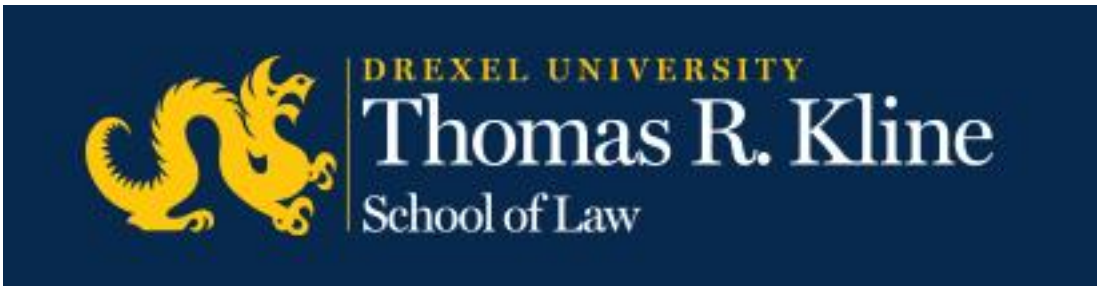

"Resolving Ambiguity: The Continued Relevance of Legislative History in an Era of Textualism"

John Cannan

Resolving Ambiguity: The Continued Relevance of Legislative History in an Era of Textualism

By John Cannan

A major argument for textualism is that a judge should read a statute as it is, interpreting it objectively rather than subjectively. Divining legislative intent to a textualist is an impermissible subjective goal and one of the prime means of achieving it--legislative history--is just an avenue to express a judge's own biases.[1] This view, of course, was advanced most forcefully by Justice Antonin Scalia and since has become embraced by some of the leading jurists today, including a majority of the Supreme Court.[2] Even Justice Elena Kagan herself famously said, "We're all textualists now."[3] But any ideology rigidly applied in all circumstances will expose its weaknesses. Such is the case with the majority opinion in, Allina Health Servs. v. Price, 863 F.3d 937 (D.C. Cir. 2017) penned by Judge Bret Kavanaugh, avowed textualist and legislative history critic.[4] Kavanaugh's opinion shows how even textualism itself can be afflicted by the same subjective deficiencies its proponents ascribe to legislative history. Ironically, had Kavanaugh turned to legislative history, his subjective opinion could have been elevated to objective analysis. Perhaps his failing in the case shows how textualism can actually benefit from a good dose of legislative history research.

Allina's facts sound like eye-glazing bureaucratic banality. In 2014, the Department of Health and Human Services (HHS) published a spreadsheet containing a fraction used to calculate FY 2012 hospital Medicare reimbursements.[5] Hospitals, that would be negatively affected by this calculation, challenged the agency's action, arguing that the change was subject to the notice and comment requirements of the Administrative Procedure Act (APA).[6] The provision applying the APA to Medicare, 42 U.S.C. 1395hh(a)(2), read:

> No rule, requirement, or other statement of policy (other than a national coverage determination) that establishes or changes a substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits under this subchapter shall take effect unless it is promulgated by the Secretary by regulation….[7]

[1] ATONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17-18 (ed. Amy Gutmann 1997).
[2] See e.g. Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905 (2016); Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge As Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1911 (2017).
[3] Elena Kagan, The Scalia Lecture at Harvard Law School (Nov. 18, 2015).
[4] Cert. granted in part sub nom. Azar v. Allina Health Servs., 139 S. Ct. 51, 201 L. Ed. 2d 1129 (2018) (oral argument was heard on January 15, 2019; Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge As Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1911 (2017).
[5] 863 F.3d at 940.
[6] 863 F.3d at 941.
[7] 42 U.S.C. 1395hh(a)(2) (2012).

One of HHS' arguments in response was that its revised fraction was merely an interpretive rule and thus fell under an APA exception to public notice of rules changes.[8] The hospitals sued and HHS' view on that issue prevailed at the district court.[9]

On appeal, Judge Kavanaugh, then presiding on the United States Court of Appeals for the District of Columbia Circuit, dispatched HHS' interpretive rule argument because no such exemption existed because the statutory text:

> Unlike the APA, the text of the Medicare Act does not exempt interpretive rules from notice-and-comment rulemaking. On the contrary, the text expressly requires notice-and-comment rulemaking. The Medicare Act states: "No rule, requirement, or other statement of policy ... shall take effect unless it is promulgated" through notice-and-comment rulemaking.[10]

Further, according to Kavanaugh, Congress had demonstrated it "knew how" to incorporate the APA's notice and comment exceptions as it had done so for Medicare regulations in the subsection below the one at issue, 42 U.S.C. 1395hh(b)(2).[11] Kavanaugh observed that his interpretation broke with other courts that had reached a contrary result to which he "respectfully" disagreed.[12] His decision was appealed to the U.S. Supreme Court, which heard oral argument on January 15, 2019.

Kavanaugh's textualist reading betrays a problem with the practice. Reasonable minds could differ with Kavanaugh and did…a lot![13] He just made his own "subjective" decision to disagree with the many prior authorities, a result textualism is supposed to avoid. He was not picking out friends at a party, he was picking out which party to go to. If reasonable judges could disagree on the meaning of language that

