The Contribution of Lawyers to the American Legislative Process, and Their Education for that Role

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Introduction

In this lecture I shall seek to do three things. First, I shall outline the roles played by lawyers in the American legislative process. (For simplicity I shall focus on the federal legislative process and ignore the variation in state legislative processes.) To outline such a role for lawyers presupposes some familiarity with the process by which statutes are enacted in America, so I shall begin by reminding you of some of the basic features of the American legislative process itself. Only then will I seek to pinpoint the role of lawyers in that process.

My second task will be to describe the kinds of knowledge or skills lawyers bring to the various roles that I have outlined. Why lawyers have such a prominent role in the American legislative process can only be answered if one first understands what it is that lawyers have to contribute in the way of special knowledge or skills. Third, I want to draw out how American legal education at least attempts to prepare lawyers for the roles demanded of them in the legislative process. This American law schools can accomplish only by giving their students the knowledge and the skills I will discuss in the second part of this lecture.

Before I begin on these three tasks, perhaps a word of caution is in order. What I shall describe as the American experience with lawyers and legislation

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will be as much a description of the ideal as the real. It should come as no
surprise that the organizational structures or educational techniques that I will
describe do not always function effectively so as to achieve their goals. Still,
I think it worthwhile for Koreans reflecting on the American experience to
know what we have been trying to achieve, even if only with limited success.

With that caveat let me begin by describing the American legislative process
and the role of lawyers within it.

I. The Role Played by Lawyers in The American Legislative
Process

A. An Introduction to the American Legislative Process

Perhaps the easiest way to understand the legislative structure in which
lawyers play their various roles, is to outline the route a bill takes as it
proceeds from inchoate idea to enacted and codified law. With this chronological
sequence in mind, we can then pinpoint where lawyers contribute their skills
to the process of making law in America. The following chart is perhaps
helpful in picturing this chronological sequence: I shall expand a bit on each of
these thirteen actions needed before an idea becomes law.

1. Sources of Legislative Proposals

Broadly speaking, there are four sources of legislation in the United States:
executive departments and agencies, Congress itself, private industry and interest
groups, and scholars. As is well known, a large percentage of federal legislation
originates within executive departments and agencies. This is not surprising,
given the fact that it is those agencies that administer and enforce existing

(1) A helpful summary of how law is made in the U.S. Congress may be found in Jones,
Kernochan & Murphy, Legal Method (Mineola, N.Y.: Foundation Press, 1980), pp.255-318:
reprinted as a separate booklet as Kernochan, The Legislative Process (Mineola, N. Y.:

(2) It is often thought that most federal legislation originates within executive departments. See
James Minor, “Role of the Executive Agency,” in Dickerson (ed.), Professionalizing
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**PERSONNEL:**

- Executive Depts.
- Agencies
- Congressmen
- Congressional Committees
- President
- Senate
- Speakers
- Staffs
- Committees
- District
- Industry
- Interest groups
- Scholars
- Institutes

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**ADMINISTRATION:**

- Subcommittees
- Revision of the Code
- Judiciary Committee
- House of Representatives
- Senate
laws and are thus in a position to observe the need for changes. The prominence of executive agencies as a source of legislative ideas is also no doubt due to the increased role of the Presidency in the twentieth century as the active proponent (and not merely the passive reviewer) of major new programs. Because of this prominence, and because of the important roles lawyers play in the executive agencies, I shall discuss separately later the detailed legislative process within the executive branch.

The other sources of legislative ideas are also important, however. Individual congressmen or their staffs may perceive the need for legislation on a certain topic; Congressional committees and their staffs may also perceive such needs, particularly after an investigative hearing into some subject matter. The private sector also contributes legislative ideas. These may be the views of individual constituents of congressmen, but more often it is the associations of various kinds—business, labor, consumer action groups—that propose legislation to Congress. Lastly, there are the legislative recommendations of scholars that are a source of legislative ideas. Although there are numerous legislative proposals by scholars in every issue of every American law review, more influential are the recommendations of organized groups of scholars. The American Law Institute, for example, has been very influential with its model codes for the states. The American Bar Foundation, sponsored by the American Bar Association, has also made recommendations from time to time on the subjects of its various research projects. A recent example of such scholarly input into legislation was provided by the unpopular acquittal of John Hinckley for his attempted assassination of President Reagan. Hickley’s acquittal lead to several legislative proposals to abolish or reform the defense of insanity in criminal trials; these proposals came from the American Medical Association, the American Bar Association, and the American Psychiatric Association, each body deliberating and voting on a position articulated for it by a group of legal scholars.
2. Sponsorship and Introduction

Once transmitted to a Congressman by one of these four sources, a bill is introduced into either the House of Representatives or the Senate by its sponsor, who must be a Congressman.

3. Reference to Committee

After its introduction into either the House or the Senate, a bill is then referred to one of the committees of the House or Senate. Usually such bills are referred to one of the standing committees of either house, each of which has jurisdiction over certain subject matters. The referral to the appropriate committee is done by the Speaker of the House, or by the presiding officer of the Senate.

4. Reference to Subcommittee

Since there are only about 15 to 20 standing committees in each house, much of the scrutiny given a bill is in subcommittees. The committee chairman will thus usually refer a bill to the appropriate subcommittee within his committee.

