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## Introduction

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## Preface

The purpose of this study is to present a survey and analysis of the legislative drafting process as it exists within the executive branch of the federal government.\* Initially, the research focused on the mechanics of processing legislation, including the documentation of the organization, personnel, and legislative procedures of several departments and agencies. Also, the Project examines the drafting process itself, with emphasis on the standards, guidelines, and objectives of each agency. These two approaches permit the Project to examine both the quality of draftsmanship and the role of the lawyer-draftsman within the legislative process. They further provide the basic data upon which this study has formulated some limited recommendations for improving the legislative drafting process.

## Introduction

[N]o real improvement in the quality of our statutes can be hoped for until our legislators and others responsible for the preparation and passage of bills realize that all the processes involved in converting a meritorious idea into an effective statute are equally important and that in each process experts must be employed.<sup>1</sup>

Although written in 1914, many observers of the legislative process feel this comment is equally relevant today. At that time, concern centered on the establishment of a congressional legislative drafting service to provide technical expertise for the transformation of substantive policy into effective legislation. As the volume and complexity of federal legislation has increased, the need for improved drafting has become more acute. Congress at an early date recognized the legislative draftsman as a skilled specialist. Its consistent concern for improvement in the drafting process has yielded encouraging results. For example, the establishment of the Law Revision Counsel<sup>2</sup> within the House Committee on the Judiciary has led to the codification of numerous titles in the United States Code.<sup>3</sup> Also, a legislative drafting service was begun to aid individual

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\* This study was performed under a research grant from the American Bar Foundation. The analyses, conclusions, and opinion expressed are those of the authors, however, and not those of the Foundation, its officers and directors or those of the Catholic University of America Law School.

1. Beaman, *Bill Drafting*, 7 LAW LIBRARY J. 66 (1914).

2. There is no express statutory authority for the Law Revision Counsel. The office functions solely as a subcommittee of the House Judiciary Committee. Telephone conversation between Mr. Joseph Fischer, Law Revision Counsel, and William Fox, *Catholic U.L. Rev.*, July 19, 1972.

3. See the discussion on codification, text accompanying footnotes 31-37. The Department of

congressmen in preparing legislative proposals.<sup>4</sup> However, similar recognition of the value of the professional draftsman has been slow to develop in the executive departments.<sup>5</sup> Today, when the legislative function of program initiation is rapidly shifting from Congress to the executive branch, the services of competent draftsmen are especially demanded.

This study began with the hypothesis that many laws are inadequate for the purposes for which they were designed, and that most deficiencies result from the use of outmoded methods of drafting, screening and processing legislation.<sup>6</sup> Poor draftsmanship can cause confusion in many areas: it may cloud the purpose and intent of the proposed legislation before enactment; it may encourage misinterpretation and misapplication by the bar; and, it may affect both judicial and executive implementation of the law at national, state and local levels.<sup>7</sup> Some bad legislation is produced by the inevitable policy conflicts between Congress and the executive. However, the presence of such conflicts should not preclude attempts to recognize and resolve the inherent technical problems of drafting and processing legislation.

The quality of legislative drafting cannot be measured against a thoroughly objective standard. Although certain information can be expressed and abstracted from statistical data, it is impossible to describe either quality draftsmanship or the legislative process in purely empirical terms.<sup>8</sup> Thus it was necessary to devise a methodology which combined objective and subjective analysis in a manner which did not detract from the empirical value of the

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Defense, for example, operates under three important codified titles: Title 10, Armed Forces; Title 32, National Guard; and Title 37, Pay and Allowances of the Uniform Services.

4. Both the House of Representatives and the Senate have established an Office of the Legislative Counsel, created in 1919 and originally referred to as the "Legislative Drafting Service." The original purpose was "to aid in drafting public bills and resolutions . . . on the request of any committee of either House of Congress." 40 Stat. 1141. Middleton Beaman was the first man appointed to a drafting position in this office in the House of Representatives. Undated memorandum from the Office of the Legislative Counsel of the Senate, on file at Catholic U.L. Rev. offices.

5. See, e.g., the Department of Justice study, *infra*, in which the draftsmen consider themselves "generalists" rather than as legislative drafting "specialists." DOJ Study, text accompanying footnotes 440-445.

6. See, e.g., the discussion of codification, text accompanying footnotes 31-37, *infra*. Codification is a process which has become necessary because so many statutes are enacted with little regard for previous related legislation.

7. For an excellent general discussion of the problems which loose drafting produces, see Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947). Particularly of note is Frankfurter's quoting of a hypothetical senator who mentions to his colleagues: "I admit this new bill is too complicated to understand. We'll just have to pass it to find out what it means." *Id.* at 545.

