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Lawyers and Legislatures

John C. McDonald* and James S. Turner**

*The Government of democracy is favorable
to the political power of lawyers.¹*

SINCE ITS BEGINNING the American republic has depended on lawyers to run major portions of its government. Twenty-five of the fifty-two signers of the Declaration of Independence were lawyers. Twenty-four of America's thirty-eight Presidents have been lawyers. In the period from 1877 to 1934, seventy percent of American Presidents, Vice Presidents and cabinet members were practicing attorneys, while nearly half of all state governors between 1870 and 1950 were members of the legal profession.²

Lawyers have also played major roles in American legislative bodies. Thirty-one of the fifty-five members of the Continental Congress of 1787 were lawyers. All studies conducted on American legislatures indicate that the percentage of lawyer members far exceeds the percentage of lawyers in the general population. In 1964 attorneys numbered 300,000 or about .15% of the nation's 190,000,000 population. In the preceding fifteen years the number of lawyers increased at a faster rate than the amount of population.³ However, in spite of their small percentage of the total population, 54 percent of the United States Senators in the decade between 1947 and 1957 were lawyers. In the eight years of the 71st to 75th Congresses (1929 to 1937) well over half of the members of the Senate and House (as high as 76% in the Senate) were lawyers.

The number of lawyers in state legislatures, while not as dramatic, is still startling when compared to the total number of lawyers in the general public. In a study of thirteen selected states between 1925 and 1935, 28% of the members of the legislatures were lawyers. In 1949, 22 percent of all state legislators in the country were lawyers.⁴ Ohio has been no exception to the rule. In a study conducted of the Ohio Legislature in 1957, 30% of the members were lawyers.⁵ The current number

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¹ Alexi de Toqueville, *Democracy in America* 275 (Phillips Bradely Ed., 1948).

² Eulau and Sprague, *Lawyers in Politics* (New York; Bobbs-Merrill Co., 1964), quoted in Vern Countryman and Ted Finman, *The Lawyer in Modern Society* 47 (Little Brown and Co., Boston, 1966).

³ Countryman and Finman, *supra* note 2, at 1.

⁴ Eulau and Sprague, *supra* note 2, at 47.

⁵ *Ibid.*

of attorneys in the 108th General Assembly of Ohio is 14 of the 33 Senators, and 36 of the 99 Representatives.⁶ The Speaker of the Ohio House of Representatives and both the Majority and Minority Floor Leaders are lawyers.

All currently available studies show that lawyers comprise the largest single occupation group in legislative bodies.

Four reasons are generally given for the disproportionate participation of lawyers in legislatures. The prestige of the legal profession, the convenience of linking legal work and politics, a working knowledge of power as a part of professional legal competence, and an ability to be an "adroit broker of ideas as well as of interests" are professional assets which serve the lawyers well in the legislative setting.⁷ Specifically, according to Keefe, one of the leading writers on the American legislative process, "Legal training, if deficient and illiberal on some counts, is extraordinarily successful in assisting its recipients to master the intricacies of human relations, to excel in verbal exchange, to understand complex and technical information, and to employ varying tactics to seize advantage. These qualities of mind and make-up serve the legislator no less than the campaigner."⁸ It is little wonder that, as in all other complex legal involvements of the society, "the lawyer is depended upon to represent citizens in the lawmaking body."⁹

The predominance of lawyers in state legislatures forces the legal profession to assume a major portion of the responsibility for both the successes and failures of state legislative bodies. Unfortunately, the general impression throughout society is that there have been more failures than successes on the part of state legislators.

Even if all legislators were models of efficiency and rectitude, as indeed some of them are, most state legislatures would remain poorly organized and technically ill equipped to do what is expected of them. They do not meet often enough; they lack space, clerical staffing, professional assistance; they are poorly paid and overworked; they are prey to special interests, sometimes their own; their procedures and committee systems are outmoded; they devote inordinate time to local interests that distract them from general public policy; they sometimes cannot even get copies of bills on which they must vote. They work, in short, under a host of conditions that dampen their incentive and limit their ability to function effectively.¹⁰

⁶ "Roster of the 108th General Assembly" (Columbus, Ohio, 1969).

⁷ William J. Keefe and Morris S. Ogul, *The American Legislative Process: Congress and the States* 119 (Prentice-Hall, Inc., Englewood Cliffs, N.J., 1964).

⁸ *Ibid.*

⁹ Charles S. Hyneman and George W. Cary, *The Iowa Legislature: A General Description* 569 (Manuscript, Indiana University, 1960), quoted in Keefe, *supra* note 7.

