How Our Laws Are Made: A Ghost Writer's View

by Sandra Strokoff[1]

Frequently, on the floor of the House of Representatives, one will hear a Member refer to another as the "author" of a bill who has "carefully crafted" the language of the proposed legislation. Statements like these make me smile, because if the Members are the authors, then I and my colleagues in the Office of the Legislative Counsel of the House of Representatives are the ghost writers.

The Office of the Legislative Counsel, created by statute originally in 1918[2], is currently composed of 30-plus attorneys who generally toil in anonymity, at least as far as those outside the legislative process are concerned. Attorneys are charged with taking the idea of any Member or committee of the House of Representatives requesting the services of the Office and transforming it into legislative language or, as one of my clients used to say, "the magic words." We participate in all stages of the legislative process, be it preparing a bill for introduction, drafting amendments, participating in any conference of the two Houses of Congress to resolve differences between the two versions of the bill, or incorporating changes in the bill at each stage for publication and ultimately for presentation to the President. Frequently, we draft while debate is going on - both during committee consideration and on the House Floor, and may be asked to explain the meaning or effect of legislative language.

Although the Office has drafting manuals and guidelines, drafting legislation is without question a matter of on-the-job training. For up to two years, a new attorney in the Office, while communicating directly with clients (congressional staff members, but occasionally the Members themselves) on legislative requests, works under the tutelage of a senior attorney in preparing for introduction a wide variety of bills to gain as much experience as possible in developing drafting skills. Typically, only legislation that is unlikely to pass is given to a new attorney. Ironically a new attorney's work will almost always include drafting a few amendments to the U.S. Constitution.

Members of the Office of the Legislative Counsel are bound by statute not to express views on or make policy with respect to legislation. Our responsibility is to reflect the ideas of Members of Congress accurately in legislative language. That isn't to say that we can't affect policy by pointing out the consequences or meanings of the printed word. Trying to close loopholes before they open is a constant challenge. It is easy to overlook the consequences of the simplest word. Some years ago, a House bill authorizing the President to impose controls on exports to any foreign country for foreign policy reasons was amended to prohibit placing these controls on "food". When the House was in conference

with the Senate on the bill, the Senate staff referred to the provision as the "Twinkies amendment" because "food" meant any kind of food, exported for any reason. The conference agreement modified the provision to prohibit controls on exports of food, but only food used to combat malnutrition. Most would not put Twinkies in that category.

Attorneys in our office "specialize" in particular areas of law with which we become reasonably conversant over a period of time; however, because of the relatively small number of attorneys handling anything that comes in the door, we use the term "specialist" loosely. I, for example, am responsible for legislation involving trade with other countries, exports from the United States, controlling the proliferation of arms and weapons of mass destruction, all forms of intellectual property, and matters affecting the Federal courts and civil actions, and I share responsibility with other attorneys on all other matters affecting international relations. We work best when we can rely on the expertise of congressional staff, the executive branch, the Library of Congress, and even outside groups, who are able to answer our questions regarding the practical effect of a particular policy.

We draft legislation for all sides on the issues at the same time, both Republicans and Democrats, and factions within each party. We may be drafting the same legislation for different individuals. At times, it would be much more efficient to be able to hook up several different clients who want to do roughly the same thing at the same time, instead of having to produce multiple documents with enough modifications to make them look different. But we are strictly bound by the rules of attorney-client confidentiality. We are therefore frequently in the position of knowing what all sides are up to before anyone else does.

While drafting legislation primarily involves knowing what existing law is and how to change it to do only what is asked and no more, we of course have to be mindful of the constraints of the Constitution. Bill of Rights issues do occasionally arise, but far more likely are issues regarding Federal versus State powers. I have become aware of parts of the Constitution I didn't know existed in law school, such as Article 1, section 9, clause 5, which prohibits the imposition of a tax on exports from any State, and Article I, section 10, clauses 2 and 3, which require the consent of Congress to any State-imposed duty on imports or exports and to any interstate compact (e.g. the agreement between Pennsylvania and New Jersey establishing the Delaware River Port Authority, which is supposed to keep the bridges connecting the two States from falling down). Sometimes we are asked to draft a constitutional fix for a provision that the courts have struck down as unconstitutional. Far more common, however, are proposals to amend existing law to change an interpretation of it by the courts that was unintended when the law was first enacted.

Of more pervasive impact than the Constitution are procedural issues. The rules of the House of Representatives and the Senate have tremendous significance at all stages of the legislative process once a bill has been introduced. An amendment to be offered to a bill in committee or on the House floor has to be *germane* to the bill (a term meaning, roughly, to be within the jurisdictional scope of the bill), and has to be offered at the appropriate time and in the appropriate form (e.g. as an amendment, an amendment to an amendment, a substitute to an amendment, an amendment to a substitute, etc.). But more significantly, before each bill is considered on the House floor, a rule is adopted (as reported by the Committee on Rules of the House) that stipulates how it is to be considered. Whereas in the past most bills had an "open rule", that is, a rule under which anyone could offer an amendment to the bill, more recently the norm is either a rule making in order a short list of amendments submitted in advance to the Rules Committee, or a rule prescribing a limited time within which consideration of the bill, and all amendments thereto, must be completed. Both of these so-called "modified open rules" have the effect of cutting off debate. The result is that many ideas are never debated at all.

