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# Why Congress Drafts Gibberish

Richard K. Neumann Jr.\*

We are so used to Congressional gibberish that we take it for granted. We sigh, roll our eyes, and ask, “Will Congress’s drafters 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 I 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 II examines a statute so mysteriously drafted that no one really knows what a President could legally do in replacing an Attorney General and Deputy Attorney General who stood in the way when the President wanted to get rid of a special counsel.

Part III shows how Congress hasn’t learned how to draft a coherent criminal statute. Part IV examines the federal obstruction of justice statutes, which are so incoherent that reading them is like wading through glue.<sup>1</sup> They appear here in Appendix A. I have 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.

Part V hypothesizes some of the causes of Congressional gibberish. The main hypothesis is that legislating is made up of two functions—

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\* Professor of Law, Maurice A. Deane School of Law, Hofstra University. Because it is superbly peer-reviewed and peer-edited, *Legal Communication & Rhetoric: JALWD* is special, and publishing in it is a professional pleasure. Virtually every editorial suggestion improved this article. Warmest thanks to editors Kristin Gerdy, Amy Langenfeld, Susan Bay, Jessica Wherry, and EIC Ruth Anne Robbins and, at Hofstra, Isaac Samuels and Navi Naat.

<sup>1</sup> Alfred Lord Tennyson used those words in describing Ben Jonson’s poetry. *FIGHTING WORDS: WRITERS LAMBAST OTHER WRITERS—FROM ARISTOTLE TO ANNE RICE 5* (James Charlton ed., 1994).

designing law and enacting it. Designing law is analogous to architecture or engineering. It's choosing an intellectual structure, with optimal wording, so that a statute will get the right results. Enacting is adopting the design so that it will be enforced. Legislators are good at the enacting part but have few, if any, law-design skills. Judging by their output, almost no one in Congress has the most important law-design skill—simplicity. If there's a way to make something unnecessarily complicated, an American legislature will find it. That's our one true legislative skill.

## I. The Gibberish Case

The case was *Cyan, Inc. v. Beaver County Employees Retirement Fund*.<sup>2</sup> The statute was the Securities Litigation Uniform Standards Act of 1998,<sup>3</sup> 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:<sup>4</sup>

**Justice Alito** Mr. Katyal, . . . [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 . . . that the state courts have jurisdiction over federal claims, except as provided in Section 77p, which says nothing whatsoever about jurisdiction . . . for federal claims.

**Mr. Katyal**<sup>5</sup> So—

**Justice Alito** So what are—what are we supposed to do with this?

**Mr. Katyal** 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. . . .

**Mr. Katyal** 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

<sup>2</sup> 138 S. Ct. 1061 (2018).

<sup>3</sup> 3 U.S.C. § 77a et seq.

<sup>4</sup> Oral Argument, *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061 (2018) (No. 15-1439), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/15-1439\\_k5fl.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/15-1439_k5fl.pdf) [hereinafter *Cyan Transcript*].

<sup>5</sup> Neal K. Katyal for *Cyan, Inc.*, *Cyan Transcript*, *supra* note 4, at 1.

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.

**Justice Gorsuch** Mr. Goldstein, speaking of gibberish—  
[later]

**Mr. Goldstein**<sup>6</sup> Yes?

**Justice Gorsuch** —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).

**Mr. Goldstein** Okay. So—

**Justice Gorsuch** So help me out with that.

**Mr. Goldstein** I — I —

**Justice Gorsuch** 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—<sup>7</sup>

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, § 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

<sup>6</sup> Thomas C. Goldstein for the Beaver County Employees Retirement Fund. *Id.*

<sup>7</sup> *Id.* at 11–12, 16, 47.

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 and others on a fool's errand, imposing costs on everyone affected. Lawyers didn't know where to sue; judges didn't know 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. Gibberish isn't only in the wording. It's primarily in the thinking.

## II. The Vacancies Reform Act: The Statute That Tied Up Everyone Twice

This story's human drama is so well known that we can omit the details here. The essence is that in February of Year 1 of his presidency, a President grew unhappy with an investigation going on in his Justice Department. In March, the Attorney General recused himself from supervision over that investigation<sup>8</sup> and delegated that responsibility to the

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<sup>8</sup> The reason offered at the time was a conflict of interest because of the Attorney General's connection to political organizations being investigated. Another reason didn't become public until two years later. The Attorney General himself became one of the subjects of the investigation, regarding possible perjury and making false statements to Congress, although ultimately he was not indicted. SPECIAL COUNSEL ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, Vol. 1, at 197–98 (2019), <https://www.justice.gov/storage/report.pdf> [hereinafter MUELLER REPORT].

Deputy Attorney General, who appointed a special counsel to take over the investigation. This so deeply offended the President that for twenty months—from March of Year 1 to November of Year 2—he subjected his Attorney General to merciless humiliations, continually in public and occasionally in private, in an apparent effort to provoke the Attorney General into resigning so the President could appoint a new Attorney General who would terminate the investigation.

During those twenty months, the President didn't fire his Attorney General, and the Attorney General didn't resign<sup>9</sup>—behavior on both sides that seemed inexplicable to everyone except the few people who realized that, in a key place in the Vacancies Reform Act, the word *dismiss* doesn't appear.

In November of Year 2, the Attorney General finally did resign, and the President named as Acting Attorney General a breathtakingly unqualified person who had said many times previously in print and on television that the special counsel's investigation should be shut down.

That person was claimed by the administration to be Acting Attorney General for three months before a new Attorney General was confirmed by the Senate in February of Year 3. During those three months, there was serious doubt about whether anybody was Acting Attorney General.

Throughout the whole story—from March of Year 1 to February of Year 3—people kept looking at the Vacancies Reform Act for answers and not finding them. On two issues crucial to the country and at the statute's core—its meaning was genuinely disputable. Any statute with that level of opaqueness is a legislative failure. In a national crisis, the statute is a spectacular failure.

