Why Congress Drafts Gibberish — With Illustrations Concerning Threats to Fire a Special Counsel, Presidential Tax Audits, and Obstruction of Justice Statutes.

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We are so used to Congressional gibberish that we take it for granted. We sigh, roll our eyes, and ask, “Will Congress’s drafters will ever learn?”

If we mean the drafters Congress has on staff, maybe that’s an unfair question. Every writing teacher knows that it’s impossible to separate developing the wording from developing the ideas. Congress is one drafter. Many people are involved — Senators, Representatives, employees in their offices, committee staff, and the Senate and House Offices of Legislative Counsel. But Congress is one author writing in one voice.

This article examines some typical Congressional gibberish and hypothesizes some of its causes. Part 1 explains how the Supreme Court was flummoxed by a statute so complicated that neither the justices nor the lawyers arguing the case could really understand it. Part 2 examines a statute so mysteriously drafted that no one really knows what a President could legally do after firing an Attorney General and Deputy Attorney General who stand in the way when the President wants to get rid of a special counsel.

Part 3 shows how Congress is ambivalent about how to draft criminal statutes. For example, Congress used two inconsistent drafting methods in a Tax Code section that criminalizes Presidential interference in tax audits and also criminalizes failure of Internal Revenue Service employees to report Presidential interference to an inspector general. Part 4 examines the federal obstruction of justice statutes, which are so incoherent that reading them is like wading through glue.¹ (I redrafted those statutes, cutting their size in half. The redraft is in the article’s Appendix B. The Appendix’s footnotes explain how gibberish became clarity.)

¹ Alfred Lord Tennyson used those words in describing Ben Jonson’s poetry. FIGHTING WORDS 5 (James Charlton ed. 1994).
Part 5 hypothesizes some of the causes of Congressional gibberish. The main hypothesis is that legislating is two functions — creating law and enacting it. Creating law is designing it so that it works. Legislators are good at the enacting part but have few, if any, law-creation skills. Judging by their output, almost no one in Congress has the most important law-creation skill — simplicity.

It might be unfair to pick on Congress. In the gibberish-production department, Congress is about average among American legislatures. Some are better, and some are worse. But being average also makes Congress typical. If there’s a way to make something unnecessarily complicated, an American legislature will find it. That’s our one true legislative skill.

1. The Gibberish Case

The case was Cyan, Inc. v. Beaver County Employees Retirement Fund.\(^2\) The statute was the Securities Litigation Uniform Standards Act of 1998,\(^3\) which amended the Securities Act of 1933.

The word gibberish doesn’t appear in the Court’s opinion. Judges are too polite to put that in writing. But the word dominated oral argument:\(^4\)

\[
\text{Justice Alito} \quad \text{Mr. Katyal, \ldots [what are we] supposed to do when Congress writes gibberish. And that’s what we have here. You said it’s obtuse. That’s flattering. And we have very smart lawyers here who have come up with creative interpretations, but this is gibberish. It’s — it is just gibberish. It says \ldots that the state courts have jurisdiction over federal claims, except as provided in Section 77p, which says nothing whatsoever about jurisdiction \ldots for federal claims.}
\]


\(^3\) 15 U. S. C. § 77a et seq.

So —

So what are — what are we supposed to do with this?

Justice Alito, I — I think I’d say three things about that. First, as I — as I was saying to Justice Ginsburg, I don’t think the statute’s by any stretch a model of clarity, but I don’t go so far as to say it is gibberish. . . .

. . . Congress had other ways of writing the statute that are clear, that could have been clearer, but this Court confronts this — and this returns to Justice Alito’s question — all the time, in big cases like Burwell, in small cases like Perry versus Merit Systems Protection Board last term, you’re dealing with the statute that, maybe if you look at it one way it’s gibberish, maybe some of you could have written it better, but it still has to be given some meaning.

Mr. Goldstein, speaking of gibberish —

Yes?

— aren’t we stuck with gibberish your way too? I mean, it seems like it’s gibberish all the way down here because — because under your version, as I understand it, . . . that first “except” clause, is superfluous. It doesn’t — doesn’t do anything. And also we render “involving a covered security,” that language, potentially superfluous in (c).

Okay. So —

So help me out with that.

I — I —

And — and I know — I know we generally — you know, we — nobody likes gibberish, but it is our job to try and give effect whenever possible to Congress’s language. It’s not for us to assume that Congress’s language means nothing —

Justice Alito didn’t say “If Congress writes gibberish.” He said “When Congress writes gibberish.” He was referring to § 77v(a)’s cross-reference to § 77p. Among other things,

5 Neal K. Katyal for Cyan, Inc.

6 Thomas C. Goldstein, for the Beaver County Employees Retirement Fund.
§ 77v(a) gives state courts jurisdiction over certain federal claims “except as provided in section 77p.” Section 77p contains two judicial duties; seven declarations of jurisdiction and lack of jurisdiction, many of them phrased as prohibitions even though they aren't; and five definitions, one of which contains a total of 41 concepts — ideas that must be understood individually to understand the definition as a whole.

A concept in this sense is a discrete idea being used as raw material by a drafter. A three-element test has a minimum of three concepts, at least one per element. If any of the elements is complicated, it will use more than one concept, and the test’s total concept usage will rise. Every concept imposes costs. Complying with a ten-issue test can be harder and more complicated than complying with a three-issue test. The same is true of enforcement. Complicated tests confuse everyone and lead to complicated litigation.

Imagine that you’re a lawyer or a judge who must make a practical decision that will be governed by this statute. In one section, Congress told you to go to another section, but the thing Congress told you to find isn’t where Congress told you to find it — even though Congress drafted both sections. Congress sent you on a fool’s errand, imposing costs on everyone affected. Lawyers didn’t know where to sue; judges didn’t what to do with the lawsuits; and eventually the Supreme Court had to pretend to find meaning where there was none. Those were real costs, passed on to ordinary people: individuals who were retired or were saving for retirement, shareholders, and taxpayers whose taxes paid for wasted court time.

Some of this can be blamed on Congress’s drafters — the Congressional staff whose job it is to find the best wording for what legislators want to enact. Both of the sections involved here contain a lot of wording that staff drafters shouldn’t have used. And maybe those drafters should have spotted the fool’s-errand cross-reference and pointed it out to the legislators who might have fixed it. But content is the legislators’ turf, which they guard fiercely. When legislators insist on mind-numbing complexity throughout a statute — of which a 41-concept definition is but one example — perhaps we can empathize with drafters who were overwhelmed and missed the faulty cross-reference. Gibberishness might be in the wording, but it’s also in the thinking.

2. **Appointing an Attorney General Who Will Fire a Special Counsel**

This is like the gibberish case — except that it affects the entire country during a political crisis.
Suppose you were a President and suppose that inside the Justice Department was a special counsel who was annoying you to the point that now you want that special counsel to be gotten rid of. But to fire him, you’d have to fire the Attorney General and perhaps the Deputy Attorney General and maybe other people, too.

