

WHO'S THE CLIENT? LEGISLATIVE LAWYERING THROUGH THE REAR- VIEW MIRROR

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I

INTRODUCTION

I am invited to consider whom I regarded as my client when I was Legal Counsel to the Senate Foreign Relations Committee. Happily, I can answer succinctly: I do not know. Traditional notions of attorney-client relations do not really apply on Capitol Hill as they do in executive departments and agencies. There, a lawyer has one client—the President, or, depending upon its measure of independence, the agency. The legislative branch, on the other hand, comprises hundreds of potential clients—535 Members plus committees, subcommittees, and various legislative officers. Each of these entities pursues multiple, often conflicting, objectives. Rather than working for a particular body (a committee) or person (its chairman), committee counsel arguably work for the Senate as a whole—Members not on a committee, Members in minority, or Members concerned about matters on which the committee does not have a firm position. In a sense, committee counsel function almost as independent contractors, hopscotching about a political minefield in which the committee, or its chairman, or a Member seeks to vindicate views that are at odds with the views of the others, and using the counsel to help do it. Often, counsel has discretion to pursue his own interests, even when those interests conflict with the expressed preferences of a member of the committee, though it normally is necessary under such circumstances to seek political cover by finding a sympathetic member of the committee to espouse those views. All this translates into opportunities for ideological entrepreneurship in which a committee counsel with a modicum of political savvy can, within certain parameters, advance his own philosophical interests.

My thesis, therefore, is that committee counsel need seldom worry about high-minded attorney-client matters because the landscape does not lend itself to that way of thinking. While I recognize that the breadth of a counsel's discretion may vary from committee to committee, knowing how my peers operated leads me to be confident that my experience was not unique. And, lest

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one conclude that ethical discretion is unlimited and that no standards guide the committee counsel's conduct, I would suggest that some standards do indeed obtain. Those standards are similar to the traditional canons of legal ethics in some respects, and different in other respects. They are similar in the reason for their existence and in their content: They exist to encourage Members to seek expert counsel and in content are analogous to the canons of professional responsibility of legal ethics. They differ, however, in the way they are made, to whom they apply, and in the way they are enforced. They come from custom, not codification; they are applicable to all committee staff, not just lawyers; and they are enforced not with formal sanctions but through an informal process more akin to that used by dissatisfied customers of an inattentive tradesman—the cold shoulder. All of this will be developed with examples, but first, some background.

II

I was hired in 1977 by a personnel subcommittee consisting of the two top-ranking Senate Democrats on the Foreign Relations Committee (Sparkman and Church) and the two top-ranking Republicans (Javits and Case). Before that, from 1973 to 1977, I was Assistant Counsel in the office of the Senate Legislative Counsel, where I spent a good deal of time working with the Committee. The personnel subcommittee acted on the advice of the staff director. At first, the Committee's professional staff was unified and nonpartisan. I then worked for both sides. Later, when the staff was divided into majority and minority staffs, I worked for the majority, but continued to have the title of Legal Counsel to the full Committee. Like other staff members, my salary was paid by the full Senate; committees are its creation, and its pay structure reflects that. During this period, I also wore another hat, heading up an investigation of intelligence activities for the Subcommittee on International Operations.

The years that I served the Committee were tumultuous ones. My first big task for the Committee was to serve as second-chair counsel, two months after graduating from law school, to the Senate conferees on the War Powers Resolution.¹ In 1975, the Committee met regularly to oversee the evacuation of American personnel from Phnom Penh and Saigon. The following year, the Committee undertook a major rewrite of legislation governing arms exports, and, in subsequent years, reported the Panama Canal Treaties² and the SALT II Treaty. The period from 1973 to 1980 probably represented the high water mark in congressional attempts to institutionalize the notion of joint executive-legislative foreign policymaking, and in intellectual as well as emotional inclination, I supported this objective enthusiastically. I had been active in the anti-war movement during college and law school and, for three of those summers, had worked as an intern in the office of one of the leading foreign policy ex-

1. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-48 (1998)).

2. Panama Canal Treaty, Sept. 9, 1977, 33 U.S.T. 39.

perts in the House (Donald M. Fraser, a Democrat from Minneapolis). My views had been profoundly influenced by his, and by books such as *The Arrogance of Power*, by J. William Fulbright, and *The Imperial Presidency*, by Arthur Schlesinger. No doubt these predilections shaped my view of my responsibilities every bit as much as the *Code of Professional Responsibility*. I saw my policy preferences and the Committee's as virtually identical, and thus felt less restraint in exercising discretion that might otherwise be left to the client.