8. One Department of Justice employee insisted that each bill is a unique experience and in and of itself does not necessarily reflect an agency's drafting process. As he put it more emphatically: "I've seen bills written on the floor [of Congress]." Interview with Mr. Thomas Finley, Department of Justice, March 4, 1972.

report. Continual reevaluation of the effectiveness of the information-gathering procedures produced several changes from the original methodology.<sup>9</sup> The research was performed in three stages: (1) interviews with legislative personnel; (2) tracing specific bills, largely by the simple expedient of file drawer content analysis; and (3) observation within selected agencies.

### *Selection of Specific Agencies and Departments*

At first, the study was limited to the following executive agencies and departments: the Federal Trade Commission (FTC); the Department of Defense (DOD); the Department of Housing and Urban Development (HUD); the Department of Transportation (DOT); and the Department of Health, Education, and Welfare (HEW). It was felt that these departments represent a cross-section of the executive branch in policy orientation, size, age, volume of legislation, organization and complexity of process.

Due to their statutory independence and their unique mixture of administrative, executive and judicial functions, regulatory agencies provide a contrast to the other departments studied. The Federal Trade Commission was selected as representative of the regulatory agencies because of its policy orientation and because it has undergone considerable organizational reform.<sup>10</sup> The Commission's judicial and executive functions have existed since its inception; however, its role as originator of legislative programs has evolved only recently. Bills such as the Consumer Protection Act<sup>11</sup> and the Flammable Fabrics Act<sup>12</sup> are evidence of the change in the Commission's legislative activity.

The Department of Transportation was chosen because, like many executive departments, it was formed from several smaller agencies and offices;<sup>13</sup> it uses the task force approach in drafting and processing legislation; and it is involved

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9. For example, the initial questionnaire produced only limited results with respect to ascertaining the scope and nature of a typical draftsman's duties with the legislative section. As a result, it was necessary to use the interview method to ascertain duties. See text accompanying footnotes 39-43.

Additionally, the original proposal for the project recommended a computer analysis of the statistical information gathered. In the course of the investigation it was found impossible to develop sufficient "hard" quantitative data susceptible of analysis by computer.

10. Shortly after the FTC was established it was charged with enforcement of the Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. § 12 *et seq.* (1970). Presently its authority extends to investigation of business misconduct, enforcing consent decrees against unlawful business combinations and other similar areas. It has now moved into the consumer protection area. See, e.g., footnotes 11 and 12, *infra*.

11. Currently H.R. 10835, 92d Cong., 2d Sess. (1972).

12. 15 U.S.C. §§ 1191-1204 (1970).

13. See Department of Transportation Act of October 15, 1966, 80 Stat. 931 (1970). DOT combined under one Secretary the then independent Federal Aviation Agency, the Federal Railroad and Highway Administrations, and the U.S. Coast Guard.

in two codification projects.

Because of the resource and time limitations inherent in the research for the Project, three large executive agencies were examined only briefly. In the Departments of Defense (DOD), Health, Education and Welfare (HEW) and Housing and Urban Development (HUD), the Project has traced a single bill and has set out an overview of the agencies' drafting process without the in-depth treatment afforded the principal subjects of the study.

As the field research progressed, it became obvious that the report would be incomplete without an examination of the legislative process within the Department of Justice (DOJ). The bill tracing revealed that the Department's statutory enforcement authority affects virtually every agency and every title in the United States Code.<sup>14</sup> Moreover, the Department's juridical character presents a policy orientation distinct from the social-action agencies. The Department processes legislation as much from the interpretive viewpoint of the courts as from the standpoint of implementation of executive policy. One of the Justice Department's most important tasks in the legislative process is evaluating the potential legal consequences of legislation proposed by other agencies. Finally, the Department is currently in the midst of a revision of its statutory authority and re-codification of the criminal laws.<sup>15</sup> The Project believed that a study of this revision and recodification might be useful in evaluating the attitudes and approaches of the other agencies toward such projects.

The field research concluded with an examination of the clearance process of the Office of Management and Budget (OMB). Every executive department is required to secure approval from OMB before sending any legislative program to Congress.<sup>16</sup> It is the legislative reference division of OMB which is responsible for examining proposed legislation to insure consistency with the President's policies.<sup>17</sup> Analysis of this office and its role in the legislative process tends to indicate the importance placed on the lawyer-draftsman by the executive branch. Moreover, OMB's responsibility to clear all the legislative proposals of the executive agencies should assist in comparing the legislative processes of those agencies studied.

### *Methodology*

As noted earlier, the methodology consisted of interviews, bill tracing and

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14. See Department of Justice Study, footnotes 419, 420 *infra*.

15. DOJ memorandum dated February 5, 1971, explaining the Final Report of the National Commission on Reform of Federal Criminal Laws, on file at Catholic U.L. Rev. office. See also, Wozencraft, *OLC: The Unfamiliar Acronym*, 57 A.B.A.J. 33, 35-36 (1971).

