A Crack at Federal Drafting

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This will not be the first or last article that criticizes the style of drafting in federal statutes. But it will, I believe, be different in at least one respect: it will scrutinize the style in just one small slice of federal drafting in a way that should edify drafters of any legal document. In fact, this inspection should open the eyes of all legal writers — for I'll identify some of the persistent, inexcusable failings that pervade all legal writing. I've done this kind of thing before, using the final orders from the Clinton impeachment trial.[1] If you think those impeachment orders were revealing, wait until you see the USA Patriot Act.[2]

It's amazing, really, how much you can wring out of a few paragraphs. And I'm not talking about subtle or arguable points; I'm talking about the kinds of changes that good stylists or editors would make almost routinely. At the same time, none of the items that I list below are what you would call major. None of them go to the unfriendly format of federal statutes or their overdivided structure. Nor do I get into organization or degree of detail. Nor do I raise the standard complaint about serpentine sentences full of embedded clauses, or even mention the passive voice. Individually, my changes may seem small, but taken as a whole, their effect

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[1] *See* Joseph Kimble, *How to Write an Impeachment Order*, in *Lifting the Fog of Legalese: Essays on Plain Language* 125 (Carolina Academic Press 2006).

[2] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act) of 2001, Pub. L. No. 107–56, 115 Stat. 272 (2001).

is considerable. And so it is with writing: clarity does not come in one or two strokes, but through the cumulative effect of many improvements, some of them larger and some smaller.

How did our profession ever arrive at this state of linguistic distress? Apparently, 400 years' worth of legalese has left us blind. We are so used to it that we can't see it for what it is, or can't muster the will to resist, or don't care. The great irony is that most lawyers seem to consider themselves quite proficient at writing and drafting.[3] They are deluded. But as Reed Dickerson, the father of American drafting, observed, "It is hard to sell people new clothes if they consider themselves already well accoutered."[4]

Of course, we all realize that legislative drafters work under pressure, that very often or perhaps most often they do not have a free hand, that the process is messy and variable, and that some drafters are no doubt skilled and experienced. Yet they are still heirs to "a history of wretched writing."[5] So it's not surprising that the habits I criticize have seemingly become ingrained.

At any rate, let me say a word about the paragraphs I'll use from the Patriot Act. I didn't scour the Act for the worst examples. I didn't scour the Act at all. These paragraphs came to my attention because they affect the Federal Rules of Criminal Procedure, which I have an interest in. The Advisory Committee on Criminal Rules spent three years between 1998 and 2001 restyling all the criminal rules — a huge undertaking — and I served as a consultant during the last part of the project. The restyled criminal rules were submitted to the Supreme Court in November 2001. At about the same

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[3] Bryan A. Garner, *President's Letter*, The Scrivener (newsletter of Scribes — Am. Socy. of Writers on Legal Subjects) 1, 3 (Winter 1998) (noting that, according to the author's informal surveys, 95% of lawyers claim to be good drafters).

[4] Reed Dickerson, *The Fundamentals of Legal Drafting* 2 (2d ed. 1986).

[5] Bryan A. Garner, *The Elements of Legal Style* 2 (2d ed. 2002).

time, Congress passed the Patriot Act, and the advisory committee had to scramble to insert conforming language into the new version of the rules. The Act amended Rules 6(e)(3)(C) and 41(a) of the old rules; the committee inserted the changes into 6(e)(3)(D) and 41(b)(3) of the new rules. I'm going to deal only with the Rule 6 changes because the Rule 41 changes were much shorter.

Now, the committee decided that it had to use the statutory language in the court rules — an understandable decision but a serious setback for good drafting.[6] It's disheartening, after the long effort to improve the rules' clarity and consistency, to see that statutory language imported almost verbatim.

And here it is, in all its glory.