It is tempting to try to isolate distinct functions performed by committee counsel with a view to determining whether ethical principles varied from one function to the next, but the line between functions is too blurry to make the approach work. Formally, the principal functions that I performed were rendering legal advice to the Committee and its Members, on matters concerning international law, constitutional law, statutory law, and parliamentary procedure; negotiating on behalf of the Committee with representatives of the Executive Branch, other Senate committees, and the House members of conference committees; and carrying out oversight and investigative activities on behalf of the full Committee or one or more of its subcommittees.

Normally, though not altogether intentionally, I frequently found myself trying to make those functions cohere. The upshot was that the functions overlapped. If, for example, one were asked one's view concerning the constitutionality of a certain executive agreement, advice that it was invalid would lead, not infrequently, to an effort classifiable as "oversight" that would be directed at curbing the use of such agreements. Similarly, to discover through the taking of depositions that a certain intelligence agency was engaged in activities of doubtful propriety would lead, naturally, not simply to advising the Committee but to drafting and proposing legislation to halt that activity. Thus the work was not easily divided functionally; in performing one category of functions, one moved ineluctably into the performance of another category of functions—sometimes, as will be seen, for a different client.

In many activities, of course, I served the full Committee, and surely regarded the Committee as my client in every traditional sense. In, for example, drafting conditions to the Panama Canal Treaty, or writing the law-related portions of the committee report on that Treaty, or drafting amendments to the Taiwan Relations Act or its committee report, I saw my client as the full Committee and comported myself accordingly. In practical terms, this meant five things.

First, what I wrote reflected what I knew to be the collective views of the full Committee—not my own views or the staff director's, or the chairman's. To glean those views, I met with the Committee and listened as its members discussed legal issues, sometimes in response to questions that I put to them incident to the disposition of collateral policy issues.

Second, what I wrote reflected what the Committee need necessarily and implicitly have assumed or decided in disposing of policy issues. In reporting the Taiwan Relations Act, for example, the Committee did not address in any

detail the issue of the validity of the termination of the mutual security treaty with Taiwan, but the predicate of recognition of the People's Republic of China—which I knew the Committee did support—was that the termination of that Treaty was valid. It therefore seemed sensible to include in the Committee report reasons that the Committee considered the termination valid, even though it had not discussed the validity of the termination *per se*. My theory was that every Member would see the report before it was filed, and, if objections were made, they would be addressed.³

Third, confidentiality requirements applied. All Committee staff members were expected as a matter of course to hold confidential all matters discussed within closed meetings of the Committee. That requirement, it seemed to me, subsumed attorney-client norms that might otherwise have precluded the disclosure of information disclosed to me in confidence by a member of the Committee or its staff. That included the usual gossip and grapevine commentary, such as remarks made by Senators about other Senators. One described another, for example, as “peculiar”; another described the President as someone “who couldn't sell ***** on a troop train”; another said of a colleague, “It's not that I don't trust him, but I don't”; one said of another, “Another day on the floor with him and I'll be ready for a padded cell.” I suppose that, strictly speaking, those characterizations may not have been formally privileged, but some Senators, like other clients of other lawyers, simply feel more comfortable, and speak more candidly, if they can hold out some scintilla of hope that their words will not appear in the next morning's *Washington Post*. Perhaps it ought not matter, but all of these Senators had run for President, and might have planned to run again, and it seemed especially important to me that some blabber-mouth staffer not further complicate their already confused lives. The fact that I was a lawyer seemed to add little to the comprehensive mandate of discretion.

It is in the realm of confidentiality expectations that the system's self-enforcing characteristics tend to be especially visible. I recall, in this regard, a lapse on my part that I can only describe as a product of frustration compounded by inattention. I had been asked by the chairman of a subcommittee to get to the bottom of a long-standing controversy. The State Department, it appeared, had enlisted the help of the CIA to smear a foreign journalist who was active in lobbying against a military junta friendly to the United States. The question was, “Who in the Department initiated the effort?” To find out, I deposed various Department officials. The journalist was a friend and supporter of the Chairman of the Subcommittee, so I kept the journalist generally informed as to how things were proceeding—which witnesses said what, basically—to see whether their testimony squared with his own recollection of events and what leads should be pursued. When troubling questions arose, I suggested to the Chairman that we needed to press harder and higher. No, he