16. See Office of Management and Budget section, text accompanying footnotes 47-54 *infra*.

17. *Id.*

observation within each agency. The interviews were conducted in three stages. Initial interviews were usually held with the General Counsel and the Assistant General Counsel for Legislation in each department. These were designed to acquaint the Project with the agency, its functions, organization and personnel. During each of these interviews the researchers worked from questionnaires which outlined areas of particular concern in legislative drafting. The questionnaire assured uniformity of approach and allowed for refinement of the questions when necessary. In almost every instance the interviews provided both information as to the basic operations of the department and a general outline of the legislative process. They also served as a base for an in-depth inquiry into the work of the lawyer-draftsman during the bill tracing procedure.

The second level of interviews was conducted principally with the legislative personnel of each agency studied. The Project inquired into problems noted in the initial interviews and encouraged amplification of the lawyer-draftsman's viewpoints through both topical discussions and review of the initial questionnaires.

A third set of interviews was conducted following the bill tracing procedure. These meetings bridged gaps in the legislative files of particular bills by allowing the Project to ask specific questions of the lawyer-draftsman and the personnel concerned with policy. They also afforded the Project an opportunity to discuss tentative conclusions and evaluate factual data. At this point, to round out the Project's view of particular legislation, interviews were arranged with personnel of the congressional committees to which the bills had been assigned.

As an integral part of these final interviews a detailed questionnaire was prepared relating to the legislative process, organization of staff and peculiarities of the particular bill studied. The questionnaires were left with each person interviewed and written answers and comments requested.

The Project determined that the only way to collect accurate factual data on the legislative process was through a careful tracing of specific legislation from its earliest stages to its final enactment. This process consisted of a page-by-page analysis of each piece of correspondence on that legislation found in the agency's files. Each agency selected certain bills which it felt adequately reflected its legislative process and could be conveniently traced. Access to the legislative files and the draftsmen involved was essential to the tracing process, and most agencies were extremely cooperative.

The drafts of each bill were examined in chronological order, and the substantive and stylistic changes from previous drafts were noted. Bill tracing had a number of advantages. Initially, it provided a basis for comparison between the draftsman's conception of the legislative process and the actual process was

reflected by the bill's files. Second, by observing correspondence sent from various offices, it was possible to determine the responsibilities of the individual lawyer-draftsmen. Third, it enabled the staff to examine the scope of the lawyer-client relationship existing between the draftsman and the agency's policymakers.<sup>18</sup> Finally, it provided a base for evaluating and contrasting the mechanics of the legislative processes in the various departments observed.

As originally conceived, bill tracing offered an opportunity to examine style and process. It was hoped that examination of the various drafts and comments in the tracing procedure would distill an objective basis for evaluating the quality of the draftsmanship considered. However, since the executive branch does not require agencies to follow a specific style<sup>19</sup> when drafting legislation, bill tracing alone provided an inadequate basis for evaluating the department's draftsmanship. With considerable assistance from many of the draftsmen interviewed, the Project adopted a different approach.

It was decided that during the tracing process and the follow-up interviews emphasis would be given to the statutory authority of the agency being studied, attitudes of personnel on the importance of drafting in the legislative process, and the problems of implementing the proposed statute. The Project hoped that this approach would enable it to more objectively evaluate the quality of drafting.

Departmental attitudes on the importance and purposes of legislative drafting were considered important because these attitudes might reflect the departments' sensitivity toward improving drafting procedures. They might also reflect the quality of the work of that office. Moreover, a number of interviews indicated that poor drafting might cause administrative, judicial or substantive difficulties when implementing the legislation. Thus, emphasis was given to this aspect in tracing.<sup>20</sup>

Finally, in addition to interviews and bill tracing the Project observed the operation of the agency's legislative shop. The Project obtained a general permission to roam unrestricted throughout the particular legislative offices. The Project questioned personnel about their specific functions; and, since the bill tracing was conducted over a two-week period, researchers had ample time to observe the normal operations of the legislative office.

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18. See discussion of the draftsman's lawyer-client relationship, text accompanying footnotes 43-44 *infra*.

19. Note the diversity and lack of uniformity in the various drafting manuals used by the different agencies, text accompanying footnotes 25-28 *infra*.

20. The thought was to note what the Project has called the "cost-identification" effect of executive legislation. The interviews revealed that many draftsmen considered poor legislation to be expensive. It wastes court time; it forces the government to allot substantial man hours to refine vague statutes; and it causes a considerable amount of private litigation.

### *Drafting Tools*

The transformation of substantive policy into statutory language is one of the primary functions performed by the legislative draftsman. To assist him in this work, numerous types of drafting materials are available. These materials include drafting manuals, departmental guidelines, authoritative materials such as the United States Code and the lawyer's own skill and experience. The legislative personnel interviewed were unanimous in asserting that there is no single source which solves all drafting problems. Nevertheless, the following tools were found to be most frequently used by the draftsman.