5. Subcommittee Hearings and Report

The subcommittee will often hold hearings on the bill. This will involve the taking of testimony about the bill from both the private sector and from representatives of the executive agencies that would be affected by the bill. Other Congressmen may also testify. A transcript of the hearing is then prepared, and subcommittee deliberation begins on whether to report the bill out or not. If the bill is to be reported out, it will then be marked up, that is, drafted into a definitive shape. The finished bill, together with the subcommittee report, is then forwarded to the full committee.
6. Full Committee Hearings and Report

The entire subcommittee process may be repeated at the committee level. There may be additional hearings, transcripts, redrafting, and a new committee report prepared. Alternatively, the full committee may defer to its subcommittee's judgement and make the latter's report its own. In any case, the full committee's actions culminate in the issuance of another draft of the bill together with the committee report, which is transmitted to the whole House or Senate.

7. House Rules Committee

The next item of business is to calendar the bill for floor consideration by the full House or Senate (unless the bill is noncontroversial, so that floor consideration can be dispensed with and the bill adopted without debate). In the House of Representatives this calendaring function is done by the House Rules Committee. The Rules Committee will hold a hearing to decide when the bill will be considered and on what terms the debate about the bill will be carried on. In the Senate, these matters are handled less formally by negotiation and agreement between the majority and minority leaders of the Senate.

8. Floor Consideration and Vote

The bill is then debated on, amendments offered, and vote taken on the amendments and on the final bill.

9. Conference Committee

If the House version of the bill differs from that of the Senate, a conference committee made up of both Representatives and Senators must be formed to iron out the differences. Considerable redrafting may be done here as well, although the committee is forbidden to add new provisions or to alter provisions already agreed to by both houses.

(3) On the nicetics of this, see Kernochan, n.1 supra, at pp. 35-38.
10. *Floor Reconsideration of Conference Committee Bill*

The revised bill, together with the conference committee report, is then transmitted to each house for reapproval. No amendment is possible at this stage in either house, which may only vote the revised bill up or down.

11. *Presidential Signing or Veto*

The approved bill is then transmitted to the President for his signature or veto. If he vetoes the bill, it may nonetheless become law if both houses override the veto; if he signs the bill, it becomes law according to its terms. (Here again executive action is more complicated than this, and will be treated separately later.)

12. *Publication*

Bills that have become law are transmitted to the General Services Administration for publication. They are first published in separate pamphlets known as “slip laws,” then collected (in the chronological order in which they are passed) into volumes called “statutes-at-large.”

13. *Codification*

Eventually many (but far from all) federal statutes find their way into the *United States Code*. The *Code* was authorized by Congress in 1926 in order to improve the accessibility and consistency of federal statutes.\(^{(4)}\) The laws existing in 1926 were arranged into 50 titles, each divided into various subject-matter related sections. In 1946 Congress authorized a further codification, a process still only partially completed. The Law Division Counsel of the House Subcommittee on the Revision of the Laws of the House Judiciary Committee is in charge of the entire codification process. The initial work, however, is

\(^{(4)}\) On codification of federal statutes, see American Bar Foundation Project, "Legislative Drafting in the Federal Agencies," 21 *Catholic University Law Review* 703, 716-17 footnote 31 (1972).
done by counsel in the executive agencies charged with administration or enforcement of the various acts. The Law Revision Counsel provides supervision only.

This bare-bone outline of the legislative process does not of course do justice to the complex realities attendant upon passing a statute through Congress. Still, it may prove sufficient to pinpoint where in the process lawyers contribute their special skills. Before we turn to that topic, however, we must first explore in more detail one facet of the legislative process with special attention, this is the executive role in legislation.

B. An Introduction to the Role of the Executive Branch in the American Legislative Process

Executive departments and agencies perform five functions in the American legislative process: (1) they are the initiators of the ideas for a substantial share of federal legislation; (2) they contribute their expertise, via testimony and less formal advice, to Congressmen and to Congressional committees considering proposed legislation; (3) they give advice to the President on whether to sign or to veto legislation that affects their jurisdiction; (4) they do the initial work in codifying the federal statutes; and (5) they write the regulations that implement Congressional statutes. I shall discuss each function in turn.

1. As Initiators of Legislative Ideas

To see the complex structure of how legislative ideas develop within a federal agency, a particular example may be helpful. Consider the Department of Transportation, one of major executive departments headed by a Cabinet Secretary.\(^{(5)}\)

\(^{(5)}\) The information that follows about the structure of the Department of Transportation’s legislative processes is based on the survey done by the American Bar Foundation Project, n. 4 supra, at 727–64. For an overview of the executive’s role in developing legislative proposals, see Hetzel, Legislative Law and Process (Indianapolis: Bobbs-Merrill, 1980), at 754–56.
The Department of Transportation has seven Administrations, including the U.S. Coast Guard, the Federal Aviation Administration, the Federal Highway Administration, and the Federal Railroad Administration. There are thus two levels of offices, department-level offices and Administration-level offices. Although legislative ideas might originate at either level, suppose an idea develops within the personnel of one of the Administrations. For example, suppose the Office of Policy and Program Analysis in the Federal Railroad Administration has an idea to reduce the number of railroad accidents.\(^6\) Upon the recommendation of the Director of that Office, and the approval of the Federal Railroad Administrator, the Chief Counsel’s Office within the Federal Railroad Administration would then draft a bill to effectuate that idea. That draft bill would then be forwarded to the departmental level, and specifically to the Office of Legislation, one of four units in the General Counsel’s Office of the Department of Transportation. The Office of Legislation, in turn, would circulate the bill within any other Administrations affected by it for ideas and suggestions. At this juncture a departmental task force for the bill might be established. Such a task force would include personnel from both the Federal Railroad Administration and the Department of Transportation, and also perhaps representatives of other public agencies and private interest groups.