3. No objection was made, although in subsequent floor debate, one Committee member did dissociate himself from that portion of the report.

responded, it was time to back off; a friend of his (and mine) had just been appointed assistant secretary of state for that bureau, and, the chairman told me, he simply did not want to create problems for someone so new on the job. Meanwhile, the journalist was of course nonplussed by my sudden seeming indifference to his grievance and suggested in blunt terms that I get off my behind, put the gloves back on, and start swinging at the Department. I wanted to, of course, and I in effect told him so: "Look," I said, "it wasn't my decision. If you want action, talk to the Chairman." That, I soon realized, was a mistake. As I found out when the Chairman canceled our after-hours martinis, my job, he thought, was to be the fall guy, or at least to keep him from being the fall guy. And he was right: As a staffer, if not as a lawyer, my job was indeed to insulate him from the repercussions of his decision by keeping confidential *even the fact that he had made it*. When the Chairman makes a decision, a staff person—lawyer or not—should respect it; if that means keeping the fact of the decision confidential, so be it.

Fourth, conflicts of interest were ruled out. Representing the Committee meant not undertaking activities that would conflict. Of course, in the traditional sense that was easy: Mine was a full-time job, and I was hardly about to go out and sign up a client with conflicting interests. Nevertheless, I took the no-conflicts obligation seriously and interpreted it broadly. To me, its primary import lay in its implications for relations with the Executive Branch. I thought that the canon mandated an arms-length relationship unless the Committee explicitly enjoined cooperation. That meant, specifically, not accepting the "assistance" of the State Department, which was always available on almost every matter. When conference committees concluded their deliberations, for example, and the staff sat down to translate into proper legislative language the decisions that the conferees had made, State Department representatives constantly hovered about, often with language in hand to slip into the law. My view was that to accept their help would have been improper, though I am sad to say that that view was not shared on the House side.

The House Committee on Foreign Affairs worked hand-in-hand with State Department lawyers and shamelessly accepted their help. I often suggested that they do their own work, but House staff members would still disappear regularly into back rooms, only to emerge with freshly drafted provisions just off the typewriter of a State Department lawyer squirreled away out of sight. Perhaps it was my more recent exposure to academe, but I thought that collaboration unseemly, rather like slipping into a lavatory during an examination to trade answers. I accepted the Department's work only once, when I knew that it represented the Committee's intent; it was report language explaining an amendment they initiated to the Taiwan Relations Act, and their lawyer insisted that the provision was, after all, "their amendment." It was, but I still felt uneasy about accepting their words.

Similarly, I believed that a conflict of interest would have arisen had I sought, directly or indirectly, to move to a job in the Executive Branch from my position as the Committee's counsel. To make the friends necessary for such a

move would have required pulling punches and seeking to curry favor downtown; that, it seemed to me, would inevitably have involved pulling back in the Committee's ongoing disputes with the Executive Branch. I was asked from time to time whether I was interested in a job with the Administration, and I always said no. I knew congressional staffers who were constantly angling for some job with the departments and agencies that they were supposed to be overseeing, and I never trusted them.

Finally, I thought that zealous representation of my client pertained especially to its institutional interests. Frequently, these interests escaped the note of Members unless specifically called to their attention. Frequently, these questions involved separation of powers disputes with a federal department or agency, or parliamentary "turf wars" with the House or with other Senate Committees. And, frequently, the willingness of the Committee to respond depended upon the play of personalities or politics—of which the staff is frequently unaware. For example, the House Committee, it seemed to me, was perennially jealous of the Senate's advice-and-consent prerogative, and forever interested in getting a cut of the action. I thought the Committee's lawyer ought to be cognizant of the House Committee's penchant for poaching. I drafted something I called the "Treaty Powers Resolution," and got Senators Clark, Church, Mondale, and Kennedy to co-sponsor it. Half the Committee opposed it, but it was reported because it had been included in a bill reported to the full committee by a subcommittee (Senator McGovern's) and a majority plus one was therefore required to strike it.⁴

Similarly, the Committee was in constant jurisdictional conflicts with other Senate committees. Two stand out in my memory. The first was with a subcommittee of the Appropriations Committee, chaired by Senator Inouye. I pointed out that that Committee had encroached upon Foreign Relations' jurisdiction and suggested to Senator Hubert Humphrey, chairman of the relevant subcommittee, that he rise to a point of order on the Senate floor when the legislation came up. Humphrey responded: "Mike, if I took on Dan Inouye on the Senate floor on this, I'd come out looking like a piece of Swiss cheese." I had had no idea that Humphrey's power on the floor was dwarfed by Inouye's (or that Humphrey himself believed that it was).