### *Manuals*

Most draftsmen stated that no one manual was required by their departments; however, almost everyone had read *Legislative Drafting*,<sup>21</sup> prepared by Professor Reed Dickerson of the Indiana University School of Law. In some departments, such as the legislative division of the Army Judge Advocate General's Office, all incoming staff members were required to familiarize themselves with Professor Dickerson's book. Most draftsmen in DOD considered this manual to be particularly useful when working with codified titles. Similarly, the Department of Transportation adopted many of the guidelines proposed by Professor Dickerson for use in the codification of titles 46 and 49.

In HEW, *Notes on Legislative Drafting*,<sup>22</sup> by James Peacock was used as a reference. However, HEW personnel thought this book to be of somewhat limited value, since it concentrates on the philosophy of legislative drafting and only briefly covers style and technical draftsmanship. Speaking with regard to HEW legislative proposals, one draftsman stated that none of the drafting manuals was sufficient. Nor did he feel it necessary to subscribe to any one set of drafting principles due to the uniqueness of the Department's statutes; he believed draftsmen should set their standards according to the type of bill being written.

In the FTC Study, *Cases and Materials on Legislation*<sup>23</sup> written by Professors Charles B. Nutting, Sheldon D. Elliott and R. Reed Dickerson was mentioned. This textbook-drafting manual sets out in detail the philosophy of legislative drafting, contains cases involving statutory interpretation, and discusses various techniques in draftsmanship. The technical portion of the book is similar to Professor Dickerson's manual.

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21. F. DICKERSON, *LEGISLATIVE DRAFTING* (1954).

22. J. PEACOCK, *NOTES ON LEGISLATIVE DRAFTING* (1961).

23. C. NUTTING, S. ELLIOTT, and F. DICKERSON, *CASES AND MATERIALS ON LEGISLATION* (4th ed. 1969).



Most draftsmen admitted that the uniformity in style which a manual provides is desirable, but were unsure whether the adoption of uniform drafting principles would significantly improve legislation. It was generally felt that preparing uniform guidelines is one thing; drafting statutes within those guidelines is another. The pressures of time and lack of personnel will not always permit the draftsman to adhere to all of the niceties proposed by the usual style manual.<sup>24</sup>

### *Departmental Guidelines*

Of the organizations studied, only two—DOD and DOT—had substantial departmental guidelines. DOD's guidelines were developed by the Office of the Secretary.<sup>25</sup> They are of a general nature and focus primarily on the problems of converting substantive policy into statutory language; drafting style is not covered. The Department of the Army uses Memorandum No. 340-6,<sup>26</sup> which briefly describes the preparation and processing of its legislative proposals. This memo contains 21 appendices which include summary sheets, letters for transmitting bills to Congress, sample bills, and other legislative materials. In the Department of the Air Force the legislative draftsmen use the DOD guidelines plus a detailed job description.<sup>27</sup> These guidelines do not relate to style; they cover only the latitude of discretion given the draftsman in writing legislation.

DOT has compiled a style manual for use in its codification project.<sup>28</sup> Essentially, these guidelines are a condensation of Professor Dickerson's drafting manual. They are especially helpful as a refresher for the draftsman who cannot spend several hours studying a complex drafting manual. The guidelines summarize the technical drafting errors most frequently committed; and their outline form provides effective assistance even to a neophyte draftsman.

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24. Mr. Sidney A. Saperstein of the Legislation Division, Office of General Counsel, HEW, stated that "[o]ne of the more serious problems faced by our Division in drafting legislative proposals is the lack of time allowed us for the preparation of the draft. . . . Rarely do we have anything approaching adequate time within which to draft a legislative proposal." Saperstein, memorandum on a description of the activities of the legislative division of HEW, dated May 21, 1971, 10-11, on file at Catholic U.L. Rev. office.

25. DOD Instructions on Legislative Drafting No. 5550.7 (Sept. 28, 1966) (unbound memorandum for internal use only).

26. Dep't of the Army Memorandum 340-6 (Dec. 1971).

27. See DOD Instructions, *supra* footnote 25.

28. Dep't of Transportation, *Style for Drafting Regulations in the DOT* (undated memorandum).

### *Authoritative Materials*

An assortment of reference materials is essential to any draftsman's library. All of the agencies studied supply each draftsman with at least the following materials: United States Code, United States Code Annotated, Government Printing Office Style Manual, Congressional Directory, and United States Government Organization Manual. In addition, department law libraries invariably provide access to the following essential materials: United States Statutes at Large, current slip laws, United States Code Congressional and Administrative News, Code of Federal Regulation, Federal Register, Congressional Record, the West Federal Reporter System, Shepard's Citations, opinions of the agency's counsel, Opinions of the Attorney General, hearings on major acts affecting the agency, and similar materials. The agencies also provide state statutory materials.