The problem isn’t really firing people. You might not have the power to fire the special counsel. But the Attorney General and, in this case, the Deputy Attorney General have that power. They aren’t doing it. But you have the Constitutional power to fire them.

The problem is replacing them with someone who will fire the special counsel. You know that you have the power to nominate successors to be approved by the Senate. But you want someone to take office immediately and fire the special counsel within the first hour, without waiting for Senate approval. And the Senate might not approve the kind of person who would do what you want. You also know that you can make recess appointments while the Senate isn’t in session. But the Senate is in session more than you’d like.

Presidentially-appointed offices become vacant all the time. Officials die, retire, or quit to take more lucrative jobs. It can months for a successor to be nominated and then confirmed by the Senate. In the meantime, who does the departed official’s job? Somebody must be able to make kinds of decisions the departed official had been making. This is such a predictably recurring situation that Congress long ago legislated solutions, the most recent version of which is the Federal Vacancies Reform Act of 1998.

People who know how to read statutes have been reading this one and can’t agree on what it means for you now. There are two ways to read the statute. Any statute that can be read more than one way is a legislative failure.

It doesn’t matter whether you’re a good President or a bad one or whether your motivations are good ones or bad ones. This is about bad law.

Understanding the problem requires a brief detour through some well-drafted

7 U.S. Const., art II, § 2, clause 2.

8 “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” U.S. Const., art II, § 2, clause 3.
administrative regulations.

The Justice Department’s Special Counsel regulations: They’re well thought out and expressed clearly in plain language. Here are the relevant ones (italics added) —

28 C.F.R. § 600.4(a).

The Special Counsel will be provided with a specific factual statement of the matter to be investigated. The jurisdiction of a Special Counsel shall also include [i.e., automatically includes] the authority to investigate and prosecute federal crimes committed in the course of, and with intent to interfere with, the Special Counsel’s investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses . . . .

28 C.F.R. § 600.7(d)

The Special Counsel may be . . . removed from office only by the personal action of the Attorney General [and only] for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies. . . .

People who want very much to discover gaps in this haven’t found any.

The Federal Vacancies Reform Act: Below is the most important part of it, from title 5 of the U.S. Code (italics added).

§ 3345. Acting officer

(a) If an officer of an Executive agency . . . whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office —

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity . . . ;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity . . . ; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such
Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if —

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

Subsections (a)(2) and (a)(3) would seem wonderful to a President who wants to name an Acting Attorney General who will fire a special counsel within the hour. Under (a)(2), the President would be able to move into the Attorney General’s office anybody who has already been confirmed by the Senate for some other job. There are hundreds of such people. Under (a)(3), the President would be able to do the same with any of the thousands of Justice Department lawyers who have GS-15 rank and have been in the Justice Department for at least 90 days. The statute seems crystal clear.

No, it isn’t. Nobody knows what this statute really means in this situation.

“Dies, resigns, or is otherwise unable to perform the functions and duties of the office”:
In the block quote above, these are the words italicized near the beginning of § 3345. Three types of event trigger the President’s power to name an acting officer. “Is fired” or a synonym isn’t among the three. Congress seems to have left a gap. No one knows for certain why the gap is in the Vacancies Reform Act. The bill originated in the Senate Committee on Governmental Affairs, whose 36-page report says nothing about officers being fired — why they were excluded or whether they might be included by implication.9

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9 The genteel way of firing an incumbent officer, saving face for both sides, is for someone from the White House to tell the officer something like “The President wants your resignation,” after which the officer writes a cordial letter resigning and expressing gratitude for the opportunity to serve, etc. That letter would satisfy § 3345(a) — if an Attorney General were to write one, which this Attorney General has not done.

The “dies, resigns, or is otherwise unable to perform the functions and duties of the office” formulation occurs more than once in the Vacancies Reform Act. Wherever the list appears, the gap recurs, and its consequences recur. Notice the italicized words here:

§ 3348. Vacant office
(a) In this section —
(1) the term “action” includes any agency action as defined under section 551(13); and
(2) the term “function or duty” means any function or duty of the applicable office that —
   (A) (i) is established by statute; and
       (ii) is required by statute to be performed by the applicable officer (and only that officer); or
   (B) (i) (I) is established by regulation; and
       (II) is required by such regulation to be performed by the applicable officer (and only that officer) . . . .
(b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency . . . whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office —
   (1) the office shall remain vacant . . . .
(d)(1) An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b) [of this section], in the performance of any function or duty of a vacant office . . . shall have no force or effect.

Under the Justice Department regulations, only an Attorney General can fire a Special Counsel. If someone purports to be an Acting Attorney General in circumstances that don’t satisfy the Vacancies Reform Act, any attempt by that person to fire a Special Counsel will have “no force and effect” under 5 U.S.C. § 3348(d)(1).”

11 When Attorney General Alberto Gonzales resigned in 2007, the positions of Deputy Attorney General and Associate Attorney General were already vacant for unrelated reasons. Following the prescribed line of succession, President George W. Bush at first named the Solicitor General, Paul Clement, as Acting Attorney General. But then Bush substituted Peter Keisler, who was Assistant Attorney General for the Civil Division, by-passing others ahead of Keiser in the line of succession operative at the time. Keisler served for eight weeks until Michael Mukasy was confirmed as
The Supreme Court — in *NLRB v. S.W. General, Inc.*, the main case interpreting the Act — held that nullifying an officer’s actions under 3348(d)(1) is the Act’s remedy for violations. In a seven-to-two decision and in an opinion by Chief Justice Roberts, the Court nullified an action by an acting NLRB general counsel on exactly that reasoning.

Arguments about subsection (c) in § 3345: Subsection (a) gives Presidents wide powers to name acting officers. Below is subsection (c). First note the italicized words at the end of (c)(2).

§ 3345. Acting officer

(c)

(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

A White House lawyer might make this argument: Firing an officer ends that officer’s term of office. Under subsection (c)(2) ending a term of office is “an inability to perform the functions and duties of such office.” That phrase is in the list of events that will trigger a President’s power to appoint an acting officer under (a)(2) or (a)(3). Therefore, a President has the power to fire an Attorney General and appoint an acting one using the (a)(2) method or the (a)(3) method, whichever the President might prefer.

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Attorney General. There are no reported cases involving Keisler. In his eight weeks, he seems not to done anything that anyone would want voided under § 3348. But his appointment was illegal. A political fuss wasn’t made, but the reasons were different. Those opposed to the Administration were concentrating their fire on Mukasy, a controversial nominee who was confirmed by 53 votes to 40. It was in their interest not to complain that Keisler was serving illegally. If they had, they would have been creating pressure on themselves to end the illegality by allowing Mukasy’s to be confirmed quickly.