If sufficient agreement is reached to persuade the Secretary of Transportation on the desirability of the bill, a revised version be drafted by the Office of Legislation.\(^7\) Before submitting the bill to a Congressman for introduction, however, clearance must be obtained from the Legislative Reference Division of the Office and Management and Budget. This clearance step is required in order

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\(^6\) See the case study done by the American Bar Foundation Project, n. 4 supra, on Federal Railroad Administration initiated legislation. Id. at 747-64.

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<td>Circulation to other Administrations within Dept. of Transportation and Redrafting</td>
<td>Consideration for clearance as consistent with Presidential Program</td>
<td>Further clearance consideration</td>
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### PERSONNEL:

| Office of Policy and Program Analysis | Federal Railroad Administration | Office of Legislative Reference Division, Office of Management and Budget | Office of Legal Counsel, Dept. of Justice | Congressional Relations Office, Dept. of Transportation | Legislative Reference Division, Office of Management and Budget | Dept. of Transportation | General Services Administration | Subcommittee of the Revision of the House Judiciary Committee | Office of Legislation, General Counsel's Office, Dept. of Transportation |
to assure that the legislation being proposed by the Department of Transportation is consistent with the general legislative program of the President.

With varying degrees of regularity, sometimes the Office of Management and Budget has sought out the views of the Justice Department on how a proposed bill will interact with other Presidential proposals and laws. The Office of Legal Counsel in the Justice Department serves such an advisory clearance function, when asked to do so.\(^8\)

Assuming the bill is cleared, it is then ready to be transmitted to Congress. This is done in the Department of Transportation by another office, the Congressional Relations Office. This is a liaison office that acts as a general watchdog for legislative proposals affecting the Department of Transportation.

These various stages are summarized by the accompanying chart, the numbers of which are keyed to the earlier chart of the legislative process.

2. *As Advisor to Congress*

The second legislative function served by the executive departments is to advise Congress about pending legislation, whether proposed by the department in question or elsewhere. Such advice is usually sought out by the Congressional committee considering a bill. Such advice can be in the form of formal testimony before a Congressional committee or subcommittee, or by transmission of factual information less formally; or by redrafting legislation if a committee so requests.

For testimony by departmental spokesmen, the same clearance function is provided by the Legislative Reference Division of the Office of Management and Budget as is done for the proposing of legislation by the executive departments. Such testimony must be cleared in advance as being consistent with Presidential policy.

\(^8\) See the American Bar Foundation Project, n. 4 *supra*, at 848-95 for a general review of the Department of Justice's legislative activities. See also Herbert Hoffman, "Role of the Department of Justice," in Dickerson (ed.), 2 *supra* , at 92-93. See also Frank Wozencraft, "OLC: The Unfamiliar Acronym," 57 A.B.A.J. 33 (1971).
3. **As Advisor to the President on Veto or Signing**

The President seeks the formal recommendation about whether or not to veto a piece of legislation from the Office of Management and Budget, Legislative Reference Division. The Division, in turn, usually seeks the advice of affected agencies for their views about the desirability of the legislation.\(^{(9)}\) The executive agencies thus have an indirect voice in the exercise of the Presidential veto.

4. **As Codifiers of Enacted Laws**

An executive agency’s legal personnel will be responsible for codifying the laws affecting that agency into the relevant title. The actual work of codification is done in the agencies, although the formal approval must come from the Subcommittee on the Revision of the Laws, House Judiciary Committee, which is changed by statute to oversee the work of codification.

5. **As Drafters of Regulations Implementing Congressional Statutes**

At least when measured by the volume of words, ten times as much “legislation” is done by administrative regulation as is done by formal statute.\(^{(10)}\) It is the lawyers in the executive agencies that formulate and draft this large volume of legislative material. Moderate review of the drafting of regulations is provided by the lawyers in the Office of the Director of the Federal Register, where all federal regulations are published. But it is in the executive departments and agencies where the real work in formulating the regulations is done.

**C. The Role of Lawyers in the American Legislative Process**

We are now in a position to pinpoint where lawyers contribute to the legislative process just described. It is easiest to see such contributions by

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\(^{(9)}\) Given that the President has only ten days in which to decide to sign or veto a bill, the turn around time from the federal agencies in very short—48 hours. See Kornoch, n. 1 \textit{supra}, at pp. 51–52.

\(^{(10)}\) Minor, n. 2 \textit{supra}, at p. 82.
considering separately: (1) lawyers in Congress; (2) lawyers in the executive branch; (3) lawyers representing private interests; and (4) scholarly lawyers.

1. Lawyers in Congress

It has been a long established fact of American politics that there are more lawyers in Congress than anyone else. In 1973 over one-half of U.S. Senators or Representatives were lawyers.\(^{(11)}\)

Aside from this major role of lawyers as legislators, there are five subsidiary roles lawyers play in Congress.\(^{(12)}\) One such role is being the lawyer on the personal staff of individual Senators or Representatives. Each Senator or Representative has some personal staff to answer mail, deal with constituents, run errands and the like. Within that personal staff, however, there are usually some lawyers—several for a Senator, less for a Representative. Such staff lawyers—“legislative assistants”—perform a variety of functions for their Congressmen. They analyze and summarize pending legislation, draft or help draft legislation to be introduced by their Congressmen, help lobby other Congressmen to rally support for a bill, and stand-in for their Congressman in speaking engagements, in presenting testimony before Congressional committees or even speak for their Congressman in committee. They are very much their Congressman’s lawyer, expressing his views and doing his bidding. Because their legal work carries them across many fields of law, they usually regard themselves as generalists in the law.

