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HEARING ON A BILL: LEGISLATIVE FOLKLORE?

JULIUS COHEN*

A CONGRESSMAN or Senator introduces a bill. Beyond the fact that it entails the formality of dropping a written instrument into the legislative hopper, what does this seemingly simple act mean? A moment's reflection will reveal that it involves a complex of at least three distinct elements. It means, first of all, that the author of the proposal assumes the existence of a fact situation, the correction of which is sought on the legislative level; secondly, that the method advanced for dealing with the situation is believed to be an appropriate method or means for bringing about an immediate end or goal; thirdly, that the immediate end sought would be instrumental in achieving an even higher or more inclusive end or goal. These constituent elements—the present fact situation, the means-ends hypothesis, the instrumental value judgment, together constitute the very essence of a legislative proposal. Thus, before it was enacted, the meaning of the recent bill to abolish the federal tax on oleomargarine consisted of (1) an assumption of a present fact situation (among others) that oleomargarine is a food which contains nutrients that are beneficial to human health, and that poor people were not at the time able to purchase it at a price that they could afford to pay; (2) a means-end hypothesis (among others) that the passage of the measure would bring a healthful food product to the poor man's table; and (3) an instrumental value judgment (among others) that we *ought* to make colored oleomargarine more readily available to lower economic groups because it would be more in keeping with the broader goal of economic justice to the poor.

It will readily be seen that the first two of these elements deal directly with aspects of experience—the first with past and present experience, the second with the future. Both of them are in the realm of fact, with respect to which tools for observation and techniques for prediction and empirical confirmation are applicable. Although the third, or “ought” element, is by its very nature normative in quality and therefore non-experiential, there are observable consequences of an instrumental “ought” choice to which these tools and techniques are also applicable.

Obviously, if the broad value goal is applied to a set of facts assumed to be true, but which are actually false, or on the strength of a means-end hypothesis which experience has rejected, or is conditioned upon an instrumental value which would effectuate a con-

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trary end, the application would be erroneous. Thus, hypothetically speaking, if it could reliably be shown (1) that the allegations of the present fact situation were not true—that, for example, oleomargarine is abundantly available to the poor, or (2) that the means-end hypothesis is faulty because the elimination of the tax would simply fatten the pocketbooks of manufacturers without reducing the price of oleomargarine, or (3) that making oleomargarine available to the poor would have consequences that would somehow result in greater economic injustice to the underprivileged—the broad value goal which the bill would seek to implement would not be realized. Accordingly, a bill would be defective and thus vulnerable to attack if the assumptions which underly any one or all of the three constituent elements would be found wanting. In the same way, a judicial decision would be defective when a law would be applied to an erroneous set of facts—when, for example, a criminal statute making it unlawful to take the life of another human would be applied with full sanction to one who really did not commit the act. In the legislative realm, what would result would be a non-realization of a value goal; in the judicial, it would be a denial of justice.

Thousands of bills of varying degrees of complexity are introduced during each session of Congress. (There were 8,215 bills, exclusive of joint, simple and concurrent resolutions, that were introduced in the first session of the 82nd Congress, from January 3 through October 20, 1951.) How does the legislative arm of our government check on the accuracy of the fact situations, the plausibility of the means-end hypotheses, and the efficacy of the instrumental value judgments which underly each of them? What machinery, if any, is available to Congress for avoiding error with respect to the claims and assumptions made concerning these component elements which are inherent in all proposed legislation?