Presidentially-appointed offices become vacant all the time. Officials die, retire, or quit to take more lucrative jobs. It can take 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 decisions of the type the departed official had been making.

This is a relatively simple cluster of problems, at least compared to others that legislatures must solve. Here's how to do it: First, create one simple formula that identifies the person who will automatically take over the vacant position on an acting basis the moment it becomes vacant. Make that formula so elegantly simple that it will work in every executive branch department with every position normally filled by a Senate-

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<sup>9</sup> Actually, in one chaotic incident, the Attorney General did offer a resignation letter in May of Year 1, but the President was persuaded not to accept it, a decision he quickly regretted. By coincidence, the FBI had just delivered an evidence-preservation notice to the White House Counsel. White House staff returned the letter to the Attorney General. MUELLER REPORT, *supra* note 8, Vol. 2, at 79–80.

approved Presidential appointee. Please don't say that the executive branch is too big and complicated for one formula to work. That's an excuse, not an explanation. Great law is made by finding the simple solution. Mediocre law-making fails to do it. And horrible law results from not even trying.

Second, create one simple backup formula that a President can use to substitute someone else—just one formula, not three or four. If you pile on alternate formulas to give a President flexibility, your statute will become inefficiently complex. If you come up with a well-thought-out formula, alternate ones shouldn't be needed. After all, these are *temporary* appointments to fill positions that are *temporarily* vacant.

Finally, provide for the miscellaneous details. Set deadlines, for example.

Congress instead enacted a statute filled with mind-numbing complexity. It 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 that apply in different ways to extending different deadlines; and cross-references to statutes that the Act doesn't identify and that might or might not apply, depending on the extent to which they "expressly" authorize or designate something. There's no effective way to understand all this. The best you could do would be to put huge pieces of paper on a wall and draw flow-chart diagrams. You might need an entire wall and still not understand what you're reading. 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. Bad actors will capitalize on accidental loopholes, as they do in the tax code and virtually all other overly complicated statutes. And good actors won't be able to figure out how to obey the law.

### **A. The Word That Isn't There—"Dismiss"**

Suppose you were the President. And suppose that a special counsel was annoying you to the point that you want him gotten rid of. 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, and 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.<sup>10</sup> But you want someone to take office imme-

10 U.S. CONST., art II, § 2, clause 2.

diately and fire the special counsel within the hour, without waiting for Senate approval. You also know that you can make recess appointments while the Senate isn't in session.<sup>11</sup> But the Senate seems to go out of its way to stay in session all the time. 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.

Other than recess appointments, your power to make temporary appointments is in the Vacancies Reform Act, in title 5 of the U.S. Code. The most interesting words for you are in bold italics below:

**§ 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.

<sup>11</sup> "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.



Subsections (a)(2) and (a)(3) would seem wonderful to you if you want to name an Acting Attorney General who will fire a special counsel within the hour. Under (a)(2), you 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.

But (a)(3) is even better. You 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.

Three types of events trigger your power to name an acting officer: death, resignation, or inability to perform the functions and duties of the office. Dismissal by the President *isn't* among them. The original wording, from the 1868 Vacancies Act, was "in case of the death, resignation, absence, or sickness."<sup>12</sup> Through various codifications and amendments, the nouns became verbs: "dies, resigns, or is sick or absent." But in substance the list didn't change for 130 years, until the Vacancies Reform Act in 1998, when the list became what it is today: "dies, resigns, or is otherwise unable to perform the functions and duties of the office."

Resignation is by a large margin the most frequent method through which vacancies are created. Far less common are death, disability without resignation, and dismissal without resignation.<sup>13</sup> All except dismissal are in the statute. Dismissal without resignation isn't, and the only relevant Congressional committee report is silent about why.<sup>14</sup> When a President dismisses someone who doesn't resign, how is the office to be filled temporarily until a new office holder can be nominated and confirmed?

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 the consequences of its absence recur. Notice the bold italicized words here:

**§ 3348. Vacant office**

....

- (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

<sup>12</sup> Act of July 23, 1868, ch. 227, 15 Stat. 168–69.

<sup>13</sup> 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). But if an Attorney General refuses to write such a letter when fired, the President can't make a § 3345(a)(2) or (3) appointment.

<sup>14</sup> Report of the Senate Committee on Governmental Affairs to Accompany S. 2176, S. REP. No. 105-250 (1998).

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 Justice Department regulations, only an Attorney General can fire a Special Counsel.<sup>15</sup> If someone is claimed 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).

The Supreme Court—in *NLRB v. SW General, Inc.*,<sup>16</sup> 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.

Sometimes the most important words are the ones that *weren’t* drafted. Was this a careless oversight? Or did Congress do it on purpose, perhaps with great foresight, to prevent a President from abusing power by firing a cabinet officer and then bypassing the Senate by making a GS-15 civil service employee an acting cabinet officer for 210 days, which is the time allowed for a temporary appointment under the statute.<sup>17</sup>

If Congress left out dismissal on purpose, why didn’t Congress tell us that? It would be so easy to do (*see Chart 1*).

**Chart 1**

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<i>What the statute says</i>	<i>“an officer . . . dies, resigns, or is otherwise unable to perform the functions and duties of the office”</i>
<i>What it could have said</i>	<i>“an officer is unable to perform the functions and duties of the office, or the office becomes vacant for a reason other than dismissal by the President without the officeholder’s resignation”</i>

. . . . .  
<sup>15</sup> “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 . . . .” 28 C.F.R. § 600.7(d)(2019).

<sup>16</sup> 137 S. Ct. 929 (2017).

<sup>17</sup> 5 U.S.C. § 3346(a).

