Statutory Structure and Legislative Drafting Conventions: A Primer for Judges

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Introduction

The circumstances under which statutes are drafted in Congress are often incompatible with long reflection or careful revision. The political moment comes briefly, and the statutory iron must then be struck, or left to cool unfashioned. As a result, judges often have to puzzle over the solidified remains of a messy political process. It is sometimes difficult to discern any underlying intent through the blurred surface of the legislative language.

Nevertheless, there are a variety of sometimes little-known conventions that will ease the way of a federal judge through the sometimes opaque world of legislation. Some of these conventions have statutory or case-law origins. Others have evolved from the experience of drafters over the years, especially drafters in the separate Offices of the Legislative Counsel for the House and the Senate. By the third quarter of the twentieth century, one or both of those offices participated in the drafting of practically every piece of legislation that passed through Congress. Attorneys in the offices often spend their entire careers there, and the two offices retain a relationship that stems from their common origin in a demonstration project conducted early in the twentieth century by Columbia University Law School's Legislative Drafting Research Fund. Consequently, the attorneys influence each other and try to develop a consensus over time on how drafting should be done. New attorneys are taught to draft by drafting under the guidance of more experienced attorneys. Thus essentially oral traditions are passed down and become conventions. Collectively, the attorneys in the two offices influence outside drafters, further reinforcing conventions over time. Even such matters as how the subdivisions of Acts of Congress are named have largely been a product of this process.

This guide describes the statutory framework of federal law and examines some legislative drafting conventions, the knowledge of which may help judges with statutory interpretation.[1]

Caution should be exercised, however, in automatically applying any given convention precisely because the drafting of legislation is not the careful academic exercise we might hope for. Not only do various political imperatives bring in legislative language written by persons unfamiliar with the usual conventions, but the conventions themselves change over time to reflect changes in public thinking and legal trends. Luckily, the careful observer can usually articu-

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1. For a more detailed examination of federal drafting conventions and techniques in general, one can consult either *The Legislative Drafter's Desk Reference*, Lawrence E. Filson & Sandra L. Strokoff (2007), or *Legislative Drafter's Deskbook: A Practical Guide*, Tobias A. Dorsey (2006).

late a reason for a departure from the conventions in use at the time a particular piece of legislation was drafted. Thus, starting with the conventions can greatly help in the task of interpreting a statute, even if the task cannot be a simple mechanical one. Before we turn to a few of the drafting conventions currently in use, let's examine a preliminary problem for judges trying to interpret statutes. How do we establish a reliable text of a statute?

Part I. Sources of Statutory Law

A. What is the authoritative text of federal legislation?

What constitutes the authoritative text of federal legislation has deeply affected drafting conventions and approaches, especially how amendments are drafted and reflected in widely used editions of the law. In order to understand how congressional enactments address statutes, we need to understand the structure of our hybrid system of statutory law.

Even though virtually all of federal law is statutory in derivation, we are still in fact a "common-law" country in the sense that our statutes are not formally arranged in a code that is officially promulgated according to civil-law standards. (See 1 U.S.C. § 106a for what we call "promulgation"—actually just putting the official copy as passed by each House into the U.S. National Archives.) In fact, as we will see, the U.S. Code itself is not a fully authoritative edition of all, or even most—maybe not of any—laws of the United States.

Technically, the only authentic version of a law of the United States is the actual physical document that was passed by Congress, authenticated by signature of each House's chief clerical functionary in accordance with the customs of that House, and either signed by the President or allowed to become law through the President's inaction or over the President's veto. These documents are, as we mentioned, kept in the National Archives. In rare cases judges might have to examine them, if there is any reason to doubt the accuracy of some purported copy of them presented to the court as being the law of the United States. As we will see, some copies or versions of law based on these documents are "prima facie" evidence, and some are "legal" evidence. None is conclusive. In effect, judges are expected to take judicial notice of statutes to which they have no regular direct access. This in general seems to work just fine, perhaps because a number of enterprises earn their living by providing reliable copies of laws.

