

The Role of Research in Legislative Advocacy

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• Probably everyone at this meeting can remember when it was a popular myth that men of practical affairs—men whose daily calendars called for decisions one after another in order that “things got done”—did not have time for research. The impression was left that there was some basic incompatibility between the roles of the researcher and these men of action. This myth has now been exploded. And nowhere has it been exploded more clearly than in connection with the construction and operation of highway systems. The entire legal framework within which the present Federal-aid highway program and the road programs of State and local governments now function is a direct lineal descendant and beneficiary of research directed and, in some instances, conducted by the very people who now are responsible for making this program work.

Numerous examples might be cited. One, which profoundly influenced the terms of National and State legislation is the series of highway needs studies made to determine just how crowded, how obsolete, and how costly the highway system had become during the decades just prior to and following World War II. Of these studies the late Thomas MacDonald, as Commissioner of Public Roads, has said:

Historically, nothing has so contributed to the stability of the road program and assured the authorizing State and Federal legislation as have facts gathered, analyzed and interpreted by the State and Federal Highway units assigned to this work.¹

¹ Quoted in Hill, G.A., “The Effect of Highway Need Studies on National Legislation.” PROC., AASHO, pp. 29, 30 (1950).

Similar testimony has also come from legislative leaders, administrators, and spokesmen for various segments of the public.

This close reliance—indeed, dependence—of the lawmaker and administrator on research is not, however, something reserved for times of great events involving basic shifts in the emphasis or direction of public policy. It is needed, and it should be evident, in the daily operations of highway lawmakers and administrators. It is the purpose of this paper to discuss how this relationship between research and operations can be developed in regard to at least one important aspect of highway programs; namely, legislative matters.

In a very general division of this subject, it may be suggested that counsel for highway agencies are directly concerned with legislation on three occasions: when laws are being prepared and enacted, when laws must be interpreted, and when laws must be revised.

PREPARATION AND ENACTMENT OF LEGISLATION

The comment of Commissioner MacDonald just quoted gave research credit for a substantial contribution toward “assuring” the passage of legislation. He meant, of course, that by means of research legislators were brought to see the essentiality of taking action now rather than putting off doing something about highways. This use of research is important, but it is not all. Every great and complex program is made up of a great mass of details. When and if programs are implemented by law, these details affect each other, and they affect other parts of the general body of law. The

highway lawyer is expected to know and explain these relationships to legislative leaders and committees as part of the advocacy of enactment. And, quite probably, he will be expected to present the highway agency's position on legislative proposals which it opposes. In short, the highway counsel's function in the preparation and enactment of legislation is that of an advocate.

Advocacy in the legislative arena is as real and significant in its results as advocacy in the courtroom, but its precepts and practices have only recently begun to be studied by lawyers.² The rise of interest in legislative advocacy has, to a significant extent, been the result of curiosity about how a governmental agency should conduct itself and its business before legislative bodies.³ The setting of this problem deserves particular attention before going further.

Ethics and Advocacy

The Anglo-American tradition in law leads us to rely predominantly on what may be called "adversary inquiry" to determine the facts on which legal decisions are based. In this process it is expected that counsel, by vigorously presenting all facts and arguments favorable to his

² Of this fact it has been said: "The bar seems to have been less aggressive in this field than in its more familiar background of the courts. Lawyers in our system by training and tradition long regarded the legislative process as alien to the true body of the law; they seem, therefore, not to have been alert to the possibilities of practice before legislative committees, and not as vigilant there as in court to assert the claims of clients. Moreover, legislative inquiry often was armored against successful legal attack: the committee commanded publicity, the adverse effects of which might outweigh even a successful legal challenge to the committee's probing; events too, might move too fast in a legislative inquiry to permit practical relief by court action against unauthorized or unfair tactics" (HURST, J. W., *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS*. Boston, p. 34, 1950).

³ For example, Weeks, O. D., "Initiation of Legislation by Administrative Agencies," 9, *Brooklyn L. Rev.* 117 (1940); Moneyppenny P., "A Code of Ethics for Public Administration," 21 *Geo. Wash. L. Rev.* 423 (1953).

clients' position, will build a factual record and a balanced perspective for the decision-makers to do their work. As we rely on adverse examination of witnesses and partisan argument to disclose fully and interpret the facts of a law suit, so we also expect our legislatures to proceed in the same way through hearings, investigations, and debates to discover and interpret the facts and various other considerations on which statutes are based. From time to time, abuse has been leveled at this form of partisan advocacy, but no other or better system appears ready to replace it.

