LEGISLATION, CASES AND MATERIALS. By Frank C. Newman and Stanley S. Surrey. Englewood Cliffs: Prentice-Hall, Inc., 1955. Pp. xvii, 729. $9.50.

"LEGISLATION" is a term covering both a process and its product. Legal education may once have limited its concern with legislation to the product—to warning the future practitioner to watch for the intrusion of the slightly alien element of statutes into the symmetry of the law, and to preparing him to disarm the intruder with canons of construction. That was long ago. Codes, statutes and their uses are now the central content of many substantive courses. "Legislation," as a specific subject of legal study, is concerned more and more with the process.

The legislative process is, of course, a fascinating field of study, most certainly so to a class or seminar of law students whose own interests have led them to select the customarily elective course in legislation. Few law courses can match for interest its overt concern with policy formulation, with techniques of law-making, with sources of persuasion and decision which must seem wholly unsystematic compared with the disciplines of positive law and of adjudicative processes.

It is not easy to define, beyond constitutional law, a "law of legislation" as the proper content of such a law course. Its advance sheets are the daily newspapers. These same concerns which give immediate and dramatic interest to a study of the legislative process also blur most of the remaining conventional lines between "law" and "government" or "political science." More than in most legal courses, there is wide room for choice as to the main function of the lawyer and of legal education.

At the outset of the preface to their *Cases and Materials*, Professors Newman and Surrey explain that their book is designed to emphasize (1) the lawyer's role in the legislative process, and (2) the drafting of statutes. They refer to the need for bridging law and political science and mention the fruitful participation of non-law graduate students in the course in which the book's materials were developed and tested. They believe that "the student should be reminded constantly that he is studying a subject which borders on the front lines of political warfare. . . ."[1] Thus, in compiling this book, the authors have generally resolved the necessary choices in favor of a broad presentation of the complexity of the modern legislative process in an era of big government.

In line with this objective, they have made the most of the opportunity to capitalize on the inherent interest in the perpetual legislative struggle, which is daily recorded in many public journals besides the *Congressional Record* and the reports of adjudicated cases. They have drawn heavily on committee hearings and reports, administrative documents and newspaper columns. On a half-dozen topics Herblock cartoons from *The Washington Post* provide editorial commentary more effective than a page of scholarly text.

Altogether, the illustrative materials collected here are as fresh and provocative as possible. Here are the crime investigations of the Kefauver subcom-

1. P. vi.

mittee; the Bureau of Standards' AD-X2 case; Senator McCarthy's negotiations with Greek shipowners; the hearings generally identified by the tagline reminiscent of a football game: "Army-McCarthy"; the numerous investigations of the loyalty of authors and actors, and federal, state and United Nations employees—the familiar controversies which throughout the past decade have formed so much of the public image of the role of legislators in the scheme of government. Yet, besides being *causes célèbres*, these controversies also made much modern law on legislative powers and procedures, and they are skillfully presented here as situations of maximum stress to point up the unsolved problems uniquely inherent in our separation of governmental powers. The book remains a text in law, only incidentally in political science, always focusing on the effects of these problems on the law and lawyers' work and on the role of law and lawyers in managing the problems.

What is that role? Lawyers of course meet the legislative process as judges and as advocates, as government attorneys and administrators, as members and on staffs of legislatures, and as counsel to persons affected by existing or proposed legislation. More recently, the image has expanded to include the man to whom the witness in the spotlight turns again and again before answering, or declining to answer, the questions of a legislative investigating committee—and the man who travels throughout the nation in the tasks of "determining the attitude of Senators" on pending legislation and of "distribution of campaign funds."[2] If legislation is necessarily a "problems" and "skills" course, the question is which problems and which skills are properly the lawyer's.

This question is explicit or implicit throughout the materials that are placed in the first third of the course. Early in chapter one it is viewed from the aspect of professional ethics in a discussion of the American Bar Association's Canon 26[3] from Mr. Charles Horsky's book, *The Washington Lawyer*.[4] In chapter two federal and state lobbying acts serve both as guides to a discussion of lobbying and its regulation, and as examples of legislative and judicial wrestling with some of the thorniest possible issues of policy and draftsmanship. Chapter three surveys the procedures by which bills are enacted—and, incidentally, by which legislative history is made, as in the fascinating saga of the Blackfeet and Gros Ventre Tribes[5]—with a glance at judicial review of legislative procedures. Contemporaneously with the study of these chapters, Professors Newman and Surrey assign the collection, from sources outside the book, of the detailed statutory history of a recent act of Congress.

