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Simplification-A Federal Legislative Perspective

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Symposium on Federal Government Simplification Experiences

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I. Federal Use of Plain Language Principles

Most of my exposure to the current plain language movement is through the Internet site of the Clinton-Gore Initiative, of which Annetta Cheek is an integral part. Their manual, "Writing User-Friendly Documents," is in fact a user-friendly document. I highly recommend that you look at the website. It has the very admirable feature of practicing the principles that are articulated there. It is easy to read. It is clear.

I am an attorney in the House Office of Legislative Counsel. This is the non-partisan bill-drafting office for the United States House of Representatives. It may surprise you to know, given the criticism sometimes made of the quality of writing in federal law, that it has long been the practice in my office to expressly train our attorneys in most of the very same principles that are advocated by the Clinton-Gore Initiative. The Senate Office of Legislative Counsel does so as well.

These general principles of good, clear writing have been understood for a long time: draft in the singular, using the active voice and the present tense. Consistency of terminology is critical; once you choose words to describe a particular concept, use only those words to describe that concept. Use short blocks of text. Use descriptive headings. Use separately indented lists; that is, so-called

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"bullets" using, (1), (2), (3), or (A), (B), (C), etc. All these are enormously valuable tools.

II. Two Simplification Issues for Federal Law

Why is it that, despite Capitol Hill's adherence to these drafting principles, federal law is sometimes difficult to understand? What are the barriers to simplification? Perhaps there are two main issues. One is the problem of time pressures, particularly at the end of a session or the end of a Congress. I have been through experiences such as sitting in a meeting all day as policy and drafting issues are explored and then being told at the end of the day, "Okay, Peter, we need a draft of this by tomorrow. The bill is probably going to the House floor the day after that." So I stay up most of the night trying to put something together, and after that there may be little or no opportunity to improve the bill.

The other main issue is the number of people who have to agree. Not only do the House and the Senate have to agree as a matter of policies and politics, but there may be large numbers of people inside and outside the federal government who must reach agreement that the particular words work as a technical matter. Sometimes there is no one person who is in charge of the drafting. It can be as if you are trying to build a house with no general contractor, just a bunch of subcontractors trying to coordinate with each other.

So, there can be communication problems. From my perspective as a House bill drafter, a not infrequent situation is that I am asked to comment on (or perhaps simply format) language that was drafted by individuals in the private sector. I will refer to these individuals as "outside parties." If I see substantive or technical issues in their language, it may be difficult for me to get a hearing with all the outside parties because there may be too many of them and too many intermediaries between them and me.

I believe it was Carol Mooney who said her instinct when she does not understand something is to rewrite it. I think that is a good technique for trying to communicate, and for me, one that is especially useful when I am trying (through my rewrite) to communicate with outside parties. If I succeed in being clear in my rewrite, then the outside parties can easily see that "yes, this is what we want." If on the other hand they say, "no, this is not right," I receive comments through intermediaries and learn and go from there.

Another communication technique is to try to raise issues with the congressional staffers involved and put enough fear into them that they raise the issues with the outside parties. Then the outside parties may decide they want to discuss the issues with me directly.

On the other hand, occasionally I am handed a document that was drafted by outside parties and I read it over and I say this is terrible and congressional staffers tell me, "Well, that's tough. All the players who are involved in this have managed to come to an agreement and put together this language. It was very difficult for them to do so. The language cannot be changed because, if we do, that puts us back at the table. Everybody will want to know why these changes have been made and what are the effects of the changes. If you think there are technical problems, we will just have to fix them with a later law."

I have to admit that such attitudes sometimes make sense. The situation cannot be helped because once the deal is struck you have to move forward, take it to the floor, get those votes and get it to the President's desk. Slowing the process down may cause the deal to collapse. What good is a technically perfect product if it does not have the votes to pass the House and Senate?

It obviously is better, however, for those "at the table" to get the language right in coming to an agreement. People sit around the table and they think "we all know what this language means." Well, I think one of the most dangerous things that can happen is for only the people around the table to be the ones who have input on the drafting. The tendency of most people is to think that the words they have put on paper accurately state the ideas they have in their heads. Often they are wrong. Only people who were not at the table, those who have nothing to go on but the words on paper, can judge whether the draft succeeds. If these others do not read the draft as stating the policies intended by the drafters, the draft is defective.

Assume this draft becomes law. When the federal agency is looking at it and trying to figure out what the Congress intends, it may not have access to the people who were at the table. Certainly a judge construing that law will not have access to those people. The piece of paper that becomes law had better do a good job of explaining the policy.

I really do believe that federal laws can be clear. Simplification can be accomplished. It is hard work, however, and sometimes you cannot get people to engage in that hard work.

III. Style vs. Substance

As much as I endorse the drafting principles discussed above, I can tell you that day in and day out in my professional life I see drafts that follow the principles, but nevertheless are not intelligible. They are drafted in the singular, they use the active voice, they use all these stylistic devices, but nevertheless they are incomprehensible.

