DRAFTING FEDERAL LAW

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DRAFTING FEDERAL LAW

Second Edition

by

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Drafting Federal Law is a self-teaching manual of modern federal drafting practice. The Office of the Legislative Counsel, United States House of Representatives, is publishing this edition so as to make the book more readily available to professional drafters and students of drafting. Nevertheless, the views expressed are the author's own, and do not in every case necessarily reflect the views of the Office of the Legislative Counsel.

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FOREWORD

The best and possibly only way to learn to draft a federal legislative bill is by trying to draft one. Most professional drafters wrote their first bills during an apprenticeship in which they learned largely by trial and error. But apprenticeships are time-consuming and labor intensive. I therefore tried, in 1979, to develop a drafting seminar that would simulate such an apprenticeship for a small group, no more than a dozen, but would concentrate the experience into about 30 or 40 hours of classroom instruction, spread over 8 to 10 weeks. At the time, I directed the legislative drafting staff of the Department of Health and Human Services. My first students were necessarily drawn from my younger colleagues: attorneys working in other fields within the department who nevertheless wanted to learn to draft.

This book grew out of that seminar. From the beginning, David Meade, now the Legislative Counsel of the House of Representatives, Lawrence Filson, recently retired as the Deputy Legislative Counsel, and (through David) Ward Hussey, then Legislative Counsel, strongly encouraged me to complete it. To be urged on by the nation's three pre-eminent federal drafters was both intimidating and inspiring. In 1980 the Department of Health and Human Services, HEW's successor, published the book under the title *Drafting Federal Law*.

The purpose of the book was, and continues to be, three-fold: to serve as a self-help manual to train drafters; to develop their capacity to analyze bills for technical sufficiency; and to strengthen their understanding of the links between legislative ideas and legislative language.

The original printing of the book has long since been exhausted, in tribute, perhaps, to its having been made available to the public at no charge. I am therefore especially grateful to OLC for giving me the opportunity to publish a second edition. This has enabled me to add an article on drafting appropriations riders, and to expand the discussion of style and usage, as well as to supplement other articles and add new exercises. The materials have been updated to conform to OLC's *Style Manual: Drafting Suggestions for the Trained Drafter,* published by OLC on February 28, 1989.

Also, a new edition gave me the chance to reorganize the book's presentation. The original text concentrated on the preparation of a free-standing bill, and then moved on to describe amendatory technique. Having now taught legislative drafting to government and private audiences for 10 years, I have become convinced that it makes more pedagogic sense to start with the amendatory bill, before taking on the additional complexities of the free-standing bill. Most drafters begin by drafting amendments; and the drafting of amendments will remain throughout their careers a principal concern. Although this change of focus caused me to rewrite virtually all of the exercises of the first edition, I have preserved and, I hope, improved the original text.

Donald Hirsch
December, 1989

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CHAPTER ONE

An Approach to Legislative Specifications

§1.1. An overview

Many years ago, in a tax seminar I was enduring in my third year of law school, our professor had us read what he called "a most amusing opinion in a field that does not abound in humor." The humor, as it turned out, was in observing an eminent jurist, in the course of a hopelessly confused decision, demonstrate his total incomprehension of the Internal Revenue Code's treatment of a corporate reorganization.

Time has passed, and no longer am I amused to find that a scholarly judge of high intelligence, writing after careful study and much concentration, is unable to make sense out of a statute. Sometimes, when this happens, the drafter is to blame. But the growing impenetrability of much federal legislation is not wholly, or even primarily, caused by its drafters. Rather, it mirrors the increasingly complicated ways in which government intervenes in private and public activity: activity that itself continues to gain in sophistication.

In the face of this ever-burgeoning complexity, the drafter has a very special responsibility. It is the legal analog of the Hippocratic injunction on the practice of medicine: First, do no harm. It may be stated as follows: Let's not make things more complicated than they have to be. This is not as novel an idea as it may appear. In 1817, Thomas Jefferson, no mean legislative drafter, wrote to a Mr. Cabell:

> I should apologise perhaps for the style of this bill. I dislike the verbose & intricate style of the modern English statutes, and in our revised code I endeavored to restore it to the simple one of the antient statutes, in such original bills as I drew in that work. I suppose the reformation has not been acceptable, as it has been little followed. You however can easily correct this bill to the taste of my brother lawyers by making every other word a 'said' or 'aforesaid,' and saying every thing over 2. or 3. times, so as that nobody but we of the craft can untwist the diction, and find out what it means; and that too not so plainly but that we may conscientiously divide, one half on each side.

Since Jefferson's time, the drafter's passion for whereas's and aforesaid's has abated. Instead, as statutes grow longer, the main impediment to their intelligibility is the poorly organized, convoluted, or otherwise slovenly treatment of concepts that demand precision. In *The Summing Up,* W. Somerset Maugham made the same point with some eloquence about creative writing:

> Another cause of obscurity is that the writer is himself not quite sure of his meaning. He has a vague impression of what he wants to say, but has not, either from lack of mental power or from laziness, exactly formulated it in his mind, and it is natural enough that he should not find a precise expression for a confused idea.

Nevertheless, it is also true that what appears, in a drafter, to be "lack of mental power or...laziness," may simply reflect the drafter's ignorance of the most effective way to approach the task. This book, by itself, cannot turn you into an accomplished legislative drafter. Only experience can do that. What it can do is teach you an approach: an approach that will equip you with techniques to solve drafting problems for yourself as you encounter them in your work.

Virtually all major programs of federal financial assistance, and most of the significant regulatory statutes, have in their ancestries a proposal made to Congress by an executive agency, customarily in the form of a draft bill. Large federal agencies typically have extensive legislative interests, and have evolved effective machinery, operating within an annual legislative cycle, for converting legislative ideas into legislative language. If your own need is simpler—preparing language for a trade association or a member of Congress, for example —you do not need to understand the complexities of this machinery. Nevertheless, there are lessons in the way these agencies go about drafting bills that in some degree apply to all legislative drafting.

In the Department of Health and Human Services, an agency unrivaled within the federal government in the extent and diversity of its legislation, a legislative proposal is routinely reduced to legislative specifications: that is, an extensive narrative description of how the proposal is intended to work. This arrangement seems optimal. It compels the responsible policy maker to refine the content of a proposal, at least in a preliminary fashion, before he may look to the drafter for preparation of a draft bill; yet the process usually offers the drafter a modest

opportunity to participate in the proposal's formulation.*

The last of your tasks, as a legislative drafter assigned to draft a bill for submission to Congress, is actually to write the language. If you have done the necessary preliminary work, it is the task that is the least time-consuming. Here are the steps you should take, in chronological order, before you begin to write:

(1) *General policy review.* You should review drafts of the "decision memorandum" that explains the proposal in general terms to the policy maker and asks his approval for its further development.

(2) *Issue refinement.* After the policy maker endorses the initial general proposal, you should help to refine, develop, and present issues for his subsequent decision.

(3) *Preparation of legislative specifications.* You should advise on how to prepare the "legislative specifications," *i.e.,* the written expression of the detailed policy decisions that you must incorporate in the bill.

(4) *Clarification of legislative specifications.* Upon receiving the specifications, you should clarify them through telephone calls, meetings, or memoranda.

(5) *Preparation of drafting outline,* if necessary. If the proposal involves amendments to current law, you should prepare a drafting outline for your own use that specifies each section of current law that must be amended, and describes how it is to be amended. If the proposal is for a wholly new statute, you should outline the contents of each section of the draft bill.

If you have taken these steps, you are ready to write the first draft of the bill, circulate it to the policy maker for review, revise it to take account of comments, circulate a second draft, and so on until a draft is finally agreed to.

*The term "policy maker" is used throughout the text as shorthand for what, in a trade association, might be the president or his board, in a federal agency will often be the agency head and numerous subordinate officials, and in Congress will often be committee or subcommittee professional staff acting at the direction of the chairman. In a large organization, unless the drafter succeeds in arranging for one person to be designated as his policy contact, he or his secretary will spend a great deal of time arranging meetings to resolve differences among all of the people involved in the policy process in order to resolve conflicting views.

§1.2. Guides for evaluating the adequacy of legislative specifications

When you receive a set of legislative specifications approved by the policy maker, you know that the awful moment has arrived when you are actually called upon to do something. This moment is especially terrifying when, as often happens in federal agencies, the time reserved for the drafter has been eroded by delays in reaching decisions on the specifications. Often the policy debate would not end at all except that over the horizon there comes into view some event—a congressional committee hearing, a subcommittee bill markup—that irresistibly compels argument to yield to action. All eyes then turn upon *you,* and you are told that unless you prepare your bill within X days (X days always being fewer days than the job demands) the government will fall to its knees.

This book features, as its first major exercise, the preparation of a bill to be called the "Domestic Violence Prevention Amendments of 1990", to be administered by the Department of Health and Human Services. When drafted in accordance with the specifications at appendix A, the bill will consist of a number of amendments to a mock statute, the Domestic Violence Prevention Act, at appendix B. The DVP Act is a simple federal grant program consisting of two major parts. Under the first part, sections 5 and 6, the federal government is to reimburse each participating state for 75 percent of the state's expenditures to carry out the DVP program, up to the size of the state's allotment. The size of the state's allotment is a share of the program's annual appropriation set aside for the state grant program by section 4(b), and allotted among the states by formula under section 5(a)(2).

The second part of the DVP Act, sections 7 and 8, consists of a discretionary grant program, under which the Secretary of HHS makes grants and awards contracts for various activities related to the statute's purposes.

Before reading on, familiarize yourself with the specifications at appendix A and the statute at

appendix B. Notice that the amendments are sought by the federal agency administering the law. From the drafter's standpoint, the amendments could as well be sought, for example, by a congressional committee or a public interest group. In every case, as the drafter, you must first ask yourself whether you understand the specifications well enough to draft a bill from them.

> Do they seem clear? *i.e.,* do I understand each specification sufficiently well to convert it to a legal requirement?
>
> Are they comprehensive? *i.e.,* does the set of specifications include an instruction on every subject that I must include in the bill?
>
> Are they administratively feasible? *i.e.,* on a mechanical level, will the bill work?

Are there techniques that will help you to answer these questions? My first suggestion is that you try to put yourself in the shoes of the individual at the operating level who must administer or comply with the language drafted to carry out a specification. Ask yourself what, exactly, he will have to do.

Some years ago I drafted a bill to allow certain officers of the Commissioned Corps of the United States Public Health Service (PHS) to elect transfer to competitive career appointments in the classified civil service. Upon an officer's transfer, the officer would cease to be covered by the PHS retirement system—a non-contributory system to which the officer had made no financial contribution—and, instead, would enter the Civil Service Retirement System (CSRS), to which the officer would make a bi-weekly payment. A specification directed that, for the purpose of computing a transferred officer's annuity upon the officer's later retirement, the bill require the CSRS to credit the officer with service performed in the Commissioned Corps. Given the cost to the CSRS, I thought it necessary to draft a provision under which PHS would reimburse the CSRS for providing retirement benefits for these transferred officers. Unfortunately, I had no idea what these costs would be. I therefore devised a formula that PHS would use to compute the reimbursement. The formula would require PHS to determine the amount that each transferred officer *would have paid* into the CSRS if the officer had, during his PHS service, been a civilian employee.

The policy maker approved the provision, I included it in the bill, and Congress enacted it. A few days after its enactment a PHS personnel official called me. The conversation went something like this:

> **PHS official:** Are you the one who drafted this bill?
>
> **Me:** Yes.
>
> **PHS official:** Well, it's not possible for PHS to figure out how much to pay the CSRS.
>
> **Me:** You're kidding! How do you know?
>
> **PHS official:** I'm the one who has to do the calculation, and I just don't have the data I need, and there's no way I can get it.
>
> **Me:** Why tell me this now? Why didn't you tell me before we sent the bill up?
>
> **PHS official:** I didn't know about the bill until it was enacted.

This cautionary tale illustrates several points. First, it shows what can happen when the drafter neglects to consider the administrative feasibility of a provision. A drafter should always ask himself, "If I had to administer this provision, how would I go about it?" If I had done this, I would have asked myself what data I would need to carry out the retirement provisions of my bill. The question might have led me to discover that the data was unavailable.

Second, it is a reminder that the policy maker, when formulating a bill, sometimes (the uncharitable would say "usually") neglects to consult those who will have to administer the bill when it becomes law. This puts a special responsibility on the drafter to ensure that, on a mechanical level at least, the bill's directives can be followed.

Even more than with administrative feasibility, the drafter will have problems with the clarity of the specifications. You will see that specification III at appendix A requires you to draft a definition of the term "domestic violence." In 1979 a set of specifications for preparing a version of the statute at appendix B actually called for such a definition. At no point, though, did these specifications reveal what domestic violence was. The uninitiated could readily have concluded that the specifications

described a proposal for services to those injured in urban street fighting or for a program of law enforcement assistance to deter civil riots. This omission reveals an important truth equally illustrated by the specifications at appendix A. Legislative specifications are usually vague and incomplete. In part this is attributable to the policy maker's reliance on the drafter's knowledge and judgment; even more so, this reflects the embryonic state of the policy maker's thoughts. The drafter must now engage the policy maker in a colloquy to inform himself as to what, exactly, he must do. Often this colloquy will reveal to the policy maker that he, himself, is not sure, beyond general objectives, what he wants to accomplish.

For example, the 1979 specifications required that a bill be drafted to enact a program to reduce spousal abuse. The specifications were silent on whether to make federal funds available for projects dealing with child or parent abuse. In all probability you would have found that on these major issues the policy maker had a definite view, which he had merely neglected to express in the specifications. If you had asked, however, whether he wished a federally supported domestic violence project to assist an adult male who had been injured by his adult brother with whom he shared an apartment, you might find that the policy maker had not considered the problem.

In extreme cases, specifications are so incomplete as to be unacceptable. Most of the time, though, they are sufficient to enable an experienced drafter, after clarifying a handful of issues, to write a first draft that contains at least something on every item with which they deal. Necessarily, this means that the drafter will have to anticipate ultimate policy decisions on innumerable small matters.

On the question of when to draft, I follow these guides:

(1) *Essential concepts.* If the specifications are obscure on an aspect of the proposal that would be time-consuming or otherwise hard to draft —something that might take an experienced drafter more than an hour, let us say—I prefer to obtain guidance on precisely what is intended.

(2) *Boilerplate.* If the specifications are obscure on "boilerplate," that is, those portions of agency programs that tend to show up in similar form from statute to statute, I do not seek guidance. Instead, I draft what I think will be an appropriate set of provisions.

(3) *Other.* If the specifications are obscure on matters that do not fall readily under one of the two preceding rules, what I do depends upon the time I have available to prepare the draft, my feeling for the material, and the accessibility of the policy maker.

Some drafters prefer to draft immediately upon receiving specifications, simply guessing at obscurities. They argue that the test of whether a drafter understands an idea is whether he can write a provision expressing it. During the writing itself he will discover gaps and ambiguities even in specifications that at first seemed complete and clear. If "premature" drafting wastes some time and energy, these may be more than repaid, they contend, by the insights that early drafting will give the drafter into the demands of the job: insights that he will need in order to make his initial meeting with the policy maker on the proposal as productive as possible.

Of course, if you must deal with specifications on a subject about which you have no prior knowledge, nothing will be clear enough to draft. To guard against this, you must take the first two steps listed as preceding the actual bill writing: study policy memoranda and, insofar as you are permitted to do so, participate in the process that refines the issues before the drafting specifications are written.

§1.3. Applying the guides

Using the specifications at appendix A as an example, you probably should not attempt to draft the domestic violence definition until you obtain a decision on whether it should include parental abuse or injuries inflicted on each other by cohabiting siblings.

Now examine section 6(a)(6) of the DVP Act at appendix B. You will see well-worn language that conditions state program participation on the state's agreement not to use federal funds to supplant state funds. If you had received specifications for the drafting of the act that said

something like, "The state plan must contain assurances that federal funds will not be used to supplant state funds," you would draft section 6(a)(6) without further discussion. It is boilerplate.

Another example: imagine a specification that calls for a provision allowing an aggrieved person to bring suit in federal district court. You should not wait for answers to questions of whether a plaintiff may bring suit in district court without regard to the amount in controversy, or the court's venue (*i.e.*, place of suit). You should simply write a provision reflecting your best guess, given the bill's objectives, of what you think the policy official would wish, *viz.:*

> A person...may, without regard to the amount in controversy, bring an action in the district court of the United States for the district in which the defendant resides, is found, has an agent, or transacts business...

Your explanatory memorandum circulating the first draft for review should alert the addressees to your waiver of the usual amount-in-controversy requirement, perhaps noting that the Justice Department may raise the issue. The venue provision is boilerplate. You will soon hear if the policy maker has a different idea.

You may well ask why you should waste any time at all in drafting on the basis of your best guess as to the intentions of the specifications. Admittedly, it might be more efficient to remove all uncertainties before drafting, but this is generally not practical. Specifications are typically fluid and different policy makers often have different ideas on details. A draft bill is a marvelous instrument for concentrating the mind of the policy maker; it usually precipitates many specifications changes of which, without seeing a bill, the policy maker might not have thought. The drafter observes that today's decisions, when hastily made, are tomorrow's decisions hastily reversed. Time spent on perfecting a first draft is thus usually time wasted.

Moreover, even if major policy changes are not in prospect, policy makers remain an impatient breed, especially while awaiting the work of others. They ordinarily prefer to review an imperfect draft bill rather than suffer the delays that are sure to attend the drafter's effort to resolve all policy issues before drafting. As far as technical matters go, you can polish the draft while the policy maker is studying it. There is no need to delay his review because you want to perfect the bill. The most precious commodity in drafting is time.

§1.4. Determining where to clarify specifications

As I have said, when reading specifications you must constantly ask yourself, "If this were a statute addressed to me, how exactly would I go about carrying it out?" Put yourself in the place of one who must administer the specifications once they become law. Think through in detail the specific actions that you would have to take. You need not translate all of these specific actions into bill language; it is not your objective to write as detailed a bill as you are able to imagine. Your purpose is simply to assure yourself that a bill drafted from the specifications will, when enacted, be reasonably unambiguous and capable of being followed.

If you look at specifications this way, you will be able to write a bill that facilitates the actions of those who must implement it. Remember that you are addressing individuals. To take a trivial example of the neglect of this principle, the morning Washington, D.C., commuter who drives west along Constitution Avenue daily encounters illuminated signs apparently instructing him to "Use All Lanes."

§1.5. An example of an ambiguous specification

Let us apply this way of looking at specifications to specification II at appendix A, which calls for the drafter to "Amend the formula for the state grant program so that no state receives less than $100,000, regardless of its population." Assume that this phrase becomes law (*i.e.*, "No state shall receive less than $100,000,") as an addendum to section 5(a)(2) of the act at appendix B, and that Congress appropriates $13 million for the first fiscal year of program operation. Some administrator must now figure out who gets what. If you were the administrator, how would you do the necessary arithmetic?

You will discover that there are at least two plausible ways of performing the calculation for making state allotments, each of which produces different results. One way is to allot the entire $13 million among the states on the basis of population, and thereafter increase to $100,000 the allotment of each state that would otherwise fall below $100,000. In this case, you must select among alternative means of reducing the states that are initially above $100,000, in order to obtain the money to increase the other states. If the means you select are simply to reduce all of those above-$100,000 states *pro rata*, you will find that, in bringing up the below-$100,000 states, you have reduced one or more states below $100,000 that were previously at or above $100,000. You will then have to perform the computation a third time, and so on, until all states are at or above $100,000.

The alternative allocation method is to allot $100,000 to each state first, so as to meet the requirement of a "floor," and thereafter to allot the balance among them on the basis of their respective populations.

For several states the difference in allotments between the two allotment methods is large. The *pro rata* reduction method allots $1,036,300 to New York, compared to the initial-floor allocation method, which allots only $726,600: a loss to New York of $273,700. The initial-floor allocation method would cost California $309,300, but would increase the allotments for Puerto Rico by nearly 30 percent and Utah by almost 40 percent. If an ambiguous allotment formula were enacted, litigation would be a certainty because the amounts at issue would be enough to pay the states' litigation costs. Needless to say, your job as the drafter is to identify the allotment method intended and draft it clearly.

This example should suggest a second technique for answering the three questions—clarity, comprehensiveness, and administrative feasibility—in the drafter's mind when he reads specifications. He will be greatly helped if he understands the objectives that the policy maker is seeking. In the previous example, the purpose of the specification is to ensure, given the low level at which the program is to be funded, that a small state will receive a grant large enough to run a viable program. If the drafter appreciates this purpose—and he will if he has been a witness to its formulation—he could probably guess that the policy maker, when his attention is drawn to the ambiguity, will prefer the second alternative allocation method. If time is tight, the drafter might thus prefer to select this method for his first draft, without waiting for clarification. In that case, he would flag the issue with a transmittal memorandum or call attention to it at a meeting on the draft.

Contrary to the views of those legislative drafters who are lawyers and therefore believe that the legal discipline especially fits them to formulate social policy, the early involvement of drafters in general policy review and specification refinement is less in tribute to their potential contribution to the policy-making enterprise than to a need to give them early exposure to policy thinking. As the drafter, you need this exposure to understand the issues and how the policy maker approaches them. It will enable you to guide yourself by both your awareness of what he is seeking and your recollection of the choices that he has rejected. Together with your program knowledge of what is administratively feasible, this early involvement will enable you to perform creditably at high speed when the specifications arrive.

§1.6. An example of lack of comprehensiveness

The original 1979 specification for the provision that became section 5(2) of the Domestic Violence Prevention Act at appendix B directed, in pertinent part, that state grants were to be "distributed by formula based on population". Putting himself in the shoes of the administrator, the drafter found the specification incomplete:

> (1) *What is a state?* The administrator is not told whether the term "state" includes the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, or the Commonwealth of the Northern Mariana Islands. All of the department's other programs are in effect in D.C., and most of them are in effect in one or more territories.
>
> (2) *Which population figures?* The administrator is not told which of several widely used measures of

population he should use or how much discretion he has to select among data. For example, the Bureau of the Census, in *Current Population Reports,* estimated that the population of Alaska increased almost 4 percent between 1970 and 1976. But the 1970 census figure, based on a total survey, was more reliable than the samplings that show the increase. If the specification had been enacted into law in 1979, should the administrator then have selected the most recent year for which reliable data was available for all of the states, should he instead have used the 1970 census, or should he have used what he considered to be the most recent reliable data for *each* state even though this may have meant using different years for different states?

(3) *How to make payments?* The administrator does not know how to pay the allotment to the states. Is it to be solely by reimbursement or may he pay in advance on the basis of estimates? In case you think this is an easy question, I invite your attention to what was then 31 U.S.C. 529, which read "No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law." (Compare the current 31 U.S.C. 3324(b) to similar effect.)

§1.7. Jargon versus terms of art

The original 1979 specifications for a domestic violence program told us, "State requirements include...the establishment of linkages between this program and law enforcement agencies and other agencies providing services to domestic violence victims." As an administrator, what must you do to establish "linkages?" Do you make an occasional telephone call to other agencies or do you establish a highly structured arrangement among agencies for coordinated action? This specification reflects the policy maker's belief that a program to assist the victims of domestic violence would be more effective if it took account of other resources that the state can bring to bear. Unfortunately, it also reflects his unwillingness to subject his belief to serious analysis. If the bill is to demand linkages, it should either say what they are or provide a means for the federal administrator and the state to agree on what they are. If you were drafting this bill, you would want to ask the policy maker for further guidance.

I suggested earlier that the 1979 specifications left the term "domestic violence," surrounded by a fog. They used the term as a convenient way of expressing a complex and partly unformulated idea. This sort of compression causes a common problem in legislative specifications, which are typically replete with verbal shorthand. Some of this jargon is indispensable. In the arcana of social security benefit law, for example, phrases used in specifications such as "dropout years," "guarantee cases," "old-starts," or the like, are convenient terms of art alluding to precise statutory provisions. You must know what the phrases mean if you are to draft social security amendments. On the other hand, the use of a term or catch-word, such as "domestic violence" or "linkages," may merely serve as a cloak for imprecision. Then it becomes the drafter's job to dispel the fog and compel the policy maker to think his intentions through.

§1.8. Specifications for amendments

A large part of a drafter's skill resides in his substantive knowledge. A drafter must always be alert to his legal surroundings—the measures already on the books—if his draft is adequately to take them into account. Nowhere is this more true than in drafting amendments, where there is no ready substitute for familiarity with the subject matter.

This is a serious problem for the novice because most legislative drafting for the federal government is of bills to amend existing statutes. Assume, for example, that you are asked to prepare amendments to section 218 of the Social Security Act, 42 U.S.C. 418, which deals with voluntary agreements for the social security coverage of state and local employees. You may not realize that this provision is cited by at least 12 other sections or sectional subdivisions buried in a title of the act that runs to several hundred pages, and is also referred to at least eight times by various parts of the Internal Revenue Code and at least six times by two free-standing public laws. The section, itself, will confront you with 122 tabulated subdivisions and numerous additional untabulated alphanumeric subdivisions.

A drafter not intimately familiar with such a complex statute cannot acquire competence to draft amendments to it merely by devoting to it a

day or two of study. Yet the time for writing a bill is usually constrained. The drafter is without the leisure to embark with each new drafting assignment upon a voyage of discovery over a sea of uncharted substantive law. The full-time practitioner of legislative drafting meets this difficulty by selecting areas of the law in which to specialize.

But what are you to do if you are compelled to draft amendments to a statute with which you are unacquainted? The best advice is to apply the First Rule of Statutory Construction: READ THE STATUTE. If the statute turns out to consist of 200 pages of closely printed text, *e.g.,* title II of the Social Security Act in the most recent compilation, apply the Second Rule of Statutory Construction: CONSULT AN EXPERIENCED PROGRAM ATTORNEY OR PROGRAM ANALYST. He may tell you that you can remedy your ignorance merely by reading a relevant section or portion of a section, in conjunction with the act's general definitions. Also, if the authors of the specifications are technicians who have substantial experience with the statute to be amended, ask them to direct you to the portions of the statute that they think should be amended in order to comply with the specifications. In most cases, your problem will be not in eliciting their cooperation, but in preventing them from trying to draft the bill for you.

At all events, make sure your draft bill is reviewed by program technical staff and the program attorney responsible for interpreting the statute that you seek to amend.

§1.9. Where to start drafting

If you have carefully planned your bill and expect it to be short, like the bills called for by the specifications in the drafting exercises at appendix A and appendix L, you may draft its sections in any order you please without its making a difference to anyone or to the quality of the final product. This is generally the case whether you are to draft a set of amendments to an existing statute, as in the exercise beginning at appendix A, or a bill for a free-standing statute, as called for by appendix L.

The order of drafting is important if, as is often the case with long and complicated bills, you must circulate each portion of the bill to the policy maker for review as it is drafted. Unfortunately, these circumstances present a dilemma. On the one hand, if some of the bill's main provisions are difficult to draft, you will want to draft them earlier than less consequential provisions so that the policy maker has more time to consider them. This also gives you more time to refine the provisions before the bill is put in final form. In this alternative, boilerplate is drafted last, since it should need little review and redrafting.

On the other hand, when one confronts a hungry lion, one throws to it whatever meat is handy. Routine administrative provisions are often voluminous but nevertheless easy to write quickly; you may be tempted to dash them off first, circulate them for review, and while that review is in progress turn to the more demanding sections. This alternative *appears* efficient because it speeds the initiation of review. Moreover, it enables you to draft the bill's most difficult sections at your (comparative) leisure. But if you do this, you may short-change the bill's most sensitive provisions, which may not, ultimately, get as much attention in review as the less significant boilerplate provisions. What course you take in given circumstances is a matter for your conscience.

§1.10. Clarifying specifications: an exercise

Specification III at appendix A calls for an amendment to the definition of "domestic violence" in the Domestic Violence Prevention Act, appendix B, so as to substitute uniform federal criteria in place of the state criteria currently in use. The new federal definition should cover injury done by an individual to his spouse. But it must also include injury done by an individual to one with whom he is living (or was living) as husband and wife, even if the relationship is not recognized as marriage under state law.

You search for a model. You remember a definition of something called "family violence" that you once saw in a statute. Research uncovers section 309(1) of the Family Violence Prevention and Services Act:

> Sec. 309. (1) The term "family violence" means any act or threatened act of violence, including any forceful detention of an individual, which—

> (A) results or threatens to result in physical injury; and
>
> (B) is committed by a person against another individual (including an elderly person) to whom such person is or was related by blood or marriage or otherwise legally related or with whom such person is or was lawfully residing.

You decide that this definition is unsatisfactory because it covers cases that it should not and does not cover cases that it should.

For example, it would include a man who strikes his brother-in-law over a business difference.

On the other hand, it would exclude a man and woman who have been living together as husband and wife for many years, and who have children who live with them, in a jurisdiction that does not recognize common law marriage.

You therefore draft the following:

> The term "domestic violence" means the infliction of physical injury by an individual upon his spouse, or by an individual upon one with whom he is (or was) living as husband and wife (whether or not the relationship is so recognized under state law).

After some thought you come to realize that this definition is not adequate.

Why not?

To see if your definition works, you must apply it to some hard cases.

First, take the case of the man and woman, both married but not to each other, who are living together. If the man injures the woman is she eligible for services?

You will find that the definition does not supply a clear answer. The phrase, "living as husband and wife (whether or not the relationship is so recognized under state law)," may contemplate a domestic arrangement that, except for the statutes of particular states, would be a common law marriage. If so, it is too restrictive. From the general tenor of the program to be proposed, you can guess that it is supposed to serve victims of relationships that would not be common law marriages regardless of state law.

Also, what does "living as husband and wife" mean, if the individuals do not hold themselves out as husband and wife and could not legally marry? Does it mean living together and engaging in sexual relations? If so, would it include an incestuous relationship? If incestuous relationships are included why are homosexual relationships excluded (as they seem to be)? Is this a moral preference?

Does the definition cover a husband who gives his wife an ulcer from verbal abuse?

And how does this definition handle services to children who, although not the subject of domestic violence, are taken by an abused wife when she flees home?

It is your job as the drafter to find out how the policy maker wants these questions answered. Now draw up a list of questions that you would ask the policy maker in order to equip yourself with sufficient information to draft a satisfactory definition.

When you have completed your list, examine the cases described at appendix E devised with the objective of refining the concept of domestic violence. Here is a summary of what the resolution of those cases teaches:

- The underlying theme of the specifications is to provide services—not merely shelter, but counseling and other non-cash assistance as appropriate—to assist women who are psychologically dependent upon men who abuse them.
- The strength of this dependency cannot be gauged, in all cases, by the legal character of a given relationship, the recency of injury, or the recency of cohabitation.
- A person should not be required to answer questions about her sex life as a condition of receiving services under the proposal.
- On the other hand, the bill is essentially concerned with physical not psychological abuse, even though psychological abuse may have physical consequences.
- Finally, the bill's services are not to be available for homosexual or incestuous relationships.

You must revise your first draft of the domestic violence definition. Your redraft should not cover an abused child living with a parent or guardian, or a child of a victim of domestic violence who accompanies the victim to a shelter. The former will be dealt with in your draft for specification IV; the latter is already provided for in the definition of "services to victims of domestic violence".

Now examine the draft at appendix F. When enacted, the new definition will read as follows:

> (1) the term 'domestic violence' means the threat of physical injury to, or the infliction of physical injury upon, an individual by one to whom that individual is or has been married, or with whom that individual is or has been living; except that the term does not include (A) a threat to, or infliction of injury upon, an individual of the same sex; or (B) a threat or infliction of injury by one to whom the individual is related by blood, or is or was related by marriage (other than by the individual's spouse, former spouse, brother-in-law, or sister-in-law); or (C) an injury that is not the result of physical abuse;

You will notice that, at the margins, the definition is somewhat vague. Cases 5 and 6 on the list in appendix E are probably covered, but surely would not be if the man (in case 5) or the woman (in case 6) had a separate fixed address.