But how can counsel for a public highway agency effectively participate in this partisan process? How can he be as vigorously partisan for his client's position as lobbyists for other interest groups who do not have the public official's obligation of service to the legislature? The highway department may strongly oppose a piece of proposed legislation, but it cannot ethically adopt the attitude that it will do everything possible to defeat this bill in the legislature and, if it fails in this, will continue its opposition for the avowed purpose of scuttling its administration. With respect to the legislation it does not like, the public position of a public agency must be: we respectfully believe that the proposed bill is a bad one for the following reasons, but if in its collective wisdom the legislature sees fit to enact it we urge that the following changes or additions be made in order to make the legislative intent clear and the provisions of the law capable of effective enforcement.

By comparison to the positions that outright lobbyists sometimes take, this may seem greatly restrained. But it is by no means a powerless position. The same obligation of commitment to and service of whatever is duly enacted as law can become the key element of an extremely effective legislative advocacy based on the image of candor and accuracy of advice.

A moment's reflection will reveal the sources of strategic strength in

this approach. What makes a legislative advocate successful in his work? Not the overstatements, threats of reprisal at the polls, cajolery, and bribery that were the trademarks of some of the notorious unbridled lobbyists of the 19th century. Procedural reforms in Congress and the State legislatures commencing in the 1910's have completely changed the atmosphere of legislative business. Equally important, the degree to which interest groups have become organized—statewide, regionally, and nationally—has meant that on any major or controversial issue the balance of outside pressures bearing on the legislature will be more even than it was when, in the 19th century, only a relatively small group of interests enjoyed direct access to the attention of the lawmakers and the media of public information.⁴ In this setting of competing claims and statements the busy legislator must and does place a high premium on the candor of the advice he receives. Thus his respect goes to the counselor who he knows will tell him the truth, the whole truth, and nothing but the truth. And, conversely, the counsellor who has a legislator's respect and credence holds the key to influence with that legislator.

Some years ago, an official in charge of Congressional liaison for a major department of the Federal government spoke candidly to a group of Washington lobbyists. He reminded them that what made them valuable to their clients was the confidence that Congress and the Federal executive agencies reposed in them. This confidence was not an attribute acquired en masse or by reason of the prestige of their clients. To the extent that it existed it was individually bestowed by reason of demonstrated reliability over long periods

⁴ Insight into the changes that have occurred in the techniques of legislative advocacy during the twentieth century may be gathered from HURST, J. W., *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (Boston, 1950); SCHRIFTGESSER, K., *THE LOBBYISTS* (Boston, 1951); and HORACK, F. E., JR., *CASES AND MATERIALS ON LEGISLATION* (Chicago, 1954, Ch. 5).

of contact. Momentarily it might seem otherwise; the influence peddler and the high-pressure campaigner might occasionally have his day. But in the long run, confidence in the candor and thoroughness of the lobbyist's advice—be it pleasant or not—was the strongest basis of influence with the legislature.⁵

Confidence is one foothold for the legislative advocate. Information is the other. Here, counsel for a State highway agency enjoys a real advantage. Through his State's highway department he has access to knowledge of all phases of highway programs and their impact on the community at large. By drawing on the research which has been and is being done by his State highway department, by universities, by the U.S. Bureau of Public Roads, by the Congress, and by others, counsel can provide comprehensive, analyzed information on literally every controversial issue involved in the preparation and enactment of modern highway laws.

The potential advantage of access to this source of knowledge should not be underestimated. Today, research on the scale that is necessary to really discover and interpret the facts regarding highway transportation problems is too expensive, too time-consuming and too complex to be within the reach of any but the major organized groups. This has been recognized by many special interest groups throughout the country and has led them to organize and finance research on matters of common interest, and then, most important, to make this information

⁵ Documentation of such a sensitive proposition is naturally difficult. However, to cite a personal experience, in the course of a decade of legislative counseling the writer had many dealings with the offices of Members of Congress, and particularly the Members' legislative assistants. On one occasion, when a Senator's assistant was about to leave his position for other employment, he introduced his successor to the writer, and said to the successor, "You can always rely on what this fellow tells you. He will never throw you a curve." The writer regards this as one of the highest compliments he ever received as a lobbyist.

available to their members for use in their operations.

Anyone who has watched the legislative activities of the States recently can cite examples of this phenomenon. One might be the activity of the utility industry in connection with legislation to liberalize State laws relating to reimbursement for the cost of relocating utility facilities due to highway construction. The coincidence of the language of the bills that were introduced, and the arguments and factual data presented in support of these bills, are too striking for one not to see in their background a single central source of research and inspiration.

With respect to almost any major highway policy issue of the present or future, it is possible to detect signs that affected interest groups are organizing for the purpose of making their interest known to legislatures, and that one of the principal aspects of their organized activity will be research.

