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# NEBRASKA LAW REVIEW

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## THE LAWYER AND THE LEGISLATIVE HEARING PROCESS\*

Julius Cohen\*\* and Reginald A. H. Robson\*\*\*

Despite the fact that a considerable number of lawyers are often called upon to appear at committee hearings to argue the merits or demerits of bills affecting the interests of their clients,<sup>1</sup> there are many of them—particularly those who have not ventured beyond the pale of the courtroom—to whom the legislative hearing process remains somewhat of a mystery. And when they are confronted with a situation that requires an appearance at a legislative hearing, they are at a loss to know what to expect, let alone what to do. Take the case of the typical courtroom lawyer, untrained and inexperienced in legislative lawmaking, who is confronted with a situation which requires him—for the first time—to plead his client's case before a standing committee of a state legislature. He would want to know several

\* The authors gratefully acknowledge the assistance of Robert A. Barlow of the faculty of the University of Nebraska College of Law, and Robert E. Sorenson, formerly of the faculty of the College of Law, in the formative stages of this study; and of Donald Ravenscroft, Research Associate, in the implementing stage. It is not to be assumed, however, that these colleagues, who shared in the work, in any manner share in the responsibility for the study.

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<sup>1</sup> The extent of such activity is suggested by the following tabulation of the number of committee hearings in which there were appearances by lawyers during the 62nd session of the Nebraska Unicameral (1951):

<i>Committee</i>	<i>Total Number of Hearings on Bills</i>	<i>Committee Hearings at Which Attorneys (1 or more) Appeared</i>
Agriculture .....	39	7
Banking, Commerce and Insurance.....	47	33
Education .....	43	4
Government .....	81	31
Judiciary .....	103	42
Labor and Public Welfare.....	23	10
Miscellaneous Appropriations and Claims....	34	8
Public Health and Miscellaneous Subjects....	55	18
Public Works .....	51	25
Revenue and Taxation.....	41	20
Grand Total .....	517	198

Percentage of total committee hearings at which attorneys appeared 38.3%

Note: Only private attorneys were included in the above tabulation; public attorneys, e.g. city attorneys, the revisor of statutes, and the attorney general were excluded. If the number of attorneys appearing at each hearing were tabulated, the figures in the above right hand column would be enhanced considerably. For example, as many as eight attorneys appeared at each of several hearings before the Judiciary Committee.

things before preparing for battle on unfamiliar terrain. How much weight, for example, does a committee recommendation concerning a bill carry with the full legislative body? Are the committee members really concerned with coming to grips with the facts that are relevant to a policy issue prior to making their recommendations to the full house? What is the nature of the fact-finding and fact-checking machinery available to committees at the hearing stage? How should he plead his case—with rigorously adduced evidence, with tightly reasoned arguments?

On the assumption (1) that there are many courtroom lawyers who would welcome guidance in what to them is still an uncharted field; and (2) that the available literature offers little illumination on the subject, it was thought fruitful to seek the answers to these and related questions by an intensive probing of the legislative hearing process in Nebraska.<sup>2</sup> Despite the fact that Nebraska is unique in that its legislative body is unicameral in form, preliminary observations suggest that the process by which bills are given a "hearing" in Nebraska is essentially no different than that which is operative in most of the other jurisdictions with bicameral legislatures.

The probing took several forms: (1) the official journal of the unicameral, which records the day to day proceedings of that body, yielded information concerning the extent to which the recommendations of the standing committees with respect to bills corresponded with final legislative action; (2) an attempt to catch the flavor of the hearing process was made by on the spot observations, by the use of transcripts of committee hearings,<sup>3</sup> by discussions with practitioners who have participated in the hearing process, and with government personnel who have worked in various capacities with the legislative committees; (3) the ascertainment of the functions of the hearing process was undertaken by extensive interviews with the chairmen of ten standing committees of the unicameral during its 1952-1953 session.<sup>4</sup>

<sup>2</sup> Excluded from the study are hearings on long-range legislative proposals that are conducted by legislative interim committees. Such hearings are not typical of the hearings by standing committees on the bulk of the bills introduced at a legislative session.

For an account of the hearing process on the federal level, see Cohen, *Hearing on a Bill: Legislative Folklore?*, 37 *Minn. L. Rev.* 34 (1952).

