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THE CIVIL AIR REGULATIONS AND THE CODE OF FEDERAL REGULATIONS

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As the preceding papers in this symposium indicate, the Civil Air Regulations, which were issued by the Secretary of Commerce on May 31, 1938, and, subject to certain amendments, were re-adopted by the Civil Aeronautics Authority on August 20, 1938, constitute a thoroughly scientific and, from the viewpoint of the technique of codification, an unusually instructive achievement. What is perhaps more important is that these Regulations have established a plan which provides for the effective development of national regulation in an area of strategic and increasing importance. From a more general point of view, it may be remarked that the circumstances which antedated these Regulations find their parallels in other branches of the so-called administrative law—faulty methods of publication, relative inaccessibility to the public of the existing materials, and, in recent years, a rapid increase of the scope of regulation requiring a vastly increased mass of rules and documents. Long since, the general enactments of the States and of the Congress have been reduced to codified form; more recently, the American Law Institute has undertaken to clarify and simplify the Common Law in a restatement; at the present time, owing to the rapidly increasing volume, significance, and the unsystematic publication of administrative regulations, there has arisen an imperative need to consolidate, revise, and render more readily accessible the materials of so-called administrative law. Without such efforts as are represented by the Civil Air Regulations and similar intelligently devised plans of codification in specific areas of administration, the citizen affected by the applicable regulations is bound by requirements difficult to ascertain.

For the purpose of Federal administration, it is obvious that the primary work involved in the revision and codification of the Federal administrative law can best be accomplished by the several agencies which administer and therefore should most competently understand the regulations for which they are responsible. On this account, it is to be desired that such efforts as are represented by the Civil Air Regulations and analogous enterprises undertaken in

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other agencies should be carried forward and extended in further directions. But it should also be obvious from the public viewpoint that such consolidations of the regulations of individual bureaus and agencies need to be assembled and published in a comprehensive uniform plan for the codification of Federal regulations. This need has been recognized by the Act of June 19, 1937, amending the Federal Register Act and authorizing the codification of all documents issued by the Federal agencies which are of general applicability and affect the public. Indirectly, by requiring the several agencies to prepare codifications for this purpose, this enactment has given a salutary stimulus to the systematization and revision of the existing materials, and, as the Act contemplates periodic revisions every five years, it may be expected to have such effect, even more conspicuously, in the future.

Although the interesting historical background of this legislation is scarcely appropriate to the present discussion,¹ there are certain general features of the projected Code of Federal Regulations now in the process of editing and publication, under authority of the above Act, to which attention may be directed. In brief the pertinent provisions of the Act of June 19, 1937, in question, are as follows. First, it is required that, on July 1, 1938, each agency of the government shall have prepared and shall file with the Administration Committee of the Federal Register a complete codification of its documents effective June 1, 1938. Secondly, it is prescribed that each such codification shall include—

"All documents which, in the opinion of the agency, have general applicability and legal effect and which have been issued or promulgated by such agency and are in force and effect and relied upon by the agency as authority for, or invoked or used by it in the discharge of, any of its functions or activities."

Thirdly, the Act establishes a Codification Board composed of the Director of the Federal Register Division as chairman *ex officio*, three attorneys of the Department of Justice, and two attorneys of the Federal Register, to supervise and coordinate the form, style, arrangement, and indexing of the codifications. Finally, it is provided that the complete codification, upon publication as authorized by the President, shall be *prima facie* evidence of the text of the documents included and of the fact that they are in effect on and, subject to subsequent amendments published in the Federal Register, after the date of publication. These provisions are supplemented

1. For a resume of the details the recent article by *J. H. Ronald*, a member of the Codification Board, "Publication of Federal Administration Legislation," 7 *George Washington Law Review*, 52 ff. may be consulted.

by regulations which were approved by the President on November 10, 1937.