More and more, also, legislatures are turning to interim study committees and other public agencies available to them to make studies of the facts regarding important questions and recommend the best manner of proceeding. On a national scale the studies called for by Congress under §210 of the Federal-Aid Highway Act of 1956 may stand as a classic example.⁶ These studies, which were completed by the publication of the results of the AASHO Road Test, were for the avowed purpose of providing a factual basis for revision of the legislative policy and statutory provisions relating to financing the national highway program. Probably, also, they will influence State and

⁶ Public Law 627 (84th Cong.), June 29, 1956 (70 Stat. 374) §210. See also the following reports on the study of highway cost allocation: First progress report, 1957, House Doc. 106 (85th Cong. 1st Sess.); Second progress report, 1958, House Doc. 344 (85th Cong. 2d Sess.); Third progress report, 1959, House Doc. 91 (86th Cong. 1st Sess.); Fourth progress report, 1960, House Doc. 355 (86th Cong. 2d Sess.); Final report, 1961, House Docs. 54 (Jan. 16, 1961) and 72 (Jan. 23, 1961) (87th Cong. 1st Sess.).

Federal vehicle-size and weight laws. Possibly, they will have an impact on other aspects of the law related to highways.

The pertinence of research to legislative advocacy should not have to be documented further. We ask our elected representatives at all levels of government to determine public policy on questions that are beyond the capabilities of even a Solomon. We ask them to work under pressures of cruel proportions as part of the price of continuing to operate the republican form of government guaranteed in the Constitution. Is it any wonder, then, that the two things legislators want most of all are advisors who are candid and thoughtful in their consultation and who can give them accurate and complete knowledge of the facts as they exist?

This brings up the matter of technique. How does counsel for the State highway agency establish and make use of his sources of strength as an advocate?

Technique of Liaison

At the AASHO meeting in 1961, Robert May, Assistant General Counsel of the Bureau of Public Roads, spoke with great insight about the importance of legislative liaison. He stressed the fact that effective liaison involved more than appearances at legislative committee hearings. It has to be a day-to-day matter. He said:

The day-to-day coordination which I have in mind consists of having a representative of the state highway department constantly in contact with the appropriate committees of the state legislature so as to keep fully informed as to legislative proposals being considered by the committees, plans they may have for hearings and other actions with respect to such proposals, and to be available at all times to offer technical assistance upon request in the preparation of draft bills, furnishing needed information, and related matters.'

The details of organization within highway counsel's staff and the pre-

' May, R. L. "The Importance of Legislative Liaison." PROC., AASHO, p. 85 (1961).

cise methods established to carry on liaison will, of course, vary. But it need not be a massive or complicated system, designed to penetrate subtle or mysterious walls of resistance. It is surprising how often the obstacles to legislation are simple and easily overcome.

Recently an experienced State highway counsel told a story that illustrates this. At a meeting with his staff this counsel asked why a certain highway bill which the department was interested in appeared to be buried in a legislative committee. No one could say. The counsel knew the chairman of this committee well enough to call him and ask him bluntly what was troubling the committee about this bill. The chairman was just as blunt in his answer. "None of us understand this bill," he said, "and nobody has explained it to us." Counsel then asked if the chairman would arrange an executive session of the committee so that counsel and some of the highway department staff might go over the bill to explain its background, its basis, and its terms. The chairman was glad to oblige. The meeting was held and the bill was reported favorably out of the committee.

Not all highway bills can be moved through the legislative process this easily, but many problems with the legislature can be avoided or eased if day-to-day liaison, backed up by sound legislative research, is practiced. Possibly the little day-to-day victories over fuzzy language, incomplete expressions of legislative intent, inconsistency of statutory construction, and legislative oversight will not seem like very much of an accomplishment to the lawyer who performs this liaison. If so, he should reflect on the time, the frustration, and the man-hours that are called for to correct the consequences of these oversights once they have passed unnoticed into an enacted bill. Let him also be reassured that there is no better or firmer way of building up the legislative advocate's sources of strength—confidence and knowledge

—than in this type of day-to-day liaison with legislative leaders.

INTERPRETATION OF LEGISLATION

If, as has been suggested, the State's highway counsel is becoming a key man in the process of preparation and enactment of legislation, it is even truer that he is an indispensable party to the process of interpreting the meaning of the law once it has been enacted. As legal advisor to the chief administrator of the State highway department he is the first recourse for advice on the meaning of the law. He has the lawyer's time-honored privilege of occasionally saying, "I am sorry; I do not make the law, I merely tell you what the legislature says, and in this case they just do not make sense." All of us have fled to this refuge at one time or another. But this is an answer that counsel should use sparingly. Used too often, it looks bad to the outsider. More than that, it is not necessary if a proper foundation of legislative research underlies the statute in question.