<sup>3</sup> Permission was graciously extended to obtain, by wire-recording, full transcripts of the proceedings of twelve hearings on diversified bills.

<sup>4</sup> Of the fourteen Standing Committees, three of them, the Rules, Intergovernmental Cooperation and Enrollment and Review Committees, are not concerned with the consideration of the merits of legislative proposals. Another, the Committee on Miscellaneous Appropriations and Claims has as its principal function the examination of claims against the State. Since the study was concerned primarily with the operation of the public hearing process as a method for determining the merits of legislative proposals, it was decided not to include these four standing committees within its scope.

With respect to the latter, a few comments concerning the procedure of the interviews are in order. On the basis of preliminary discussions, it was felt that the chairmen of the standing committees would be better able to give a more accurate picture of the machinery of the hearing process than would the ordinary members. This was confirmed subsequently by disclosure in the interviews that it was the chairman, and not the committee as a unit, who assumed responsibility for whatever arrangements were necessary for the staging of a hearing. The interviews with each of the chairmen lasted between an hour and an hour and a half. Every effort was made to avoid a "question and answer" type of interview; as far as possible, the interviewers endeavored to direct the interview into a general discussion of the committee procedures, asking the prepared questions at appropriate points in the discussion, and noting both responses to questions and any other general comments that appeared to have relevance to the purposes of the study. The following are our findings:

#### A. The Weight of Committee Recommendations<sup>5</sup>

Woodrow Wilson's observation that "Congress in session is Congress on public exhibition whilst Congress in its committee rooms is Congress at work"<sup>6</sup> could well apply to the state level of legislative activity. The committees to which bills are referred for a hearing are in reality little legislatures, whose findings and recommendations concerning the disposition of legislative proposals carry great weight with the full legislative body. In this respect, the experience in Nebraska is illuminating. In the 1952-53 session of the Unicameral there were 568 bills which were referred to and acted upon *after hearings* by the standing committees.<sup>7</sup> Of these, 230 were reported out without amendments, 166 were reported out with amendments, and 172 were "indefinitely postponed" (which means that the committee voted not to report these measures out). Of the 230 that were reported out without amendments, 139<sup>8</sup> or 60% of them were passed by the full house without modification. Of the 166 that were reported out with amendments,

<sup>5</sup> We are especially indebted to Donald Ravenscroft, Research Associate, for collecting the empirical data contained in this portion of the study.

<sup>6</sup> Congressional Government 79 (3d ed. 1885).

<sup>7</sup> There were a total of 595 introduced; of these, there were 27 bills upon which there was no committee action, i.e. 7 were withdrawn, 2 were indefinitely postponed by the legislature, and with respect to 18, the rules were suspended to by-pass the committee—thus leaving a total of 568 bills, concerning which there was committee action.

<sup>8</sup> This figure does not include a total of 70 bills that were amended by the full legislative body after the committee had reported them out. It is reasonable to assume that some of these 70 bills were amended for minor or stylistic reasons; if they were included in the count, the ratio between the committee recommendations and final legislative action would be enhanced.

100<sup>9</sup> or 60% were passed by the full house without further modification. Of the 172 that were indefinitely postponed, 168 or 98% failed ultimately of passage.<sup>10</sup>

Accordingly, it is not implausible to assume that it is more the rule than the exception that, when a standing committee recommends or rejects a legislative measure, the chances are much better than even that the full legislative body will follow suit. There is reason enough for this. The staggering number of bills to screen and consider, the unwieldiness of the full legislative body for this task, and the pressure of time make reliance on the "little legislatures" nigh on imperative. Thus the importance to the lawyer of winning the battle of the committee, and the attention that must be given to one of the crucial stages of this battle—the committee hearing. What kind of proceeding is it? What is it supposed to accomplish?