It is not that these drafting principles are unimportant. They are necessary, but not sufficient. To a significant extent, these principles are stylistic matters. Due consideration must be given to substantive considerations. Substantive problems affect clarity; they affect efforts to achieve simplification in language.

Style and substance, however, are all mixed up together. Perhaps they are points on a continuum. In most places on the continuum they are very much intertwined, but at the two extreme poles of the continuum, they are separate. They are separate at least to the extent of this truism: Before there can be good writing, there must be good thinking. Substance has to do with thinking, style has to do with writing, but ultimately putting words on paper and using stylistic devices effectively becomes a means of thinking.

So then, I want to make a few points about substance. My comments will primarily concern the analysis of policy specifications. To analyze the specifications and write law clearly, the drafter must first understand the fundamental nature of law. My view is that law gives instructions, and these instructions are expressed in the three functions of law: law creates prohibitions, requirements, and authorizations. The drafter's job is to use these functions and give instructions that explain the legislature's policies to the world. The second substantive principle that the drafter must know is that you cannot draft what you do not understand. That is, you must understand the instructions that the policymaker has given you and the legal context into which those instrucitons fit. It sounds so simple, but it is not.

You must have a true meeting of the minds with the policymaker. To do this, to understand and draft federal policies, you must understand what type of program is involved. This requires that you have a good grounding in how the federal government operates in a general sense. For example, consider that federal law is full of provisions known as "authorizations of appropriations." On the one hand, these concern House and Senate procedural matters, and the drafter needs to understand the relevant procedural rules. On the other hand, authorizations of

appropriations relate to whether a program is carried out by a federal agency with "discretionary spending" or "mandatory spending," and understanding the difference is very important. And you must recognize whether a program is a spending program or a regulatory program, as the constitutional context for the two is very different.

Once you know the basic policies of the policymaker, understanding the types of federal programs enables you to assist the policymaker in refining his or her policies. If a grant program is to be drafted, is it a discretionary grant program or a formula-grant program? If the latter, how will the formula allocate the grant funds? Is the grant program to be carried out with discretionary or mandatory spending? If a regulatory program is to be drafted, what type of enforcement mechanism will be used? A civil penalty? A criminal penalty? If a civil penalty, what will be the maximum fine? Will the main proceeding be an agency adjudication or a trial in the district court? If a criminal penalty, what actions and what state of mind constitute the crime? What will be the term of imprisonment? Will the maximum fine be specified, or will it be determined in accordance with chapter 227 of title 18, United States Code?

For any type of federal program, some understanding of the Administrative Procedure Act is important. It also is important for drafting purposes to understand the difference between the world of the statute and the world of regulations under the statute. The two worlds are related, but there are significant differences. Regulations often use terms and concepts that are not used in the statute. Arbitrarily introducing these terms or concepts into the statute may cause problems.

Many people assume that, even without receiving training in legislative drafting, they will be able to produce a quality legislative product because they have an understanding of the basic policy to be drafted. Experience shows that understanding the basic policy may not always be enough. As suggested above, it is best if the drafter has the full range of knowledge necessary to understand the complete legal context into which the policy fits.

IV. The Challenge of Writing Federal Law

Writing federal law can be a challenging task. You must learn plain language principles, plus the many other elements of federal legislative style. You must learn the general substantive matters I mentioned above, plus the details of the particular programs with which your drafting is concerned. There are certain technical

matters, such as knowing when to use the United States Code in citations and when to use short titles. You must learn the techniques for amending laws. Even if you know all these matters, it can be hard to use all your knowledge effectively to produce a document that clearly presents congressional policies.

Again, it is not easy. Just ask my students. I teach a drafting course at George Washington University Law School. This is the design of the course: the students submit suggestions for a class project. I use these suggestions to create a letter from a fictitious client. The letter is not written in a precise legal manner, but rather uses everyday, conversational, imprecise language. Each of the students has to take that letter and figure out what the policies are. Then they have to figure out how to write up those policies as a law. This includes having to figure out how to amend existing federal law to insert the client's policies. The students have to draft it all from scratch. They think it is challenging. This is true whether the students have the normal background, or are congressional staffers, or employees from federal agencies, or lobbyists. Drafting law may be harder than you think. Achieving simplification may be harder than you think.

V. Particular Drafting Issues

A. Stylistic Discrepancy in Federal Law vs. Federal Regulations

I will now address some particular drafting issues. First I will discuss a stylistic matter concerning the Code of Federal Regulations, and then I will discuss two recommendations that are made in the Clinton-Gore manual on plain language, "Writing User-Friendly Documents."

Given that consistency is an important issue in writing clearly, and that we are discussing model drafting principles, you may find it curious that there is a stylistic inconsistency between federal laws and federal regulations.

This concerns the use of organizational units, such as subsections, paragraphs, and subparagraphs. Generally speaking, there is uniformity among professional drafters on Capitol Hill in the organizational units that are used in legislation, both as to the names of the units and as to how the units are designated in terms of sequence (e.g., "(a)," "(1)" and "(A)"). This statutory system for the units has been used for many years. There are attorneys who have been in my office for over 30 years, and they can remember no other system.