Building a Legislative History

Building legislative history into the record of a statute is the key to subsequent interpretation of the law. This is not a responsibility that counsel can rely on the legislative committees or the State's legislative reference service to assume. It is true that these bodies are the sources of valuable extrinsic aids to statutory construction, but more often than not their products fall short of what is needed later to develop administrative doctrine for the law. Often legislative reference services have time only to draft bills, and committees can do no more than record their votes on the bills they consider. If counsel for the highway department cannot rely on these sources to explain legislative intent, he must turn elsewhere.

The debates of the legislative assembly may offer aid since they are more thoroughly reported and pre-

served in permanent records. Here, statements of sponsors of highway bills or legislative leaders who manage these bills in debate can serve as an authoritative explanation of the intent and meaning of various key provisions.

But none of these devices is likely to be volunteered by legislators. They know (or think they know) what the bill before them says and how it will accomplish its purpose. This is enough for them. It is up to counsel for highway department to look out for his own future needs. This he can often do by preparing statements of the probable administrative interpretation of the provisions of the bill, and arranging with legislative leaders to see that they become part of the permanent record of the debate.⁸ Sometimes a prearranged series of questions and answers by legislators during debate will serve the same purpose if it is faithfully reported in the permanent record of the assembly.⁹ Such explanatory statements, planted in the record of the legislative proceedings, may ultimately

⁸ Administrative interpretations have, of course, been referred to by courts in the construction of statutory language; see *U.S. v. American Trucking Assns, Inc.*, 310 U.S. 534 (1940); *Motor Carrier Act*; *Dobson v. Commissioner of Internal Revenue*, 320 U.S. 489 (1943), taxation; *Mayes v. Paul Jones & Co.*, 270 Fed. 121 (1921), taxation. Also, generally: Nathanson, N., "Administrative Discretion in the Interpretation of Statutes." 3 *Vand. L. Rev.* 470 (1950); Note, "Weight to Be Given Administrative Construction of State Statutes." 36 *Minn. L. Rev.* 100 (1951); Notes, 39 *Geo. L. J.* 244 (1951) and 33 *Iowa L. Rev.* 544 (1948).

⁹ Illustrations of this are, of course too familiar to expand here. The writer's favorite incident occurred in the debates of the U.S. Senate on an agricultural bill. The day following the vote that approved this bill its sponsor inserted in the record a statement regarding a question asked by another Senator in the previous day's debate. The matter involved a technical point which the sponsor had not been able to answer. His subsequent statement assured the questioner that following the vote he had telephoned the Department of Agriculture and been told that the language of the bill would be interpreted in a certain way. This apparently cleared up the meaning of the language the Senate had approved the previous day.

grow into valuable aids for interpretation. And they can be arranged easily and naturally by the counsel that enjoys good day-to-day liaison with legislative leaders.

Reference Points Outside the Statute

What are counsel's other resources for the interpretation of legislation? One, which has grown to significance in modern times, arises from the increasing use of the delegation of power as a technique of legislation.

Like many other fields of activity, highway programs have become so vast, so varied, and so technical that no legislative body attempts to specify all of the necessary details in statutory form. Large areas of authority are delegated to highway administrators, and statutes attempt to control the exercise of administrative discretion by setting forth standards. The Federal-Aid Highway Acts provide numerous examples of this: geometric design standards¹⁰, apportionment of funds¹¹, contracting practices¹², and roadside advertising¹³. These provisions direct counsel to sources outside the language of the statute to fill in the details of its

¹⁰ Title 23, U.S. Code, "Highways" §109, (b), "The geometric and construction standards to be adopted for the Interstate System shall be those approved by the Secretary [of Commerce] in cooperation with the state highway departments. Such standards shall be adequate to accommodate the types and volumes of traffic forecast for the year 1975"

¹¹ *Ibid.*, §104, providing apportionment according to highway construction needs as determined by a series of studies and re-evaluations of construction progress over a 13-year period.

¹² *Ibid.*, §112, (a), "In all cases where construction is to be performed by the state highway department or under its supervision, a request for submission of bids shall be made by advertisement *unless some other method is approved by the Secretary*" [italics added]; and §113, insuring that labor employed by contractors or subcontractors on Interstate System projects shall receive "wages at rates not less than those prevailing on the same type of work in the immediate locality as determined by the Secretary of Labor. . . ."

