Extremist Drafting of Federal Statutes

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Extremists are rarely elected to Congress. If elected, they are unlikely to be effective legislators. Legislation requires compromise. Congress is therefore a place for moderates, for men and women who, by nature or hard experience, are compromisers.

Years ago, congressional moderation was often reflected in a reluctance to legislate. Getting something enacted took time as the lawmakers carefully inspected the ground and worked out agreements, often with the result that, when signed, a law would deal only with yesterday's problems. Today, however, Congress uses a variety of techniques, old and new, that allow it to legislate at great length on voguish, current subjects, without abandoning its predilection for moderation and compromise. By leaving the most vexing problems to the courts, by calling for commissions to study this or that, by requiring innumerable reports, by regulating the details of administration, by describing demonstration projects as though they were major programs, by reenacting and rearranging statutes before the ink has dried, and by accepting low estimates of the cost or difficulty of doing things—in all these ways, those responsible for our laws now manage to enact page after page of the most formidable statutory text at a rate that not so long ago would have been thought impossible.

Yet, strange to say, those who draft these federal laws, setting to paper the great outpouring of moderation and compromise, are, time after time, extremists—and extremists of the most stubborn kind. They espouse different causes and labor in different cubbyholes on Capitol Hill and in the executive agencies. But taken together, they increasingly dominate the language of our federal statutes.

Drafters of appropriations acts are extremists in using the proviso. These men and women turn out text that, in its traditional form, starts off "For expenses necessary" or "For the prosecution of projects"; then they blossom out with prose like this excerpt from Public Law No. 101-101:

> *Provided further*, That the Secretary of the Army, acting through the Chief of Engineers, is directed to initiate remedial work on the Sacramento River Flood Control Project levees . . . : *Provided further*, That the Secretary of the Army, acting through the Chief of Engineers, is directed to initiate design and construction of the Waterloo Bridges in Waterloo, Iowa . . . : *Provided further*, That the Secretary of the Army, acting through the Chief of Engineers, is directed to use $9,900,000 of the total sum appropriated herein for design, testing and construction in fiscal 1990 of juvenile fish bypass facilities . . . : *Provided further*, That the Secretary of the Army, acting through the Chief of Engineers, is directed to initiate . . . .[1]

As you can see, there is much repetition in this way of presenting things. What is more, these federal drafters prefer block arrangements, with no sentence breaks. In the text from which our example was taken, one sentence runs nearly three solid pages through 23 consecutive provisos, all without so much as a single indentation, heading, or other bit of eye relief. There is nothing unusual about this. Lengthy blocks of more than a solid page of proviso-littered prose can be found in almost any current appropriations statute, whether the subject is housing and community development, foreign assistance, or the District of Columbia.

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1. Energy and Water Development Appropriations Act, 1990, Pub. L. No. 101-101, tit. 1, 103 Stat. 641, 645 (1989). The statutory words and phrases discussed throughout this article have been italicized within quotations for purposes of illustration.

Appropriations writers apply the proviso to all manner of problems even when not dividing up money. Thus, in Public Law No. 101-121, we find this section:

> Effective sixty days after enactment of this Act, the Forest Service is directed to assure an immediate supply of timber from the Kootenai National Forest and to protect the environment: *Provided*, That pending implementation of the Forest Service's final agency action on the Upper Yaak Decision Area . . . the Forest Service is directed to expeditiously prepare, offer, and supervise the harvest of timber from the lodgepole pine timber type . . . : *Provided further*, That adequate environmental assessments for certain timber sales in the Upper Yaak Decision area have been completed . . . : *Provided further*, That the Forest Service actions . . . shall comply with the Kootenai National Forest Plan: *Provided further*, That this section does not in any way represent a judgment upon the legal adequacy or in any way affect the final decision made in the development and implementation of the Upper Yaak Final EIS.[2]

Of this section, the reader may at least say that the individual provisos are short and make limited demands on the memory. But it is not always so. Appropriations writers are capable of wedging provisos of the most impressive dimensions into their sentences without breaking the series of one of their proviso concoctions. In the current appropriations for the Legal Services Corporation, as part of an uninterrupted string of 24 provisos, extending in a single sentence for over five pages, we find two that are sufficiently complex that even the proviso writers deviate from their standard block format to take refuge in indented subunits. One of these provisos, having to do with protecting members of Congress and other officials from the blandishments of federally funded lobbying, rolls out