Of the many and varied issues which have presented themselves to the Codification Board since it commenced its work on December 1, 1937, with the writer as director, a fundamental and, in certain respects, a most difficult question has involved the arrangement of the projected Code. Under the regulations of November 10, 1937, titles were to be assigned in order, first to the President, then to the Departments according to their seniority, and thereafter to the independent agencies in alphabetical sequence. This plan, albeit eminently suitable for the preparation of their codifications by the various agencies, involves certain primary difficulties when regarded as a basis for a more or less permanent scheme for the codification of the Federal administrative documents. In the first place, it unnecessarily separates related materials from different agencies; in the second place, the alphabetical ordination of independent agencies, while avoiding possible recriminations on account of claims to seniority, makes no systematic provision for such new agencies as may appear in the future or even for regulations issued by agencies which at present have no materials to be included in the Code. Indeed, even a change in the name of an agency would render the alphabetical order *pro tanto* obsolete. Consequently, attentive and at times argumentative consideration has been given over several months to various alternatives: to a plan for disposing the materials under an agency classification but in the order of seniority, a plan which avoids the second but not the first objection to the initial plan; to a functional arrangement which, however logically desirable, seems quite impracticable on account of the absence of any accepted or clearly defined classification of governmental functions and the extraordinary criss-crossing of Federal activities among the agencies when regarded from a functional point of view.

In the result, a compromise plan has been adopted, which for the most part parallels the classification of titles in the United States Code. Under this familiar arrangement, titles are assigned according to subject matter in alphabetical order, the particular titles being selected after exhaustive study of the relevant statutes and the codifications submitted, supplemented by consultation with the agencies concerned. It has not, however, appeared possible or desirable to follow the plan of the United States Code literally. In the first place, chapters are assigned within each title to the bureaus and agencies concerned with the subject matter, so as to respect the identity of the regulations of the various agencies and to facilitate the publication of their respective codifications as units. In the

second place, certain amendments have been made in the United States Code arrangement, which have been necessitated in part by the lack of correspondence in certain subjects between the distribution of statutory materials and the regulations, and in part by developments since the arrangement in question was conceived. For instance, in the Code of Federal Regulations, the Civil Air Regulations owing to their volume and significance will appear under Title 14, Civil Aviation, whereas in the United States Code the corresponding legislation appears under Title 49, Transportation, where it is somewhat buried within the mass of statutes relating to interstate commerce there codified, the bulk of which is administered by the Interstate Commerce Commission. It is obviously difficult to anticipate with any degree of assurance the probable course of future Federal administrative enterprise, but it is hoped that the arrangement which has been adopted, which for the most part corresponds to that of the United States Code, will recommend itself as a convenient solution and will admit of a reasonable degree of future expansion.

Another and a most interesting series of questions has arisen with respect to the construction to be given to the Act of June 19, 1937, in determining what documents are to be included in the codification. Under the Act the respective agencies are, quite properly, invested with the responsibility of deciding which of their documents fall within the Act, but the Codification Board has been frequently called upon to consult with agency representatives in borderline cases. Without attempting to define in detail the rather fine line which has had to be set in certain instances, it may be briefly stated that the following types of documents will not be found in the Code of Federal Regulations. (1) Ephemeral documents which have merely temporary application. (2) Intra-administrative documents, which apply to Federal officials in their capacity as such. An exception to this rule has been made in the case of the general civil service regulations on account of the widespread public interest in this subject matter. (3) Merely informative and non-regulatory material. (4) Documents of specific and not general applicability, e. g., orders in individual cases, appointments of named individuals, etc. (5) Regulations of the District of Columbia Government and of various territorial governments, which do not constitute Federal agencies within the meaning of the Act. And, of course, (6) documents which had become obsolete on June 1, 1938. In addition, (7) the great mass of Executive orders and similar documents which merely contain land grants are excluded, partly for the reason that the publication of these documents would be

misleading as a statement of the status of the title to public lands and partly since it would be an apparent waste of public funds to publish the thousands of such unnumbered Executive orders in the present codification. In certain types of cases, however, tabulations of all Executive orders. Proclamations and analogous documents relating to particular classes of reservations, e. g., the national parks and the military reservations, are to be included, so as to provide a summary index of the pertinent documents. With this exception, however, particular study has been given to the Executive orders, which have been in a peculiarly unsatisfactory situation so far as their accessibility is concerned, and the Code will contain a complete codification of all such orders containing effective regulations. Finally, (8) the documents of legislative and judicial agencies are not included, except that the copyright rules, which are issued by an office in the Library of Congress, are to be included through the cooperation of those concerned.