All of the draftsmen interviewed discussed the importance of having these materials close at hand. In preparing legislation, the draftsman must be able to check not only the laws of his own agency, but also those of other agencies in order to make comparisons and avoid inconsistencies. To intelligently comment on legislative proposals the draftsman often must survey the originating agency's existing laws. All legislative personnel questioned found their department law libraries adequate; rarely must a draftsman go elsewhere for basic source material.

### *Lawyer's Skill and Experience*

Legislative personnel, particularly the chief draftsmen, noted the relation of experience to good draftsmanship. Experience should be examined at two levels: (1) experience in the agency, and (2) experience in drafting legislation. Most draftsmen agree that the preparation of legislative proposals requires substantial knowledge of the agency's existing statutes, rules and regulations, organization and other related matters. In most agencies studied each legislative proposal was screened by the chief legislative counsel and then referred to a draftsman with expertise in that area. Because of the small legislative staffs in some departments, most lawyers were assigned several areas of responsibility. A few draftsmen were capable of writing almost any type of legislative proposal. These draftsmen usually had several years experience with the department in other capacities and all of them acknowledged that this experience provided valuable assistance in the preparation of legislative proposals.

Experience in drafting legislation must also be considered. Some lawyers interviewed believe that any attorney can draft legislation. They compare drafting legislation to drafting a will. But the study revealed that such beliefs were unfounded. Interviews indicated that very few draftsmen received legislative

drafting training while in law school. Usually, a draftsman must acquire his skill while on the job.

Legislative drafting involves a peculiar terminology and setting. To be effective it must have reference to statutory authority and practical problems of implementation. A legislative proposal often must resolve complex policy considerations. In addition, legislation must be drafted quickly as strict deadlines are common. Thus experience is very important but not always determinative of the quality of the draftsmanship. Just as good experience in drafting legislation leads to good legislation, poor experience leads to bad legislation. Persistent use of outmoded styles and methods combined with a shallow appreciation for problems of implementation and statutory background will not lead to improved statutes.<sup>29</sup>

The lack of objective standards or guidelines intensifies the problems of the inexperienced draftsman, since he cannot compare his work with accepted standards of quality. Guidelines are not generally available except as previously discussed.<sup>30</sup>

### *The Process of Codification*

A consideration of the process of codification is important in any discussion of the skill and experience of the draftsman.<sup>31</sup> Because of its special character,

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29. But perhaps all that any draftsman can aspire to is an "adequate" statute. As the late Justice Frankfurter put it: "Perfection of draftsmanship is as unattainable as demonstrable correctness of judicial reading of legislation. [But] fit legislation and fair adjudication are attainable . . ." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 546 (1947).

30. See text accompanying footnotes 25-28 *supra*.

31. Since the Constitution was drafted in 1789, Congress has enacted thousands of laws regulating the structure of the government. The resulting conglomeration of statutes contains contradictions, duplications, ambiguities, obscurities and obsolete provisions. To solve this problem, Congress enacted the Revised Statutes, 18 Statutes at Large, Part I (1875), which codified all of the permanent laws in force as of December 1, 1873. Because of the enactment of thousands of laws since that time, the Revised Statutes has become, for the most part, out of date. Again in 1926, Congress attempted to improve the quality and timeliness of the statutes. This effort culminated in the enactment of the first edition of the United States Code. The existing laws were rearranged into fifty titles which were divided into various sections. This compilation was enacted by Congress as only *prima facie* evidence of the specific laws restated therein. Thus, for the most accurate statement of the law, it remained necessary to refer to the Statutes at Large. Twenty years later, in the preface to the 1946 edition of the United States Code, Congress stated that many of the laws included in the Code were "inconsistent, redundant, archaic and obsolete." 1 U.S.C. [Preface] (1946). Furthermore,

. . . there has been inaugurated a comprehensive project of revising and enacting the Code, consisting of 50 titles, into positive law, title by title. . . . When this work is completed all the titles of the Code will be legal evidence of the general and permanent law and recourse to the numerous volumes of the Statutes at Large for this purpose will be unnecessary.

a codified title requires the services of the most competent draftsmen both during the codification process and after the title has been enacted into positive law. Codification calls for the restatement and rearrangement of existing law, not the drafting of new law. The draftsman engaged in codification is constrained to proceed cautiously, so as not to disturb or distort the original statutes. This does not mean that the draftsman must use language identical to that of the old statute. The old law must be carefully reworded in order to reflect judicial interpretation, opinions of certain governmental officials, executive orders, regulations and various established administrative practices. Essentially, the draftsman's job is to change the form of the statute without changing its substance. Rewording of statutes is necessary; otherwise consolidation would result in a confusion of obscure, ambiguous, and inconsistent laws. The style of older statutes must be made compatible with recent enactments.<sup>32</sup>

To insure consistency and clarity the draftsman must follow accepted modern terminology and use the best techniques of legislative drafting. This point is affirmed by the following statement from the drafting manual for the Department of Defense:

The important idea in legislative drafting is to say what you mean accurately, cohesively, clearly, and economically. Substance comes before form, but the two run together. The draftsman's job is mainly architectural. He starts by determining the needs to be filled, looks for specific answers, arranges the answers in a coherent plan, and expresses the results as clearly and simply as the complexities of the plan allow. Form is important to substance because ambiguity and confused expression tend to defeat the purposes of the legislation. Substance and arrangement are important to form because no amount of language "simplification" will make simple sense out of a statute whose underlying approach is confused. Clarity and simplicity, therefore, begin with straightforward thinking and end with straightforward expression.<sup>33</sup>

Once the title has been codified, contradictions and ambiguities can be pre-

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*Id.*

The Subcommittee on the Revision of the Laws of the House Committee on the Judiciary has been assigned the task of revising and enacting each of the 50 titles of the United States Code into positive law. The initial codification, however, is done by legislative draftsmen within the departments and agencies of the executive branch. Sometimes several departments, agencies or offices must work together on codification since they are regulated under the same title in the Code. Once these governmental entities agree on style and organization, the laws are redrafted and sent on to the Law Revision Counsel of the House Subcommittee on the Revision of the Laws. The Counsel supervises the entire codification to insure the completeness and uniformity of the project.

32. See, e.g., Title 10, U.S.C. (Armed Services), which has codified numerous statutes, some of which have origins in the earliest development of the armed forces in the United States.

33. DOD Instructions, *supra* note 25, at 2.

vented by using the same terminology in amendments as was used in the basic title.<sup>34</sup> Formulating guidelines becomes a necessity in an agency with codified statutory authority.

Presently, only 19 of the 50 titles in the United States Code have been codified;<sup>35</sup> however, codification projects are presently underway in both the Department of Justice (revision of Title 18) and DOT (revision of Titles 46 and 49). Of the agencies studied in this project, DOD and DOT's Highway Department operate under codified titles. Thus, a comparison between the legislative process in both codified and uncodified departments was possible.<sup>36</sup>

All the interviewed draftsmen agreed that codification was worthwhile. It seemed to have a very definite positive effect on the drafting in those agencies with codified titles. The training process essential to carrying out an effective codification project seems to be good experience for individual draftsmen and has the effect of setting objective standards for good drafting within an agency. In spite of these benefits, codification projects have low priority in agency planning. The greatest impediment seems to be lack of time and personnel.<sup>37</sup>

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34. Many individuals fear that changes in terminology and style will result in substantive changes or lessen the precedential value of court cases and other interpretations of the statute. This anxiety might be warranted if codification were the typical amendatory legislation process where a change in language can be interpreted as a change in substantive content; but the courts have agreed that the intention of codification is to leave the law substantially unchanged. Thus, the job of the draftsman is particularly complex: he must update and consolidate the law without changing it.

35. They are: Title 1, General Provision; Title 3, the President; Title 4, Flag and Seal, Seat of Government and the States; Title 6, Official and Penal Boards; Title 9, Arbitration; Title 10, Armed Forces; Title 13, Census; Title 14, Coast Guard; Title 17, Copyrights; Title 18, Crimes and Criminal Procedure; Title 23, Highways; Title 28, Judiciary & Judicial Procedure; Title 32, National Guard; Title 34, Navy; Title 35, Patents; Title 37, Pay and Allowances of the Uniformed Services; Title 38, Veterans Benefits; Title 39, Postal Service; Title 44, Public Printing and Documents. 1 U.S.C. § 204(e) (1970).

36. For example, in DOD, draftsmen writing proposed amendments were under more technical restrictions than draftsmen in uncodified departments such as HEW and HUD. DOD has specific guidelines to assist the draftsmen in obtaining consistency and accuracy of substance, terminology and style. On the other hand, HEW placed few restrictions on its draftsmen, feeling that drafting is essentially a "creative" process not lending itself to rigid formulas. *See* HEW Study, text accompanying footnotes 243-259. It was also noted that DOD writes almost twice as many drafts of a proposed bill as other departments do.

37. Most codification projects took several years to complete and many departments are reluctant to embark on such a long term project. Also, only the best draftsmen are qualified to work on codification, and the departments are unwilling to release them from their normal duties of drafting new legislation. Some organizations have solved the dilemma by dividing the draftsman's time between his normal duties and the codification work. This appears to be the only solution for those agencies which cannot spare their most efficient draftsmen for a full time codification project.

Inclusion of two or more organizations in the same Code title poses another problem. The present codification of Titles 46 and 49 by DOT and the Interstate Commerce Commission is

While the task is a formidable one,<sup>38</sup> in the interest of good drafting alone, it is certainly worthwhile.