Aside from a single comment in floor debate by Senator Fred Thompson, the principal sponsor of the bill that became the Vacancies Reform Act, no explanation appears in the legislative history. Here's the comment:

[T]he *Doolin* court stated that the current [statute] 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.<sup>18</sup>

Thompson's theory seems to have been that an officer who has been fired is "unable to perform the functions and duties of the office." Courts have at least four reasons to ignore this (listed in the footnote).<sup>19</sup> 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."<sup>20</sup>

If the President had fired his Attorney General and then named a temporary replacement under the Act, litigation would have followed immediately. Privately the judges involved would have been grumbling about Congress leaving it to courts to clean up Congress's mess. And publicly those judges would have written opinions parsing Congress's mysteries with reasoning like this (which, fortunately for the judges here, they didn't have to write):

Congress repeated the list several times in the statute and each time omitted firing, and Congress knows how to spell "dismissed by the President" when it wants to write those words.

Courts determine legislative intent using this type of reasoning. It's a game courts are forced to play. Often, as here, there is no legislative intent. Nobody knows why firing isn't on the list. Congress didn't really know why it did what it did.

18 144 CONG. REC. S12,823 (daily ed. Oct. 21, 1998) (statement of Sen. Thompson). The reference is to *Doolin Security Savings Bank v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998).

19 First, the committee report says nothing on this subject. Second, there's no evidence that other co-sponsors agreed with Thompson's comment. Third, the House of Representatives couldn't consider his comment because the House had already passed the bill. 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.

20 NLRB v. SW Gen. Inc., 137 S. Ct. 929, 943 (2017).

**B. Changing “Application” to “Exclusivity” and Getting the Opposite of What the Drafter Wanted**

Finally, after 20 months of verbal abuse by the President, the Attorney General in our story did resign in November of Year 2. The President then used § 3345(a)(3) to appoint, as Acting Attorney General, the breathtakingly unqualified person mentioned earlier.

The Vacancies Reform Act isn’t the only way that presidentially-appointed offices are filled temporarily. The Act includes this (bold 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 . . .*

For Attorneys General, such a statutory provision exists. 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 bold 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 . . . .

Chart 2 shows the difference between the two statutes’ lists of vacancy predicates (*see Chart 2*).

**Chart 2**

<b>Statute</b>	<b>Vacancy Predicate</b>	<b>Consequence if the predicate is satisfied</b>
5 U.S.C. § 3345(a)	“dies, resigns, or is otherwise unable to perform the functions and duties of the office” ( <i>Firing the incumbent isn’t in this list.</i> )	The President can exercise the powers in (a)(2) or (a)(3)
28 U.S.C. § 508(a)	“a vacancy in the office of Attorney General, or . . . his absence or disability” ( <i>Because this statute doesn’t list causes for vacancies, a vacancy created by the President in firing the incumbent would satisfy this vacancy predicate.</i> )	The Deputy Attorney General becomes Acting Attorney General

But the Deputy Attorney General was exactly the person the President *didn't* want. It was the Deputy Attorney General who had appointed the special counsel who so outraged the President. 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 both 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.<sup>21</sup>

Because the Attorney General finally resigned in November of Year 2, the Vacancies Reform Act was finally activated—maybe. What about § 508(a)? The two statutes lead to different results. Which one controls?

For three months, until an Attorney General was finally confirmed, motions were filed in various courts, including the Supreme Court, asking for orders declaring that the person whom the President claimed to be the Acting Attorney General was not actually the Acting Attorney General. If that turned out to be true, under § 3348(d), every document he signed would be void. Judges procrastinated ruling on these motions, apparently hoping for a quick appointment of a real Attorney General. If the purported Acting Attorney General had purported to fire the special counsel,<sup>22</sup> there would have been turmoil, and nobody would really know who in the Justice Department had authority.

How did Congress create this mess? The only way to answer that question is to tell the Vacancies Reform Act's story.

During the Clinton administration, vacancies in positions requiring Senate confirmation were increasingly being filled on a theoretically

21 On March 31, 2017, the President issued Executive Order 13,787 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, are unable to act—for example in a disaster affecting Washington. This is unremarkable. The two preceding Presidents had issued similar executive orders (numbered 13,481, 13,557, and 13,762).

22 The reason he didn't might be the same reason the President's aides refused to carry out his orders to fire the Attorney General and the special counsel. The aides could have been indicted for obstruction of justice. See MUELLER REPORT, *supra* note 8, Vol. II, at 77–120.

temporary basis by people who hadn't been confirmed by the Senate for anything, much less the jobs they were temporarily filling. This happened partly because of Clinton's presidential style and partly because the Republican majority in the Senate was increasingly less willing to observe the tradition of deferring to a President's desires in executive branch appointments. In 1997, about one in five positions requiring Senate confirmation were being occupied on a temporary basis by people who had not been Senate-confirmed,<sup>23</sup> and many of them were working in violation of the Vacancies Act then in effect.<sup>24</sup> The Justice Department was the object of much of the Senate's blame, both because of the number of DOJ positions being filled temporarily and because for a decade or more DOJ had considered itself exempt from the Vacancies Act and had encouraged other departments to take the same position.<sup>25</sup> For Senate Republicans, the breaking point came in December 1997 when Bill Lann Lee was appointed Acting Assistant Attorney General for Civil Rights despite the fact that the Senate Judiciary Committee had refused to approve his nomination for the job on a permanent basis. Lee was thoroughly qualified, but he was anathema to the Senate Republican majority.

In June 1998, Senator Thompson,<sup>26</sup> of Tennessee, introduced S. 2176, the bill that would become the Vacancies Reform Act.<sup>27</sup> His principal co-sponsor was Senator Robert Byrd of West Virginia, who had been majority leader when Democrats controlled the Senate. The bill was referred to the Committee on Governmental Affairs, which Thompson chaired. In July, the Committee reported out the bill with minor changes.<sup>28</sup>

Both versions of the bill—the one Thompson introduced in June and the one the Committee reported out in July—included this sentence, as § 3345(c):

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<sup>23</sup> Although the Trump administration's statistics fluctuate, they often exceed the Clinton percentages. Senate Republicans, however, do not complain.