Lawyers for Congressional committees, the second role here, tend to be more specialized in the area of law that form the jurisdiction of their particular standing committee. Each committee and subcommittee will have a professional staff of lawyers. These lawyers must prepare the hearings of the committees. This means lining up witnesses, and subpoenaing them if necessary; arranging


for the production of documentary evidence; feeding questions to the members of the committees, or conducting some of the examinations of witnesses themselves; preparing the transcript of the hearings. In addition, committee staff lawyers may help draft or redraft the bills themselves, and may draft the subcommittee or committee report. They may also be assigned to deal with lobbyists for private groups.

The third role for lawyers is in the American Law Division of the Congressional Research Service, itself a part of the Library of Congress. Several hundred lawyers here research any area of law requested by a Congressman or Congressional committee. Such requests may be made so that the Congressman or the committee may understand the legal background of the area in which they propose to legislate. Given the size of the office, there tends to be some specialization among the lawyers by subject matter.

The fourth place lawyers are to be found in aid of Congress is in Offices of Legislative Counsel. There are two such offices, one for the House and one for the Senate. These lawyers basically serve a drafting function. Their job is to aid any Congressman or committee that requests it in the drafting of bills. Such aid in drafting may be requested at any stage of the legislative process from the mere consideration of a bill by individual Congressman through committee work and floor amendments to and including the final redrafting done in conference committees.

These offices are not large a mere 24 attorneys each in 1965. (13) They were formed in 1918 after the utility of having expert drafting assistance available to Congress was demonstrated by the Columbia University Legislative Drafting Research Fund. The Columbia Fund for two years in 1916–1918 aided Congress in drafting legislation and thereby convinced Congress of the value of the service. The offices now tend to have lawyers specialize in certain areas of law, paralleling the divisions of jurisdiction of the House and Senate standing committees.

(13) See Krasnow and Kurzman, n. 12 supra.
Finally, lawyers may be found in the Congressional supervision of codification. Such lawyers are in the Office of Law Revision Counsel, a part of the Subcommittee on the Revision of the Laws of the House Committee on the Judiciary. Such lawyers supervise the codification efforts of the lawyers in the various executive departments.

1. Legislative Lawyers in the Executive Branch

There are three places that legislative lawyers appear in the executive branch: within the federal agencies that propose legislation, give testimony about it, and advise the President on his veto or approval of it; within the Legislative Reference Service of the Office of Management and Budget; and within the Justice Department's Office of Legal Counsel.

The role of lawyers in the first of these may again be illustrated by the Department of Transportation's organizational structure. Lawyers appear at both the departmental level and at the Administration level. At the departmental level, there are lawyers in both the liaison office for Congress—the Office of Congressional Relations—and in the Office of General Counsel for the Department. The lawyers in the Office of Congressional Relations appear to do three jobs: they arrange for the transmission of proposed legislation from the Department to the appropriate members of Congress; they review proposed legislation affecting the Department's jurisdiction but originating from outside the Department; and they participate in the planning and review of the legislative proposals of the Department.

It is the Office of General Counsel, however, that does the actual putting together of legislative proposals for the Department. Lawyers dealing with Department-proposed legislation are grouped into the Office of Legislation, one of four units in the Office of General Counsel. These lawyers are officially assigned eight functions: (1) to coordinate the preparation and clearance of the annual legislative program of the Department; (2) to provide legal counsel in the formulation of program proposals; (3) to draft proposed legislation; (4) to
prepare supporting materials for legislative proposals and to prepare testimony and briefing memoranda for departmental witnesses; (5) to analyze and comment on legislative proposals originating outside the Department; (6) to provide drafting or other legislative services to Congressional Committees, if they request it; (7) to prepare and circulate for comment status reports and analyses of the legislative program of the Department; and (8) to maintain central legislative files.\(^{14}\)

The lawyers in the Office of Legislation are thus the main clearinghouse for legislation originating in the Department of Transportation. The actual formation of legislative proposals, however, may originate anywhere within the Department. Legislative proposals relating to railroads, for example, may well originate in the Federal Railroad Administration, one of the seven administrations within the Department of Transportation. The earliest drafting of a legislative proposal relating to railroads may well be done by the lawyers assigned to the Federal Railroad Administration’s own Chief Counsel’s Office. Each of the administrations have their own set of lawyers, and these will likely be involved in the earliest stage of legislative proposals. In such a case Administration lawyers will do the early thinking through of the policy behind a legislative proposal, and do the initial drafting; the departmental lawyers in the Office of Legislation will then serve to gather the opinions of other relevant units within the Department of Transportation and do any redrafting that is necessary.

The second place legislative lawyers appear within the Executive Branch is in the Office of Management and Budget’s Legislative Reference Division. This, it will be recalled, is the Division that reviews all executive branch legislative proposals for their consistency with Presidential policy before they can be transmitted to Congress. There are six subdivisions within the Legislative Reference Division, divided by subject matter. Lawyers are typically the heads of several but not all of these subdivisions. This is because the main function performed by the Legislative Reference Division is not technical or strictly legal;

\(^{14}\) See the American Bar Foundation Project, n. 4 supra, at 729.
it is a policy analysis, a check for coherence with the general legislative program of the President. The lawyers within the Division may do some redrafting; they may also negotiate compromise positions on proposed legislation if different executive agencies disagree in what should be proposed. But their main function is that of a policy watch-dog for legislative proposals originating within the Executive Branch.