B. *The problem of later amendments to earlier statutes in the "common-law" tradition*

There is one area where this system is a little creaky: where there are amendments by later Congresses to laws passed by earlier ones. How can these amendments be integrated into the original statute so that the lawyers and judges can know what the law as amended looks like? The only form in which the amendments are found in the statute books is as a set of instructions for changing the earlier, original statute's text, which continues to exist in the books in its original form. Usually, these amendments are in a form called "cut and bite" amendments, striking parts of existing legislation and adding or substituting others.[2] This form of amendment often results in there being no fully authoritative text of the original law as later amended by another statute. Indeed, sometimes through inadvertence the amendments made by a later law cannot actually be literally executed to the earlier law. What then?

This problem of how to show changes is even more significant in federal law than it would be in a purer "judge-made" common-law system where statutes are not the only, and perhaps not the most important, source of rules of decision.

The attempts of Congress to deal with this problem have created a rather confused cross between a civil-law code system and a common-law statute system for federal law. Many of the conventions of federal drafting owe something to this fact.[3]

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2. In a few cases, an amendatory statute will amend an earlier statute "to read as follows" and so provide a complete substitute and updated text. For example, see Public Law 93-445, which amended the Railroad Retirement Act of 1937 by completely rewriting its text, in the process renaming it the Railroad Retirement Act of 1974. 45 U.S.C. §§ 231 et seq. But soon after, Congress made additional cut and bite amendments to this new Act, so the 1974 text is no longer authoritative.

3. The problem is not a new one either. James Madison had planned to introduce the then-modern, if not radical, legislative drafting technique of interpolating amendments directly into the text of the U.S. Constitution, the primary legal text for federal law. He was not successful in doing so. Congress, for its first century or so, perhaps following this lead, would simply pass a new rule in a new statute. The new rule would prevail over the old rule as a later enactment. The earlier statute, though, was facially, if not substantively, left unchanged by the "amendment," so judges would just have to know it no longer applied as written, even though parts of it were impliedly repealed. Sometimes it was difficult to know how much of an older statute was still in force, given the lack of congruence between the application of the new rule and the old one. This is probably one reason the modern method of cut and bite amendments has proved so popular and almost altogether eclipsed the traditional common-law approach. However, that traditional approach is still used for constitutional amendments.

C. First attempt at codification—the Revised Statutes of the United States

The problem was made more complex in the mid nineteenth century by a general American movement toward the "code" system of statute law. It seems to have been argued that the existing system gave the public too little usable notice of what the laws were (and perhaps the courts too great an ability to resolve ambiguities however they liked rather than as Congress intended). This movement resulted in a complete restatement and reorganization of federal statutory law in the Revised Statutes of the United States of America (hereinafter referred to as the "Revised Statutes of the United States," or simply the "Revised Statutes").

The enactment of the Revised Statutes of the United States was approved by the President on June 20, 1874.[4] Earlier statutes were repealed and the new Revised Statutes supposedly represented a complete statement of generally applicable federal law. It was intended that any amendments in the future would be made by changes to the Revised Statutes' text, a practice that had by then become the custom in most parts of the world, including the English-speaking "common-law" world.

So the Revised Statutes of the United States became just another law of the United States. Some parts of it are still in effect today, notably certain civil rights statutes, such as those "codified" (this turns out to be a loaded term that is not used to mean consistently the same thing, as we shall see later) in section 1983 and those near it in title 42 of the U.S. Code.

D. Complications

When cut and bite amendments are made in a statutory common-law system, we have already seen that there is no formal document that shows the law as amended. In theory, anyone who wants can start with the original statute and each succeeding statute that makes the cut and bite amendments, and execute those amendments seriatim to create a text of the law as amended. We call those texts "compilations." Many of us are familiar with CCH or Prentice Hall, or with Collier's or West Publishing Company's compilations of commonly used statutes, such as the Internal Revenue Code, the bankruptcy law or the criminal code. (These various "codes," by the way, are not truly codes in the European sense, but the fact we often use that name indicates how strongly a definitive text is desired by users.)

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4. See the Act of June 20, 1874, 18 Stat. 113, pt. 3, ch. 333. For a complete and detailed outline history of the statutes of the United States and their legal sources throughout its history, see *United States Statutes: Historical Outline and Source Notes*, Richard J. McKinney (2004) (available at http://www.llsdc.org/sourcebook/docs/us-statutes-outline.pdf).