¹³ *Ibid.*, §131, referring to the national standards to be promulgated by the Secretary of Commerce.

meaning. And, he may find that these directions lead him ultimately to sources outside the official family of governmental agencies. For example, the geometric design and construction standards involved in the Federal-aid act just mentioned actually turn out to be those formulated by the American Association of State Highway Officials in consultation with the U.S. Bureau of Public Roads. Thus counsel's legislative research may be aided by an excellent series of explanatory statements contained in the official policy pamphlets of AASHO, and indirectly by the discussions of these matters in the meetings of AASHO and its committees.

Examples of this type of extrinsic aid could be multiplied¹⁴, but enough has been said to make the point that counsel has certain reference points outside the statute as well as within its four corners, and that these must be relied on by him in the interpretive process just as they were relied on by the legislature in the process of formulation.

Counsel must, of course, be wary of certain constitutional pitfalls which threaten the use of outside references in the delegation of standards. In theory, legislative power cannot lawfully be delegated to others. In practice, however, the courts have treated the various possible situations with caution. Where a public official is independently responsible for final promulgation of standards or regulations, the fact that these standards may have been prepared originally by outside groups generally will not invalidate the law.¹⁵ But the character of the regulation is also important. In the regulation of economic relationships

¹⁴ Some other fields may also be cited. For example, the Uniform Vehicle Code, which is widely used as a model for State traffic and motor vehicle equipment laws, adopts standards of such groups as the Society of Automotive Engineers, American Association of State Highway Officials, National Commission on Safety Education, Interstate Commerce Commission, and Bureau of Explosives.

¹⁵ 1 SUTHERLAND STATUTORY CONSTRUCTION (3d ed.), §S309 and citations: 1954 Wis. L. Rev. 500.

between private parties the courts seem more sensitive about the use of the non-governmental origin of standards than where public health and safety or engineering techniques are involved.¹⁶ Other pitfalls may be present in prospective adoption of standards as they may be amended or added to in the future. These, however, are beyond the scope of the present discussion, and, in addition, may be considered as the penalty of inadequate review and liaison with the legislature during the laws formative period.

The Common Law of Legislation

One other source of aid to counsel in his role as interpreter of the law should be mentioned. This has been described by the late Professor Frank Horack (who was one of the pioneers in bringing the study of legislation into the law schools) as the "common law" of legislation. He has commented:

The function of precedent in judge-made law has been discussed elaborately; its similar function in legislation has been ignored. Nevertheless, legislation, like judge-made law, follows precedent. Save for formal differences of structure, legislation and adjudication spring from similar patterns of human conduct. . . . [The] law of statutory precedents must be looked for, not in the courts, but in the legislative acts. . . .

Statutory precedent grows as case-precedent grows. First, someone bolder than the rest marks a new course. If the course appears satisfactory, others follow. Legal science calls this the doctrine of *stare decisis*. The legislative process is similar.¹⁷

The significance of this trait in our legislative behavior should not be overlooked by highway counsel. In their field this process has been stimulated by the fact that the Federal-aid program is based on a premise of adherence to uniform minimum

¹⁶ In this respect the shadow of *Schechter v. U.S.*, 295 U.S. 495 (1935), and the NRA industry codes of fair conduct may still be seen.

¹⁷ Horack, F. E., Jr., "The Common Law of Legislation." 23 Iowa L. Rev. 41, 42 (1937).

standards, and that in regard to certain aspects of the program, such as control of access, model laws have been drafted for guidance in preparing State legislation.¹⁸ State laws governing construction of highways show some remarkably clear lines of common ancestry. There is no reason why this fact should not be made to work for achieving similar interpretation of their terms by the courts.¹⁹

Tools of Interpretation

From the fruits of legislative research counsel can assemble a sizeable kit of tools for the interpretation of statutes. Within his easy reach he may have a detailed annotation of his own State's highway laws and the pertinent Federal laws and regulations that are related to highways.

Hopefully this annotation would include references to the origin of the legislation, and, section-by-section, references to cases, Attorney General's opinions, his own opinions to the highway administrator, pertinent administrative rulings and proceedings under the law, and technical manuals or similar documents used by engineers and administrative of-

ficers. Hopefully, also, this source book would include some reference to pertinent writings in the fields of engineering, planning, economics, and law which bear on the subject of the statute. It will not be going beyond his calling for counsel to include such non-legal references in his index or annotation; nor will he find that it is only used in the preparation of an occasional "Brandeis Brief" in an unusual appellate case. He will find that this material, combined with sound research of the law, is the material that makes his opinions not only correct but persuasive to the reader.