[8] 863 F.3d at 944.
[9] 863 F.3d at 942.
[10] 863 F.3d at 944.
[11] 863 F.3d at 944-945.
[12] 863 F.3d at 945.
[13] Medics, Inc. v. Sullivan, 766 F.Supp. 47, 51 (D.P.R.1991), aff'd sub nom. La Casa Del Convaleciente v. Sullivan, 965 F.2d 1175 (1st Cir.1992); Warder v. Shalala, 149 F.3d 73, 79 (1st Cir. 1998); Monmouth Med. Ctr. v. Thompson, 257 F.3d 807, 814 (D.C. Cir. 2001); Erringer v. Thompson, 371 F.3d 625, 633 (9th Cir. 2004); Vencor Nursing Centers, L.P. v. Shalala, 63 F. Supp. 2d 1, 11 (D.D.C. 1999); GCI Health Care Centers, Inc. v. Thompson, 209 F. Supp. 2d 63, 69 (D.D.C. 2002) ; Erringer v. Thompson, 371 F.3d 625, 627 (9th Cir. 2004); Visiting Nurse Ass'n of Brooklyn v. Thompson, 378 F. Supp. 2d 75, 87 (E.D.N.Y. 2004); Baptist Health v. Thompson, 458 F.3d 768, 776 n 2 (8th Cir. 2006); Via Christi Reg'l Med. Ctr., Inc. v. Leavitt, 509 F.3d 1259, 1271 n11 (10th Cir. 2007); Cottage Health Sys. v. Sebelius, 631 F. Supp. 2d 80, 97 (D.D.C. 2009); Texas All. for Home Care Servs. v. Sebelius, 811 F. Supp. 2d 76, 102 (D.D.C. 2011), aff'd, 681 F.3d 402 (D.C. Cir. 2012); Gentiva Healthcare Corp. v. Sebelius, 857 F. Supp. 2d 1, 13 (D.D.C. 2012), aff'd, 723 F.3d 292 (D.C. Cir. 2013); Catholic Healthcare W. v. Sebelius, 919 F. Supp. 2d 34, 41 (D.D.C. 2013), aff'd, 748 F.3d 351 (D.C. Cir. 2014) ; Abington Mem'l Hosp. v. Burwell, 216 F. Supp. 3d 110, 130 (D.D.C. 2016); Adirondack Med. Ctr. v. Sebelius, 935 F. Supp. 2d 121, 130 (D.D.C. 2013); Clarian Health W., LLC v. Burwell, 206 F. Supp. 3d 393, 408 (D.D.C. 2016), rev'd and remanded sub nom. Clarian Health W., LLC v. Hargan, 878 F.3d 346 (D.C. Cir. 2017); Blue Valley Hosp., Inc. v. Azar, 322 F. Supp. 3d 1149, 1168 (D. Kan. 2018); Under Will of Wills v. Burwell, 306 F. Supp. 3d 684, 692 (E.D. Pa. 2018) .

applied the APA to Medicare, who is right?[14] An investigation into legislative intent, using legislative history, provides the objective answer. To find it, you have to know where…and when to look.

Congress' desire to bind Medicare to the APA arose in the early 1980s in response to the Reagan administration's unilateral, and sometimes surreptitious, slashing of Medicare costs by limiting benefits and reimbursements through administrative actions, effectively subjecting health policy to budget policy with little warning and little public input.[15] Historically, Medicare, as a benefits program, was not subject to the APA, though, since 1971, the agencies that managed the program voluntarily complied with the law's public input requirements.[16] Adherence to this policy was thrown into question in 1982 when the Health Care Finance Administration (HCFA), the agency which oversaw Medicare at the time, issued a proposed rule that it would no longer strictly comply with the APA.[17] Though no final rule was ever published, senior citizen and health provider organizations complained to Congress that Medicare reimbursements were being cut and limited and claims were being increasingly denied, not through any regulatory changes, but by directives from the HFCA to its contractors, called fiscal intermediaries, which processed payments.[18] Senator Lloyd Bentsen (D-TX) quipped that the HCFA was becoming a budget cutting arm of the White Office of Management and Budget.[19]

Of particular Congressional concern was the HCFA's limitation on the Medicare home health benefit, which provided part time, or intermittent, care for homebound beneficiaries, often necessary after

[14] In addition, the assumption that because Congress would act the certain way in one instance than it would in another presupposes insight into the legislative "group mind" textualism abhors. The subsections that Kavanaugh discusses were added at different times. As will be shown, 42 U.S.C. 1395hh(a)(2) was added by the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 4035, 101 Stat. 1330-78 - 79 (1987) while 42 U.S.C. 1395hh(b)(2) was added Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9321(e), 100 Stat. 1874, 2017-2018 (1986). In addition, control of Congress changed hands from the 99th to 100th Congress, with Democrats assuming the control of both chambers in the latter for the first time since 1981. CQ CONGRESSIONAL ALMANAC, VOL. XLIII 3 (1987).

[15] *Catastrophic Health Insurance: The Home Care Benefit, Before the Subcommittee on Health and Long-Term Care of H. Select Comm. on Aging*, 99th Cong. 79 (Mar. 19, 1986) (*The Attempted Dismantling of the Medicare Home Health Benefit*, submitted for the record by Val Halamandaris, President, Nat'l Assoc. for Home Care); *The Erosion of the Medicare Home Health Care Benefit, Before the S. Special Comm. on Aging*, 99th Cong. 44 (Apr. 26, 1986) (statement of Elana Zucker, Dir. of Cmty. Health Serv., Overlook Hospital); *Proposals to Modify Medicare's Physician Payment System, Before the Subcomm. on Health of the S. Comm. on Fin.*, 99th Cong. 63 & 289 (Apr. 25, 1986) (statements of Sen. Durenberger, Lawrence C. Morris, Senior Vice Pres., Blue Cross & Blue Shield Assoc.).

[16] Public Participation in Rule Making, 36 Fed. Reg. 2532 (Feb. 5, 1971).

[17] Administrative Practices and Procedures, 47 Fed. Reg. 26,860 (June 22, 1982).