Here’s the counter-argument: Subsection (c)(1) is inside subsection (c), which covers officers who have terms countable in years. In the block quote above, note the italicized words in (c)(1): “nominated by the President for reappointment for an additional term.” Attorneys General don’t have terms. They serve at the pleasure of the President.

Here’s the counter-argument to the counter-argument: Subsection (c)(2) begins “For the purposes of this section” — not “this subsection.” The subsection is limited to officers with terms, but the section as a whole unquestionably covers Attorneys General.

Here are the counter-arguments to the counter-argument to the counter-argument: Congress knows how to spell the words “fired by the President.” If that would seem too blunt, Congress also knows how to spell “dismissed by the President.” Omitting firing from the list of three triggering events must have been deliberate on Congress’s part. Congress repeated that list several times in the statute and each time omitted firing. Congress could have had a very good reason for omitting firing. That reason would have been to prevent Presidents from doing things like creating a cabinet vacancy and then bypassing the Senate by making a GS-15 civil service employee an acting cabinet officer. Courts determine legislative intent by exactly this type of reasoning. (Actually this is a game courts are forced to play. There is no legislative intent here. Nobody knows why firing isn’t on the list.)

Arguments about the legislative history: These won’t go far. The only mention of firing is a comment on the Senate floor by the bill’s principal co-sponsor, which courts have at least four reasons to ignore (listed in the footnote). Regarding another comment about the Act made in the same speech by the same Senator, the Supreme Court held that “floor statements by individual legislators rank among the least illuminating forms of legislative history.”

If you’re getting tired of this arcane statutory dissection, dear reader, that is exactly the

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13 Fred Thompson, Senator from Tennessee. During floor debate, he said this: “[T]he Doolin court stated that the current language of the Vacancies Act does not apply when the officer is fired, and for similar reasons, it might not apply when the officer is in jail if he does not resign. To make the law cover all situations when the officer cannot perform his duties, the ‘unable to perform the functions and duties of the office’ language was selected.” 144 CONG. REC. S12,823 (daily ed. Oct. 21, 1998). The reference is to Doolin Security Savings Bank v. Office of Thrift Supervision, 139 F.3rd 203 (D.C. Cir. 1998).

14 First, the committee report says nothing on this subject. Second, there’s no evidence that other co-sponsors agreed with Thompson’s comment. Third, there’s no evidence that the House of Representatives even knew about it. Fourth, Thompson misquoted the Doolin court, which said nothing about officers being fired. And even if the court had said anything, it would have been dicta because nobody in Doolin had been fired.

point. The Vacancies Reform Act seems to be written in plain language. There’s very little legalese. Most of the sentences can be understood. But on an issue of vital importance during a national crisis, the statute is gibberish.

But wait, as they say in the late-night TV infomercials. There’s more.

28 U.S.C. § 508: The Vacancies Reform Act isn’t the only way that Presidentially-appointed offices are filled on an acting basis. The Act includes this (italics added):

§ 3347. Exclusivity
(a) Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless —
   (1) a statutory provision expressly . . .
   (B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity . . . .

In the case of Attorneys General, there is such a statutory provision. Under 28 U.S.C. § 508(a), if the Attorney General is fired, the Deputy Attorney General would become the Acting Attorney General. Note the italics:

§ 508. Vacancies
(a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office . . . .

Here’s the difference between the two statutes’ lists of vacancy predicates:

<table>
<thead>
<tr>
<th>statute</th>
<th>vacancy predicate</th>
<th>consequence if the predicate is satisfied</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 U.S.C. § 3345(a)</td>
<td>“dies, resigns, or is otherwise unable to perform the functions and duties of the office”</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(Firing the incumbent isn’t in this list.)</td>
<td>The President can exercise the powers in (a)(2) or (a)(3).</td>
</tr>
<tr>
<td>28 U.S.C. § 508(a)</td>
<td>“a vacancy in the office of Attorney General, or . . . his absence or disability”</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(Because this statute doesn’t list causes for vacancies, a vacancy created by the President in firing the incumbent, would satisfy this vacancy predicate.)</td>
<td>The Deputy Attorney General becomes Acting Attorney General.</td>
</tr>
</tbody>
</table>
What if a President were to fire both the Attorney General and the Deputy Attorney General? That would be governed by § 508(b):

(b) When by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.

Thus, under 28 U.S.C. § 508(a), the powers of the Attorney General can be exercised by the Deputy Attorney General or Associate Attorney General or, if those offices are vacant, by someone in a line of succession created under § 508(b) by the Attorney General before he was fired, or, if all those people have been fired, by someone named in an Executive Order.¹⁶

**How did Congress create this mess?** We pay a lot of attention to drafting the right words, but sometimes the most important words are the ones that haven’t been drafted. Here five words — *is dismissed by the President* — are missing from the Vacancies Reform Act. Normally officers cease to be officers through resignation, death, or dismissal. The statute specifies the first two and says nothing about the third.

The omission might have been accidental or deliberate. The staff drafters might have goofed, and their mistake might not have been discovered until it was too late to do anything about it. Or members of the Senate committee — with great foresight — might have demanded that the five words, or at least the concept behind them, be omitted; those members might have gotten their way through the usual legislative haggling; and the staff drafters might have done exactly what they were expected to do.

If the drafters goofed, it might have been that they were overwhelmed with the Act’s mind-numbingly complexity. The Act includes tests with elements that seem to have mysterious purposes; lists of exceptions combined with exceptions to exceptions; lists of different categories of deadlines; complicated ways of extending deadlines; limits which apply in different ways to extending different deadlines; and cross-references to statutes which the Act doesn’t identify and which might or might not apply, depending on the extent

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¹⁶ On March 31, 2017, the President issued Executive Order 13787 adding three U.S. Attorneys at the end of the line of succession “to act as Attorney General” if all the officers named in 28 U.S.C. § 508, plus all those designated by the Attorney General exercising § 508’s authority, have “died, resigned, or otherwise become unable to perform the functions and duties of the office of Attorney General” — repeating the language in the Vacancies Reform Act. The executive order is at [https://www.whitehouse.gov/presidential-actions/presidential-executive-order-providing-order-succession-within-department-justice/](https://www.whitehouse.gov/presidential-actions/presidential-executive-order-providing-order-succession-within-department-justice/). This is unremarkable. The two preceding Presidents had issued similar executive orders (numbered 13481, 13557, and 13762).
to which they “expressly” authorize or designate something. There's no effective way to understand all this. The least ineffective way is to put huge pieces of paper on a wall and draw flow-chart diagrams. You might need an entire wall. And while drawing those diagrams, you'll feel like sending texts to Congress saying “Simplify! Simplify! Simplify!” Complexity raises the odds that both drafters and readers will make mistakes.