Also, the definition may pick up some "commune" cases; that is, women who have been assaulted by men with whom they have no relationship that goes beyond the sharing of a common abode. This is the consequence of not requiring a female applicant for services to attest to an illicit relationship as a condition of eligibility. (Could this problem be solved by substituting for the phrase "...or with whom that individual is or has been living..." the phrase "...or a boy friend or girl friend with whom that individual is or has been living..."?)

A drafter cannot anticipate all conceivable cases. The harder he tries, the more likely it is that he will introduce into his bill obstacles to sensible administrative judgments. Also, the need for anticipation depends upon the likelihood and extent of abuse. If the bill were one that distributed large sums of money to domestic violence victims, a more exacting definition might be required. But remember, the more elaborate a requirement, the more complex the process needed to give it effect, and therefore the less likely it is that the legislation will work as the policy maker envisioned it.

To improve the definition's readability, you might prefer to divide the definition into two subparagraphs: the first to state the rule ("The term 'domestic violence' means..."); the second to announce the rule's exceptions ("The term does not include...). In a structure that used sentences rather than phrases, the definition would then read as follows:

> (1) DEFINITION OF "DOMESTIC VIOLENCE"—
>
> (A) IN GENERAL.—The term "domestic violence" means the threat of physical injury to, or the infliction of physical injury upon, an individual by one to whom that individual is or has been married, or with whom that individual is or has been living.
>
> (B) EXCEPTIONS.—The term "domestic violence" does not include—
>
> (i) a threat to, or infliction of injury upon, an individual of the same sex;
>
> (ii) a threat or infliction of injury by one to whom the individual is related by blood, or is or was related by marriage (other than by the individual's spouse, former spouse, brother-in-law, or sister-in-law); or
>
> (iii) an injury that is not the result of physical abuse.

If the definition were so divided, the rule contained in subparagraph (A) would appear unqualified to those who neglected to read on. (As the lawyers would say, subparagraph (A) would have to be "construed" in light of subparagraph (B).) When this is the case, drafters commonly feel obliged to warn of the exception in the sentence that states the rule. If the exception is extensive, the general rule might be introduced like this: "(A) Except as provided in subparagraph (B)...". This may be less important where the format, as here, makes clear by line headings that the initial statement of a rule is merely a general one.

Chapter two covers the technical aspects of writing amendments; chapter four contains general information on drafting definitions.

CHAPTER TWO

AMENDING A STATUTE

§2.1. The nature of an amendatory bill

Let us examine an amendment that will be contained in our Domestic Violence Prevention Amendments of 1990, the amendment required by specification II at appendix A. The specification reads:

> II. Amend the formula for the state grant program so that no state receives less than $100,000, regardless of its population.

One form of an amendment to carry out this specification might read as follows:

> SEC. 4. MINIMUM STATE GRANT.
>
> Section 5(a)(2) of the Domestic Violence Prevention Act is amended by striking "The Secretary shall allot such available sums" and inserting "From such available sums the Secretary shall first allot to each State the amount of $100,000. The Secretary shall then allot the remainder of those sums".

The section number, section 4, is a section of your amendatory bill. It makes its change in section 5(a)(2) of the Domestic Violence Prevention Act, the mock statute at appendix B. When section 4 of the amendatory bill is enacted and becomes effective, only the language placed inside the quotation marks in the amendatory bill will be removed from or added to the statute that the bill is amending. Conceptually speaking, the amendatory bill does its job—strikes and inserts language—and then disappears. Another way of putting this is to say that the amendatory section, section 4, has been "executed."

Here is section 5(a)(2) of the Domestic Violence Prevention Act, marked to show the effect of section 4 of the Domestic Violence Prevention Amendments of 1990:

> (2) [The Secretary shall allot such available sums] *From such available sums the Secretary shall first allot to each State the amount of $100,000. The Secretary shall then allot the remainder of those sums* among the States in proportion to their populations, as determined on the basis of the most recent satisfactory data available from the Department of Commerce.

The form in which we have displayed the amended section—stricken matter in brackets, new matter in italics, unchanged matter in roman—is called a "Ramseyer." That is because Article XIII, cl.3 of the Rules of the House of Representatives, adopted in 1929 and presumably advanced by a Mr. Ramseyer, requires that when a committee reports legislation to repeal or amend a statute, the report include a comparative print showing the changes. In the Senate a virtually identical requirement (Standing Rules of the Senate, Article XXIX, cl.4) is known as the "Cordon" rule. Nevertheless, even in the Senate the term "Ramseyer" is frequently used.

§2.2. Modular construction

§2.2.1. *An amendatory section should entirely accomplish a single policy objective.* The inexperienced drafter, when confronted with specifications for a bill to amend an existing statute, is tempted to arrange his amendatory bill to follow the sequence of the law to be amended. For example, the drafter might begin his amendatory bill with a section to amend the statute's "Findings and Purposes" section, if it needs amendment, because that is the first section of the statute after its enacting clause. Then, if the statute's next section contains an expiring appropriations authorization, the drafter might use the next section of his amendatory bill to extend it. Finally, in later sections, the drafter might include language to amend the statute's operating provisions.

Structuring an amendatory bill in this way deprives it of internal coherence. For example, to carry out the policy maker's purpose expressed by specification I at appendix A, *i.e.*, to continue the Domestic Violence Prevention Act (at appendix B) in operation for an additional three years, the drafter must extend the act's appropriations authorization, which calls for an amendment to section 4, and also suspend operation of the sunset provision, which calls for an amendment to section 11. If we draft our amendatory bill to amend each section of the act in sequence, our amendment to section 4 will be followed by amendments to all of the other sections of the bill called for by the remaining specifications, until we finally arrive at the amendment we must make to section 11. By

separating the amendments to section 4 and 11 by unrelated amendments to other provisions of the act, we make it more difficult for a reader of the bill to grasp the full scope of the policy expressed by specification I.

To avoid this, good drafting practice calls for modular construction. Modular construction means that each section of an amendatory bill is dedicated to a single legislative subject, and contains all of the amendments to the underlying statute needed to give that subject a legislative reality. For example, if it is the policy maker's objective to continue the DVP Act for an additional three years, we should put both of the amendments of the DVP Act essential to accomplish this objective into a single section of our amendatory bill: subsection (a) of that section of our amendatory bill would contain language to amend the DVP appropriations authorization in section 4 of the DVP Act; subsection (b) would contain an amendment to the sunset provision in section 11 of the DVP Act.

As an exercise, draft the amendment called for by specification I at appendix A. Then compare your work with the draft at appendix C. (For information on the nature of appropriations authorizations, see §4.4 on page 32.)

Here is a second example. Assume you are to prepare an extensive bill to amend various programs contained in the Public Health Service Act. One of the specifications calls for modification of a program under which the Secretary of Health and Human Services enters into an agreement to pay off the educational loans of a health professions student who agrees to practice in a health manpower shortage area. Under current law, if the student becomes a regular officer of the PHS commissioned corps, the secretary reduces his monthly pay by a proportion of the loan payments the secretary is obligated to make. You must draft language, to apply to future agreements between the secretary and a student, under which such a student would simply reassume responsibility for those payments.

To accomplish this, you must draft at least two amendments to the Public Health Service Act: an amendment to section 741(f)(1)(C), which currently provides for the secretary to make payments on the loans of these officers; and a conforming amendment to section 331(d)(1)(C), which currently requires the secretary to reduce monthly pay by a proportion of the loan payments the secretary is obligated to make.

If the sections of your amendatory bill follow the order of the sections to be amended in the Public Health Service Act, the reader of the amendatory bill will first come upon your amendment to section 331(d)(1)(c). This is the conforming amendment that removes language from the Public Health Service Act directing the secretary to reduce pay of regular commissioned officers whose student loans the secretary is obliged to repay. Unless the reader understands that this is a conforming amendment, he will think the amendment is intended to increase the pay of those officers. He will not discover his mistake until, after much intervening material, he arrives at your amendment to section 741(f)(1)(C). To avoid this confusion, you should put both amendments into a single section of your amendatory bill: a section that contains only those amendments.

Because it is common for a congressional subcommittee to address policy issues within the framework of the language of the bill in which they are embodied, modular construction of this sort often facilitates a bill's consideration. A subcommittee may even wish to discuss or vote on the various sections during a formal reading of the bill. If so, subcommittee members and attendant staff would have difficulty following a single concept that is spread among widely scattered amendments.

In addition, modular construction simplifies the drafter's task if the subcommittee chooses to accept some but not all of the amendments proposed in the bill. The removal of a "module" does not usually require much redrafting of the remainder of the amendatory bill.

§2.2.2. *An amendment should not anticipate a future amendment.* A second principle of modular construction is that early amendments should not anticipate later ones. A common sight, in amendatory bills prepared by novice drafters, is a provision that refers to a section of the act being

amended that, on inspection of that act, seems not to exist. Eventually, the reader discovers that the missing section is to be added by a section of the amendatory bill itself, which section the drafter has carefully placed twenty pages further on.

In order to adhere to the principle that an amendment should not anticipate a later amendment, you must sometimes amend the same language two or more times in the same bill.

To illustrate, assume that you are to amend the following statutory list:

(1) wife,
(2) husband,
(3) child, and
(4) widow or widower.

There are to be two amendments to the list, the first to add "divorced wife" after paragraph (1) and the second to add "divorced husband" after paragraph (2). In the real world, those amendments would probably be made by a single section of a draft bill. Let us suppose, nevertheless, that you conclude that the amendments must be made by different sections of your bill. How do you do it?

A beginner might draft the amendments something like this:

SECTION 1. INCLUSION OF DIVORCED WIFE.

Paragraphs (2), (3), and (4) are respectively redesignated as paragraphs (3), (5), and (6), and there is added after paragraph (1) a new paragraph as follows:

"(2) divorced wife,".

SEC. 2. INCLUSION OF DIVORCED HUSBAND.

There is added after paragraph (3) a new paragraph as follows:

"(4) divorced husband,".

This draft has two flaws. First, the reader of section 1 will be unable to understand why paragraphs (3) and (4) were renumbered "(5)" and "(6)" rather than "(4)" and "(5)". The reader will not know whether this is an error or an indication that section 1 is not self-contained. Second, a reader of section 2 will be uncertain whether its reference to "paragraph (3)" is to pre-existing law ("(3) child") or to the law as amended by section 1 ("(3) husband"), although an understanding of the reference is essential to the correct placement of the amendment made by section 2.

Here are the amendments redrafted correctly:

SECTION 1. INCLUSION OF DIVORCED WIFE.

Paragraphs (2), (3), and (4) are respectively redesignated as paragraphs (3), (4), and (5), and there is added after paragraph (1) a new paragraph as follows:

"(2) divorced wife,".

SEC. 2. INCLUSION OF DIVORCED HUSBAND.

Paragraphs (4) and (5) (as redesignated by section 1 of this Act) are respectively redesignated as paragraphs (5) and (6), and there is added after paragraph (3) (as redesignated by section 1 of this Act) a new paragraph as follows:

"(4) divorced husband,".

The practice of not anticipating later amendments eliminates inexplicable references, and thereby helps a reader to understand an amendment, particularly if the reader studies it in conjunction with the law being amended, without his having to know what in the bill is yet to come. (Remember that we are talking about discrete amendments in an amendatory bill. This does not mean that a provision in the act being amended may not refer to some later provision in that act.)

§2.2.3. *An amendment should assume the enactment of prior amendments.* Nevertheless, although an amendment should not anticipate a later amendment, it may—indeed, must—assume the enactment of previous amendments contained in the bill. In the example, section 2 (which adds "divorced husband") assumes the enactment of section 1 (which adds "divorced wife"). A perfectly modular bill—one that assumes nothing, forward or backward—is possible, but not desirable. The drafter should assume, as is normally the case, that the responsible committee will accept most provisions, in one form or the other.

The conventional practice is to assume that the reader of the amendatory bill has started to read the bill from its beginning. Such a reader will understand an amendment that looks to what he has already read, but will not readily understand an amendment that assumes what he has not yet read.

§2.3. Organizing an amendatory bill

As we have mentioned, the sections of an amendatory bill are organized by subject. When assembling an amendatory bill containing a number of sections, the drafter generally arrays them in order of their importance, the most important first. If a drafter must make a great many amendments of relatively equal significance to a very complex statute—for example, where the bill will contain several dozen amendments to title II of the Social Security Act—an acceptable approach is to begin with amendments whose main changes are to be made to the earlier-numbered sections. In other words, an amendment whose focus is on section 201 will be made before an amendment whose focus is on section 202, even though each amendment may also make conforming changes in later-numbered sections of the statute.

§2.4. The sequence, within a section of an amendatory bill, of amendments to an act

As you see from the two examples that began the discussion of modular construction, it is common for even a simple section of an amendatory bill to amend several different parts of an act to achieve a single objective. In what order do you put the subdivisions of such a section? The answer: subject to overriding technical considerations, put the most important material first. In the example dealing with the payment of educational loans, the repeal of the secretary's authority to make payments should come before the amendment requiring the secretary to reduce monthly pay. The second amendment unavoidably derives from the first.

To take another example, you are assigned to draft a section of an amendatory bill to add a category of beneficiary to an act. You observe that the act contains a preamble (often called the "long title") or statement of purpose that itemizes beneficiaries. You conclude that your section must amend the preamble or statement of purpose to add the new category. Begin your draft section by amending the act's operative provisions to add the new beneficiary category, even though those provisions appear after the preamble and statement of purpose. Conclude your draft section by amending the preamble or statement of purpose. This is a conforming amendment (*i.e.*, it necessarily follows from the policy decision to add the new category of beneficiary) and therefore, because of its unimportance, may come last.

Of course, there are technical considerations that are inescapable. If your amendment must redesignate a list of subdivisions in order to make a hole for your new subdivision, naturally you must redesignate first, even though this is a trivial detail; otherwise you will create an ambiguity (*e.g.*, if you begin by adding a second paragraph (2), and *then* redesignate the existing paragraphs (2) through (5) as paragraphs (3) through (6), the reader will not know which of the two paragraphs (2) is to become paragraph (3).).

§2.5. Amendment by restatement versus amendment by striking and inserting

Specification IV at appendix A calls for you to extend the Domestic Violence Prevention Act to assist activities to prevent child abuse. The easiest way to do this is to amend the definition of "domestic violence", which you have already amended to meet the requirements of specification III, to include the infliction of physical injury upon, or the sexual abuse of, a child. Assume, as a result of your amendment to carry out specification III, the domestic violence definition in section 3(1) of the Act is in this form:

> Sec. 3. ...
>
> (1) The term "domestic violence" means the [etc.]

Let us suppose that you want this last amendment to divide paragraph (1) into two subparagraphs: subparagraph (A) will contain the definition prepared to meet specification III; subparagraph (B) will contain the material extending the definition to child abuse. How do you handle the assignment?

You have two reasonable choices:

You can restate the entire definition, *i.e.*,

> Paragraph (1) of section 3 of the Domestic Violence Prevention Act (as previously amended by section ___ of this Act) is further amended to read as follows:
> "(1) [etc.]

This is the clearest way to display the new format. It has, however, the drawback of obscuring what the amendment would change. Consider the following legally equivalent alternative:

> Section 3(1) of the Domestic Violence Prevention Act is amended—
>
> (1) by inserting a dash after "domestic violence means",
>
> (2) by adding, following the dash, a new subparagraph (A) containing the remaining text of section 3(1), amended to redesignate clauses (A), (B), and (C) as clauses (i), (ii), and (iii), respectively,
>
> (3) by adding "or" after the semicolon at the end of that new subparagraph, and
>
> (4) by adding after that new subparagraph a new subparagraph as follows:
>
> "(B) the infliction of physical injury upon, or the sexual abuse of [etc.]"

The alternative, using a technique called "cut and bite", has the advantage of making clear to one who examines the unamended act precisely what change is being made in the domestic violence definition, without subjecting him to the necessity of reading the new definition against the old one searching for altered language. The disadvantage of the alternative is that, to one reading merely the proposed amendment, it makes less clear than the first alternative what the amended domestic violence definition will provide.

Other considerations may underlie the drafter's choice of the technical means best suited to effecting an amendment. Recall the appropriations authorization to be extended under specification I. The original provision reads:

> Sec. 4. (a) For the purpose of carrying out this Act, there are authorized to be appropriated $16,000,000 for fiscal year 1986, and such sums as may be necessary for each of the two succeeding fiscal years.

Let us, for simplicity, suppose that specification I merely called for a three-year extension of the original authorization at the current $16 million level. A concise amendment would be: "Section 4(a) of the Act is amended by striking 'two' and inserting 'five'." Even the sophisticated reader would be hard put to tell the effect of an amendment in this form without examining current law. A different way of making the change would be:

> Section 4(a) of the Domestic Violence Prevention Act is amended to read as follows:
>
> "Sec. 4. (a) For the purpose of carrying out this Act there are authorized to be appropriated $16,000,000 for fiscal year 1989, and such sums as may be necessary for each of the two succeeding fiscal years.".
>
> [OR]
>
> "Sec. 4. (a) For the purpose of carrying out this Act there are authorized to be appropriated $16,000,000 for fiscal year 1986, and such sums as may be necessary for each of the five succeeding fiscal years.".

The difficulty of the first shown section 4(a) is that it erases the history of the appropriations authorization, which some find useful to preserve in the statute. The alternative section 4(a) has, on the other hand, the peculiarity of asking Congress to reenact an appropriations authorization for three past years that have already been funded. Moreover, it leaves unclear, without an examination of the current 4(a), how long an extension is being proposed.

The compromise is to write an amendment striking out "two succeeding fiscal years" and inserting "five succeeding fiscal years". By striking out and replacing a little more than is legally essential, the drafter assists an experienced reader quickly to infer what the amendment would do.

A note of caution is in order on substituting new for existing provisions. By way of illustration, let us say that you are instructed that the policy maker has decided that the United States should assume the costs of federal safety inspection of certain manufacturers. Upon examining the governing statute you find that these costs are now imposed upon manufacturers, in the form of inspection fees, by a subsection of a section to which, in any event, you intended to add a new subsection authorizing federal inspectors to examine business records kept on inspected premises. In order to avoid redesignation, you decide to put the new records inspection provision into the hole you will create by removing the inspection fee provision.

You may be tempted to write: "Subsection X is amended to read as follows:", and then set out

your new records inspection language. This is grossly misleading! Whenever new material is essentially unrelated to the material it is to replace, the proper form is as follows: "Section X is repealed. There is added a new section X as follows:". This signals the reader that he is not looking at a revised version of the current section X. (Note, though, that there are other hazards in filling in a place that is still warm: who knows how many cross references to that place, in its previous incarnation, you may fail to locate and delete?)

§2.6. Organizing amendments to support legislative strategy

When organizing a group of sections to amend an act, your primary aim is to put them in the sequence that makes their purpose the clearest. The order of your provisions will usually not alter their legal effect. Sometimes, though, the order of your amendments, or how you organize them, may have tactical implications bearing on their enactment.

This was the case, one year, when title II of the Social Security Act was to be amended. At the time the social security system did not cover an American citizen employed outside of the United States by a foreign business unless the foreign business met two requirements: it had to be a corporation, and at least 50 percent of its stock had to be owned by an American business. Then, beyond this, the American business, itself, was required to be a corporation. The Social Security Administration concluded that these rules unduly restricted social secuirty coverage, and proposed to change them.

A drafter was asked to include in that year's multi-sectioned omnibus Social Security Amendments bill, legislation to dispense with the corporate requirement for both domestic and foreign businesses and to reduce the ownership interest that the domestic business was obliged to maintain in the foreign business to a minimum of 10 percent. These three proposed changes did not depend on each other. The Social Security Administration would have been pleased to get any or all of them. The question for the drafter was: into how many separate sections should he divide these three changes?

The drafter considered putting all of the changes into a single section of the omnibus bill, but rejected it. He knew of no objection on the Hill to repeal of the domestic incorporation requirement, but was afraid of controversy over the proposals to repeal the foreign incorporation requirement and relax the ownership rule. A single section could cause all three changes to be considered together. If either of the two controversial changes were lost, there was a good chance that the remaining changes would go down with it. This seemed to argue for placing each of the three changes into separate sections of the amendatory bill.

The drafter was aware, however, that the expected objection to repeal of the foreign incorporation requirement was the same as that against relaxing the ownership requirement: uncertainty as to whether the American business could guard against bad record-keeping by an unincorporated foreign subsidiary that it did not wholly control. Because this was a single policy issue, the drafter decided to simplify its consideration by grouping these two changes in a single amendment. He then put the uncontroversial repeal of the domestic incorporation requirement into a section of its own.

In short, the drafter arrayed the Social Security Administration's proposals not to suit his technical convenience, but to facilitate their consideration in Congress. Sometimes, as we will see later in this book, the desire to improve a bill's chances leads the drafter into practices that alter the law in undesirable ways.

§2.7. Some practices to avoid

§2.7.1. *Unnecessary redesignation.* If you properly draft the language called for by specification III at appendix A, you will repeal paragraph (3) of section 6(a) of the Domestic Violence Prevention Act because it is no longer needed. The question that you must then answer is whether to redesignate paragraphs (4) through (11) as paragraphs (3) through (10).

In his book, *Notes on Legislative Drafting* (REC Foundation Inc. 1961), James Peacock called redesignation an "abominable practice...contribu-

ting its so unnecessary complexities." His position is stated succinctly: "...redesignation should be totally scrapped as a legislative drafting technique."

Few professional drafters of federal legislation would go this far. Nevertheless, the renumbering or relettering of provisions of current law can create confusion. If the redesignated provision is referred to in other laws, the drafter who fails to correct those references will mislead individuals using those other laws. If the provision is an important one, he will also have rendered obscure or misleading references in innumerable reprints, digests, texts, opinions, regulations, and so forth. Consider the havoc it would create, for example, if section 501(c)(3) of the Internal Revenue Code of 1954, dealing with organizations eligible for exemption from income tax, were periodically redesignated.

It is no answer to use a catchall provision, such as, "Section 210(a) of that Act is amended by striking out paragraph (3) and redesignating paragraphs (4), (5), and (6), and any references thereto contained in that or any other Act, as paragraphs (3), (4), and (5)." As Peacock points out:

> But no draftsman can, and, as far we know, none has even tried to accomplish the impossible task of assuring that he has run down all possibly existing citations or references anywhere in the whole wide legal and administrative world. (At p. 42)

The other side of all this is the desirability of having a bill's provisions in the sequence that best ensures their being found and understood, and having their designations logically reflect that sequence. It will also cause confusion, if one scrupulously refuses to redesignate provisions of a statute that is much amended, to see a sequence like this: (1), (3), (3a), (3a-1), (3aa), (5), etc.

The best advice I can give is that the larger the subdivision and the older the statute the more you should try to avoid redesignation. No drafter in his right mind would renumber section 162 of the Internal Revenue Code of 1954, which deals with trade and business deductions, except in the course of a comprehensive revision of the tax code. (And the most recent revision, the Tax Reform Act of 1986, did not renumber that section.) On the other hand, there is probably little risk in redesignating a paragraph or subparagraph of a recently enacted law with which the drafter has had experience.

§2.7.2. *Amending laws in substance but not in form.* If it looks like a duck, waddles like a duck, and quacks like a duck, it may be a rabbit. Or so I learned in the pre-Darman days of the Carter Administration. At the time, there was sentiment in Congress for requiring the Department of Agriculture to inspect domesticated rabbits slaughtered for human food. Congress gave concrete expression to this sentiment by enacting (twice) what is surely one of most peculiar bills ever vetoed (twice) by an American president. For convenience, we will refer to it as the "rabbit bill". It is reproduced in appendix N.

The drafter of the rabbit bill took for his model the Poultry Products Inspection Act (the "Poultry Act", for short). But rather than draft the rabbit bill as an amendment to the Poultry Act, he wrote a bill to create an entirely new act to deal exclusively with rabbits. This new bill did not repeat the provisions of the Poultry Act, though. Instead, it provided—

> ...all the penalties, terms, and other provisions in the Poultry Products Inspection Act...are hereby made applicable...to domesticated rabbits, the carcasses of such rabbits, and parts and products thereof...

Standing alone, this language—a marvel of economy—creates a few technical problems. The first problem is that nowhere does the Poultry Act mention rabbits. To overcome this difficulty, the drafter redefined various terms used in the Poultry Act, not for the purpose of reinterpreting the Poultry Act, but only to ensure that the rabbit bill would apply to rabbits, *i.e.,*

> ...wherever the term "poultry" is used in the Poultry Productions Inspection Act, such term shall be deemed to refer to domesticated rabbits...
>
> ...wherever the term "poultry product" is used in the Poultry Products Inspection Act, such term shall be deemed to refer to domesticated rabbit products...

So far, so good. Unfortunately, the Poultry Act is replete with references to what it calls a "domesticated bird". Accordingly, the drafter was compelled to "deem" a domesticated bird to be a "domesticated rabbit." This still did not solve all

of the drafter's problems. It appears that the Poultry Act, in one place, refers to "feathers". Rabbits, as the drafter was aware, did not usually possess feathers. Rising to the challenge, the drafter wrote, "...the reference to 'feathers'...shall be deemed to be 'pelt'."

Unfortunately, by solving his technical problems in this way, the drafter threatened to confuse the law (*i.e.,* the lawyers) if the rabbit bill were enacted. No lawyer advising a client, thereafter, on the reach of the Poultry Act would know from its text that its provisions applied to rabbits. And even a drafter, amending the Poultry Act in later years, might well forget such arcane information. After all, when one thinks of poultry, rabbits do not spring to mind. The least of the bill's sins is the quaintness of its definitions. Far more serious is the bill's failure to amend expressly the statute that it amends by necessary implication. Had the enrolled bill become law, there would be no whisper of a suggestion in the Poultry Products Inspection Act to warn the reader that the act's scope included rabbits.

All of this is to illustrate that amendatory techniques can also make it very difficult for anyone to understand exactly how the basic statute, as amended, would operate. The operation of the Poultry Act, even with a hidden scope including rabbits, is comparatively straightforward. More complicated statutes, amended in technically undesirable ways, may be far less penetrable.

A special and often offensive type of amendment that amends in form but not in substance is the amendment that begins with the words, "Notwithstanding any other law". What the words usually tell you is that the drafter is seeking a specific result, *i.e.,* overcoming conflicting provisions, but has failed to integrate his amendment with other relevant statutes. In other words, he literally does not know what he is doing. This approach can be useful if taken with care. All too often, though, the drafter is a little like the hunter who fires at anything that moves and then checks to see what he has killed.

To strain the simile, he is also a hunter who uses an intangible bullet and thus leaves no visible wound on his victim as evidence to others of his marksmanship. This is true even if the amendment specifically cites the sections it affects. The National Housing Act offers a good example of this, doubtless attributable to the exigencies of the political process. If someone who is not a specialist in housing law were to research the maximum rate of interest that a home mortgage is allowed to bear in order to be insurable by the Secretary of Housing and Urban Development, the National Housing Act, which establishes the program, will inform him unambiguously, in section 203(b)(5), that it is six percent. What the Housing Act will not tell him is that Public Law 90-301, an obscure statute originally introduced in 1968 to amend the veterans' home loan program, contains a section that proclaims,

> Notwithstanding the provisions of [section] 203(b)(5)...the Secretary...is authorized...to set the maximum interest rates...at not to exceed such per centum per annum...as he finds necessary to meet the mortgage market...

Public Law 90-301 has left no mark on the statute that it has implicitly amended.

In terms of our distinction between permanent and temporary law, Public Law 90-301 has enacted a bit of permanent law, but fixed it in the framework of an amendatory statute that was primarily intended as temporary law.

This drafting technique has unfortunate consequences:

One who reads the interest ceiling in the Housing Act is given no notice that it is modified by Public Law 90-301.

Also, the drafter has needlessly complicated the law by dividing the pieces of a single rule on interest between two statutes: the Housing Act and P.L. 90-301. To find out the true interest limitation, one must now consult two statutes rather than one. If a subsequent amendment to the Housing Act ceiling were to adopt the same technique, one would then have to consult three statutes to decipher three statutes to determine the maximum interest rates.

To avoid these difficulties when drafting a change affecting permanent law, it is best to amend that law directly.

Let us return, for a moment, to the rabbit bill at appendix N. Given all the drawbacks, why did the drafter not take the more natural course and amend the Poultry Act to include rabbits: not as poultry, but as rabbits? Alternatively, why did he not draft a "Rabbit Products Inspection Act" containing provisions parallel to those in the Poultry Act, but redrafted solely to cover rabbits?

It is all too easy to assume (as, admittedly, I did when I first read the rabbit bill) that the drafter was a rank amateur who would profit from professional help. With the years, I have come to a better appreciation of the bill. My guess—and it is just a guess—is that the drafter was in fact a skilled (or at least semi-skilled) craftsman who, on the eve of congressional adjournment, was instructed by the chairman of the pertinent Agriculture subcommittee roughly as follows:

> Listen up! I need a bill to force the Agriculture Department to inspect rabbit meat, which they don't want to do. Now, with department opposed, and the session coming to an end, we can't break any new ground. Just give them the same kind authority they already have to inspect chickens. And don't amend the Poultry Act, because I don't want that act opened up. Also, keep the bill short: there won't be much time for markup and if the subcommittee gets bogged down we'll have to put the bill over. Now take all the time you need, but give me the bill by 10:00 a.m. tomorrow morning.

If this was the instruction, the rabbit bill starts to look intelligent. First, by explicitly referring to the Poultry Act, instead of setting forth a new set of provisions to apply to rabbits, the bill reassures subcommittee members that they are not being asked to give the administering agency any new or unusual regulatory devices. Second, incorporating the Poultry Act keeps the rabbit bill very short (2 pages), minimizing debate in committee. Third, by not casting the bill as an amendment to the Poultry Act, the drafter enables the subcommittee chairman to rule out of order proposed amendments to the Poultry Act, as well as narrows the scope of germane floor amendments. And, finally, any drafter can throw together a bill of this kind in a few hours.

In short, a bill that is a legal and technical nightmare, and a reproach to the craft, turns out to be the only kind of bill that, given our imagined constraints, the subcommittee could have been induced to report. This illustrates a general point about legislative drafting. To draft federal law effectively, it is not enough for the drafter to understand professional drafting style. The really skilled drafter of federal law must also have, besides a strong stomach, a decent grip on how Congress works.

But why, I hear someone ask, did the president veto the rabbit bill? Was he concerned that its draftsmanship would be a blight on the statute books? No. Only technicians worry about things like that. The problem was that the bill would have increased the price of rabbit meat.

§2.7.3. *Amending amendments.* Avoid amending amendments. If a statute has added new language to a second statute and you wish to amend the added language, amend the language as it appears in the (now amended) second statute, not as it appears in the statute that added it. If our Domestic Violence Prevention Amendments of 1990 should become law, and in some subsequent year it is desired to alter further the definition of domestic violence, the drafter would amend the Domestic Violence Prevention Act not the Domestic Violence Prevention Amendments of 1990.

The reason is one we have already mentioned. The amendment made by the first statute is considered to be "executed" upon its effective date. In theory, an executed statute is not amenable to amendment because it is not of continuing effect. It does its job and melts away.

This does not mean that an agency will ignore an amendment to its basic statute merely because it is cast as an amendment to an amendment of that statute. One does not tempt the wrath of Congress merely to cultivate the scholasticism of statutory construction. Nevertheless, amend the underlying statute, rather than amendments to it, if for no other reason than to demonstrate your awareness of the nicer practice.

§2.8. Amending a bill

When a bill is considered in committee or on the floor, members may offer amendments.

Except in the case of an amendment in the nature of a substitute bill, a bill amendment is usually short and presents no major technical problems. Because the enacting clause of a bill, and every line that follows, is numbered, bill amendments are by page and line number, *viz.*

> Page 10, line 5, strike "two" and insert "five".
>
> Page 11, line 3, strike "the Secretary" and all that follows through page 12, line 5 before the period.

Problems of modular construction usually do not arise, because a bill amendment (again, except for an amendment in the nature of a substitute) is normally addressed to a single proposition.

One peculiarity: bill line numbers begin with the line on which the bill's enacting clause begins. The bill's long title, which comes before the enacting clause, does not display line numbers. The practice when amending a bill's long title, therefore, is to state the new title in its entirety, *viz.*

> Amend the title so as to read: "A bill to prohibit the sale of widgets, and for other purposes.".