#### B. The Functions of the Hearing Process

The interviews with the chairmen of the standing committees reveal at least three functions that are ascribed to the hearing process.<sup>11</sup> Considered the most important is the function of gathering facts to enable committee members to make reliable judgments concerning legislative proposals. (Nine of the ten chairmen regarded fact-finding as a function of the hearing process; five of the nine regarded it as the most important function, two as the second most, one as the third most, and one as the fourth most important.) Next in importance is the function of giving the public an opportunity to express its views—to "blow off steam," as it were. (Eight of the ten chairmen were of the view that this was also a function of the hearing process; four of the eight regarded it as the most important function; three as the second most, and one as the third most important.) Third in importance is

\* This figure does not include a total of 48 bills that were amended by the full legislative body after the committee had reported them out; as indicated in note 7 supra, if those bills with technical and stylistic amendments were included in the count, there would be a higher ratio between the committee recommendations and final legislative action.

<sup>10</sup> The experience of the 1951-52 session reveals a strikingly similar pattern. In that session, there were 539 bills which were referred to and acted upon after hearings by the standing committees. Of these, 233 were reported out without amendments, 172 were reported out with amendments, and 134 were indefinitely postponed. Of the 233 that were reported out without amendments, 153, or 65% of them were passed by the full house without modification. Of the 172 that were reported with amendments, 103 or 60% were passed by the full house without further modification. Of the 134 that were indefinitely postponed, 132 or 99% failed ultimately of passage.

<sup>11</sup> The interviewer asked: "As a member of the \_\_\_\_\_ committee of the unicameral, what purposes do you think the public hearings undertaken by your committee serve at the present time? Could you possibly give me some idea of the relative importance of these purposes? For example which is most important, which is least important and so on."

the function of providing members of the committee information regarding the competing viewpoints that gather around a legislative proposal—of furnishing a political barometer for the purpose of identifying and assessing the political forces that are arrayed for and against the proposals. (Four committee chairmen regarded this as one of the functions; one of these four regarded it as the most important; the other three as the third most important.)

At the outset, the lawyer is confronted with the problem of ascertaining his role in relation to these three functions. With respect to the function of “blowing off steam”—even assuming, *arguendo*, that such activity assuages rather than actually exacerbates the tensions of the competing groups—this may be accomplished without argument and without even paying lip service to the standards of relevance and rigorousness to which he is normally accustomed. For this, the skills and services of a lawyer are scarcely needed. With respect to the third function, that is, of providing a political barometer, the skills of a lawyer are not especially involved, save for the task of selecting those witnesses who would register the greatest amount of political influence. It is with respect to the first function, that is, fact-finding, that his role would seem to be more clearly defined, and to which his skills would be more clearly attuned. How is this function performed?

### C. The Fact-Finding Function of the Hearing Process

#### *The Aura of Judiciousness*

There are times when the hearing on a bill is staged with the physical trappings of a courtroom, and conducted with the quiet dignity of a judicial proceeding. There are other times when the sentiment concerning a legislative proposal is fever-pitched and the presence of reporters, of packed galleries, of cameras and loud speakers and of big-name witnesses suggest the flavor of a tense Hollywood drama. But the ordinary bill is apt to get a hearing around a conference table with the procedure, on the surface at least, resembling a meeting of a board of directors listening to a policy proposal by an officer of a corporation. By and large, one may expect considerably greater informality in the committee-room than in the courtroom. There are no technical rules of evidence; there is usually no special form in which the arguments on the merits or demerits of a bill need be cast; nor any special kind of brief or memorandum that is required. The time allotted for the appearance of witnesses is usually divided equally between the opponents and proponents of a measure. If they are organized, it is normal practice for the leader of each of the contending groups to sub-allocate the allotted time among their respective witnesses, and to plan the over-all strategy for the presentation of the testimony. Even with organization, testimony is often repetitive and overlapping; but if organization is lacking, there is even a greater

probability that the testimony will suffer from these defects. At the opening of the hearing, the chairman of the committee announces that Bill No. — is under consideration, and asks if there is anyone who wishes to speak for or against it. A witness on behalf of the measure rises to be recognized, and the hearing is under way. The committee members usually maintain an air of judicious impartiality throughout the proceedings. It would be a rare committee, indeed, that would not endeavor to leave the impression of being objective and open-minded concerning the issue of policy before it; it would be unusual if it did not try to create the impression that the issue would be judged with the same serious detachment as would a court confronted with an issue of law. But the aura of judiciousness is immediately marred by two factors: (1) the availability of pre and post-hearing access to committee members, and (2) the presence of predispositions.