<sup>24</sup> Morton Rosenberg, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative*, 4 (Congressional Research Service 1998). In March 1998, Rosenberg had testified before the Senate Governmental Affairs Committee in favor of the bill that would become the Vacancies Reform Act. In January 2019, he filed an amicus brief in the Supreme Court arguing, in *Michaels v. Whitaker* that Matthew Whitaker's appointment as Acting Attorney General violated the law because the operative statute was 28 U.S.C. § 508 and not the Vacancies Reform Act. The Supreme Court never ruled on the issue.

<sup>25</sup> S. REP. NO. 105-250, at 3 (1998).

<sup>26</sup> Before election to the Senate, Thompson had been counsel to the Republicans on the Senate Watergate Committee. During the televised Watergate hearings, he was frequently seen by millions of viewers interrogating witnesses. Later he became an actor in movies such as *Die Hard 2* and *The Hunt for Red October*, and he became a regular on the television drama *Law & Order*.

<sup>27</sup> 144 CONG. REC. S6413–16 (daily ed. June 16, 1998).

<sup>28</sup> S. REP. NO. 105-250, at 9–11.

With respect to the office of the Attorney General of the United States, the provisions of section 508 of title 28 shall be applicable.

The Committee report explained (*italics added*) —

With respect to a vacancy in the office of Attorney General, 28 U.S.C. § 508 will remain applicable. *That section ensures that Senate-confirmed Justice Department officials will be the only persons eligible to serve as Acting Attorney General.*<sup>29</sup>

*Remember:* Thompson, Byrd, and a number of other senators were incensed that people who hadn't been confirmed by the Senate were in charge of major units in the Justice Department, holding, on an endlessly temporary basis, positions that were supposed to require Senate confirmation.

In the Committee's bill, § 3347 was titled "Application" and in part provided that —

- (a) Sections 3345 and 3346 *are applicable to* 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) . . .
  - (2) *a statutory provision in effect on the date of enactment of [this Act] expressly* —
    - (A) . . .
    - (B) *designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity.*<sup>30</sup>

In two separate ways, the Committee's bill would have unambiguously forbidden the purported Acting Attorney General appointment in November of Year 2.

One way would have been through the bill's § 3345(c) and its cross-reference to 28 U.S.C. § 508 as the method of designating an Acting Attorney General. Under § 508, the Deputy Attorney General, a position requiring Senate confirmation, automatically becomes the Acting Attorney General.

The other way would have been through the bill's § 3347(a)(2)(B) and its general cross-reference to all statutes like 28 U.S.C. § 508. The Vacancies Reform Act would apply unless some other statute designates

29 *Id.* at 26 (*emphasis added*).

30 *Id.* at 26 (*emphasis added*).

an officer or employee to fill a vacancy temporarily. That's what 28 U.S.C. § 508 and other statutes do.

On September 25, the Committee's bill came up for debate, and several senators, including Thompson, submitted amendments.<sup>31</sup> One of Thompson's amendments would delete § 3347(a)'s "are applicable to" and substitute "are the exclusive means for temporarily authorizing an acting official to perform the functions and duties." Clearing away all but the basics, this is the wording Thompson's amendment would produce:

Sections 3345 and 3346 are *the exclusive means* for temporarily authorizing an acting official . . . *unless* . . . a statutory provision in effect on the date of enactment of [this Act] expressly . . . designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity.

Thompson wanted his bill to control as much temporary office-filling as possible to prevent presidential manipulation. *Exclusive* sounds so much more powerful than *applicable*. But substituting *exclusive* for *applicable* actually had the opposite effect.

The bill was—and the Vacancies Reform Act is—so convoluted that there's plenty of room *inside* it for presidential manipulation. But position-specific statutes like 28 U.S.C. § 508 are much simpler; they mostly operate automatically; and there's far less room for manipulation because they typically put people who are already Senate-confirmed for their current jobs into acting positions to fill a vacancy temporarily. The *applicable . . . unless* wording would have caused the maximum number of vacancies to be filled that way.

But the *exclusive . . . unless* wording would—and later did—create ambiguity. If two statutes cover the same vacancy when the Act isn't exclusive, which statute outranks the other one? Thompson's amendment would make the Attorney General's position subject to *both* the Act *and* 28 U.S.C. § 508 without any indication of which statute would outrank the other. The Congressional Record doesn't show a vote on Thompson's amendment, but he later put it in the bill when it was enacted via a House appropriations bill. The ambiguity might have been cleared up by the explicit sentence in the bill's § 3345(c): "With respect to the office of the Attorney General of the United States, the provisions of section 508 of

31 144 CONG. REC. S10,996–97 (daily ed. Sept. 25, 1998).

32 144 *Id.* at S11,021–38. The debate is charming. There's a relaxed civility among the senators. They graciously yield to each other as friendly colleagues with no apparent party tensions, although there was a party division on the bill. Senator Byrd, who affected classical oratory, tells, in his unique style, a long story about seven youths who fled persecution in ancient Greece and ended up sleeping in a cave for 187 years, believing they had been asleep for only one night, the story leading to Byrd's moral that the Senate has been sleeping on its rights versus the Executive branch.



title 28 shall be applicable.” But that sentence later disappeared from the version of the bill that became law.

On September 28, after some floor discussion,<sup>32</sup> the bill was headed toward a filibuster, and a cloture motion failed to muster the three-fifths majority needed to cut off debate. Clinton had threatened to veto it anyway. The bill appeared comatose, if not dead.