¹⁰ Alexander Heard, *State Legislatures in American Politics* 1 (New Jersey, Prentice-Hall for the American Assembly, Dwight D. Eisenhower, Honorary Chairman, 1966).

The academic criticisms of legislatures generally, developed through detailed studies, attitudes, and mechanisms of the various legislatures, have been directed at the Ohio General Assembly specifically by newspaper reports.¹¹ However, in the past ten years the Ohio legislature has eliminated a number of obstacles to effective action. In response to the pressure of demands on it the legislature has begun to meet more frequently and for longer periods of time. The Legislative Service Commission has provided members of the General Assembly with advanced technical services, including membership in an 11 state computer arrangement, that greatly ease legal research and bill preparation. The salaries of the legislators have been raised to a point where they can no longer be identified as a legitimate bar to legislative service by qualified and committed community leaders. And, of course, most dramatically, the legislature has been reapportioned, eliminating the gross geographical discrimination that hampered progressive legislative action for many years. In short, the major institutionalized barriers to effective legislative action have been eliminated.

Still, the Ohio legislature has not yet taken the lead in resolving state problems. Tax reform, educational improvement, operation of welfare programs, the general setting of state priorities are all areas in which the legislature has yet to reach its full potential as innovator and leader. The legal profession, because of its general association with the laws passed by the legislature, and because of its professional predominance in the legislature itself, is in a unique position and has a unique responsibility to aid in the upgrading of Ohio legislative activity.

The magnitude of the governmental role played by legislatures is not widely known or appreciated. For example, in Illinois the General Assembly appropriated more money in 1965 for the operations of that state alone than did the United States Congress for the needs of the entire country in 1917, and their appropriations for that one year equaled the combined amount spent by all of the states in 1938.¹²

In Ohio the growth of spending under the control of the legislature is just as significant. In 1927 the state Treasurer of Ohio reported expenditures of \$50 million.¹³ In 1948 that figure had increased to \$658 million.¹⁴ By 1967 the legislature was appropriating and authorizing the expenditure of \$2.5 billion.¹⁵ In 1967 the State of Ohio spent nearly the

¹¹ See, Zimmerman and Burdock, *How the Legislature Really Works* (Cleveland *Plain Dealer*, Dec. 29, 30, and 31, 1968 and Jan. 1, 2, and 3, 1969).

¹² A report of the Illinois Commission of the Organization of the General Assembly, *Improving the State Legislature* (University of Illinois Press, Chicago, 1967).

¹³ Bert B. Buckley, *Annual Report of the Treasurer of State to the Governor of the State of Ohio 6* (Columbus, F. J. Heer, 1928).

¹⁴ *Statistical Abstract of Ohio 1960* (State of Ohio, Department of Industrial and Economic Development, 1960).

¹⁵ John D. Herbert, *Annual Report of the Treasurer of State to the Governor of the State of Ohio, 1968* (Columbus, Office of the Treasurer, 1968).

same amount of money on state government that the entire federal government spent on all of its needs in 1929. If for no other reason, the tremendous amounts of money controlled by the legislature should cause all citizens to be concerned about its operation. Of course, if their predominance in the legislature is a cause for lawyers to be concerned about its operation, the magnitude of the legislative task should merely heighten that concern.

Ohio offers a unique opportunity for legislative action. The urban crisis is general conceded to be one of the major problems facing Americans in the second half of the 20th century. Within its borders Ohio has six of the nation's fifty largest cities; no other state, not even California, has as many. In addition, Ohio is not dominated by one or even two large urban centers in the way New York, Michigan, Illinois, or even California is. At the same time that Ohio has a large but diversified urban population it also has a significant rural population. In spite of the fact that there are a large number of major cities in Ohio the percentage of rural population is comparable to the national average. Ohio, then, is a small reproduction of the nation with a diversified economy, a number of major cities, and a large population (5th in the nation).¹⁷ In addition it is projected that by 1985 Ohio will occupy the center of one of three geographical areas of the country that will contain 50% of the nation's population, but cover only 10% of its land.¹⁸ Faced with the problems that diversity of interest and concentration of population present, the Ohio legislature has an opportunity to be a governmental innovator.

If the Ohio General Assembly is successfully to take advantage of the opportunity that time and events have thrust upon it, it will have to have the support, cooperation, and prodding of the Ohio Bar. The activities of the bar, if they are to help and not hinder the development of legislative responsibility, should have two distinct goals. The first should be to continue efforts already underway to improve legislative procedures within the General Assembly. The second, and perhaps more important, should be to insure that a wider range of viewpoints on a larger number of problems is brought to the attention of the legislators. There are a number of institutions already in existence which merely need to be expanded or adapted to improve the functioning and responsiveness of the legislature.