In recent years the volume of work, coupled with extraordinary time constraints within which to do it, have made the job as legislative counsel increasingly demanding. There has also been the advent of the "megabill", that is, instead of a bill dealing with a specific subject within the jurisdiction of one committee that more than likely began as the idea of one Member of the House, a bill on a general subject for which many committees contribute provisions within their respective jurisdictions. The major megabills created by the budget process mandated by law are the budget reconcilation bills, encompassing changes in law required for each committee to meet prescribed budget targets for the coming fiscal year for matters within their respective jurisdictions. Our office is assigned the task of assembling these massive bills, which by their nature require coordinating the efforts of many attorneys in the Office who handle the different jurisdictions.

If, as we are all aware, legislation is not perfect, the circumstances under which it is put together prevent its being so: being asked to draft major proposals or multiple requests (as in preparation for committee or floor consideration) in short periods of time; being told to leave language ambiguous so as to avoid a particular interpretation or to gain the support of a particular constituency; generally not having enough time to read and reread proposed legislation for consistency and technical correctness. And, in some cases, the services of legislative counsel are not even used. The extraordinary agenda of the House of Representatives in the 104th Congress of *completing* consideration of major pieces of legislation in the now famous first "100 days", coupled with the major downsizing of congressional staff (and with it, a significant loss of expertise and

institutional memory) have made the job of legislative counsel all the more challenging.

Complaints aside, what keeps the job interesting and intellectually stimulating is the steady stream of new issues to tackle. To be presented with a problem that seeks a legislative solution, and then to put the pieces together in the matrix of existing law, much like solving a puzzle, can be very gratifying. And my work does have its humorous side. To wit:

Washington's love of acronyms has on occasion required some last minute word reshuffling. After laboring for months with my Senate counterpart and a host of staff from the Hill and the executive branch on the complex legislation implementing the GATT agreements entered into in April of 1994, I was told we had to change the title of the bill, and every reference to it in the 650-page bill, from the "Uruguay Round Implementation Act" to the "Uruaguay Round Agreements Act" because someone had already referred to the bill as "URIA", pronounced "U-REE-A". Needless to say, no one liked the sound of that.

Similarly, some years ago a bill was enacted to replace the Copyright Royalty Tribunal, a group of 3 highly paid full-time officers charged with the apparently part-time job of settling occasional copyright royalty disputes. The new ad hoc panels would be appointed as the need for them arose and would be paid for by the participants in the arbitration proceeding. Certainly a more economical and efficient way of doing things. But economy and efficiency only go so far in Washington. One day the staff person from the Judiciary Committee with whom I had been working on the bill appeared and said, in obvious amusement, that what we had been calling the new "**c**opyright **r**oyalty **a**rbitration **p**anel**s**" had to be changed to "copyright arbitration royalty panels" (which logic argued against)...well, you can figure it out.

In 1974, Congress passed a bill creating in essence a statutory trademark for "Woodsy Owl", defining Woodsy down to his "slacks (forest green when colored), a belt (brown when colored), and a Robin Hood style hat (forest green when colored) with a feather (red when colored)... who furthers the slogan 'Give a Hoot, Don't Pollute' ". Woodsy was to be under the watchful eye of the Secretary of Agriculture, who would be ready to slap an injunction on the unlicensed use of Woodsy or his slogan. The problem with the meticulous definition of Woodsy was that, when the Agriculture Department decided Woodsy needed a new look for the '90s, his new wardrobe required an Act of Congress. A bill was introduced to do this, only this time around, the bill was drafted to entrust Woodsy's new look to the Secretary of Agriculture to modify at will!

Being a participant in and observer of the legislative process has been at times exhilarating, at other times frustrating, and many times nerve-wracking. Most

legislation that is enacted is a compromise of divergent points of view, and that, perhaps, is the essence of the democratic process. There are times, purely for the sake of that compromise, when I am asked to draft provisions that may not make much logical, let alone policy, sense. At such times I am happy to remain a ghost writer as I mutter the title of a pamphlet given to me on my first day in the Office 20 years ago: "How our laws are made."

Endnotes

[1] The original article was published by the author in The Philadelphia Lawyer, Philadelphia Bar Association Quarterly Magazine, Vol. 59, No. 2, Summer 1996.
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[2] Section 1303 of the Revenue Act of 1918. The Office of the Legislative Counsel is presently governed by title V of the Legislative Reorganization Act of 1970 (2 U.S.C. 281-282e).
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