3. Formulating Crimes

Here are five commonly used methods of creating a crime and its punishment:

<table>
<thead>
<tr>
<th>Method</th>
<th>(a declaration)</th>
<th>“Whoever [does X] shall be [fined, imprisoned, etc.].”</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>or</td>
</tr>
<tr>
<td></td>
<td></td>
<td>“A person who [does X] shall be [fined, imprisoned, etc.].”</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Method B</th>
<th>(a declaration)</th>
<th>“It is unlawful to [do X].”</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>[A nearby sentence or section will set out the punishment.]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Method C</th>
<th>(a duty)</th>
<th>variation 1: “A person shall not [do X].” [A nearby sentence or section will set out for the punishment for doing X and thus violating this negative duty.]</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>variation 2: “A person shall [do X],” [A nearby sentence or section will set out the punishment for not doing X and thus failing to perform this affirmative duty.]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Method D</th>
<th>(a declaration)</th>
<th>“A person who [does X] is guilty of [crime Y]. [Crime X] is a [Class B felony or Class A misdemeanor].”</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>[A group of sections elsewhere in the criminal code will set out the punishments for each Class.]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Method E</th>
<th>(a declaration)</th>
<th>“A person is guilty of [crime Y] if the person [does X]. [Crime Y] is a [Class B felony or Class A misdemeanor].”</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>[A group of sections elsewhere in the criminal code will set out the punishments for each Class.]</td>
</tr>
</tbody>
</table>

(In the examples below, the words that signal the drafting method are underlined.)

Methods D and E are infinitely better than the others. They give each crime a name as part of a system of classifying crimes with uniform punishments, which most states have done. Method E is better than D because it gets the reader to the verb as fast as possible, and an English-language sentence makes sense only after the reader has found the verb.

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17 Every method except C uses declarations. A declaration creates a status or legal situation by declaring it to be true, often with a form of the verb to be.
Congress doesn’t use Method D or Method E. Instead, it loves Method A, using it to create most of the crimes in title 18, the federal criminal code. Here is an example. (Where’s the verb?)

§ 1503. Influencing or injuring officer or juror generally.
(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).

But Congress can be fickle. Or, put another way, Congress can’t make up its mind about how to create a crime. For some Title 18 crimes, it uses Method B. An example is the RICO statute (Racketeer Influenced and Corrupt Organizations), also in title 18:

§ 1962. Prohibited activities
(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity to use or invest any part of such income in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Sometimes Congress can even be ambidextrous, using two methods in the same section. Tucked away in an obscure corner of the Tax Code is a statute in which Congress uses Method B to create a crime in subsection (a) and Method C to create another crime in subsection (b).

18 Section 1961(B) defines “racketeering activity” to include, among others, the following Title 18 crimes, which are discussed elsewhere in this article: “section 1503 (obstruction of justice), section 1510 (obstruction of criminal investigations), section 1512 (tampering with a witness, victim, or an informant), section 1513 (retaliating against a witness, victim, or an informant).”

19 Title 26 of the U.S. Code.
§ 7217. Prohibition on executive branch influence over taxpayer audits and other investigations

(a) Prohibition. — It shall be unlawful for any applicable person to request, directly or indirectly, any officer or employee of the Internal Revenue Service to conduct or terminate an audit or other investigation of any particular taxpayer with respect to the tax liability of such taxpayer.

(b) Reporting requirement. — Any officer or employee of the Internal Revenue Service receiving any request prohibited by subsection (a) shall report the receipt of such request to the Treasury Inspector General for Tax Administration.

(c) Exceptions. . .

(d) Penalty. — Any person who willfully violates subsection (a) or fails to report under subsection (b) shall be punished upon conviction by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(e) Applicable person. — For purposes of this section, the term “applicable person” means —

(1) the President, the Vice President, any employee of the executive office of the President, and any employee of the executive office of the Vice President; and

(2) any individual (other than the Attorney General of the United States) serving in a position specified in section 5312 of title 5, United States Code.

Congress is making two kinds of mistakes. One is using three different methods of creating crimes. The other is using the worst possible method for the overwhelming majority of the crimes it creates. Most states use one — and only one — of the five methods. And most states use Method D or Method E, the most effective two of the five.

But Congress has also done something well here. Section 7217 is a lean, simple statute with a clarity and economy unlike any of the other Congressional enactments discussed in this article. It might be drafted in an odd way, but it’s the opposite of gibberish.

4. Obstruction of Justice

Here’s a list, from title 18 of the U.S. Code, of the federal cover-up crimes — the ones for

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20 In the controversy over whether a President can be prosecuted for exercising what the Constitution calls “The executive Power [which is] vested in a President” (Article II, section 1), it seems not to have been noticed that Congress created a crime specifically for Presidents.
which people are indicted and convicted during national political scandals. They are all reproduced in Appendix A.

§ 4. Misprision of felony
§ 1001. Statements or entries generally
§ 1503. Influencing or injuring officer or juror generally
§ 1504. Influencing juror by writing
§ 1510. Obstruction of criminal investigations
§ 1512. Tampering with a witness, victim, or an informant
§ 1513. Retaliating against a witness, victim, or an informant
§ 1515. Definitions for certain provisions; general provision
§ 1521. Retaliating against a Federal judge or Federal law enforcement officer by false claim or slander of title
§ 1622. Subornation of perjury

“Obstruction of Justice” is the name of title 18’s Chapter 73, where Congress codified all of these crimes except misprision of felony and subornation of perjury.

When significant numbers of people are being indicted for various types of obstruction of justice, you might want a detailed scorecard that would help you follow the action through pre-trial motions, trials, and appeals and explain it all to non-lawyers when they’re curious. Appendix A should provide that scorecard. These crimes shouldn’t be hard to understand. They cover simple things like falsifying evidence and threatening witnesses. Take a look at Appendix A and try to read it. Will it help you follow obstruction of justice cases and explain them to your family and friends? Why not?

These sections contain so many crimes with overlapping elements that the total effect is incoherence. Reading them is like trying to find your way through a labyrinth. Over decades Congress has enacted new sections or amended existing ones with no attempt to coordinate them and limit the number of concepts involved. It has piled complexity onto complexity.

And the wording is slippery. For example, § 1001 penalizes false statements concerning “any matter within the jurisdiction of the executive . . . branch.” Suppose your client is approached on the street by an FBI agent who shows official identification and starts asking questions. It’s unlikely that the average person would realize that lying to that agent is a felony even though the person isn’t on the witness stand in a courtroom. But that’s what 18 U.S.C. § 1001 means even though the meaning is hidden deep inside wording that looks like it addresses something else. “Jurisdiction” suggests the power to decide. Courts, not the

21 Since lying to state and local police, without more, isn't typically known to be a crime, defendants charged under § 1001 have argued that if Congress wanted to criminalize lying to federal law enforcement agents, it would have said so specifically. The Supreme Court has rejected that argument. U.S. v. Rodgers, 466 U.S. 475 (1988).
executive branch, decide who is guilty of a crime. If Congress meant law enforcement personnel, it should have said so rather than hiding the meaning in the words “jurisdiction of the executive . . . branch.”