Then Thompson, perhaps with Byrd, made an end-run around both the Senate and Clinton.<sup>33</sup> Thompson went to the House and got his bill folded into a 920-page House omnibus appropriations bill<sup>34</sup> that was so vast that the Senate couldn’t pick it apart and Clinton couldn’t veto it without shuttering federal agencies awaiting their operating funds. Other people had done the same thing with their pet bills. The Vacancies Reform Act is on pages 612–17 of the House bill, just ahead of the American Fisheries Act, which regulates commercial fishing vessels in ways so convoluted as to be incomprehensible.

In the House’s mega-appropriations bill, the § 508 sentence—“With respect to the office of the Attorney General of the United States, the provisions of section 508 of title 28 shall be applicable”—had disappeared. There seems to be no record of how or why it disappeared. If it had stayed in the bill, Matthew Whitaker would never have been Acting Attorney General.

The House passed the appropriations bill on October 20. The next day, the Senate passed it, and Clinton signed it.<sup>35</sup>

That is how Congress made a mess of the Vacancies Reform Act. It wasn’t just sloppy work. It was unprofessional. When judges make law, they are expected to act like professionals. No such expectation is applied to Congress. We will explore that in this article’s part V.

### III. Congress Still Hasn’t Mastered the Basics of How to Create a Crime

Chart 3 presents five commonly used methods<sup>36</sup> of creating a crime and its punishment (*see Chart 3*).

33 There appears to have been some negotiation between the bill’s sponsors and the Clinton administration.

34 H.R. 4328, which became the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277 (1998).

35 October 21 was also the day on which the House Judiciary Committee decided to begin impeachment proceedings against Clinton.

36 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*.

**Chart 3**

<b>Method A</b> (a declaration)	"Whoever [does X] shall be [fined, imprisoned, etc.] or "A person who [does X] shall be fined, imprisoned, etc.]"
<b>Method B</b> (a declaration)	"It is unlawful to [do X]." [A nearby sentence or section will set out the punishment.]
<b>Method C</b> (a duty)	<b>VARIATION 1:</b> "A person shall not [do X]." [A nearby sentence or section will set out the punishment for doing X and thus violating this negative duty.] <b>VARIATION 2:</b> "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.]
<b>Method D</b> (a declaration)	"A person who [does X] is guilty of [crime Y]. [Crime Y] is a [Class B felony or Class A misdemeanor]." [A group of sections elsewhere in the criminal code will set out the punishments for each Class.]
<b>Method E</b> (a declaration)	"A person is guilty of [crime Y] if the person [does X]. [Crime Y] is a [Class B felony or Class A misdemeanor]." [A group of sections elsewhere in the criminal code will set out the punishments for each Class.]

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 quickly, and an English-language sentence makes sense only after the reader has found the verb.

Congress uses Method A—by far the worst method—to create most of the crimes in title 18, the federal criminal code. Here is an example. (*Find 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).

Where is the empathy in this sentence? Good writing is built on empathy—an ability to see words as a reader will and to write and rewrite until the words satisfy the reader’s needs and cause the reader to feel gratitude at having been helped. Congress has no empathy for its readers, a situation that should shock us for two reasons. First, a legislature’s readers are the millions of people who must comply with what the legislature writes. Lack of empathy for their needs is self-defeating because it sabotages the legislature’s own goals. Second, most law can be expressed in words that educated lay readers can understand (which Appendix B illustrates). Legislatures are a unique category of authors who are elected by their own readers. A legislature that writes in a way that shows not just lack of empathy but also contempt for reader needs undermines democracy.

For some crimes, Congress breaks out of its addiction to Method A. 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<sup>37</sup> . . . 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 be ambidextrous, using two methods in the same section. Tucked away in an obscure corner of the Tax Code<sup>38</sup> is a statute in which Congress uses Method B to create a crime in subsection (a) and Method C to create a different crime in subsection (b).

**§ 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

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<sup>37</sup> Section 1961(B) defines “racketeering activity” to include, among others, obstruction of justice; obstruction of criminal investigations; tampering with or retaliating against a witness, victim, or informant; mail fraud; wire fraud; and money laundering. Under § 1963, every asset a defendant has acquired through RICO violations can be forfeited to the government.

<sup>38</sup> Title 26 of the U.S. Code.

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,<sup>39</sup> 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.

## IV. Obstruction of Justice

### A. The Big Picture

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

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<sup>39</sup> In the controversy over whether a President can be prosecuted for exercising what the Constitution calls “The executive Power [that is] vested in a President” (Article II, § 1), it seems unnoticed that Congress has created a crime specifically for Presidents.

- § 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

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. Appendix A should provide that scorecard. These crimes shouldn't be hard to understand. They cover simple things like falsifying evidence and threatening witnesses. Try to read Appendix A. Will it help you follow obstruction of justice scandals and explain them to your family and friends?

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 just thrown concepts onto a page. That's not writing—it's typing.<sup>40</sup>

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.

In the Appendix B redraft, simplifying not only created clarity but also cut the number of words in half:

Appendix A (*current law*) — 2,193 words

Appendix B (*the redraft*) — 1,107 words

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*.

40 Truman Capote's description of Jack Kerouac's work. FIGHTING WORDS, *supra* note 1, at 129.

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. But with obstruction of justice crimes—reprinted here in Appendix A—Congress unaccountably combines the two, using the formula “do X or attempt to do X.” This is inefficient, and Congress knows better because with one obstruction of justice crime Congress has used a brilliant solution.

For nearly two centuries—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.<sup>41</sup> 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:

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.<sup>42</sup>

*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:

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

<sup>41</sup> See *supra* text accompanying notes 36 and 37.

<sup>42</sup> United States v. Russell, 255 U.S. 138, 143 (1921) (emphasis added). “This is not to say that the defendant's actions need be successful; an ‘endeavor’ suffices.” United States v. Aguilar, 515 U.S. 593, 599 (1995). “The ‘endeavor’ element of the offense describes any attempt or *effort* to obstruct justice.” United States v. Thomas, 916 F.2d 647, 651 (11th Cir. 1990) (emphasis added).