There appears to have been no official regularly updated compilation of the Revised Statutes integrating the cut and bite amendments to the original text. This may have contributed to the Revised Statutes' general failure to wean Congress from Congress's earlier loose statutory ways.

E. A second attempt: the U.S. Code, a work in progress

The Revised Statutes of the United States did not satisfy those wishing for reform in the way statutes were presented. Much of the bar, especially the New York state bar, continued to push for change. Acting through the House Judiciary Committee, advocates were able to establish, by the early twentieth century, an Office of Law Revision, which would be charged with bringing those laws enacted independently of the Revised Statutes into a single code with the Revised Statutes. This single code was called the United States Code. The Office of the Law Revision Counsel would periodically publish updated compilations showing the cumulative cut and bite amendments that Congress had made to earlier laws. The problem of authoritative compilations was finally addressed, for the first time in American history. Starting with those laws in the jurisdiction of the Judiciary Committee of the House, the new codifiers got off to a good start with the enactment as "positive law"—that is, a single statute or Act of Congress, several "titles" of this as-yet-incomplete U.S. Code.[5]

F. The varieties of legal effect of various parts of the U.S. Code

In examining the U.S. Code, you will find at the front of each volume a listing of its "titles," some with asterisks and some without. Those with asterisks have been enacted into law as titles of the U.S. Code. Sometimes when someone says a title of the U.S. Code has been codified, this is what they mean. Like the Statutes at Large (the only official publication of the Acts of Congress, set forth seriatim in their native, as enacted, form), and for the same reason (namely that they were enacted as an Act of Congress), those titles are "legal evidence" of what are the laws of the United States (1 U.S.C. § 112 and 1 U.S.C. § 204). Notice these sections do not say "conclusive." Section 204 also makes the compilations updating the "enacted" or "codified" titles of the U.S. Code—cumulatively integrating the cut and bite amendments Congress has made to those titles—

5. And then things stalled again. While the process of "codification" continues, it is far from complete, and the original fifty-title framework for the U.S. Code seems increasingly burdened by changes in the way Congress divides national problems for legislative solution. So title 42, for example, has come to suffer from elephantiasis. The existence of a defunct title, title 6, made possible the incorporation of the "new" topic of homeland security without breaking the fifty-title structure, but that may be a process difficult to repeat.

"legal evidence" for their content. This could still be challenged by resort to the true statute version found only in the National Archives.

The other titles of the U.S. Code are in fact an attempt by the Office of the Law Revision Counsel to make sense out of and organize as a part of the U.S. Code those statutes that are not yet "codified" in it as positive enactments. This work, never passed by either House of Congress or signed by the President, is not technically the law of the United States. Nor are the updated compilations of those titles that the Office of the Law Revision Counsel from time to time makes. But by reason of that same section 204, they are "prima facie" evidence of what is the law of the United States.[6] However, the underlying statutes continue to be "legal evidence."[7]

As we have mentioned, the "codified" (in the sense of "enacted as positive law) titles of the U.S. Code are "legal" evidence of the laws of the United States, just as the Statutes at Large are. So you might think you could rely on "codified" titles of the U.S. Code as fully as you could on the statutes at large. However, in nearly every case,[8] Congress has, upon originally enacting a title of the U.S. Code, cautioned that it intends no substantive change in the laws so codified (and seemingly repealed). Presumably any apparent discrepancy or ambiguity in language in the codified title must be resolved by reference to the underlying and supposedly repealed mass of statutes brought into the codified title. Indeed, even where there is no discrepancy or ambiguity, in theory the underlying stat-

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6. The Office of the Law Revision Counsel takes statutes, such as the Securities Act of 1933, and arranges them into titles, giving the sections new numbers and making various other form changes in them. Periodically, these "titles" of the U.S. Code are updated with the cut and bite amendments Congress has made to the original Act. Even though the presentation, section numbering, and other details are different, the United States Code version is therefore more up to date than the Statutes at Large version of the Securities Act as originally enacted. In some cases, people might say the Securities Act has been codified to title 15 of the U.S. Code, though this is a different use of the term "codification" than we have been making.

