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The Codification of Military Law

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Department of Legislation

Charles B. Nutting, Editor-in-Charge

- Problems of codification in various areas have been considered in these pages from time to time and are of interest not only because of the wide range of subjects involved, but also because of the methods used. From both aspects the following discussion by Mr. Dickerson of the codification of military law is significant. His vivid description of the activities of the “codification team” in dealing with an extremely complex body of law serves once again to highlight the difficulties of codification and the devices that may be helpful in solving them.

The Codification of Military Law
by Reed Dickerson
Deputy Chief Joint Army-Air Force Statutory Revision Group

- This is a brief account of the Pentagon’s current project to codify the great bulk of military law. Since a proposed bill is not law until it is actually enacted, this report must remain one of general goals, of progress to date and of tentative conclusions.

Even before 1947, when a special task group formally noted the situation, it had been apparent that the Army’s law was a hodgepodge of live and dead law, written in many languages, full of gaps and overlaps, and wracked with inconsistencies. This was not to impugn the varying skills of a long line of legislative draftsmen nor the wisdom of succeeding Congresses, but simply to recognize the accumulation of years of dealing with spot problems on a spot basis. A year before, the preface to the 1946 edition of the United States Code had noted that many of the laws reflected there were “inconsistent, redundant, archaic and obsolete”, signaling the start of the House Judiciary Committee’s program to restate the laws reflected in the fifty titles of the Code in such form that they could be incorporated without editorial change. The two ideas, independently conceived, conjoined.

The Army’s codification team took the field early in 1948. Within a year it was joined by a civilian contingent representing the Air Force, most of whose law was inherited from the Army. The Joint Army-Air Force Statutory Revision Group, with the blessing and co-operation of the House Judiciary Committee and in close consultation with the editors of the United States Code, began immediately to wrestle with a problem whose dimensions it did not fully grasp. One preliminary estimate had been a nine months’ job. The first considered estimate was two years. Individuals still on the project have since learned to hedge their predictions even more cautiously.

The fact that a substantial part of recent Army and Air Force law applied also to the Navy and the necessity of keeping uniform law uniform suggested Navy participation. Under full sail by September, 1950, the Navy’s project did not integrate with that of her sister services because most of her law diverges widely. After six months of indoctrination and development, the projects assumed a stable, practical and, it is gratifying to say, wholly harmonious liaison relationship.

In October, 1950, the triangle became a square. At the suggestion of the House Judiciary Committee, the Secretary of Defense directed the preparation of a four-part title of the U. S. Code (tentatively Title 10, “Armed Forces”), the new part to contain laws of general military significance (such as the Uniform Code of Military Justice), laws dealing with relationships between the military departments or services, and laws dealing with the activities of the Department of Defense as a whole. Because of the Navy’s later start, the job of preparing this segment was entrusted to the Army-Air Force group. The Office of the Secretary of Defense became co-ordinator.

An important phase of the mission was the appropriate handling of National Guard law. The federal aspects of the National Guard had to be tied in with related federal law without doing violence to the law that applied to the Guard in its purely state aspects. The law was divided accordingly and Title 32 of the U. S. Code (“National Guard”) was preserved as a home for the latter. To assist in the work, the National Guard Bureau detailed a succession of individual draftsmen.

The rest of this story is largely an account of what the Joint Army-Air Force Statutory Revision Group has been doing up to the present moment in restating Army and Air Force law. Although generally similar, Navy methodology has diverged at several points.

The four main phases of codification have been (1) architectural, (2) research, (3) accounting and (4) editorial. The first was mainly a planning function. The last three have involved continuing operations and have been reflected in the organization of lawyers working in the Group to allow these functions to be performed as separate specialties.

The big architectural problems at the outset were to define the scope of the project, subdivide the selected materials, and arrange them into a functionally satisfactory result. The big piece had to fit with the rest of the United States Code and the smaller pieces had to make sense and add up to the big piece.

In general, the revised Titles 10 and 32 are intended to restate the law now represented by Titles 10 (“Army and Air Force”), 32 (“National Guard”), and 34 (“Navy”);
Chapters 3 ("Department of the Army"), 7 ("Department of the Navy"), and 11A ("Department of the Air Force") of Title 5; a number of sections from Title 50 ("War and National Defense"); and miscellaneous sections from other titles. Cutting across the desirability of including all laws of primary interest to the Armed Forces was the fact that the United States Code is arranged primarily on a subject and not a departmental basis. Accordingly, the competing pulls of other and well-established titles made it necessary to omit, for instance, laws dealing with executive departments and government employees generally. To include these laws would not only disrupt the United States Code but would mean repeating them for each executive department if the idea were pressed to its logical conclusion.

A satisfactory separation meant a close study of all fifty titles of the United States Code. This tentatively done, the next step was to separate from the law to be restated (1) laws that had died from obsolescence or implied repeal but which had never received an official funeral, (2) laws more logically classified to other titles of the Code, (3) temporary laws, and (4) laws of such limited interest (for instance, the one allowing removal of gravel from Fort Douglas) that to include them would clutter up the permanent restatement. (The plan is not to repeal laws of the last two kinds but to carry them as legislative footnotes to the general and permanent law.) Because of the prodigious amount of fine-mesh sifting required here, the job was made the specialty of a third or more of the lawyers assigned to the project.