Lobbying lies at the heart of any legislative action whether it be internal procedural reform or external substantive action. As one state legislator explained to a political scientist conducting a study,

¹⁶ Facts and Figures on Governmental Finance (Tax Foundation, Inc. 15th Biennial ed., 1969).

¹⁷ Statistical Abstract of the United States, 1967 (National Data Book and Guide to Sources, 88th ed.). All figures are from the Statistical Abstract.

¹⁸ Report of the National Commission on Community Health Services 186, Health is a Community Affair (Harvard University Press, Cambridge, Mass. 1966).

Lobbyists are a vital part of the legislative process. Without them to explain, you couldn't get a clear picture of the situation. They can study and present the issues concisely—the average legislator has no time or inclination to do it and wouldn't understand bills or issues without them. A professional lobbyist in ten minutes can explain what it would take a member two hours to wade through just reading bills. Both sides come around to you, so you can balance off all one-sided presentations (and they're all one-sided). A definite function is performed by lobbyists.¹⁹

Unfortunately, because of the press of time and other demands and the sheer size of their task, legislators can not inform themselves fully and in detail on the majority of bills on which they are expected to vote intelligently. Therefore, they often must rely on the presentations of lobbyists to suggest the issues contained in many pieces of legislation.

The problem with this situation is that it forces legislators to depend on the information and activities of groups that can afford to hire lobbyists. Therefore, according to one study, labor, teachers, chambers of commerce, farm organizations, truckers, medical associations, local government officials, and manufacturers are the groups which get the ear of the average legislator.²⁰ What is noticeably missing from the list are welfare groups, students, civil rights organizations, religious groups, and consumers, all of which are raising important issues and all of which are suggesting that the legislative process is not responsive to their problems. One of the first steps that the legal profession in Ohio could undertake to make the legislature more responsive would be to take advantage of the lobbying process, as part of their professional responsibility, and bring currently neglected social issues and solutions to the attention of the legislature.

No group is as equipped as lawyers to bring to legislative attention, through the already existing lobbying mechanism, many subjects that have been neglected or overlooked.

The attorney is the accepted agent of all politically effective groups of the American people. As the lawyer is habitually the representative of the grasping and abused in litigation, as he is increasingly the negotiator between businessmen with conflicting interests, as he is more and more the spokesman of individual and corporation in public relations—so is the lawyer today depended upon to represent the citizen in the lawmaking body.²¹

A beginning toward expressing opinion on legislative matters has been made by groups such as the Cleveland Bar Association through presentations to Committees of Congress. However, rarely, if ever, does

¹⁹ Malcolm E. Jewell and Samuel C. Patterson, *The Legislative Process in the United States* 292 (Random House, New York, 1966).

²⁰ *Ibid.*

²¹ Hyneman, *supra* note 9.

a written proposal from a professional legal group in Ohio reach Ohio legislators, and it is almost as rare that an oral presentation is made. Legislators are ready and willing to listen to any proposal that might solve a particular problem. All the public spirited attorney needs to do in order to be heard is to speak.

From the small beginning of a bar committee making periodic presentations to state legislative committees, it is possible to expand into a more substantial and far reaching program. In 1968 Ralph Nader suggested, in an address to the Columbus Bar Association, that professional legal groups tax themselves enough to support a public interest lobby. Such a lobby, supported by the expertise and political know-how of a public spirited bar, could bring invaluable information to the attention of legislators. Expanding the concept of public interest lobbying a bit further, it would be possible for bar associations to develop and work for the adoption of an office of legislative ombudsman. The Ombudsman, or parliamentary commissioner, as developed in Sweden, Finland and Denmark, is a legislative office.

There is a further important function of a legislature . . . as a committee of grievances. . . . The great extension of governmental power and services has brought the citizen into contact with the administration to a much greater extent than ever before, and the task of dealing with the complaints and difficulties which arise is more than members of the legislature can cope with. This is one reason why the institution of Ombudsman as developed in Scandinavia has aroused interest in other countries. . . . These officers deal with a great number of matters which, in Britain, for example, would provide the content and occasion for a question in the House of Commons. . . .²²

Efforts to bring matters to the attention of the legislature could be undertaken by a concerned bar with little or no expenditure of money. Time and legal expertise properly used by concerned lawyers could play an important role in moving the Ohio legislature into a problem solving leadership position in Ohio, and (because of Ohio's unique potential) in the nation. But, it is not enough to have a way of saying things. There must be something to say. There must be a way to find out active causes of problems and the range of various solutions.