The title is amended after all of the line number changes, *i.e.*, at the end of the bill making amendments to the bill under consideration.

CHAPTER THREE

Drafting a Free-Standing Bill

§3.1. The free-standing bill

A bill may fall into any one of three categories: it may be free-standing, or it may amend existing law, or it may be a combination of free-standing and amendatory legislation. The Domestic Violence Prevention Amendments of 1990 at appendix B is purely an amendatory bill.

A free-standing bill is one that establishes or affects an activity entirely through provisions that are not amendments to existing law. The significance of this for the drafter is that a free-standing bill presents him, generally speaking, with more difficult and extensive problems of bill structure and sectional organization than an amendatory bill. The social security number drafting exercise at appendix L is an exercise in drafting a free-standing bill.

Chapter one and your experience with the Domestic Violence Prevention Amendments should assist you in getting started. Once you have done everything necessary to clarify the specifications (*i.e.*, engaged in the colloquy transcribed in part III of the social security number exercise at appendix L) you are ready to draft.

§3.2. Keeping your bill sections conceptually distinct

As your first step, you should divide your bill into bite-size chunks and, as a second step, arrange those chunks in some digestible way. Your aim is a framework that others can readily understand, remember, and retrace, and that future drafters can conveniently amend. Attaining these objectives for a draft bill calls for the exercise of intuition schooled by experience. Nevertheless, the ideas that follow may serve you as guides.

Statutes are divided into numbered sections. This is required by one of the very few drafting rules enacted into law:

> Each section shall be numbered, and shall contain as nearly as may be, a single proposition of enactment. 1 U.S.C. 104.

You can draw a useful principle on how best to make this division from Stephen Leacock, a Canadian economist and author. Leacock concluded that he had great proficiency in languages, because after only a few days study of Latin and Greek he found that merely by glancing at a page of each he could tell which was which. The moral for those who seek proficiency in legislative drafting: as a first step, make sure it is possible for a reader to tell which of your draft bill sections deal with which subjects without his having to read each section in its entirety. Do it by devoting each of your sections to a topic that is conceptually distinct from the topic of any other section. This enables the reader to infer a section's contents from its heading, with assurance that the material for which he is searching is not also covered in other sections.

To accomplish this, you should follow a coherent theory of division in allocating material among sections. Then, either you must draft your sections to be of the same order of generality or, if the ideas of some sections are logically subordinate to those of other sections, you must reveal the logical hierarchy of those ideas in the sequence of the sections and in their captions.

Let's take an example from the Egg Products Inspection Act, 21 U.S.C. 1031 *et seq.* The drafter had to write requirements for—

(1) the continuous inspection of egg processing plants, and
(2) the sanitary operation of egg processing plants, and
(3) the condemnation of adulterated egg products.

The drafter grouped requirements for continuous inspection and condemnation ((1) and (3)) in one section and placed the requirements for sanitary operation in the following section. The conceptual distinctiveness between these sections is based on their theoretically different addressees. One section instructs the Secretary of Agriculture when to inspect and condemn; the other section instructs the plant operator to comply with sanitary regulations.

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In reality, the Secretary and the plant operator are each interested in both provisions. But separating the sections in accordance with some logical principle, in this case the putatively different audience to which each is directed, allows the drafter to ease the burden of locating and understanding the sections and to avoid overlap.

Conceptually distinct ideas do not necessarily call for separate sections. Here, for example, the instruction to inspect ((1)) and the instruction to seize for condemnation that which is inspected ((3)) are distinct ideas of the same order of generality. Why did the drafter combine these instructions in a single section, when he could have illustrated their distinction by writing them as separate sections?

Without being privy to the drafter's thinking, you might nevertheless guess that his reasoning went something like this:

If the purpose of inspection is to ensure quality by locating adulterated products, and the consequence of locating an adulterated product is its seizure for condemnation, then the interrelationship of these ideas can be underscored by including both of them in the same section.

Knowing when to separate ideas and when to combine them involves balancing intangibles in ways that no rules are likely to instruct. In the example, if joining the two concepts produced an interminable section, the drafter might have elected to separate them. Do not use different sections for different concepts, though, if the concepts are integral to each other, so that one of them, by standing alone in a section, implies the nonexistence of the other. In that case, the two concepts should either be in a single section or cross referenced.

This principle is illustrated by the treatment of exceptions to a general rule. If the exceptions are few, they can be made part of the rule, itself, *e.g.*—

> No motor vehicles, except for self-propelled wheel chairs or motor scooters, when employed to transport handicapped individuals, may enter the park.

If this is thought too cumbersome, the general rule may be stated in the first subsection of a section, and the exceptions set out in the second subsection of that section *e.g.*—

> (a) No motor vehicles may enter the park.
>
> (b) Subsection (a) does not apply to self-propelled wheel chairs or motor scooters, when employed to transport handicapped individuals.

In this case, better practice calls for a cross reference in subsection (a) (*i.e.*, "(a) Except as provided by subsection (b), no motor vehicles may enter the park.") If the exceptions are so elaborate and voluminous that they call for separate sections, a cross reference to those sections in the general rule is essential.

A common violation of the principle of keeping a rule and its exceptions together is the so-called "split amendment," discussed at §4.12, savings provisions, in chapter four. The split amendment consists of two sections, one making an apparently unconditional amendment to a statute, and the other, as the reader discovers later in the amendatory legislation, causing the first section to be effective only for cases that are subject to some previously undisclosed contingency. An extreme example of this is title XIV of the Social Security Act, Grants to States for Aid to the Permanently and Totally Disabled, which on its face appears to apply to every state, and to named territories. Nevertheless, because of a provision contained in a separate law, Public Law 92-603, title XIV in fact applies only to the named territories.

§3.3. Examples of sections that illustrate and sections that blur the relative subordination of their ideas

In any event, the ideal statutory structure is one in which each section deals comprehensively with a single topic, identified in its caption. It allows the reader to find within each section every rule that is logically subordinate to that topic. This means, of course, that every section is of the same generality—another way of saying that the subject matter of one section is not dealt with by another section.

Such an ideal statute should also contain only short sections because, other things equal, short sections are easier to read and understand than long sections. Unfortunately, the two prin-

ciples—combine like ideas for logical coherence, but separate ideas for ready intelligibility—push the drafter in opposite directions, sometimes with bizarre results. Title II of the Social Security Act has separate sections for its definitions of wages, employment, and self-employment. But there is also a section labeled "Other Definitions," which includes definitions of a wife, widow, divorced wife and divorce, child, husband, and widower (yes, in that order), plus a number of rules that do not look much like definitions at all (such as a subsection entitled, "Periods of Limitation Ending on Nonwork Days," and one labeled, "Waiver of Nine-Month Requirement for Widow, Stepchild, or Widower in Case of Accidental Death or in Case of Serviceman Dying in Line of Duty, or in Case of Remarriage to the Same Individual"). The principle of division is probably the relative length of the sections involved. Is that principle likely to help the reader locate a definition in title II?

In contrast, the Egg Act, mentioned above, groups all of its definitions in different subsections of a single section. The clustering of definitions into a single section makes the section conceptually distinct from other sections, because the definitions are not logically subordinate to the ideas that dominate the other statutory sections. Conceptual distinctiveness may also achieved, if the definitions are long and complex, by giving each definition its own section. The drafters took this approach when they prepared the bill that became the Internal Revenue Code of 1954. The 1939 Code collected allowable deductions from gross income in a single section, section 23. The user of the 1939 Code knew that there was only one section to which he needed to resort to study the rules that applied to a particular deduction. That section would, however, also include other deductions. In recognition of the growing complexity of tax law, the 1954 Code affords each deduction its own section. The user still need only resort to one section for a particular deduction, although now that section is more narrowly focused.

The clustering of definitions or deductions into a single section makes the section conceptually distinct from other sections. In the case of the Egg Act and the 1939 Code, definitions sections and deductions sections are not logically subordinate to the ideas that dominate the other statutory sections. Similarly none of the deduction sections in the 1954 Code, which devotes to each deduction an individual section, is logically subordinate to any other deduction section, because the basis for division is the difference in subject matter.

§3.4. An example of economy in drafting

A further goal in shaping sections is that of drafting economically. The Egg Act pursues it by using a single section to define almost all of its terms. Without any loss of clarity, these terms could have been defined each time they were used. By defining them only once for the entire act the drafter not only preserves our forests (an ecological objective rarely sought by legislative drafters), but avoids cluttering other sections of the bill with repetitious material.

§3.5. Putting sections of a free-standing bill in the proper sequence

The sequence of the main provisions of the Egg Act may be outlined as follows:

(1) Short title
(2) Findings and purpose
(3) Definitions
(4) Principal operative provision, which also specifies the act's scope
(5) Subordinate operative provisions
(6) Prohibited acts (and related exclusions from prohibited acts)
(7) Sanctions for commission of prohibited acts or other offenses
(8) General administrative authorities and procedural rules
(9) Jurisdiction of courts
(10) Relationship of the act to other statutes
(11) Administering agency's report to Congress
(12) Appropriations authorization
(13) Savings provisions
(14) Effective dates

The sequence of sections shown above is common in regulatory statutes, but, with minor revision, may serve as a model for free-standing bills to establish other types of programs as well. The sequence enables one to understand a statute by reading its sections consecutively, as you would read the chapters of a book. But do not conclude

from this that rules of composition that promote the clarity of draft bills are always those of an essayist. The drafter is not employed to produce a work of literature, but to express legislative policy clearly and simply.

In the past, placing all of a bill's definitions at the beginning of a bill has been thought to serve several important functions. It warns the reader early that certain terms have meanings that may differ from their dictionary definitions. Also, by immediately acquainting the reader in detail with the bill's subject matter, it makes the bill's operative provisions, read subsequently, more comprehensible. Nevertheless, there is a movement afoot, spearheaded by the Office of the Legislative Counsel of the House of Representatives, to place definitional sections at the end of new free-standing bills. The argument for the new practice is that it enables the reader to reach a bill's operative provisions—the sections that more directly govern conduct—sooner.

In any event, the bill's key operative provisions should come ahead of provisions having less scope. In short, the main material is up front. Administrative and technical provisions, or provisions of temporary effect (such as savings or grandfather provisions, repealers, and so on) come at the end. For example, the appropriations authorization (if any) for a regulatory statute, *i.e.*, in most cases a statute based on the commerce clause or the taxing power, is of limited general interest and can be tucked away somewhere. In the case of a grant-in-aid statute, *i.e.*, a statute based on the welfare clause, such as one that allocates appropriations among states or applicants, the appropriations authorization is of wide concern (unless, of course, the statute establishes a legal entitlement to a specific amount). For this reason, it is usually best placed near the beginning of the statute, preferably immediately ahead of the section that allocates the appropriations.

The format suggested adopts an order that reveals the logical connections among an act's sections and fits the reasonable expectations of the user. It is not an arrangement written in the heavens for all bills. If another sequence better serves the purposes for a specific subject, follow it.

§3.6. Subdividing a section

A bill's sections are subdivided into subsections for the same reasons and with the same logic that the bill's subject matter is divided into sections. If a section's central theme is most readily understood when analyzed into its component subsidiary themes, you should divide the section into subsections. Each subsection should develop a single idea, readily distinguishable from, and ordinarily not logically subordinate to, each of the ideas upon which the section's other subsections are founded. One or more of those subsections may be further subdivided in the same fashion.

Let us give some life to these points with a real illustration. Some years ago the food industry found itself facing a crisis. At the time, fresh meat, poultry, and many canned foods, were commonly treated with sodium or potassium nitrite or nitrate ("nitrites" for short) as a preservative. Then, in 1979, new but preliminary tests suggested that nitrites caused cancer in laboratory animals. If the finding were confirmed through accepted testing methodology, the law mandated the immediate removal of nitrites from the market. Unfortunately, nitrites were the only approved food additives known to prevent botulism. Botulism is an especially deadly form of food poisoning.

The Departments of Agriculture and Health, Education, and Welfare agreed to propose a temporary moratorium to prevent them from banning nitrites before May 1, 1980. Specifications were drawn for a bill to enact this moratorium, and to confer on the secretaries a new authority to ban nitrites on or after May 1, depending upon the results of further testing.

The critical provisions of the bill are reproduced beginning on the next page. The drafter used the chronological relationship of the moratorium to the new banning authority as his principle for dividing and sequencing these ideas. In section 3 of the bill the drafter placed the prohibition that applied to the secretaries prior to May 1; in section 4, the authority that the bill conferred on them on May 1 and thereafter.

Section 4 thus authorized action on nitrites on or after May 1, 1980; but the section had to be

written to make the form of action depend upon which of two contingencies occurred. First, there was the possibility that nitrites might be shown to be safe. In that case, neither secretary was to be permitted to ban them. Second, there was the possibility that nitrites might not be shown safe, but might be shown necessary to prevent botulism (*i.e.*, that no safe alternative to nitrites was currently available). In this second case, the secretaries were to be allowed to ban nitrites after the lapse of a specified period. (No special language was required to handle the case of a failure to show that nitrites were either safe or necessary. The section 3 moratorium would expire on April 30. Therefore, unless nitrites then met the section 4 criteria, they would be banned under existing food laws.)

At first, the drafter intended to use separate subsections, subsections (a) and (b) of section 4, to divide these alternative findings. Subsection (a) would prohibit banning nitrites if they were found to be safe; subsection (b) would prohibit banning them if they were not found safe, but were found necessary. He soon discovered, however, that such an approach would force him to repeat in subsection (b) much of the procedural material he had written for subsection (a) on the action the secretaries were authorized to take. Therefore, he divided the two subsections on a different theory. Subsection (a) would deal with the procedures that applied in common to either finding (*i.e.*, safe; or not safe but necessary). Subsection (b) would then deal with the procedures that applied uniquely to the second finding (not safe but necessary).

Under the specifications for what became subsection (b), the secretaries were to establish a period during which nitrites could continue to be marketed. The secretaries were to set this interval after considering a variety of factors, so that it would represent their best estimate of when a feasible substitute for nitrites that gave equivalent protection would be available. After that time, whether or not the substitute actually became available, the secretaries could limit or ban the use of nitrites in food.

The drafter divided these ideas for subsection (b) into three paragraphs. Paragraph (1) required the secretaries to establish the requisite period during which nitrites could continue to be marketed, paragraph (2) made illegal the use of nitrites after the expiration of that period, and paragraph (3) listed the factors that the secretaries were to consider in setting the period. The theory of the division between paragraphs (1) and (2) is easily explained on the same basis as the division between sections 3 and 4, *i.e.*, time. Paragraph (3), the list, was conceptually distinct from the preceding two paragraphs.

Here is the final result:

> Sec. 4. (a) ACTION IF NITRITES FOUND SAFE OR NECESSARY.—Except as provided by subsection (b), neither the Secretary of Agriculture (with respect to any meat food product or poultry product) nor the Secretary of Health, Education, and Welfare (with respect to any other food) may, by reason of the addition to that food of a quantity of nitrite, prohibit commerce, on or after May 1, 1980, in any food to which section 3 [the moratorium] applies, if the appropriate Secretary finds, after opportunity for hearing to be held in compliance with 5 U.S.C. 553 at any time following the enactment of this Act, that the addition of that quantity of nitrite in that food (1) is shown to be safe, or (2) if not shown to be safe, is shown to be necessary to protect against the development in that food of the *Clostridium botulinum* toxin.
>
> (b) ACTION IF NITRITES FOUND NECESSARY BUT NOT FOUND SAFE.—
>
> (1) PERIOD OF MARKETABILITY.—If, under the preceding subsection, the addition of that quantity of nitrite in a food is not shown to be safe, but is shown to be necessary within the meaning of clause (2) of that subsection, the appropriate Secretary, by regulation promulgated under the preceding subsection, shall permit the addition of nitrite to that food only for the period of time the Secretary determines to be necessary for there to become available a means not requiring the addition of nitrite, or requiring the addition of a lesser quantity of nitrite, to prevent the development in that food of the *Clostridium botulinum* toxin. Such means shall (A) be feasible and (B) afford a degree of protection against such development that is determined by the Secretary to be at least substantially equivalent to that afforded by the addition of nitrite to that food in the quantity shown to be necessary under subsection (a)(2).
>
> (2) FOOD DEEMED ADULTERATED AFTER PERIOD.—A food is deemed

adulterated within the meaning of the applicable Act cited in paragraph (1), (2), or (3) of section 2 [the Federal Food, Drug, and Cosmetic Act; the Federal Meat Inspection Act; and the Poultry Products Inspection Act] if nitrite is added to that food after the period of time prescribed with respect to that food under paragraph (1) of this subsection, except in such quantity (if any) and under such conditions of processing, storage, shipment, or other handling of that food as the Secretary may, by regulation under subsection (a), prescribe.

(3) FACTORS IN ESTABLISHING PERIOD.—For the purpose of establishing the period of time to be prescribed under paragraph (1), each Secretary shall, with respect to the food to which that period of time applies, consider—

(A) the likelihood that the *Clostridium botulinum* toxin will develop in that food if nitrite is not added, or added in a reduced quantity;

(B) the extent and magnitude of the risk to the public health should that toxin so develop;

(C) the extent and magnitude of the risk to the public health from the addition of nitrite to that food;

(D) the effectiveness and feasibility of means for preventing botulism, other than by the addition of nitrite to that food at then current levels, and

(E) such additional matters as he determines to be relevant.

This provision is not presented as a model of perfection. Different drafters might draft it differently, and better. But it does show you how a drafter attacked a real-life job of subdividing material. You will gain the most benefit from this example if, after mastering it, you close your book and try your hand at drafting section 4 for yourself. Then compare your work with the original.

§3.7. Sequence of subdivisions of a section

Often a section of a bill—sections of the Internal Revenue Code are typical of this—will contain a general rule (the major point of the section), exceptions to that rule, and then possibly special rules, transitional rules, or other provisions, such as the definitions that apply only to that section.

The best order for these provisions, generally speaking, is the order in which the preceding paragraph lists them. For example, in an extensive section dealing with widgets, subsection (a) may announce that widgets must weigh 20 pounds, subsection (b) may exempt from this rule widgets intended for use by handicapped children, subsection (c) may provide that the general rule on weight of widgets applies to each section of an A-B double widget, subsection (d) may provide that the section does not apply to widgets manufactured prior to 1989, and subsection (e) may define the term "widget".

§3.8. Technical features of bill structure

Every draft bill must have a preamble (often called the "long title") and an enacting clause. The enacting clause, although unnumbered, is considered to be in the first section of an act (because the law, 1 U.S.C. 103, requires it to be). Some bills, as you have seen, have short titles as well. If a bill has a short title immediately following the enacting clause, the short title is preceded by the word "That" and concludes the bill's first section, *e.g.*—

> *Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Low-Income Home Energy Assistance Act of 1981".

The next section, unless it is within a larger numbered subdivision of the act (*e.g.*, title I), often appears as "Sec. 2". Perhaps, to avoid confusion among the uninitiated, it might be better to number this section as section 1. If the bill begins, after the enacting clause, with a numbered section 1, the section designator is written, "Section 1", not "Sec. 1". Subsequent sections appear as "Sec. [number]".

If a bill has titles—traditionally the largest of a bill's subdivisions—all sections under title I (except if the title is to be enacted as part of the United States Code) should be in the 100 series, those under title II should be in the 200 series, and so forth. If a title is divided into subtitles or other parts (designated "I", "II", or "A", "B", and so forth), each part should begin at the beginning of a 10 series, *e.g.*, part A begins at 100, part B at 120, part C at 140. This leaves room to add sections to a part, after the bill becomes law,

without complicated renumbering of the entire title or confusing *ad hoc* designation (such as, sec. 115A or 115-2). It also makes it convenient to add new sections to successive drafts of the bill.

A bill is divided into numbered sections. "Each section shall be numbered, and shall contain, as nearly as may be, a single proposition of enactment." 1 U.S.C. 104. Section numbers are not repeated. That is, section numbers do not start over when the bill begins a new major subdivision. (If title I begins with section 101, as is a common practice, title II will begin with section 201. It is therefore unnecessary (and even incorrect), in citing these sections, to refer to "section 101 of title I". The correct reference is to "section 101 of the [name of act]".

The major subdivisions of a section are subsections. They appear as small letters in parentheses ("(a)", etc.). Because subsections set forth a complete thought—a full sentence at a minimum---paragraph designators replace subsection designators if the principal subdivisions of a section are merely parts of a tabulated sentence—*i.e.,* a sentence whose parts are set out as indented clauses or phrases—even though the subdivision is the first division after the section number. Typically, this occurs in definition sections.

Subsections are divided into numbered paragraphs ("(1)", "(2)", etc.) which are tabulated, but which, grammatically, need not be paragraphs or even sentences.

Paragraphs are divided into tabulated lettered subparagraphs ("(A)", "(B)", etc.) that, like paragraphs, may be clauses of a sentence or even phrases.

Subparagraphs are divided into clauses bearing small roman numerals ("(i)", "(ii)", "(iii)", "(iv)") that are, in turn, divided into clauses (or, if you prefer, "subclauses") bearing large roman numerals ("(I)", "(II)", etc.). Clauses follow the same tabulation and grammatical rules as paragraphs and subparagraphs.

Sometimes the clarity of a phrase can be improved by alphanumeric designation without the need for tabulation. Where a subdivision does not appear in tabular form, as in the subdivisions of sections 4(a) and 4(b)(1) of the nitrite bill on page 25, the enumerated matter is referred to merely as a "clause" regardless of its alphanumeric designation.

To reiterate, the name of a subdivision does not necessarily correspond with the rhetorical unit that bears that name in formal composition. A "paragraph" in legislation may be no more, grammatically speaking, than a clause (as are the paragraphs of section 2 of the nitrite bill). Nevertheless, it is more common to cross refer to "paragraph (1)", say, rather than "clause (1)", because this facilitates distinguishing among subdivisions. The exception to this rule is the cross reference to an untabulated (*i.e.,* unindented) designation, such as appears in sections 4(a) and 4(b)(1) of the nitrite bill. Here, you would speak of "clause (1)" or "clause (A)".

A warning: do not change subdivisions in midstream. For example, section 202(e)(1) of the Social Security Act reads, in pertinent part:

> (e)(1) The...surviving divorced wife...if such ...surviving divorced wife—
>
> (F) ...satisfies subparagraph (B) by reason of clause (ii) thereof—
>
> (i) the first month after her waiting period..., or
>
> (ii) the first month during all of which she is under a disability...
>
> and ending with the month preceding the first month in which any of the following occurs: she remarries, dies, becomes entitled... For purposes of the preceding sentence...the termination month shall be the earlier of (I) the third month following the earliest month..., or (II) the third month following the earliest month in which...

Neither clause (I) nor (II) is a subclause of clause (ii). Subsection (e)(1) should have been divided into two paragraphs, (A) and (B). The material beginning with the words "and ending" should then have been put in paragraph (B).

We have assumed, in this discussion, a bill the major divisions of which are titles, with one or more titles divided into "parts" and, perhaps, some parts divided into "subparts". This is probably the most complex bill you are likely to have to deal with, even if you are a professional drafter. You may wish to know, however, that more complex

bill structures exist. See, for example, the Internal Revenue Code of 1954. Because the Code is an enacted title of the United States Code, it is not itself divided into titles. Instead, it is divided into subtitles. Each subtitle is divided into chapters. Each chapter may be subdivided into parts. Parts may be divided into subparts.

§3.9. The Social Security Account Number Act: an exercise

Turn now to appendix L and read parts I and II. In all probability, your first reaction will be, "I haven't the least idea how to draft this bill!" This is a common reaction among drafters who are asked to draft from specifications developed without their involvement on subjects with which they are unfamiliar. Have no fear. You can do it by approaching the assignment systematically, and by not trying to do everything at once.

First, absorb the milieu. Over the next week or so reread part I six or seven times. Outline for yourself the five principles advanced by the report of the Secretary's Advisory Committee on Automated Personal Data Systems. Write down the points of the original legislative recommendation. Then draw up a list of the exemptions for a restructured proposal.

After you feel comfortable with the background, concentrate on getting in mind the specifications in part II. When you have done this, focus on the first specification:

> Make it unlawful for any federal, state, or local government agency, or any private person, to deny to any individual, because of his refusal to disclose his social security number, any benefit to which the individual would otherwise be entitled.

In time, questions will occur to you. For example, how do you handle the case of a company that denies a benefit to an individual because the individual refuses to agree to allow his employer to disclose his social security number to the company? The specification does not say. You will need to obtain guidance from the policy maker.

Study each of the specifications in turn, writing your questions down as you go along. You can even try writing a little draft language on a specification or two, just to stimulate your thinking. When you have completed this process, read the colloquy in part III of appendix L. If you have questions not answered by the colloquy, you will have to answer them for yourself. Remember, you will inform the policy maker of this when you circulate your first draft.

You are now ready to draw up an outline of the bill. Compare your outline with the outline in part IV. There are many ways to draft this bill; do not assume that because your outline differs from the outline in part IV you have missed some critical point. Nevertheless, the outline in part IV is viable; therefore spend time with it until you feel you fully understand it. For example, you should be aware that section 1(a) is primarily addressed to private, not governmental, use of the social security number. That is because section 2 exempts governmental action from section 1. One consequence of this structure is that the disclaimer referred to in section 1(a)(3) will be required only of non-governmental solicitations. Government solicitations must be accompanied by the notice described in section 4.

Now draft section 1 through subsection (a)(1). To enable you to compare your draft language with comparable language in the bill in part V and the representative student paper in part VI of appendix L, use the outline in part IV for drafting purposes. Compare your draft with the comparable language in parts V and VI. Read the annotations. Then draft subsection (a)(2). Again read the comparable language in parts V and VI and the annotations. When you have completed work on section 1(a), try drafting other parts of the bill, using part V to check your work. Do not try to do all of this at once; work an hour or so at a time on different days. If your patience allows, when you have finished all of this try doing it over again.

CHAPTER FOUR

Common Bill Provisions

§4.1. Short titles

Many bills, particularly those more than a few pages long, are given what are known as "short titles", not to be confused with the bill subdivision known as a "title". If a bill contains more than one title (the subdivision, that is), particularly if the titles are directed to different purposes, those titles themselves may also be designated by short titles. For example, Public Law 93-344, an act of ten titles, bears as its short title, the "Congressional Budget and Impoundment Control Act of 1974". Nevertheless, titles I through IX of that act have their own short title, the "Congressional Budget Act of 1974". If you need to refer only to title X of the Congressional Budget and Impoundment Control Act of 1974, you could cite the short title for title X: the "Impoundment Control Act of 1974".

Unlike a bill's "long title"—the preamble immediately preceding a bill's enacting clause—a short title follows the enacting clause. In the case of a short title to apply to an entire bill, a common way of drafting the short title is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Example of Short Title Act of 1989".

Alternatively, the short title could be placed in the first numbered section after the enacting clause. A short title for a title could also be placed in that section, *viz.*

> SECTION 1. (a) SHORT TITLES.—This Act may be cited as the "Congressional Budget and Impoundment Control Act of 1974". Titles I through IX may be cited as the "Congressional Budget Act of 1974", and title X may be cited as the "Impoundment Control Act of 1974".

An alternate practice is to use the first or last section of a title to designate the short title that applies to it.

The drafter assigns a short title to a bill for the convenience of those who must cite the bill after its enactment, and those who must read those citations. It is more informative to refer, for example, to the Medicare Catastrophic Coverage Act of 1988 rather than to Public Law 100-360, or to the Act of July 1, 1988, 102 Stat. 683.

If you use a short title for a bill or title of a bill, avoid two pitfalls:

(1) Contrary to common practice, do not use the year of expected enactment in the short title of a free-standing bill. Trying to remember, and having to restate, that year will be a nuisance to everyone who has to cite the law. The "Higher Education Act of 1965", for example, should have been called the "Higher Education Act", just as the Social Security Act is cited as the Social Security Act. The year of a law is appropriate, though, to distinguish among a series of amendatory laws, *e.g.*, the "Social Security Amendments of 1977", in order to avoid confusion with the Social Security Amendments of 1972.

(2) Do not lose sight of the objective of a short title, which is to make it easy to refer to the bill. Does the short title, "The Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963" (enacted as P.L. 88-164, 77 Stat. 382) accomplish this objective?

§4.2. Findings and statement of purpose

Many of the more ambitious public laws contain, after the short title, a variety of congressional findings of fact and statements of congressional purpose in enacting them. These may be useful, in a bill founded on the commerce clause of the United States Constitution, to bolster the validity of provisions to regulate intrastate commerce. (That is to say, if Congress "finds" that an activity previously thought to be *intrastate* commerce places a burden on *interstate* commerce, and is therefore subject to regulation under the commerce clause, the courts will give that finding great weight.)

Beyond this—in bills based on the welfare clause, for example, such as amendments to title II of the Social Security Act—findings and statements of purpose contained in the bill will be far too general to enlighten the courts, when the bill is enacted, on the meaning of particular statutory

provisions. They are therefore without legal significance. If policy makers or congressional relations officials insist upon them, you may allow their staffs to write them, subject to your editorial review.

§4.3. Definitions

Happily, all of the words you will need to draft a bill are defined in the dictionary. Defining terms in a bill should be limited to cases in which dictionary definitions are too vague, too inclusive, or too narrow for purposes of the bill, or are ambiguous in the context; or if you wish to stipulate a meaning for a term that is different from its dictionary definition, or assign to it some meaning not conveyed by common understanding of the words comprising it.

§4.3.1. *Pre-existing statutory definitions and rules of construction.* There are several statutes that define selected terms for any law of the United States in which the terms appear (unless, of course, that law chooses to redefine the term for its special purposes). The drafter should be aware of at least the more important of these statutes. We will review them in chapter five, which covers style and usage.

§4.3.2. *Partial definitions.* Generally, it is better to assume the dictionary definition of a word, if feasible, and clarify the term's penumbra. For example, if you want to include osteopathic practitioners as participants in a program on the same basis as physicians, you do not have to write a comprehensive definition of "physician". You need merely provide, "The term 'physician' includes an osteopathic practitioner as determined under the law of the State in which he is practicing." A variation of this technique, in the form of a comprehensive definition, is, "The term 'physician' means an individual who is licensed as a physician or osteopathic practitioner under the law of the State in which he is practicing." Unlike formal writing, legislative drafting allows a word to be defined in terms of itself.

§4.3.3. *Pickwickian definitions.* Avoid assigning to a term a meaning that strays very far from common usage. There are several reasons for this. The drag of a word's normal meaning is very strong; if you give to a word a highly idiosyncratic meaning, you run the risk—at least in a long bill—of forgetting this meaning and employing the word in its customary sense, with resulting confusion. Moreover, it is difficult for a reader to keep odd definitions in mind; their use reduces a bill's intelligibility. For example, many years ago, in a bill introduced in Congress to revise the conflict-of-interest criminal provisions of title 18 of the United States Code, the term "bribery" was defined to include *all* amounts received by a federal employee as compensation for *any* service. The bill then proceeded to exempt from its *penalty* provisions those amounts received as salary from federal employment. Apart from the difficulty of keeping this weird definition in mind, one can imagine the feelings of federal employees, if the bill had been enacted, upon learning that a criminal statute designated their paychecks as bribes. (And, as we mentioned in a previous chapter in another connection, rabbits are not poultry.)

Drafting economy will dictate minor departures from the principle of defining words within the ambit of their common usage. For example, a widely accepted drafting convention is to define the term "State" to include the District of Columbia and some or all of the territories. This avoids the need to repeat constantly throughout the bill the litany, "State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands". The convenience of this practice overcomes the reservations of the purist.

§4.3.4. *Sometimes what looks like a problem of definition, isn't.* In 1979, the Department of Health, Education, and Welfare proposed a Mental Health Systems bill that contained an example of how to obtain the type of advantage illustrated by the definition of "State", without at the same time distorting the word that is defined. The drafter was aware that the Federal Grant and Cooperative Agreement Act of 1977 prescribed, among other things, the use of a "cooperative agreement" to establish a legal relationship that the act defined very similarly to the way it defined the relationship of grantor to grantee (for which it prescribed the use of a grant agreement). He

wanted to avoid the necessity of repeating "or enter into a cooperative agreement" every time he authorized the Secretary of Health, Education and Welfare to award "a grant". At the same time, he was reluctant to define "grant" to include a cooperative agreement, because the FGCA Act apparently contemplated that the cooperative agreement would give rise to a different relationship between the parties than did a grant agreement.