A third place legislative lawyers appear within the Executive Branch is in the Department of Justice’s Office of Legal Counsel. Here more technical review of a bill is possible before it clears the Executive Branch on its way to Congress. This review function was set up in the late years of the Johnson Administration at White House request. The lawyers within this office were part of what was loosely termed the “Sloppiness Review Program,” because their work consisted of correcting bad drafting as well as reviewing of the bill for consistency with existing law. Since the Department of Justice has tended to attract better lawyers than the other executive departments, and because the Department has enforcement authority for all federal law, its lawyers are apt choices for this review function which they perform.

3. Lawyers Representing Private Interests

Given the democratic ideology prevailing in America about legislation, it is no surprise that private interest groups have a legitimate role to play, both as the source of legislation and as parties to be consulted as legislative proposals develop within Congress or the Executive Branch. The lawyers who regularly represent such businesses, trade associations, labor unions, and consumer action groups thus have as part of their normal jobs the presentation of their client’s views about proposed legislation. Such presentation may be formally to a Congressional committee, or less formally, and at an earlier stage of the legislative process, to an executive agency considering the proposal of a bill to Congress.

More surprisingly, perhaps, is the development of that American phenomenon
known as "the Washington lawyer."\(^{(15)}\) Washington, D.C. is home to a number of law firms who make it their business to know the ins and outs of Washington politics. Often such firms are retained when a private group wishes to impress its point of view on a Congressman, Congressional Committee, or an executive agency. In performing these services such lawyers sometimes perform the traditional lawyer's job of advising clients about their proposed testimony in Congressional hearings; or they may interpret proposed legislation to the client and suggest alternatives that might be to the client's interest. Less traditionally, such lawyers may also lobby Congressmen or their staffs for passage of legislation in which their client is interested; feed friendly questions to Congressional staff during hearings so as to elicit the maximum benefit for their client's testimony; write supplementary memoranda to be circulated to Congressmen about a bill; or suggest to Congressmen how committee reports or floor statements might be phrased to shape the "legislative intent" behind a bill in a manner favorable to the client's interest. Such tasks of the Washington lawyer are an integral part of the American legislative process, even if they go beyond the traditional, less political tasks of lawyers in other contexts.

4. *Scholarly Lawyers*

Scholarly lawyers by-and-large perform a very preliminary function in the American legislative process. The traditional form of legal scholarship is the lengthy and elaborately researched law review article. Often such articles are aimed at judges, urging reform of interpretations of statutes or common law rules. Almost as often, however, such articles propose new legislation and argue for its enactment. When such articles are the group products of an institute of scholars—such as the American Bar Foundation, or the American Law Institute—they can be a highly influential first step in the process of law-making.

Scholarly lawyers may also enter the legislative process at a later point. It

is not uncommon for legal academics to testify before Congressional committees about the need for new legislation. A recent example was provided by the Congressional hearings held on whether to reform or abolish the insanity defense in criminal law; a veritable parade of law professors gave their views to Congress on this issue, giving the Congress a cross section of the best expert advice available on this much discussed issue.

II. The Knowledge and Skills Contributed by Lawyers to Legislation

A. The Traditional Skills of Formal Advocacy

The Committee system in Congress uses formal hearings as its means of both fact-finding and of allowing various segments of society to express themselves about proposed legislation. Because of this, lawyers are called upon to exercise the traditional skills for which they are trained. These are the skills of formal advocacy, the skills involved in bringing out facts favorable to a particular point of view through the testimony of witnesses and through documentary evidence.

Lawyers located is three of the four different roles earlier identified—in Congress, the Executive Branch, or representing private industry—are called upon by the hearing system to exercise these traditional skills. Lawyers for Committees of Congress must organize the presentation of testimony and other evidence in a logical way. They must be familiar with the subpoena power and its constitutional limits as they gather evidence to be presented. They must be able to prepare the questions that will elicit the desired information from witnesses. They must know the various privileges that might be asserted by witnesses. They must know the legal remedies available to them in the courts to be able to compel testimony or documents. Committee staff lawyers, in short, need the background knowledge and skills in evidence, procedure, constitutional law and trial practice in order to conduct the judicial-like hearings of
Congressional committees.

Lawyers representing executive agencies or private interests in such hearings are also called upon to exercise the traditional skills needed for formal hearings. Private clients and executive officers typically have lawyers advising them about the form and content of their testimony. To the extent that executive agencies themselves have formal hearings before they propose legislation, then executive branch lawyers also need the organizational and supervisory skills of their counterparts on the Congressional committee staffs.

B. The Less Traditional Skills of Negotiation, Persuasion and Political Compromise

Given the democratic nature of the American legislative process, and given the fragmentation of power in that process, a considerable amount of negotiation and compromise may be necessary before enough support is mustered to pass a bill through Congress. Such adjustment of differences may be necessary, for example, between different executive agencies; between different private interest groups; between different congressmen; and so forth. The lawyers who are legislative assistants to a Congressman, who are on the staff of Congressional committees, who represent private interests, or who are in the executive agencies all have a role to play in facilitating the negotiation and compromise that is so necessary to the functioning of the American legislative process.

There is an uneasy line that exists between what a lawyer can contribute qua lawyer, and what he or she can contribute as a political actor. It is not, for example, thought to be part of a lawyer’s skill when representing a private interest to call upon friendship with a key Congressman, or past favors done him, in order to secure support for a measure favoring a client.\(^{(16)}\) Nor

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(16) On this elusive line, see Horsky, n. 15 supra. Horsky quoted the ABA’s Canon 26 of the old Canons of Professional Ethics, which provided that a lawyer-lobbyist should not “use means other than those addressed to the reason and understanding, to influence action.” See also Gell, “The Lawyer as Lobbyist,” 15 Alberta Law Review 400(1977), which also discusses the Canon.
is it part of a legislative assistant’s special skills as a lawyer that he/she trade adjustments in one bill for adjustments in another bill. It is not that such traditional practices as lobbying and logrolling do not take place—they plainly do—but there are no lawyerly skills being exercised here. These kinds of political activities, a part of negotiation and compromise in the American system, could be carried on by anyone, lawyers or not.