The other incident involved a dispute that arose between the Committee and the CIA over Committee access to a certain set of classified documents. The Agency had simply refused to let us see them, on the ground that they had already been given to the Senate Select Committee on Intelligence. Remembering Humphrey's earlier response, and recalling that the Intelligence Committee was also chaired by Senator Inouye, I picked a Senator who I expected would have stronger institutional pride: Jacob Javits. Javits was smart, tough, and intensely devoted to the Committee. I went down to his hideaway office in the Capitol basement the morning before the Director of Central Intelligence,

4. Ultimately, it was stricken on the Senate floor when Mondale—then Vice President—personally lent his efforts to defeating it.

Stansfield Turner, was to testify before our Committee. I explained to Javits that, in establishing the Intelligence Committee, the Senate never intended to diminish Foreign Relations' jurisdiction. I was not disappointed, and I will never forget his response: "We'll kill him. We'll kill him." From what I was told by CIA people present with Turner at that meeting, Javits ripped the bark off of him. We got the documents.

III

So much for what matters where the application of the attorney-client relationship seemed clear. In many instances, it seemed unclear. In one sense, I always viewed the client as the Chairman. Sometimes, though, it appeared to me that the client was, in reality, the Senate. Still other times, the client appeared to be another Senator, sometimes not even a member of the Committee. I will elaborate.

I never undertook any activity at odds with what I knew to be the Chairman's position, or even with what I thought might be the Chairman's position. He, not I, was Chairman of the Committee, and I was there to act as his lawyer. Moreover, I regarded the Staff Director as acting in his stead, and treated his wishes as the wishes of the Chairman.

To be distinguished from situations where the Chairman had expressed specific views or desires were the many situations in which none were expressed, either explicitly or implicitly. Here, one's latitude was greater, though hardly unlimited. It was often possible, for example, to "shop" a bill, an amendment, or a speech until a receptive Senator was located. When, for example, Senator Church got into a public dispute with former CIA Director Richard Helms following Helms's conviction of lying to the Committee, I offered Church an op-ed piece, defending Church's view that the conviction was appropriate. He did not want to use it, apparently preferring to duck out of the fight. I then took the piece to Senator Clark, who sent it in to the *New York Times*, where it was published.

This sort of "Senator shopping" occurred all the time, and I was not the only member of the Committee staff who did it. Often, one would be aware of a particular Senator's interest in a specific topic, such as arms control, human rights, or nuclear proliferation, and an idea for an amendment on that topic—for a mark-up session or floor debate—was appropriately put to that Senator. That was, it seemed to me, squarely within the role of the staff, who were, after all, supposedly experts hired by the Committee to bring to its attention matters falling within their areas of expertise. The client, though, at least at that point, became more the individual Senator than the Committee.

Matters became trickier when the Senator fell within a Committee minority on the issue in question. One particular incident stands out in my memory. At issue was the so-called "extension" of the SALT I Interim Agreement in October, 1977. One group of Senators, a Committee majority, as it turned out, believed the Administration's action to be a circumvention of the Senate's pre-

rogative of advice and consent to treaties. Some other Senators simply were not enthusiastic about arms control agreements with the Soviet Union. They hoped to trigger a major Senate debate on the question before the negotiations on SALT II were complete, and before the Administration had prepared for the debate (in part by educating Senators and staff on a fairly esoteric subject).

I thought their effort misguided from a legal as well as diplomatic standpoint. Constitutionally, the Administration had not entered into an agreement; it had merely announced a policy intention that was wholly within the President's exclusive power to articulate. Diplomatically, premature Senate action could have complicated seriously the ongoing SALT II negotiations, which were then entering a particularly delicate stage.