Next, the Group developed a sixty-page blueprint called the "Analysis", a comprehensive outline (by part, chapter and section) naming the specific topics to be covered and citing the corresponding fragments of the United States Code. This was the most important single tool used on the project, even though it underwent drastic revision to reflect lessons learned as the work progressed.

The objective in arranging the various materials has been to make the end product as useful as possible. Subjects have been placed where they can be found quickly, taking into account the needs of both the persons who are directly affected by the law and those who will be called upon to administer it. Historical groupings have been changed where others are considered to offer greater findability and clarity.

The biggest problem of arrangement has been to determine which subject groupings offer the greatest utility. (On such questions, reasonable men can differ widely!) It became necessary also to decide where to locate subjects that fell under one heading. Where the problem of competing pulls could not be solved by adjusting the topic headings, we have treated the subject under the heading which judgment says has the stronger logical pull and editorial cross references have been prepared for insertion following the other sections to which it relates. In classifying administrative organisms, we have tried not to cut the brown ears from white dogs.

Special problems of arrangement arose because much of the military law is shared by the Army and Air Force and a substantial part is shared also by the Navy. With the large number of permutations and combinations possible, we decided to restate for each military service all bisservice law and such triservice law as is necessary to complete the orderly development of subjects which because of substantive differences must be treated separately for the three services. On the other hand, laws of substantial length, such as the Uniform Code of Military Justice, whose omission from the separate service subtitles will cause no difficulties and which it would be unfortunate to have to state three times, we have stated but once (in the general subtitle).

The Analysis served not only as a blueprint of how a table of contents of the finished product was expected to look, but as an index to the second important tool, the ninety-thousand-card "Plant". For laws listed for inclusion or possible inclusion, every word of text, notes and cross references from the United States Code have been cut out and pasted on cards. Text went on white cards, legislative notes on pink cards, cross references on orange cards. The same had been done for the relevant materials from the Statutes at Large (blue cards), the Military Laws of the United States (yellow cards), and the Digest of Opinions of the Judge Advocate General (green cards). The cards were grouped by proposed chapters and sections of the Analysis.

The original plan was to study the cards relating to each particular subject and then prepare proposed text simply by editing the white cards. These were to be sent directly to the printer. But what works well for the publishers of the United States Code developed shortcomings when applied to the differing needs of the Army-Air Force project. The main differences lay in the fact that the new project required vastly greater changes in wording. Unlike the publishers of the Code, we have been called upon, under our charter, to drop superfluous text, standardize terminology, and supply clarifying material and definitions. The inevitable result was radically new text that underwent many revisions (not on cards) before it jelled. For bookkeeping purposes, we maintained contact with the original Analysis and Plant, at every point, with renumbering tables. Although cumbersome, they were the only way to preserve the flexibility necessary to normal growth without losing track of the prodigious amount of source material that had to be accounted for. The Navy codification group, on the other hand, benefiting from the experience of the Army-Air Force group, has dispensed with a card system altogether. Instead, it has relied solely on its Analysis to allocate the source materials.

Keeping track of the many jagged and scattered fragments of source law represented by the new arrangement became a problem so complicated that it was made the primary
The responsibility of two lawyers (called "control editors") whose main function has been to conduct periodic audits. An accounting system not only was necessary to comprehensiveness, consistency and accuracy but it greatly reduced the overwhelming burden on the lawyers whose main function has been to prepare the new text.

At first, all the dozen or more lawyers in the Group participated in preparing text. This was unsuccessful both because the writing skills were unevenly divided and because the larger the number of lawyers writing the greater the problems of diversity in quality and style and other matters needing administrative co-ordination. We attacked the problem first by issuing a series of written instructions called "Policy and Procedure Memoranda". One of these prescribed definitions for several dozen commonly used terms, thus shortening the height of the Tower of Babel we had inadvertently erected. Another included a manual of drafting. This attempted to impose stylistic as well as substantive uniformity and to include the soundest and most up-to-date principles of legislative writing. One of its main targets was gobbledygook, or legal "fruitcake".

But the problem was not satisfactorily solved until specialization made it possible to concentrate the basic editorial work in the three or four most experienced draftsmen. This solved most of the problem of administrative co-ordination simply by reducing the occasions for needing it. Even so, the factory methods of writing legislation which the size and joint nature of the job required created problems unknown in the preparation of ordinary legislation.

Besides changes in language, it was originally planned to make "noncontroversial" changes in substance. Because it soon became a matter of controversy as to what was noncontroversial, and because we had already undertaken radical changes in arrangement and style, we concluded that the chances of enactment would be jeopardized if we tried to do more than make the proposed law an accurate, economical and undistorted mirror of the law in effect at the time of re-enactment. This conclusion was fortified by a directive from the Office of the Secretary of Defense. The decision will tend to allay any suspicion that some crusading draftsman may have sneaked in unauthorized changes in substance. The longer the bill the greater the risk.