What then do lawyers have to contribute to the process of political accommodation? Two sorts of things, I think. First, there are the more technical skills of accommodation that a good lawyer brings to a disagreement. These include the skills of: reframing the issue in a way that minimizes disagreement; securing agreement on whatever can be agreed upon and thus gradually narrowing the area of disagreement; analyzing the issues clearly and keeping arguments focused on those issues. (17) Secondly and more importantly, lawyers allow for negotiation and compromise to be carried on in a principled way. Lawyers, in other words, can bring to political negotiation what they often bring to negotiation between private parties—a standard for adjustment that seems fair to all parties. Lawyers can bring to a system of power and favor their own tempering insights of what, in general, is fair. Showing differing parties what a fair standard should be does not of course end their disagreement; but it does allow it to be carried on in a different rhetoric, the rhetoric of principled argument.

This second kind of contribution of lawyers I shall say more about shortly, because it is part of the role of lawyers I call the “guardians of legal culture.” Before coming to that, however, there is a third set of technical skills that lawyers contribute to the legislative process, those having to do with drafting legislation.

C. The Technical Skills of Transmitting Ideas into Language

Perhaps the most obvious contribution lawyers make to the American legislative process is their contribution as drafters of the bills that become law if enacted by Congress. Academic lawyers, lawyers representing private interests, lawyers in the executive agencies, and lawyers in Congress all may be the original drafters or redrafters of legislative proposals. Wherever they are located, lawyers serving the drafting functions bring several important skills to the process.

1. First, lawyers can contribute to the formulation of the legislative idea that motivates a proposal. Legislation necessarily aims at achieving some goal or remedying some evil, and lawyers can aid in articulating just what that goal might be. This they can do because lawyers have some expertise in what is often called “policy analysis.” Lawyers may, for example, hypothesize future happenings as a way of bringing out incompleteness in a legislative proposal. Lawyers in such a case force a legislative idea into a more specific and more concrete form. Alternatively, a lawyer may point out conflicts between the different policies that may motivate a bill, and force out into the open disagreements that mere hitherto latent. If the disagreements are resolved, such activity again makes a bill more concrete in that it prioritizes the policies that motivate it. Lawyers may also employ their knowledge of the enforcement mechanisms within the legal system to make some prediction of the effectiveness, and the costs, of enforcement of some legislative policy. In each of these ways lawyers may bring to bear their skills at policy analysis—cost/benefit or instrumental reasoning—to aid policy makers in articulating just what it is they want to accomplish with some proposed piece of legislation.

2. Lawyers can also contribute their knowledge of the existing law in some area (or, more often, lawyers can contribute their research skills in finding out the existing law in some area of proposed legislation). Legislators need such detailed knowledge of existing law in order to assess the need for new legislation.
As Reed Dickerson once observed, “A competent architect would not dream of remodeling a house without first taking a close look at it.”\(^{(18)}\) No more than a legislator should think of changing the law until he first knows what it is.

3. Lawyers can also contribute their knowledge about how legal language will be interpreted by the courts to the legislative process. Every lawyer should be equipped with what I have elsewhere called a “theory of interpretation.”\(^{(19)}\) This is a theory about how legislation will be interpreted by the courts. Such knowledge is indispensable for a legislator drafting statutes, given that such statutes will be enforced only as the courts interpret them.

As I have argued elsewhere, the theory of interpretation largely in use by American courts makes use of four ingredients: the pre-existing meaning (technical or ordinary) of the words that compose a statute; the prior interpretations of a statute by a court; the purpose or aim of the statute; and general considerations of justice and fairness.\(^{(20)}\) A lawyer steeped in this tradition should thus be in a position to contribute the corresponding skills to the legislative process. That is, he should have a firm grasp of the ordinary meaning of words in English or of the technical legal meaning of such words, including knowledge of vagueness, open texture, and ambiguity and metaphor, and how to reduce the effect of such inevitable features of natural languages; he should know how the courts have previously interpreted a statute that is being amended; he should be able to say how the purpose of the bill will be used by the courts to refine or reshape the meaning the words might otherwise have, and he should be able to say how and from what the courts will ascertain the purpose behind the bill; and he should be able to say how certain absurd or unjust consequences will or will not be taken into account by a court as it interprets the language of a statute.

4. Finally, lawyers who are legislative draftsmen contribute their writing skills to the legislative process. These are the organizational skills that give a complex statute some structure that makes it easier to understand and more accessible to those reading it; and the actual writing skills that allow brevity and clarity in expression, together with consistency in style and usage. (21)

D. Lawyers as the Guardians of Legal Culture

The final major kind of contribution lawyers may make to the legislative process is less tangible than the preceding three. It is also more controversial. In general terms the contribution is to keep individual laws from breaching the fundamental principles of the legal system. Those fundamental principles are what make a legal system both a system at all, and a legal system specifically. These most general principles we might call the "legal culture" of a society.

There are two kinds of such principles relevant here, process principles and substantive principles. The process principles are the subject of another lecture that I am giving here in Korea. (22) These are the principles requiring the legislation take a certain form before it be considered legislation at all—it must be general, prospective, public, stable, clear, specific, consistent, possible to comply with and non-capricious in its enforcement; process principles also require that proposed legislation be justifiable by an acceptable theory of legislation before it should be passed. Paternalistically motivated legislation, for example, is in American legal culture (with its emphasis on individual liberty) viewed with widespread distaste.