In this brief review of the tools of legislative interpretation, passing reference should also be made to the writings on highway law which appear in legal periodical literature. The law reviews have an established place among the sources of information recognized and used by the courts. Some have literally changed the course of legal history by their influence on the bench.²⁰ In the field of highway law, several may be cited (because of their repeated appearance in judicial opinions) as having made a significant contribution to the development of current judicial acceptance of the controlled-access highway principle.²¹ Significantly the writings on access control that have appeared in legal periodicals have come almost entirely from counsel for State highway departments. This is a good thing insofar as it indicates the active interest of highway counsel in building legal doctrine on the problems that press them most urgently. One might wish, however, that more recruits could be persuaded

¹⁸ For example, "Model Controlled-Access Highway Act," in LEVIN, D. R., *PUBLIC CONTROL OF HIGHWAY ACCESS AND ROADSIDE DEVELOPMENT*, Public Roads Administration, 1947.

¹⁹ Pertinent to this is the further comment of Professor Horack: "The significant point is that in adopting these statutes legislatures have followed a system remarkably similar to that of judicial precedent. It may be objected that the legislature, not having to explain its result, need not feel bound by the statutes of other states. This is, indeed, true. But the statute tells but half the story. If the committee reports, the hearings, and the debates accompanied every statute, the procedure would be apparent. Important present-day legislation is no longer of 'wild and sporadic growth'. Scientific legislative services have made great strides, national associations follow proposed state and federal legislation with careful scrutiny, and the conflicting interests represented in every committee room make it as dangerous for proponent or committee-man to be unfamiliar with existing legislation as it is for judge or counsel to argue without 'authorities.'" ("The Common Law of Legislation." 23 *Iowa L. Rev.* 41, 44 (1937).

²⁰ For example, *Erie v. Tompkins*, 304 U.S. 64 (1938), reversing the doctrine of *Swift v. Tyson*, 16 Pet. (U.S.) 1 (1842), in which the court frankly acknowledged a law review article as the persuasive factor in showing the error of this 96-year old rule.

²¹ For example, the Note in 3 *Stan. L. Rev.* 298 (1951); Cunyningham, W., "The Limited Access Highway from a Lawyer's Viewpoint." 13 *Mo. L. Rev.* 19 (1948); Duhaime, W. E., "Limiting Access to Highways." 33 *Ore. L. Rev.* 16 (1953); Bowie, "Limiting Highway Access." 4 *Md. L. Rev.* 219 (1940).

to work on highway law research for there are more than enough problems to go round.

In this connection reference should be made to the series of highway law studies begun in 1957 by the Highway Research Board and the Bureau of Public Roads. A score of monographs have been published in the last five years as a result of this program, and their value as references on the comparative law of the States has been demonstrated in their continued use.

A catalog of the highway lawyer's tools for interpretation of the law could be continued at length, but enough has already been said to suggest the possibilities that exist. Essentially the point here is an old and familiar one: "With characteristic hardheadedness Chief Justice Marshall struck at the core of the matter with the observation [that] 'where the mind labours to discover the design of the legislators, it seizes everything from which aid can be derived.'"²²

STATUTORY REVISION

The third role of highway counsel that should be noted concerns his responsibilities when highway laws must be revised. The mechanics of law revision are discussed in some detail at a later session of this workshop, and by speakers more competent and experienced than I am. It may, however, be useful at this time to look briefly at some of the underlying elements of a law revision project and thus establish a measure of perspective for the discussion of mechanics.

Aim of Revisor

When one is first asked to take charge of or assist in the revision of a body of law, his natural response is likely to be, "Why? We've been get-

²² Frankfurter, F., "Some Reflections on the Reading of Statutes," 47 Colum. L. Rev. 527 (1947), quoting Marshall's remark in *U.S. v. Fisher*, 2 Cranch (U.S.) 358, 386 (1805).

ting along fairly well with what we have." It is, of course, true that a "muddling through" process can go on for many years. But the process of piecemeal amendments and the addition of successive layers of law becomes increasingly costly. As long ago as 1923 the establishment of the American Law Institute marked a recognition of the unwisdom in continuing without a systematic program for re-examination and revision of the law in the light of changing times. At this time it was said:

The two chief defects in American law are its uncertainty and its complexity. These defects cause useless litigation, prevent resort to the courts to enforce just rights, make it often impossible to advise persons of their rights, and when litigation is begun, create delay and expense.

When the law is doubtful most persons are inclined to adopt the view most favorable to their own interests; and many are willing if necessary to test the matter in court while those willing to overreach their neighbors are encouraged to delay performing their obligations until some court has passed on all the novel legal theories which skilled ingenuity can invent to show they need not be performed

The same bad effects, though in a less degree, result from the law's complexity. . . . [Complex] law tends to make the administration of justice a game in which knowledge and skill are more important for obtaining victory than a just cause.²³

In addition to seeking simplifications and greater clarity, revision of the statute law provides an opportunity for systematic changes in substance. So the courts have said:

The object of a revision of the statutes is that there may be such changes made in them as the changes in political and social matters may demand²⁴

All this, however, is apt to sound too general to the layman or the legislator. The case for highway law revision can be put in much sharper focus, as Louis Morony, of the Auto-

²³ American Law Institute, *PROC.*, v. 1, p. 6-11 (1923).