7. A number of cases deal with the effect of the placement of material from "uncodifed" statutes into those parts of the U.S. Code not enacted by Congress as positive law. *E.g.*, North Dakota v. United States, 460 U.S. 300 (1983) (classification decisions given no weight); Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958) (an error made by the Law Revision Counsel has no effect); United States v. Welden, 377 U.S. 95 (1964) (recourse must be had to the original statutes when construing a section of the U.S. Code that has not been enacted into positive law).

8. Title 11 of the U.S. Code, dealing with bankruptcy, is an important exception. Also, on some occasions, Congress has reenacted an earlier title of the U.S. Code with substantive modifications, such as was the case with title 18 in 1948. CNA Fin. Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987).

utes would trump the codified title![9] Needless to say, this creates yet another possibility for confusion in determining what are the laws of the United States.[10]

G. The bottom line on sources of federal statutory law

So, to sum up, finding an authoritative copy of the laws of the United States is a tricky job. Only the National Archives has the real thing. The next best thing is a compilation made by applying the cut and bite amendments from amendatory statutes to a statute not yet codified. (Many commercial companies produce these, and in many areas they are used to such a great extent that errors in them are assumed to be in the "real" law of which they are unofficial compilations.) Not nearly as good, but often good enough, is to look to the U.S. Code in its current edition (but with care for recent enactments that are in force but found only in the Statutes at Large and not yet in the current edition of the Code or even its supplements) for laws in titles that have been codified, in the sense of enacted as such. Least authoritative, but often sufficient, are the versions of laws found in uncodified titles of the U.S. Code.

Part II. Naming Conventions

Having established the authoritative texts of statutes, we have the context in which we can consider drafting conventions. Among the most important are those relating to the naming of subdivisions of a statute. As we have seen, federal law is a disparate collection of statutes enacted in differing styles, literally over the centuries. So it may come as a surprise that there are naming conventions about basic subdivisions of federal laws that have been (mostly) observed consistently over the entire range of statutes. However, it is not surprising that some laws, especially older ones, depart very substantially from the conventions, so caution must be used in applying them.

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9. Sompo Japan Ins. Co. of Am. v. Union Pac. R.R., 456 F.3d 54 (2d Cir. 2006); United States v. Bhutani, 266 F.3d 661 (7th Cir. 2001); United States v. Ward, 131 F.3d 335 (3d Cir. 1997). I am grateful to Peter Lefevre for drawing these cases to my attention.

10. There are also sections in title 1 of the U.S. Code dealing with the effect of a compilation by Little and Brown (section 113) of the laws of the United States, a compilation few modern people have ever laid eyes on, and the effect of a compilation by the Secretary of State of the Treaties in Force of the United States (since these may, to the extent that they are self-executing, be fully as authoritative as a statute) (section 112a).

A. Sections

Almost always, from the earliest days of the Republic, the text of a law, if divided at all, has been divided into sections. These sections either have the designation "section" (although for a while it was the convention not to have any designation for the first "section") or the designation "sec." (after the first section).Typically they are numbered with Arabic numerals, but in some old statutes this will not be so. Like every convention, these are sometimes violated. Still, the section is the most fundamental division of federal law, and almost all federal laws use it.

Some laws are so short they do not really have any subdivisions. Because of the custom of not designating the first section, some people decided these were "single section" laws, so now you will at times see a statute with a designation of a section 1, but no section 2. Probably this represents a misunderstanding of the structure of statutes, but it has become somewhat entrenched.

B. Subsections and paragraphs

A section in turn is normally divided into subsections. These are designated by lowercase letters: "(a)," "(b)," etc. Each subsection is a complete sentence and idea within itself.

But sometimes the section is one complete idea, with several subdivisions, none of which is itself a full sentence. The subdivisions are meant to separate out partial sentence elements. These subdivisions of a section are called paragraphs—not subsections—even though they generally are not technically paragraphs, but are instead phrases or clauses. They are designated (usually) with Arabic numerals: "(1)," "(2)," etc.

An example might look like this:

Sec. 2. This section is supposed to convey—
  (1) the first idea;
  (2) the second idea; and
  (3) a third idea.