I redrafted all the Appendix A obstruction of justice statutes, and the redraft is in Appendix B. It’s not the best conceivable drafting. It’s just what a good drafter would be able to do if the drafter were permitted to rewrite all the relevant sections from scratch, which our legislatures usually don’t permit their staff drafters to do. (Not allowing drafters to do that might be one of the reasons why our statutes become more complex as they are continually amended rather than simpler.)

In the Appendix B redraft, simplifying created clarity and reduced size:

<table>
<thead>
<tr>
<th>Appendix A (current law)</th>
<th>2,193 words</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appendix B (the redraft)</td>
<td>1,103 words</td>
</tr>
</tbody>
</table>

Some of the shrinkage is because Appendix B’s wording is more concise. But most of the shrinkage is because Appendix B has fewer concepts — many fewer.

For example, Congress frequently criminalizes both an act and an attempt to commit the act. An attempt is an inchoate crime. It equals trying plus failing to succeed. Criminal law treats completing a crime and attempting it as mutually exclusive. Succeeding and failing don't overlap. If you want to penalize both success and failure, the usual drafting method is to create two crimes, perhaps punishing a failed attempt less than a successful one.

Since 1831, 18 U.S.C. § 1503 has contained an ingenious method of creating one crime in place of two, which Congress seems not to have realized even though it created the method. Instead of using the word attempt, § 1503 uses the word endeavor. The complete crime definition is quoted earlier in this article. Here’s the key wording, which courts call the omnibus clause:

- corruptly . . . influences, obstructs, or impedes, or
- endeavors to influence, obstruct, or impede, the due
  administration of justice

For at least the last century, courts have seized on this use of endeavor to hold that in § 1503 success is irrelevant and that a defendant is just as guilty for trying as for succeeding. The courts reason that because Congress didn't say attempt, it meant something other than the inchoate crime of attempt. This is from a 1921 Supreme Court case:

22 See text, supra, between notes 17 and 18.
The word of the section is ‘endeavor,’ and by using it the section got rid of the technicalities which might be urged as besetting the word ‘attempt,’ and it describes any effort or essay to do or accomplish the evil purpose that the section was enacted to prevent. ... The section ... is not directed at success in corrupting a juror, but at the ‘endeavor’ to do so.²³

Attempt has an exact meaning in criminal law. Endeavor has none of attempt’s baggage, and the courts had to invent a meaning for it. Essentially the courts are reading the statute like this:

\[
\text{corruptly \ldots influences, obstructs, or impedes, or}
\]
\[
\text{endeavors to influence, obstruct, or impede, the due}
\]
\[
\text{administration of justice}
\]

Because Congress used endeavor rather than attempt, courts are able to ignore the words crossed out above. Trying makes you guilty, and § 1503 doesn’t care whether you succeed or fail.

Congress probably did this by accident. Nobody today knows why a drafter in 1831 wrote endeavor rather than attempt. The statute obviously mentions succeeding (“influences, obstructs, or impedes”) separately from trying (“endeavors to influence, obstruct, or impede”).

Maybe the drafter thought endeavor and attempt meant the same thing. Maybe to many people in 1831, they actually did mean the same thing, and endeavor seemed the more genteel way of saying it. Or maybe it was style. The drafter might just have liked endeavor more than attempt and didn’t wonder about the similarities or differences in meaning. Or maybe the drafter actually meant that trying completes the crime and success or the lack of it is irrelevant. That actually seems like the least likely explanation. Why would the drafter have mentioned success (“influences, obstructs, or impedes”) if the drafter meant it to be irrelevant?

Today it doesn’t really matter why the drafter wrote endeavor. Whether by accident or by design, the drafter — and therefore Congress — invented a two-fer, a way of getting one concept to do the work of two. But actually endeavor is a three-fer. Using endeavor reduces

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three concepts to one. *Endeavor* includes both trying and succeeding, making it unnecessary to criminalize both the act and the attempt. And *endeavor* also includes the concept of *knowingly*. If you make an effort (*endeavor*) to do something, inherent in making the effort is knowing that you are making it: you are trying to accomplish a specific goal.

Where Congress had criminalized equally both an act and the attempt in the same section — invariably in the same sentence — the Appendix B redraft uses *endeavor* instead, eliminating also any *knowingly* requirements. This is how drafters simplify — by using the smallest number of concepts that will get the job done. Bloated drafting isn’t caused only by too many words. It’s also caused by too many concepts. Here Congress was using three concepts to do the work of one.

Section 1503 was the original obstruction of justice statute. All the others in Chapter 73 came afterward. In every later statute, Congress ignored the efficiency of its own accidental invention.

When it enacted Chapter 73’s later sections, why didn’t Congress do what the Appendix B redraft does with its own brilliant but accidental invention of *endeavor*? Surely Congress reads the case law — the way Broadway stage actors read critics’ reviews — and should have been pleasantly surprised at how well its accidental invention has worked out when courts interpret § 1503. Maybe Congress doesn’t read case law. Or maybe Congress reads it, but simplicity isn’t something Congress would value or even notice when courts create it.

Other aspects of the redraft — and there are many — are explained in Appendix B’s footnotes, which develop this article’s analysis.

**5. Why Congress Drafts This Way**

Simplicity is the ultimate sophistication.
— headline on the brochure introducing the Apple II computer (1978)

Keep it simple, stupid.
— the KISS principle in engineering, created by Kelly Johnson, from the common experience that malfunctions occur more often in complex systems

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than in simple ones performing similar tasks.

Clutter and confusion are failures of design . . . .
—Edward Tufte

Simplicity is the shortest path to a solution. . . . [A] lot of simplicity comes from knowing what matters and what doesn't matter.
— Ward Cunningham

Abair ach beagan is abair gu math e.
(Say but little and say it well.)
— Gaelic proverb, posted on a wall in the Scottish Parliament’s drafters’ office.

Drafting is designing. A contract or statute is intellectual machinery — a machine made up of ideas geared together. It should produce the results we want whenever we use it. It shouldn’t waste fuel (cost a lot to comply with or enforce). It should be reliable. It should work right.

Simple solutions, if well chosen, work better than complex ones. To achieve simplicity, a drafter figures out the few things that really matter, uses them, and throws away the rest as clutter. A confused drafter uses every relevant concept because that drafter can’t tell the difference between what really matters and clutter. What separates those two drafters is that one knows how to design and the other doesn’t.

Simplicity isn’t simplistic. It’s sophisticated. Simplicity is a skill, and in legislation, it’s a very hard one to master.

Legislating is two functions — creating law and enacting it. A lot of legislative incoherence is caused by mistakenly conflating the two functions.