The substantive principles are those principles that give consistency and coherence to the vast amount of doctrine that makes up a body of law. (23) There are, for example, fundamental principles of criminal justice that underlie

(21) These skills are described in more detail in Dickerson, n. 18 supra, at pp. 36-54. See also Dickerson, Legislative Drafting (Boston: Little, Brown, 1964), pp. 26-46.
(22) "The Limits of Legislation."
(23) These are explored by me in Moore, Law and Psychiatry: Rethinking the Relationship (Cambridge University Press, 1984), chs. 2 and 6.
the positive legal doctrines that define particular crimes. One can see such principles by first looking to the distinction (common in Anglo-American criminal law) between the general part and the special part of criminal law. The special part defines what particular acts are criminal. Viewed as single doctrines, the laws that define theft, rape, arson etc. may seem to have little to do with one another. Yet such an unsystematic view is false, and can be seen to be false when one enquires about what sorts of conditions will excuse each of these crimes. It turns out that Aristotle was pretty much correct for the American legal system as for the Athens with which he was familiar: there are only two excuses to crime, ignorance and compulsion.\(^{(24)}\) It is such similarities that lead to there being a "general part" to the criminal law, the general part consisting of those doctrines that apply to all crimes. The doctrines of excuse are examples of the doctrines of the general part.

Behind the doctrines of excuse of the general part there are yet more general principles constituting a theory of excuse. Such a theory consists of those moral principles that show why it is fair to excuse some people, but not others, for performing identical criminal actions. An example of such a theory is what I have elsewhere called the "causal theory of excuse," a theory according to which causation of behavior by external factors is the core common to all legal and moral excuses.\(^{(25)}\)

Behind a theory of excuses there has to lie yet a more general theory of moral responsibility and of its role in punishment. Excuses are only one of several ways in which moral responsibility for a harm may be avoided; and moral responsibility itself is arguably only a part of a general theory of punishment.

It is these most general principles—in the criminal law, of punishment, of responsibility, of excuse—that are the substantive principles that make a body of legal doctrine into a system of law; for it is these principles that cohere what


\(^{(25)}\) The nature of the causal theory of excuse, and of a theory of excuse in general, is explored by me in Moore, "The Causal Theory of the Excuse," a paper given to the German/Anglo-American Conference on Criminal Law Theory, Max Planck Institute, Freiburg, West Germany, July 11, 1984.
would otherwise be unrelated and chaotic laws, into the coherent system that citizens as well as judges can understand and respect.

Lawyers make their deepest contribution to the legislative process when they protect these substantive and process principles from the gradual erosion of piecemeal legislation. Insofar as lawyers are not themselves legislators, they can make this contribution only indirectly; only, that is, by persuading those who are legislators that some proposed piece of legislation either violate or promotes one of the fundamental principles of the legal system. Such a contribution is necessary from legislative lawyers, however for legislation is typically a piecemeal process whereby immediate benefits may more easily be seen by legislators than may systemic costs. Lawyers by their training are able to take the longer view; they serve the legal system best when they do perform this guardianship role.

**III. The Education of Lawyers for Their Legislative Roles**

I will close with some brief comments on how American legal education seeks to prepare law students so that they can make the kinds of contributions to the legislative process outlined in Part II above.

With respect to the knowledge and skills required in legislative hearings, the training of most American law students is limited to the general training they receive for performing their adjudicatory roles. Courses in civil procedure, evidence, constitutional law, and trial practice are the kinds of courses standardly offered to train students in the skills of examining witnesses, introducing evidence, and the like. There are courses in "legislation," but a survey of the leading casebooks in the field\(^{(26)}\) suggests that imparting the skills of formal advocacy in the legislative arena is not an important objective of such courses.

In any case, only a small minority of American law schools require a course in legislation or legislative process, and only a minority even offer such a course as an elective.\(^{(27)}\)

Although this state of affairs has been lamented for over a century in America—particularly by teachers of legislation\(^{(28)}\)—it is not to my mind a serious deficiency. The skills needed to marshall facts for a legislative hearing, to subpoena witnesses and to protect various privileges, are not so different than those lawyers develop for ordinary practice that special courses are necessary. Basic familiarities with the legislative process is helpful, but that can be given in a general introduction to law course as well as in a full blown course in legislation.

With respect to the skills necessary to facilitate political compromise, the technical skills of negotiation can perhaps be taught. The Harvard Law School has very recently experimented with several course in negotiation with an eye to training lawyers in the art of compromise. Whether there is truly a subject matter here for course work remains (for me at least) an open question.

In terms of developing within lawyers that sense of where proper negotiating standards are to be found, that is the business of all courses teaching substantive law. Not because older legal doctrine can be the standard for negotiating away disagreements about new law, but because behind much of such doctrine are those substantive moral principles that do form the basis for principled settlement of differences about the content of proposed legislation.

Four skills were identified as part of a lawyer's ability to transform legislative ideas into legal language: skills in policy formulation, knowledge of pre-existing law, skill in interpretation in the courts, and skill in legal composition itself. The first of these, skill in policy analysis, is taught through the development of analytic skill in all substantive law courses, with there usually being an


\(^{(28)}\) See Dolan, n. 27 supra, who quotes much of such commentary.
emphasis on such skill in first year law courses. Policy analysis is a large part of what is called "thinking like a lawyer," and much of Socratic teaching in American law schools is aimed at inculcating this skill. The critical interchange between professor and student is thought to enhance the student's ability to see inconsistencies in his policies, to question his means/ends calculations, to frame rules to fit desired outcomes in hypothetical cases, and the like. The degree to which such skills in policy formulation can be taught is certainly open to debate, but American law schools have had the teaching of such skills as a major item on their academic agenda since at least the 1930's.