Obviously, it cannot be the machinery of the first and third "readings" of a bill, because they are purely perfunctory in nature—the first reading being a recital of the title of the bill, the third being for purposes of engrossment. And it certainly cannot be the machinery of debate on the House or Senate floor, for rarely has it been used to generate other than heat. To use Woodrow Wilson's expression, Congress during debate is "Congress on public exhibition," not "Congress at work."¹ And what was apparently true in 1884, when Wilson recorded his views on the subject is appar-

1. Wilson, *Congressional Government* 79 (3d ed. 1885).

ently confirmed by the very recent observations of a distinguished member of the upper Chamber, who, in a bitter attack on the workings of this phase of the legislative process, borrowed from Hamlet by describing it as "words, words, words."² The ready answer, of course, is the hearing process, which becomes operative upon the "second reading" of a legislative proposal. If there is to be any check at all on these three component elements of a bill, it must be during the hearing on the measure, for it is here that the Committee to which it is referred is presumed to study it in its various ramifications before it passes judgment on it—either by recommending it for passage or defeat, or by "pigeon-holing" it and thereby refusing to report it out. But what kind of study is undertaken? And by whom? What is the nature of the process? The answers to these questions vary, of course, with the different legislative committees, but those who have observed the hearing process at close range should, at least in part, recognize certain familiar aspects in the rough sketch that follows.

The chairman of the standing committee to which a bill is referred obtains his venerable position of power through seniority, that is, as a political reward by the party in power for having managed to remain in office for a long period of time. The dominance of the chairman's position ordinarily allows him to play the leading role in determining the composition of the committee's staff, that is, the professional and clerical members who handle the details of the committee work, and oftentimes its planning. All too often he simply presents a completed slate of candidates to the other members of the committee, and asks their approval.³ Generally, there is acquiescence in his choice, partly out of a desire to avoid a clash with the chairman, because of the fear of political reprisal; partly because of the realization that if any of them ever became a chairman of a committee they, too, would wish to wield similar power without challenge. Present acquiescence, then, in the chairman's activities is simply a way of making a good investment for the future. In filling the positions on the staff, especially those of clerk, counsel, assistant counsel, economists, etc., which carry with them fairly lucrative salaries, a great deal of regard is given to political considerations: to patronage, the building of fences for the next election, the payment of political debts, the bowing to the demands

2. See the speech on "Loquacity of Senatorial Speeches" by Senator Matthew M. Neely, Cong. Record, November 14, 1951, Appendix A7241.

3. For confirmatory experience, see Voorhis, *Congressional Investigations: Inner Workings*, 18 U. of Chi. L. Rev. 455, 458 (1951).

of particular pressure groups that have a stake in the proposals over which the committee has jurisdiction. Training and ability, though considered, are too frequently of secondary importance, with the result that one often finds a strange admixture of personnel on committee staffs—hacks, political “has beens,” relatives, opportunists seeking to capitalize on contacts, shrewd representatives of special interests, and even an occasional high talented individual with the public interest at heart. If the party in power is in control by a very narrow margin of House and Senate seats, the minority will likely be given the opportunity to select some of the staff personnel who are of their own political persuasion. This not only permits the ranking minority committee members to partake of a share of the patronage but makes it possible for the “outs” to keep the “ins” under competitive political surveillance. It is the spoils system, then, that casts a shadow on the quality of the staff personnel of the committees that are entrusted with the task of passing on the merits of Congressional legislative proposals.

When political considerations are thus operative, the committee staff can be expected to employ its collective skills to aid the interests of those who were responsible for their hiring; and, because of this, the chances that they will be guided in their work by a detached but zealous regard for the public interest cannot be expected to be very great. It is not common for a committee staff to be selected for its competence in making independent critical investigations of the fact situation which prompts a legislative proposal, the means-end hypothesis which is advanced for correcting the situation, and the efficacy of the instrumental value judgment which underlies it—a task which calls for skills of the highest caliber, and for an objective frame of mind that is not harnessed to power politics. And why, one may ask? Simply because the making of critical independent investigations is not primarily the task which the committee ordinarily sets out to perform during a hearing on a bill. This is evident alone from the very size of committee staffs. For even assuming, *arguendo*, that they were of the highest expert competence, and selected solely for the purpose of undertaking critical investigation and research, their total number is so pitifully small that, even with an occasional assist from the Legislative Reference Service of the Library of Congress, they could not even begin to do an effective job. (It has been estimated that in the second session of the 81st Congress, the combined professional and clerical staffs of all of the committees of both the House and the Senate numbered 614. Of these