*The Factor of Access: Pre-Hearing and Post-Hearing*

Private access to a committee member prior to a hearing on a bill is quite normal. Long before the bill is scheduled for public hearing a private hearing is usually available to those who are able to get to the legislator's ear—in the legislator's office, in the hotel, in the rooms surrounding the legislative chambers. Sometimes access comes easily; often it requires prestige, political connections, a certain economic status, or some other manifestation of power. It is common practice to send out "feelers" on how each member of the committee will probably vote on the measure, and then endeavor to win over as many recalcitrants as possible by various types of persuasion, pressures, or promises. This is the pre-hearing "softening-up" process in which the objective is to cultivate favorable predispositions and to obtain as many prior commitments as are possible before the actual hearing on the merits of the measure.

Of course, those committee members who have been elected on a political platform pledged to support or oppose a measure long before it was introduced and sent to the committee for a hearing need not be subjected to the "softening-up" process at all. With respect to them, access for this purpose is unnecessary.

What is true of pre-hearing access is also true of post-hearing access, if there is a sufficient time interval between the hearing and the committee recommendation. Commitments may be obtained by various means; through pressure exerted by party leaders, by trading the support for one bill in exchange for the support of another, by subtle threats of political reprisals or promises of support, by an appeal to friendship or ethical principles, etc.

All this is quite foreign to a courtroom lawyer to whom the word "hearing" on the judicial level carries with it entirely different con-

notations. There, such private pre-hearing and post-hearing access are virtually unheard of.

*The Factor of Predispositions*

Where the lawyer is appearing before a court, he would be reasonably certain that the judge or judges had not been approached or briefed privately by counsel concerning the issues prior to the hearing itself. He would, of course, expect the judges to be human and therefore to carry with them certain bents or predispositions, based on background, training, philosophy, etc. But he would not expect a judge to have made up his mind on the issues before the evidence is in or to be personally interested in the outcome of the decision without disqualifying himself from the proceedings. Yet, though these things would not be expected of a judge, they might reasonably be expected of a member of a committee considering the merits of a bill at a hearing. Though differing as to the extent, all of the chairmen admitted the existence of predispositions with respect to measures referred to their respective committees.<sup>12</sup> Six of the chairmen made no distinction, with respect to their predispositions, between bills which they introduced, and other measures. The existence of these predispositions ranged from 10% to 60% of the total number of bills considered by their committees; the average occurrence of predispositions for these six chairmen was with respect to 31% of the total number of bills. The remaining four chairmen also acknowledged the presence of predispositions, but with respect only to the bills that they themselves introduced.

On the judicial level the lawyer finds a distinction between those who prosecute a cause and those who judge it. However, on the legislative level, it is not uncommon at a hearing for a committee member—even the chairmen—to participate in the judging of a bill that he himself has sponsored because of previous political commitments. He may often step out of his committee role and appear as a witness on behalf of a bill. But he is apt to step back into the role of committee member when the measure is put to a vote.

Does this mean that the legislative hearing process is not the forum for adjudging a bill on its merits and that, what with predispositions, it is useless for a lawyer to prepare and argue his case publicly before the committee with rigorously adduced evidence? That depends. The hearing might, under certain circumstances, be mere “window dressing” for a decision on a bill reached prior to the hearing. This may

<sup>12</sup> Each member of the ten standing committees was asked: “Are there any proposed bills brought before your committee about which you have already made up your mind previously, and therefore upon which you do not need further facts or information to decide whether you are in favor of the proposal or against it?”

“About what percentage of the total number of bills that are referred to your committee do these bills represent?”



be the case, for example, when the issue is politically judged and is decided beforehand strictly on party lines, or where other predispositions hold sway. When, in such cases, the lawyer is convinced that the ears of the committee are actually, though not ostensibly, closed to argument and that predispositions are not favorable to his cause, he, of course, still might find the hearing an advantageous vehicle for reaching out beyond the committee members to the public at large. This requires an issue that is newsworthy, a presentation that is shrewdly calculated to make good copy, and a press that is either eager for grist, or friendly, or both. The pressure of an aroused segment of the population has been known to make many a committee member retroactively see the light.

#### *The Fact-Finding Machinery*

But predispositions were acknowledged to exist with respect only to a portion of the measures brought before each committee. With respect to those measures concerning which the committee members, either collectively or individually, have an open mind, the hearing is regarded by most of them as the machinery for finding the facts upon which their recommendations are to be bottomed. Let us examine the nature of this machinery.