The Paragraphs That Affect Criminal Rule 6

This is from Title II, section 203(a)(1), of the Patriot Act:

> Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure is amended to read as follows:
>
> "(C)(i) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made —
>
> . . .
>
> "(V) when the matters involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in clause (iv) of this subparagraph), to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist

[6] *See* Joseph Kimble, *How to Mangle Court Rules and Jury Instructions*, in *Lifting the Fog of Legalese*, *supra* n. 1, at 105, 114–18.

the official receiving that information in the performance of his official duties.

. . .

"(iii) Any Federal official to whom information is disclosed pursuant to clause (i)(V) of this subparagraph may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Within a reasonable time after such disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

"(iv) In clause (i)(V) of this subparagraph, the term 'foreign intelligence information' means —

"(I) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against —

"(aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

"(bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

"(cc) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of [a] foreign power; or

"(II) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to —

"(aa) the national defense or the security of the United States; or

"(bb) the conduct of the foreign affairs of the United States."

So What's the Trouble?

Did those paragraphs seem pretty normal — about par for legal drafting? I suspect they did, so let me try to identify some deficiencies. After each item, I'll include one or more examples, along with a revised version or a question.

1. An Aversion to Pronouns

- "acts of a foreign power or an agent of a foreign power"

  acts by a foreign power or its agent

- "the national defense or the security of the United States; or the conduct of the foreign affairs of the United States"

  . . . or the conduct of its foreign affairs

2. An Aversion to Possessives

- "clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of [a] foreign power"

  clandestine intelligence activities by a foreign power's intelligence service, intelligence network, or agent

3. *An Aversion to* -ing *Forms (Participles and Gerunds)*

- "in the performance of his official duties"

  in performing his official duties

- "in the conduct of that person's official duties"

  in conducting [or "to conduct"] that person's official duties

4. *An Aversion to Hyphens*

- "foreign intelligence information"

  foreign-intelligence information

- "Federal law enforcement, . . . national defense, or national security official"

  Federal law-enforcement, . . . national-defense, or national-security official

5. *Overuse of "Such," "That" (as a Demonstrative Adjective), and "Any"*

- "~~Any~~ [A] Federal official to whom information is disclosed pursuant to clause (i)(V) of this subparagraph may use ~~that~~ [the] information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of ~~such~~ [the] information. Within a reasonable time after ~~such~~ disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that ~~such~~ [the] information was disclosed . . . ."

6. *Cumbersome and Unnecessary Cross-References*

- "foreign intelligence information (as defined in clause (iv) of this subparagraph)"

  foreign-intelligence information (as defined in (C)(iv))

- "In clause (i)(V) of this subparagraph, the term 'foreign intelligence information' means —"

  "Foreign-intelligence information" means — [There's no need for the cross-reference, since the earlier provision, where the term was used, already referred forward to this part.]

7. *A Tendency Toward Syntactic Ambiguity*

- "foreign intelligence or counterintelligence (as defined in . . . 50 U.S.C. 401a)" [Does the parenthetical element modify both items? Yes?]

- "any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official" [How many items does *Federal* modify? All of them?]

- "activities by an intelligence service or network of a foreign power" [Does *intelligence* also modify *network*?]

8. *General Wordiness*

- "in order to assist the official receiving that information in the performance of his official duties"

  for use in performing the official's duties

- "Any Federal official to whom information is disclosed pursuant to clause (i)(V) of this subparagraph may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information."

A federal official who receives information under (C)(i)(V) [or "receives grand-jury information"] may use it only as necessary to perform official duties [and?] subject to any limitations on its unauthorized disclosure.

- "Within a reasonable time after such disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed and the departments, agencies, or entities to which the disclosure was made." [But isn't the disclosure to an official, not an agency?]

  Within a reasonable time after disclosure, a government attorney must file, under seal, a notice with the court stating what information was disclosed and to whom [or "stating what information was disclosed, the federal official's name, and the official's agency"].

9. General Fuzziness

- "any Federal . . . protective . . . official" [?]
- "a United States person" [?]