Lawyers have a vested interest in understanding legislative action. Their jobs depend on that understanding. It is also in the public interest to have legislative enactments which can be understood. Therefore, one of the first projects that lawyers can address themselves to is the development of methods for clarifying legislative actions. First a legislative history of each action taken should be made.

There is an increasing desire and need on the part of the public and the press to be better informed concerning the deliberations of the

²² K. C. Wheare, *Legislatures* 127, 229 (Oxford Univ. Press, New York, 1963).

General Assembly. The only record now kept relating to the events that take place on the floor is that contained in the Journal, which records final votes cast by each member on matters coming before each house. The reason for such action, however, may only be surmised. Transcripts of the floor debates, which often clarify the reasoning of both the proponents and opponents of legislation, are nowhere available. The same is true of committee hearings.²³

If lawyers undertook a campaign to convince the legislature that it was both wise and feasible to create detailed legislative histories, they would be serving themselves and the public. The lack of an adequate legislative record is a major deficiency of the legislative process in Ohio.

There is a second task for lawyers who undertake to improve the understanding of legislation. Currently there is no really concerted effort in Ohio law schools to develop the skills of bill drafting and analysis. Also there is a definite lack of people to do the day-to-day tasks of drafting and analysis as effectively and efficiently as they could and should be done. If the legal profession, through law schools, were to encourage the teaching of legislative drafting as part of legal education both of these problems could be solved. If Ohio law schools were to conduct courses in bill drafting they could be called upon as part of the course, under supervision of a staff member from the Legislative Service Commission for example, to help draft proposed legislation. In fact, both Columbia and Harvard law schools have bill drafting services used by legislatures in their own states and across the country. In addition, if law schools showed the interest, it is not unlikely that the legislature itself would create positions for legislative interns to work with the legislature as part of the course in a class on legislation. The importance of such a program to the legislature would be as a way of developing a group of individuals trained in the details of legislation and as a way of providing manpower to improve legislative activity. For law schools such a program would provide an additional professional focus at a time when service in the large corporate law firm does not seem to be receiving the same deference from law students that it once did.

A third method for clarifying the acts of the legislature would be to develop a closer monitoring of court decisions. Legislative acts are interpreted by the courts and often in ways unexpected by the legislature. Court interpretations both set out the limits of future legislation and signal the fact that the intent of the legislature has not been clearly expressed or understood. There should be some kind of formal mechanism to bring the actions of the court to the attention of the legislature. If the manpower were available it would be possible for the Legislative Service Commission to monitor all cases questioning state laws. In this way the legislature would be in a position to know the exact nature of the legal problem as soon as action was required. This same monitoring

²³ Illinois Commission Report, *supra* note 12, at 12.

task could be undertaken by the office of the legislative ombudsman if it were established.

The important fact is that legislative action must be more easily understandable than it now is. The establishment of a legislative history for each act of the legislature, upgrading of bill drafting and analysis through cooperation with Ohio law schools and a closer coordination between court action and legislative action are all projects which are in the public interest while still serving the professional interests of lawyers. These are tasks which lawyers could immediately undertake as part of an effort to help the legislature solve problems in Ohio.

Most important, however, is the help that the bar can give in finding new alternatives to what are fast becoming old problems. Congressmen and state legislators have increasingly begun to conduct hearings on current problems in their districts. Such efforts are to be welcomed and encouraged. However, no legislator has enough time to go into the details, often very important details, of every problem that should receive legislative attention. The Columbus Bar Association has begun to explore a possible solution to the problem of getting important information to the legislature. A number of its members who understand the legislative process and have ties with it, are attempting to set up a series of conversations with welfare recipients and the groups that represent them.

Such conversations with other under-represented interests such as students, consumers, civil rights groups, and small businessmen, could serve the dual function of making the legislature responsive and the protestors responsible. Both groups could then get what they want; an orderly society which solves the public problems of its members.

Ohio is a state whose innovations and efforts, if successful, could easily provide models for the rest of the country. Strong legislative action is central to any hope of eliminating the feelings of disparity, disinheritance and disintegration that seems to be gaining in strength throughout the country. And strong action by the bar, individually, and collectively, is an important part of any concerted legislative action. If the Ohio legislature is to continue the momentum for meaningful reform that it now has, the legal profession will have to provide much of the expertise, manpower and effort. If the Ohio legislature is to face and solve actual problems it will have to depend on the legal profession to provide new alternatives and gather important information.

Throughout its history, this nation and this state have had to depend in large part on the ability of its lawyers for effective legislative action. At a time when the State legislature is dealing with billions of dollars and millions of lives, it is even more crucial that the organized bar involve itself intimately in the daily legislative activities of Ohio. Lawyers working through the legislature have an important part to play in improving the lives of Ohioans.