His solution was to include a substantive provision in the bill to authorize the secretary to enter into a cooperative agreement in any case in which the bill authorized a grant, provided that the conditions imposed under the cooperative agreement were the same as those that the secretary would impose as a condition for receipt of a grant. Also, the entity entering into the agreement with the secretary would be subject to all conditions of the bill to which a grantee would be subject. This treatment reveals that what appeared to be a definitional problem was a more subtle problem better handled by a substantive provision.

§4.3.5. *Definitions that impose substantive requirements.* It is a bad idea to put operational provisions—the bill's substantive rules—into a section labeled "Definitions". Doing so may mislead one who reads only the bill's substantive sections, which have thereby been rendered deceptively simple. The reader may believe that he has grasped the bill's essential rules, when unknown to him a body of them is elsewhere.

Despite this, it is a rare professional legislative drafter who has not sinned this way, less from ignorance than from the need for haste. Putting substantive rules in definitions is a "quick and dirty" technique of whipping up a fast amendment to a complicated statute. Usually, when this is done, the substantive rules are given the formal appearance of definitions. The Federal Food, Drug, and Cosmetic Act has some choice examples. The act regulates, among other things, all new animal drugs. Nevertheless, the secretary is authorized to exempt from regulation a drug that he finds is generally recognized as safe and effective, and with respect to which batch certification is unnecessary to assure its identity, strength, quality, and purity. This authority is found in the act's definition of the term "new animal drug", where it appears in the form of an exclusion from that term of any drug that has been the subject of that finding.

Another example is the act's informal hearing requirements. The act's intention appears to be that of substituting its own hearing requirements for requirements that might otherwise be imposed by the Administrative Procedure Act as the prelude to issuing certain orders. The proper way to accomplish this is to write a section or sectional subdivision labeled "Informal Hearings" and, in each place in the act that is to provide for an informal hearing, to add language such as,

> ...the petitioner shall have an opportunity for an informal hearing on the order under [cite the Informal Hearings section or sectional subdivision designation].

Instead, at each such place the drafter merely provided, "...the petitioner shall have an opportunity for an informal hearing on the order." Then, in the act's definitional section, he added a definition of "informal hearing" as one that "provides for the following". Six numbered paragraphs follow. Typical of them is paragraph (6):

> The Secretary may require the hearing to be transcribed. A party to the hearing shall have the right to have the hearing transcribed at his expense. Any transcription of a hearing shall be included in the presiding officer's report of the hearing.

6. *Definitions in odd locations.* If a definition is to be used in only one section of a lengthy act, you may put it in that section, rather than with the act's general definitions. In that way, it will be conveniently located: that is, in the only place it is used.

Conversely, avoid putting in a non-definitional section a definition of a term used throughout the act. Otherwise, the reader will constantly be searching for the definition. Worse yet, he may not know that the term he is reading is defined. A well-worn exception to this last rule is in drafting the act that has no general definitions section, if you wish to save the reader the burden of repeatedly ploughing through an extensive organizational name or title, such as, "the Secretary of Health and Human Services". Accepted practice permits you, the first time you refer to the name, to do so (if it is the Secretary, for example) as

follows: "the Secretary of Health and Human Services (hereinafter in this Act referred to as the 'Secretary')". This exception is justified by three considerations:

> The term "Secretary" (or "Commission" or "Administration", etc.) is on its face a term that must surely be defined somewhere, so that the use of such shorthand does not mislead the reader.
>
> Most readers will be aware, anyway, what official or agency of government is administering the statute.
>
> And, finally, the definition will be easy to find because it must necessarily be located in one of the earlier sections.

§4.4. Provisions to authorize appropriations

It is usual—the Old-Age, Survivors, and Disability Insurance Program and other true entitlement programs excepted—for federal grant-in-aid statutes to contain a section that might read like this:

> To carry out this [program] there are authorized to be appropriated $100,000,000 for fiscal year 1988, and such sums as may be necessary for each of the next succeeding two fiscal years.

This is a provision to authorize appropriations. Someone new to government might find it curious, given that Congress also appropriates money by statute to carry out these grant programs, that Congress need pass a law in order to empower itself to pass a law.

The key to this enigma is the rule against appropriating amounts to fund activities not authorized by law enacted prior to enactment of the appropriation. Rule XXI, cl. 2, of the House of Representatives provides, in pertinent part:

> No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works and objects as are already in progress.

Freely translated, this means that in most cases legislation to authorize the executive branch to carry out an activity must be on the books before the House will consider an appropriation to carry out that activity. The Senate follows a similar rule.

Provisions to authorize appropriations are not usually found in older statutes, particularly regulatory statutes such as the Federal Food, Drug, and Cosmetic Act. That is because the original purpose of inserting them—they grew up in connection with grant-in-aid statutes—was not to authorize the appropriation of some amount. It was to limit the amount that might be appropriated in their absence. They were intended to allow the authorizing committees of Congress to set an upper limit on sums approved by congressional appropriations' committees. These sections are usually captioned, "Authorization of Appropriations". A more accurate title for them would be, "Limitations of Appropriations Authorized", inasmuch as, in their absence, appropriations would be implicitly authorized indefinitely without limit. Once such a provision is included in a statute, however—the authorization being for a fixed period and a definite amount—the provision means that, unless it is extended, no further appropriations are authorized for that statute after the period has expired.

In response to these provisions, appropriations acts usually enact what is known in appropriations parlance as "budget authority." Budget authority (*e.g.*, "To carry out the Domestic Violence Prevention Act, $20,000,000.") confers on a government agency the right to obligate the United States to pay money. In most cases, budget authority is in the form of an appropriation (as in the previous parenthetical illustration). Beyond allowing an agency to obligate the United States to pay money, an appropriation authorizes the Treasury of the United States to "liquidate" the obligation—in other words, to cut a check to pay the bills.

A typical example of budget authority is an appropriation of a definite amount, which is to be available only for the fiscal year of the appropriations act. Occasionally, though, you may be called upon to draft an appropriations authorization that calls for extended availability of appropriations. The specifications may call for an appropriations authorization to provide that funds

are to be available "without fiscal year limitation"—so-called "no-year money." Typically, appropriations bills override such language, and contain language to ensure that, whatever the appropriations authorization may announce, appropriations are available for only one year.

The Domestic Violence Prevention Act at appendix B contains a formula grant program, in which the ceiling on how much federal money a state may receive for a fiscal year is governed by a formula that allots to the state a share in the amount appropriated. There is another type of formula grant program: the appropriated entitlement. Like the DVP formula grant program, an appropriated entitlement, such as Medicaid, is administered by the states with federal financial assistance. It is distinguished from other programs involving federal financial participation by one characteristic: the state is legally entitled to reimbursement for some portion of its costs. In other words, the size of the appropriation does not govern the size of the program. If Congress appropriates less than the amount to which the states become legally entitled, it is obliged to appropriate additional funds. For the drafter, the significance of all this is that an appropriations authorization for such a program typically authorizes appropriation of an indefinite amount. For example, the provision to authorize appropriations for the program of Aid to Families with Dependent Children reads, in pertinent part, as follows:

> ...there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this [program].

Although an explanation of the concepts underlying the Budget of the United States is beyond the scope of this book, a drafter may find it useful to ground himself in them if he is to translate his clients' decisions on such esoterica as "advance appropriations," "advance funding," "forward funding," "full funding," and so on. Among the good (but dense) sources of information are part 6b of the current Budget, part III of the Budget Appendix, the current edition of *A Glossary of Terms Used in the Federal Budget Process*, published by the General Accounting Office, and *Manual on the Federal Budget Process*, published by the Congressional Research Service.

§4.5. State plan provisions

State plan provisions give federal statutes a bad name. The state plan requirement for the program of Aid to Families with Dependent Children, title IV-A of the Social Security Act, consists of a single sentence that is about 8,000 words long and covers 18 single-spaced printed pages in the current Social Security Administration compilation. It contains 39 numbered paragraphs, which themselves hold 90 additional alphanumeric subdivisions.

You will find a less mind-boggling sample of the genre in section 6(a) of our Domestic Violence Prevention Act at appendix B. Read section 6(a)(1). The typical state plan program requires each participating state to designate a single state official or agency to administer it. Whatever benefit this may be to the state, the provision at least simplifies administration at the federal level. The federal administrator does not have to deal with a multiplicity of state agencies, each claiming that some other state agency is responsible for any perceived problems.

Another typical provision is at section 6(a)(6). Styled a "maintenance-of-effort" provision, the section is intended to prevent a state from substituting federal money for state money. When cast as a requirement that the state "supplement and not supplant" state money, the provision is difficult—some would say impossible—to administer. The reason: who knows what the state *would have spent* in the absence of federal financial participation? A more muscular version of this provision would require a state expenditure of no less than the amount expended by the state in the fiscal year prior to the year for which the state seeks federal funds.

Section 6(a)(10) of the DVP Act is often included in state plans. It requires the plan to provide that the Comptroller General of the United States or his duly authorized representatives shall have access for the purpose of audit and examination to the records that the federal agency requires the state to keep under the plan.

If the program is one that supports construction, it was customary in the past to include a state plan

provision requiring the state to give reasonable assurance to the federal agency that all laborers and mechanics employed by contractors or subcontractors in the performance of work on a project will be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Act of March 3, 1931 (40 U.S.C. 276a—276a-5, known as the Davis-Bacon Act). If a Davis-Bacon assurance is to be used for a new program, or added to an old one, a state plan provision should also contain language that gives the Secretary of Labor, with respect to those labor standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 5 U.S.C. Appendix) and section 2 of the Act of June 13, 1934 (40 U.S.C. 276c). Reorganization Plan 14 vests in the Secretary of Labor responsibility for prescribing appropriate standards, regulations, and procedures that federal agencies must observe on federal construction. The Act of 1934 gives the Secretary of Labor similar responsibility over contractors and subcontractors employed to construct federal buildings or federally financed public works. See for example, section 1621(b)(1)(I) of the Public Health Service Act (42 U.S.C. 300s-1(b)(1)(I)).

You should be aware that subjecting construction to the Davis-Bacon Act automatically subjects it, also, to the Contract Work Hours Standards Act, by virtue of section 103(a)(3) (40 U.S.C. 329(a)(3)) of the CWHS Act.

§4.6. Provisions authorizing applications for assistance

§4.6.1. *State plan programs.* As mentioned in the discussion of appropriations authorizations, above, in some state plan programs, such as AFDC, the statute merely directs the agency to use appropriated funds to reimburse state program expenses, in a ratio determined by the statute's formula. If a state has an approved state plan on file with the agency, it will usually receive quarterly advances, adjusted to reconcile actual expenses for the second quarter preceding the quarter for which the advance is made.

This structure makes sense for a program in which all individuals in the state who meet established standards of eligibility will receive certain benefits. To the extent that these standards and benefits are in the discretion of the state, the state must be required to set them forth in its plan. Once it does so, the standards and benefits are established until the state formally amends its plan.

If, however, the program's scope is more limited and a state is expected to use the federal funds for services that will not be made available throughout the state, the state plan will not adequately reveal how the state intends to use its federal funds for a particular grant year. Such a program will often be drafted to require the state to file an annual application for grant funds that is in conformity with, but in addition to, its previously approved state plan. This application will have to set out such things as the budget covering the year for which the grant is sought, the objectives of each of project, whether or not the state will charge fees for a project's services, and other information on how the state intends to conduct the program for the grant year.

The application's purpose could also be served by an after-the-fact reporting requirement, particularly if the program is one in which the agency has no discretion but to pay to a state that has submitted an approved plan its share of the program's appropriations. In other words, if the agency lacks discretion to determine how much to pay to a state on the basis of what the state's application shows that it proposes to do with the payment, there is no reason to have an annual application; amounts could as well be obligated merely under the plan, itself.

§4.6.2. *Other assistance programs.* In federally assisted programs not involving a state plan, the provisions for application to the agency for assistance cover roughly the same ground as state plan provisions. The agency will approve the application only if it contains assurances of the same general kind as those required of the state under a state plan program. Because non-construction project grant programs that assist public and nonprofit private groups are the small change of the grant field, the statutory provisions governing project applications can appropriately be kept simpler than state plan requirements, and a great

deal may be left to the agency's regulations. To do this, you will want those provisions to confer on the agency an explicit authority to specify the form and contents of project applications. See section 8 of the DVP Act.

§4.7. Civil and criminal penalties and other sanctions

§4.7.1. *Noncompliance with program conditions.* Section 6(c) of the Domestic Violence Prevention Act illustrates a typical sanction for state noncompliance with a program condition in a formula grant statute: termination of the program after opportunity is given to the state for what is known as a "conformity" hearing. Some formula grant statutes, for example the Medicaid law (see section 1903(g) of the Social Security Act, 42 U.S.C. 1396b(g)), impose for specified nonconformity penalties substantially less than termination of all assistance. In the absence of provisions to the contrary, however, the federal government may not recover money expended by the state for proper program purposes, even if the state expenditure is contrary to procedural requirements.

No special provision is needed to recover amounts expended by the state for purposes that the administering agency determines are outside the scope of the program. The amounts are simply ineligible for federal financial participation. Nevertheless, if the state has tapped its advance of federal program funds in order to make expenditures to which the federal auditors take exception, the administering agency cannot offset the amount of the "audit exception" against future federal payments to the state unless the statute contains a provision allowing it to do so.

Finally, under the federal common law of grant administration, the court will entertain a suit by the administering agency to compel a state to comply with its assurances and other plan conditions under the program for so long as the state remains in the program.

When drafting formula grant programs such as the Domestic Violence Prevention Act, the drafter should offer penalty alternatives to the policy officials, along with some guidance as to their implications.

§4.7.2. *Civil and criminal penalties.* Specifications are usually written by people not especially conversant with criminal law. You may, as a result, find specifications obscure when they attempt to describe conduct that is to be declared unlawful or the associated penalties.

When delineating conduct to be declared unlawful, a central concern is the malefactor's state of mind: is it to be an element of the offense and, if so, how is it to be characterized? Although you may occasionally see variations, there are three main choices:

(1) An offense may be established without criminal intent. This is the strict or absolute criminal liability imposed by the Federal Food, Drug, and Cosmetic Act. The prosecutor need only prove that an employee of a drug company, for example, committed the proscribed acts on the company's behalf, in order for the prosecutor to make a *prima facie* case against the controlling corporate officials (*i.e.*, a case which, if unanswered, is sufficient to prove guilt). It is no defense that the officials did not condone—and in fact were ignorant of—the employee's conduct. The typical way to draft a strict liability provision is illustrated by section 368 of the Public Health Service Act, 42 U.S.C. 271, which reads, "Any person who violates any [quarantine] regulation... shall be punished...".

(2) An offense may require a "generalized" criminal intent. This merely means that the prosecutor must show that the individual intended to commit the acts that he in fact committed; or, put differently, that the defendant personally committed or aided or counseled in the commission of the prohibited acts. A statute usually signals this kind of intent by characterizing the prohibited conduct as action that is performed "willfully" or "knowingly".

(3) Finally, there are offenses that call for a specific criminal intent. An example is section 1107 of the Social Security Act, 42 U.S.C. 1307, which reads, in pertinent part, "Whoever, with the intent to defraud any person, shall make or cause to be made any false representation..." The prosecutor must prove beyond a reasonable doubt both

that the defendant made a false representation, and that he did so for a fraudulent purpose.

Sometimes specifications call for imposition of a penalty on certain conduct only if an individual engages in it with knowledge that a law or regulation prohibits it. As a practical matter, unless a prosecutor can show, in such case, that the defendant, prior to the alleged infraction, had been warned about the unlawfulness of his conduct, the prosecutor cannot meet the required burden of proof. The drafter must call this problem to the attention of the policy officials.

Penalties are of two types: criminal and civil. To establish a civil penalty, a statute should specifically announce that a civil penalty is intended. The penalty takes the form of a fine imposed on conduct that the prosecutor need prove only by a preponderance of the evidence.

§4.8. Administrative and judicial review provisions

A drafter of federal legislation needs to be grounded in the Administrative Procedure Act, now spread over several chapters of title 5 of the United States Code. The discussion that follows is not intended as a primer in the subject, but as a warning of several aspects of the act that can cause trouble if you ignore them.

§4.8.1. *Rulemaking.* Although the APA's rulemaking section, 5 U.S.C. 553, exempts matters relating to loans, grants, and benefits, some agencies, such as the Department of Health and Human Services, have waived this exemption. See 36 Fed. Reg. 2532 (Feb 5, 1971). In consequence, a drafter's silence on the subject will cause rulemaking under his bill, when enacted, to be subject to the APA's informal rulemaking procedures (unless his bill is an amendment to a statute that provides its own rulemaking procedures). This means, at a minimum, that the agency will have to give the public an opportunity to present written views before a rule is adopted. This may require agency publication of a notice of intent to propose regulations, followed by the receipt of public comment and, often, public hearings, followed by the publication of one or more notices of proposed rulemaking and opportunities for public comment, followed by publication of a final regulation. See 41 Fed. Reg. 34811-34812 (Aug. 17, 1976).

Judicial review of informal rulemaking will be available in the appropriate United States district court by virtue of 5 U.S.C. 704. Section 706 of title 5 of the Code fixes the scope of that review. The court is to set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

If the drafter is asked to offer interested persons an opportunity for hearing as part of the administrative rulemaking process, he can do so without narrowing either the range of information that the agency may consider in formulating its rules, or the scope of judicial review. If he should provide that a given rule is "...to be made *on the record* after opportunity for an agency hearing" (5 U.S.C. 553(c), emphasis added), however, he will have subjected the rule to the APA's formal rulemaking procedures. This involves a trial-type hearing under 5 U.S.C. 557, in which the decision is confined to the evidence presented. Judicial review of the decision, under 5 U.S.C. 706, will cause it to be set aside unless it is supported by "substantial evidence" on the record taken as a whole.

§4.8.2. *Adjudication.* Unless a statute provides otherwise, or provides for a *de novo* judicial hearing (*i.e.,* one in which the court retries the case rather than merely reviews the agency record), adjudication under the APA is a formal process, subject to the "substantial evidence" test on judicial review. See 5 U.S.C. 554 and 706. The APA does not extend hearing rights to the beneficiaries of a state grant program. Any such rights must come from the particular federal assistance statute or from state law. In determining what, in this regard, an agency should require of a state (or require of itself under a new grant program), policy officials find themselves pitting, on the one hand, their desire to allow the state, or their agency, the flexibility to design an adjudication procedure by regulations that may be perfected on the basis of program experience, against a need, on the other hand, to reassure beneficiaries of their rights by extending to them specific statutory protection. If the drafter is a lawyer, his legal knowledge should inform the debate.

§4.8.3. *Authority to issue rules.* A number of statutes contain provisions similar to section 701 of the Federal Food, Drug, and Cosmetic Act. "The authority to promulgate regulations for the efficient enforcement of this Act, except as otherwise provided in this section, is hereby vested in the Secretary." When is such a provision necessary?

If your concern is merely that the agency head be empowered to govern the performance of agency employees in implementing the new statute, 5 U.S.C. 301 already authorizes him to issue the needed regulations. If you wish to confer on the agency head the authority to interpret the new statute, this authority is inherent in the statute's mandate that he administer it.

But what if you want to vest in the agency head substantive rulemaking authority? For example, assume that you wish him to have power to issue a regulation imposing fines: a regulation, in other words, that does not merely interpret a statute but has the effect of law? For this, you need an explicit statutory provision. But the type of general provision quoted is probably too obscure for the purpose. Far better would be a clear grant of authority in the provision establishing exemptions, *e.g.,* "The Secretary may prescribe fines...".

§4.9. Repealers

A common drafting problem is the proper disposition of programs that a new bill is intended to supersede. For example, in 1974 the Hill-Burton hospital construction program, title VI of the Public Health Service Act, expired or, more accurately, the provision authorizing Congress to pass further appropriations for the title expired. A successor program called "Health Resources Development," in the form of a new title XVI of the PHS Act, was then making its way through Congress. It was left to the drafter to decide whether the bill to enact title XVI should repeal title VI or leave it standing.

The first question the drafter had to answer was the effect of a repeal on continuing legal obligations incurred under title VI. Section 609 of the act, for example, provided (to oversimplify somewhat) that if, within 20 years of its construction, an assisted facility ceased to be used as a nonprofit hospital the government could get its money back. Would repeal of title VI extinguish this right? The answer to this question is found at 1 U.S.C. 109:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

In this case the drafter wished to preserve existing obligations, and now saw that a simple repeal of title VI would not disturb them.

The drafter knew, nevertheless, that title VI had been much amended over a number of years, so that one could not readily tell what was in the title merely by consulting the Statutes at Large. If the title were repealed, it would become difficult, in future years, for anyone to figure out what obligations subsisted under it. By leaving the title intact, however, the drafter could ensure that the United States Code and other compilations of the Public Health Service Act would always display the title in its most recent pre-expiration form. Accordingly, the drafter chose not to repeal it.

What happens, to consider another problem, when you repeal an act that itself repealed a predecessor act? Have you revived the earlier act? The answer (as you probably guessed) is no; a repealer is thought of as being "executed" upon enactment. Therefore its work is not undone when it is itself wiped from the books. This rule appears at 1 U.S.C. 108. "Whenever an Act is repealed, which repealed a former Act, such former Act shall not thereby be revived, unless it shall be expressly so provided."

§4.10. Severability clauses

A typical severability (or "separability") clause reads something like this:

> If any provision of this Act, or the application of that provision to any person or circumstance, is held invalid, the remainder of this Act, or the application of that provision to persons or circumstances other than those as to which it is held invalid, is not affected thereby.

It is debatable whether such a provision can affect the outcome of a judicial determination, or whether one should want it to. If a court finds some part of a statute unconstitutional, it may be expected to leave the remainder of the statute untouched, even without the clause, unless its decision has left the statute in tatters. If so, one would expect the court to strike down the entire statute, notwithstanding a severability clause. If a court finds the application of a provision unconstitutional, it may ordinarily be expected to narrow the provision to valid applications without the clauses's help.

Most specifications will not call for the addition of the clause; the drafter is well advised not to volunteer one.

A more useful approach to the threat of constitutional invalidity was taken in the enactment of the Balanced Budget and Emergency Deficit Control Act of 1985 (the Gramm-Rudman-Hollings legislation). Because of congressional uncertainty as to whether the Comptroller General of the United States was constitutionally permitted to perform a function that the new law would assign to him, Congress inserted into that law a provision that prescribed an alternate deficit control procedure that was to come into effect only if the court struck down the provision that prescribed the Comptroller General's. In fact the court did strike down the questioned provision, and the alternate procedure then went into effect.

§4.11. Effective date provisions

A bill is effective when enacted, *i.e.*, upon the day it is approved by the president; or, if the president does not act, upon the close of the tenth day (excluding Sunday but including any holiday) after the day it is "presented" to him; or, if the president vetoes the bill, on the day the veto is overridden.

An "effective date" provision should be used only to contravene the general rule. For example, a statute conferring benefits retroactively will need an effective date provision prior to enactment. A more common reason for effective date provisions, of course, is to delay the application of one or more sections of the bill. Be careful with these. Provisions that read, "This Act is effective six months after enactment" invite confusion. More precise is, "This Act is effective upon the expiration of six calendar months following the month in which it is enacted," or "This Act is effective upon the close of the 180th day following the date of enactment."

Although burdensome to codifiers, the tying of an effective date provision to the occurrence of a future event, rather than to a specific time, often makes the most sense, especially for non-regulatory programs. For example, "The amendments made by this Act are effective with respect to grants made from appropriations for fiscal years beginning after fiscal year 1990."

Occasionally, an effective date is tied to the issuance of regulations implementing the statute.

Extensions and other amendments of programs of federal financial assistance to states or other entities are usually made effective with the beginning of a fiscal year or with respect to appropriations for a fiscal year.

§4.12. Savings provisions

Regulatory statutes and statutes that confer benefits or impose burdens on individuals often call for more sophisticated treatment than the simple establishment of an effective date, generally because of the need to "save" the rights of persons under prior law, either permanently or for an extended period. (Savings provisions are often called "grandfather" provisions after the post-Civil-War practice, in some states, of enacting legislation extending the right to vote only to individuals whose grandfathers had been eligible to vote.)

For example, title I of the Color Additive Amendments of 1960, P.L. 86-618, consisted of amendments to the Federal Food, Drug, and Cosmetic Act, the effect of which was governed by title II. The provisions in title II, because they were transitional, were not made amendments to the FFD&C Act, but were instead free-standing. Thus, after the Color Additive Amendments were enacted, the FFD&C Act appeared to establish a new set of rules governing the use of substances to color foods, drugs, or cosmetics; nevertheless, title

II of P.L. 86-618 made those rules inapplicable for an extended period.

This is what is called a "split amendment," *i.e.*, an amendment in two parts. The first part of a split amendment adds to a law language that appears to be unconditionally effective; the second part, often at end of the enacting statute and not added to the law being amended, conditions application of the first part. The inspiration for split amendments is the drafter's desire to avoid cluttering permanent law with material of transient interest. But in avoiding this clutter the drafter creates provisions of law that are misleading. Rules that seem absolute on their face are conditioned by an overlay of language seemingly concealed elsewhere.

The alternative approach to transitional provisions is to include these provisions in the basic statute. The drafter of the 1977 amendments to the Social Security Act felt that the duration of the transitional period for large numbers of potential social security beneficiaries—five years—justified the complexity entailed in writing transitional provisions that were integral to the underlying statute. Those who think that this solves the split amendment problem may wish to glance at the result: section 215 of the Social Security Act, 42 U.S.C. 415, a provision that looks like the drafter's version of Finnegan's Wake.

I know of no way to obtain the advantages that the drafter sought in these cases without, in the first example, suffering the disadvantages of split amendments or, in the second case, complicating the underlying statute with material soon to become obsolete.

§4.13. Conforming amendments

The Department of Education Organization Act, P.L. 96-88, which established the Department of Education and changed the name of the Department of Health, Education, and Welfare to the Department of Health and Human Services, contained a provision, section 509(b), as follows:

> Any reference to the Department of Health, Education, and Welfare, the Secretary of Health, Education, and Welfare, or any other official of the Department of Health, Education, and Welfare, in any law, rule, regulation, certificate, directive, instruction, or other official paper in force on the effective date of this Act shall be deemed to refer and apply to the Department of Health and Human Services or the Secretary of Health and Human Services, respectively, except to the extent such reference is to a function or office transferred to the Secretary or the Department [of Education] under this Act.

This section, boilerplate that it is, created a problem. References to the "Secretary of Health, Education, and Welfare" are merely *deemed* to refer to the Secretary of Health and Human Services. The actual statutory language of the various statutes that HHS continued to administer was left unchanged. Although this is of no legal consequence, it can become confusing.

This type of confusion was caused in the Public Health Service Act by Reorganization Plan No. 3 of 1966, which transferred all of the functions of the Surgeon General of the Public Health Service to the Secretary of HEW, but changed none of the innumerable references to the Surgeon General that appeared in the Public Health Service Act. In subsequent years, however, amendments were enacted with references to the Secretary. The PHS Act therefore now appears to vest some functions in the Secretary and some in the Surgeon General: in fact, the Surgeon General has almost no statutory authority although (as Dr. C. Everett Koop has reminded the nation) such an official still exists.

Thus, when an area of the PHS Act is amended that still contains a reference to the Surgeon General, the drafter will routinely correct the reference to read "the Secretary." This will appear to be a significant substantive change, but will in fact be no more than a conforming amendment, *i.e.*, an amendment of no independent legal significance that is intended conform statutory language to substantive changes made elsewhere.

The drafter has a special responsibility to ensure that technical and conforming amendments are so designated and not mislabeled. Nothing will damage a drafter's credibility with congressional staff as quickly as his appearing to conceal policy changes by calling them "technical amendments." A drafter's integrity, as well as his reputation for

integrity, must be beyond reproach in this regard. (Such a ploy would in any event almost certainly be uncovered before the bill is enacted, thus not only impugning the drafter's character but also destroying any reputation he may have for intelligence.)

§4.14. Sunset provisions

Sunset provisions aim at forcing congressional review of a program that might continue to be funded beyond its need. From time to time Congress has considered bills to subject a range of government programs to review every ten years. (See, for example, S.2, 96th Congress, H.R. 2, 96th Congress.)

In the absence of general sunset legislation, the Domestic Violence Prevention Act includes a specific sunset section, section 11. Now you may wonder what a three-year sunset section will accomplish that the expiration of the appropriations authorization in three years will not. I, for one, have never found this entirely clear.

On the other side, a sunset provision sets a trap for the unwary drafter of a future resolution continuing appropriations, a so-called "continuing resolution". A continuing resolution is drafted to provide funds for programs the appropriations authorizations of which have expired. It is not drafted to overcome prohibitions contained in any such statute that forbid the obligation or expenditure of funds after a specified date. Unless special provision is made in such a resolution, therefore, the resolution will fail to extend a program containing sunset language. The program will then expire by accident (or, more realistically, some kind of emergency legislation will be needed to rectify the error).

The sunset section in our Domestic Violence Prevention Act therefore creates the risk that in October of 1990, if the reauthorization bill has not been acted upon, the continuing resolution, through the inadvertence of its drafter, may fail to preserve the program.

§4.15. Appropriations riders

For the Senator or Representative acting as an individual Member, the single most potent legislative tool—the device with the largest return for the lowest investment in time and energy—is the appropriations rider. When Henry Hyde first persuaded Congress to attach the Hyde amendment to the appropriations act of what was then the Department of Health, Education, and Welfare, he caused Congress to withdraw in one stroke all federal funding from more than one-quarter million abortions annually financed by Medicaid. Yet his amendment was drafted to accomplish this in a few words, and without amending the Medicaid statute.

As a legislative vehicle, the appropriations rider has two undoubted virtues. First, if an appropriations subcommittee accepts it, the rider is almost certain to be accepted also by the parent committee and passed by the House to which it is reported. Second, whatever may be the fate of other bills, the enactment of an appropriations bill, or a continuing resolution embracing its text, can be relied upon.

But this silver lining surrounds a cloud. An appropriations act exists to appropriate money, not to make or alter the laws for which that money is appropriated. To curb the use of appropriations acts for non-appropriations purposes the rules of both the Senate and House of Representatives contain two important prohibitions. A general appropriations bill may not include appropriations for activities not previously authorized by law, nor may it include language to change the law. If these two prohibitions were absolute and uniformly enforced, appropriations riders would hardly exist. In fact, the prohibitions are riddled with major exceptions. A drafter must learn to draft so as to take advantage of these exceptions.

The first and most important exception rests on the principle of "limitation." Neither House is obliged to appropriate for all of the purposes for which a statute authorizes an appropriation. An appropriation may, instead, be limited to selected purposes. As an example of this, consider the Hyde amendment:

> None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.

By casting his amendment in the language of limitation ("None of the funds...shall be used"), Hyde was able to bring his amendment within the ambit of this exception and avoid a point of order.

This is not as easy as it looks. Let us recast the Hyde amendment as follows:

> None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term, *or except for such medical procedures necessary for the victims of rape or incest.*

The addition of the material in italics opens the amendment to a point of order in the House, should a Member choose to raise it. That is, the presiding officer, on the advice of the House Parliamentarian, will strike the amendment from the bill. Why? Because the limitation exception is, itself, qualified by an exception. A limitation will be ruled "legislative" if it imposes significant new duties on an administering official. Making or reviewing the determinations called for by the italicized language constitutes such duties.

A more recent example of this was the proposed Ridge amendment to the fiscal 1990 Commerce Department appropriation bill:

> No funds in title I shall knowingly be used to enumerate any undocumented alien in the 1990 decennial census.

The chair sustained a point of order on the ground that the rider would require the Census Bureau to adopt special or additional rules and give enumerators additional instructions.