### *The Draftsman*

Tools and guidelines are essential ingredients of a properly drafted statute. But if the Project has discovered one central “truth” during its investigation it is that there is no substitute for a highly qualified well-trained draftsman. In the final analysis, the words must get down on paper in some meaningful fashion; it is the draftsman who must put them there. As Thomas Parkinson once observed, “the translation of a legislative idea into an effective statute is not . . . ‘a pasttime for a summer afternoon.’ ”<sup>39</sup>

#### *The Draftsman’s Duties—Generally*

The draftsman within the executive branch can be examined in general terms. He drafts specific pieces of legislation; writes agency regulations; comments on Congressional bills and internal proposals; writes testimony for committee hearings; answers questions on the department’s legislative program from public or private groups; and helps prepare legislative programs. In almost every instance the draftsman will be concerned to some extent with each of these functions. The list itself, however, is not intended to be exclusive. Particular duties may be unnecessary to the draftsman’s job description or, occasionally, to the function of the legislative division itself. From a working standpoint, the division may just not perform some of these services. Moreover, in some agencies certain tasks will be minimized in the performance of the legislative division, while in others, a distinct role in policymaking or program evaluation compound the duties of the lawyer-draftsman.

The duties of the draftsman do not exist in a vacuum. Any office works together in some fashion to achieve an objective. The office itself can have an effect on the legislation. Legislation has various and sometimes multiple sources: a congressman’s inquiry, the result of policy evaluation of departmen-

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illustrative. Draftsmen of these agencies stated that differences in style and other technical features have prolonged the project. Because of disagreements, DOT draftsmen are attempting to get their portion of the titles, which has been completed, enacted separately. Some draftsmen suggested that the technical difficulties might be overcome if the Law Revision Counsel would develop specific guidelines for all codification. They feel that since consistency is one of the chief reasons for codification (and is required within each individual title) it is foolish not to have consistent guidelines for the Code as a whole.

38. See, e.g., The Time Allocations For FTC Legislative Attorneys, FTC Study, *infra*, footnote 412.

39. Parkinson, *Legislative Contribution to Progress*, 12 A.B.A.J. 95 (1926).

tal programs, an administration memorandum regarding program and policy objectives, interdepartmental memoranda on agency policies, court decisions affecting pre-existing legislation, state or other governmental inquiries, independent or appointed studies of professional groups, or lobbying efforts of particular organizations.

The variety of these sources suggests multiple duties for the draftsman and his division. Commenting, for example, on a department's legislative program or answering the queries of a congressman are necessarily functions of the legislative office. How substantial that function in particular should be to the legislative office and to the individual lawyer-draftsman is questionable. But, at the least, it should not detract from his central function—that of producing quality legislation.<sup>40</sup>

### *Some Specific Duties*

#### *Managing the Legislative Office*

The lawyer-draftsman within the executive branch will have specific duties within the operation of the legislative division. These may be separate from the main legislative office or they may be within that office. In most instances legislation affecting only a particular section within a large department will be channelled to the responsible unit. The lawyer in that section will administer all the duties associated with the legislative division.

The Federal Railroad Administration<sup>41</sup> and the Federal Aviation Administration,<sup>42</sup> for example, perform and administer under the guidance of the Department of Transportation, all the functions of a separate legislative office. Guidance, particularly in policy areas in the form of memoranda or conferences, is provided through the legislative division, the office of the General Counsel or the under-secretary for the particular unit. The draftsman in this

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40. Mr. Donald Hires, Dep. Ass't Gen. Counsel for Legislation at HEW has estimated his time as follows:

In my own case, at present, I would say that, over the course of a single session of the Congress, more than half my time is devoted to subjecting to a policy review responses prepared within the Department to requests of OMB or Congressional Committees for departmental views on proposed or introduced legislation. Perhaps five percent of my time goes into the review of proposed testimony. The remainder of my time is devoted to drafting, to the preparation of memoranda related to that drafting or to aspects of the Department's legislative program, and to miscellaneous divisional or O.G.C. administrative matters. A portion of that remainder is spent working with the staffs of congressional committees, with Legislative Counsel, and on occasion with the committees themselves.

Letter from Donald Hirsch, to Catholic U.L. Rev. dated November 17, 1971.

41. See the FRA Study, text accompanying footnotes 143-243.

42. See the FAA Study, text accompanying footnotes 76-142.

position can serve as an administrator of a legislative office separate from the departmental legislative division; as a draftsman and legislative officer of the section, but with the administrative problems centralized in the department's legislative office; or in a legislative-policy function with administrative problems somewhat different from the lawyer-draftsman.<sup>43</sup>

### *Lawyer-Client Relationship*

One of the most important topics discussed during the interview was the lawyer-client relationship and its effect on the legislative process. Every lawyer is responsible to his client, and the legal draftsman is no exception. In the legislative process the client is usually a policymaker, and the lawyer's duty is to put the client's formulated substantive policy into legal form. The problems which arise are considerable. The draftsman, while not a policymaker *per se*, must be conscious of the reasons for and circumstances behind the policy. The departments each presented different approaches to this relationship and its effect on substantive policy development.