And yet, a paragraph can be a full, independent sentence or sentences when it is used as a subdivision of a subsection. That may have been its first use, and why it got the name. It might look something like this:

Sec. 2. (a)(1) This subsection is pretty complicated. It has a main idea.
  (2) It also has another idea that deserves its own exposition.

For now, in these illustrations, we have not used headings for the various parts. Headings are usually used now, but we will discuss that later. At this point it is easier to see the units without the headings.

So we have a section divided into subsections or sometimes paragraphs. The subsections divide into paragraphs. Paragraphs may have subparagraphs, designated usually with capital letters: "(A)," "(B)," etc.

C. Clauses

In an ideal world, there would never be any further subdivisions. But in dense statutes, they are sometimes found. Usually they are called clauses and subclauses. A clause, like a paragraph, is not necessarily grammatically a clause. It is typically designated with a small Roman numeral, such as "(i)" or "(ii)." Subclauses use large Roman numerals, such as "(I)" or "(II)."

So you could get something that looks like this:

SEC. 2. IMPORTANT OVERALL TOPIC.

(a) In General—In a well-written statute, the main idea of the section will come first and be elaborated here.

(1) Sub-idea One.—If there are sub-ideas, they will show up looking something like this.

(2) Sub-idea Two.—There have to be at least two of them to make it worthwhile to do this. But either one of them can be divided further, like this:

(A) By this level of subdivision, the drafter may have stopped using headings; it is likely that further subdivisions, if needed—

(i) will be run-ons; and

(ii) will look something like this, and in a few cases will include their own subdivisions as follows:

(I) A ridiculously oversubdivided section can have these.

(II) It will always have to have more than one, though.

(B) You can't have a subparagraph (A) without a (B).

(b) Some Lesser, but Independent Idea.—Usually, the later subsections are for details that flesh out the main idea covered in the first subsection, such as exceptions, definitions, special rules, things like that.

In this example, you would say that section 2(a)(2)(A)(ii) has two subclauses, (I) and (II). Or you could say that clause (ii) of section 2(a)(2)(A) has two subclauses. Notice that when you combine a number of elements, you call the whole by the largest and first element in the combination: section 2(a)(2)(A)(ii), for example.

D. Bottom line in dealing with "small divisions"

In most cases, the important nomenclature convention to remember is the difference between "subsections" and "paragraphs." At times, though, the decisions in cases can turn on the proper use of the nomenclature for smaller subdivisions.

E. Titles, chapters, and other divisions

Most bills are divided into sections and their subdivisions, but some bills are rather too big for that, including omnibus bills with relatively unrelated topics combined together. These are divided into "titles," "chapters," and "subchapters," all relatively clearly labeled. Not all of these subdivisions may be used in any given bill, but sometimes all are. Occasionally, several different "Acts" of Congress are combined, each Act being called something like a "division." This is, thankfully, rare, and in most cases it is obvious from the labeling. So it causes little confusion even if it is aesthetically questionable.

F. Various styles, one nomenclature

You may have noticed that in the examples I gave in the subdivision portion of this, I actually used two rather different styles. Mostly you will run into the "legislative counsel" style embodied in the longer example at the end of page 9, which has more headings, variations in typeface, and more indentations where there are subdivisions. But in a few cases you might run into the older "traditional style," shown in the first examples. It is characterized, usually, by fewer headings and less indentation. But the conventions about naming the subdivisions are the same in both styles; the main differences are in typeface and presentation.

G. Convention relating to cross references within a unit

Sometimes you will find a cross reference in a law to another subunit in the same unit, such as another subsection in the same section, or another section in the same law. The convention is that mention of another subunit in the same

unit does not require reference to the overall unit. Usually you will see "subsection (b)" rather than "subsection (b) of this section."

Part III. Other Conventions That May Be Useful To Know

A. "Including" means "not limited to"

It has become a convention in federal law that the term "including" means what it usually means in English. It is a nonexclusive "for instance" type of phrase. If I say I have some change in my pocket, including a penny and a dime, most people would expect that I might have some other coins as well. Few would think I meant to exclude that possibility. But in legal writing in general, there seems a worry that "including" means that what follows is a complete list of the elements. There are even a few federal laws that use the term "including but not limited to." The "but not limited to" should be thought of as surplusage. "Includes" is typically used in definitional sections. You might have a section that looks something like this:

SEC. 45. DEFINITIONS.