There also exists a rule of the House of Representatives, the body in which appropriations bills originate, that (as modified in 1983) prohibits its Appropriations Committee from reporting a provision changing existing law in any general appropriations bill "except germane provisions which retrench expenditures by the reduction of amounts of money covered by the bill". Known as the "Holman exception," the quoted language also applies to floor amendments to appropriations bills. The key difference between a rider cast as a limitation and a Holman rider is that a Holman rider reduces appropriations through the use of legislative language: *e.g.*, an amendment reducing appropriations previously made in the same bill. True Holman riders are not common.

But what if your policy intention does not fit within the limitation or Holman exception? For example, instead of preventing the use of appropriated funds, you want instead to require their use for a particular purpose. An example is the Proxmire proviso to the policy research account of the Labor-HHS-Education Appropriations Act:

> For carrying out...research studies under section 1110 of the Social Security Act, $14,718,000: *Provided,* That not less than $1,500,000 shall be obligated to continue research on poverty conducted by the Institute for Research on Poverty.

If section 1110 of the Social Security Act does not provide authority for a grant to the Institute, the proviso is plainly subject to a point of order in the House, and the Senate as well. But, in fact, the section does permit such a grant; the proviso's purpose is to ensure that it be made. Why is there a problem? Because section 1110 does not *require* the grant to be made. By changing this law, the proviso is legislation on an appropriations act.

If the Proxmire proviso had originated in the House, the drafter should have reworded the proviso to take advantage of the limitation principle; *viz.*,

> *Provided,* That $1,500,000 shall be available to continue research on poverty conducted by the Institute for Research on Poverty.

On its face, the proviso cast in this form passes muster under House rules (and Senate rules, as well). It has become an appropriation for a specific item for which appropriations are authorized. How has the drafter wrought this magic? By altering "shall be obligated" (a change in law) to "shall be available" (a simple appropriation). What is the practical effect of the change? None. The revised proviso will be read to mean that the $1.5 million earmark is available *only* for the stated purpose. However, the

Impoundment Control Act of 1974 bars a federal agency from refusing to obligate appropriated funds (absent a congressional joint resolution rescinding them). The administering agency —HHS in this case—*is thus legally required* to grant the $1.5 million to the Poverty Institute, whether the language directs it to ("shall be obligated") or merely appropriates for this purpose ("shall be available").

The Senate is less demanding in matters of this sort. The Senate Appropriations Committee accepted the amendment as originally drafted and it found its way into the HHS Appropriations Act for several years.

One point to keep in mind: it is difficult to persuade appropriations subcommittees of the House to add this kind of proviso, because there is a strong preference in the House Appropriations Committee for "clean" appropriations bills, *i.e.*, bills having few provisos that could raise point-of-order questions. But if such a proviso, even a proviso subject to a point of order, is passed by the House, it will not be subject to a point of order in the Senate.

The reverse is not true, however. Although the Senate is far more tolerant than the House of these provisos, legislation on an appropriations bill, even if added by Senate amendment, will be subject to a point of order when the bill returns to the House. For this reason, if Senate conferees insist on a legislative proviso, and House conferees acquiesce, the joint statement of the committee of conference on the bill will nevertheless announce that the conferees are in "technical disagreement." That is, while there is no objection on the part of House conferees to the substance of the proviso (in other words, the disagreement is "technical"), the proviso's adoption is a violation of House rules.

Portions of an appropriations bill in technical disagreement are usually voted on *en bloc*, after the conference report on the unoffending portions has been adopted. In that way, if the either body rejects the material in disagreement, the conference report itself will not have to be recommitted. This is not usually a problem, and in ordinary circumstances the House routinely adopts provisos reported in technical disagreement.

A final note: the assumption of this discussion has been that your intention is to draft an amendment for inclusion in a bill as reported by an appropriations subcommittee or its parent committee. If your amendment is to be proposed from the floor, and is legislative (*i.e.*, it does more than appropriate money for a purpose for which appropriations are authorized in the appropriations bill under consideration) it must be drafted so as to be "germane" to the language amended. This is relatively easy to do in the Senate; if the general subject of the amendment, *e.g.*, the Social Security Act, is mentioned in the appropriations bill, an amendment affecting that act will be ruled germane.

If a legislative amendment is to be proposed in the House, it may meet the Holman criteria and fail, anyway, because it is not germane. In the House, the germaneness requirement is exceedingly complex, and not easy to characterize, even in a general way, in a few sentences. *Germaneness* does not mean *relevance*. An amendment is not germane, in the House, if it contains a proposition "different from that under consideration," even though it may be relevant to the proposition under consideration. For example, if a bill seeks to eliminate wage discrimination based on the sex of the employee, an amendment that bars wage discrimination based on race is not germane. To be germane, the purpose of the amendment must be the same as the purpose of the bill, the amendment must relate to the subject matter under consideration, and the amendment's method of achieving its end must be closely allied to the method employed by the bill.

If the amendment is not legislative, but relies instead on the limitation exception, the drafter who is not a student of parliamentary procedure should not have to worry about germaneness. Language that fits within the limitation exception—*i.e.*, language that limits amounts that may be obligated under the bill to which the amendment is made—is probably always germane.

CHAPTER FIVE

Style and Usage

§5.1. Characteristics of legislative drafting style

Legislative prose differs from most other prose: In the world of expository writing, its style is cousin to that of the assembly instructions included with children's swing sets. It takes special pains to be precise, regardless of the cost to other literary values. Usually, it takes the form of a command to someone to do, or not to do, something that is explicitly described. It does not give reasons or explanations. In no way does it seek to entertain or otherwise engage the recreational interests of the reader.

You began to develop your own drafting style as you did the exercises in this book. Now you should begin to refine it by developing writing habits that reduce the risk of ambiguity, the principal bane of legislation (and assembly instructions).

§5.2. Consistency of expression

The most important of these habits is that of expressing like ideas in like ways. For example, consider the newly amended Domestic Violence Prevention Act allotment formula:

> From such available sums the Secretary shall first allot to each State the amount of $100,000. He shall then allot the remainder of those sums among the States in proportion to their populations . . .

This could have been written as follows:

> From such available sums the Secretary shall first allot to each State the amount of $100,000. He shall then allocate the remainder of the money among the States in proportion to their populations . . .

This alternative is bad on several counts. Inasmuch as the Secretary was told first to "allot", the reader is compelled to construe the paragraph's subsequent instruction to "allocate" in order to determine whether the allocation function is in some way different from the allotment function. Then, also, the reference to "money", while not confusing in context, needlessly introduces a word not previously used in the bill. If "sums" does the job in the first sentence, it and not "money" should be used in the second sentence.

Why then, you may ask, does the original section speak of "available sums", but of "the amount of $100,000"? Should it not read: "From such available sums the Secretary shall first allot to each State the *sum* of $100,000"? No, because "sums" was first used to refer to the entire appropriation to be allotted. It was marginally clearer, therefore, to use a different word, "amount", to mean a *part* of the "sums". This last usage illustrates a corollary of the rule of expressing like ideas in like ways: do not use the same terms to describe different ideas. For example, if you draft a bill to govern the labeling of medical devices, you should not write: "A person shall not affix or cause to be affixed to any device any statement, information, or device in such terms as to render it likely . . .". The use of "device" in different senses is misleading. It is an elegant bit of poetry for Shakespeare's Berowne to declaim, "Light, seeking light, doth light of light beguile", but it is an inelegant model for the legislative drafter.

§5.3. Drafting in the singular

Specification VI at appendix A calls for you to draft a provision to bar the making of DVP Act grants or contracts, under section 7, above $25,000 without the approval of a named advisory committee. As an exercise, try drafting the provision.

Because a public law ordinarily applies to classes, *e.g.*, all qualified applicants or all authorized grants, rather than to some single individual or object, it seems natural to draft in the plural. A typical example of such drafting is this:

> The Secretary shall not award grants, or enter into contracts, in excess of $25,000 without the approval of the National Advisory Committee.

The use of the plural, unfortunately, is a major source of ambiguity in draft language. In the example, does the $25,000 restriction limit the size of grants in the aggregate or merely the size of each grant? Similarly, does it limit the aggregate size of contracts or each contract? Or does it,

perhaps, seek to limit the sum of all grants and contracts, taken together?

When the provision is redrafted in the singular, these questions disappear:

> The Secretary shall not award a grant, or enter into a contract, in excess of $25,000 without the approval of the National Advisory Committee.

As redrafted, the provision, although in the singular, will be construed to reach all grants and contracts.

As a general rule, you should draft in the singular unless you are aware of a reason not to in a particular situation.

When drafting in the singular, use "a" or "an" in preference to "each" or "any".

§5.4. All about sex

The suggestion that you draft in the singular will exacerbate a newly discovered drafting problem. In recent years, legislative drafters have been pressed by groups concerned with the invidious effects of gender-based discrimination to avoid the use of masculine personal pronouns in references intended to include women. The suggested alternatives usually involve either writing in the plural or using constructions such as "his or her". Neither alternative is especially satisfactory. The former leads to ambiguity; the latter to sentences so ludicrous as to suggest an ironic intent. (See, for example, the Somerset Maugham passage from *The Summing Up*, rewritten in Strunk and White's *The Elements of Style* (3rd ed. pp. 60-61) to "affirm equality of the sexes".)

The same difficulties arise from words that use "man" or "men" as a prefix or suffix to designate people of either sex. Neologisms have flowered (if that is the word), some meant quite seriously (such as "chair" or "chairperson" for "chairman") and some not ("personhole" for "manhole" or "person person" for "mail man"). Like the replacement of "shepherd" by "sheepherder", few of these have contributed to the euphony of the English language.

If you can avoid using "he" to refer to people in general without contorting your sentences, that is all to the good. Modern drafting practice is to repeat the proper noun in order to avoid using a personal pronoun, *viz.:*

> The Secretary shall allot to each State an amount that the Secretary determines...

RATHER THAN

> The Secretary shall allot to each State an amount that he determines...

Do not forget, though, that as a drafter your overriding objective is to express an idea as clearly and simply as you can, not to pursue a social ideology, no matter how lofty.

This is especially true with neologisms. For years I insisted on referring to the "draftsman" rather than the "drafter", because a drafter was a horse. Now, because new dictionaries generally include "draftsman" among the meanings of "drafter", I can cheerfully use the newer terminology.

The point goes beyond issues of gender. Innovation in devising new meanings for words is a flaw, not an asset, in a drafter. The analogy is to the "creative" clerk who finds hitherto unthought of locations in which to file documents. Certainty of meaning largely depends upon the drafter's unbendingly conservative use of language.

§5.5. Avoiding vague modifiers

Modifiers, such as adjectives, adverbs, and clauses serving the same purpose, enrich the meaning of nouns and verbs. They are as essential to the drafting of legislation as they are to other forms of writing. In drafting, however, they can cause endless legal difficulties if they are used carelessly. The reason is that a modifier typically ascribes to a noun or verb a characteristic that the modifier does not precisely define. For example, our definition of "domestic violence" referred to the infliction of "physical" injury. Those who must administer the statute and those who are intended to benefit from it must ascertain what injuries qualify as "physical".

Fortunately, the line between harm that is physical and harm that is "only" psychological is about as clear as most distinctions in the law and therefore should create no insuperable interpretive or administrative difficulties. Such would not be

the case if the bill's services were confined to those who had suffered "serious" physical injury. The word "serious" is so vague that it would add to the administrative burden of the agency and otherwise multiply the points of controversy between the agency and those that the statute affects.

- It would compel the agency to define the term "serious" by regulation.
- It would open the agency to legal action to test that definition.
- It would be a constant source of friction between the agency and those whose injuries the agency refuses to consider "serious", despite their seriousness to the victims.

Often, these consequences are knowingly accepted by the administering agency or Congress as the price of giving the agency the opportunity to exercise a flexible judgment, in the light of its experience, as to the kinds of cases that a statute should reach. A drafter may seek a degree of vagueness for reasons of policy; unnecessary vagueness should not be inflicted on his client because of the drafter's ineptness.

Every modifier that you use in a draft bill will, upon the bill's enactment, call for some sort of administrative judgment. Other things equal, therefore, the fewer the modifiers the easier is a statute to administer. Thus, if a statute must determine the legal rights of a very large number of people or organizations—the Internal Revenue Code or title II of the Social Security Act are examples of such statutes—you must try to avoid including in it rules calling for the exercise of judgment. Action must be required to take place within, for example, "30 days" not within "a reasonable time". The Code's concepts of "ordinary and necessary expenses" (for trade and business deductions) and a "reasonable allowance" (for depreciation) have supported generations of lawyers and regulations writers.

Remember that an inflexible rule, for example driving on the right in the United States, is not unreasonable merely because it is arbitrary.

§5.6. Choosing between the indicative mood of the present tense and the purposive future tense

Various commentators on drafting have tried, over the years, to persuade drafters to use the present tense rather than the future tense. For example, "This Act is effective upon the close of 180 days after the date of enactment", is preferred to "This Act shall be effective upon the close of 180 days after the date of enactment". Similarly, "an applicant is entitled to obtain..." is better than "An applicant shall be entitled to obtain...". Title 5 of the United States Code abounds in illustrations of the technique.

Where the indicative mood of the present tense is clear, it should be used. There is always the risk, however, that what is intended as a command will, in the present, look merely like a description. Section 101 of title 5, instance, reads:

> The Executive departments are:
> The Department of State.
> The Department of the Treasury.
> [etc.]

What is the section's purpose? Is it intended to constitute the departments (as would be the case if it read, "The Executive departments shall be ...") or merely to announce their existence? In this example, either the purposive future tense should be used or the provision scratched as unnecessary.

§5.7. Imposing duties

The best way to impose a duty on an individual by statute is through the use of a sentence—

- that is in the active voice,
- whose main verb is accompanied by the auxiliary verb "shall", and
- whose subject is that individual.

For example, "An applicant shall file with the Secretary..." is better than "There shall be filed with the Secretary..." because it shows more clearly who is responsible for doing what must be done.

Avoid the use of "must", as in "An applicant must file...".

§5.8. Imposing prohibitions

The preferred way to impose a prohibition is to put the prohibition in the verb rather than in the subject. For example:

An individual under the age of 18 may not use the facility.

is better than

No individual under the age of 18 may use the facility.

In any event, do not say:

No individual under the age of 18 shall use the facility.

The word "shall", in this sentence, might be interpreted to mean "is required to." If so, the sentence would mean "An individual under the age of 18 is not required to use the facility, but may do so if the individual wishes."

§5.9. Conferring rights

The better practice is to confer a right, benefit, or privilege by using the word "may", as in "An individual may...", instead of the turgid "empowered" or "authorized", as in "The Secretary is authorized". Sometimes, though, when there might be some doubt as to who may exercise a right conferred, the term "is entitled" may clarify the matter. For example, the announcement, "A member of the commissioned corps may receive transportation," may leave unclear whether the agency is obliged to provide it. It is clearer, in this case, to say, "A member of the commissioned corps is entitled to receive transportation."

Beware of conferring rights as though they were duties. "A member of the commissioned corps shall receive transportation" is a poor way of saying, "A member of the commissioned corps may receive transportation." You do not intend, after all, to oblige the corps member to exercise a right to transportation.

§5.10. The use of "and" and "or"

A common drafting problem is whether to join a coordinate series of words or phrases with "and" or "or". Consider, for example, the following phrase:

(1) Every aged and blind individual...

Does this mean:

(2) Every individual who is both aged and blind...?

or does it mean:

(3) Every individual who is aged, and every individual who is blind...?

In the illustration, the matter can be put beyond doubt by selecting the alternative, either (2) or (3), intended. This is not so easily done in a series such as this:

(4) Every individual who is--
(A) aged,
(B) blind,
(C) otherwise disabled, [and? or?]
(D) indigent,

A well accepted drafting convention is to use "and" if the conditions are to be joint, as in example (2); but to use "or" if the conditions are to be several, as in example (3). Thus, in the absence of a context suggesting the contrary, the meaning of example (1) is that conveyed by example (2).

The use of "or", as dictated by this convention, is also not free of ambiguity. Does the phrase:

(5) Every individual who is aged or blind ...

mean:

(6) Every individual who is either aged or blind, or both aged and blind ...?

or does it mean:

(7) Every individual who is aged but not blind, or blind but not aged ...?

An equally well accepted drafting convention is to use "or" only in the sense of "either or both", or if there is a series of items, "any one item or combination of items". Thus, the meaning of example (5) is conveyed by example (6).

§5.11. "A" versus "any"

What is the difference between the phrase—

No hospital may take any adverse personnel action with respect to any employee because...

and the phrase—

> No hospital may take an adverse personnel action with respect to an employee because... ?

In non-legislative prose writing, the first quote is a universal prohibition, whereas the second may seem to apply to only one action against one employee. In legislative drafting, though, the singular includes the plural. (See Rules of construction, *infra*.) Therefore the phrases are equivalent. Since this is the case, it is better to use the simpler "a" or "an", saving "any" for expressions that require unusual emphasis.

§5.12. "That" versus "which"

In prose writing, it was at one time customary for the more careful writers to use "that" as a relative pronoun to preface the defining or restrictive relative clause, and ", which" as a relative pronoun to preface the non-defining or unrestrictive relative clause. For example—

> The book that is in my car is excellent

means that the specific book in my car is excellent. Contrast—

> The book, which is in my car, is excellent.

This means that the book is excellent, and it is in my car. This is a useful distinction, but seems pretty much to have died out. Drafters generally use "which" for defining clauses and ", which" for non-defining clauses.

§5.13. "Under" versus "pursuant to"

If you are writing a provision that authorizes or requires action to be taken in accordance with some other provision, the better practice is to refer to the action "under" that provision, as in—

> The Secretary shall prescribe regulations, under section 105, to govern the filing of...

This assumes that the provision to which you refer clearly establishes rules for the action taken "under" it. If this is not the case—for example, in the illustration, if section 105 is merely a very general authorization to the agency to prescribe regulations under the statute—then it is acceptable to write:

> The Secretary shall prescribe regulations, pursuant to section 105, to govern the filing of...

§5.14. "Such"

In non-technical English prose, the word "such" means "of like kind", as in "I will never buy such bad apples again." In legislative drafting, the word is used to mean "the previously mentioned", as in

> The Secretary shall promulgate regulations for carrying out this title. Such regulations shall provide...

The use of "such" in this way is a little stilted and probably should be avoided if a more natural word, such as "the" or "it" can be used. No clarity is lost if the above-quoted language were to read:

> The Secretary shall promulgate regulations for carrying out this title. The regulations shall provide...

§5.15. Deeming

Not to put too fine a point on it, deeming is simply a device for claiming that something is so when it is not.

> For purposes of prescribing duties and tariffs under this Act, a typewriter is deemed a musical instrument.

Deeming has some of the same problems discussed previously in connection with using odd definitions. Generally speaking, instead of creating a legal fiction, establish a rule of law, *e.g.*,

> For purposes of prescribing duties and tariffs under this Act, the Commissioner shall treat a typewriter in the same way as a musical instrument.

§5.16. Cross references

Examples of cross references within a bill are: "section 204(a)(3)(B)", "subsection (a)(3)(B)", "paragraph (3)(B)", "subparagraph (B) of paragraph (3)", "paragraph (3)(B) of subsection (a)". All of these references are to a subparagraph (B). It is improper to refer to "section 204 of title II" if the reference appears within the act containing title II. The correct reference, in that case, is "section 204 of this Act" (note the practice of using a capital A for the word "act" when used in a statute), or merely "section 204".

A cross reference to a subdivision of the section in which the cross reference appears should not name the section. In other words, if in section 204(a) you wish to refer to section 204(b), your cross reference should read "subsection (b)" or "subsection (b) of this section", not "section 204(b)". Analogous rules are followed for references within a paragraph of a subsection to another paragraph of the subsection. The reference should be to "paragraph (2)" or "paragraph (2) of this subsection", not "section 204(b)(2)". Similarly, a reference in section 204(a) to a paragraph in section 204(b) should read "subsection (b)(2)", "subsection (b)(2) of this section", or "paragraph (2) of subsection (b) of this section". A corresponding practice should be followed in referring to other subdivisions with the section containing the reference.

What is the logic behind this? It will become apparent if, when writing a cross reference to a statute, you imagine yourself, instead, as standing in a room on the first floor of a house, and required to explain to a guest how to find a different room in the house. You would not say, "the room on the second floor of 222 Main Street" if you are already in 222 Main Street. You would say, "the room on the second floor of this house," or merely "the room on the second floor". If the room is adjacent to the room in which you are standing, you would probably say, "the other room," or "the other room on this floor" rather than "the other room on the first floor" or "the other room on the first floor of 222 Main Street." If you give more information than is needed, you may create confusion.

Following this logic, a reference within a subdivision to the subdivision itself should appear simply as "this [name the order of subdivision, *e.g.,* subsection]".

In §3.8 on page 26 we observed that the enacting clause must be in what 1 U.S.C. 103 refers to as the "first section". When a short title is used immediately after the enacting clause, as shown in §3.8, references to the location of that short title are to "the first section", not to "section 1". This is because many bills begin with a section numbered "1" after the enacting clause.

Insofar as practicable, avoid the blind cross reference, *e.g.,* "...in accordance with section 4...". Say, instead, *e.g.,* "...in accordance with section 4 (pertaining to conditions of eligibility)". This costs you little, and often helps the reader greatly.

§5.17. Incorporation by reference

Let us suppose that you are drafting legislation to improve working conditions for migrant laborers. In aid of this objective, the policy maker directs that your bill make their employer responsible for their health and safety. In the course of preparing to draft you discover that you cannot simply refer to their "employer", because the question of who is the employer of an agricultural worker may be open to debate. Often, agricultural workers are provided to a farmer by a crew leader who is responsible for paying their wages, and who furnishes them during harvest under a contract that he has entered into with the farmer. In such case, the crew leader seems to be the employer. If, however, the crew leader is an employee of the farmer, then the farmer is probably the employer.

To resolve this issue for purposes of your bill, you can define the term "crew leader", *viz.:*

> The term "crew leader" means an individual who furnishes individuals to perform agricultural labor for another person, if such individual pays (either on his own behalf or on behalf of such person) the individuals so furnished by him for the agricultural labor performed by them and if such individual has not entered into a written agreement with such person whereby such individual has been designated as an employee of such person; and such individuals furnished by the crew leader to perform agricultural labor for another person shall be deemed to be the employees of such crew leader. A crew leader shall, with respect to services performed in furnishing individuals to perform agricultural labor for another person and service performed as a member of the crew, be deemed not to be an employee of such other person.

Another way to do the same thing is this:

> The term "crew leader" means a crew leader as defined by section 210(n) of the Social Security Act.

The two definitions are substantively identical, *i.e.,* section 210(n) contains the language repro-

duced as the first option. Which definition should the drafter prefer?

The second method uses a drafting device known as "incorporation by reference". As you see, it is substantially shorter than the first; the first method employs 136 words; the second, 18 words. But the tradeoff is intelligibility. The reader of the second definition must now locate section 210(n) of the Social Security Act to understand exactly what you have done.

Incorporation by reference has other advantages and disadvantages. Let us suppose that however a crew leader is defined for social security purposes, that is the individual upon whom you wish your bill to impose obligations. Subject to one qualification, you achieve this by electing the second method. If, on the other hand, you elect the first method, later amendments to your act or to the Social Security Act could create unintended differences.

The danger in using incorporation by reference to ensure parallel construction is that a court may interpret your reference as a reference to section 210(n) *only as that section was in effect upon the date that your bill became law.* In such case, your definition of crew leader would be held not to include or exclude individuals covered or excluded by later amendments to section 210(n). The danger can be avoided by using a form such as this:

> The term "crew leader" means a crew leader as defined by section 210(n) of the Social Security Act, *as that term may from time to time be amended.*

This form is unnecessary, of course, if a section of your bill incorporates material by reference to some other section of that same bill. The courts should have no trouble in reading the reference to incorporate that material in whatever its current state.

Whether you incorporate language by reference to another act or to material in the same act that you are drafting, you must be sure that the incorporated material fits, and will continue to fit. In the example, the Social Security Act's definition of "crew leader" is part of a set of elaborate provisions intended to establish social security coverage; the definition may not be entirely apposite when used in other contexts, such as your migrant worker bill. Later amendments to section 210(n), if automatically picked up by what will then be your new act, may create unanticipated problems.

When the incorporated material does not fit, the result can be confusing even to the point of defeating a statute's purpose. Study the example at appendix M, paying particular attention to the parenthetical reference in subsection (b) to "an alien described in subsection (c)". Does this refer to an alien who has filed an application for asylum, or one who has not?

§5.18. Provisos

A proviso is a condition preceded by the term "*: Provided,* That..." or "*: Provided further,* That...". Except in appropriations bills, provisos are little used today in federal legislation. The reason, probably, is that the use of a proviso signals poor bill organization. That is, if the drafter intends an exception to a rule that the bill has just stated, it is more natural to precede the exception with the words "except that", and dispense with the proviso form. If the drafter intends something else, his use of a proviso suggests that his intention was an afterthought which, for convenience, he has inserted in the wrong place.

§5.19. Punctuation

Examine example (7) in §5.10:

> Every individual who is aged but not blind, or blind but not aged ...

If this phrase were punctuated conventionally, it would read:

> Every individual who is aged, but not blind, or blind, but not aged ...

Legislative punctuation will depart from the rules commonly accepted for other forms of writing if the departure promotes clarity. For example, in an enumerated list contained within a subsection, each item (except, perhaps, the last) will normally be concluded with a comma or semicolon, and all items (but the last) will be concluded with the same punctuation.

In expository writing, if a quotation ends with a period it is customary to place the period inside of the closing quotation mark, *viz.,*

> He said, "Please don't let your dog do that on my lawn."

In legislative drafting, however, material "inside the quotes" is inserted as an amendment into a statute. If the period is inside the quotation marks it also goes into the statute, even though you merely used it to end your sentence. For this reason, end your sentences with a period outside of the quotation marks, *viz.*,

> ...and inserting "two succeeding fiscal years".

What if the language inserted by an amendment ends with a period? Although drafters have not handled this consistently, the better practice is to show that period inside the quotes, but to then end your amendment with a period outside of the quotes, *viz.*,

> ...and inserting "until the close of fiscal year 1994.".

This answers the question, if there is no period outside of the close quote, whether the period inside the quotes is deliberate.

§5.20. Adjusting tabulation margins

On occasion, a drafter may need to tabulate an undivided provision. For example, in the exercise at appendix G we divided paragraph (1) into two subparagraphs in order to add a subparagraph. If no change is intended in one of the subdivisions—in appendix G, for example, no change was made in the language that became subparagraph (A)—the drafter should avoid repeating the language merely to adjust its margins. This can confuse legislators who are considering the amendment, because it may suggest a substantive change where none is proposed.

One way to approach this problem is to amend the margins directly. For example, section 2663(a)(12)(A) of the Deficit Reduction Act of 1984, P.L. 98-369, provides:

> (12)(A) Section 217 (d) of [the Social Security] Act is amended by indenting paragraph[s] (1) and (2) two ems.

"Two ems" is a paragraph indentation.

§5.21. Rules of construction

There are several statutes that define certain terms for any law of the United States in which the terms appear. The most significant of these is 1 U.S.C. 1, entitled "Rules of Construction". The following are among its more important provisions:

(1) words importing the singular include and apply to several persons, parties, or things;

(2) words importing the plural include the singular;

(3) words importing the masculine gender include the feminine as well;

(4) words used in the present tense include the future as well as the present;

(5) the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

The Congressional Budget Act of 1974, which changed the fiscal year of the federal government to a year beginning on October 1, also added to the law a definition of the fiscal year. (This is now codified at 31 U.S.C. 1102.) The current form of language authorizing appropriations, therefore, should no longer speak of appropriations for the "fiscal year ending September 30, 19__." but rather of appropriations for "fiscal year 19__".

The Federal Grant and Cooperative Agreement Act of 1977, P.L. 95-224 attempts to establish government-wide criteria for the selection of legal instruments for various governmental purposes. Its provisions affect the meaning of the terms "grant" and "contract", and create a new legal relationship styled "cooperative agreement". To comply with the purposes of the Act, a drafter should avoid specifying the use of a grant, when his intention is to procure goods or services for the use of the federal government.

§5.22. Analyzing defective language: an exercise

The following regulatory provision appeared in the 1980 edition of the Code of Federal Regulations, 35 CFR §61.333, relating to military personnel:

> During the time when a person found to be infected with a venereal disease is undergoing treatment, he shall refrain from committing any acts or deeds that would permit the spread of the disease to other persons.

The provision illustrates many of the things that can go wrong in the hands of an unskilled drafter. Let us examine the provision, phrase by phrase:

During the time when a person found to be infected with a venereal disease is undergoing treatment...

Does this mean only while he is in the physician's office, or does it include the entire period during which he suffers from, and receives treatment for, the disease? If an individual declines treatment, or after he abandons it because it proves ineffective, does the regulation's prohibition continue to apply to him?

Do you think the drafter asked why the policy maker would be indifferent to an infected person's spreading the disease when *not* undergoing treatment?

...he shall refrain from committing any acts or deeds...

Does the drafter intend to distinguish between "acts" and "deeds"? If so, what is the distinction? Does the drafter contemplate some course of conduct that would not be an act or deed, but would be permissible although it might spread the disease?

...that would permit the spread of the disease to other persons.

Does the regulation prohibit an infected person from driving an infected friend home to his, the friend's, wife? to visit his fiancé? to visit a brothel?

* * *

In short, the provision is ambiguous, in some respects inappropriately vague, in other respects over-specific, and at least in one respect ("acts or deeds") prolix. In order to redraft the provision correctly, one must try to reconstruct the policy process. Why, for example, does the prohibition apply only "during the time when a person found to be infected...is undergoing treatment"? The policy maker's reasoning may have gone like this:

> A soldier should not be punished for spreading a disease he does not know that he has. Therefore, the prohibition should not attach until there has been a "finding" that he is infected. At the same time, he should not be barred from sexual activity after he has completed treatment, because he will then (presumably) be free from the disease.

It was never the policy maker's intention to allow a soldier to spread the disease, once found, irrespective of the course of treatment. Also, in characterizing the prohibited conduct, the drafter fell into a common bad habit. Uncertain as to whether the conduct to be prohibited should be described as an "act" or a "deed", the drafter used both words. Often, this is harmless. Sometimes, though, more is less. For example, suppose that you wish to apply a rule to organizations of every type. Instead of writing "every organization", you write "every corporation, association, partnership, or sole proprietorship". Have you covered a real estate investment trust? Maybe, maybe not.

Why does the drafter use the term "person", when that term covers entities, such as corporations, that are not individuals?

Notice, also, that the drafter uses the singular personal pronoun "he". This is not technically incorrect; but its use is easily avoided.

Here is how the provision might be revised to accomplish its policy objectives while avoiding the problems described:

> An individual found infected with a venereal disease shall not act so as to spread that disease to another.

This seems to accomplish in 19 words, what the original draft failed to accomplish in 37 words.

Consider this alternative:

> An individual found infected with a venereal disease shall not [act so as to] spread that disease to another.

The alternative may also meet the specifications. Nevertheless, eliminating "act so as to" narrows the prohibition. Under the original improved version, a soldier who engages in the prohibited conduct has committed an offense even if the conduct does not spread the disease. In the alternative, the soldier, in such case, has committed no offense. Presumably, the policy maker would prefer the former to the latter version.

§5.23. Why drafters find it hard to use short, simple sentences

> *Horatio.* Is it a custom?
> *Hamlet.* Ay, marry, is't;
> But to my mind, though I am native here
> And to the manner born, it is a custom
> More honor'd in the breach than the observance.