Creating law is diagnosing the problems a statute would address; building a set of legal rules that would best do that; finding the best words to express those rules; and producing, in writing, a product suitable for enactment. These require a set of professional skills, most


especially mastery in the wise use of rules with the foresight to predict what will work and what won’t. (This is one of the reasons why teaching a law school drafting course involves teaching high-level problem-solving skills.)

Enacting law is deciding whether the creators’ product should become law. Enacting provides legitimacy. Those who enact were elected by the public and are responsible to the public. If they make bad enactment decisions, the public can replace them. Professional expertise isn’t particularly relevant to good enacting and might even be a hindrance to political credibility. Deciding whether to enact is intuitive work — intuition about what’s right and wrong and about what the public will accept as fair and reasonable. The finest intuition is priceless, and your favorite legislators probably have it.

In our legislatures, those who enact also do most of the creating. But winning an election isn’t evidence that a legislator has professional law-creating skills or even realizes that they exist as a skill set. An election isn’t a professional licensing exam. It establishes legitimacy.

Legislation can be evaluated by measurable criteria. Wisely drafted legislation —

1. uses the fewest concepts needed to accomplish a goal;

2. uses concepts that collectively —
   (a) produce the right results a high percentage of the time;
   (b) have the smallest number of adverse side effects;
   (c) cost little to enforce;
   (d) impose few compliance costs on those subject to a rule;
   (e) seem fair and reasonable to the public;

3. expresses those concepts in words that —
   (a) are unambiguous;
   (b) are as few and as short as possible; and
   (c) can be understood by as many people as possible.

Most elected legislators have skills related to 2(e). But those are the only skills that many legislators bring to law creation.

Most legislators deal with 2(a) through gut instinct and unexamined assumptions rather than by gathering evidence and evaluating it, which involve complex and detailed skills. The statutes discussed in this article — which are fairly typical American legislation — reflect very little understanding of 2(b), (c), and (d).

Top-notch professional drafters are excellent at 3(a), (b), and (c), but a significant
number of drafters aren’t top-notch. I have yet to meet a legislator who has any skill at all related to 3(a), (b), or (c).

In legislatures, the elephant in the room is number 1. The statutes discussed in this article suggest that nobody in Congress or employed by Congress has ever tried to master any of the skills related to number 1.

Chaos. When Victoria Nourse and Jane Schecter interviewed Congressional drafters, they heard comments like these

Staffers repeatedly told us that there was often insufficient time to achieve textual clarity: “Time pressure . . . is the key here. . . . This pressure leads to errors, inertia, [and] not understanding completely the potential . . . pitfalls” of a law. When bills are drafted on the floor or in conference, time pressures can be intense; a staffer may have only “thirty minutes to get something done” on a “high profile issue.” Another reported that she might get the actual text only twenty minutes before the vote: “This happened with the juvenile-crime bill, when the stuff on gun shows came out of the woodwork, and there was no time to even check what the current law is. So sometimes you can’t be more clear because you don’t know what you’re addressing.”

What could be more important to a society than the quality of its laws? But this isn’t a professional process designed to produce professional-quality work. It’s amateurish, excludes skills, and produces gibberish.

Conclusion

These problems — a chaotic process and law being created amateurishly — typically don’t occur in some parliamentary systems, where law is created in the executive branch, sometimes with the help of separate commissions, and presented to the legislature for enactment. Parliaments aren’t, however, being used as rubber stamps. A parliament chooses from its own members the cabinet that controls the executive branch.

Maybe we should treat legislative drafters with a bit more respect. In most U.S.

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legislatures, the drafters on staff aren’t the core problem. Legislative drafters have a lot of experience in part of creating law (finding the words), but they are typically excluded from the rest. Writing and thinking, however, are one process. And a legislature’s drafters are its institutional memory. Some are senior in years of service to most of their legislators. An experienced drafter has seen decades of bad law being made and might have learned law-creation lessons that legislators don’t have much opportunity to learn.\textsuperscript{31} An hypothesis that probably won’t be tested is that we would get better legislation if legislators were to reduce, by at least some amount, their involvement in law creation and if some staff drafters were to have a more active role in it.

\textsuperscript{31} To get a sense of how legislative drafters go about their work, you can find links to about 30 state legislatures’ drafting manuals on the National Conference of State Legislatures website: \url{http://www.ncsl.org/legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff/bill-drafting-manuals.aspx}. The Texas manual is particularly good.

Appendix A

Federal Cover-Up Crimes
(from Title 18, U.S. Code)

This Appendix contains cover-up crimes involving courts and criminal investigations, including lying to the FBI. Omitted are offenses like lying to Congress and administrative agencies, which have been edited out of § 1001.

This Appendix includes only the crimes’ formulations — the elements of crimes and defenses. Deleted are provisions on penalties, jurisdiction, and venue.

Congress drafted nearly all these sections using this formula: “Whoever [does X, Y, and Z] shall be imprisoned [number of years] or fined [details] or both.” The real drafting challenge is setting out the elements of a crime — the X, Y, and Z. Penalties are relatively easy to draft, aren’t part of the issues explored in this article, and would be distracting in this Appendix.

Deleting the penalty wording for this Appendix isn’t easy. The same sentence that sets out the elements of the crime also includes the penalties. That’s terrible drafting because it can lead to huge sentences, as the one in 18 U.S.C. § 1503. To cut out the distracting penalty clutter in this Appendix, I deleted the penalty parts of the sentences and replaced them with “shall be [penalty].” That might seem awkward wording, but it’s a concise way to indicate a deletion needed here because Congress uses the least effective method of creating crimes. See text after note 18.

§ 4. Misprision of felony

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be [penalty].

§ 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive . . . or judicial branch of the Government of the United States, knowingly and willfully —
(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
shall be [penalty].
(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party’s counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) . . . 32

§ 1503. Influencing or injuring officer or juror generally
    (a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be [penalty].

§ 1504. Influencing juror by writing
    Whoever attempts to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in relation to such issue or matter, shall be [penalty].

    Nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury.

§ 1510. Obstruction of criminal investigations
    (a) Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator shall be [penalty].

    (b) . . . 33

    (c) As used in this section, the term “criminal investigator” means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States.

    (d) . . . 34

    (e) . . . 35

32 Subsection 1001(c) applies to Congress.

33 Subsection 1510(b) penalizes a financial institution officer for alerting a customer that the customer’s records have been subpoenaed. Because this crime is so narrow and specialized, I omitted it.

34 Subsection 1510(d) covers insurance company officers and employers in the same way that subsection (c) covers bank officers. I omitted it because the crime is narrow and specialized.

35 Subsection 1510(e) concerns the Fair Credit Reporting Act, the Right to Financial Privacy Act, and related statutes. Again, I omitted it because it is so narrow and specialized.
§ 1512. Tampering with a witness, victim, or an informant

(a) Whoever kills or attempts to kill another person, with intent to —

1. prevent the attendance or testimony of any person in an official proceeding;
2. prevent the production of a record, document, or other object, in an official proceeding; or
3. prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be [penalty].