If the attempt to bury the dead law, to make uniform both approach and terminology and to clarify and simplify style succeeds even moderately, Congress will have a correspondingly better chance of appraising the existing legislative situation. Specific provisions that cry for amendment will be more clearly heard. In anticipation of this possibility, we have kept an inventory of items that appear to be legislative oversights going beyond mere discrepancies in language. These will be turned over to the appropriate officials at the appropriate time.

Fortunately, the Group has been able to preserve a scrupulous objectivity. In this respect its most precarious operation has been the reading of existing law. Naturally when heterogeneous laws are being restated in uniform terminology for the first time, the risk of inadvertent changes in substance cannot be entirely eliminated. However, the intensive study of court cases, and of the opinions of the Attorney General, the Comptroller General, and the Judge Advocate General, has reduced this risk, it is hoped, to a negligible minimum. In general, we have tried not to impose our own ideas of what the law means, but have looked to authoritative pronouncements outside the Group.

The editorial approach of the Group is also worth outlining. Each chapter was assigned to a lawyer editor called a Revising Editor. After examining the existing authorities against the background of contiguous law and checking with the available administrative personnel, he prepared text for each section in accordance with the applicable Policy and Procedure Memoranda, making such changes in arrangement within the chapter as seemed appropriate. Interchapter adjustments, on the other hand, were carried on only in collaboration with the control editors, to make sure that no law within the scope of the mission was lost or repeated. For each section the Revising Editor also prepared a "Revision Note", naming the specific fragments of source law for each section and explaining the specific changes, additions and deletions. Finally he combined the source credits for the several sections into a United States Code distribution table for the chapter as a whole. If this failed to coincide exactly with the chapter assignment, he had a discrepancy to track down and correct.

Experience showed that because of the complexity of the job the Revising Editor, by himself, could not achieve a satisfactory degree of accuracy. Accordingly, the completed work of the Revising Editor was later assigned to another lawyer, called a "Review Editor", to be checked at every point. Sometimes the two worked together. The Review Editor invariably turned up significant errors or improvements. Each chapter was then submitted to a panel of from six to ten lawyers who had not previously worked on it. Here we got a cross fire of expert opinion shot mostly from the hip. This, too, gave an invaluable boost toward final accuracy.

When the panels completed their work, the whole was turned over to the control editors for a rigorous audit to see that the myriad of fragments were accounted for and that they adequately dovetailed. This disclosed significant errors of a different kind.

One very important stage in processing was the assignment to the entire professional staff of more than forty specialized "across-the-board checks", to assure consistency of substance, approach and style for the finished product as a whole. For example, one of several checks assigned to one lawyer was to determine whether the term "Territory" had...
been consistently used. Another was to see whether warrant officers had been treated uniformly. This kind of horizontal treatment turned up discrepancies that could be discovered in no other way.

One of the final steps in assuring an accurate and readable result is now being taken. The drafts of the Army and Air Force subtitles, the National Guard title, and their accompanying tables were recently reproduced and circulated within the military departments concerned for intensive scrutiny by administrative specialists to determine whether the proposed draft adequately mirrors their own understanding of what the law requires or permits. These comments have been compiled and are being studied section by section. Appropriate adjustments will follow.

A major step still to be taken is the co-ordination of the Army and Air Force subtitles with those of the Navy. This is particularly important in those areas where the law is now uniform for the three services. There are other time-consuming problems, but there is no room to discuss them here.

After the long, slow process of clearing the final product through the appropriate departmental channels and the Bureau of the Budget, the codification bill will receive intense scrutiny by the Judiciary and Armed Services Committees of both houses of Congress.

If the efforts of the participants in this legal marathon are ultimately successful, the Armed Forces will have a much clearer and more usable charter. It should not only save them untold hours of uncertainty but also lay bare for further study the many substantive inadequacies that now lie obscured beneath the surface.

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Notice by the Board of Elections

The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1953 Annual Meeting and ending at the adjournment of the 1956 Annual Meeting:

- Alabama
- Alaska
- California
- Florida
- Hawaii
- Kansas
- Kentucky
- Massachusetts
- Missouri
- New Mexico
- North Carolina
- North Dakota
- Pennsylvania
- Tennessee
- Vermont
- Virginia
- Wisconsin

Nominating petitions for all State Delegates to be elected in 1953 must be filed with the Board of Elections not later than March 27, 1953. Petitions received too late for publication in the March issue of the JOURNAL (deadline for March issue, January 28; deadline for April issue, February 27; deadline for May issue, March 31) cannot be published prior to distribution of ballots, fixed by the Board of Elections for April 3, 1953. Ballots must be returned by June 8, 1953.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., March 27, 1953.

Attention is called to Section 5, Article VI of the Constitution, which provides:

Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts, nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed on April 3, 1953, to the members in good standing accredited to the states in which elections are to be held as above stated.

Board of Elections
Edward T. Fairchild, Chairman
William P. MacCracken, Jr.
Harold L. Reeve.