In *Style Manual; Drafting Suggestions for the Trained Drafter,* published February 28, 1989, by the Office of the Legislative Counsel, U.S. House of Representatives, that office advises, "Use short simple sentences. ... Most complex and compound sentences should be broken into 2 or more sentences." Let us examine a typical sentence emanating from that office, a subparagraph of the recently enacted (and now repealed) Medicare Catastrophic Coverage Act of 1988:

> (A) IN GENERAL.—Except as provided in subparagraph (B), for drugs dispensed in—
> (i) 1990 or 1991, the administrative allowance under this paragraph is—
> (I) $4.50 for drugs dispensed by a participating pharmacy, or
> (II) $2.50 for drugs dispensed by another pharmacy; or
> (ii) a subsequent year, the administrative allowance under this paragraph is the administrative allowance under this paragraph for the preceding year increased by the percentage increase (if any) in the implicit price deflator for gross national product (as published by the Department of Commerce in its "Survey of Current Business") over the 12-month period ending with August of such preceding year.
> Any allowance determined under the clause (ii) which is not a multiple of 1 cent shall be rounded to the nearest multiple of 1 cent.
>
> (B) ADJUSTMENT IN ALLOWANCE FOR MAIL SERVICE PHARMACIES.—The Secretary may, by regulation and after consultation with pharmacists, elderly groups, and private insurers, reduce the administrative allowances established under subparagraph (A) for any drug dispensed by a mail service pharmacy (as defined by the Secretary) based on differences between such pharmacies and other pharmacies with respect to operating costs and other economies.

Those of you accustomed to reading the texts of statutes will recognize the quote as fairly typical of legislative sentence structure. In the example, the first sentence after the side heading is 107 words long (including the alphanumeric subdivision labels); the second, 25 words; and the third (after the side heading), 54 words. The entire subparagraph, including side headings, is 194 words long. Let us call this "version I".

If we now apply the short sentence precept to it, we might get something like this:

> (A) IN GENERAL.—For 1990 or 1991, the administrative allowance under this paragraph is $4.50 for drugs dispensed by a participating pharmacy. It is $2.50 for drugs dispensed by another pharmacy. For a year subsequent to 1991, the administrative allowance for drugs dispensed under this paragraph is the preceding year's administrative allowance under this paragraph, adjusted. Make that adjustment as follows. Compute the increase, if any, in the implicit price deflator for gross national product over the 12 months ending with August of such preceding year. Then raise the preceding year's allowance by that increase. Finally, round the allowance to the nearest multiple of 1 cent. For purposes of the computation, use the gross national product published by the Department of Commerce in its "Survey of Current Business".
>
> (B) ADJUSTMENT IN ALLOWANCE FOR MAIL SERVICE PHARMACIES.—The Secretary, by regulation, may reduce the allowances under subparagraph (A) for any drug dispensed by a mail service pharmacy (as defined by the Secretary). The Secretary shall base any such reduction on differences in operating or other costs between mail service pharmacies and other pharmacies. The Secretary shall not put the regulation into effect until the Secretary has consulted with pharmacists, elderly groups, and private insurers.

In this version, we shall call it" version II," no sentence is longer than 25 words. But at 205

words, including the two subparagraph letters and the side headings, version II, itself, is about 6 percent longer than version I. Herein lies a moral: in drafting, simpler is often longer, at least if the drafter is to achieve the same degree of clarity.

Of course, 6 percent may be a small price to pay for greater ease of reading. Notice, though, that version II also sacrifices some advantages of version I. In version I, the administrative allowances for drugs dispensed by a participating pharmacy and by another pharmacy are separated by alphanumeric clauses. This makes it easy to cross refer to one or the other of them at other points in the statute (*e.g.*, "In the case of the administrative allowance established under subparagraph (A)(i)(II)..."). Version I also facilitates cross references to allowances established for drugs dispensed in 1990 or 1991 (subparagraph (A)(i)) and allowances for drugs dispensed in a subsequent year (subparagraph (A)(ii)).

Also, the tabular layout of subparagraph (A) in version I lends itself to amendment. For example, if in 1990 Congress chooses to legislate administrative allowances for 1992, the drafter would simply redesignate clause (ii) as clause (iii), strike the "or" at the end of clause (i), and insert after that clause a new clause (ii) containing the new allowance. Anyone generally familiar with the statute who read that amendment would easily understand everything that had been done even before consulting the underlying text. Amending version II is a little more complicated, and the resulting amendment could be less readily intelligible.

Finally, there is the problem of "construction." Version I begins by announcing, "Except as provided in subparagraph (B)". This warns the reader that the administrative allowances announced in subparagraph (A) may be qualified later on. In contrast, version II states, in subparagraph (A), what appears to be an unqualified rule. Unless the reader knows about subparagraph (B), he will be misled. How would you correct this? Not easily. The many sentences used in subparagraph (A) of version II do not lend themselves to a single qualifying clause. Yet the consequence of the absence of such a clause is that the reader must "construe" the rules in subparagraph (A) of version II as being subject to the adjustments described in subparagraph (B). In other words, subparagraph (A) must be interpreted, because it does not speak for itself.

The problems with version II are not insuperable. But they explain, at least in part, why drafters customarily use long sentences, even drafters who tell us to use short sentences.

§5.24. On making statutes readable

Legislative drafting is a craft, not an academic pursuit. You will learn it not by reading about it but by imitating good models under expert guidance. The better you get at it, the more your bills will look as though they had been written in English to be read by real people.

This is not to say that you should strive for "John and Jane" language. There is a limit to how simply a complex idea can be expressed. When Henry Kissinger attempted to describe an intricate foreign policy issue to a group of reporters, one of the reporters asked, "Mr. Kissinger, could you explain that more simply?" Kissinger responded, "That is as simple as I get."

That a statute is hard to understand is not always a compelling criticism; what shames the drafter is a statute that he has made unnecessarily hard to understand. The essence of effective exposition is not always the expression of complex concepts in simple language. Nevertheless, the best drafting expresses its ideas in as easy and natural a way as the subject matter allows.

26-149 - 90 - 3

APPENDICES

M E M O R A N D U M

DATE January 11, 1990

TO Ms. Susan B. Drafter

FROM Mr. John Policymaker

SUBJECT Specifications for Domestic Violence Prevention Amendments

As you know, the DV reauthorization hearings are scheduled for early in March, with committee action probable before summer. I would like to get a bill up by mid-February. Here are the specifications:

Specifications for Amendments
to the Domestic Violence Prevention Act

I. Increase the appropriations authorization to $20,000,000 (and "such sums" for the outyears) and extend through FY 1993.

II. Amend the formula for the state grant program so that no state receives less than $100,000, regardless of its population.

III. Amend the definition of "domestic violence" so as to substitute uniform federal criteria in place of the state criteria currently in use. The new federal definition should cover injury done by an individual to his spouse. But it must also include injury done by an individual to one with whom he is living (or was living) as husband and wife, even if the relationship is not recognized as marriage under state law.

IV. Allow the use of appropriations for activities to prevent child abuse or assist its victims, if the abuse is physical injury to, or sexual abuse of, a child under the age of 16 by a parent, guardian, or other adult relative with whom the child is living.

V. Authorize the use of grant funds for the minor remodeling of facilities for use as temporary shelters.

VI. Add a provision that bars the making of section 7 grants or contracts above $25,000 without the approval of the National Advisory Council on Family Violence and Child Abuse.

VII. The definition of "State" should be updated. The reference to the Trust Territory is now obsolete. However, the definition should continue to include Palau, at least until Congress adopts the resolution implementing the Compact of Free Association between Palau and the United States.

An Act*

To provide Federal assistance to States and other entities for programs to prevent domestic violence and assist its victims, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Domestic Violence Prevention Act".

FINDINGS AND PURPOSE

Sec. 2. (a) The Congress finds that a substantial number of adults, particularly adult women, are beaten or otherwise injured by their spouses; that this domestic violence constitutes a significant proportion of the homicides, aggravated assaults, and assaults and batteries in the United States; that the effectiveness of State laws, and State and local community programs, in identifying, preventing, and treating this domestic violence is unknown; and that no existing Federal program materially contributes to solving the problem presented by domestic violence.

(b) It is the purpose of this Act—

(1) to provide emergency shelter, protection, and other services, to victims of domestic violence;

(2) to develop methods and conduct activities for preventing or reducing the incidence of domestic violence; and

(3) to evaluate the effectiveness of activities relating to domestic violence.

DEFINITIONS

Sec. 3. As used in this Act—

(1) the term "domestic violence" means an action that inflicts an injury upon a citizen or resident of a State (or upon an individual that is otherwise found within the State), in circumstances that meet criteria established under a plan of that State that complies with section 6;

(2) the term "services to victims of domestic violence" includes the provision of shelter (not to exceed 30 days in any fiscal year), pertinent counseling, and emergency medical treatment for traumatic injuries, to a victim of domestic violence; the provision of shelter to her minor children during any period in which she is receiving shelter; and the provision of pertinent counseling to the individual who has subjected her to domestic violence; except that the term does not include the provision of cash payments to those victims;

(3) the term "Secretary" means the Secretary of Health and Human Services;

(4) the terms "State" and "States" include the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands; and

(5) a word importing the feminine gender includes the masculine as well.

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*This "Act" is not an existing statute of the United States. I drafted it as an exercise from an actual set of drafting specifications submitted in 1979 to the Legislation Division of the Office of the General Counsel, Department of Health and Human Services, and have now modified it to meet the needs of the current edition of *Drafting Federal Law*. Its format is typical for statutes of this type. Nevertheless, in preparing a bill to amend it, as we shall do during the course of the book, we shall follow the more modern "office style" format currently used by the Office of the Legislative Counsel, U.S. House of Representatives.

AUTHORIZATION OF APPROPRIATIONS

Sec. 4. (a) For the purpose of carrying out this Act, there are authorized to be appropriated $16,000,000 for fiscal year 1988, and such sums as may be necessary for each of the two succeeding fiscal years.

(b) From the sums appropriated for a fiscal year under subsection (a), the Secretary shall reserve an amount, equal to not less than one percent and not more than three percent of those sums for that year, to carry out the functions specified by section 10 (pertaining to evaluations and reports). Of the remainder, 75 percent is available to the Secretary to carry out the program of State grants for services established by section 5 and the balance (in addition to amounts, if any, available under section 5(b)) is available to the Secretary to carry out the program of research and demonstration projects established by section 7.

STATE GRANTS FOR SERVICES

Sec. 5. (a)(1) From the sums available under section 4(b) for carrying out the program of State grants for services, the Secretary shall pay to each State for a fiscal year an amount equal to 75 percent of its expenditures under a plan of the State approved by the Secretary under section 6, but not in excess of the State's allotment computed under paragraph (2) of this subsection.

(2) The Secretary shall allot such available sums among the States in proportion to their populations, as determined on the basis of the most recent satisfactory data available from the Department of Commerce.

(b) If, upon the expiration of the eighth calendar month of the fiscal year, a State has not submitted to the Secretary a plan that complies with section 6, there is made available to the Secretary for the purpose of carrying out section 7 an additional amount equal to the allotment of that State under this section.

STATE PLAN REQUIREMENTS

Sec. 6. (a) The Secretary shall approve a plan of the State, for the purposes of section 5, if the plan—

(1) designates, or provides for the establishment of, a single State agency as the sole agency for administering or supervising the administration of the activities assisted under section 5;

(2) sets forth a State program plan, and the policies and procedures for its implementation, to achieve the objectives enumerated in section 2(b) by providing services to victims of domestic violence without regard to their incomes or resources, and by conducting other activities relating to domestic violence;

(3) establishes criteria for determining the eligibility of an individual for services under activities assisted under section 5;

(4) includes, or is accompanied by (A) documentation and other evidence showing that, in the process of its development and before it was submitted to the Secretary, a reasonable opportunity was afforded to interested agencies, organizations, and individuals to present views and to comment on the proposed State program plan; and (B) satisfactory assurance that, after submission of the State program plan to the Secretary and its approval by him, a reasonable opportunity will be afforded to interested individuals to contribute their services to its implementation;

(5) provides satisfactory assurance that—

(A) adequate measures will be taken to protect individuals from domestic violence while they are receiving shelter in accordance with the State program plan; and

(B) neither the identity nor whereabouts of an individual who is seeking, is receiving, or has received, services under the State program plan will be revealed to any person, except a public employee in need of the information in order to perform his official duties;

(6) sets forth policies and procedures to ensure that funds received under section 5 will (A) be used to supplement and, to the extent practical, increase the level of non-Federal funds that would otherwise be made available for the purposes for which funds under section 5 are provided, and (B) not be used to supplant those non-Federal funds;

(7) sets forth the means by which the State will assist and encourage grantees under the State program plan to obtain resources, other than those provided by this Act, for the conduct of activities relating to domestic violence;

(8) describes the steps that are proposed to be taken, which the Secretary determines to be reasonable, to coordinate the provision of services under the State program plan with other services available within the State for victims of domestic violence, and with law enforcement agencies;

(9) establishes means for the evaluation of the effectiveness of services provided under the State plan, and for reporting to the Secretary thereon and includes an assurance that a report will be made to the Secretary within 90 days following the close of the fiscal year for which a grant is awarded, summarizing the services assisted by the grant, and their effectiveness;

(10) provides that the State agency designated under paragraph (1) will make such reports, in such form and containing such information, and keep such records, as the Secretary may require, and afford such access to those records as the Secretary or the Comptroller General of the United States may find necessary to assure the correctness of, and to verify, such reports; and

(11) contains or is accompanied by such additional information or assurances and meets such other requirements as the Secretary prescribes in order to achieve the purposes of this Act.

(b) Upon the request of a State made for good cause, the Secretary may waive compliance with any provision of subsection (a) if he determines that the waiver is consistent with achieving the purposes of this Act.

(c)(1) The Secretary shall not finally disapprove a State plan (or any modification thereof) except after reasonable notice and opportunity for a hearing to the State agency designated under subsection (a)(1).

(2) Whenever the Secretary, after reasonable notice and opportunity for a hearing to the State agency designated under subsection (a)(1), finds that the State plan approved under this Act has been so changed that it no longer complies with this Act, or that in the administration of the plan there is a failure to comply substantially with any provision of this Act, the Secretary shall notify the State agency that further payments will not be made to the State under the plan (or, in his discretion, that further payments will not be made to the State under the plan with respect to any projects or activities affected by such failure), until he is satisfied that there will no longer be such failure. Until he is so satisfied, the Secretary shall make no further payments to the State under the plan or shall limit payments to projects or activities not affected by such failure.

RESEARCH AND DEMONSTRATION PROJECTS

Sec. 7. (a) From the amounts made available for the purpose under section 4(b), the Secretary may award grants to public or nonprofit private entities, or enter into contracts with private entities, which have applied therefor under section 8, for the conduct of activities relating to domestic violence, including—

(1) research into its causes, prevalence, and methods of preventing or alleviating it;

(2) the evaluation, development, or demonstration of any such method, including the use of temporary shelters, counseling, emergency medical treatment for traumatic injury, and job referral or placement services;

(3) the collection, publication, or dissemination of information about domestic violence or services available with respect to it; and

(4) the training of individuals in activities relating to domestic violence.

(b) The Secretary shall not award a grant or enter into a contract under this section to provide for the payment of more than 80 percent of the cost of the activity for which it is awarded, except that the Secretary, in response to a request under section 8(3), may waive all or part of this limitation for the first year in which he assists an activity under this section.

(c) The Secretary shall give preference, in awarding a grant or entering into a contract under this section, to activities for the development of methods of reducing domestic violence that are both new and promise to be unusually effective.

(d) No amount available under this section may be used for cash payments as assistance to victims of domestic violence.

(e) The Secretary shall not award a grant to, or enter into a contract with, an entity under this section, to assist that entity to conduct an activity for a fiscal year, if that entity has received assistance under this section for that activity for three previous fiscal years.

APPLICATION FOR PROJECT GRANT OR CONTRACT

Sec. 8. To be eligible to receive a grant from, or enter into a contract with, the Secretary under section 7 for assistance for an activity, an applicant for that grant or contract must file with the Secretary, upon such terms and conditions as the Secretary may prescribe, an application that contains, in addition to such other information or assurances that the Secretary may require—

(1) the assurance described by section 6(a)(5) (pertaining to protection and confidentiality), and the means and assurances described by section 6(a)(9) (pertaining to evaluation of effectiveness), insofar as applicable to the activity;

(2) if the applicant is an agency of a State (or political subdivision) that has designated a State agency under section 6(a)(1), a certification by the State agency that the application is consistent with activities under the State plan submitted under section 6;

(3) if the applicant seeks a waiver under section 7(b) of its share of the activity's cost, an explanation of the need for that waiver; and

(4) for that portion of the activity's cost for which the applicant does not seek a waiver under section 7(b) (and, in a supplement to the application, for any portion of the cost that is not so waived), evidence that cash is available to pay that portion of the activity's cost for which the applicant does not receive assistance under section 7, except that the applicant may substitute for cash the equivalent value (determined under the Secretary's regulations) of real property (including a leasehold).

ADMINISTRATION

Sec. 9. (a) COOPERATIVE AGREEMENTS AUTHORIZED.—In any case in which the Secretary is authorized to make a grant to an entity under section 7, he may instead enter into a cooperative agreement with that entity under which he will make the same payments, on the same terms, for the activity as he would under a grant therefor, but only on condition that the entity comply with the requirements of this Act to the same extent as would be required of an applicant for or recipient of a grant for the same purpose.

(b) ADVANCE PAYMENT OF GRANTS.—The Secretary may pay the amount of any grant or cooperative agreement under this Act in advance or by way of reimbursement.

(c) WAIVER OF CERTAIN REQUIREMENTS APPLICABLE TO CONTRACTS.—The Secretary may enter into a contract under section 7 of this Act without regard to 31 U.S.C. 3324 (pertaining to advance payments) and section 3709 of the Revised Statutes (41 U.S.C. 5) (pertaining to advertised bids).

(d) GRANTS TO FEDERAL AGENCIES.—(1) Amounts available under section 7 are available for grants to, or cooperative agreements with, Federal agencies or institutions for the same purposes, and on the same terms and conditions, as apply to grants to other entities under that section, except that grants to Federal agencies or institutions may be for the entire cost of the activity for which they are awarded.

(2) Notwithstanding any provision of law, a Federal agency may apply for, receive, and use a grant under section 7 for any purposes (consistent with that section) for which it is otherwise authorized to use appropriated funds.

(e) TECHNICAL ASSISTANCE.—The Secretary may provide technical assistance to a grantee, contractor, or applicant for a grant or contract under this Act, to the extent consistent with any purpose set forth in section 2(b).

EVALUATIONS

Sec. 10. (a) The Secretary shall use the amounts reserved for the purpose under section 4(b) to evaluate the administration of this Act, and to submit the reports required by subsection (b). The Secretary shall not employ, to conduct that evaluation or prepare those reports, an individual who has been engaged in the administration of this Act.

(b) The Secretary shall submit to the President, and to each House of Congress—

(1) within 90 days following the close of each fiscal year for which this Act is effective, an evaluation of the Act's administration during that year; and

(2) not less than 90 days prior to the close of each three fiscal year period for which this Act is effective, an evaluation of the Act's administration for such period.

(c)(1) The Secretary shall include in each evaluation submitted under subsection (b)—

(A) an evaluation of the effectiveness of this Act in preventing or reducing domestic violence, and providing services to its victims;

(B) a survey of domestic violence programs, with an estimate of the number and type of such programs the existence of which are attributable to assistance under this Act;

(C) an estimate of the number and type of programs assisted under this Act that have become, or are expected to become, independent of the need for that assistance; and

(D) an analysis of the types of information on domestic violence developed under this Act and the extent of its dissemination.

(2) The Secretary shall include in the evaluation required by subsection (b)(2) his recommendations regarding the desirability of extending this Act beyond the expiration date provided by section 4(a).

REAUTHORIZATION OF PROGRAM

Sec. 11. (a) EXERCISE OF RULEMAKING POWER.—(1) It is not in order in either the Senate or House of Representatives to consider any bill or resolution, or amendment thereto, that authorizes the enactment of new budget authority for this Act for any fiscal year after fiscal year 1990.

(2) The rule contained in the preceding paragraph is enacted by Congress—

(A) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such shall be considered as part of the rules of each House, and shall supersede other rules only to the extent that it is inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change such rule (so far as relating to that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

(b) SUNSET PROVISION.—The Secretary may not obligate budget authority under this Act for a fiscal year beginning after fiscal year 1990.

SPECIFICATION

I. Increase the appropriations authorization to $20,000,000 (and "such sums" for the outyears) and extend through FY 1993.

DRAFT SECTION

SEC.___. EXTENSION OF APPROPRIATIONS AUTHORIZATION.

(a) EXTENSION OF AUTHORIZATION.—Section 4(a) of the Domestic Violence Prevention Act is amended by inserting before the period at the end ", and $20,000,000 for fiscal year 1991, and such sums as may be necessary for each of the two succeeding fiscal years".

(b) CONFORMING AMENDMENT.—Subsections (a) and (b) of section 11 of such Act are each amended by striking "1990" and inserting "1993".

RAMSEYER

AUTHORIZATION OF APPROPRIATIONS

Sec. 4. (a) For the purpose of carrying out this Act, there are authorized to be appropriated $16,000,000 for fiscal year 1988, and such sums as may be necessary for each of the two succeeding fiscal years, *and $20,000,000 for fiscal year 1991, and such sums as may be necessary for each of the two succeeding fiscal years.*

* * *

REAUTHORIZATION OF PROGRAM

Sec. 11. (a) EXERCISE OF RULEMAKING POWER.—(1) It is not in order in either the Senate or House of Representatives to consider any bill or resolution, or amendment thereto, that authorizes the enactment of new budget authority for this Act for any fiscal year after fiscal year [1990] *1993.*

* * *

(b) SUNSET PROVISION.—The Secretary may not obligate budget authority under this Act for a fiscal year beginning after fiscal year [1990] *1993.*

APPENDIX D

SPECIFICATION

II. Amend the formula for the state grant program so that no state receives less than $100,000, regardless of its population.

DRAFT SECTION

SEC. ___. MINIMUM STATE GRANT.

Section 5(a)(2) of the Domestic Violence Prevention Act is amended by striking "The Secretary shall allot such available sums" and inserting "From such available sums the Secretary shall first allot to each State the amount of $100,000. The Secretary shall then allot the remainder of those sums".

RAMSEYER

STATE GRANTS FOR SERVICES

Sec. 5. (a)(1) * * *

(2) [The Secretary shall allot such available] *From such available sums the Secretary shall first allot to each State the amount of $100,000. The Secretary shall then allot the remainder of those* sums among the States in proportion to their populations, as determined on the basis of the most recent satisfactory data available from the Department of Commerce.

APPENDIX E

ILLUSTRATIVE CASES TO TEST DEFINITION OF "DOMESTIC VIOLENCE"

The drafting exercise assumes that a legislative proposal is to be drafted that will authorize grants to states to enable them to assist individuals who are victims of domestic violence in the context of a spousal or spousal-seeming relationship. The bill's definition of the term "domestic violence" will determine whether an individual receives services.

Case Nr.	Illustrative Case	Yes	No
Case 1:	A man and woman, both married but not to each other, are living together. The man physically assaults the woman. Is the woman eligible for services?	☑	
Case 2:	In case 1, the husband of the woman living with the man locates and physically assaults her. Is the woman eligible for services?	☑	
Case 3:	In case 1, the wife of the man who is living with the woman locates him, at which point he physically assaults her. Is the wife eligible?	☑	
Case 4:	In case 1, the man returns home from time to time to assault his wife. Is she eligible for services?	☑	
Case 5:	A man of no fixed address keeps some clothes in a woman's apartment and visits her there once or twice a week for sexual and other purposes. If he physically assaults her is she eligible for services?	☑	
Case 6:	Assume case 5, except that it is the man's apartment, and the woman visits there once or twice a week. Is she still eligible?	☑	
Case 7:	A brother and sister live in an incestuous relationship. If either assaults the other, is the victim eligible for services?		☑
Case 8:	A man and woman repair to a motel for purposes of sex. The man physically assaults the woman. Is the woman eligible for services?		☑
Case 9:	A man hurls oral abuse at his wife (but does not threaten physical violence). She suffers a nervous collapse. Is the eligible?		☑
Case 10:	A man threatens to kill his wife but does not touch her. Is she eligible?	☑	
Case 11:	A man strikes his children. His wife leaves with the children in order to protect them. Are either she or the children eligible?		☑
Case 12:	A man living with two women strikes them both. Are both eligible?	☑	
Case 13:	A man and his live-in male lover injure each other. Is either eligible?		☑
Case 14:	A woman is beaten by her son-in-law, with whom she is living. Eligible?		☑
Case 15:	A woman is beaten by her brother-in-law, with whom she is living. Eligible?	☑	
Case 16:	A woman is put in fear of her life by her husband's drunk driving? Eligible?		☑

SPECIFICATION

III. Amend the definition of "domestic violence" so as to substitute uniform federal criteria in place of the state criteria currently in use. The new federal definition should cover injury done by an individual to his spouse. But it must also include injury done by an individual to one with whom he is living (or was living) as husband and wife, even if the relationship is not recognized as marriage under state law.

DRAFT SECTION

SEC. ___. ELIGIBILITY FOR SERVICES.

(a) UNIFORM DEFINITION OF DOMESTIC VIOLENCE.—Section 3(1) of the Domestic Violence Prevention Act is amended to read as follows:

"(1) the term 'domestic violence' means the threat of physical injury to, or the infliction of physical injury upon, an individual by one to whom that individual is or has been married, or with whom that individual is or has been living; except that the term does not include (A) a threat to, or infliction of injury upon, an individual of the same sex; or (B) a threat or infliction of injury by one to whom the individual is related by blood, or is or was related by marriage (other than by the individual's spouse, former spouse, brother-in-law, or sister-in-law); or (C) an injury that is not the result of physical abuse;".

(b) CONFORMING AMENDMENT.—Paragraph (3) of section 6(a) of such Act is repealed.

RAMSEYER

DEFINITIONS

Sec 3. As used in this Act—

(1) the term "domestic violence" means [an action that inflicts an injury upon a citizen or resident of a State (or upon an individual that is otherwise found within the State), in circumstances that meet criteria established under a plan of that State that complies with section 6] *the threat of physical injury to, or the infliction of physical injury upon, an individual by one to whom that individual is or has been married, or with whom that individual is or has been living; except that the term does not include (A) a threat to, or infliction of injury upon, an individual of the same sex, or (B) a threat or infliction of injury by one to whom the individual is related by blood, or is or was related by marriage (other than by the individual's spouse, former spouse, brother-in-law, or sister-in-law); or (C) an injury that is not the result of physical abuse*;

* * *

STATE PLAN REQUIREMENTS

Sec. 6. (a) The Secretary shall approve a plan of the State, for the purposes of section 5, if the plan—

(1) * * *

* * *

[(3) establishes criteria for determining the eligibility of an individual for services under activities assisted under section 5;]

SPECIFICATION

IV. Allow the use of appropriations for activities to prevent child abuse or assist its victims, if the abuse is physical injury to, or sexual abuse of, a child under the age of 16 by a parent, guardian, or other adult relative with whom the child is living.

DRAFT SECTION

SEC. ___. EXPANSION OF PROGRAMS TO INCLUDE CHILD ABUSE PREVENTION AND TREATMENT ACTIVITIES

(a) INCLUSION OF CHILD ABUSE IN DEFINITION OF DOMESTIC VIOLENCE.—Section 3(1) of the Domestic Violence Prevention Act (as amended by section ___ of this Act) is further amended—

(1) by inserting a dash after "domestic violence means",

(2) by adding, following the dash, a new subparagraph (A) containing the remaining text of section 3(1), amended to redesignate clauses (A), (B), and (C) as clauses (i), (ii), and (iii), respectively,

(3) by adding "or" after the semicolon at the end of that new subparagraph, and

(4) by adding after that new subparagraph a new subparagraph as follows:

"(B) the infliction of physical injury upon, or the sexual abuse of, an unmarried child under the age of 16 by the child's parent, guardian, or other adult with whom the child is living;".

(b) FINDINGS.—Section 2(a) of such Act is amended—

(1) by inserting ", and that a substantial number of children are physically or sexually abused by their parents or guardians" after "injured by their spouses", and

(2) by inserting "and, in the case of children, sexual crimes," after "assaults and batteries".

RAMSEYER

FINDINGS AND PURPOSE

Sec. 2. (a) The Congress finds that a substantial number of adults, particularly adult women, are beaten or otherwise injured by their spouses *and that a substantial number of children are physically or sexually abused by their parents or guardians*; that this domestic violence constitutes a significant proportion of the homicides, aggravated assaults, and assaults and batteries *and, in the case of children, sexual crimes,* in the United States; that the effectiveness of State laws, and State and local community programs, in identifying, preventing, and treating this domestic violence is unknown; and that no existing Federal program materially contributes to solving the problem presented by domestic violence.

* * *

DEFINITIONS

Sec 3. As used in this Act—

(1) the term "domestic violence" means—

(A) the threat of physical injury to, or the infliction of physical injury upon, an individual by one to whom that individual is or has been married, or with whom that individual is or has been living; except that the term does not include [(A)] *(i)* a threat to, or infliction of injury upon, an individual of the same sex, or [(B)] *(ii)* a threat or infliction of injury by one to whom the individual is related by blood, or is or was related by marriage (other than by the individual's spouse, former spouse, brother-in-law, or sister-in-law); or [(C)] *(iii)* an injury that is not the result of physical abuse*; or*

(B) the infliction of physical injury upon, or the sexual abuse of, an unmarried child under the age of 16 by the child's parent, guardian, or other adult with whom the child is living;

SPECIFICATION

V. Authorize the use of grant funds for the minor remodeling of facilities for use as temporary shelters.

DRAFT SECTION

SEC. ___. USE OF FUNDS FOR TEMPORARY SHELTERS.

Paragraphs (3), (4), and (5) of section 3 of the Domestic Violence Prevention Act are respectively redesignated as paragraphs (4), (5), and (6), and there is added after paragraph (2) a new paragraph as follows:

"(3) the term 'activities relating to domestic violence' includes the minor remodeling of facilities to enable them to be used as temporary shelters;"

RAMSEYER

DEFINITIONS

Sec 3. As used in this Act—

(1) * * *

* * *

(3) the term "activities relating to domestic violence" includes the minor remodeling of facilities to enable them to be used as temporary shelters;

[(3)]*(4)* the term "Secretary" means the Secretary of Health and Human Services.

[(4)]*(5)* the terms "State" and "States" include the District of Columbia, the Commonwealth or Puerto Rico, Guam, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands; and

[(5)]*(6)* a word importing the feminine gender includes the masculine as well.

SPECIFICATION

VI. Add a provision that bars the making of section 7 grants or contracts above $25,000 without the approval of the National Advisory Council on Family Violence and Child Abuse.

DRAFT SECTION

SEC. ___. APPROVAL BY NATIONAL ADVISORY COUNCIL.

Section 7 of the Domestic Violence Prevention Act is amended by adding at the end a new subsection as follows:

"(f) The Secretary shall not award a grant or enter into a contract, under this section, in excess of $25,000, unless that grant or contract has been approved by the National Advisory Council on Family Violence and Child Abuse."

RAMSEYER

RESEARCH AND DEMONSTRATION PROJECTS

Sec. 7. (a) * * *

* * *

(f) The Secretary shall not award a grant or enter into a contract, under this section, in excess of $25,000, unless that grant or contract has been approved by the National Advisory Council on Family Violence and Child Abuse.

SPECIFICATION

VII. The definition of "State" should be updated. The reference to the Trust Territory is now obsolete. However, the definition should continue to include Palau, at least until Congress adopts the resolution implementing the Compact of Free Association between Palau and the United States.

DRAFT SECTION

SEC. ___. DEFINITION OF STATE.

Paragraph (5) of section 3 of the Domestic Violence Prevention Act (as that paragraph is redesignated by section ___ of this Act) is amended—

(1) by inserting "(A)" after "(5)",

(2) by striking "the Trust Territory of the Pacific Islands; and" and inserting "the Commonwealth of Palau, except;" and

(3) by adding at the end a new subparagraph as follows:

"(B) that such term shall cease to include the Commonwealth of Palau after the close of the fiscal year in which there is enacted (or, if later, for which there first becomes effective) a Joint Resolution implementing the Compact of Free Association with Palau, P.L. 99-658; and".