[18] S. REP NO. 99-5 at 164 (1985); *Examination of Quality of Care Under Medicare's Prospective Payment System, Before the S. Comm. on Fin.*, 99th Cong. 2 (June 3, 1986) (statement of Sen. Packwood); *Quality of Care Under Medicare's Prospective Payment System: Volume I, Before the S. Special Comm. on Aging,* 99th Cong. 155 (Sept. 26, Oct. 24, Nov. 12, 1985) (statement of Margaret Cushman, Exec. Vice President Visiting Nurse & Home Care). One touted example of this activity was HCFA's 1984 repeal of the right of Medicare beneficiaries to be represented by a provider during appeals--which was implemented via a change to a Medicare contractor manual. 131 CONG. REC. 17244 (June 25, 1985) (Statement of Sen. Wyden); *Medicare Appeals Provisions, Before the Subcommittee on Health of the S. Comm. on Fin.*, 99th Cong. 282 (1985) (statement of Paul B. Simmons, Pres., Health Ind. Distributors Assoc.).

[19] 132 CONG. REC. 33311 (Oct. 17, 1986) (statement of Sen. Bentsen). See also *The Erosion of the Medicare Home Health Care Benefit, Before the S. Special Comm. on Aging*, 99th Cong. 3 (Apr. 26, 1986) (statement of Sen. Lautenberg).

hospital stays.[20] HCFA's curtailment of the benefit was exacerbated by significant contemporaneous Medicare reform.[21] In 1983, Congress passed legislation transitioning Medicare hospital reimbursements from a payment per cost regime to set fees for particular services.[22] The goal of the new system was to curb skyrocketing health care costs by reducing hospital stays and creating a disincentive to provide unneeded services.[23] However, it also encouraged hospitals to discharge Medicare patients as soon as possible or, as often described in Congressional hearings and floor debate at the time, "quicker and sicker."[24] This created greater need for post-hospital services at home.[25] HCFA's response to the greater demand was to use "regulatory mechanisms" and pressure on fiscal intermediaries to control a resulting increase in home care costs by restricting access to the benefit.[26]

One of the most significant examples of the "regulatory mechanisms" employed was HCFA's reinterpretation of the statutory meanings of "intermittent" and "homebound".[27] The problem was Congress had not fully defined what these terms meant in Medicare law.[28] This ambiguity provided the opening for HFCA to reinterpret both to limit costs.[29] In 1982, HCFA issued a more restrictive

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[20] *The Erosion of the Medicare Home Health Care Benefit, Before the S. Special Comm. on Aging*, 99th Cong. 49-50 (Apr. 26, 1986) (statement of Sen. Bradley); *The Attempted Dismantling of the Medicare Home Care Benefit, H. Select Comm. on Aging*, 99th Cong. 20 (April 1, 1986) (comm. print).

[21] *Long-Term Health Care, Before the Subcomm. on Health of the Comm. on Fin.*, 100th Cong. 123-24 (Feb. 24, 1987) (statement of Jacob Clayman, President National Council of Senior Citizens).

[22] The new policy was named the Prospective Payment System (PPS). This set costs for a certain case type classified by diagnosis related groups (DRGs). *Quality of Care Under Medicare's Prospective Payment System: Volume I, Before the S. Special Comm. on Aging*, 99th Cong. 1 & 3 (Sept. 26, Oct. 24, Nov. 12, 1985) (statements of Sen. Heinz & Sen. Glenn).

[23] *Examination of Quality of Care Under Medicare's Prospective Payment* System, *Before the S. Comm. on Fin.*, 99th Cong. 2 (June 3, 1986) (statement of Sen. Packwood); *The Erosion of the Medicare Home Health Care Benefit, Before the S. Special Comm. on Aging*, 99th Cong. 1 (Apr. 21, 1986).

[24] *Catastrophic Health Insurance: The Home Care Benefit, Before the Subcommittee on Health and Long-Term Care of H. Select Comm. on Aging*, 99th Cong. 36 (Mar. 19, 1986) (statement of Marvin Cetron, Forecasting Int'l.); 132 CONG. REC. 7969 -7971 (Apr. 17, 2986) (statement of Sen. Heinz).

[25] 132 CONG. REC. 7977 (Apr. 17, 1986) (statement of Sen. Bradley).

[26] *Quality of Care Under Medicare's Prospective Payment System: Volume I, Before the S. Special Comm. On Aging*, 99th Cong. 192-93 (Sept. 26, Oct. 24, Nov. 12, 1985) (statement of Sen. Heinz); *Catastrophic Health Insurance: The Home Care Benefit, Before the Subcommittee on Health and Long-Term Care of H. Select Comm. on Aging*, 99th Cong. 6, 59 & 92 (Mar. 19, 1986) (statement of Rep. Pepper, Jack Guildroy, member, AARP); *The Attempted Dismantling of the Medicare Home Health Benefit*, submitted for the record by Val Halamandaris, President, The Nat'l Assoc. for Home Care); *The Erosion of the Medicare Home Health Care Benefit, Before the S. Special Comm. on Aging*, 99th Cong. 3 & 29 (Apr. 26, 1986) (state. of Sen. Lautenberg & John Paul Marosy, Exec. Dir., Home Health Agency Assembly of N.J.); 132 CONG. REC. 11741 (May 21, 1986) (statement of Sen. Bradley).

[27] *The Erosion of the Medicare Home Health Care Benefit, Before the S. Special Comm. on Aging*, 99th Cong. 28 (Apr. 26, 1986) (state. of Sen. Lautenberg).

[28] *Medicare Home Health Benefit, Before Subcomm. on Health of S. Comm. on Fin.*, 98th Cong., 26 (June 22, 1984) (statement of Mary Suther on Behalf of the Nat'l Assoc. for Home Care & the Home Health Services & Staffing Assoc.).