As used in this Act—

(1) the term "mother" means, with respect to a human, the woman who gave birth to that human; and

(2) the term "parent" includes mother.

Notice that paragraph (1) uses the word "means." That is like an equals sign in math. What follows is a full and final definition. But paragraph (2) uses the word "includes." Even by the context, you can tell it is not intended to equate "parent" with "mother," but leaves open the possibility, indeed probability, that others are parents as well. Very often, "includes" or "including" is used to bring into the coverage of the provision something that is rather counterintuitive. Perhaps you might find something like "The term 'firearm' includes any explosive device." While it might not make much sense in common speech, the intent is to provide the same rules for explosive devices that are provided for firearms, so this rather odd locution is used.

B. The doctrine of functus officio as applied to amendatory Acts

Since the cut and bite amendment form has taken hold, it seems logical to recall that once the amendments made by an amendatory Act take effect, that Act is, to that extent, something of a spent force, almost a nullity. We can think of the amendatory Act as a sort of ship carrying passengers to the Act being amended. Once those passengers get out and go to that other Act, they are no longer really on the ship. Very occasionally, Congress will try to amend an amendatory Act that has taken effect. Kindly courts might wish to follow the evident intent by transferring those amendments to their real home, the Act amended, but this can be difficult if subsequent amendments to that Act change the context of the changes made in the earlier amendatory Act.

C. Definitions under title 1 of the U.S. Code

There are a number of statutory default provisions that drafters of federal law often rely on, without referring to them by location in the law. These include the definitions and general provisions in title 1 of the U.S. Code; using "on the record after opportunity for a hearing" in connection with administrative rule making and adjudications; the avoidance of citation of civil venue and jurisdiction statutes; the provision for alternate and sometimes larger fines under section 3571 of title 18; and the convention that, in criminal statutes, the state of mind required for the conduct elements of the offense also applies to the circumstances and results elements of the offense. Drafters usually follow these conventions, but not always. When they do not, it is usually because someone has added into the law repetitive or surplus recitations. This can result from an attempt to reassure persons not as familiar with the defaults, or from simple inadvertence. Let's look at each individually.

Section 1 of title 1 of the U.S. Code provides a number of definitional conventions. There is a broad definition of "person" that includes most organizations and applies unless an individual law otherwise provides. The singular is deemed to include the plural and vice versa. Other definitions and provisions at the beginning of title 1 provide useful shortcuts for drafters, though sometimes traps for the unwary.

One such trap is the default definition of "person." This includes all sorts of groups and associations as well as natural persons. Combined with the rule, also set forth in section 1, that the singular includes the plural, this can create a much more sweeping provision than the casual reader might have expected. Congress often uses the word "person" when in fact they mean "individual." Since section 1 has an out, namely the exception "unless the context indicates otherwise," it may be necessary to apply this definition with caution.

Notice, too, that this definition of "person" does not include governmental entities, though it probably includes almost everything else. Yet some statutes are applicable to governmental entities as well as private ones. While it is not set forth as a definition, Congress has taken to using the term "entity" when it wants to include governmental entities.[11]

Other definitions in chapter 1 of title 1 are seldom noticed but could have a somewhat surprising effect. The term "vehicle" includes all forms of land transportation, but one is left to wonder what then is a "space vehicle" (section 4). The term "vessel" includes every "artificial contrivance used, or capable of being used, as a means of transportation on water" (section 5). I suppose a lot of things are capable of being used as flotation devices in a flood, such as perhaps an old wooden door passing by my roof as I try to escape, but in areas where there are no floods, it seems unlikely they should be considered vessels. Even in areas where there are floods, it seems unlikely that an old unused door stored in the attic should be considered a vessel. Once again, recourse would be needed to the context of the use of the term, but one wonders if these definitions are ever actually useful.