RAMSEYER

DEFINITIONS

Sec. 3. As used in this Act—

(1) * * *

* * *

(5)*(A)* the terms "State" and "States" include the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, and [the Trust Territory of the Pacific Islands; and] *the Commonwealth of Palau, except;*

(B) that such term shall cease to include the Commonwealth of Palau after the close of the fiscal year in which there is enacted (or, if later, for which there first becomes effective) a Joint Resolution implementing the Compact of Free Association with Palau, P.L. 99-658; and

APPENDIX K

DRAFTING EXERCISE
AMENDMENTS TO THE DOMESTIC VIOLENCE PREVENTION ACT
Annotated Draft Bill

A B I L L [1]

To amend the Domestic Violence Prevention Act[2] to authorize increased appropriations to carry out the Act for an additional three years, to establish a minimum State grant, to provide uniform standards of eligibility for services, to assist abused children, to ensure review of Federal grants and contracts by a National Advisory Council, and for other purposes.[3]

Be it enacted[4] by the Senate and House of Representatives of the United States of America in Congress assembled,[5] That this Act may be cited as the "Domestic Violence Prevention Amendments of 1990".[6]

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1. This bill is in the form in which a federal agency or private organization might submit it for introduction. Its style conforms to the current practice of the Office of the Legislative Counsel, U.S. House of Representatives, as set forth in its *Style Manual; Drafting Suggestions for the Trained Drafter,* February 28, 1989. When printed, the bill will have line numbers. When a bill is passed by one House it will be reprinted for the other House with a heading that reads, "An Act." It is an "Act" of one House. A bill is one of four types of measures on which either House may take action. The remaining three are the joint resolution, the concurrent resolution, and the simple resolution. Only the first of these can become law.

2. If the Domestic Violence Prevention Act had been previously amended, the better practice (one that avoids confusion) is nevertheless to continue to refer to the "Domestic Violence Prevention Act", not the "Domestic Violence Prevention Act, as amended".

3. This is a "title" or "long title" of a bill, sometimes called a "preamble". In Pennhurst v. Halderman, note 14, the Supreme Court observed "...that the title of an Act 'cannot enlarge or confer powers'." Beyond describing the bill, a long title might influence the committee to which a bill is referred. Long titles commonly conclude with the phrase "and for other purposes." As far as is known, it would make no legal difference if the phrase were omitted. Note that the title of an appropriations Act is expressly set out by 1 U.S.C. 105. "The style and title of all Acts making appropriations for the support of Government shall be as follows: 'An Act making appropriations (here insert the object) for the year ending September 30 (here insert the calendar year)'."

4. Note that Congress "enacts" a law; the President "approves" it. Notwithstanding this rather technical distinction, a bill is treated as "enacted into law" on the date of presidential approval. If this were a resolution, "Be it enacted" would be replaced with the phrase "Be it resolved".

5. This is the enacting clause. Its form is prescribed by 1 U.S.C. 101. Compare the resolving clause for resolutions (prescribed by 1 U.S.C. 102). The law provides, "No enacting or resolving words shall be used in any section of an Act or resolution of Congress except the first." Therefore, the enacting clause is considered to be in the first section.

6. This is a short title. Its purpose is to simplify cross references to the bill in other Acts and documents. (How well do you think that purpose is served by the short title: "The Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963"?) The year of enactment is commonly used in order to distinguish a set of amendments from past and future amendments. Note that the year of enactment is a calendar year. Thus, the DVP amendments, although they will become effective at the beginning of fiscal 1991, will be referred to as the DVP Amendments of 1990, because fiscal 1991 begins on October 1, 1990. Use of the year of enactment in the short title of a free-standing statute (for example, the Higher Education Act of 1965) is a nuisance. The better practice is not to use it. (See, for example, the Social Security Act.)

SECTION 1.[7] REFERENCES IN ACT.[8]

Except as otherwise specifically provided, whenever in this Act an amendment is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Domestic Violence Prevention Act.[9]

SEC. 2. EXTENSION OF APPROPRIATIONS AUTHORIZATION

(a)[10] EXTENSION OF AUTHORIZATION.—Section 4(a) is amended by inserting before the period at the end ", and $20,000,000 for fiscal year 1991, and such sums as may be necessary for each of the two succeeding fiscal years".[11]

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7. "Each section shall be numbered, and shall contain as nearly as may be, a single proposition of enactment." 1 U.S.C. 104. If a bill is long and complex, the drafter may precede this section with a table of contents. The bill may also contain an introductory section setting forth congressional findings or a statement of the bill's purpose. The findings and statement of purpose are of little or no legal value in the federal system, and are often best omitted. (An exception: when congressional findings of fact (to which the courts traditionally give weight) would bolster a judicial determination that the bill, when enacted, is constitutional. Example: a bill to regulate an intrastate activity might appropriately contain congressional findings that the activity burdens interstate commerce.)

Notice that this section is designated as section 1. As you may recall from note 5, the enacting clause is, by law, always contained in the "first section". Therefore, the first numbered section of many statutes is section 2 ("Sec. 2."). This is confusing. The better practice is probably to have the first numbered section designated as section 1, even though it is not the "first" section. (If the first numbered section is within a title of a bill, say title I, then it will be numbered "Sec. 101", and the confusion will disappear.) As it appears in a bill preceding the section, the word "section" appears in full before section 1 (*i.e.*, "SECTION 1."), but is always abbreviated for later sections (*e.g.*, "SEC. 2.").

8. In the older drafting practice, this side heading would be a caption that appeared over the section and preceded the section number. Most statutes still appear in this form in the Statutes-at-Large of the United States. Among the more obscure points that drafters delight in debating is whether the caption, in that case, is part of the section. In other words, if an amendment provides, for example, "Section 1 is amended to read as follows", is it necessary to include a new caption, or will the existing caption survive the amendment?

9. This is a common type of provision, sometimes combined in a section that also specifies the act's short title.

10. The major subdivisions of a section are subsections. They appear as small letters in parentheses ("(a)", etc.). Because subsections set forth a complete thought—a full sentence at a minimum—paragraph designators replace subsection designators if the principal subdivisions of a section are merely parts of a tabulated sentence—i.e., a sentence whose parts are set out as indented clauses or phrases—even though the subdivision is the first division after the section number. Typically, this occurs in definitional sections, even where the subdivision is technically a complete sentence. See, for example, section 3 of the Domestic Violence Prevention Act.

11. Consider the following alternative formulations for subsection (a):

> (a) Section 4(a) is amended by striking "$16,000,000 for fiscal year 1988" and inserting in lieu thereof "$20,000,000 for fiscal year 1991".
>
> [OR]
>
> (a) Section 4(a) is amended to read as follows:
>
> "(a) For the purpose of carrying out this Act, there are authorized to be appropriated $20,000,000 for fiscal year 1991, and such sums as may be necessary for each of the two succeeding fiscal years."

Each of these alternatives is legally equivalent to the text section. What are their advantages and disadvantages?

(b) CONFORMING AMENDMENT.—Subsections (a) and (b) of section 11[12] are each amended by striking "1990" and inserting[13] "1993".[14]

SEC. 3. MINIMUM STATE GRANT.

Section 5(a)(2) is amended by striking "The Secretary shall allot such available sums" and inserting "From such available sums the Secretary shall first allot to each State the amount of $100,000. The Secretary[15] shall then allot the remainder of those sums".[16]

SEC. 4. ELIGIBILITY FOR SERVICES.

(a) UNIFORM DEFINITION OF DOMESTIC VIOLENCE.—Section 3(1) is amended to read as follows:[17]

"(1) The term 'domestic violence' means the threat of physical injury to, or the infliction of physical injury upon, an individual by one to whom that individual is or has been married, or with whom that individual is or has been living; except that the term does not include (A) a threat to, or infliction of injury upon, an individual of the same sex; or (B) a threat or infliction of injury

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12. An alternative reference would be "Sections 11(a) and 11(b) are amended ...". An alternative approach would be "Section 11 is amended by striking '1989' wherever it may appear and inserting '1992'."

13. In the older practice this would read "...by striking out '1990' and inserting lieu thereof '1993'."

14. Why does the underlying statute, the Domestic Violence Prevention Act, contain both an appropriations authorization (section 4(a)) and a sunset provision (section 11)? What special problems will a sunset provision cause at the end of a fiscal year when a continuing resolution is adopted? Can an appropriations authorization and a sunset provision be extended in the same bill? In other words unless §11 of the DVP Act has been previously amended, would not §2(a) of the DVP Amendments fall to a point of order on the House floor?

15. In the older practice, this sentence would have begun, "He shall then allot...". What if the Secretary were a woman? The answer is supplied by 1 U.S.C. 1: "...words importing the masculine gender include the feminine as well". In recent years, legislative drafters have been pressed by groups concerned with the invidious effects of gender-based discrimination to avoid the use of masculine personal pronouns in references intended to include women. The suggested alternatives usually involve either writing in the plural or using constructions such as "his or her". Neither alternative is especially satisfactory. The former leads to ambiguity; the latter to sentences so ludicrous as to suggest an ironic intent. (See, for example, the Somerset Maugham passage from THE SUMMING UP, rewritten in Strunk and White's THE ELEMENTS OF STYLE (3rd ed. pp. 60-61) to "affirm equality of the sexes".) Sometimes, as here, the problem is easily handled by simply repeating the proper noun.

16. An amendment may strike, strike and insert (which includes amendments in the form "Section __ is amended to read as follows:"), or insert. An amendment should not insert and strike; that is, you need to create a hole before you put something in it.

17. The use of the phrase "amended to read as follows" signals that the new language deals with subject matter similar to that dealt with by the language it replaces. If the language deals with a different subject matter, use the phrase "Section __ is repealed. There is inserted after [name the preceding section] a new section ___ as follows." Such would be the case, for example, if the "supplement not supplant" paragraph (section 6(a)(6) of the DVP Act) were to be replaced by a new paragraph, bearing the same number, but dealing with state policies governing applications by beneficiaries.

by one to whom the individual is related by blood, or is or was related by marriage (other than by the individual's spouse, former spouse, brother-in-law, or sister-in-law); or (C) an injury that is not the result of physical abuse.".[18]

(b) CONFORMING AMENDMENT.—Paragraph (3) of section 6(a) is repealed.[19]

SEC. 5. EXPANSION OF PROGRAMS TO INCLUDE CHILD ABUSE PREVENTION AND TREATMENT ACTIVITIES.

(a) INCLUSION OF CHILD ABUSE IN DEFINITION OF DOMESTIC VIOLENCE.—Section 3(1) (as amended by section 4 of this Act) is further amended--

(1)[20] by inserting a dash after "domestic violence means",

(2) by adding, following the dash, a new subparagraph (A) containing the remaining text of the section, amended to redesignate clauses (A), (B), and (C), as clauses (i), (ii), and (iii), respectively,

(3) by striking the period at the end of that section and inserting "; or", and

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18. Note the use of the period outside the quotes, even though a period is used inside the quotes. Current practice makes this optional, and many drafters make the period inside the quotes do double duty (as in normal typographical practice). My own view is that the use of the second period is desirable, because it eliminates any question that the period inside the quotes is in fact intended to be part of the amendment, and is not simply a bow in the direction of customary typography.

19. The drafter has chosen not to redesignate the remaining paragraphs of section 6(a). When do you think redesignation is desirable and when undesirable?

20. Subsections are divided into numbered paragraphs ("(1)", "(2)", etc.) which are tabulated, but which, grammatically, need not be paragraphs or even sentences. Paragraphs are divided into tabulated lettered subparagraphs ("(A)", "(B)", etc.) that, like paragraphs, may be clauses of a sentence or even phrases. Subparagraphs are divided into clauses bearing small roman numerals ("(i)", "(ii)", "(iii)", "(iv)") that are, in turn, divided into clauses (or, if you prefer, "subclauses") bearing large roman numerals ("(I)", "(II)", etc.). Clauses follow the same tabulation and grammatical rules as paragraphs and subparagraphs. Sometimes the clarity of a phrase can be improved by alphanumeric designation without the need for tabulation (as in the text paragraph). Where enumerated matter in a subdivision does not appear in tabular form, as in the text paragraph, or in subdivisions of sections 6(a)(4) and 6(a)(6) of the Domestic Violence Prevention Act, the enumerated matter is referred to merely as a "clause" regardless of its alphanumeric designation.

(4) by adding at the end of that section a new subparagraph as follows:

"(B) the infliction of physical injury upon, or the sexual abuse of, an unmarried child under the age of 16 by the child's parent, guardian, or other adult with whom the child is living.".

(b) FINDINGS.—Section 2(a) is amended—

(1) by inserting ", and that a substantial number of children are physically or sexually abused by their parents or guardians" after "injured by their spouses", and

(2) by inserting "and, in the case of children, sexual crimes," after "assaults and batteries".

SEC. 6. APPROVAL BY NATIONAL ADVISORY COUNCIL.

Section 7 is amended by adding at the end a new subsection as follows:

"(f) The Secretary shall not award a grant or enter into a contract, under this section, in excess of $25,000, unless that grant or contract has been approved by the National Advisory Council on Family Violence and Child Abuse.".[21]

SEC. 7. USE OF FUNDS FOR TEMPORARY SHELTERS.

Paragraphs (3), (4), and (5) of section 3 are respectively redesignated as paragraphs (4), (5), and (6), and there is added after paragraph (2) a new paragraph as follows:

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21. The specification for this provision read, "Add a provision that bars the making of section 7 grants or contracts above $25,000 without the approval of the National Advisory Council on Family Violence and Child Abuse." Does this mean approval is required if an individual grant or contract is above $25,000, or when the aggregate of grants or contracts exceeds $25,000? By drafting the provision in the singular, the drafter has eliminated the ambiguity. "[W]ords importing the singular include and apply to several persons, parties, or things". 1 U.S.C. 1.

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"(3) the term 'activities relating to domestic violence'[22] includes the minor remodeling of facilities to enable them to be used as temporary shelters;".

SEC. 8. DEFINITION OF STATE.

Paragraph (5) of section 3 (as that paragraph is redesignated by section 7 of this Act) is amended—

(1) by inserting "(A)" after "(5)",

(2) by striking "the Trust Territory of the Pacific Islands; and" and inserting "the Commonwealth of Palau, except;" and

(3) by adding at the end a new subparagraph as follows:

"(B) that such term shall cease to include the Commonwealth of Palau after the close of the fiscal year in which there is enacted (or, if later, for which there first becomes effective) a Joint Resolution implementing the Compact of Free Association with Palau, P.L. 99-658; and".

22. The single quotation marks (') enclosing "activities [etc.]" will appear in the law as double quotation marks (").

SEC. 9. EFFECTIVE DATE[23]

This Act is[24] effective with respect to appropriations under section 4(a) for fiscal years beginning after fiscal year 1990.[25]

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23. Notice that the effective date provision is not in quotes. In other words, there will be no indication in the underlying statute, the Domestic Violence Prevention Act, when the amendments made by the Domestic Violence Prevention Amendments of 1990 will become effective. For this reason, in cases in which the effective date of a provision is highly complex and is phased in over a number of years during which the superseded material remains in varying degrees effective, a common practice is to include the effective date in the text of the amendments to the underlying statute. This simplifies the reader's job in determining the time and circumstances governing an effective date, but can vastly complicate the underlying statutory provision. (For an elaborate example of incorporating effective date provisions into the amendatory text, see section 215 of the Social Security Act, 42 U.S.C. 415.)

24. The use of "is" is an example of drafting in the indicative mood. Various commentators on drafting have tried, over the years, to persuade drafters to use the indicative rather than the imperative mood, even though the language of statute is a command. For example, "This Act is effective upon the close of 180 days after the date of enactment", is preferred to "This Act shall be effective upon the close of 180 days after the date of enactment". Similarly, "an applicant is entitled to obtain ..." is better than "An applicant shall be entitled to obtain ...". Title 5 of the United States Code abounds in illustrations of the technique.

Where the indicative is clear, it may be used. There is always the risk, nevertheless, that what is intended as a command will, in the indicative, look merely like a description. Section 101 of title 5, for instance, reads:

> The Executive departments are:
> The Department of State.
> The Department of the Treasury.
> [etc.]

What is the section's purpose? Is it intended to establish the departments (as would be the case if it read, "The Executive departments shall be . . .") or merely to announce their existence? In this example, either the imperative should be used or the provision omitted as unnecessary.

25. In a grant statute, where amendments are commonly intended to go into effect with respect to subsequently enacted budget authority, the technique of tying the effective date to the new budget authority avoids confusion. A more common effective date is a date certain (e.g., "This Act is effective for fiscal years beginning after fiscal year 1990.") A statute is effective upon enactment, therefore an effective date provision is unnecessary if amendments are to begin operating on the date that the bill becomes law.

SOCIAL SECURITY NUMBER DRAFTING EXERCISE—PART I

Background and Explanation of a Proposal to Regulate the Use of Social Security Account Numbers[1]

The Social Security Administration ("SSA"), an agency of the United States Department of Health and Human Services ("HHS"), assigns a unique social security account number (the "SSN") to every individual in the United States who earns income, whether as an employee or as a self-employed person. SSA uses the number to identify an account that it maintains in the name of the individual, and to which it credits amounts that are regularly deducted from the individual's earnings to pay for old-age, disability, and survivor benefits. The SSN is also used by the federal government, and by state governments as well, to identify an individual's federal and state tax records. In addition, many other federal, state, local, and even private uses of the SSN have sprung up over recent years. Currently, if requested, SSA assigns SSN's to children and other categories of individuals outside of the work force.

Although a provision of existing law, popularly called the "Goldwater amendment," does deal with SSN use, it is generally thought to be inadequate.[2] Many believe that if every public and private organization in the United States chose to use the SSN as the means of identifying individuals, the enormous growth of automated data systems in recent years would make possible the assembly in one place of a great deal of information about the individual without his knowledge or consent, and possibly to his detriment. In response to this concern, the Secretary of Health and Human Services, who directs HHS, appointed a distinguished group of public officials and private citizens to study what was widely perceived as a growing threat to personal privacy, and to make recommendations.

In its report, the group recommends that future public and private use of the SSN be governed by five principles:

- SSN's should be used only when needed to carry out requirements imposed by the federal government.
- Federal departments and agencies should require or promote that use only in compliance with express legislative mandate.
- Congress should allow SSN use only when that use is to be accompanied by safeguards against abuse.
- No individual should be forced to disclose his SSN, nor should it be used without his consent, unless the previous three foregoing principles have been observed.
- An individual should be informed by those asking him to disclose his SSN whether he is legally obliged to do so, and how they intend to use his number.

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1. The events described in this part are a simplified and fictionalized account of an actual legislative proposal developed by the Department of Health, Education, and Welfare, partly in response to the issuance of RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS, Report of the Secretary's Advisory Committee on Automated Personal Data Systems, U.S. Department of Health, Education, and Welfare, July 1973 (DHEW Publ. No. (OS) 73-94), chapter VIII. The proposal was not submitted to Congress.

2. Section 7 of the Privacy Act of 1974, 88 Stat. 1896. Section 428 of the Medicare Catastrophic Coverage Act of 1988, P.L. 100-360, added a new section, section 1140, to the Social Security Act to prohibit a person from falsely advertising that an item is authorized or endorsed by the Social Security Administration. Although the section does not deal with the use of social security numbers as such, a portion of the act overlaps a provision in the exercise intended to bar private use of the social security number for commercial purposes. To avoid complicating the exercise with conforming amendments, we shall assume that the events described in the exercise occurred prior to the enactment of the Medicare Catastrophic Coverage Act.

Accordingly, the group proposes the enactment of federal legislation to provide:

(1) that an individual have the right to refuse to disclose his SSN to any individual or organization that does not have specific authority under a federal statute to request it;

(2) that an individual have the right to redress if his lawful refusal to disclose his SSN results in the denial of a benefit, or the threat of denial of a benefit;

(3) that, should an individual, in response to the threat of loss of benefits, disclose his SSN under protest to an unauthorized requestor, the individual shall not be considered to have forfeited his right to redress; and

(4) that any oral or written request made to an individual for his SSN be accompanied by a clear statement of whether or not compliance with the request is required by federal statute, and, if so, citing the specific legal requirement.

After reviewing group's report, the secretary directs his staff to draft a bill, for submission to Congress, that would incorporate the following elements:

- The bill shall make it unlawful for any federal, state, or local government agency to deny to any individual, because of his refusal to disclose his SSN, any benefit to which the individual would otherwise be entitled.
- The bill shall make unlawful the disclosure of an individual's SSN without his consent (or the false representation of a number to be an SSN).
- The bill shall prohibit various forms of commercializing the SSN (or using for commercial purposes numbers falsely represented to be SSN's).
- The bill shall subject a violator of its prohibitions to a fine of $5,000, and shall allow private persons to sue in district courts of the United States to enjoin violations.
- Current law limiting SSN use—the Goldwater amendment—is to be repealed.

These instructions leave open the question of what SSN uses the bill is to exempt from these rules. The SSN had originally been devised to serve as an identifier in the administration of the social security system. That use had not, in itself, proven objectionable, and in any event must be exempt from any prohibitions against SSN use. With respect to additional public or private SSN uses, however, there had evolved no governmental procedure for weighing their desirability against the threat to privacy that the uses might pose. Instead, federal agencies had instituted various public uses of the SSN by regulation, at least partly in response to a 1943 Executive Order of President Roosevelt, "Numbering System for Federal Accounts Relating to Individual Persons," directing them to use the SSN for federal records systems. These regulations were typically issued under statutes that did not expressly authorize those uses.

The secretary decides to accept a modified version of the advisory group's recommendation that an individual have the right to refuse to disclose his SSN to any person who does not have specific authority under a federal statute to request it. Accordingly, the secretary agrees to exempt from the bill's prohibitions three categories SSN use:

(1) Uses of the SSN by programs under the Social Security Act.[3]

(2) Uses of the SSN expressly authorized or required by statute at the time of the proposed bill's enactment.

(3) Uses of the SSN by private and other non-federal SSN systems, even when not to carry out a federal purpose.

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3. In addition to the program for which the SSN was originally created—the Old-Age, Survivors, and Disability Insurance Program—programs under the Social Security Act include a wide range of health and welfare activities, many of which (for example, the program of benefits for the unemployed) are actually administered by the states under federal guidance.

The last exemption goes beyond the advisory group's recommendations, which favor limiting SSN use to federal purposes. Nevertheless, the secretary decides to permit private use for private purposes, but only on two conditions:

- that the bill forbid a private organization from denying any benefit to, or otherwise acting adversely against, an individual who refuses to disclose his SSN; and
- that each private SSN solicitation be accompanied by a notice that the individual is not legally required to disclose his SSN, and that no benefit may be denied to, and no adverse action may be taken against, anyone who declines to disclose it.

The secretary would also permit state and local public agency use of the SSN for non-federal purposes, but only if authorized by a state statute that expressly allows for its use in the protection of the safety, health, or welfare of an individual, or in the administration of the criminal justice system of the state, or to raise revenue. However, the bill must condition this use upon state enactment of a statute—

- that sets forth the intended state and local SSN uses with particularity;
- that prohibits intra-state SSN interchanges of information except as necessary to implement the uses specified by the state statute;
- that permits individuals to inspect and correct records compiled as the result of the statute's implementation; and
- that establishes the appropriate remedies and penalties for its violation.

States using the SSN prior to the bill's enactment—uses exempt under the Goldwater amendment—would be given until 30 days after the close of the first session of the state legislature that began on or after the date of enactment of the bill to come into compliance.

Finally, as a general condition of excepted use, the draft bill is to require that each SSN solicitation authorized or required by federal or state statute be accompanied by notice to the person solicited of the authority for the request, and the uses that could be made of the number solicited.

In response to the secretary's instructions, HHS policy officials draw up a set of legislative specifications based on his decisions. You, a legislative drafter, are assigned to translate these specifications into a draft bill.

SOCIAL SECURITY NUMBER DRAFTING EXERCISE—PART II

MEMORANDUM

TO: Mr. Wilbur Altmeyer

FM: Mr. John Policymaker

SUBJ: Specifications for the SSN draft bill.

Here are the specifications for the SSN draft bill. I am sorry for the delay but, as you know, we had difficulty resolving some of the issues. In order to get the bill to Congress before the scheduled privacy hearings, we will need the bill by Friday.

I. Make it unlawful for any federal, state, or local government agency, or any private person, to deny to any individual, because of his refusal to disclose his SSN, any benefit to which the individual would otherwise be entitled.

II. Make it unlawful for anyone to disclose an individual's SSN without his consent.

III. Prohibit private use of an SSN for commercial purposes.

IV. Make violations of the bill a misdemeanor, subject to a $5000 fine, but only if the violator knows that his conduct is unlawful.

V. Authorize the United States district courts to entertain private suits for mandatory relief.

VI. Exempt programs under the Social Security Act.

VII. Exempt other SSN uses expressly authorized or required by federal statute at the time of the bill's enactment.

VIII. Exempt private record systems, but only if their requests to individuals for their SSN's is accompaned by notice that no adverse action will be taken against anyone who fails to disclose his SSN.

IX. Permit state and local use of the SSN if authorized by a state statute that expressly provides for its use in the protection of the safety, health, or welfare of an individual, or in the administration of the criminal justice system of the state, or to raise revenue. Require the state statute to set forth the intended uses with particularity. Prohibit intrastate interchanges of SSN information except as necessary to implement the specified uses, permit individuals to inspect and correct records compiled as the result of the statute's implementation,

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and establish appropriate remedies and penalties for violation.

X. Give a state 30 days after the close of the first session of the state legislature that begins on or after the date of the bill's enactment to come into compliance, if the state is one that used the SSN prior to the bill's enactment.

XI. Require that each SSN request under a federal or state statute be accompanied by notice of the authority for the request and the uses that could be made of the number.

SOCIAL SECURITY NUMBER DRAFTING EXERCISE—PART III

Colloquy Between the Drafter (D) and the Policymaker (P)

This colloquy is the substance of a meeting between the drafter and the policy maker, called at the drafter's request in order to clarify and refine the specifications of the SSN proposal, drawn from part II. Each specification is identified by a roman numeral, and immediately precedes the relevant discussion.

I. MAKE IT UNLAWFUL FOR ANY FEDERAL, STATE, OR LOCAL GOVERNMENT AGENCY, OR ANY PRIVATE PERSON, TO DENY TO ANY INDIVIDUAL, BECAUSE OF HIS REFUSAL TO DISCLOSE HIS SSN, ANY BENEFIT TO WHICH THE INDIVIDUAL WOULD OTHERWISE BE ENTITLED.

1. **D.** Do you wish to bar adverse action against an organization that refuses to disclose an individual's SSN, or against an individual who refuses to disclose the SSN of some other individual?

   P. Yes, in both cases.

2. **D.** What if an individual is not asked to disclose his SSN but merely to agree to, for example, his employer's disclosing it?

   P. The same policy should apply, whether someone is asked to disclose his SSN or to consent to someone else's disclosing it.

II. MAKE IT UNLAWFUL FOR ANYONE TO DISCLOSE AN INDIVIDUAL'S SSN WITHOUT HIS CONSENT.

3. **D.** If consent to a disclosure is obtained by threat or fraud, should the consent still be treated as making the disclosure lawful?

   P. No. But of course we don't want to punish someone who discloses a social security number in the face of a threat, or who is somehow tricked into it.

   D. I think the way to handle that is simply to make it illegal to ask for or obtain the SSN that way, rather than to bar its disclosure.

   P. I agree.

4. **D.** What about the case of someone who is paid to disclose a number, his own or someone else's?

   P. Let me ask you a legal question. Is an SSN property? In other words, if an individual now "owns" his SSN, I hesitate to interfere with his disposing of it as he pleases.

   D. If the SSN had been privately developed it might have been copyrighted. As a number developed by the government for its own use, however, it is not copyrighted and, in any event, does not belong in a legal sense to the person whom it identifies. As a matter of constitutional law, use of the SSN can be regulated under the authority of the Commerce Clause or a clause of the Constitution that allows the federal government to take any action that is necessary and proper in aid of its direct powers. One of the direct powers, in this case, is the taxing power, because the Federal Insurance Contributions Act imposes a tax that is part of the social security system.

   P. In that case, I think it should be made unlawful for a company, say, to buy social security numbers from another company, where the affected individuals do not consent. I have more trouble if it is the holder of the number who is paid. On balance, though, I think our policy of discouraging the use of the SSN as a standard universal identifier is best served if we prohibit buying their disclosure, even from someone whose number it is.

5. D. What about the disclosure of a number, but not the name of the individual to whom it belongs?

P. Does that happen?

D. I can visualize situations in which a number is disclosed in association with, perhaps, only an individual's address; or possibly a number is falsely represented as being someone's SSN when it is in fact someone else's SSN.

P. Let's prohibit that.

III. PROHIBIT PRIVATE USE OF AN SSN FOR COMMERCIAL PURPOSES.

6. P. But let's also cover the more common situation: the representation of a number as an SSN when it isn't.

D. As a sales device, perhaps?

P. Yes, such as including in a new leather wallet a card that purports to be a social security card with a number on it. A wallet manufacturer did that, once, and, believe it or not, a lot of people who bought the wallet thought that they had been assigned the social security number on the card. Until the confusion was straightened out, the Social Security Administration received wage statements on behalf of several hundred people, all for posting to the same fictitious account.

7. D. What about the marketing, as an advertising gimmick, of privately manufactured plastic or metal imitation social security cards with an individual's number on it?

P. Let's preserve the government's monopoly on social security cards.

IV. MAKE VIOLATIONS OF THE BILL A MISDEMEANOR, SUBJECT TO A $5000 FINE, BUT ONLY IF THE VIOLATOR KNOWS THAT HIS CONDUCT IS UNLAWFUL.

8. D. The requirement that a violation is a misdemeanor only if the violator knows that his conduct is unlawful creates an enforcement problem.

P. How do you mean?

D. It makes ignorance of the law a complete defense. Generally speaking, it is very difficult to prove beyond a reasonable doubt that an individual was personally aware of the existence of a provision of law. The only foolproof way is to show that he was prosecuted or convicted of its violation. But an individual runs little risk of that, because a responsible prosecutor will hesitate to file a criminal information against an offender in the absence of solid evidence demonstrating that awareness.

P. But if an individual discloses information contrary to our new law, he will be warned.

D. Perhaps. But that assumes that if that individual violates the Act a second time it will be possible to prove in court that he was warned when he violated the Act the first time. But the prosecutor may be unaware of the earlier violation, because (given the individual's claimed ignorance of the law at that time) that earlier violation probably did not result in an arrest or conviction.

P. What would you suggest?

D. Let's depart from the specifications by omitting the requirement of knowledge.

P. All right, Proceed on that basis, and I'll try to square it with the Commissioner and OS.

V. AUTHORIZE THE UNITED STATES DISTRICT COURTS TO ENTERTAIN PRIVATE SUITS FOR MANDATORY RELIEF.

9. D. What remedies should an individual have if a violation injures him?

P. What remedies are available?

D. First of all, should he be able to recover damages?

P. Yes.

10. D. What about attorneys' fees?

P. Isn't that an unusual remedy?

D. Yes, although there is precedent for it. The reason it might be appropriate here is because the pecuniary loss to support the award of actual damages may be hard to show, and I don't think anyone wants to go so far as to authorize the award of punitive damages. This could leave a plaintiff substantially out of pocket.

P. All right, allow attorneys' fees.

11. D. Injunctive relief?

P. Yes.

12. D. Should these remedies be in addition to (or, at the plaintiff's option, alternative to) state remedies, or should they supersede state remedies?

P. As a legal matter, can we preempt state remedies?

D. In this case, probably so.

P. Well, in any event, I see no good reason to do so.

VI. EXEMPT PROGRAMS UNDER THE SOCIAL SECURITY ACT.

13. D. The Secretary has directed that we exempt from the bill programs under the Social Security Act. Does that include programs under the Act that are not administered by our Department, specifically unemployment insurance [Grants to States for Unemployment Compensation Administration, title III of the Act] and the WIN program [Work Incentive Program, title IV-C of the Act], both of which are administered by the Department of Labor?

P. It certainly includes WIN, because that is closely related to the AFDC [Aid to Families with Dependent Children, title IV-A of the Act] program, which we do administer. I see no reason to exempt the unemployment insurance program, though.

14. D. What about the Black Lung Program, which the Social Security Administration once administered in its entirety? It still has a small piece of the program, although it is not embedded in the Social Security Act but in the Federal Mine Safety and Health Act of 1977?