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?

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. Actually *endeavor* is a three-fer. Using *endeavor* reduces 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 has 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 came afterward. In every later statute, Congress ignored the efficiency of its own accidental invention.

When it enacted the 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 recognize it.

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

## **B. The Dispute between Mueller and Barr about the Word “Otherwise”**

In June 2018, while still a private citizen, William Barr wrote a 19-page unsolicited memo<sup>43</sup> complaining that Robert Mueller's investigation was, among other things, based on a wrong-headed interpretation of the word *otherwise* as Congress used it in 18 U.S.C. § 1512(c)(2). This has come to be known as the “audition memo” because it was unsolicited and Barr handled it in a way that suggested that he himself wanted to be appointed Attorney General.

A long passage in the Mueller Report, apparently written after Barr eventually became Attorney General (and Mueller's supervisor), is devoted to refuting Barr's interpretation of *otherwise*.<sup>44</sup> The two documents read like dueling appellate briefs on the issue. Analyzing the true meaning of *otherwise* would require a separate law review article in itself. Here it's enough to point out that Congress made two mistakes and the mistakes embroiled everyone in uncertainty about which crime a President might have committed.

Section 1503, the original obstruction of justice statute, applies only to obstruction connected to a judicial proceeding. In 2002, as a result of the Enron-Arthur Anderson scandal, Congress passed the Sarbanes-Oxley Act, adding 18 U.S.C. § 1512(c) to cover obstruction not connected to a judicial proceeding.<sup>45</sup> This was Congress's first mistake. The simple solution would have been to amend § 1503, changing or adding only a phrase or two. But as usual, Congress chose the complicated solution, which created unnecessary issues about the relation between and relative scope of the two sections. Prosecutors and courts now must make unnecessary decisions about which statute has been violated and whether there's a gray zone between them where bad behavior falls between cracks and actually hasn't been criminalized.

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<sup>43</sup> Memorandum from Bill Barr to Deputy Attorney General Rod Rosenstein (June 8, 2018), <https://documentcloud.org/documents/5638848-June-2018-Barr-Memo-to-DOJ-Muellers-Obstruction.html>.

<sup>44</sup> MUELLER REPORT, *supra* note 8, Vol. 2, at 160–68.

<sup>45</sup> Julie R. O'Sullivan, *The Federal Criminal “Code” is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643 (2006). Title 18 is “a haphazard grab-bag of statutes accumulated over 200 years, rather than a comprehensive, thoughtful, and internally consistent system of criminal law.” *Id.* at 643.



Congress's second mistake was to use the word *otherwise* in § 1512(c)(2), following a list of specific acts in (c)(1). This is such a common mistake that a substantial amount of case law has been created—unnecessarily—to decide what *otherwise* means when used to introduce an omnibus general item at the end of a list of specific items. The case law is described in great detail in Barr's audition memo and in the Mueller Report's rebuttal.

These two mistakes aren't just legislative sloppiness. Given the stakes involved, they are displays of legislative incompetence. We expect this kind of thing from our legislatures, and lawyers and courts are used to cleaning up legislative messes. But it is incompetence, and in some other countries it occurs much less frequently.<sup>46</sup>

## V. Why Congress Drafts This Way

*Simplicity is the ultimate sophistication.*

— headline on the brochure introducing the Apple II computer (1978)<sup>47</sup>

*Complexity leads to more complexity.*

— Richard A. Givens<sup>48</sup>

*Keep it simple, stupid.*

— the KISS principle in engineering, created by Kelly Johnson,<sup>49</sup> from the common experience that malfunctions occur more often in complex systems than in simple ones performing similar tasks.

*Clutter and confusion are failures of design . . .*

—Edward Tufte<sup>50</sup>

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

— Ward Cunningham<sup>51</sup>

<sup>46</sup> For examples, see Reed Dickerson, *Legislative Drafting: American and British Practices Compared*, 44 A.B.A.J. 865 (1958) and Richard K. Neumann Jr., *Legislation's Culture*, 119 W. VA. L. REV. 397 (2016) (France and Sweden). The poet Paul Valéry said that the French Civil Code is "the greatest book of French literature," and the novelist Stendhal read it daily as an example of precision and clarity that he had set as a benchmark for himself while writing *The Charterhouse of Parma*. Neumann, 119 W. VA. L. REV. at 403, 408. The British Parliament's drafting manual sets out an exemplary method of statute creation. OFFICE OF THE PARLIAMENTARY COUNSEL, DRAFTING GUIDANCE (2017).

<sup>47</sup> Curated by the Computer History Museum, <http://www.computerhistory.org/collections/catalog/102637933>.

<sup>48</sup> Richard A. Givens, *Legal Simplification*, 68 N.Y. ST. B.J. 26, 26 (Oct. 1996).

<sup>49</sup> BEN R. RICH, *Clarence Leonard (Kelly) Johnson, 1910–1990, A Biographical Memoir* (National Academy of Sciences).

<sup>50</sup> EDWARD TUFTE, ENVISIONING INFORMATION 51 (1990).

<sup>51</sup> Bill Venners, *The Simplest Thing That Could Possibly Work: A Conversation with Ward Cunningham*, Part V (concerning software programming) at <https://www.artima.com/intv/simplest2.html>.

*Our life is frittered away by detail. . . . Simplify, simplify.*

— Henry David Thoreau<sup>52</sup>

*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.<sup>53</sup>

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 (require unnecessary effort to understand, 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 professional skill, and in legislation, it's a hard one to master.

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

*Designing* 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 drafting involves teaching high-level problem-solving skills.)

*Enacting* law is deciding whether the designers' product should become law. Enacting provides legitimacy. Those who enact are 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.