It is obvious that if the public hearings were *planned* to obtain the most reliable information upon which the committee members would base their recommendations, they would (1) isolate *beforehand* the issues of fact around which the testimony at the hearing would revolve, (2) take steps to invite the most competent witnesses to attend each public hearing, rather than leave it to sheer chance that they might in fact attend, and (3) adopt a procedure that would encourage the exclusion of irrelevant and other non-rigorous types of testimony. That these standards are not met is quite evident.

#### (1) *The Isolation of the Issues*

First of all, the committees *qua* committees do not plan any agenda for the hearings.<sup>13</sup> Moreover, when asked whether they individually have sufficient time prior to the public hearing to decide what facts or information should be supplied by the witnesses at the public hearings so that the issues may be joined, six of the ten chairmen replied "No," and of the four who replied in the affirmative, three made the following qualifications: (a) "Very seldom," (b) "On important bills," and (c) "Whenever I can." If this is the case with respect to the chairmen who, after all, are in charge of the hearing, it is reasonable to as-

<sup>13</sup> The interviewer asked: "When a bill is referred to your Committee for consideration, is the work of getting witnesses, securing facts and information and so on, undertaken: (a) by each Senator individually? or (b) by the Committee as a whole?" All ten chairmen indicated that it was done individually.

sume that the performance of the regular members of the committee in this respect is even more inadequate, or at best on a par with that of the chairmen. Thus, the hearing takes on many of the aspects of an adversary proceeding common to the judicial sphere, with the burden upon the competing witnesses to isolate the relevant issues involved in a legislative proposal and to supply most of the information upon which committee members are to base their recommendations. Unlike the judicial form of adversary procedure, however, there is no requirement that the contending parties join issue in argument. This has resulted in a great deal of confusion and lost motion. With each side free independently to determine the relevant issues in dispute, the chances are good that they will often not come to blows, thus denying the illumination that the heat of competitive argument is presumed to supply. For example, in the public hearing on the bill to abolish rent controls in Nebraska, it was found, after an intensive analysis of a verbatim report of the hearing, that the proponents of the bill made *eleven* general claims. Of these, the opponents completely ignored *six* of them; they merely denied *one* of them by maintaining the converse; they discussed (presented reasons or evidence for rejecting) only *four* of the claims. On the other hand, the opponents made *four* claims (in addition to the five which denied or discussed the proponents' claims). Of these, *two* were ignored by the opposition, *two* were merely denied by the proponents by asserting the converse, leaving no claims which were discussed. In sum, therefore, of some fifteen claims, eight were completely ignored, three were merely denied, and four were discussed.

The frequent failure at the hearings to meet head-on in argument is indeed, under the circumstances, quite understandable. Since there is no machinery which provides that the arguments of contending witnesses be made available for inspection beforehand by witnesses on both sides, knowledge of an adversary's argument prior to the public hearing is limited to guesswork. With respect to claims and arguments that are not foreseen, it is sometimes difficult properly to answer or refute them on the spot. They are then either ignored, or categorically denied, or, at best, discussed in a superficial manner. Subsequent study, of course, might provide competent rebuttal arguments, but it is unusual practice for a committee to postpone the making of a decision on a bill in order that additional evidence might be obtained.

#### (2) The Witnesses

Because of the absence of committee planning, the quality and availability of witnesses is, by and large, governed by chance—that is, the chance that either the chairman or the individual members will see fit to make such invitations or that the competent witnesses will, on their own initiative, attend the public hearing. But although all of the chairmen stated that they took it upon themselves individually to

invite people to give testimony at public hearings, the percentage of hearings to which such invitations were extended by the various chairmen ranged from only 1% to "almost 100%," the average being 25%.<sup>14</sup> It would seem reasonable to assume that the percentage for the ordinary members of each committee would probably be lower or at best the same as for the chairman.