P. Yes, exempt it.

VII. EXEMPT OTHER SSN USES EXPRESSLY AUTHORIZED OR REQUIRED BY FEDERAL STATUTE AT THE TIME OF THE BILL'S ENACTMENT.

15. D. Does the decision to exempt an SSN use that is expressly authorized or required by statute mean that a request for, or disclosure of, an SSN is exempt only if expressly authorized or required? or does it mean that a request for, or disclosure of, an SSN is exempt merely if it is in aid of a use that is expressly authorized or required (even though the request or disclosure is not)?

P. You'd better give me an example.

D. Well, let's say that a statute, other than an exempt statute such as title II of the Social Security Act, authorizes a federal agency—perhaps the Labor Department in its administration of unemployment insurance, for example—to use the SSN as an identifier in a system of records, but doesn't say anything about how the agency is supposed to obtain the SSN, or whether it can disclose the number to state agencies that administer state unemployment

insurance programs. Can the agency require an individual to provide it with the number, and may it disclose the number to a state agency?

P. The Secretary intends that all of those uses be reviewed within the executive branch and by Congress. To ensure this, exempt only the statutes that expressly authorize or direct an agency to obtain or disclose the SSN. Those are the only cases in which we are sure that the issues were considered by Congress and the executive branch. As for other agencies, when we send the bill to the President's Office of Management and Budget for clearance they will have a chance to argue for their inclusion in the exemption.

VIII. EXEMPT PRIVATE RECORD SYSTEMS, BUT ONLY IF THEIR REQUESTS TO INDIVIDUALS FOR THEIR SSN'S IS ACCOMPANED BY NOTICE THAT NO ADVERSE ACTION WILL BE TAKEN AGAINST ANYONE WHO FAILS TO DISCLOSE HIS SSN.

16. D. What is meant by the decision to exempt private systems from the bill? Isn't this inconsistent with the decision to bar private organizations from withholding any benefit on account of an individual's refusal to disclose his SSN?

P. There is no intention to allow private organizations to obtain SSN's by threat or promise from the individuals to whom those numbers are assigned, or to make them waive the notice requirement. The objective is merely to permit requests for, and disclosure of SSN's among employees of an organization in the management of a records system of the organization that uses the SSN.

IX. PERMIT STATE AND LOCAL USE OF THE SSN IF AUTHORIZED BY A STATE STATUTE THAT EXPRESSLY PROVIDES FOR ITS USE IN THE PROTECTION OF THE SAFETY, HEALTH, OR WELFARE OF AN INDIVIDUAL, OR IN THE ADMINISTRATION OF THE CRIMINAL JUSTICE SYSTEM OF THE STATE, OR TO RAISE REVENUE. REQUIRE THE STATE STATUTE TO SET FORTH THE INTENDED USES WITH PARTICULARITY. BAR INTRASTATE INTERCHANGES OF SSN INFORMATION EXCEPT AS NECESSARY TO IMPLEMENT THE SPECIFIED USES, PERMIT INDIVIDUALS TO INSPECTAND CORRECT RECORDS COMPILED AS THE RESULT OF THE STATUTE'S IMPLEMENTATION, AND ESTABLISH APPROPRIATE REMEDIES AND PENALTIES FOR VIOLATION.

[No questions]

X. GIVE A STATE 30 DAYS AFTER THE CLOSE OF THE FIRST SESSION OF THE STATE LEGISLATURE THAT BEGINS ON OR AFTER THE DATE OF THE BILL'S ENACTMENT TO COME INTO COMPLIANCE, IF THE STATE IS ONE THAT USED THE SSN (UNDER THE GOLDWATER AMENDMENT) PRIOR TO THE BILL'S ENACTMENT.

[No questions]

XI. REQUIRE THAT EACH SSN REQUEST UNDER A FEDERAL OR STATE STATUTE BE ACCOMPANIED BY NOTICE OF THE AUTHORITY FOR THE REQUEST AND THE USES THAT COULD BE MADE OF THE NUMBER.

[No questions]

SOCIAL SECURITY NUMBER DRAFTING EXERCISE—PART IV

Outline of SSN Bill

SECTION 1. USES OF SOCIAL SECURITY ACCOUNT NUMBER PROHIBITED.

(a) Prohibitions and Penalty for Violation:

(1) Inflicting injury for failure to disclose.
(2) Solicitation by threat or promise.
(3) Solicitation without disclaimer.
(4) Disclosure without consent.
(5) False portrayals of cards or numbers.

(b) Damages in U.S. District Court for Violation of Subsec. (a).
(c) Injunctive Relief in US " " " " " " "
(d) Non-exclusivity of Penalties & Remedies.

SEC. 2. EXEMPTIONS FROM SECTION 1(A).

(1) Actions by U.S. to administer SSA & related statutes.
(2) Other actions to comply with SSA & related statutes.
(3) Other expressly authorized or required U.S. requests.
(4) State requests under State statutes in compliance with § 4.
(5) Intra-organization dissemination.

SEC. 3. REQUIREMENTS OF STATE STATUTE.

(1) Request for disclosure only by State officials re State functions.
(2) Specifies (A) program and (B) SSN use.
(3) Bars unauthorized use or disclosure.
(4) Individual access to and correction of records.
(5) Provides remedies.

SEC. 4. TERMS OF NOTICE.

(a) Notice to Accompany Public Request for Disclosure:

(1) Request in accordance with law.
(2) Citation of law.
(3) Penalty for noncompliance.
(4) Purpose of request; use of number.

(b) Prohibition Against Penalizing Non-Disclosure.
(c) Intra-Agency Disclosure.

SEC. 5. APPLICATION OF ACT TO PUBLIC AGENCIES

(a) Application of Act to Federal Agencies.
(b) Application of Act to State and Local Agencies.

SEC. 6. REPEALER.

SEC. 7. EFFECTIVE DATE.

SOCIAL SECURITY NUMBER DRAFTING EXERCISE—PART V

Annotated Draft Bill

[The roman numeral that identifies the specification addressed by a provision is shown in brackets preceding the provision; i.e., [Sp. I]. The arabic numeral that identifies the policy decision reflected by a provision is shown in brackets following the relevant language; i.e., [P. 1]. (See Part III)]

A B I L L[1]

To protect personal privacy by further regulating the solicitation, disclosure, and use of the social security account number.[2]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,[3] That this Act[4] may be cited as the "Social Security Account Number Act".[5]

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1. If the bill passes one House it will be reprinted for the other with a heading that reads, "An Act". This is because the House of Representatives and the Senate "enact" legislation (see the enacting clause that follows the bill's preamble). The legislation becomes law when the president "approves" it, or 10 days pass without his taking action. If the president vetoes the bill, it becomes law only if Congress overrides the veto by a two-thirds vote of those present and voting in each chamber.

2. This is a "title" or "long title" of a bill, sometimes called a "preamble". In Pennhurst v. Halderman, note 14, the Supreme Court observed "...that the title of an Act 'cannot enlarge or confer powers'." Beyond describing the bill, a long title might influence the committee to which a bill is referred. Long titles commonly conclude with the phrase "and for other purposes." As far as is known, it would make no legal difference if the phrase were omitted. Note that the title of an appropriations Act is expressly set out by 1 U.S.C. 105. "The style and title of all Acts making appropriations for the support of Government shall be as follows: 'An Act making appropriations (here insert the object) for the year ending September 30 (here insert the calendar year)'."

3. This is the bill's enacting clause. A federal statute requires that the enacting clause appear in the first section of the bill. It is not the practice to number this section, however.

4. Although the bill is not yet an Act, the practice is to refer to "this Act" not "this Bill".

5. The purpose of a short title is to provide a convenient way to refer to a bill in other laws and documents. The announcement of the year of enactment in a short title is common (for example, the "Social Security Account Number Act of 1989"), but generally unnecessary and even undesirable.

SECTION 1.[6] USES OF SOCIAL SECURITY ACCOUNT NUMBER PROHIBITED.[7]

[Sp. I] (a) PROHIBITIONS AND PENALTIES.—Unless exempted from this subsection by section 2, no person[8] may[9]--

(1) withhold a service or other benefit[10] from, or take an action to the injury of, a person because of that person's failure or refusal to disclose [P. 1] or consent to the disclosure [P. 2] of that person's[11] social security account number (if that person is an individual) or the number of any other individual;[12] or[13]

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6. A statute classified to 1 U.S.C. 103 reads:

> No enacting or resolving words shall be used in any section of an Act or resolution of Congress except the first.

Thus the enacting clause of every bill is necessarily "the first section," even if it is not designated as section 1. For this reason, the first numbered section of many bills is shown as "sec. 2." The more easily understood approach, is to designate the first numbered section as "section one." Note, though, that if the first numbered section of a bill is to be the first section of a bill title—title I, for example—the section number would reflect this, *i.e.*, "section 101."

7. Prior to the first operative section a bill may have a table of contents, congressional findings, a statement of purpose, or all of these. This bill is too short to derive much benefit from such devices.

8. The term "person" is defined by another statute of the United States, unofficially codified as 1 U.S.C. 1. The term includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals. It has been construed to exclude government agencies. Of course, nothing prevents the drafter from defining the term differently for purposes of a specific statute in which it is used. In other words, in the Social Security Account Number Act, the drafter could have included a definition of the term "person" to include a government agency, or, alternatively, to make the term synonomous with "individual".

9. Alternatively, the bill could have read, "a person shall not" or "no person shall" or "it shall be unlawful for any person". Is there any difference among these formulations?

10. Could we merely say "withold a benefit"?

11. A provision of law classified to 1 U.S.C. 1 provides, "words importing the masculine gender include the finimine as well". Therefore, under older drafting practice, the term "his" would be used at this point. Modern practice, as shown by the text, seeks to avoid personal pronouns.

12. What is wrong with the alternative formulation "...that person's failure...to disclose that person's social security number or the social security account number of any individual"? What if the person referred to is a corporation?

13. The use of "or" is intended to show that the conduct described in each of the numbered paragraphs of section 2(a) is prohibited without regard to the remaining paragraphs. It is not necessary to put an "or" at the end of each of these paragraphs; one "or" between the last two paragraphs would suffice. Nevertheless, it is helpful to the reader if the drafter follows the practice of the text.

(2) solicit or obtain the social security account number of an individual by offer of a service or other benefit[14], **[P. 4]** by threat, or by a materially false representation of fact or law;[15] **[P. 3]** or

[Sp. VIII] (3) solicit the social security account number of an individual, unless the solicitation is accompanied by written notice to the person[16] solicited that bears in a conspicuous place in conspicuous and legible type[17] the following statement:

"The disclosure of an individual's social security account number in response to this request is not required by law. Should you fail or refuse to provide that number, the person requesting the number may not, on account of your failure or refusal, deny any benefit or other service to, or take any adverse action against, you or any other person."; or

[Sp. II] (4) disclose the social security account number of an individual (whether or not in association with the name or other identifying characteristics of the individual or any other

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14. What about simply saying "a benefit", inasmuch as the full phrase, "service or other benefit" was used above? The problem is that someone might conclude that the provision is not intended to reach something called a "service".

15. What are the implications of calling for this kind of judgment? Who will make it?

16. Would it be clearer to use the phrase "individual or other person"?

17. Like "materially", referred to in note 15, this will call for a judgment. Compare the considerable detail specified by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331, et seq., respecting the size and placement on cigarette advertising of the various Surgeon General's warnings of the dangers of smoking; e.g., respecting advertising on outdoor billboards, "Each such label statement shall be printed in capital letters of the height of the tallest letter in a label statement on outdoor advertising of the same dimension on such date of enactment. Each such label statement shall be enclosed by a black border which is located within the perimeter of the format required in outdoor billboard advertising of the same dimenson on such date of enactment and the width of which is twice the width of the vertical element of any letter in the label statement within the border."

individual) [P. 5] without that individual's consent;[18] or

[Sp. III] (5) publish[19] a number falsely portrayed[20] as a social security account number, [P. 6] or disseminate a card or other device falsely portrayed as a card or device issued by the United States[21] [P. 7] in connection with the assignment of a social security account number.

[Sp. IV] Violation of this subsection is a misdemeanor punishable by a fine of not to exceed $5,000.[22] [P. 8]

[Sp. V] (b) CIVIL DAMAGES.—A person sustaining injury by reason of an act made punishable by subsection (a) may, without regard to the amount in controversy, bring an action in the district court of the United States for the district in which the defendant resides, is found, has an agent, or transacts business, against a person who committed, or was responsible for the commission, of that act, and recover damages sustained and the

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18. Does this subparagraph allow an individual to consent to the disclosure of his social security number in association with the identifying characteristics of some other individual? That is, should there be a simple prohibition on representing a number to be that of an individual whose number it is not, whether or not there is consent? The answer would be yes, except that the Social Security Act already makes it a felony falsely to represent a number to be the social security account number assigned to him or another, if the intent is to obtain anything of value from the government or any person. See § 208(g)(2) of the Social Security Act, 42 U.S.C408(g)(2).

19. The term "publish" is apparently used, here, in the same sense as it is used in the law of torts, i.e., to make known to any person other than the person libeled. Might the term be misunderstood to mean "to make widely known to be public"?

20. Would the alternative formulation "falsely represented or portrayed" add anything? Often, when a drafter is not sure which word to use, he uses both. This is a very dangerous practice. Why?

21. Would the alternative formulation "issued by an agency or official of the United States" add anything? The answer, I think, is no.

22. The bill does not provide a prison term for violation of its prohibitions. If the sentence merely read, "The violation of this subsection is punishable by a fine of not to exceed $5,000," the penalty could be understood to be civil, not criminal. That is why the offense is specifically designated as a misdemeanor.

cost of suit, [Q. 9] including in the discretion of the court a reasonable attorney's fee. [P. 10][23]

[Sp. V] (c) MANDATORY RELIEF.—An interested person may sue in the United States district court for the district in which the defendant resides, is found, has an agent, or transacts business, for appropriate injunctive relief [P. 11] with respect to an act made punishable by subsection (a).

(d) NON-EXCLUSIVITY OF FEDERAL PENALTIES AND REMEDIES.—The penalties or remedies provided for in this section shall be in addition to and not instead of any other penalties or remedies provided by common law or under any law of a State[24] or the United States. [P. 12]

SEC. 2. EXEMPTIONS.

Section 1(a) does not prohibit[25]—

[Sp. VI] (1) an action taken by an officer or employee of the

23. Title 28 of the United States Code and the Federal Rules of Civil Procedure contain general rules to cover some of that matters dealt with in this subsection. This subsection, and the one that follows, modify these rules for purposes of the bill.

24. Given that the social security account number is generated by the federal government for federal purposes, it is likely that federal law could preempt state law on use of the number. The drafter has therefore made clear the bill's intent not to interfere with state law imposing penalties on SSN uses.

25. Is there any significant difference between "does not prohibit" and "shall not prohibit"? Grammatically, the former is in the indicative mood of the present tense; the latter is in the purposive future tense. Older practice normally used the purpose future for rules and commands. Modern practice prefers to use the indicative mood of the present tense, insofar as practicable. There are some drawbacks to this. Compare these formulations: "There is a Department of Health and Human Services"; "There shall be a Department of Health and Human Services." Title 5 of the United States Code uses the former approach. What is its problem?

United States in the administration of the Social Security Act (other than title III),[26] [Q.13] 42 U.S.C. ch. 7[27] (other than subchapter III), title IV of the Federal Mine Safety and Health Act of 1977, [Q. 14][28] 30 U.S.C. 901 et seq., the Federal Insurance Contributions Act, 26 U.S.C. 3101 et seq., the Self-Employment Contributions Act of 1954, 26 U.S.C. 1401 et seq., or provisions of the Internal Revenue Code of 1954, U.S.C. title 26, related to the administration of those Acts; or

(2) any other action taken by a person for the purpose of complying with a requirement imposed under a statute, or regulation issued under a statute, cited in the preceding paragraph; or

[Sp. VII] (3) a request for, or disclosure of, a social security account number [P. 15] expressly[29] authorized or required by any other statute of the United States; or

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26. Note the blind cross reference ("title III", "title IV",). Blind cross references can be avoided by the expedient of informing the reader what the reference deals with in a parenthetical phrase following the reference, e.g., "title III (unemployment insurance)".

27. You will notice, with respect to the various statutory citations in the bill, that sometimes the "slip" law (e.g., "P.L. 93-579") is cited, sometimes the Statutes at Large (e.g., 88 Stat. 1909), and sometimes only the United States Code (e.g., 42 U.S.C. 208(g)). The reason for the differences have to do with the usefulness of the reference. A "slip" law or P.L. reference is of small value when citing title II of the Social Security Act because the Act has been amended innumerable times.

28. Note that the provisions in question were significantly recast by the Black Lung Benefits Reform Act of 1977, 92 Stat. 95, which extensively amended the Federal Mine Safety and Health Act of 1977 (an Act originally enacted as the Federal Coal Mine Health and Safety Act of 1969, P.L. 91-173, 83 Stat. 742, but redesignated by section 101 of the Act of November 9,1977, P.L. 95-164, 91 Stat. 1290) Would it be proper to cite the Black Lung Benefits Reform Act if all of the provisions we wish to cover were contained in it as amendments to the Federal Mine Safety and Health Act? The answer is no.

29. Why "expressly"? How effective is this in regard to later enacted statutes?

[Sp. VIII] (4) a request for, or disclosure of, a social security account number by an officer or employee of a State (or its political subdivisions) expressly authorized or required by a statute of the State [P. 16] that meets the requirements of section 3; or

(5) the dissemination of social security account numbers among agents or employees of an organization, institution, or agency[30] that utilizes the numbers.

SEC. 3. REQUIREMENTS OF STATE STATUTE.

[Sp. IX]A statute of a State meets the requirements of this section, as provided by section 2(4), if the statute--

(1) provides that the request for, or disclosure of, the social security account number may be made only by an officer or employee of the State (or political subdivision) in connection with a program or activity[31] of the State (or political subdivision) to protect the health or safety, or otherwise provide for the welfare, of an individual, to administer the criminal justice system of the State, or to raise revenue; and

(2) specifies with particularity (A) the program or activity with respect to which such request or disclosure may

30. In some statutes, the term "entity" is used instead of "organization, institution, or agency".

31. Could we simply say "activity"?

be made, and (B) the use to which the social security account number may be put in that program or activity;[32] and

(3) prohibits any request for, disclosure of, or other use of the social security account number by an officer or employee of the State (or political subdivision), including the interchange of the number among components of the government of the State (or political subdivision), except as may be specified in conformity with paragraph (2) or otherwise authorized by this section; and

(4) establishes, or is enacted after the establishment of, a procedure under which an individual may gain access to, and correct, any record or information pertaining to him that is maintained by the State (or political subdivision) in connection with the program or activity specified in conformity with paragraph (2), subject to such exceptions as the State, in the statute, may provide as to information required to be kept confidential for good cause; and

(5) vests jurisdiction in the courts of the State (and, as the State may determine to be appropriate, the political

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32. This paragraph has two untabulated clauses, (A) and (B). A cross reference in another part of the bill to either of them will be to "clause (A)" or "clause (B)" of section 4(2). If the clauses were tabulated, i.e., set out as though they were separate paragraphs, the cross reference would be to "subparagraph (A)" or "subparagraph (B)" of section 4(2). At this point, you may wonder why some tabulated major subdivisions of a section are designated as subsections, i.e., "(a)", "(b)", "(c)", etc., whereas others are designated as paragraphs, i.e., "(1)", "(2)", "(3)", etc. The general practice is to reserve subsection letters for relatively independent tabulated provisions, generally expressed in one or more complete sentences. If the major subdivisions of a section do not meet this criterion, but are tabulated, they are given paragraph numbers. Note that although the subdivisions are then referred to as "paragraphs," they are not true paragraphs, grammatically speaking, but only clauses. See the discussion on technical features of bill structure and internal cross referencing at part 9 of TAB X.

subdivision) to entertain suits or actions[33] for the enforcement of the statute by interested persons; and authorizes the appropriate courts of the State (or political subdivision) to impose a fine for each violation of the statute, up to a maximum amount of not less than $5,000, and provides such additional penalty for violation as the State may determine to be appropriate.

SEC. 4. TERMS OF NOTICE TO ACCOMPANY STATE OR FEDERAL DISCLOSURE REQUEST.

[Sp. XI] (a) NOTICE TO ACCOMPANY REQUEST FOR DISCLOSURE UNDER FEDERAL OR STATE STATUTE.—Except as provided by subsection (c),[34] whoever requests a person to disclose that person's social security number (if that person is an individual), or the social security number of another individual, in accordance with a statute of the United States or any State expressly authorizing or requiring that request or disclosure, shall, in connection with that request, inform that person in writing[35]--

(1) that the request is in accordance with an express provision of Federal or State law (as the case may be),

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33. The language speaks of "actions" and "suits" in order to recognize the distinction, not entirely vanished from state practice, between actions at law and suits in equity.

34. If a general rule is stated, to which exceptions are to be made in later provisions, it is the practice to warn the reader of those exceptions in the general rule, itself.

35. Note that this portion of subsection (e) is cast in the active voice Consider the alternative formulation:

A person who is requested to disclose...shall be informed in writing...

Which formulation is preferable?

(2) of the citation of the section of law in which the authorization or requirement appears,

(3) that compliance with the request is or is not (as the case may be) required by law and, if compliance is so required, of the penalty for non-compliance, and

(4) of the purposes for which the request is made, and the uses that may be made of the number provided in compliance with it.

(b) NONCOMPLYING REQUEST.—Notwithstanding any other provision of law,[36] no person may withhold a service or other benefit from, or take action to the injury of, another person because of a failure or refusal to disclose a social security number, unless that failure or refusal is in response to a request that complies with the preceding paragraph.[37]

(c) INTRA-AGENCY DISSEMINATION.—This subsection does not apply to the dissemination of social security account numbers among officers or employees of a public agency who have need for those numbers in the ordinary course of administering a system of records maintained by the agency that utilizes the numbers.

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36. The phrase "notwithstanding any other provision of law" is a frequently used drafting device. It potentially has several problems. First, it leaves no mark on the "provision of law" that it overrides. A person reading such a provision will not know that an exception has been made to it in some other law. Second, the phrase is a sure sign that the drafter does not fully understand the implications of what he is doing, i.e., he does not know the full scope of the laws that he is overriding. This has its risks. Third, it is unclear to what extent these other provisions of law will continue to be overridden if they are amended subsequent to the enactment of the "notwithstanding" language.

37. In drafting this provision, the drafter should give some thought as to how it will be enforced. How can it be?

SEC. 5. APPLICATION OF ACT TO PUBLIC AGENCIES.

(a) APPLICATION OF ACT TO FEDERAL AGENCIES.—For the purpose of applying this Act to the United States government, there shall be treated as a separate organization, institution, or agency each agency, as that term is defined in 5 U.S.C. 551(1) and 552(e), except that an authority of the Government of the United States that is within or subject to the review of an executive department may not be treated as separate from that department.

(b) APPLICATION OF ACT TO STATE AND LOCAL AGENCIES.—For the purpose of applying this Act to components of the government of a State or its political subdivisions, there shall be treated as a separate organization, institution, or agency each department and agency of State government and each separately identifiable administrative component of each multi-State agency, county, municipality, township, or other unit of local government.

SEC. 6. REPEALER.

Section 7 of the Privacy Act of 1974, Public Law 93-579, 88 Stat. 1909, 5 U.S.C. 552a note,[38] is repealed.[39]

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38. Many drafters prefer not to use any citation other than the short title of an Act (if any) or the public law number. This protects them from typographical errors that are hard to catch, but also makes it slightly more difficult to locate the material cited. Section 7 of the Privacy Act of 1974 reads as follows:

> Sec. 7. (a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.
>
> (2) the provisions of paragraph (1) of this subsection shall not apply with respect to--
>
> (A) any disclosure which is required by Federal statute, or
>
> (B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.
>
> (b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

SEC. 7. EFFECTIVE DATE.

[Sp. X] This Act does not apply to a disclosure of a social security account number required by any State, or its political subdivisions, to which section 7(a)(1) of the Privacy Act of 1974, 5 U.S.C. 552a note, as in effect on the day prior to the date of enactment of this Act, is made inapplicable by section 7(a)(2) of that Act as then in effect, until 30 days following the close of the first session of the Legislature of the State that begins on or after the date of enactment of this Act.[40]

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39. (...continued)
39. A different approach to this drafting assignment would have been to amend section 7 of the Privacy Act to contain all of the new material in place of its current contents. This would have been the least disruptive course, technically speaking. That is, provisions governing the use of the SSN would continue to be contained in a section of a statute where lawyers have become accustomed to looking for law on this subject, and in the context of a statute that deals globally with the subject of privacy from federal intrusions. Had this approach been taken, the entire contents of our bill would have had to be crammed into one section of an act, which would have made it somewhat more difficult to follow.

40. This overcomes the usual rule as to the effective date of an act in the absence of an effective date provision, which is that the act becomes effective on the day that the president approves it, or ten days after presentment to the president without his signature, or, if he disapproves it, on the day the veto is overridden. To better understand the operation of this provision, refer to note 38, which contains the text of section 7 of the Privacy Act of 1974.

SOCIAL SECURITY DRAFTING EXERCISE—PART VI

Representative Student Paper, Annotated

Sec. 7. (a)(1) It shall be unlawful for any Federal, State, or local government agency[1], or any private organization or individual[2]--[3]

(A) to deny to any individual any right, benefit, or privilege provided by law[4] because of such individual's refusal to disclose his social security account number[5];[6]

(B) to solicit[7] an individual's social security account number by threat or promise of a benefit[8];

(C) to solicit an individual's social security account number without providing to such individual appropriate

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1. Federal, state, and local governments should not be included here because there is no intent to impose "corporate" liability on a government agency. Is the federal government supposed to fine, say, the Public Health Service? The prohibition is intended to act against "persons", i.e., individuals and private organizational entities. Actions taken by individuals on behalf of a governmental body will be exempted under subparagraph (b) if the conditions of the exemption provided in that subparagraph are observed.

2. The word "person" substitutes for private organizations and individuals, and is shorter.

3. Note absence of warning flag, "except as provided by. . ." or "Unless exempted from this subsection . . .".

4. This raises the question of whether a private benefaction can be said to be "provided by law".

5. This language fails to pick up a number of cases: (1) an individual's refusal to consent to the disclosure of his SSN by another; (2) an individual's simple failure to disclose not amounting to a refusal (e.g., his neglecting to return a self-addressed postcard sent to him by a solicitor); (3) the refusal of a corporation to disclose SSN's in its possession. Also, what about the infliction of an injury, rather than the denial of a benefit?

6. What about action taken to the injury of a person (as distinct from denying him a benefit?). For example, GMAC informs you that unless you supply it with your social security number it will repossess your car.

7. Should we bar obtaining it without a solicitation?

8. What about obtaining it by a false representation of fact or law, e.g., a car dealer who falsely tells you that State law requires that you have to provide your number to him when buying a car.

notice[9] of the Federal or State statute pursuant to which such solicitation is made[10];

(D) to disclose an individual's social security account number without his explicit[11] knowledge and written[12] consent;[13] or

(E) to manufacture[14] any object that is a facsimile of, purports to be, or could be reasonably mistaken[15] as a representation of an individual's social security card or social security number.

Violations of the prohibitions in this subsection are subject to a fine of $5,000.[16]

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9. The use of the term "appropriate" will make for some interesting law suits. It would be better to be explicit on the contents of the notice (perhaps spelling it out in this subparagraph, along with type size).

10. This phrase forgets the structure of the bill. The intention is to cover private solicitations in this paragraph. An individual who solicits on behalf of a government agency is given an exemption in section 2 subject to his complying with a notice requirement set forth in section 4.

11. What is meant by "explicit"? That is, what does it add to "knowledge"?

12. The specifications do not say that consent has to be written. Isn't this a policy issue that we should have clarified?

13. What about disclosure of a numbers without identifying characteristics: for example, an advertising campaign in which numbers are published with an announcement that if any of these numbers is yours and you contact the company you will receive a prize?

14. Why just "manufacture"? What about publishing a number falsely portrayed as an SSN? or disseminating a false SSN card?

15. This is a criminal statute. "Could be reasonably mistaken" is too vague a standard. The Libertarian Party once published a card that at first glance looked like a social security card. Nevertheless, it bore the heading "Social Insecurity", had inscribed on its face the number "000-00-0000" in large red letters, and said on the reverse, among other things, "Keep this card, if you wish. It entitles you to absolutely nothing. However, it has several advantages over your Social Security card: ...It does not force you to invest money from your paycheck or profits in a fraudulent and financially doomed retirement scheme." Could this card be reasonably mistaken for a social security card?

16. Is this a civil or a criminal penalty? What is the difference? For the answer, see §4.7.2., *supra.*

A PROBLEM IN INCORPORATION BY REFERENCE

Examine the following abstract of three subsections of H.R. 4853, 98th Congress, a bill introduced by the Chairman of the House Judiciary Committee. What error has the drafter made?

(a) The status of any alien described in subsection (b) may be adjusted by the Attorney General...to that of an alien lawfully admitted for permanent residence if... [conditions omitted]

(b) The benefits provided by subsection (a) shall apply to any alien (other than an alien described in subsection (c))--

(1) who has received an immigration designation as a Cuban/Haitian entrant (status pending), or

(2) who is a national of Cuba or Haiti, arrived in the United States before January 1, 1982, and with respect to whom any record was established by the Immigration and Naturalization Service before January 1, 1982.

(c) The benefits provided by subsection (a) shall not apply to an alien who was admitted to the United States as a nonimmigrant, unless the alien filed an application for asylum with the Immigration and Naturalization Service before January 1, 1982.

H.R. 2521

Ninety-fifth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the fourth day of January, one thousand nine hundred and seventy seven

An Act

To provide for the mandatory inspection of domesticated rabbits slaughtered for human food, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, except as provided in section 2 of this Act all the penalties, terms, and other provisions in the Poultry Products Inspection Act (71 Stat. 441; 21 U.S.C. 451-470) are hereby made applicable (1) to domesticated rabbits, the carcasses of such rabbits, and parts and products thereof, and to the establishments in which domesticated rabbits are slaughtered or in which the carcasses, or parts or products thereof, are processed, (2) to all persons who slaughter domesticated rabbits or prepare or handle the carcasses of such rabbits or parts or products thereof, and (3) to all other persons who perform any act relating to domesticated rabbits or other carcasses of such rabbits or parts or products thereof, and who would be subject to such provisions if such acts related to poultry or the carcasses of poultry, or parts or products thereof; and such provisions shall apply in the same manner and to the same extent as such provisions apply with respect to poultry and the carcasses of poultry, and parts and products thereof, and to persons who perform acts relating to poultry, the carcasses of poultry, or parts or products thereof.

SEC. 2. (a) The provisions in paragraph (a)(2) of section 15, section 24(a), and section 29 of the Poultry Products Inspection Act shall not apply with respect to domesticated rabbits or the carcasses of such rabbits, or parts or products thereof. The two-year period specified in paragraph (c)(1) of section 5 of such Act and the periods contemplated by paragraph (c)(4) of such section shall commence upon the effective date hereof, with respect to domesticated rabbits and the carcasses of such rabbits, and parts and products thereof; and in applying the volume provisions in paragraphs (c)(3) and (c)(4) of section 15 of such Act, the volume restrictions applicable to poultry shall apply to domesticated rabbits.

(b) For purposes of this Act—

(1) wherever the term "poultry" is used in the Poultry Products Inspection Act, such term shall be deemed to refer to domesticated rabbits;

(2) wherever the term "poultry product" is used in the Poultry Products Inspection Act, such term shall be deemed to refer to domesticated rabbit products;

(3) the reference to "domesticated bird" in section 4(e) of the Poultry Products Inspection Act shall be deemed to refer to domesticated rabbit; and

(4) the reference to "feathers" in section 9(a)(4) shall be deemed to be "pelt".

SEC. 3. This Act shall become effective on October 1, 1978.

SEC. 4. The provisions hereof shall not in any way affect the application of the Poultry Products Inspection Act in relation to poultry, poultry carcasses, and parts and products thereof.

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