D. Use of title 5 conventions

Chapter 5 of title 5 (a codified title) of the U.S. Code is popularly known as the Administrative Procedure Act, from its precodification embodiment as a separate statute. It provides a complete default system for many of the activities of administrative bodies, especially in rule making and adjudication, where executive agencies sometimes act in quasi-legislative or quasi-judicial modes. Though not every committee in Congress is aware of it, this body of law was intended to provide due process and uniformity in agency proceedings. Generally, the chapter provides for informal "notice and comment" rule making and simple adjudications, and the chapter that follows it in title 5 provides a fairly broad level of judicial review. In addition, the chapter also provides a more formal procedure as an option for rulemaking or adjudication, which leads to a somewhat more restricted judicial review. This more formal procedure is invoked merely by putting the words "on the record after opportunity for an agency hearing" in the new law Congress might be contemplating. Innocent as these words sound, they are full of legal effect. When applied to rule making, use of these magic words means that sections 556 (providing for very formal hearings) and 557 (relating

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11. *See* Organizacion JD LTDA v. U.S. Dep't of Justice, 18 F.3d 91, 94–95 (2d Cir. 2001); Conner v. Tate, 130 F. Supp. 2d 1370, 1374–75 (N.D. Ga. 2001); Dorris v. Absher, 959 F. Supp. 813, 819–20 (M.D. Tenn. 1997); PBA Local No. 38 v. Woodbridge Police Dep't, 832 F. Supp. 808, 822–23 (D.N.J. 1993). I am grateful to Mark A. Jones for calling these cases to my attention.

to the contents of and how an agency will use the record established at the hearing) of title 5 apply instead of section 553(c), which provides a much less formal procedure, leaving many details to agency discretion. In the case of adjudications, the same sections apply with respect to hearings and records, making the adjudication into the equivalent of a judicial type trial.

Perhaps even more important than the procedure evoked by the simple "on the record after opportunity for an agency hearing" is the different scope of judicial review. In effect, the scope of review for a matter decided on the record after opportunity for an agency hearing is limited to whether or not the agency decision is "unsupported by substantial evidence on the record" taken as a whole. The convention is to use those words alone, without any reference to title 5. Since the full-bore formal proceeding is rarely used now, the fact that these words create a kind of springing use may be a trap for the unwary.

E. Reliance on title 28 conventions

Another convention is based on the provisions in title 28 (chapters 85 and 87) providing default jurisdiction in U.S. district courts for the trial of most civil actions. In earlier times, when Congress created a new cause of action, it would also usually provide ad hoc provisions for jurisdiction and venue in the U.S. district courts. However, the enactment of chapters 85 and 87 has made it unnecessary to do this anymore. An added advantage of letting title 28 supply these details (jurisdiction, venue) is that they are likely to be more uniform than when done on an ad hoc basis.

This absence of statute-by-statute jurisdiction and venue provisions is less likely than some other omissions to trouble judges, however, since pleadings always must recite the jurisdictional provisions on which the case is based and the courts are very aware of the default provisions, such as section 1331 of title 28 (also a codified title, by the way).

The elimination of the amount-in-controversy requirement for federal cases is not always understood by congressional drafters, so you will sometimes find superfluous jurisdictional statements.[12] More troubling are superfluous venue provisions, as it is sometimes unclear whether they provide additional or exclusive venue, and they may leave out venue options that probably would have been included if the drafters had focused on that issue. Unfortunately, this is a case in which Congress sometimes fails to follow its own drafting conventions.

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12. A few examples: 36 U.S.C. § 220505; Section 16 of the Deepwater Port Act of 1974 (33 U.S.C. § 1515); Section 4003 of Public Law 93-406 (29 U.S.C. § 1303).

F. Criminal fine conventions

Another trap for the unwary is the combined effect of sections 3571 and 3559 of title 18 on possible fines for criminal offenses. There are a number of existing sections that purport to set maximum fines, and at times Congress inadvertently enacts additional ones. These seeming maxima may be superseded by the rules set forth in section 3571. The key rule (found in section 3571(b)), which is intended as a rule of construction to provide a uniform system of fines for federal offenses, says that the maximum fine is the higher of the maximum set by a specific statutory enactment and the general rule provided in section 3571 unless the specific statutory enactment overrules section 3571 by explicit reference to it (section 3571(e)).

One should also keep in mind section 3571(d), a little-noticed additional rule, which provides that in cases where the offense results in a gain or loss, the maximum fine can be increased over what it otherwise would be to an amount that is double that gain or loss.