Since the legislative committees do not make any organized effort to insure the presence of the most competent witnesses, whether those who appear will have anything worthwhile to say will depend, among other things, upon the financial resources of those whom they represent. Organized groups interested in a legislative proposal often endeavor to present a coherent case by pooling resources for collecting evidence, and by allocating various arguments to selected witnesses. Those who represent unorganized interests, with little or no financial resources for fact-gathering, are obviously at a disadvantage. Without such resources, the unorganized are scarcely able to compete with the organized. Without such planning, overlapping and confusion of testimony are inevitable; indeed, competent witnesses are often denied an opportunity to develop their case merely because incompetent, repetitious ones preempt too much of the hearing time.

### (3) The Rules of Evidence

If the courts are to be distinguished by the presence of highly technical rules of evidence; if administrative tribunals are to be distinguished by the presence of more informal rules of evidence; then legislative committees are to be distinguished by the virtual absence of evidentiary rules at the hearing stage. It is seldom, indeed, that a witness is cautioned to refrain from introducing testimony that is irrelevant, incompetent or repetitious. Much of this type of testimony beclouds the issues at the public hearings. Anecdotes, personal experiences, qualifications of witnesses completely unrelated to the area under discussion, the use of popular cliches, emotionally-toned arguments, and question-begging devices are often sprinkled generously throughout the hearings. Much of this type of testimony undoubtedly is used in good faith by witnesses untrained in the art of rigorous thinking; some of it, undoubtedly, is used consciously to compensate for weaknesses in one's own case, or to deflect from otherwise unanswerable arguments of the opposition. But whatever the motive,

<sup>14</sup> The response, "almost 100%," was taken as 100% to obtain the average. Excluding the chairman whose response was imprecise, that is, "almost 100%," the average would be 17%. Theoretically, of course, if all of the members of each committee extended invitations to people to attend public hearings on an average of 17% of the total number of hearings, this could mean that witnesses would be invited to every public hearing, but this would occur only by chance or accident, since there is no attempt made to coordinate the invitations of individual committee members.

it is clear that the absence of a procedure that would encourage the exclusion of such evidence does little to enhance the fact-finding function of the hearing process.

*The Machinery for Evaluating the Testimony at the Hearing*

Testimony at a hearing that is adversary in form is at best competitive. There are conflicting claims and conflicting evidence supportive of these claims. Often the evidence is highly complex and technical; often it is emotionally charged and deceptive; often it is illogical. How sift the good from the bad? In brief, how evaluate the evidence? The task is enormous. How do the committees cope with it?

At the outset, the task of evaluating the testimony at a hearing is encumbered by the fact that provision is not made for obtaining full transcripts of the hearing proceedings. If a committee member wishes to review and evaluate the testimony of witnesses, he must rely chiefly on memory or on his own hurried notes. Sometimes, of course, witnesses furnish the committee with printed copies of their testimony, but such a practice is not required; nor is it followed by those with more limited resources.

Much is wanting, too, by way of obtaining assistance for the members of the committee in the post-hearing evaluating stage. With regard to whether the chairmen ever secured assistance in evaluating testimony given at public hearings,<sup>15</sup> nine of the ten respondents said "Yes." However, the frequency with which such assistance was requested ranged from 5% to 25% of the total number of hearings considered by the respective committees; the average frequency was only 12%. Thus, in 88% of the cases, on the average, such assistance is not secured. Even more significant is the fact that some 89% of the bills on the average are—according to the chairmen—disposed of in the committee's executive sessions in less than one hour; and that 27% of these are disposed of in less than five minutes.<sup>16</sup> This would hardly allow sufficient time for the members to secure evaluative assistance even were competent aides available.

The absence of transcripts, the lack of assistance in evaluating the testimony at the public hearings and the little time that is devoted to the evaluation of the testimony following the hearings might theoretically be due to the fact that the committee members are them-

<sup>15</sup> The chairmen were asked: "Do you personally ever secure assistance in evaluating the testimony given at public hearings, after the hearings have been completed?" (if yes): How frequently does this occur? (approximate percentage of total number of public hearings for his committee).