2. Act of Oct. 23, 1989, Pub. L. No. 101-121, § 316, 103 Stat. 701, 744-45.

over more than a page of enumerated or lettered paragraphs, subparagraphs, and clauses before, at last, the author stumbles back to the margin, inserts an exception to all that has gone before, and continues plodding along in the old block arrangement.[3]

In contrast to the proviso fanatics is another group of extremists, many of whom draft social-welfare legislation. These men and women yield to no writers anywhere in spinning out interminable sentences. But they scorn provisos and great blocks of texts. Their fanaticism runs instead to subdivision.

Consider section 201 of Public Law No. 100-485, the law reforming federal welfare assistance.[4] Section 201 has to do with the "establishment and operation" of a job-opportunities and training program. Lumbering on for three and a half pages in the *Statutes at Large*, it amends a major subdivision of the Social Security Act.[5] It contains not a single period to close a sentence, nor a capitalized word to begin one. For it is only *part* of a sentence, a sentence that, like some enormous monster lurking beneath the surface of the amending text, already bears the weight of hundreds of paragraphs, subparagraphs, clauses, and subclauses, echeloned over page after page of our laws.

For design, the drafters of this and similar behemoths rely upon parallelism. Thus, our section 201 picks up in a sentence starting "The State plan . . . must—," which is followed by an enumeration of requirements, each of which begins "provide" or "at the option of the State, provide." So the amendment starts off "(19) provide—" and then proceeds to a

3. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, § 608, 103 Stat. 988, 1032-33 (1989).

4. Family Support Act of 1988, Pub. L. No. 100-485, § 201, 102 Stat. 2343, 2356-60 (codified in scattered sections of 42 U.S.C.).

5. 42 U.S.C. § 402 (1982).

series of paragraphs starting "that . . . ." Although there are only seven "that" paragraphs, all but two of these have subparagraphs, also arranged in parallels, and many of the subparagraphs in turn divide into another series of parallel paragraphs, until a total of 43 subunits are rolled out, all to complete one *provide* in a sentence that was already engorged with 40 other *provide*s at levels of complexity ranging up to that of our amended "(19)."

The glue for creations like this is, of course, the semicolon; yet it is not glue but structural ingenuity upon which the greatest demands are made. Thus, one "that" subparagraph in our section 201 example reads:

> (G) that—
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> > (i) if an individual who is required by the provisions of this paragraph to participate in the program or who is so required by reason of the State's having exercised the option under subparagraph (D) fails without good cause to participate in the program or refuses without good cause to accept employment in which such individual is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined to be a bona fide offer of employment—
> >
> > > (I) the needs of such individual (whether or not section 407 applies) shall not be taken into account in making the determination with respect to his or her family under paragraph (7) of this subsection, and if such individual is a parent or other caretaker relative, payments of aid for any dependent child in the family in the form of payments of the type described in section 406(b)(2) (which in such a case shall be without regard to clauses (A) through (D) thereof) will be made unless the State agency, after making reasonable ef-

> forts, is unable to locate an appropriate individual to whom such payments can be made; and
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> (II) if such individual is a member of a family . . . .[6]

As you can see, parentheses are invaluable to the extremists who devise this kind of provision. So are the dashes by which one carries the subdivision to higher and higher levels of achievement. On the other hand, for one pursuing subdivision extremes, ordinary standards of good composition are, if anything, a burden on the way to that ultimate point at which one reaches units designated (aa) and so on, having left behind all the possibilities in the regular system of section breakdown—subsection, paragraph, subparagraph, clause, and subclause. Hence this, from Public Law No. 100-294:

> (2)(A) The Secretary shall award grants or contracts to local law enforcement agencies, acting in coordination with domestic violence shelters, social service agencies and hospitals, for the purposes of—
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> (i) the development of materials, to be provided to each abused family member at the time such spouse is identified by law enforcement officers, hospital personnel, social services personnel, education counseling personnel, and other appropriate personnel involved in the identification of family violence cases that include—
>
> (I) an explanation in basic terms of—
>
> (aa) the rights of the abused family member under the laws of the jurisdiction involved; and
>
> (bb) the services available to the abused family member, including . . . ; and

6. Family Support Act of 1988, Pub. L. No. 100-485, § 201, 102 Stat. 2343, 2359 (codified in scattered sections of 42 U.S.C.).