290 were professionals, or approximately one-half a professional staff member for each member of Congress.)⁴

But if critical investigation is not the major task of the committee staff, then what is? This depends on several situations. If the committee chairman or other influential committee members working through the chairman are already committed to the passage of a bill even prior to the hearings—an experience which is not uncommon—then one of the major tasks of the staff is the delicate one of slanting the hearing, of manipulating the hearing machinery in such a way that a previous commitment on a bill would be made to appear as a decision reached by rational, detached deliberation, after all of the evidence is in—a *post hoc ergo propter hoc* in artistic disguise.⁵ This the staff can do by several means: by inviting the strongest, most persuasive witnesses to testify on behalf of the measure; by endeavoring to limit the number of strong opposition witnesses to a minimum; by asking “proper” questions of “friendly” witnesses and embarrassing ones who are “unfriendly”; by arranging to close the hearing at a propitious time; by writing a report which brings out the best features of the testimony in favor of the bill and the most unfavorable features of that offered by the opposition; by subduing or discarding facts which do not fit the pattern of preconceived notions, opinions or prejudices. If the previous commitment is to defeat or limit the proposal, the slanting of the hearing can be arranged in the other direction. In addition, the bill might be given the “killed-with-kindness” treatment—that is, given so lengthy a hearing that no time is left prior to adjournment to consider the measure on the House or Senate floor, thus assuring its defeat. Or a hearing may be denied altogether by “pigeon-holing” it, that is, by not placing it on the committee agenda. This, too, results in a virtual defeat of the measure, for it is thereby denied a place on the House and Senate calendars, and may not be considered on the floor of either house unless a motion to discharge the bill from the committee is adopted—a procedure rarely tried, and when tried, rarely successful.

4. See Meader, *Congressional Investigations: Importance of the Fact-Finding Process*, 18 U. of Chi. L. Rev. 449, 451 (1951).

5. In a study on “The Staffing of the Committees of Congress,” (The Bureau of Government Research, University of Kentucky, 1949, p. 39) Gladys M. Kammerer reported that: “A substantial number of professional members of Congress utilize data reported by staff only to bolster a preconceived notion or position dictated by party commitments. Facts which do not fit the pattern of their opinions or prejudices are discarded by many when reaching conclusions as to committee action. Such rejection of staff efforts eventually leads to serious frustration and intellectual stultification.”

If there is no previous commitment on a bill, the hearing often serves less as a method for ascertaining the adequacy of the evidence presented in favor of or against it than it is for providing pressure groups and constituents an opportunity to "blow off steam," and for offering Senators and Congressmen an indication of the alignments of the functional interests which have a stake in the outcome of the measure. It gives the legislators a cue to the direction of the political currents which are generated by a proposal; it provides an opportunity to assess the relative weights of the competing forces and to gauge the possible effect of these forces upon their political fortunes. The very appearance of a witness as a representative of a powerful group is a subtle reminder that it might cost precious votes or support in the next campaign if the measure under consideration is not dealt with "properly." If a fellow Congressman or Senator, for political or other considerations, accompanies a witness or a delegation from home, a speech before the Committee on behalf of his constituents carries with it a suggestion that fellow Congressmen and Senators have ways of paying back favors or disavors in kind.

At first blush, the procedural trappings of a hearing might give the uninitiated the impression that its primary purpose is to dig objectively into the facts which prompted the introduction of a bill, to check the claims concerning the means-end hypotheses, and to explore the efficacy of the value judgments which are involved. There is usually an aura of informal dignity that prevails; the committee members, clerk and counsel, appear judicious in their bearing; often there are microphones, and the presence of photographers and reporters add somehow to the seriousness and importance of the occasion. But once the hearing is under way, it soon becomes evident that the procedure is not geared for a critical study of the three component elements of a bill. Witness after witness makes an appearance, states his name and connections, and usually proceeds to read from a prepared statement, even though advance copies may already be in the hands of the committee and press. Evidence of all sorts is introduced to establish the fact situation which prompted the introduction of a bill—materials ranging from mere opinion, to bold assertions, to expert testimony; often it is embellished by the elaborate charts, graphs, statistical tables, etc., which are inserted into the record without critical analysis and discussion. In dealing with the means-end hypothesis, opposing witnesses, each with conflicting interests in the outcome of the