For federal judges, much of this has been subsumed into the Sentencing Guidelines, but the evolving effect of those guidelines may require more recourse to the underlying statutory base for criminal penalties.

G. State-of-mind convention for criminal cases

Another convention that is used in drafting, but is not codified in the statute law, also deals with criminal cases. That convention relates to the state of mind required with respect to various elements of an offense. In many cases, statutes use the formula "Whoever knowingly does X in circumstance Y with result Z shall be fined or imprisoned." It is clear that "knowingly" modifies the X, but perhaps less clear that the expectation is, unless otherwise stated, that "knowingly" also applies to Y and Z.[13]

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13. One place where this convention is used is in 18 U.S.C. § 2241(c). In that section, the state of mind "knowingly" is explicitly applied to the conduct required for the offense, and through the convention would also apply to any circumstances and results that are required for the offense. This necessitated the addition of subsection (d), providing that in a prosecution under subsection (c) the government need not prove the defendant knew the victim was less than twelve years old. As stated in the report of the House Judiciary Committee, from which this section originated, "Absent this provision, the government would have had to prove that the defendant knew the victim was less than twelve years old, since the state of mind required for the conduct—knowingly—is also required for the circumstance of the victim's age." House Report 99-594 to accompany the Sexual Abuse Act of 1986. This convention may be grounded in the common-law doctrine relating to the "general intent" scienter requirement for criminal offenses. *See* United States v. Bailey, 444 U.S. 394 (1980).

There are some exceptions to this, most of them coming from a time before the convention was generally adopted or in statutes where the drafter was unaware of the convention. For instance, the crime of killing a federal officer during the conduct of that officer's duty does not require you know that the victim is a Federal officer or perhaps even that the officer is engaged in official duty. Undercover law enforcement officers were intended to be protected by the forerunner of this section (now found in an updated, and broader, version in 18 U.S.C. § 1114). The earlier version provided protections for a list of officers limited at first to law enforcement officers from named agencies, and made the killing of anyone on that list a crime. In that context it was relatively easy for the courts to decide that particular knowledge of which law enforcement agency the victim was employed by was not a required aspect of scienter, which had the effect of not requiring scienter for the fact the officer was an officer of the federal government. The current, much broader, language seems to be interpreted in the light of this earlier version.

The more common way of eliminating scienter for an element of an offense is simply to say so. The section of law defining the offense provides that the prosecution is not required to prove a state of mind with respect to whatever the element is.[14] Of course, in some cases this may raise constitutional issues.

Whether the convention that *scienter* for circumstances and results as well as conduct required for an offense applies needs to be considered on a case-by-case basis. However, it does apply in many cases, especially in newer laws, and some attention to the history of the section in question normally will resolve the issue.

H. Problems with "willful"

The state of mind "willfully" is increasingly being avoided in federal statutes. Courts and commentators have noted its varied meanings and have strongly criticized it.[15] It has been used to cover everything from carelessness to intentional malice, and so is almost perfectly ambiguous. In most cases, the reality is that "knowingly" expresses the proper state of mind. Courts seem likely to infer its being the required state of mind even if it is not explicitly made so, and there may be some constitutional constraints on departing from it unless some nearly equivalent state of mind is provided, such as "with reason to believe."

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14. Sections 2241(d) and 2243(d) of title 18 of the U.S. Code both have this format.

15. Spies v. United States, 317 U.S. 492, 497 (1943); United States v. Murdock, 290 U.S. 389, 395 (1933); United States v. Granda, 565 F.2d 922, 924 (5th Cir. 1978). See also the comments of Judge Learned Hand in the Model Penal Code and Commentaries, sec. 2.02 at 249 n.47 (Official Draft and Revised Comments 2005). I am indebted to Michael Volkov for these references.

Conclusion

We have looked at some conventions that drafters of federal statute law currently use, at least most of the time in the context of the structure of federal statutory law. Readers should be cautioned that conventions change with language and usage over time, so this discussion of them will grow out of date. Conventions are not always followed, either because of ignorance or perhaps the age of the statute being considered. But starting with these conventions, a reader of statutes will have a better chance of gleaning the legislative intent that often hides deeply encrusted within the statute's off-putting verbal exterior.