[29] *Black Box of Home Care Quality, Before the H. Select Committee on Aging*, 99th Cong. 47-48 & 145 (July 29, 1986) (Marilyn Moon, Dir., Public Policy Ins., AARP; Appendix C)

interpretation of "intermittent", not through regulations but contractor manual revisions.[30] Further, fiscal intermediaries, apparently at HCFA's direction, made narrow (and often inconsistent) determinations on what constituted intermittent, limiting the number of home health care visits and the length of time they could be provided.[31] HCFA also considered taking a similar approach toward the meaning of homebound before backing off from public and Congressional opposition.[32] Despite agency's chastisement, state officials claimed HCFA had "tightened" the definition of homebound and home care advocates asserted that fiscal intermediaries, possibly at the behest of HCFA, were unreasonably denying reimbursements for beneficiary care.[33]

As a result of these actions, home health benefit denials surged, as did horror stories of severely ill beneficiaries unable to obtain home care because of the employment of overly restrictive requirements.[34] One witness before a House committee, stated these "administrative changes" were "made under the guise that they are not substantive" but together they had the effect of completely undermining the benefit, effectively departing from implementing policy to creating it.[35] Senator John Heinz (R-PA) warned that such policies could leave beneficiaries trapped within a cruel paradox: "Mr. president, if we are not careful, we will witness the establishment of no-care zones where medicare beneficiaries are well enough to leave the hospital, but too sick for care at home."[36] HCFA's policy actions against Medicare and the specific changes to the home care benefit impelled Congress to constrain the agency and make further reforms to the program.

As Congress debated what measures to take against HCFA, some organization representatives urged that Medicare be subject to the APA so that its actions would be subject to notice and comment.[37]

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[30] Medicare Home Health Benefit, Before Subcomm. on Health of S. Comm on Fin., 98th Cong., 2-3, 25 & 89 (June 22, 1984) (statements of Sen. Bentsen, Mary Suther on Behalf of the National Assoc. for Home Care & the Home Health Services & Staffing Assoc. & Blue Cross Blue Shield Notice).

[31] 131 Cong. Rec. 6707-09 & 6711-6712 (Mar. 28, 1985) (statements of Sens. Heinz, Bentsen & Bradley).

[32] *Medicare DRG's Long-Term Care: Effect on Retirement Income Security, Before the Subcomm. on Retirement Income & Employment of the H. Select Committee on Aging*, 99th Cong. 14 & 30 (June 17, 1985) (Joel Cook, Dir., Vt. Off. of Aging & Peter Cobb, Exec. Dir., Vt. Assembly of Home Health Agencies); *Quality of Care Under Medicare's Prospective Payment System: Volume I, Before the S. Special Comm. on Aging,* 99th Cong. 172 (Sept. 26, Oct. 24, Nov. 12, 1985) (statement of William A. Dombi, Co- Dir., Legal Assistance to Medicare Patients).

[33] *Black Box of Home Care Quality, Before the H. Select Committee on Aging*, 99th Cong. 155 (July 29, 1986) (Appendix C).

[34] *Catastrophic Health Insurance: The Home Care Benefit, Before the Subcommittee on Health and Long-Term Care of H. Select Comm. on Aging*, 99th Cong. 6, 11-34 & 92 (Mar. 19, 1986) (statements of Rep. Pepper, Randy Kramer, Riva Fiterman, Connie Fischer and Joanne Cooper; and Jack Guildroy, member, and Shelah Leader, legislative staff, AARP); *The Erosion of the Medicare Home Health Care Benefit, Before The S. Special Comm. on Aging*, 99th Cong. 3 (Apr. 21, 1986) (statement of Sen. Lautenberg); 132 CONG. REC. 11741 (May 21, 1986) (statement of Sen. Bradley).

[35] *Catastrophic Health Insurance: The Home Care Benefit, Before the Subcommittee on Health and Long-Term Care of H. Select Comm. on Aging*, 99th Cong. 26 & 89 (Mar. 19, 1986) (statement of Val Halamandaris, Pres., Nat'l Assoc. for Home Care).

[36] 130 Con. Rec. 3153 (Feb. 23, 1984).

[37] *Medicare Appeals Provisions, Before the Subcomm. on Health of the S. Comm. on Fin.*, 99th Cong. 62-63 & 120 (Nov. 1, 1985) (statement of William J. Cox, Catholic Health Assoc.); *Medicare Quality Protection Act of 1986, Before the Subcomm. on Health of the H. Comm. on Ways & Means*, 99th Cong. 82 (Apr. 23 1986) (statement of John Denning, President Elect, AARP); *The Erosion of the Medicare Home Health Care Benefit, Before the S. Special*

Congress proved receptive and two significant approaches to notice comment arose to meet the demand. A more lenient method was suggested by Senator Heinz before a House Ways and Means subcommittee hearing on a bill addressing discharges of beneficiaries from hospitals and the problems with home care.[38] The Senator suggested that Medicare regulations should be subject to the APA to give interested parties notice and the ability to comment on them.[39] As for other regulatory mechanisms the HCFA had been using, Heinz recommended that a list of "transmittals, guidelines and instructions to the fiscal intermediaries" be published in the *Federal Register*.[40]

A stricter approach was offered by Senator Bill Bradley (D-N.J.). Senator Bradley's animus was HFCA's policies thwarting beneficiaries from receiving the home care they needed, "One message came through loud and clear. The Health Care Financing Administration, through a variety of administrative mechanism, has made it very difficult and frequently impossible for elderly patients to receive the home care services that they need and are entitled to under Medicare."[41] In particular, he noted that significant policy changes had occurred through nontraditional processes. "Over the past few months, HCFA has unilaterally promulgated major policy changes through written and verbal directives and manuals, rather than through the regulatory process. This gives the public little or no opportunity to comment on changes in policy."[42] Like Heinz, Bradley believed legislation was needed to thwart such ploys. "It is clear that we need legislation to stop HCFA from unilaterally and arbitrarily restricting eligibility for home care services."[43] For this purpose he introduced the S. 2494 (1986), the Medicare Home Health Care Improvement Act of 1986, co-sponsored by Senators Heinz and John Glenn (D-OH).[44] Bradley's legislation went further than that proposed by Heinz in that his bill not only contained a provision applying the APA to Medicare, but *excluded* the APA's interpretive exception to that law:

> Such regulations shall be subject to general notice, publication and opportunity for comment to the same extent as rule making which is subject to the provisions of 5 U.S.C. 553; provided, however, that the provisions of such section 553 which afford special treatment for interpretative rules, general statements of policy and statements of policy shall not be applicable. For purposes of the preceding sentence, the term "regulations" shall mean any statement which initiates, clarifies or otherwise modifies a policy or procedure or its application and which can be expected to have a significant

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Comm. on Aging, 99th Cong. 30 (Apr. 26, 1986) (statement of John Paul Marosy, Exec. Dir., Home Health Agency Assembly of N.J.).

[38] *Medicare Quality Protection Act of 1986, Before the Subcomm. on Health of the H. Comm. on Ways & Means*, 99th Cong. 118 (Apr. 23, 1986) (statement of Senator Heinz). This was also noted in a statement by the American Hospital Association before the Senate Finance Committee. *Examination of Quality Of Care Under Medicare's Prospective Payment System, Before the S. Comm. on Finance*, 99th Cong. 361 (June 3, 1986).

[39] *Id*.

[40] *Id*.

[41] 132 CONG. REC. 11741 (May 21, 1986) (statement of Sen. Bradley).

[42] 132 CONG. REC. 11741 (May 21, 1986) (statement of Sen. Bradley).

[43] 132 CONG. REC. 11741 (May 21, 1986) (statement of Sen. Bradley).

[44] 132 CONG. REC. 11741 (May 21, 1986) (statement of Sen. Bradley).

> effect on individuals who are entitled to benefits under this title or any institution, agency or other party from whom such individuals obtain health services or items.[45]

Bradley felt that this language would submit HFCA policy changes to the APA's regulatory process, "My legislation…requires HCFA to comply with the Federal Administrative Procedures Act. This would ensure that policy changes are only instituted through the normal regulatory process, which will permit a thorough review of changes in policy by Congress and the general public."[46] Though Bradley's bill went farther than that of his own, Heinz was supportive of the measure.

Congress ultimately decided to include part of Heinz's approach in the Medicare reforms of the in the Omnibus Budget Reconciliation Act of 1986.[47] It set a 60-day notice and comment period for proposed regulations and included a good cause exception to the law, provisions which were codified in 42 U.S.C. 1395hh(b).[48] The conference report for this bill specifically stated that these provisions were meant to exclude certain materials from notice and comment, including interpretive rules.[49] If Congress had stopped there, *Allina* might have had a different result.

But Congress was not finished with the issue. The following year, some Senators and Representatives remained unconvinced that the HCFA had been sufficiently reigned in. Rather, members were appalled at the agency's continued limiting of the Medicare home health benefit to cut costs through administrative mechanisms.[50] For example, concerns were raised that HCFA and its fiscal intermediaries were interpreting "homebound" to mean "bedbound" and, as a result, any beneficiary mobility at all was a cause for reimbursement denial.[51] These HCFA restrictive interpretations combined with beneficiaries being speedily discharged from hospitals, leaving them in need of home care but unable to

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[45] 132 CONG. REC. 11741 (May 21, 1986) (text of S. 2494 (1986)).
[46] 132 CONG. REC. 11741 (May 21, 1986) (statement of Sen. Bradley).
[47] Pub. L. No. 99-509, 100 Stat. 1874 (1986).).
[48] 100 Stat. 2017 -2018 (1986).
[49] H. REP NO. 99-12, at 311 (1986) (Conf. Rep.).
[50] *Medicare Hospital DRG Margins, Before the Subcommittee on Health of the H. Comm. on Ways & Means*, 100th Cong. 121-22 (Feb. 26, 1987) (statement of Jo-Anne Andre, Vice Pres., Cal. Assoc. for Health Services at Home, & Exec. Dir., Visiting Nurse Association of Orange Cnty.); *Peer Review Organizations Under the Medicare Program, Before the Subcomm. on Health of the S. Fin. Comm*., 100th Cong. 86, 154-55 (Mar. 27, 1987) (statement of Sen. Rockefeller & John J. Ring, Vice Chairman, Board of Trustees, American Medical Association).; 133 CONG. REC. 9258 &, 9261 (1987) (statement of Sen. Bradley & Medicare Home Health Services Improvement Act of 1987 Bill Summary); *The Medicare Home Care Benefit: Access and Quality, Before the S. Special Committee on Aging*, 100th Cong. 10-11. (1987) (statements of Sen. Bradley, Joel S. Gross, Medical Dir., Greenwall Geriatric Program, Monmouth Medical Center & Evelyn K. Savage, President, Home Health Agen. Assembly of N.J. & Exec. Dir., Visiting Nurse Assoc. of Somerset Hills, N.J.).
[51] *Cases of Long-Term Health Care, Before the Subcomm. on Health of the Comm. on Fin.*, 100th Cong. 123, 128-29 & 399 (Feb. 24, 1987) (statement Victoria Jaycox, Exec. Dir., Older Women's League). *Medicare Hospital DRG Margins, Before the Subcommittee on Health of the H. Comm. on Ways & Mean*s, 100th Cong. 96 (Feb. 26, 1987) (statement of Carroll L. Estes, Dir., Inst. for Health & Aging, U. Cal. San. Fran.); *Fiscal Year 1988 Budget Reconciliation Issues Relating to Hospital Payments Under the Medicare Program, Before the Subcomm. on Health of the H. Comm. on Ways & Means*, 100th Cong. 18-19, 23-24 (April 1, 1987) (statement of Reps. Stark & Moody); *Problems in Health Care for the Elderly in Rural Areas, Before Subcomm. on Retirement Income & Employment of H. Comm. on Aging,* 100th Cong. 47 (Jun. 20, 1987) (statement of Keith Kertland, Exec. Dir., Vermont Visiting Nurses Assoc.).