proposal, present competing testimonials concerning the predicted consequences of the bill—dire or wonderful, as the case may be, and each likely maintaining that, if the view of the other prevails, it would conflict with those basic values which most of us hold dear. Unless a committee member has a special interest in or commitment concerning the outcome of the proposed legislation, or an eager committee counsel wishes to make his presence felt by asking a few stray questions, the evidentiary materials presented by the witness are often apt to go unchallenged. The witness is thanked and commended for a “fine, forthright presentation,” and the next one is summoned to do his little stint. When to all of this is added the fact that, in the case of all too many committees, hearings are held with only the chairman and the staff in attendance—the committee members who are to pass judgment on a proposal being not infrequently absent—or are held in the presence of members who saunter in after the hearing is under way, and therefore are unable properly to listen to the testimony in full context, the non-judicious quality of a hearing on a bill becomes apparent.⁶

Of course, the testimony could still be read by the committee members, for a full verbatim account of hearing proceedings is ordinarily recorded and printed. But it would be rare indeed to find a Congressman or Senator or their harassed staff members who would have the time or inclination to study the voluminous testimony of an ordinary hearing on a bill in the same way that, say, an appellate court would study the transcript of a record for the purpose of scrutinizing trial proceedings.

If all of this has any semblance of the truth, how then, it may be asked, can a reliable report be made on the merits or demerits of a legislative proposal to the House or the Senate? Is the committee report and recommendation a decision not unlike a judicial opinion rendered after all of the evidence and arguments have been presented? It is a decision, to be sure, and carries considerable weight with the House and Senate—indeed, as has often happened, a favorable or unfavorable report by a committee on a bill may well mean its very life or death. But unlike a judicial decision, it is doubtful if it is reached by many committee members *after due*

6. “It is a common and discouraging experience on Capitol Hill for invited witnesses, who have worked hard and long on the preparation of their testimony, to appear before committees and find only one or a few members present.” Galloway, *The Legislative Reorganization Act of 1946*, XLV Am. Pol. Sci. Rev. 41, 48 (1951).

consideration and deliberation of the record. It is the committee staff that usually culls the transcript of the hearings and prepares a preliminary report—a “committee print”—pointed to a recommendation that would, in its judgment, be palatable to the dominant members of the committee. But, too frequently, its palatability depends on considerations wholly unrelated to the formal hearings—on a friendly call from the chairman or party functionary urging a member to “go along”; on promises or threats of reprisals from Congressmen or Senators interested in the passage or defeat of a bill; on pressure from constituents or groups who might be helpful to his political fortunes. The decision is frequently made the same way that music is frequently played—by ear; and even though the transcript of the hearing is available, and looks impressive, it often has as much bearing or influence on the decision of the committee concerning the bill as does the chaplain’s prayer on the legislative business which promptly follows in its wake. And if this is true of the committee that is charged with the duty of studying a legislative proposal, it would seem, *a fortiori*, to be true with respect to the rest of the membership of the House or Senate when the measure is brought up for debate and vote. To be sure, excerpts from the transcript of a hearing are sometimes utilized to bolster the positions of proponents or opponents of a bill during debate, but whether the position is one of opposition or support is likely determined not by a previous consideration of the evidence adduced at the hearing, but upon factors—political and otherwise—which are extrinsic to it. The legislative hearing, then, has all of the outward appearances of an impartial device for adjudging a legislative proposal on its merits: the adversary interests are usually permitted to present their respective views (that is, when the bill is not “pigeon-holed”), the testimony is recorded, a printed report is prepared—in brief, it would seem that a bill is ordinarily given its day in court. But to limit one’s observation of a process to the external trappings alone results in serious distortion. It obscures the fact that the machinery set up for the hearing is a prize that can be captured and manipulated to the advantage of the political forces that happen at the time to be in command; it hides from view the fact that a hearing is not primarily a genuine trial of a policy issue; that the committee which conducts the hearing—and this includes the staff members—is not in the main, geared to make any impartial, independent studies of its own; and that legislators, though posing as judges in committees, are themselves advocates or partisans who are

mindful of advantages for themselves, for their constituents and for their parties.