I tried to enlist Senators on and off the Committee to oppose a measure condemning the Administration's action. I got three—not enough to block the Committee from reporting the resolution, but enough to create parliamentary havoc on the Senate floor, if they could be persuaded to do that. They were. When the resolution reached the floor, I pointed out to one of their non-Committee allies that a point of order lay against the resolution (for certain technical reasons relating to the manner in which it had been hurriedly reported). The Senator made the point of order, it was sustained, and the measure was pulled from the Senate calendar. Regrouping, the measure's supporters called a time out (suggesting the absence of a quorum) and, when the Senate came back in session, announced that they had just met, in a corner of the Senate Chamber, had corrected the problem, and had just re-reported the bill, curing the parliamentary defect that had given rise to the point of order. I pointed out to our ally that the proponents' innovative solution had nevertheless presented another procedural problem (there was no committee report, necessitating that the measure lay over for a day). He therefore made another point of order. It was sustained, and the measure was again pulled from the Senate calendar, this time for good. The Congress then recessed for a holiday, and by the time it returned, the Administration had had enough time to line up allies on the House Foreign Affairs Committee to block the measure permanently.

Who was the client throughout this episode? If the client was the Committee, would not my action have been unethical, as an effort to thwart the will of its majority (and thus hardly "zealous representation" of the client)? On the other hand, had not the Committee itself made the judgment that every member of the Committee was entitled to the assistance of Committee staff, even if that member was the only member opposing the Committee's majority? For that matter, had not the Committee effectively made its staff available to the entire Senate (including our ally who rose to the points of order)? I had in the past—by request—written speeches for Senators who were not members of the Committee, though these were remarks made in support of legislation supported by the Committee's majority; but suppose they had opposed the Committee's position?

No rules governed these matters. I consulted with the Staff Director, who knew what I was doing; had he said stop, I surely would have. He did not. Perhaps some sort of waiver had thus occurred—if there existed an attorney-client relationship the requirements of which could be waived. I do not know. In the morass that is the legislative process, the formal canons of professional responsibility seem to be of little help. More pertinent, to borrow a phrase of Justice Jackson's, are the "contemporary political imponderables" of the specific situation. Sometimes it seems acceptable to act as a free agent, and other times it does not. You "know it when you see it," to paraphrase another Justice (Stewart)—but where and when the line is drawn, I am not sure. Another example illustrates the difficulty in applying the traditional canons.

Matters also became trickier when Senators on the other side of a dispute were effectively unrepresented by counsel. During the evacuation of Saigon in 1975, when a conference committee completed work on the "Vietnam Contingency Act," time was of the essence. One principle invariably honored by both Houses of Congress is—or at least was at the time—that the House that asks for the conference acts last on the conference report. The Senate had asked for a conference committee on this legislation. One member of the conference committee was the Senate majority leader, Mike Mansfield, who concluded, as is the majority leader's prerogative, to make the report—instantly—the Senate's pending business.⁵ In the process of discussing a few remaining legal matters with him, I pointed out that, in traditional parliamentary practice, the House, not the Senate, ought to act first on the conference report. My client, at the time, was, I suppose, the Senators who were members of the conference committee; most, but not all, would have supported what Mansfield did. So far as I could tell, I was the only person present who knew about the procedural irregularity that he was about to create. Was I obliged to tell others about it, who might have used this information to block it? I thought not; still, though, the meeting had been held in executive session and had involved classified reports from the besieged American embassy in Saigon and sensitive telephone conversations with the President, and if they were to be provided effective counsel—if they were to be provided *any* legal counsel—it would have been from me.

IV

CONCLUSION

The traditional concept of "client" is simply of scant practical utility in the legislative process. Nor does it help much to categorize work by function and follow the thread back to the client. Lawyering functions overlap in legislative work, and the best way to understand who legislative lawyers serve is not to

5. He was able to do it because, physically, he had possession of the enrolled bill, and he simply took it from the room where the conference committee had adjourned, walked around the corner to the Senate floor, and announced that the Senate would move to consideration of the conference report.

import an analytic framework (either the canons of professional responsibility or a functional analysis) from private practice, but to look at who those lawyers are, how their policy preferences compare to the legislators with whom they work, and what motivates the legislative lawyers to act as they do. In a free-wheeling, wide-open legislative context, the term “client” can be assigned to virtually any legislator or committee whose interests the lawyer is inclined to advance. The resulting rear-view mirror approach to lawyering creates an ethical regime that is largely indeterminate and may not comport with the tidy, not to say formalistic, traditional legal framework. Indeed, as I have tried to show, the ethical free-for-all poses problems for all staffers, not just legislative lawyers and committee counsel. But it is, I believe, the most accurate account of what goes on, and also the most honest.