the bill in this time limit, it will automatically become law unless Congress has adjourned.

The President may choose to sign the bill into law or veto it. If he sends it back unsigned to the originating chamber and notes his objections, the bill has been vetoed. For it now to become law, both the House and Senate, by roll-call votes of two thirds, must agree to override the veto. If the Congress has ended the session and adjourned sine die, the President may also "pocket veto" the bill by not acting on it for 10 days after receiving it. In this case the bill dies without a formal veto and without an opportunity for the Congress to vote to override it. No legislation solely directed to protection of archaeology and historic preservation has ever been vetoed.

ROLE OF CONSTITUENCIES

None of this legislation would have been accomplished without the support of national organizations that are concerned about the protection and enhancement of our nation's archaeological and historical resources. Among the most active on archaeological issues, in particular, are the Society for American Archaeology (SAA) and the National Conference of State Historic Preservation Officers (NCSHPO). Both were active on the 1980 amendments to the NHPA and to the ARPA of 1979 and its amendments in 1988. In addition, a major force behind the Abandoned Shipwreck Act was the Society for Historical Archaeology, helped by SAA, NCSHPO, and other organizations such as Preservation Action and the National Trust.

As Representative Seiberling often noted, good legislation does not necessarily pass because it is good, and bad legislation does not necessarily get defeated just because it is bad. People who care about archaeological resources need to inform members of Congress about the importance of legislation that will benefit these resources, either through programs that enhance them, such as the historic preservation fund in the NHPA, or through regulatory programs that protect sites from deliberate or inadvertent harm, such as the permitting and penalty provisions in ARPA Section 106 reviews under the NHPA, or Section 4(f) in the Highway Act. At the same time, it is necessary for archaeology and historic preservation groups to be ever vigilant to prevent the passage of legislation that would weaken or eliminate these provisions. An informal alliance — the National Preservation Coordinating Council — has been formed among the leaders of a dozen national organizations who meet regularly to discuss pending and proposed legislation.
But national groups cannot do it alone. As former Speaker of the House Tip O’Neill used to say, “All politics is local.” In a democracy, members of Congress respond best to those who elect them. Only an enlightened and active public can assure that good legislation is passed and bad legislation is prevented. We do so by electing members of Congress who are responsive to our concerns and then by keeping them informed about the way that legislation can affect those concerns. This is no less true for cultural resources than for any other endeavor.

CONCLUSION

Indeed, much work remains to be done. New legislative tools may be needed to meet the challenges that lie ahead. Of the 435 members of the House and 100 members of the Senate, only 32 representatives and 6 senators were members when the NHPA was passed in 1966. Nearly half of the Senate and well over half of the House has been elected since ARPA was enacted in 1979. As we move through the last decade of this century, we must reinforce our efforts to educate members of Congress to the needs of archaeology and historic preservation. Archaeological sites are still far too vulnerable to looting and vandalism; historic buildings are still too often lost to the wrecking ball. Making or amending a law is not easy, but when it is necessary, we must be there. We can do no less for ourselves and for future generations.

REFERENCES CITED


United States vs. Diaz, 499 F.2d 113 (9th Cir. 1974).