But if such be the nature of the legislative "beast," then why go through the motions of a hearing on a bill? Why perpetuate the myth that a bill is ordinarily given its day in court? Why complicate unnecessarily the harassed life of the average Congressman and Senator by endeavoring to foist on him the duties for which his talents are not especially equipped, and for which he scarcely has any time, considering the tremendous demands upon his office. For the task of checking the immediate fact situation which a legislative proposal seeks to correct, something more is necessary than mere testimonials from witnesses with axes to grind. To begin with, there are many so-called facts for which science has provided no adequate measuring rods, and for which testimonials at a hearing furnish no illumination at all. How, for example, reliably measure the extent of juvenile delinquency—the unapprehended as well as the apprehended varieties; or the extent, if any, that capital punishment has been a deterrent to the commission of crime? At best, testimonials concerning such facts are but unconfirmed hypotheses; and because, more often than not, they come in pairs—that is, a denial and an affirmation, there is, too frequently, nothing reliable upon which to lean. Of the facts that are ascertainable and measurable, the hearing is too often not the proper forum for getting at them. It frequently requires independent empirical field studies, on-the-spot investigations, and the examination of witnesses other than those, who, because of financial resources or political backing, are able to present their case at a formal hearing in Washington. It is also not the proper forum for ascertaining the efficacy of the means-end hypotheses contained in legislative proposals, or the consequences that would or would not flow if the policies which they embody are adopted. Both of these latter two matters involve predictions; and whether they meet the requirements of scientific probability cannot be ascertained by the jury-like device of observing the countenances and grimaces of witnesses. Whether reliable evidence exists to justify claims concerning means-end hypotheses, or the probable consequences of policy decisions, cannot ordinarily be ascertained by the heat of affirmation and denial of witnesses at a hearing, but by a cool, dispassionate examination of our accumulated knowledge. If because of human limitations such knowledge is unavailable, a hearing surely would not produce it.

For a serious investigation of the three component elements of

proposed legislation, an entirely different machinery as well as quality of personnel would be necessary. To begin with, inasmuch as the average Congressman or Senator has neither the time nor the training for this function, he should not be required to participate in the proceedings of investigations. Participation in such proceedings by the President or his cabinet members is not required or expected when they are engaged in recommending legislation to Congress. They rely basically on the research of experts and others for fact information—research which is based on methods far more elaborate and intensive than that ordinarily utilized by the legislative branch of government. Once this information is made available, the concern of the executive is with the policy that should be taken regarding it. His task involves a search for the larger goal or policy end, and a subsidiary determination of whether the aim of a specific policy proposal is consistent with these ends. It is, in essence, a political judgment concerning the wisdom of the proposal—assuming the facts upon which it is based. If this is true for the executive, why should it be any less true for the legislator, for is this not precisely the nature of his job, too? Is it not a task for which his talents should be peculiarly suited, and for which he is politically responsible if they are not? Why not, then, a fair division of labor in this age of specialization? Why not leave the fact-gathering relating to the three component elements of bills to fact-gathering specialists, thereby permitting the legislator more time and energy for the primary task of policy-making, of judging the wisdom of legislative proposals—for the problem of ascertaining the broad goals towards which the nation and his immediate constituency are striving, for balancing and reconciling the conflicts between them. Why unnecessarily encumber the legislator's life by requiring him to attend and participate in the fact-finding process which is preliminary to policy-making. If error in policy results from error in the facts which underly any one or all three of the component elements of proposed legislation, it surely cannot be reduced to a minimum by continuing the hearing as it is presently constituted. What is needed is a large, independent staff of competent investigators, selected without reference to political party affiliation, and trained in scientific method and in the specialized disciplines to which the legislative proposals relate. Those who introduce bills could be required to append to each of them a statement of the fact situation which prompted the proposal, a justification for the means-end hypothesis that is advanced and a rationale