10. Needless Repetition

After (C)(i)(V) requires that the disclosure be to assist the official in performing official duties, (C)(iii) then requires that the use be necessary in conducting official duties. I kept both requirements in my redraft below, but I think the first one — concerning the purpose for disclosure — could probably go. Having to file a notice of the disclosure makes it unlikely that someone will disclose for inappropriate reasons.

(Incidentally, why the switch in these two provisions from *in the performance of* (official duties) to *in the conduct of*? What

possible difference is there? Probably none, but the switch creates a hint of contextual ambiguity.)

A Redraft

I'll leave it to you to decide whether the original or the following redraft is better. Just two comments: the only part I reorganized is (C)(iv); and if I inadvertently changed a meaning somewhere, it can easily be restored without reverting to the style of the original. All right, then:

> Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure is amended to read as follows:
>
> (C)(i) Disclosure of a grand-jury matter may also be made:
>
> . . .
>
> (V) to a federal official who is engaged in law enforcement, intelligence, protection [?], immigration, national defense, or national security, if the matter involves foreign intelligence or counterintelligence (as they are defined in 50 U.S.C. 401a) or foreign-intelligence information (as defined in (C)(iv)) and if the information is for use in performing the official's duties.
>
> . . .
>
> (iii) A federal official who receives grand-jury information may use it only as necessary to perform [his or her?] official duties and subject to any limitations on its unauthorized disclosure. Within a reasonable time after disclosure, a government attorney must file, under seal, a notice with the court stating what information was disclosed and to whom.
>
> (iv) "Foreign-intelligence information" means any information about a person, a foreign power, or a foreign territory that

> relates to the national defense or the security of the United States, or to the conduct of its foreign affairs. The term includes any information about:
>
> (I) the ability of the United States to protect against actual attack, potential attack, sabotage, international terrorism, or other grave hostile act by a foreign power or its agent; or
>
> (II) clandestine intelligence activities by a foreign power's intelligence service, intelligence network, or agent.

Conclusion

Lawyers draft poorly. And for that to change, several related things must happen.

First, their loyal critics must keep complaining, keep agitating; I'll do my best, as a public service.

Second, reformers must keep exposing the myths about writing clearly, in plain language — like the myth that plain language is not precise, or involves just a few simple guidelines, or is not supported by any convincing evidence of its effectiveness.[7]

Third, to overcome resistance and doubt, reformers must keep pointing to major advancements — like the restyled Federal Rules of Appellate, Criminal, and Civil Procedure, new article 9 of the UCC, and some of the work done by the Securities and Exchange Commission in the late 1990s.[8] The drafting in these projects may not be perfect, but compare it with what went before.

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[7] *See* Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 Scribes J. Legal Writing 1, 7–31 (1996–1997) (citing 25 studies showing that plain language saves time and money and is strongly preferred by readers).

[8] *See* Div. of Corp. Finance, U.S. Sec. & Exch. Commn., *Before & After Plain English Examples and Sample Analyses* (1998).

Fourth, lawyers must stop making excuses for traditional legal style and stop aping old models. This will require, to begin with, some humility and open-mindedness, and then a close encounter with some books on legal writing or a CLE course or a good editor. Like any other skill, writing well takes sustained effort; it's not innate.

Finally, law schools must end their shameful neglect of legal drafting. Although many schools have strengthened their writing programs in the last decade, those programs concentrate mainly on briefs and memos, not on drafting (contracts, wills, bylaws, statutes, rules). True, most schools do offer an elective in legal drafting, but only a small number — maybe 15 or 20 schools — require it as a substantial part of their writing programs.[9] It's no wonder, then, that most lawyers, steeped as they are in old forms and models, consider themselves good drafters. Nobody has ever shown them a better way.

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[9] Kristin Gerdy, Assn. of Legal Writing Directors & Legal Writing Inst., 2005 Survey Results 11 (Question 20), 20 (Question 33), 21–22 (Question 35) (released July 2005) (available at http://www.alwd.org).