Each draftsman interviewed was careful to point out the limitations within which he operated. In several instances the draftsmen, such as those in HUD, were given great leeway to be creative in setting out the policy in statutes. In other departments, such as DOD, the policy was more precisely described and little was left for the draftsman to formulate on his own. In each instance, only the most experienced personnel participated to any extent in the policymaking process. Most of the legislative personnel gave advice on developed policy as opposed to formulating the policy themselves. An experienced draftsman in the department is important because a broad knowledge of the department permits him to adequately counsel his client on policy problems. Since most policymakers are appointed by the President, and are comparatively inexperienced, there is an absolute necessity for competent and experienced draftsmen to point out problems and difficulties which may arise out of the proposed legislation.

In the course of the research, it was discovered that draftsmen were rarely

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43. The needs at this level are specific. Legislation files must be complete with data relevant to the section's statutory authority. This begins with U.S.C. and C.F.R. materials, pertinent case law and certain departmental and sectional regulatory manuals and policy statements. The major portion of the files themselves should contain "bill histories" of past departmental and congressional legislation. These histories should be inclusive of all bills introduced which affect the particular section's authority. Of particular importance to the draftsman are those pieces of legislation which have been enacted into law. Where the legislation was drafted by the unit, copies of memoranda relative to both policy sessions and the actual drafting of the legislation itself should be organized by date and indexed for the topical contents involved. Virtually all agencies examined followed these or similar practices. The higher level legislative offices would be expected to have similar but not necessarily duplicative material.



brought into initial policymaking meetings. As a result when policy guidelines were transmitted to the legislative offices, the draftsmen were often confused about the desires of the decision makers. Every draftsman admitted that considerable time was spent trying to ascertain what the policymakers had in mind.

Further problems were presented because the draftsman cannot always identify his client. For example, in the task force approach used by HEW and the omnibus bill approach used by HUD, there are many policymakers. The problem for the draftsman is to determine which of the individuals should be consulted about the proposal. Had the draftsman been present, he would have known what conclusions had been reached and which of the individuals was responsible. Some legislative offices contend that this is resolved by having a higher echelon check the legislation; but the real problem develops when there is pressure to complete a draft and discrepancies are discovered. If the draftsman feels competent he will usually either insert a rather vague clause to cover the problem, or he will attempt to incorporate language which he feels expresses the intent of the decisionmakers. In either case, the closer the relationship between the lawyer and his client, the better able will the draftsman be to provide the proper policy.

### *Drafting Legislation*

The special responsibility of the lawyer-draftsman is also his main task—translating a legislative idea into proper legal form within the existing statutory authority. All the other functions performed by the draftsman, commenting, writing testimony, working on consolidation or codification projects, are meaningless if he cannot perform his basic duty—the drafting of adequate, well written statutes. It took a non-lawyer to give the proper perspective to the position of draftsmen. In his book on the legal profession, Martin Mayer described the position in glowing terms:

Intellectually, the draftsman's skills are the highest in the practice of law. Judges at bottom need merely reach decisions . . . negotiators and advocates need understand only as much of a situation as will gain a victory for their clients; counselors can be bags of wind. . . . But the documents survive, and to draw them up well requires an extraordinary understanding of everything they are supposed to accomplish. . . . Probably the greatest compliment a lawyer can receive from his profession (a compliment never publicized) is an assignment to draft a major law.<sup>44</sup>

Some of the most basic decisions a draftsman must make are, in certain

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44. M. MAYER, *THE LAWYERS* 50-51 (1966).

cases, already made for him. His choice of language and style will be affected from the beginning by several factors beyond his control; for example, whether his agency employs, and adheres to, drafting guidelines; whether he works in a codified or uncodified title; whether, as a result of political decisions, he may draft a statute of specific provisions or whether he must deliberately incorporate ambiguity.

Another preliminary task is occasionally performed by someone other than the draftsman. The research and analysis on a particular bill may be performed at a level far removed from the draftsman. On the other hand, the Project discovered that some of the more adequate legislation, and some of the happier draftsmen were found in those agencies which permitted the draftsman to participate in the development of the bill from its inception at the policy-making level.

This technique of involving the draftsman in the policy stages has a collateral effect on the attitude of the draftsman. Those draftsmen who viewed themselves as part of the policy-making process appeared to be more enthusiastic and more committed than those draftsmen who were used, or who looked upon themselves, as mere "technicians."

In the last analysis, the entire business of statutory drafting must inevitably rely on what James Peacock has called the "inherent horse sense" of the legislative draftsman.<sup>45</sup> No guidelines or rules of construction, or codification procedures will suffice to develop good statutes when the draftsman himself lacks "a good constructive imagination, and the ability to project in his mind's eye exactly how well a proposal will or will not work in actual practice."<sup>46</sup>

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45. J. PEACOCK, NOTES ON LEGISLATIVE DRAFTING 4 (1961).

46. *Id.* at 4-5.