get it.[52] The "no-care zone" Senator Heinz had warned about the year before was still a grim reality.[53] Calls to fix this problem included demands to restrict HCFA's ability to enact policies outside traditional regulatory procedures.[54]

Members of Congress proved determined to go farther than they had the year before in restricting HCFA's ability to make unilateral policy decisions such as those that had limited the home health benefit. Initially, this effort was part of legislation directed against HCFA's home health care limitations. In April 1987, Senator Bradley and Representative Henry Waxman (D-CA) introduced identical parallel bills, S. 1076 (1987) and H.R. 2138 (1987), each titled "The Medicare Home Health Services Improvement Act of 1987". These contained a restriction on HCFA policy changes that was substantially similar to that which was introduced by Senator Bradley the year before and was ultimately enacted into law:

> No rule, requirement, or other statement of policy that has (or may have) a significant effect on the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits under this title shall take effect unless it is promulgated by the Secretary by regulation…."[55]

The bill also included one of Senator Heinz's proposals from the prior year—the publishing of a "list of all manual instructions, interpretative rules, statements of policy, and guidelines of general applicability" which were not subject to the bill's notice and comment requirement.[56]

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[52] *Long-Term Health Care, Before the Subcomm. on Health of the Comm. on Fin.*, 100th Cong. 123, 128-29 & 399 (Feb. 24, 1987) (statement of Jacob Clayman, Pres., Nat. Council of Senior Citizens, Victoria Jaycox, Exec. Dir., Older Women's League & James Roosevelt, Chairman of the Nat'l. Comm. to Preserve Social Security & Medicare); *Medicare Hospital DRG Margins, Before the Subcommittee on Health of the H. Comm. on Ways & Means*, 100th Cong. 118 & 121-23 (Feb. 26, 1987) (statement of Bruce C. Vladeck, Pres. United Hospital Fund of N.Y.; Jo-Anne Andre, Vice Pres., Cal. Assoc. for Health Services at Home, & Exec. Dir., Visiting Nurse Assoc. of Orange Cnty.); *Medicare Peer Review Organizations, Before the Subcomm. on Health and the Environ. of the H. Comm on Energy & Commerce*, 100th Cong. 323 (Apr. 30, Oct. 26, 1987) (statement of William Felts on behalf of the Am. Medical Assoc.); *Medicare Home Care Benefit: Access and Quality, Before the S. Special Comm. on Aging*, 100th Cong. 7, 15, 17 (August 3, 1987) (statements of Joel S. Gross, Medical Dir., Greenwall Geriatric Program, Monmouth Medical Ctr.; Esther C. Abrams, Chairwoman, N.J. State Legislative Comm., AARP; Kenneth R. Dolan, Exec. Dir., Home Care Council of N.J.).

[53] *Medicare Hospital DRG Margins, Before the Subcommittee on Health of the H. Comm. on Ways & Means*, 100th Cong. 89 (Feb. 26, 1987) (statement of Carroll L. Estes, Dir., Inst. For Health & Aging, U. Cal. San Fran.).

[54] *Medicare Hospital DRG Margins, Before the Subcommittee on Health of the H. Comm. on Ways & Means*, 100th Cong. 123 (Feb. 26, 1987) (statement of Jo-Anne Andre, Vice Pres., Cal. Assoc. for Health Services at Home, & Exec. Dir., Visiting Nurse Association of Orange County); *The Proposed Fiscal Year 1988 Budget: What It Means for Older Americans, Before the S. Special Comm. on Aging*, 100th Cong. 467 (Mar. 13, 1987) (statement of the Nat'l Assoc. for Home Care); *Peer Review Organizations Under the Medicare Program, Before the Subcomm. on Health of the S. Fin. Comm.*, 100th Cong. 61-62, 154-155 (Mar. 27, 1987) (statements of Rep. Stenholm, John J. Ring, Vice Chairman, Board of Trustees, AMA); *Medicare Peer Review Organizations, Before the Subcomm. on Health & the Environ. of the H. Comm on Energy & Commerce*, 100th Cong. 323 (Apr. 30, Oct. 26, 1987) (statement of William Felts on behalf of the AMA).

[55] 133 CONG. REC. 9260 (1987) (Text of S. 1076).

[56] 133 CONG. REC. 9260 (1987) (Text of S. 1076).

The introduction of the Senate version coincided with floor statements by its sponsor, Senator Bradley and others. All were emphatic that the law's provision on the HCFA publication requirement was to address the actions the agency had taken against home health care, subject it to the APA and not only require notice and comment for regulations, but for any significant statements of Medicare policy in any form.[57] According to Senator David Pryor (D-AK), one of the bill's co-sponsors, the legislation would "Subject the Health Care Financing Administration [HCFA] to administrative procedures act notice and comment requirements for all matters dealing with benefits." [58]

Neither S. 1076 or its companion House bill passed but that is not the end of their story. The notice and comment provision was incorporated into a reconciliation package that emerged from the Subcommittee on Health and Environment of the House Energy and Commerce Committee.[59] This was not a surprise as that subcommittee's chair was Representative Waxman, the sponsor of H.R. 2138, S. 1076's companion bill. (Incidentally, Senator Bradley declared his intention to get elements of S. 1076, and specifically its notice and comment provision, into the reconciliation bill Congress would be deliberating upon in the fall of 1987).[60] This version's text is nearly entirely the same as that included in the House and Senate's Medicare Home Health Services Improvement Act, the only difference being the exclusion of the national coverage determinations from the requirement:

> No rule, requirement, or other statement of policy (other than a national coverage determination) that has (or may have) a significant effect on the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits under this title shall take effect unless it is promulgated by the Secretary by regulation….[61]

The House committee's section by section analysis of the publication provision, reemphasized the goals enunciated by its Senate supporters in April, but it also went further in summarizing the challenges that HCFA had presented and Congress wanted to fix through this provision:

> The Committee is concerned that important policies are being developed without benefit of the public notice and comment period and, with growing frequency, are being transmitted, if at all, through manual instructions and other informal means. This makes it difficult for persons who are interested in, and affected by, such policies from having any opportunity to express views on them and, in some instances, from even knowing of their existence until they are subjected to them. Policies issued in this fashion do not have the benefit of widespread discussion and analysis or the contributions of additional information and perspectives that could be made by interested parties. The Committee

[57] 133 CONG. REC. 9257 – 9267 (1987) (Statements of Sens. Bradley, Mitchell, Pryor, Durenberger, Glenn & Rockefeller).
[58] 133 CONG. REC. 9264 (1987) (statement of Sen. Pryor).
[59] *Medicare and Medicaid Health Budget Reconciliation Amendments of 1987, Subcomm. on Health & the Environment of the H. Comm. on Energy & Commerce*, 100th Cong. (1987) (Comm. Print.).
[60] *The Medicare Home Care Benefit, Before the S. Special Committee on Aging*, 100th Cong. 2. (1987).
[61] H.R. 3188, 100th Cong. § 4073 (1987). The committee's views were published in a report separate from the legislation.

> bill would define those policies which must be subject to the rulemaking procedures adopted last year. Policies meeting the definition that were not issued in compliance with those procedures would be invalid.[62]

The report also described the policies that were intended to fall under the new section's ambit:

> This would include any policy that had an effect on the eligibility of individuals for Medicare, on the scope of benefits, on the payment methodology or amount of payment for services, or on the qualifications of practitioners or providers to furnish reimbursable services or the terms under which such services can be furnished.[63]

If there was any doubt about whether or not the provision applied, it was to be resolved as if it did.[64] This provision was ultimately included in the reconciliation package the House voted upon and passed.[65]

Finally, another slight alteration was made to the reconciliation bill's language in conference committee-- the use of the phrase "substantive legal standard governing" replacing "significant effect". The conferees note that this language reflected recent court rulings, though, regrettably, they did not state which rulings they were referring to.[66] Given the full history of the provision, this amendment appears to be little more than what Congress said it was—a clarification.[67] This, of course, the version which became law in the Omnibus Budget Reconciliation Act of 1987.[68]

What is clear from the debates around the publication requirement that emerge from Medicare Home Health Services Improvement Act of 1987 is that Congress wasn't interested in discussing the APA nuances of substantive and interpretive rules, as HHS would claim in *Allina*. What its members were interested in was the use of interpretations of law to create policies that denied Medicare beneficiaries care. Senator Bradley made this point on the Senate floor upon the introduction of S. 1076. "I'm asking that we end the arbitrary interpretations of the law that have caused too many people to be denied the care they need".[69] Senator Bradley later elaborated upon this point at an August 1987 hearing in which he mentioned his bill:

> So, you have a definition for homebound that's been there for 22 years. You then have the Congress pass the DRG system that is supposed to improve efficiency in hospitals, and it has the effect of having many citizens-in this case senior citizens-leave the

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[62] *Medicare and Medicaid Health Budget Reconciliation Amendments of 1987, Subcomm. on Health & the Environment of the H. Comm. on Energy & Commerce*, 100th Cong. 55 (1987) (Comm. Print.).
[63] *Medicare and Medicaid Health Budget Reconciliation Amendments of 1987, Subcomm. on Health & the Environment of the H. Comm. on Energy & Commerce*, 100th Cong. 55 (1987) (Comm. Print.).
[64] *Medicare and Medicaid Health Budget Reconciliation Amendments of 1987, Subcomm. on Health & the Environment of the H. Comm. on Energy & Commerce*, 100th Cong. 55 (1987) (Comm. Print.).
[65] 133 CONG. REC. 30,019 (1987)
[66] H. REP. NO. 100-495 at 566 (1987) (Cong. Rep.).
[67] H. REP. NO. 100-495 at 566 (1987) (Cong. Rep.).
[68] Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 1987 U.S.C.C.A.N 2313-1,101 Stat. 1330-78 (1987).
[69] 133 CONG. REC. 9258 (1987) (Statement of Sen. Bradley.)

> hospital sooner than they would in the past. That increases demand for home care services.
>
> Because it increased demand for home care services, it increased the costs. HCFA then arbitrarily chooses to say that the law means something other than what it says very clearly in black and white.
>
> They choose to do that, for example, by saying homebound means that somebody has to be in their bed; that they can't be going to the hospital for chemotherapy, or going out for 5 minutes because they're a heart patient. Any of those problems would require, HCFA says, them being disallowed Medicare coverage. [70]

Congress was taking aim at policies that that were regulations in form but not in fact, policies that created or affected beneficiary care but without the requisite notice and comment.

As significant as the events behind the creation of 42 U.S.C. 1395hh(a)(2) were to the parties involved in its creation, knowledge of them, recorded in hearing transcripts, reports and the *Congressional Record*, were apparently forgotten or, at least, never entered into judicial cognizance. The historical background was barely ever mentioned in subsequent court decisions interpreting the provision.[71] While this history did reach consideration in *Allina*, the parties dug no deeper than committee reports printed in the United States Code Congressional and Administrative News (USCCAN).[72] That this record might fade from view is not surprising. Even historical memory of current events is rather brief. The evidence from the period of 42 U.S.C. 1395hh(a)(2)'s passage is available digitally but much of it can only be accessed through databases like Heinonline or Proquest Congressional, which are typically only available through academic libraries. (Those researchers who are not of the faint of heart could always seek the sources out at a depositary library…in print or microfiche!). In a sense, the passage of time and a lack of free access to this information mostly accomplished what textualists have always desired, the banishment of legislative history from the courtroom.