> (II) phone numbers and addresses for the services described in subparagraph (A)(ii);
> (ii) the development of procedures whereby . . . ; and
> (iii) the development of systems whereby . . . .[7]

One result of subdivision without limit is the expansion without limit of the things subdivided. These things are sections. According to a venerable federal law now appearing as section 104 of Title 1 of the *United States Code*, each section "shall contain, as nearly as may be, a single proposition of enactment." An example of how today's extremists apply this admonition is section 501 of the 370-page law by which Congress set out to salvage what is left of the savings-and-loan industry.[8] Section 501 starts on page 363 of volume 103 of the *Statutes at Large*. It ends on page 394. All of it but the first three lines and the last page consists of a new section (21A) added to the Federal Home Loan Bank Act, a section of 421 subunits of various kinds spread over 30 pages, or about eight pages more than Congress required for the two statutes by which it created the savings-and-loan system in 1932 and 1933.[9] Within this section, the "single proposition of enactment" includes all manner of subjects, from establishing an oversight board to supervising the savings-and-loan cleanup and the Resolution Trust Corporation to do the spadework on dead and dying institutions, to setting valuation standards, encouraging the disposition of property for lower-income

7. Child Abuse Prevention, Adoption, and Family Services Act of 1988, Pub. L. No. 100-294, § 303, 102 Stat. 102, 125 (codified at 42 U.S.C.A. § 10410 (b)(2)(A) (West Supp. 1989)).
8. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183.
9. Federal Home Loan Bank Act, 47 Stat. 725-741 (1932); Home Owners' Loan Act of 1933, 48 Stat. 128-135.

housing, establishing a $50-billion limit on federal guarantee exposure, prescribing special conflict-of-interest rules, requiring various reports, and telling the board and corporation when they must appear before Congress and what they must include in their testimony.

Even for subdivision extremists, it is unusual to venture out with all of a 30-page section in one part of one statute. More often, congressional drafters prefer the creeping approach, as they add to and subdivide sections already in the law, often heaping the new into old sentences. For example, several months ago, Congress made some changes in a section of the Child Nutrition Act.[10] Section 17 already contained 192 subunits of various kinds spanning more than eight double-columned pages in the *United States Code.* The codifiers' efforts to supply descriptive subsection headings had resulted in topic lists that were already bulging beyond the limits of usefulness. Yet section 123(a) adds a little here and a little there, often redesignating the old to fit in the new and never deleting without substituting more, until more than 100 new subunits have been affixed to section 17. Their cumulative text stretches over some nine pages of the *Statutes at Large.* This kind of extensive subdivision work on provisions of existing law can be aimed not only at sections but also at subsections or even paragraphs and subparagraphs. It is rarely obvious just what is being done, particularly when the subdividers conceal their handiwork in different sections of the amending statute.

Readers of the previous examples will have noted that, apart from provisos, long sentences, and peculiarities of organization, federal statutory prose favors some particular words and phrases. Extremists are at work here too, but one

10. Child Nutrition and WIC Reauthorization Act of 1989, Pub. L. No. 101-147, § 123(a)(3), 103 Stat. 894, *amending* 42 U.S.C.A. § 1786(e) (West Supp. 1989).

must take care to separate their work from the routine, everyday accomplishments of the law writers. As with so many lawyers and bureaucrats, those drafting our statutes prefer the solidity of nouns to the activity of verbs, with the result that we repeatedly encounter phrasing such as: "Each report shall include an estimate of the length of time the Committee must continue before the achievement of its purpose and the issuance of its final report."[11] Law writers also are excessively fond of various word combinations such as *full and complete*, *encourage and promote*, *establish and maintain*, and, above all, *prepare and submit*. Sometimes, the combinations are combined and we have, for example, an official required to "prepare and transmit . . . a plan to initiate, expand, intensify and coordinate activities . . . ."[12]

A preference for long words and jargon—whenever available—is another feature we must expect in statutory prose, given the authors' years of professional training. Accordingly, we must cope with language that describes the amassing of data that will be "maximally useful," that calls for "multidisciplinary teacher workshops for the interfacing" of educational disciplines, or that mandates a "continuum of improved services."[13] Similarly, we must expect that in federal laws nothing will be "used"; it must instead be "utilized." Only in rare instances is anything permitted to "begin" or, even worse, to "start." Instead, it will be "initiated," or

11. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5142, 102 Stat. 1107, 1446 (codified at 15 U.S.C. § 4632(e)(5)(1988)).
12. Health Omnibus Programs Extension of 1988, Pub. L. No. 100-607, § 101, 102 Stat. 3048, 3049 (codified at 42 U.S.C.A. § 285m-1 (West Supp. 1989)).
13. Decade of the Brain—Proclamation, Pub. L. No. 101-58, 103 Stat. 152 (1989); Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 6112(b)(1)(B)(12), 102 Stat. 1107, 1506; Older Americans Act Amendments of 1987, Pub. L. No. 100-175, § 107, 101 Stat. 926, 931, (codified at 42 U.S.C.A. § 3011 (Supp. V 1987)).

"instituted," or "commenced." And officials seldom "carry out" or "execute" laws or programs; they "implement" them.

Language with these characteristics has no special home. It can be found flowing from offices, bureaus, divisions, and branches all across the country, even from the most prestigious colleges and universities. Perhaps it is too common to be regarded as extremist. It has become an ordinary peril of statutory prose.

When we take up *with respect to*, however, we enter the domain of the extremists. It is not just that *with respect to* substitutes over and over again for *to, in, for, of, against,* or any other preposition. Congress is so pleased with this particular compound that it now repeatedly includes it even in section headings, as in:

> REQUIREMENT OF STUDY *WITH RESPECT TO* MINORITY HEALTH AND ACQUIRED IMMUNE DEFICIENCY SYNDROME,[14]

and:

> GRANTS *WITH RESPECT TO* ENCOURAGING STATES TO MAINTAIN CERTAIN FUNDING MECHANISMS.[15]

Even more indicative of extremism are instances in which a law drafter uses *with respect to* as a tool to complicate the prose. For example, we have language such as:

> The Secretary may not provide financial assistance under subsection (a) unless . . . (2) *with respect to* carrying

14. Health Omnibus Programs Extension of 1988, Pub. L. No. 100-607, § 251, 102 Stat. 3048, 3108 (codified at 42 U.S.C.A. § 300ee-1 note (West Supp. 1989)).

15. Child Abuse Prevention Challenge Grants Reauthorization Act of 1989, Pub. L. No. 101-126, § 3(a)(3), 103 Stat. 764 (to be codified at 42 U.S.C. § 5116).

> out the purpose for which the assistance is to be provided, the application provides assurances of compliance satisfactory to the Secretary . . . .[16]

As if this were not enough, those writing for Congress have developed the ability to group *with respect to* in flocks, perhaps with a few parenthetical phrases for variety, as here:

> In lieu of any payment under subsection (a), the Secretary shall pay to each State with a plan approved under section 482(a) (subject to the limitation determined under section 482(i)(2)) *with respect to* expenditures by the State to carry out a program under part F (including expenditures for child care under section 402(g)(1)(A), but only in the case of a State *with respect to* which section 1108 applies), an amount equal to—
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> (i) *with respect to* so much of such expenditures in a fiscal year as do not exceed the State's expenditures in the fiscal year 1987 *with respect to* which payments were made to such State from its allotment for such fiscal year pursuant to part C . . . :
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> (ii) *with respect to* so much of such expenditures . . . .[17]

In the text just quoted, as in many of the other examples of statutory prose, readers will have seen much of another word, *such*. Of all the tics afflicting authors of federal laws, none can match *such*. In an age when only an occasional Capitol Hill antiquarian can be caught in the open with *said,* federal-law writers have embraced "the illiterate *such*"[18] with an unreasoning passion—the "*such* passion." As if to

16. Health Omnibus Programs Extension of 1988, Pub. L. No. 100-607, § 221, 102 Stat. 3048, 3103 (codified at 42 U.S.C.A. § 300ee-32(b)(2) (West Supp. 1989)).
17. Family Support Act of 1988, Pub. L. No. 100-485, § 201, 102 Stat. 2343, 2373 (codified at 42 U.S.C.A. § 603 (1)(1)(A) (West Supp. 1989)).
18. H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 581 (1926).

memorialize the transition, one writer recently tied the two words together with a *provided* to mark the great divide:

> After adoption of a tribal constitution, *said* constitution shall govern membership in the Tribe: *Provided,* That in addition to meeting any other criteria imposed in *such* tribal constitution, any person added to the roll has to be of Coquille Indian ancestry . . . .[19]

As might be expected, we find *such* in language of the traditional legal sort:

> In the case of an order with respect to a discriminatory housing practice . . . the Secretary shall, not later than 30 days after the date of the issuance of *such* order (or, if *such* order is judicially reviewed, 30 days after *such* order is in substance affirmed upon *such* review) . . . .[20]

But we find it also in the rhetoric of ceremonial joint resolutions:

> Whereas 1989 marks the anniversary of the infamous Molotov-Ribbentrop Pact . . . allowing the Soviet Union in 1940 to illegally seize and occupy the Baltic Republics and to incorporate *such* republics by force . . . against the national will and the desire for independence and freedom of the people of *such* republics . . . .[21]

Sometimes we find *such* trying to refer to a prior use of a term that has never been used before. Thus we find the combination of "abused family member" and "such spouse" in the

19. Coquille Restoration Act, Pub. L. No. 101-42, § 7(b)(2), 103 Stat. 91, 93 (1989) (codified at 25 U.S.C.A. § 715e(b)(2) (West Supp. 1990)).
20. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 8, 102 Stat. 1619, 1631 (codified at 42 U.S.C.A. § 3612(g)(5) (West Supp. 1989)).
21. Baltic Freedom Day—Proclamation, Pub. L. No. 101-39, 103 Stat. 79 (1989).

early part of our example of extreme subdivision cited in footnote seven. Similarly, a provision tells us:

> For each fiscal year, the Secretary shall determine the disadvantaged graduate figure for the institution by dividing—
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> (A) the number of students from disadvantaged backgrounds who graduated from the institution as part of *such* class; by . . . .[22]

Over and over we find language that appears inexplicable except for the *such* passion, as with this statutory finding:

> Many individuals with disabilities do not have access to the assistive technology devices and assistive technology services that *such* individuals need to allow *such* individuals to function in society commensurate with their abilities.[23]

And even when a writer is so bold as to put *the* in front of something referred to before, he or she is apt to prepare the ground with at least one *such*:

> The identity of any individual who makes a disclosure described in subsection (a) may not be disclosed by the Special Counsel without *such* individual's consent unless the Special Counsel determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law.[24]

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22. Health Omnibus Programs Extension of 1988, Pub. L. No. 100-607, § 612, 102 Stat. 3048, 3132 (codified at 42 U.S.C.A. § 295g-7a (West Supp. 1989)).
23. Technology-Related Assistance for Individuals with Disabilities Act of 1988, Pub. L. No. 100-407, § 2(a)(6), 102 Stat. 1044, 1044-45 (codified at 29 U.S.C.A. § 2201(a)(6) (West Supp. 1989)).
24. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 3(a)(11), 103 Stat. 16, 23 (codified at 5 U.S.C.A. § 1213(h) (West Supp. 1990)).

How can we account for extremism in the way federal laws are written? Is it the product of a deliberate desire for obscurity? Or of efforts to puff up ideas beyond their worth? Is it simply a result of haste? Does it reflect an underlying sense of insecurity? Is it, perhaps, the product of a perverted sense of aesthetics?

All these may account for particular features of statutory prose. But for the extremist phenomenon in general, the only possible explanation is pragmatism. What counts is what works, and what works in today's Congress is measured by the success with which it can be enacted. If some committees like provisos, give them more provisos. If some lean toward long sentences and minutely subdivided sections, give them longer sentences and sections with yet more subdivisions. If *with respect to* and *such* give comfort, lay them on generously, even if it is necessary to go out of the way to do so. That the ordinary citizen or department head lacking an expert's credentials may find statutes more and more difficult to read and comprehend does not matter. One's peers, those who are expert, will applaud as long as there is more for them to explain. And grumble as they may about statutory mazes, innumerable lawyers and bureaucrats will adjust well enough to the continuing employment opportunities embedded in the torrent of words.

Thus it is that extremism in words, phrasing, and organizational technique is made to serve men and women of moderation, the compromisers of Congress, as they strive for one of the most paradoxical of federal lawmaking extremes—statutes whose bulk swells without limit in an age of political and budgetary restraint.