There is also uniformity among drafters of federal regulations in the use of organizational units. The plain language issue is that the units system used by the Hill in drafting legislation is different than the units system used in regulations.

The key difference concerns units below the section level. In federal law, there are names for each of these units; in federal regulations, there are not. Also, there are differences in the system for designating the sequence of the units. For example, in federal law, the third level below the section is designated with a capital "(A)," while in federal regulations the third level is designated with "(i)." (In federal law, the fourth level is designated with "(i).")

I wonder whether these differences are a problem for the public. Perhaps federal drafters should discuss the differences in order to make progress toward simplification.

B. Clinton-Gore Recommendations: Use of "You"

Turning to particular plain language recommendations of the Clinton-Gore manual, I will now discuss the use of the pronoun "you." Their manual recommends that the second person be used.

Generally speaking, I think the recommendation to use "you" is a good one for clear and friendly writing, but I do have some trouble with the idea of using it in statutory drafting. My main concern is that this practice could make a law ambiguous. The issue is making sure that the parties involved are clearly identified. First consider that if a company has a contract that it uses with its customers, it is easy to use "we" for the company and "you" for the customer. This approach can also be used by federal agencies in regulations. A regulation often concerns a relationship between an agency and particular people in the private sector, so again the use of "we" and "you" works.

A statute, on the other hand, often is addressing both a federal agency and the private sector. Several agencies may be involved. Several types of private entities may be involved. "You" as to federal agencies along with "you" as to the private sector would be confusing.

I confess to reservations about the cosmetic aspect, as well. Although I do not think laws should be wordy or pretentious, I do think that they are formal statements of the rules that govern a society, and as such, they should have a corresponding formal style. Laws should command respect, and so they should be written in a style that has a certain dignity, a certain gravity. Again, I am not

advocating the wordy or pretentious use of language. For example, I strongly disapprove of what is commonly called "legalese."

C. Clinton-Gore Recommendations: "Must" vs. "Shall"

I come now to one of my main concerns, which is the Clinton-Gore recommendation that the use of "shall" should be abandoned and replaced with "must." As I understand it, the reason for this recommendation is that "shall" is ambiguous. It is said that there have been too many circumstances in which the word has not been interpreted in its mandatory sense. Why do we have these problems of interpretation? The reason given is that "shall" has dual functions. In addition to expressing the mandatory, it has the alternative construction of expressing the future tense. "Shall" can mean "will," so there is a problem. "Must" has only one meaning, and therefore is considered by some plain-language advocates to be the better practice.

I have strong reservations about the use of "must" in statutory drafting. If we follow this recommendation, I fear that we will depart from strong tradition only to end up with the same problem. My opinion is that the real problem of ambiguity in the use of "shall" results from what are known as "false imperatives." A false imperative is expressing something as a command when in fact there is no command, no legal duty.

Consider an example: "This Act shall take effect 30 days after the date of the enactment of this Act." I believe that "shall" has been misused here. In reality, this is not a command to anyone, but rather a declaration by the Congress that something happens by operation of law. It is as it is simply because the Congress said so. Instead of the imperative mood, the indicative mood should be used: "This Act takes effect 30 days after the date of the enactment of this Act." Please note that, in the above example, the use of "must" rather than "shall" would make no difference. There would still be a false imperative.

There is another category of false imperatives, which involves a more subtle issue. Consider an example: "During the last 30 days of a fiscal year, an entity shall file with the Secretary an application for the continuation of the grant made to the entity under subsection (a) for the fiscal year."

Has the entity violated federal law if it does not file a continuation application? The answer is no. There is a false imperative. But, unlike the example above regarding an effective date, here the Congress is not making a legal declaration. Here

there is in fact the intent to give instructions to someone. I believe, however, that the drafter has instructed the wrong party. I believe that the most accurate instruction is as follows: "The Secretary may continue the grant made to an entity under subsection (a) for a fiscal year only if, during the last 30 days of the fiscal year, the entity files with the Secretary an application for continuation of the grant."

This approach does not command the "entity;" that is, the grantee. Instead, the instruction reflects the true legal situation, which is that there is a limitation on the authority of the federal agency that administers the grant. The real policy is "only if" in relation to the Secretary, not "shall" in relation to the grantee. But if the drafter addresses the statutory language to the grantee, the use of "shall" follows almost automatically

Again, replacing "shall" with "must" would make no difference. "Must" would also be a false imperative.

My approach in drafting federal law is to direct a "shall" at the private sector only in circumstances in which the Congress is exercising a regulatory power. I call this raw federal power; that is, the power to command people regardless of their willingness to cooperate. The usual source of this type of power is the power over interstate commerce. With exercises of the spending power, such as grant programs, I never direct a "shall" at the private sector. I direct my language at the federal agency that administers the program, describing the circumstances in which the agency has the authority to spend funds. If the conditions are met, the agency has the authority to spend (e.g., make a grant).

I believe that false imperatives are responsible for the dilution of the power of "shall." "Must" will be subject to the same problems.

VI. Conclusion.

This concludes my statement. I should add that the opinions I have expressed are my own, and not necessarily those of my office.

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