²⁴ *In re Hall*, 50 Conn. 131 (1882).

motive Safety Foundation, has stated it:

Well before the enactment of the Federal-Aid Highway Act of 1956, many states were hampered by outmoded statutory provisions which did not grant the highway departments the authority to construct and improve the highways in accordance with the demands of modern traffic. When the pressure of the accelerated Federal-aid construction program arose, many legal problems that had often been considered the merest nuisance suddenly assumed the proportions of major legal barriers to a proper implementation of the highway improvement program. This was true not only in projecting long-range plans and projects but also in attempts to reorganize for more efficient operation.²⁵

And, with equally keen insight, Commissioner of Public Roads MacDonald as long ago as 1949 warned:

The tempo of growth in highway service demands has been so rapid that legislation is lagging far behind both in range and content. Highway officials, no matter how well qualified, may act only within the legal authority delegated by legislative action. The deficiency of first magnitude is legislative sanction to the state highway departments to reorganize to meet new duties, to use new methods, to extend their operations to new fields²⁶

Thus the broad objectives of highway law revision may be listed as clarification, simplification and modernization. And within the scope of each of these broad objectives the law revisor must be prepared to pinpoint in detail the specific aspects which administrative and operating experience shows are in need of attention. Identification of problems, followed by analysis and comparison of the alternative solutions, will be necessary before any recommendations for statutory change may be made.

This formulation of aims will obviously call for legislative research oriented to the particular situation of the State involved. There is no

²⁵ Morony, L. R., "The Legislative Responsibility for Future Highway Uses." 38 Neb. L. Rev. 525, 527 (1959).

²⁶ MacDonald, T. H., "The Inadequacies of Our Present Transportation Facilities." Conference, American Road Builders Association, Washington, D.C., Nov. 1949.

nationally recommended model highway code being offered as a device for achieving uniform legislation in all States. Probably there is not the need for nationwide uniformity here as there is in connection with commercial transactions, motor vehicle travel, and similar activities which have grown up as part of the great and easy mobility of American society.

But if the aim of the law revisor is not to achieve uniformity for its own sake, it should at least be to promote the widest possible adoption of those concepts and procedures which have demonstrated themselves to be best. Wholly aside from the question of whether there should or should not be a system of uniform highway laws for the States, the law revisor should ask: Does the language of my State's law reflect the best that a careful legislative draftsman can do? Do the procedures called for by my State laws reflect the best possible accommodation of administrative needs with liberty and property? Do these procedures offer the best organization of authority among State, county and municipal agencies that is possible under the political structure of the State? As these inescapable questions are faced, it will make eminently good sense to borrow from the laws and experience of other States where research shows that better answers have been found.

This should be the law revisor's aim, and he should be prepared to study his own State's past, present, and future in order to find his answers. Only the most general advice can be given to him in advance concerning the places he should concentrate. One of these areas which counsel should note has to do with the organization of authority and responsibility. This was stressed in the comments of both MacDonald and Morony quoted earlier. This may seem somewhat out of the customary scope of counsel's competence, but actually it is not. Throughout American history, lawyers have functioned as architects for the organization of legal power. They now have a chal-

lenge to meet in the organization of highway administration and inter-governmental relations that is every bit as important as the ones that they successfully met in the 18th century when State governments were first organized or in the 19th century when their talents were turned to the problems of corporation law and organization.

Other areas in which the body of highway law is everywhere feeling the pangs of growth are more readily accepted as within the scope of lawyers' competence. These involve the speed and efficiency with which legal processes can be made to function in order to give engineers and administrators sufficient "lead time" for their work. They also involve appropriate provision in the legal process to receive and use new types of evidence in valuation, new concepts of the balance of public and private interests in the use of police powers, and new forms of action to test issues that were unknown a century ago when our codes of procedures were established.

Resources of Law Revision

All this, merely to bring into focus the aims of a project of highway law revision, may sound like an impossible requirement. Where will the research resources be found to make a study so deep as this? Where are the resources that will permit the revisor to take the next step of evaluating the experience of other States and formulating recommendations for improvement of the law?