<sup>52</sup> HENRY DAVID THOREAU, *WALDEN*, Ch. 2 (1854).

<sup>53</sup> Andy Beattie, *Why Drafting Matters*, in PARLIAMENTARY COUNSEL OFFICE, *DRAFTING MATTERS!* (2d ed.), <https://www.gov.scot/publications/drafting-matters>.

Fred Thompson and Robert Byrd were masters at enacting law. They knew the Senate and all its rules backwards and forwards. They had enormous credibility with their constituencies. And, in a narrow sense, they had reasonable judgment about choosing policy goals. But, if the Vacancies Reform Act is typical of their work, they were amateurish rather than professional law designers.

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

**Chaos.** When Victoria Nourse and Jane Schacter 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."<sup>54</sup>

This isn't a professional process designed to produce professional-quality work. It's an amateurish process and produces gibberish.

## VI. Conclusion

These problems—a chaotic process and law being designed amateurishly—typically don't occur in some parliamentary systems, where law is designed professionally in the executive branch, or by separate commissions, and presented to the legislature for enactment.<sup>55</sup> Parliaments aren't, however, being used as rubber stamps. A parliament chooses from its own members the cabinet that controls the executive branch.

<sup>54</sup> Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 595 (2002). For somewhat different views, see Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COL. L. REV. 807 (2014) and Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79 (2015).

<sup>55</sup> For an example (Sweden), see Neumann, *supra* note 46, at 418–21.

Maybe we should treat legislative drafters with a bit more respect. In most U.S. legislatures, the drafters on staff aren't the core problem. Legislative drafters have a lot of experience in *part* of designing 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-design lessons that legislators don't have much opportunity to learn.<sup>56</sup> 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 design and if some staff drafters were to have a more active role in it.

## VII. 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, especially from § 1001, are offenses like lying to Congress and administrative agencies.*

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

*Congress drafted nearly all these sections using the formula “Whoever [does X, Y, and Z] shall be imprisoned [number of years] or fined [details] or both.” The same sentence that sets out the elements of the crime also includes the penalties. That's terrible drafting because it leads to huge sentences, as the one in 18 U.S.C. § 1503. To cut out the distracting penalty clutter in this Appendix, I omitted 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 30.*

#### § 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

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<sup>56</sup> 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: <http://www.ncsl.org/legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff/bill-drafting-manuals.aspx>. The Texas manual is particularly good.

See also LAWRENCE E. FILSON & SANDRA L. STROKOFF, *THE LEGISLATIVE DRAFTER'S DESK REFERENCE* (2d ed. 2008); Tamara Herrera, *Getting the Arizona Courts and the Arizona Legislature on the Same (Drafting) Page*, 47 ARIZ. ST. L.J. 367 (2015); Amy Langenfeld, *Capitol Drafting: Legislative Drafting Manuals in the Law School Classroom*, 22 PERSPS. 141 (2014).

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<sup>57</sup>**

- (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) . . .<sup>58</sup>

**§ 1503. Influencing or injuring officer or juror generally<sup>59</sup>**

- (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,

<sup>57</sup> This is the section that Michael Flynn and George Papadopoulos pled guilty to violating. MUELLER REPORT, *supra* note 8, Vol. 1, at 192–95.

<sup>58</sup> Subsection 1001(c) applies to Congress. It is the subsection to which Michael Cohen pled guilty, together with violations of § 1001(a)(2). *Id.* at 195–96. The Mueller team considered but eventually decided not to charge Jeff Sessions with violating § 1001(c). *Id.* at 197–98.

<sup>59</sup> This is the original obstruction of justice statute, dating from 1831. See *supra* text accompanying notes 36–37 and notes 40–43. It is also one of the sections that the Mueller team apparently believed Donald Trump violated. See MUELLER REPORT, *supra* note 8, Vol. 2, at 7–14.

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) . . .<sup>60</sup>

(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) . . .<sup>61</sup>

(e) . . .<sup>62</sup>

**§ 1512. Tampering with a witness, victim, or an informant<sup>63</sup>**

- (a)
  - (1) Whoever kills or attempts to kill another person, with intent to —
    - (A) prevent the attendance or testimony of any person in an official proceeding;
    - (B) prevent the production of a record, document, or other object, in an official proceeding; or

.....

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

**61** Subsection 1510(d) covers insurance company officers and employers in the same way that subsection (b) covers bank officers. For the same reason, I omitted it.

**62** Subsection 1510(e) concerns the Fair Credit Reporting Act, the Right to Financial Privacy Act, and related statutes. Again, I omitted it because it’s so narrow and specialized.

**63** The Mueller team apparently believed Donald Trump violated § 1512(b) and (c)(2). See MUELLER REPORT, *supra* note 8, Vol. 2, at 7–14. The dispute between Mueller and Barr centered around Congress’s sloppy use of the word *otherwise* in subsection (c)(2). Compare MUELLER REPORT, *supra* note 8, Vol. 2, at 159–67 with the Barr audition memo, *supra* note 43.

- (C) 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*].

- (2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to —
    - (A) influence, delay, or prevent the testimony of any person in an official proceeding;
    - (B) cause or induce any person to —
      - (i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
      - (ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;
      - (iii) 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
      - (iv) be absent from an official proceeding to which that person has been summoned by legal process; or
    - (C) 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 —
    - (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
    - (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) 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

(D) 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)
- (1) 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,<sup>64</sup> 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,<sup>65</sup> 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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<sup>64</sup> 18 U.S.C. § 1505, titled “Obstruction of proceedings before departments, agencies, and committees.”

<sup>65</sup> 18 U.S.C. § 1114: “any officer or employee of the United States . . . 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.”