of the instrumental value judgment which it embodies. Bills could be routed to the staff after first reading for an initial processing and preliminary report on whether the salient information involved is "ascertainable," "non-ascertainable," "partially ascertainable," etc.; if capable of being ascertained, what it would involve by way of time, expense and facilities for the job. If it is determined that an investigation would yield no fruitful information because of the lack of available time or adequate knowledge, or of the absence of the know-how for getting at that knowledge (as is, regrettably, too often the case), the investigation would be dispensed with and the legislator would be obliged, as he is now, to rely on his own resources or intuitive judgment for guidance. If it is determined, however, that the facts are objectively ascertainable, and an investigation is undertaken, it would be designed to cut unnecessary conjecture and disputation to a minimum, to yield the maximum amount of reliable information and to distill it in the alembic of impartial critical judgment. The methods utilized—whether by interview, testimonial, field study, etc.—would be designed and tailored to fit the specific legislative proposal; and the allegations advanced with respect to them would be independently checked. A documented report issued by a distinguished, independent staff, bent on not compromising with the truth, would have real stature—indeed, sufficient to be taken seriously by the public and the press, and, in turn, by the law-makers in Congress. Once the report is released, it could be subjected to the spotlight of public scrutiny and criticized for avoidable bias or error. With such a staff and procedure for making investigations, the unprepared legislative branch would be better able to compete with the executive, whose expert witnesses, heavily laden with data and arguments, have long dominated the hearing process when administration bills are involved. One of the major contributing factors to the decline of Congressional government is the absence of factual information and knowledge upon which sound policy decisions must be bottomed. Armed with independent fact-finding and fact-checking facilities, Congressmen and Senators would be better able to meet the executive branch on its own level, thereby effectuating a greater check and balance and a more genuine separation of powers than has existed in recent years.

If it is argued that such a change in the procedure would deprive legislators of convenient sounding boards for gauging the alignments and strength of the political forces involved in a legisla-

tive proposal, it may be suggested that other sounding boards are surely not unavailable. It would be rare, indeed, if facilities other than the hearing were lacking for ascertaining the direction and strength of political winds. The vocal ones—those who usually monopolize the hearing process as it is now constituted—would somehow find a way to be heard, hearing or no hearing. If it is maintained that the hearing is needed as an outlet for psychological tensions, that is, as a method for permitting those involved in a competitive legislative struggle to “blow off steam,” is it not in order to ask whether the release of such tensions could not be achieved some other way than by disguising its purpose? Why dress the hearing up in formal fact-searching and fact-finding attire. If it is argued, further, that to revamp the present hearing procedure would deprive constituents and pressure groups of a forum for getting their “day in court,” for presenting their “case,” and for being “heard,” it need only be pointed out that a critical study and evaluation of the component elements of a legislative proposal is not a judicial controversy at all; that the methods of court trial are not necessary for scrutinizing these component elements; and, finally, that to insist on the formal trappings of a procedure that is often empty is to cling not to principles of democracy and good government, but to a world of folklore and make-believe.

Now, all of this should not be taken to mean that *no* hearing on any bill ever yields anything worthwhile or ever shed any valuable light on proposed legislation. To so hold would be misleading. There have doubtless been many instances in which the clash of adversaries, the cross-questioning of alert Congressmen and Senators, and the work of committee staffs have illuminated policy issues and have clarified complicated issues of fact; and there have doubtless been instances in which committee reports have played an important role in influencing the course of policy decisions. But these instances no more hide the deep-rooted weaknesses of the process than the bright spots of a city lift the pall of darkness from its slums. For under the hearing process as it now exists, there is reason to believe that too few of those who hear are really equipped to hear, and too little of that which should be heard is actually heard.