(b) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to —

1. influence, delay, or prevent the testimony of any person in an official proceeding;
2. cause or induce any person to —
   1. withhold testimony, or withhold a record, document, or other object, from an official proceeding;
   2. alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;
   3. evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
   4. be absent from an official proceeding to which that person has been summoned by legal process; or
3. hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to —

1. influence, delay, or prevent the testimony of any person in an official proceeding;
2. cause or induce any person to —
   1. withhold testimony, or withhold a record, document, or other object, from an official proceeding;
   2. alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
   3. evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
   4. be absent from an official proceeding to which such person has been summoned by legal process; or
3. hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be [penalty].

(c) Whoever corruptly —
(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be [penalty].
(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from —
   (1) attending or testifying in an official proceeding;
   (2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;
   (3) arresting or seeking the arrest of another person in connection with a Federal offense; or
   (4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;
or attempts to do so, shall be [penalty].
(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.
(f) For the purposes of this section —
   (1) an official proceeding need not be pending or about to be instituted at the time of the offense; and
   (2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.
(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance —
   (1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or
   (2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

§ 1513. Retaliating against a witness, victim, or an informant
(a) Whoever kills or attempts to kill another person with intent to retaliate against any person for —
   (A) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or
   (B) providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings, shall be [penalty].
(b) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for —
(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or
(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings given by a person to a law enforcement officer; or attempts to do so, shall be [penalty].

§ 1515. Definitions for certain provisions; general provision

(a) As used in sections 1512 and 1513 of this title and in this section —

(1) the term “official proceeding” means —
(A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;
(B) a proceeding before the Congress;
(C) a proceeding before a Federal Government agency which is authorized by law; or
(D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce;

(2) the term “physical force” means physical action against another, and includes confinement;

(3) the term “misleading conduct” means —
(A) knowingly making a false statement;
(B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;
(C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;
(D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or
(E) knowingly using a trick, scheme, or device with intent to mislead;

(4) the term “law enforcement officer” means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant —
(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or
(B) serving as a probation or pretrial services officer under this title;

(5) the term “bodily injury” means —
(A) a cut, abrasion, bruise, burn, or disfigurement;
(B) physical pain;
(C) illness;
(D) impairment of the function of a bodily member, organ, or mental faculty; or
(E) any other injury to the body, no matter how temporary; and

(6) the term “corruptly persuades” does not include conduct which would be misleading conduct but for a lack of a state of mind.

(b) As used in section 1505, the term “corruptly” means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

(c) This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.

§ 1521. Retaliating against a Federal judge or Federal law enforcement officer by false claim or slander of title

Whoever files, attempts to file, or conspires to file, in any public record or in any private record which is generally available to the public, any false lien or encumbrance against the real or personal property of an individual described in section 1114, on account of the performance of official duties by that individual, knowing or having reason to know that such lien or encumbrance is false or contains any materially false, fictitious, or fraudulent statement or representation, shall be [penalty].

§ 1622. Subornation of perjury

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be [penalty].

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36 18 U.S.C. § 1505, titled “Obstruction of proceedings before departments, agencies, and committees.”

37 18 U.S.C. § 1114 (“any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance.”).
Appendix B

Redrafted Federal Cover-Up Crimes

This Appendix is a redraft of the crimes in Appendix A. See text, supra, between notes 21–25. To avoid confusion with current law — the numbered sections reproduced in Appendix A — sections in this redraft are lettered (§ A, etc.). If this redraft were ever enacted — which is extremely unlikely — the letters would naturally become numbers.

Congress uses the least effective method of creating crimes. This redraft uses a better one, which states often adopt when modernizing their criminal codes.38

§ A. Definitions

In sections B through E —

(1) “Corruptly” means with an improper purpose.40

38 See text, supra, after note 17.

39 Congress provided few definitions for terms used in the statutes reproduced in Appendix A. One way to reduce the number of concepts — simplify — is to create a consistent vocabulary for a document through definitions. Because Congress failed to do that here, the courts have had to do it, with much effort that wouldn't have been needed if Congress had done a complete job of legislating. In creating these definitions, I used concepts from the case law.

40 In 1831, Congress used the word corruptly when it enacted what is now 18 U.S.C. § 1503, the basic obstruction of justice statute. But Congress didn’t define it then or over the next 162 years as it added the other sections in Appendix A. During those 162 years, the courts developed four different definitions, one of which was so unacceptable that in 1996 Congress finally chose sides and added, in § 1515(b), a definition of corruptly. For the history and the cases, see Daniel J. Hemel & Eric A. Posner, Presidential Obstruction of Justice, 106 CAL. L. REV. (forthcoming 2018) (manuscript at 9–13), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004876.

But the § 1515(b) definition applies only to § 1505, which penalizes obstructing justice before administrative agencies and Congress — not courts (which is why § 1505 isn’t in Appendix A). The definition is, however, consistent with most of the case law interpreting other sections in Appendix A and can be used that way here.

Congress’s § 1515(b) definition is unnecessarily complicated: “acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.” Corrupt is a state of mind, and the only state of mind words here are “with an improper purpose.” Everything else in the § 1515(b) definition is action — the things a person does while in that state of mind. All the actions in this definition are already in other parts of the statute. Cutting out the redundant bloat leaves the phrase improper purpose, which also permeates the case law. Simplicity is achieved in part by removing detritus that distracts from the core ideas.
(2) “Court” means a Federal court.
(3) “Endeavor” means an effort or to make an effort.\textsuperscript{41}
(4) “Informant” means a person who provides information to a law enforcement or judicial officer. A victim or witness might also be an informant.
(5) “Injure” includes causing pain.\textsuperscript{42}
(7) “Judicial officer” means a judge, magistrate, or prosecutor with legal authority in an Article III court.\textsuperscript{43}
(8) “Judicial proceeding” means a proceeding in a Federal court, including a grand jury investigation.
(9) “Juror” means a petit juror, grand juror, or person who has been summoned to serve as a petit or grand juror.\textsuperscript{44}
(10) “Law enforcement officer” means a Federal officer or employee, or a person authorized to act for the Federal Government, who —
    (A) is authorized under law to participate in the prevention, investigation, or prosecution of a Federal offense; or
    (B) serves as a probation or pretrial services officer under this title.

§ B. Obstructing justice; corruptly influencing or impeding a judicial officer or juror\textsuperscript{45}
(a) Obstructing justice. A person is guilty of obstructing justice if that person
    (1) corruptly
    (2) endeavors to influence or impede
    (3) the due administration of justice
    (4) in a judicial proceeding.
(b) Corruptly influencing or impeding a judicial officer or juror. A person is guilty of corruptly influencing or impeding a judicial officer or juror if that person
    (1) corruptly
    (2) endeavors to influence or impede

\textsuperscript{41} For an explanation of this definition, see text, supra, before and after note 23.