## VIII. Appendix B

### Redrafted Federal Cover-Up Crimes

*This Appendix is a redraft of the crimes in Appendix A. See Part 4 as well as the footnotes in Appendix A. 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 method states often adopt when modernizing their criminal codes.<sup>66</sup>*

#### § A. Definitions<sup>67</sup>

In sections B through E —

- (1) “**Corruptly**” means with an improper purpose.<sup>68</sup>
- (2) “**Court**” means a federal court.
- (3) “**Endeavor**” means an effort or to make an effort.<sup>69</sup>
- (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.<sup>70</sup>
- (6) “**Judicial officer**” means a judge, magistrate, or prosecutor<sup>71</sup> with legal authority in a federal court.

<sup>66</sup> See *supra* text after note 36.

<sup>67</sup> 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 through definitions. Because Congress failed to do it 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 some of these definitions, I used concepts from the case law.

<sup>68</sup> In 1831, Congress used the word *corruptly* in 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 165 years as it added the other sections in Appendix A. During those 165 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 CALIF. L. REV. 1277, 1284-89 (2018).

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 the sections in Appendix A.

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 in Congress’s § 1515(b) definition are “with an improper purpose.” Everything else Congress lists is action—things a person *does* while in that state of mind. All the acts are already in the statute as *actus reus*. Cutting out the redundant bloat leaves the phrase “improper purpose,” which also permeates the case law. To simplify, remove ideas that don’t matter.

<sup>69</sup> For an explanation of this definition, see *supra* text accompanying note 43.

<sup>70</sup> 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—broken bones, bleeding, etc.

<sup>71</sup> Prosecutors have been held to be covered even though they aren’t mentioned in § 1503’s bizarre and internally inconsistent lists of judicial officers. See *United States v. Jones*, 663 F.2d 567 (5th Cir. 1981).

- (7) “**Judicial proceeding**” means a proceeding in a federal court, including a grand jury investigation.
- (8) “**Juror**” means a petit juror, grand juror, or person who has been summoned<sup>72</sup> to serve as a petit or grand juror.
- (9) “**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.
- (10) “**Proceeding**” means a judicial proceeding, or an investigation by a law enforcement officer.

**§ B. Obstructing justice; corruptly influencing or impeding a judicial officer or juror<sup>73</sup>**

- (a) **Obstructing justice.** A person is guilty of obstructing justice if that person
  - (1) corruptly
  - (2) endeavors to influence or impede
  - (3) the administration of justice
  - (4) in a 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
  - (3) a judicial officer or juror
  - (4) in the discharge of a duty.

**§ C. Concealing a felony; concealing a material fact; making a false statement.<sup>74</sup>**

- (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.

<sup>72</sup> 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 United States v. Jackson*, 607 F.2d 1219 (8th Cir. 1979). That makes sense. A person who wants to obstruct justice could try to do so before someone is sworn in as a juror. That hadn't occurred to Congress. But it has occurred to the type of people Congress wanted to deter.

<sup>73</sup> 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 courts have interpreted it. *See supra* text before and after note 42.

<sup>74</sup> A redraft of § 4 and part of § 1001, combining the two and simplifying them. Sections C and D eliminate the need for § 1510(a).

- (b) **Concealing a material fact.** A person is guilty of concealing a material fact if that person
  - (1) conceals or encourages another person to conceal
  - (2) a material fact
  - (3) 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.<sup>75</sup>**

- (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 or speaking fully and truthfully, or
      - (iii) producing an object<sup>76</sup>
  - (4) during a proceeding.

<sup>75</sup> Subsection (a) is a redraft of § 1622. Subsection (d) includes a redraft of part of § 1001(a). The rest of this section is a redraft of § 1512, cutting out many unnecessary concepts.

<sup>76</sup> “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 place of a cluster of concepts and issues such as whether something is a document or not, whether it’s admissible as evidence, and whether the person who commits this crime believes it’s admissible.

- (c) **Informant tampering.** A person is guilty of informant tampering if that person —
- (1) endeavors to persuade, intimidate, or mislead another person
  - (2) to hinder that other person from communicating to —
    - (A) a judicial officer or
    - (B) law enforcement officer
  - (3) concerning 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 a judicial proceeding.
- (d) **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 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  
(B) intending to impair its integrity or availability in a proceeding; or
  - (4) (A) endeavors to persuade, intimidate, or mislead another person  
(B) to cause that other person to withhold, alter, or destroy an object  
(C) to impair the object's integrity or availability in a proceeding.
- (e) **Facts not relevant to a prosecution under this section.** It is irrelevant whether —
- (1) a 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) a proceeding was a federal proceeding;
    - (B) a judicial officer was a federal judicial officer; or
    - (C) a law enforcement officer was a federal law enforcement officer.

**§ E. Retaliation against a judicial officer, juror, witness, party, or informant.<sup>77</sup>**

- (a) **Retaliating against a judicial officer.** A person is guilty of retaliating against a judicial officer if that person —
  - (1) endeavors or threatens to —
    - (A) injure or kill a judicial official;
    - (B) damage a judicial officer’s property; or
    - (C) file a false document as a publicly available record concerning the judicial officer’s ownership of property;<sup>78</sup>
  - (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 or kill 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;<sup>79</sup>
  - (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 or kill 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 during a proceeding:
    - (A) attending or participating as a witness or party,
    - (B) testifying,
    - (C) providing information, or
    - (D) producing an object.

77 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 disappeared. But it isn’t possible to combine all the § E subsections into one test that would cover everybody. Although paragraph (1) is parallel in all the subsections, no paragraph (2) is the same as any other paragraph (2).

78 Adding the 16 words in (C) replaces all of § 1521, which Congress enacted because of some incidents in which 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.

79 When Congress enacted § 1521, it responded to incidents involving judges. It didn’t occur to Congress to protect jurors, parties, witnesses, and informants. This redraft covers them.



- (d) **Retaliating against an informant.** A person is guilty of retaliation against an informant if that person —
- (1) endeavors or threatens to —
    - (A) injure or kill 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 a judicial proceeding.