2. Report of the Select Committee for Contribution Investigation, SEN. DOC. No. 1724, 84th Cong., 2d Sess. 4 (1956).

3. "A lawyer openly, and in his true character, may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action."

4. HORSKY, THE WASHINGTON LAWYER 53-56 (1952).

5. P. 159.

Along with the subsequent chapter on drafting, these chapters deal with the lawyer's most typical role in the legislative process: that of representing a client with a stake in the enactment, amendment or defeat of legislation. If the legislation is of any importance or at all controversial, this is also where the lawyer ventures closest to "the front lines of political warfare"—an area which may be booby-trapped for combatants and noncombatants alike. Some of the differences between this battlefield and that surveyed in other law courses are related, with good humor, in Professor Bailey's story of the Employment Act of 1946 [6] and, with a note of bitterness, in Professor Cohen's analysis of congressional committee hearings.[7]

The committee hearing with its transcript, of course, seems to offer to interested persons and their attorneys the indispensable "record" of a bill. It is important, therefore, for lawyers to learn the place and function of these hearings in the legislative process. If hearings are customarily held by only one or two senators or congressmen who are most interested in the bill, often its sponsors or their chief opponents; if questioning is designed to bring out support for preconceived positions or to discredit opposing testimony; if committee staff members who will prepare the committee's report are committed to the views of the chairman or the committee majority, and are not independent, critical sifters of evidence—these differences from accustomed legal patterns merely reflect faithfully the different logic and discipline of the legislative process, within which the legislative counselor or representative must work.

For, unlike judges or jurors, a legislator is under no legal compulsion to stop and listen to opposing arguments on a bill before following the impulses of his general political or policy orientation. Presumably, this general orientation, as well as his announced attitude on specific legislation, played an important role in his election as a legislator. This is what it means, in practice, that the business of a legislator is not to adjudicate, but to legislate. His factual assumptions, whether correct or absurd, need be based on no evidence of record; his policy choices, whether statesmanlike or deplorable, are not limited to any pleadings or points raised in argument. If it were otherwise, the legislative process in our particular form of representative government would choke in a hopeless tangle of formal procedures within a few weeks. During the Eighty-fourth Congress 19,039 bills and resolutions were introduced in the two houses, 5,753 were reported out by the committees, and 1,028 public bills were enacted into law.[8] How could the most conscientious legislator independently judge the rightness of the ends, and the efficacy and safety of the means, of each of these measures? Inevitably, from the initial selection among proposals which are introduced, through the stages of introduction and the supporting speech, the editorials and statistics inserted in the *Congressional Record*, the letters requesting committee hearings and other committee action, getting a place for

6. P. 111.
7. P. 100.
8. 102 CONG. REC. D905 (daily ed. Aug. 20, 1956).

the reported bill on the legislative calendar, and finally to the floor debate and vote, a constant sifting of proposed legislation takes place which in effect delegates to those most interested—proponents, opponents, committee chairmen and their staffs—the task of making the record of claimed facts and claimed equities on each issue.

In the face of the pressures on the time and attention of legislators, hearings on any but the most important national programs cannot be expected just to happen in due course. In the sifting process which shapes the work of a legislative session, the scheduling of a hearing on a bill is itself already an advanced stage. It marks a major attainment by the bill's proponents and by its sponsor and supporters in the legislature. Much of the lawyer's work will, or should, have been done before this stage.

The period before the hearing is the time for negotiating compromises and amendments with others who have conflicting interests in the bill; for presenting one's claims and proposals, with supporting materials, to the legislators concerned, to committee staff experts and to executive agencies that may be expected to submit views on the legislation;[9] or alerting other groups whose interests in the bill parallel one's own and obtaining their assistance; for encouraging news coverage and editorial support for one's position; and, of course, for enlisting the interest of the legislator from one's own district and any others to whom one may have access.[10] The effectiveness of these preparations may determine much of the future course of the legislation in question. The hearings themselves, if held, serve as the forum in which all of the conflicting or interlocking claims of fact and of equity, by now thoroughly familiar to all active participants, are publicly recorded. Before the assembled audience of interested spectators and the press, whether national or local, both witnesses and legislators display their views for a record which is hard to amend. Positions stated and impressions made in this public forum are not easy to reverse. Much work remains to be done between a committee hearing and a floor vote, but the flexible opportunities of the pre-hearing period are now greatly reduced.