<sup>16</sup> With respect to this, the chairmen were asked: "Could you give me a rough idea of the amount of time which it takes for the Committee in executive session to decide whether to report the bill out or not?: Less than 5 minutes —%; 5 minutes to one hour —%; over one hour —%."

selves able to evaluate the testimony concerning more than 90% of the bills "on the spot." This might be (1) because the quality of the testimony at most of the hearings is so evidently poor, or (2) because it is so self-evidently excellent, or (3) because most of the measures involve issues of such little complexity, or (4) because the committee members have such extraordinary memories and evaluative skills, that subsequent evaluative procedure is unnecessary. But if the isolation of the salient issues and the presence of competent witnesses at the hearing is left primarily to chance, the likelihood of testimony that is "self-evidently excellent" with respect to most of the legislative proposals seems quite remote; if the testimony is so evidently poor, then the hearing, obviously, is not the proper fact-finding forum; and if most of the measures are not very complex then, for most of them, the hearing would be unnecessary. As to the memories and evaluative skills of the average committee members—it would seem most unlikely that they are endowed with such retentive memories that resort to the record of the testimony for post-hearing evaluation would be unnecessary (some of the hearings consume as much as three hours, or more); and it would be equally unlikely that they are sufficiently learned in all the various branches of specialized knowledge to which the bills in an average session of a legislature relate.

#### D. Conclusions

Several obvious conclusions emerge from this study: (1) that if the lawyer wins over the membership of the legislative committee to which a bill is referred for a hearing, his chances for a favorable decision by the full legislative body are enormously enhanced; (2) that winning over the membership of a committee may be accomplished by capitalizing on predispositions or by cultivating favorable attitudes by a private hearing with committee members; (3) that where predispositions are unfavorable, the hearing might be utilized as a forum for attracting the press and thereby reaching influential segments of the population; (4) that there is an area within which predispositions do not necessarily hold sway, and in which the avowed function of the hearing is to obtain reliable evidence concerning the merits or demerits of a legislative proposal; (5) that, within this area, the hearing is not planned by the committee to assure the isolation of the relevant issues, the presence of competent witnesses and the presentation of the most reliable evidence; (6) that if a case is to be made for or against a legislative proposal at the hearing stage, the burden, therefore, is primarily on the proponents or opponents to carve out the salient issues of policy that are involved, and to select the witnesses for the presentation of the facts relevant to those issues; (7) that the procedure at the hearing is basically adversary in nature, and is operated on the assumption that if there is anything that is worthwhile to be heard

concerning any pending measures, the adversary parties will somehow bring them out, and that in the clash of opinions truth will somehow emerge; (8) that the evaluative process at the post-hearing stage is inadequate; (9) that unless falsehoods, errors, and irrelevancies in the evidence presented are clearly exposed by the contending parties, the chances for independent exposure by the committee—especially when the evidence is technical and complex—are remote.

#### E. Recommendations

To those lawyers who would seek optimum benefits from the hearing process by operating within its existing framework, however defective it might be, a knowledge of that framework is obviously essential. This is so even with respect to those who profess to represent a cause that is presumably “on the side of the angels”—for to ignore rather than master the process with all of its infirmities, however defective it is, plays too easily into the hands of an unscrupulous opposition. But a knowledge of that which exists also suggests a point of departure for those who sense the need for reform. Although the bar has often been in the forefront of the struggle to correct deficiencies in the operation of the machinery of government, its vigilance has been limited primarily to matters administrative and judicial. It should, however, not overlook the need for focusing attention on matters legislative—especially as they relate to deficiencies in the hearing process. That there are many deficiencies can scarcely be denied. The problem of how to correct them—assuming a will to correct—nevertheless still remains. How best proceed? The following three alternative proposals may, in a preliminary way, serve to clarify the directional lines of attack:

1. If the hearing process is to provide a more impartial consideration of proposed legislation and a more adequate fact-finding and fact-evaluating machinery *within the present adversary-burden of proof framework*: (a) committee members who have made previous commitments concerning a legislative proposal, or who appear as witnesses at the hearing should disqualify themselves from the judging function of the committee and from voting with the committee on the merits of the measure; (b) strictures—moral, legal, or both—should be placed on those who desire to influence committee action by privately-arranged hearings with the judging members of the committee; (c) proposers of legislation should be required to furnish a comprehensive unequivocal statement concerning the purposes of the measure—what it seeks to achieve, and why and how it seeks to achieve it; (d) committees (with the aid of competent staff members) should isolate and make known to those who are to appear at the hearing the relevant issues to which the testimony at the hearing should be directed—for example, whether there is need for the proposed legislation, the con-