Some of the information he needs will have to be compiled by the revisor himself for it can be found only in his own State. He will have to look for it in the history of his State highway program; some will be in the collective wisdom of administrators, engineers, planners, and legislative leaders at local levels of government. The mechanical problem of how to secure the active interest and assistance of these people can be solved in a variety of ways, but the information and advice that these resources can give are essential.

Another resource which the revisor must have is a set of sound and acceptable legislative guides to use in his evaluation of the information he acquires through research. This has been notably lacking, and it still is an area where a massive amount of research should be done²⁷, but a start is being made toward the systematic study of highway laws and the relationship of the highway transportation system to the total economy.

A list of documents which might be regarded as basic resources for comparative study of State law or State and local law on selected aspects of highway law would include the Highway Research Board's series of special reports, commenced in 1957 and now numbering 15 so far published on highway law. These reports are the results of a systematic pro-

²⁷ As to this matter generally the following comment in a study of one State's laws is pertinent:

"Why is it that so many highway statutes have been 'poorly conceived'; that the law has failed to keep pace over the years with fiscal and engineering progress? . . . [T]wo basic factors are primarily responsible:

"First, a lack of coordination within the states among highway officials, and particularly between the highway engineer and the highway lawyer.

"Second, the lack of sound and acceptable legislative guides for the country as a whole.

"With reference to coordination, it is apparent that the proper inter-relationship does not exist. It is customary for engineering, administrative and fiscal programs to be carried forward to the point of submission to legislators with little or no consideration of the legal problems involved. Frequently, the lawyer finds himself in the position of a legislative draftsman, with no knowledge of the problems or objectives of the highway department. . . .

"[As to] the second basic deficiency—the lack of sound and acceptable legislative guides. There are many elements in highway law that are common to the powers and functions of highway administrators in all states. A study of the laws of the several states to determine the best principles and practices now in effect can form the basis for the development of legal standards that will best meet present and future needs." A STUDY OF THE STATE HIGHWAY LAWS OF NORTH DAKOTA, N. Dak. Legislative Research Committee, Bismarck, p. 8-10 (1953).

SUMMARY

gram of research planned to collect and analyze the laws of the States on all the major phases of highway programs. At present this project is continuing.

Also, the U.S. Bureau of Public Roads has contributed several studies in which compilation and analysis of State laws on current major problems have appeared. Some that have been extremely significant are David Levin's studies *Public Control of Highway Access and Roadside Development* (1947) and *Legal Aspects of Access Control* (1945). Others which have most recently been published and promise to be of importance are Sidney Goldstein's study of *The Use of Economic Evidence in Condemnation Cases*,²⁸ and the studies by Stanhagen and Mullins of *Highway Transportation Criteria in Zoning Law* and *Police Power and Planning Controls for Arterial Streets*.

Others which should be mentioned are the American Automobile Association's *Parking Manual*, the reports of the National Highway User's Conference, the monographs on city ordinances by the National Institute of Municipal Law Officers, and the publications of the Automotive Safety Foundation which has consulted closely with numerous States on law revision projects.

As these research resources continue to grow, and as new ones are added to the list, the law revisor's feeling of loneliness will be eased. He will be able to respond more quickly and more confidently to the question, "What is the law in the rest of the States on this point?" His "revisor's notes" for his own State's code will, in turn, become part of the growing body of collected and analyzed research, and will be of aid to others elsewhere.

²⁸ Originally prepared as a paper for the 1962 meeting of the Highway Research Board, a shorter version has been published in 50 *Geo. L. J.* 205 (1961).

In many respects this approach to legislation and legislative research is like Red Skelton's definition of an "adult western movie." An adult western is a western movie with a plot that is over 21 years old. So it is with legislation. As highway counsel faces each new biennial session he prepares himself for a series of variations on a theme he has heard before. In the preparation and enactment of legislation his ancient enemies are procrastination, pressure, and perfunctory understanding. In the interpretation of laws his harassment comes from inconsistency, inadequacy of the legislative history, and insufficient coordination of practice and precept. In the revision of the law he must overcome the handicaps of too late a start, too little liaison, and the tremendous loneliness of sifting and weighing the merits of a mass of laws.

If the foregoing comments have not been able to alter or improve on this theme (and it is difficult to alter the nature of the legislative process that much), at least they may help suggest some ways to make it more harmonious.

Essentially all of this has concerned the process of decision-making in a context that has become immensely complex in the past score of years. If the highway lawyer would help himself, he may find he can do it only by helping others—the legislator, the administrator, the planner, and the engineer. As he does a better job in establishing and maintaining an informal liaison with these other professionals he may well discover that their decision-making becomes easier and surer. Legislative and administrative decisions depend for their soundness on information thoroughly collected and carefully analyzed. Highway counsel must provide this on a scale greater than ever before.