Perhaps the foregoing analysis implies for the legislative representative functions and activities that are not peculiarly a lawyer's. But they are honest and necessary functions and activities; whether and at what point they may go beyond a lawyer's specific and proper role in the legislative process returns us to the open questions posed by Mr. Horsky's discussion of Canon 26, and to the whole task of planning a law school course about that process. Certainly, the present book provides the materials for that task.

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9. Chapter four is devoted to the important topic of legislative-administrative relations. For the lawyer seeking to shape some legislative draft or policy, the first priority will often be to persuade the administrative agency concerned to accept or, better, to support his proposal—even more so if, in a return to customs of a bygone day, the electorate chooses executives and legislatures of the same political persuasion.

10. See HEARD, MONEY AND POLITICS 14-15 (Public Affairs Pamphlet No. 242, 1956): "what the contributors buy—access."

Such analysis of the materials on the legislative process can also offer much food for thought on the proper use and significance of legislative history in the interpretation of statutes. Thus it might be preferable to take up at this point in the course, rather than at the very end, the excellent materials included on this subject in the brief seventy pages of chapter eight. The fresh insights of a just-completed look at the dynamics of the legislative process can bring to life the theoretical controversies exemplified by Professor Max Radin's attacks on the fictional terminology of "legislative intent"[11] and Mr. Justice Jackson's more pragmatic criticisms of too intensive psychoanalysis of legislatures.[12]

This look at the process might suggest, for example, that the various documented steps in the progress of a statute be realistically seen, not as so many conscious group decisions in which a majority of legislators have participated, but rather as forms of "public notice" of their progressing activities by those who do participate. At this point, the student will understand that this latter group operates under that effective delegation of legislative powers without which the legislature could not accomplish the great bulk of its less important or uncontroversial work, but which is always subject to revocation when other members, alerted by the contesting participants or by constituents, withdraw the acquiescence of silence and disinterest. In interpreting legislation, should lawyers and judges eschew the anthropomorphic "intent" and "purpose" for the semantically neutral "meaning" and "function"? Or should they ascribe to the whole legislature the ascertainable or probable intentions and purposes of the actual, determinable persons in and out of the legislature who did shape the legislation in question?

Apart from such theoretical considerations, the suggested sequence might lend itself better to a comparison of the federal with the state legislative process and a discussion of some essential reforms in the procedures and documentation of state legislatures, in many of which no records of hearing testimony, committee reports or floor debate are available either to legislators themselves or for subsequent statutory analysis. State legislatures and laws are still likely to be of more frequent concern to most lawyers than Congress and its enactments, and reform and modernization at the state level should be one of the important objectives of courses in legislation.

This applies also to the chapters on legislative investigations, which occupy 300 pages in the book, and the materials and assignments on the drafting of statutes, a feature stressed by Professors Newman and Surrey. Whether problems raised by investigations will continue to justify the space and attention given to them here, only the future will tell. The drafting assignment outlined by the authors should be of great value, provided the hypothetical interest to be protected or policy to be served is identified sharply enough to permit concentration on the efficacy of the students' draftsmanship and on the problems of accommodating probable conflicting interests so far as possible without sacri-

11. P. 647.
12. P. 667.

ficing one's own. The lawyer's role as draftsman, too, is likely to be more frequent and more decisive at the state legislature—which may lack professional legislative or committee counsel and the crutches of manufactured legislative history—than in Congress. The book includes some excellent guides; best perhaps are the Drafting Rules of the Commissioners on Uniform State Laws.[13]

In summary, the authors have provided enough material to permit considerable variations in emphasis on different subjects. These *Cases and Materials* add up to a thoroughly modern source book; and legislation taught from this book is likely to be a lively and stimulating course engaging the full interest of its students.

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13. P. 582.

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