There remain as the content of the Code of Federal Regulations, documents of general application issued by the administrative agencies which may be regarded for the most part as relatively permanent in type. In the writer's judgment, the most important lacunae are, first, the rules issued by the Judicial Department, which need to be compiled and for which an appropriate title is provided in the projected Code; second, a rather extensive body of intra-administrative orders and regulations, which should, in the public interest, be available for public consideration and may well some day form the content of an administrative code; and, third, the enormous mass of individual decisions and specific memoranda which at some time in the future could be profitably consolidated in the form of annotations to the Code. All these items have been, and most wisely, excluded from the present codification, since at this initial stage the important object has been to lay the basis for an effective plan to which such additions can later be made, if and when desired.

A further problem closely related to the arrangement of the materials has presented itself with respect to the numbering of the Code. Two factors have conditioned the solution which has been reached. The first is the rudimentary desideratum that a simple and accurate mode of reference to the Code should be chosen. The second is the quite reasonable desire on the part of the officials concerned that existing systems of numbering should be retained, particularly in instances where such systems have been widely employed or have acquired a mnemonic significance. This latter requirement has caused difficulty in view of the variety of numbering systems to be found in the several regulations and perforce precluded the

usual practice of assigning section numbers *de novo* in a code. After an intensive study of the problem, involving a survey of the numbering systems to be found in various State codifications as well as in the Federal documents themselves, a system has been devised, which satisfies the two requirements noted, is relatively simple, and at the same time has the advantage of providing readily for amendment and expansion in the future.

In brief, in the system adopted, part numbers are assigned serially within each title (though not necessarily in sequence), and the sections are similarly numbered within each part. Each section number is composed, as in the Civil Air Regulations, of the part number followed by a decimal and the section number within the part. This scheme permits a citation to the Code in the form 15 CFR 10.151, in which the numeral to the right of the decimal point may, if the agency so desires, be identical with the section, article, paragraph, or rule number in the original document. Those who are familiar with the Wisconsin Code or the Civil Air Regulations will recognize the principle as a very simple application of the so-called decimal system. Although the plan was independently arrived at, chiefly as a result of a conference which the writer enjoyed with representatives of the Bureau of Internal Revenue, it incorporates certain details which were suggested by study of the Civil Air Regulations. As a part of a plan for the progressive codification of Federal administrative documents, it sacrifices a minimum of uniformity for the advantages of simplicity and flexibility and the desire of the agencies to retain a limited amount of control over the internal numbering of their materials.

In the belief that the format of the Code of Federal Regulations would in a degree condition its use by the public and by the government agencies, an effort has been made to obtain a representative opinion as to how the Code should be printed. After consultation with all the agencies concerned, it was apparent that a relatively small and handy volume printed in readable type is distinctly preferred, as contrasted with the formidable tomes too often set in small type, in which codes are not infrequently incorporated. Consequently, the Government Printing Office, since receiving an adequate appropriation for the Code, has worked out a dignified style in ten point type in the document measure familiar as a vehicle for regulatory materials. At the generous suggestion of Dean Fagg, then director of the Bureau of Air Commerce, the Civil Air Regulations were employed as the "guinea pig" to settle the meticulous details of style, and the plates which were made for the Bureau for this purpose are also to be used for title 14 of the Code. Since then,

other agencies have requested that arrangements be made so that they can secure reprints of their submissions in the Code style for their own distribution, with the result that substantial portions of the Code will be available in separates before the Code itself can be published. Meanwhile, the documents issued subsequent to June 1, 1938, are appearing in the Federal Register in a form supplementing the Code, and it is planned to publish the relevant matter in a volume which will constitute each year an annual supplement to the Code. Under this general plan, it is to be anticipated that the Code together with the Federal Register will shortly afford a comprehensive, uniform, and relatively economical system for the publication of public documents of which the Governmental agencies will increasingly avail themselves for their respective purposes.

One of the most gratifying aspects of the writer's adventitious connection with this enterprise has been the extensive and cooperative interest exhibited by the officials designated to consult with the Codification Board in its work. This interest has reinforced the conviction which has grown upon the writer that the compilation, revision, and proper publication of the Federal administrative documents, as exemplified in the study which has culminated in the Civil Air Regulations, is one of the most essential developments in the field of administrative law at the present time. It is important that such documents should be duly published in an appropriate, consistent, codified form, not merely in the interests of governmental economy, not only that the average citizen may more readily learn the regulations to which he is subjected, but also to submit them to studied scrutiny. One of the most useful results to be sought through such codification is that, as a result of such scrutiny, the form and content of administrative documents may be constantly improved and the trend toward an excess of "administrative flexibility" in certain fields of government discouraged.