\textsuperscript{42} A redraft of § 1515(a)(5), cutting out all the unnecessary concepts. The only reason to define this term is to include the idea of pain, which might occur without what people normally think of as an injury.

\textsuperscript{43} Prosecutors have been held to be covered even though they aren’t specified in § 1503’s bizarre and internally inconsistent lists of judicial officers. See U.S. v. Jones, 663 F.2d 567 (5th Cir. 1981).

\textsuperscript{44} Even though the statutes don’t say so, the case law holds that people who have been summoned to serve as jurors are to be treated, for obstruction of justice purposes, as jurors. See U.S. v. Jackson, 607 F.2d 1219 (8th Cir. 1979). That makes perfect sense. A person who wants to obstruct justice could try corruptly to influence or impede people who have been summoned as jurors. That hadn’t occurred to Congress. But it did occur to the type of people Congress wanted to punish.

\textsuperscript{45} A redraft of part of § 1503, cutting out many unnecessary concepts and eliminating the need for § 1504. Subsection (a) here is a redraft of the omnibus clause as the courts have interpreted it. See text, supra, before and after note 23.
§ C. Concealing a felony; concealing a material fact; making a false statement.46

(a) Concealing a felony. A person is guilty of concealing a felony if —
(1) a felony under this Code has been committed and
(2) the person endeavors to conceal the felony.

(b) Concealing a material fact. A person is guilty of concealing a material fact if that person
(1) willfully
(2) conceals or encourages another person to conceal
(3) a material fact
(4) from
   (A) a Federal law enforcement agency or
   (B) a court unless the fact is concealed by a party or a party’s counsel.

(c) Making a false statement. A person is guilty of making a false statement if that person
(1) makes a false statement,
(2) knowing of its falsity,
(3) to
   (A) a Federal law enforcement agency or
   (B) a court unless the statement is made by a party or a party’s counsel.

§ D. Suborning perjury; tampering with a witness, informant, or evidence.47

(a) Suborning perjury. A person is guilty of suborning perjury if —
(1) that person
   (A) persuades a witness to testify falsely
   (B) knowing that the testimony will be false; and
(2) the witness
   (A) afterward testifies falsely
   (B) knowing that the testimony is false.

(b) Witness tampering. A person is guilty of witness tampering if that person —
(1) corruptly
(2) endeavors to persuade, intimidate, or mislead another person
(3) intending to
   (A) influence that other person’s testimony or
   (B) hinder that other person from
      (i) appearing,
      (ii) testifying fully and truthfully, or
      (iii) producing an object48

46 A redraft of § 4 and part of § 1001 combining the two and simplifying them. Sections C and D eliminate the need for § 1510(a).

47 Subsection (a) is a redraft of § 1622. Subsection (c) includes a redraft of part of § 1001(a). The rest of this section is a redraft of § 1512, cutting out many unnecessary concepts.

48 “Object” might seem like awkward writing, but Congress wisely used that word in the Appendix A statutes. Congress used one concept — an “object,” meaning a tangible thing — in
Informant tampering. A person is guilty of informant tampering if that person —

1. endeavors to persuade, intimidate, or mislead another person to hinder that other person from communicating to —
   - a judicial officer or
   - a law enforcement officer
2. concerning the possible commission of a Federal offense or violation of conditions of
   - probation,
   - supervised release,
   - parole, or
   - release pending judicial proceedings.

Evidence tampering. A person is guilty of evidence tampering if that person does any of the following:

1. knowingly participates in creating a false document connected to a judicial proceeding;
2. knowingly participates in submitting a false document to a law enforcement officer or a court;
3. (A) endeavors to alter, destroy, or conceal an object intending to impair its integrity or availability in a judicial proceeding; or
4. (A) endeavors to persuade, intimidate, or mislead another person to cause that other person to withhold, alter, or destroy an object to impair the object’s integrity or availability in a judicial proceeding.

Facts not relevant to a prosecution under this section. It is irrelevant whether —

1. a judicial proceeding was pending or about to be instituted at the time of the offense;
2. the object was admissible in evidence; or
3. the defendant knew or should have known that —
   - a judicial proceeding was a Federal judicial proceeding;
   - a judicial officer was a Federal judicial officer; or
   - a law enforcement officer was a Federal law enforcement officer.

§ E. Retaliation against a judicial officer, juror, witness, party, or informant

(a) Retaliating against a judicial officer. A person is guilty of retaliating against a judicial officer if that person —

1. endeavors or threatens to —
   - injure a judicial official;
   - damage a judicial officer’s property; or

49 Subsections (a) and (b) are a redraft of part of § 1503. Subsections (c) and (d) are a redraft of § 1513. In redrafting, many unnecessary concepts were cut out. But it isn’t possible to combine all the subsections here into one test covering everybody. Although paragraph (1) is parallel in all the subsections, no paragraph (2) is the same as any other paragraph (2).
(C) file a false document as a publicly available record concerning the judicial officer’s ownership of property;\textsuperscript{50}

(2) to retaliate for the judicial officer’s performance of an official duty.

(b) Retaliating against a juror. A person is guilty of retaliating against a juror if that person —

(1) endeavors or threatens to —

(A) injure a juror;

(B) damage a juror’s property; or

(C) file a false document as a publicly available record concerning the juror’s ownership of property;\textsuperscript{51}

(2) to retaliate for

(A) a verdict or indictment assented to by the juror or

(B) the juror’s service as a juror

(c) Retaliating against a witness or party. A person is guilty of retaliation against a witness or party if that person —

(1) endeavors or threatens to —

(A) injure another person;

(B) damage another person’s property; or

(C) file a false document as a publicly available record concerning the other person’s ownership of property;

(2) to retaliate for that other person’s doing any of the following at a judicial proceeding:

(A) attending as a witness or party,

(B) testifying, or

(C) producing an object

(d) Retaliating against an informant. A person is guilty of retaliation against an informant if that person —

(1) endeavors or threatens to —

(A) injure another person;

(B) damage another person’s tangible property; or

(C) file a false document as a publicly available record concerning the informant’s ownership of property;

(2) to retaliate for that other person’s providing to a law enforcement officer or judicial officer information relating to the possible

(A) commission of a Federal offense or

(B) violation of conditions of

(i) probation,

(ii) supervised release,

(iii) parole, or

(iv) release pending judicial proceedings.

\textsuperscript{50} Adding these 16 words here replaces all of § 1521, which Congress enacted because of some incidents where people harassed judges with false filings. But Congress didn’t need to enact § 1521. All it needed to do was add these words to § 1503.

\textsuperscript{51} When Congress enacted § 1521, it responded to incidents with judges. Because jurors, witnesses, parties, and informants hadn’t been targeted, it didn’t occur to Congress to protect them. This redraft covers them.