This is a pyrrhic victory. The problem with the ignorance of the legislative record behind 42 U.S.C. 1395hh(a)(2) is that judges have been unintentionally doing what they are forbidden to do, making statutory law.[73] Many courts construed the section as if to mean the traditional APA exemption for interpretive rules applied when, according to the substantial record just documented, Congress clearly never intended that result to happen. Judge Kavanagh's achievement of the correct interpretation of the provision should not grant textualists any comfort. Yes, he was right, but so, as the adage goes, is a broken clock twice a day. Again, many

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[70] *Medicare Home Care Benefit: Access and Quality, Before the S. Special Committee on Aging*, 100th Cong. 11. (1987).

[71] See supra. note 13. Yale-New Haven Hosp. v. Leavitt, 470 F.3d 71, 75 (2d Cir. 2006) is a rare exception.

[72] Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 1987 U.S.C.C.A.N 2313-1,101 Stat. 1330-78 (1987)

[73] ATONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17-18 (ed. Amy Gutmann 1997); ANTONIN SCALIA & BRYAN GARNER: THE INTERPRETATION OF LEGAL TEXTS 388 (2012).

other learned judges facing the subsection's interpretation came to the opposite conclusion and neither did any of them rely on legislative history. Kavanaugh just happened to be lucky. A textualist could just as easily come down on the wrong side of history in the future.

Of course, textualists raise many academic arguments against using legislative history to divine Congressional intent when interpreting a statute.[74] Some are even laudable. Even so, legislative history is evidence, sometimes the best evidence, of what Congress attempted to accomplish through its lawmaking. At the very least that evidence can be persuasive in resolving ambiguity, a practice even Justice Scalia indulged in when it suited his purposes.[75] The issue of whether or not the 42 U.S.C. 1395hh(a)(2) allowed an interpretive exemption was a textbook case of such ambiguity, i.e. where two "reasonably and well-informed persons" reach different conclusions about what a statute means.[76] Judge Kavanaugh found the lack of any text excluded such an exemption. Many other courts found it indeed did exist. (In fact, several expressed an equally casual indifference that there could be any other interpretation.[77]) Certainty as to who was right can only be found through legislative history research of the problems that Congress faced and the statutory measures they fashioned to deal with them. That history tells that Congress contended with an unbridled HCFA, which was making policies that affected constituent needs, particularly in the area of home health care. Congress took actions to bind such significant policy changes by making HCFA and Medicare subject to the APA even for some interpretive decisions. In this case, legislative history is not, as Justice Kagan famously said, just "extra icing on a cake already frosted", it is an essential ingredient to get to the right decision.[78]

Legislative history was definitely more credible than the source Kavanagh *did* use to interpret statutory language in *Allina —Black's Law Dictionary*.[79] Kavanagh used *Black*'s to parse out the meaning of the statute's phrase, "substantive legal standard'. The choice of *Black*'s is in itself a subjective act--a completely different result could have been achieved if Kavanaugh had employed the *Oxford English*, *American Heritage* or *Webster*'s to cobble together the phrase's meaning. What's more, one thing certainly is clear from the statute's legislative history--*Black*'s was never mentioned at all nor is there any evidence anyone used it in creating the subsection. (Congress did alter some of the law's text at conference to mirror that in court opinions. But you can only learn that fact if you go to the legislative history itself!) The irony in Kavanagh's use of *Black*'s is that he interpreted statutory text not through the words of anyone involved in the law's creation, but through the effort of editor Bryan A. Garner, who, incidentally, coauthored works with textualist Scalia. Who's making law now? A much better lexicon would be the legislative history itself--the hearings during which issues were deliberated; the bill texts written by Senators and Representatives; and the floor debate made by the people who discussed

[74] ATONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17-18 (ed. Amy Gutmann 1997); ANTONIN SCALIA & BRYAN GARNER: THE INTERPRETATION OF LEGAL TEXTS 388 (2012).
[75] And post fact Congressional action at that! Harmelin v. Michigan, 501 U.S. 957, 980, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1959 (2017). See also Milner v. Dep't of Navy, 562 U.S. 562, 574, 131 S. Ct. 1259, 1267, 179 L. Ed. 2d 268 (2011).
[76] 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:4 (7th ed. 2007).
[77] See e.g. Monmouth Med. Ctr. v. Thompson, 257 F.3d 807, 814 (D.C. Cir. 2001).
[78] Yates v. United States, 135 S. Ct. 1074, 1093, 191 L. Ed. 2d 64 (2015) (Kagan, J. dissenting).
[79] 863 F.3d at 943.

what their work was meant to achieve. The "ring" of a statute's words are more likely to be found in the record of the legislators who were at the statute's creation than by others who were not.[80]

Admittedly legislative history is often not a fool proof method of divining legislative intent, but, in the case of *Allina*, it provides significant clarity. The full legislative history of 42 U.S.C. 1395hh(a)(2) shows that Congress intended, and wanted, interpretive rules issued by the agencies administering Medicare to be subject to the APA's notice and comment requirements where these implemented significant policy changes. That legislative history record supports the conclusion reached by Judge Kavanaugh, though with substantially more evidence than his otherwise subjective opinion. Had he decided to look for and use legislative history to resolve the meaning of the ambiguous text before him, he could have elevated his decision from a subjective to an objective ruling. An unintended consequence of *Allina* is to show textualists, like Kavanagh, that they should reach an accommodation with legislative history instead of attempting to banish the practice from the courtroom. Their decisions will be all the better for it.

[80] Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 61 (1988).