The second of these kinds of contributions of lawyers, knowledge of pre-existing law, is of course taught by all substantive law courses. Realistically, however, a very small percentage of actual legal doctrine is ever learned in law school. The law relevant to most legislative proposals will accordingly be researched by legislative lawyers, not known from law school courses. The relevant skill to be developed by law schools is accordingly that of being able to do legal research.

Skill in doing legal research is typically taught by a first year course in legal research and writing. Such courses introduce lawyers to the basic tools of legal research, including computer retrieval systems. More advanced training in research is done through law school's most court programs, law review experiences, and the writing of papers for seminars or other written work requirements.

The basic skills of interpreting legal texts are taught in part in those substantive law courses which have a largely statutory basis; courses such as commercial law, which deals with the Uniform Commercial Code, as tax courses, dealing with interpretation of the Internal Revenue Code. In addition, most courses in legislation—at last as evidenced by the leading casebooks in the field—include a section on interpretation.

Some law schools offer a course specifically aimed at developing in students

(29) See n. 26 supra.
knowledge of interpretation theory. The Law Center of the University of Southern California has been a leader in developing such courses. All first year students are there required to take a course called Law, Language and Ethics.\(^{(30)}\)

This course introduces students to the role of logic, legal theory, semantics, factual knowledge, and morality in interpreting legal texts. Largely philosophical in nature, the course is designed to complement the other course by making explicit the skill at interpretation which the other courses teach implicitly as they focus on substantive law.

The fourth skill here, that of drafting proper, is only partly taught in law schools. Most schools have a course in legal writing, required for all first year courses. Such courses are aimed at inculcating legal writing skills generally, however, and not at legislative drafting. Students are typically given writing exercises in the drafting of research memoranda, briefs, pleadings, and “private legislation,” viz., wills, contracts, or trust arrangements. Rarely do such courses include any attention to the problems of legislative drafting.

Some specific attention to legislative drafting is given in some versions of the courses in legislation mentioned earlier. In-depth training, however, comes only in those few law schools that have separate courses in legal drafting or that have a legislative research and drafting center in which students can learn by doing. Separate courses in legal drafting are a rarity in American law schools.\(^{(31)}\) This is in part because of the staffing problem, since the teaching of drafting is a very labor-intensive operation. When they are offered, such courses focus on problems and teach law students drafting techniques through written exercises.\(^{(32)}\)

\(^{(30)}\) The course was initiated at USC in the mid-’60’s by William Bishin and Christopher Stone. Their book, *Law, Language and Ethics* (Mineola, N.Y.: Foundation Press, 1972), is still used at USC and at other schools. We also use a new version of the book, edited by myself, currently in mimeo form. The course has been exported to other American law schools by Chris Stone, Peggy Radin and myself, including the law schools at Harvard, Yale, Stanford, and University of California at Berkeley (Boalt Hall).


\(^{(32)}\) See the descriptions of the drafting programs at Indiana University, Columbia, and the
The training in drafting offered by the legislative research services of various law schools is also problem oriented, the difference being that the problems are real-life problems referred to the school by state legislatures or the federal Congress. The problem is then thoroughly researched by a small team of law students who are assigned to it, policy alternatives clarified, and then a draft (or drafts in the alternative) are prepared and sent to the legislature or Congress.

Such intensive, practical training is available only to a few students at any law school, and is available at all only at the few schools with such services. The three best known services are those at Columbia University, whose Legislative Drafting Research Fund was founded in 1911; Harvard, whose Student Legislative Research Bureau was founded in 1953, and the University of Michigan, whose Legislative Research Center was founded in 1950. (33)

The last of the major contributions lawyers make to the legislative process—their guardianship role for the legal culture—can be made only if law schools prepare their students in legal theory. Lawyers will perceive the deeper unity of the doctrines with which they work only with some help by the best minds working in each area of law. It is easy, in a complex body of law, to lose sight of the forest as one works with individual trees.

Law schools were until recently not very good at teaching their students to look for a deeper structure of principles in the law. Often the desire to teach students analytic skills through the Socratic method got in the way of teaching them also to seek larger moral patterns to the law. Highly particularized, critical interchange demands different skills than does synthetic construction of a theoretical system.

Presently the nation’s leading law schools have become more theory-oriented. Some courses, such as the Law, Language and Ethics course at USC mentioned

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(33) See Dolan, n. 27 supra, for a brief description of these programs. See also Frank Grad, Comments, in Dickerson (ed.), n. 31 supra, and in Dickerson (ed.), n. 2 supra, for more detailed descriptions of the Columbia University Program.
earlier, aim explicitly at convincing students that there is a deeper structure to law beyond mere surface doctrine. The other, substantive law courses aim at giving the students competing conceptions of what that deeper structure might be in particular areas of law. In constitutional law, for example, students are taught the need to have some theory of the First Amendment right of free speech in order to understand and critique the leading cases in that area. In property law students are taught the need for some general normative theory justifying the institution of private property—be it Lockean natural rights theory, utilitarianism, or some distributive justice theory—in order to justify certain doctrines allocating particular kinds of property entitlements. The trick in each cases is to convince future lawyers that such normative theories are not merely academic concerns, peripheral to the law proper, but that such theories are an integral part of the law that it will be their role as lawyers to foster and protect.