sequences that would follow if it were enacted, whether the means proposed would be efficacious with respect to the ends sought, etc.; (e) competent witnesses should be invited or encouraged to attend; the incompetent, repetitious ones, discouraged; (f) non-technical rules for the exclusion of irrelevant, repetitious evidence—somewhat along the lines followed by administrative tribunals—should be adopted; (g) a competent staff should be available to assist committees in independently obtaining relevant information concerning a legislative issue that the hearing fails to produce; (h) a verbatim transcript of the hearing should be available so that the testimony may be reviewed and assayed; (i) a competent staff should be made available to help committee members to distil bulky testimony to reviewable proportions, to interpret technical and complex data, to check on the reliability of witnesses and the accuracy of data; (j) finally, lest the quality of the evaluative machinery suffer from the absence of scrutiny and surveillance, the committee should be required to issue a fully reasoned report, which would contain not only its recommendations concerning legislative proposals, but a comprehensive account of the findings and reasons upon which they are bottomed.

2. For those who are persuaded that the adversary-burden of proof framework, at its best, is not the most efficient method for obtaining the most reliable evidence upon which judgments concerning legislative proposals are to be made, it has been proposed: (a) that the hearing be placed in the hands of a “staff of competent investigators, selected without reference to political party affiliation and trained in scientific method and in the specialized disciplines to which the proposals relate”; (b) that “those who introduce bills . . . be required to append to each of them a statement of the fact situation which prompted the proposal, a justification for the means-end hypotheses that is advanced and a rationale of the instrumental value judgment which it embodies”; (c) that “bills . . . be routed to the staff after first reading for an initial processing and preliminary report on whether the salient information involved is ‘ascertainable,’ ‘non-ascertainable,’ ‘partially ascertainable,’ etc.; if capable of being ascertained, what it would involve by way of time, expense and facilities for the job”; (d) that “if it is determined that an investigation would yield no fruitful information because of the lack of available time or adequate knowledge, or of the absence of the know-how for getting at that knowledge (as is, regrettably, too often the case), the investigation . . . be dispensed with and the legislator . . . be obliged, as he is now, to rely on his own resources or intuitive judgment for guidance”; (e) that “if it is determined, however, that the facts are objectively ascertainable, and an investigation is undertaken [that it] be designed to cut unnecessary conjecture and disputation to a minimum, to yield the maximum amount of reliable information

and to distil it in the alembic of impartial critical judgment"; (f) that "the methods utilized—whether by interview, testimonial, field study, etc. . . . be designed and tailored to fit the specific legislative proposal; and the allegations advanced with respect to them . . . independently checked. A documented report issued by a distinguished, independent staff, bent on not compromising with the truth, would have real stature—indeed, sufficient to be taken seriously by the public and the press, and, in turn, by the law-makers. . . ."17

The merit of this proposal is that it would secure appropriate information from sources most competent to provide it. The disadvantages are: (a) that it would be costly, and (b) that it would eliminate two of the avowed functions of the hearing—that of furnishing a "political barometer" to measure the strength of the competing forces arrayed for and against a legislative proposal, and that of providing a "safety valve" for those members of the community who wish to express their views publicly. But with additional cost, most likely would come better legislation, and with it more efficient and, therefore, more economical means for achieving desired goals. For the present crude "political barometer" a modern scientific polling technique could be employed; and for one "safety valve" that is dispensed with, other outlets for tensions would be available, e.g. the press, and the polls.

3. An alternative plan would be to adopt the second proposal but add to it the requirements (a) that a public hearing be held on the findings and the report submitted by the staff to the committee, (b) that witnesses and committee members be permitted to question the authors of the report on its contents, and (c) that witnesses be permitted to file objections and to submit further relevant evidence. This would permit the retention of the "political barometer" and "safety valve" functions of the hearing, though at extra cost.

These alternative proposals are addressed not only to the bar, but to those conscientious, harassed legislators whose work has been too time consuming to permit sustained reflection on the problems of the hearing process. To be sure, they are—in different degrees—fraught with practical difficulties, and carry with them serious political implications. For the moment, though, they are rough targets; and, if they do not immediately solve the deficiencies of the legislative hearing process, it is hoped that at least they will help point the way.

<sup>17</sup> See Cohen, note 1 *supra*.