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The Catholic University Study of Federal Legislative Drafting in the Executive Branch: A Foreword

Reed Dickerson*

The Standing Committee on Legislative Drafting of the American Bar Association has long been concerned about the quality of federal legislation. After careful consideration, it recently concluded that many of the inadequacies in current and past legislation, which need no documentation here, are attributable to the methods that the federal government has been using to draft, screen, and enact legislation, methods that the Committee believes are susceptible to significant improvement.

The main administrative inadequacies may be quickly summarized. Proposed legislation is likely to be drafted in the first instance by inexpert lawyers. Some proposals are drafted outside the Government altogether, and even by laymen. Those that are drafted inside the Government are often drafted by persons with inadequate training or experience. Even where statutes are drafted by government lawyers as an assigned duty, many of them are asked to perform their drafting duties in addition to other substantial duties. As a result, few lawyers in government are permitted to specialize adequately in this area. Even where they are so permitted, they are usually inadequately trained.

The typical government draftsman is left to develop his talents as best he can, with some guidance from the more senior members of his office. As often as not, the senior members are themselves inadequately trained or experienced in legislative drafting. Because a career drafting field does not as yet exist, there is little to attract good men to the field, little incentive for them to remain in it, and little opportunity for pride of identification with a recognized legal specialty. Indeed, the Civil Service Commission no longer even recognizes the category "legislative attorney."

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Besides inadequate original draftsmanship, there is inadequate screening and coordination comparable to what proposed legislation normally gets with respect to substantive or fiscal matters. Accordingly, most legislative proposals by the executive branch leave their respective agencies without having met the kind of professional standard that is needed to make legislation an adequate instrument for governing the complicated affairs of the nation.

Although all agency legislative proposals are routinely checked by the Office of Management and Budget in the Executive Office of the President (some also by the Department of Justice), current screening relates almost exclusively to substantive or fiscal policy. Consideration of the basic effectiveness of the legislation as a specific solution to a current problem only incidentally reaches the problems of conceptual approach, architecture, practical effectiveness, and clarity that are the peculiar province of the expert draftsman.

Even after the proposal reaches Congress, there is no assurance that it will be adequately evaluated at any stage by a professional draftsman. The Legislative Counsel of the two houses do not even see most of the proposals that come from the executive branch and, even when their advice or participation is sought, it is often restricted to superficial matters of form. Nor is there any assurance that such proposals will be scrutinized by the expert draftsmen attached to the House Judiciary Committee. The jurisdiction of these lawyers is limited to supervising or examining codification bills and bills relating to the substantive topics falling under the special jurisdiction of that committee. Most bills fall outside those areas. Although some of the other Congressional committees have expert legal staffs, there is no assurance that all such committees are similarly blessed.

The result is that many bills originating in the executive branch get enacted without adequate screening for professional draftsmanship at any level. This is not readily observable, because the fact that at least some aspects of the bills are being carefully studied at many stages makes it easy to assume, however falsely, that they are being studied also with respect to draftsmanship.

How does this affect the effectiveness and usability of the law? Statutes that have been drafted by the inexpert tend to be inadequately conceived, illogically organized, unnecessarily complex, ambiguous or undesirably vague, hard to use, and hard to understand. Evidence of these deficiencies can be found on almost any page of the Statutes at Large.

The fact of general statutory inadequacy is inescapable. What is not clear to many is that the situation can be significantly improved. Nor is it clear to many what corrective steps could most profitably be taken. What has long been needed is a study of how the executive agencies and Congress are now dealing

with the problem. Many agencies, clearly, are not dealing with it at all; some, in all probability, are. It is important to know the varying ways in which these agencies have been responding to the need. If some agencies have developed effective means of drafting and screening legislation, the facts should be made known so that other agencies may benefit from their experience.

The Standing Committee, composed largely of professionals in the field, was unanimous in recognizing the current general need. But without outside help it lacked the practical means of sharing this insight with the rest of the bar. It needed outside help also in developing concrete proposals for ABA to make to Congress and the several executive agencies of the federal government.

Although the Committee generally viewed with favor a proposal to establish an office of legislative counsel in each department or agency of the federal government, it believed that before firm recommendations could be formulated there should be a study, professionally conducted or supervised, to assume a firmer grounding in the facts. Specifically, it recommended that the American Bar Foundation, working in cooperation with the Committee, undertake a detailed factual study, from inception to enactment, of the preparation and screening of proposed federal legislation originating in the executive branch. Until the specific inadequacies could be laid bare and thoroughly documented by a private agency, there was little hope of meeting an urgent need that is now costing the nation many millions of dollars and many thousands of legal and judicial man-hours. There seemed to be no alternative, because recommendations from within the federal government would almost surely die of apathy, suspicion, or neglect. (It is hard to muster internal governmental initiative for any reform that does not relate directly to the immediate needs of substantive law.)

The Committee recommended to the Foundation that the study cover the overall manner of performing legislative drafting functions in the federal government, the methods by which legislation is developed and processed, and the persons by whom bills are written.

Specifically, it recommended that the proposed study initially concentrate on legislative proposals originating in about a half dozen representative agencies and that, with respect to those agencies, the following specific information be obtained:

- (1) Organizational recognition and identification of the drafting process.
- (2) Qualifications and experience of the participating draftsmen.
- (3) Extent to which the draftsman is required to perform non-drafting functions.
- (4) Typical stage at which the draftsman is brought in.

- (5) Form of the legislative proposal when it reaches the draftsman.
- (6) What, if any, drafting manual is used.
- (7) Procedural steps to check for adequacy, such as hearings, drafting panels, and circulation for suggestion and comment.

Responding to the Committee's request, the American Bar Foundation generously agreed to support a pilot study by a student law review group, and invited four law schools to bid. The *Catholic University Law Review*, having shown an initiative and imagination that was matched by none of the others, was selected to do the job. Most of its investigations, including conferences with members of the Committee, were made in the summer of 1970; some supplementary research has been done since that time. The final results appear below.

That the effort has been worthwhile will be immediately apparent to anyone who examines the report. Whether it is final and definitive need not concern us here. The important fact is that, supplemented by the National Conference on Federal Legislative Drafting in the Executive Branch held by the Committee at Catholic University on May 21 and 22, 1971 (to be reported elsewhere), it calls sharp attention to a highly important aspect of modern government that has never before been adequately dealt with, defines its major problems, and proposes answers that are worth close and careful consideration.

In general, the authors show how much of the Federal legislative process takes place in the executive branch, and reveal the tendency to overlook drafting expertise in the performance of related legislative functions such as policy making or interpretation. Unfortunately, careful policy screening does not necessarily include screening for draftsmanship, because policy screening concentrates on whether an idea has been expressed, not whether it has been expressed adequately. Moreover, attention to draftsmanship is not necessarily adequate attention. Since the matter may not have been fully highlighted, the reader may have to pay careful attention to appreciate the full extent of this governmental oversight.

The authors deserve high commendation for their excellent report. Except for the Committee's general guidelines, the research, analysis, and recommendations are wholly theirs. The Standing Committee on Legislative Drafting is deeply grateful for this help and it has formulated its own recommendations only after carefully considering what the Catholic University Project has found and here reported.