Introduction to Legislative Drafting

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I. Purpose of this document

The purpose of this document is to provide an overview of the drafting style and conventions used by the House Office of the Legislative Counsel in order to facilitate communication and collaboration between the attorneys of the Office and their clients.

II. Forms of legislation

There are four different forms of legislation. Two of them (bills and joint resolutions) are used for making law, while the other two (simple resolutions and concurrent resolutions) are used for matters of congressional administration and to express nonbinding policy views. Joint resolutions are also used to propose constitutional amendments for ratification by the States.

[1] The links in the Table of Contents will take you to the top of the appropriate page. You may need to scroll down to the desired section.

For a bill or joint resolution to become law, section 7 of article I of the Constitution requires that it pass both houses of Congress and be presented to the President. It will become law if the President signs it, if the President vetoes it and Congress overrides the veto by a two-thirds vote, or if ten days pass without any action by the President (while Congress is in session). Simple resolutions and concurrent resolutions are not presented to the President because they do not become law. Joint resolutions proposing constitutional amendments are governed instead under article V of the Constitution, which does not require presentment to the President.

There is no legal difference between a law that originated as a bill and a law that originated as a joint resolution. Congress chooses between bills and joint resolutions using conventions that have developed over time for the subject matter involved. Bills are more common than joint resolutions, but a prominent example of a joint resolution is a resolution to make continuing appropriations beyond the end of a fiscal year when the regular appropriations bills for the next year have not been completed (a "continuing resolution" or "CR").

One other difference between bills and joint resolutions is stylistic. When a bill passes one house of Congress, its designation changes from "A Bill" to "An Act", even though it has not yet become law. A "Joint Resolution" keeps the same designation even after passage by both houses and enactment.

Comparison of Forms of Legislation

Form of legislation	**Passage required by**	**Presentment to President**	**Result**	**Examples**
Bill	Both houses	Yes	Law	H.R. 2568 (111th Congress)
Joint resolution	Both houses	Yes (except proposal of constitutional amendment)	Law (except proposal of constitutional amendment)	H.J. Res. 52 (a CR from the 110th Congress)
Concurrent resolution	Both houses	No	Not law (binding only as to certain matters of congressional administration)	S. Con. Res. 70 (the concurrent resolution on the budget for fiscal year 2009; 110th Congress)
Simple resolution	One house	No	Not law (binding only as to certain matters of administration of the house that passed it)	H. Res. 88 (a "special rule" governing House debate on a bill; 111th Congress)

III. How Federal statutes are organized

A. Public Laws, the Statutes at Large, and the United States Code

When a bill or joint resolution is enacted into law, it is given a public law number in the form 000–0. The first number is the number of the Congress that passed the law, and the second number indicates the sequential order of enactment of the law within that Congress. For example, Public Law 111–161 was the 161st law enacted during the 111th Congress. (Note that a small number of "private laws" grant relief to specific individuals or other entities and are not further discussed in this document.) The public laws passed by recent Congresses may be accessed on Thomas at http://thomas.loc.gov.

Each new statute is printed as a separate document called a slip law. At the end of each session of Congress, the slip laws from that session are compiled, in sequential order, into the Statutes at Large. The top of each page of a slip law has a "Stat." page number, which is the number that page will have in the Statutes at Large. Neither the slip laws nor the Statutes at Large are updated to reflect amendment by later statute.

The Office of the Law Revision Counsel of the U.S. House of Representatives organizes most provisions of the public laws by subject matter in the United States Code so that particular provisions can be easily located. If a provision is of general applicability and is permanent, it will probably be assigned to a section in the Code; a provision that is temporary, narrow in scope, obsolete, or executed may be assigned to a note or appendix, or left out of the Code entirely. The Code consists of 51 titles, each devoted to a broad area of the law. You may search the U.S. Code on the website of the Office of the Law Revision Counsel at http://uscode.house.gov/search/criteria.shtml.

It is helpful to keep in mind several other points when using the U.S. Code. First, the Code has a different structure than the slip laws and is not a verbatim replication of them. Section numbers and cross-references will usually differ. There could even be some differences in language, although no substantive changes are intended. Second, the process of classifying a slip law to the Code often involves splitting it up and placing different provisions of it in different parts of the Code. Finally, unlike the slip laws and Statutes at Large, the Code is updated to reflect amendment by later statute.

See Example 1A and Example 1B at the end of this document to compare a statutory provision (section 102(a)(1) of the Family and Medical Leave Act of 1993) as it appears in the slip law with its U.S. Code counterpart.

B. Positive versus non-positive law titles of the U.S. Code

The easiest way to understand this distinction is to look at the purpose and history of the U.S. Code. The only organizing principle behind the slip laws, and thus the Statutes at Large, is chronology. This makes it very difficult to find the law on a particular topic using those sources. Beginning in 1926, the U.S. Code was published to organize the laws by subject matter and make them more accessible. The first editions of the Code were simply restatements of the laws being organized; they did not actually take the place of those laws. If there was a conflict between a Code provision and the underlying statutory provision, the statute controlled.

In 1947, Congress began the process of enacting titles of the Code into law and repealing the underlying statutes, a process that continues today. The provisions of a title so enacted become "positive" law, and the underlying statutory provisions can no longer be used to rebut them. One can quickly see the status of a title by looking at the first page after the title page of any volume of the Code or at the list on the website of the Office of the Law Revision Counsel at http://uscode.house.gov/about/info.shtml. Currently, the following 26 titles have been enacted into positive law: 1, 3, 4, 5, 9, 10, 11, 13, 14, 17, 18, 23, 28, 31, 32, 35, 36, 37, 38, 39, 40, 41, 44, 46, 49, and 51.

Here is the practical implication of this distinction for drafting purposes:

- If the provision of the Code you are citing or amending has been enacted into positive law, cite or amend the Code provision (e.g., "section 32901 of title 49, United States Code,").
- If it has not, cite or amend the underlying statute, typically by its short title (e.g., "section 325 of the Communications Act of 1934").

C. Working with provisions that are not part of positive law titles of the U.S. Code

As discussed above, when legislation cites a statutory provision that is not part of a positive law title of the U.S. Code, the citation must be to the underlying statute, not to the Code. This presents a logistical problem, because the original slip law and the Statutes at Large are not updated to reflect any amendments since enactment. For this reason, access to a compilation of the statute that includes the amendments is an enormous drafting aid. Among the entities that maintain compilations are legal publishing companies, congressional committees, and the House Office of the Legislative Counsel. Compilations of selected statutes are available on the Office's website at http://www.house.gov/legcoun/HOLC/Resources/comps_alpha.html. See Example 1C at the end of this document for section 102(a)(1) of the Family and Medical Leave Act of 1993 as it appears in the Office's compilation of the statute.

When citing a statute that is not part of a positive law title of the Code, it is helpful to give the Code cite in parentheses as an aid to readers who do not have access to a compilation. For example: "section 102 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2612)". If a provision does not appear as part of a Code section but does appear in a note or appendix, the Code cite will look like this: "section 235 of the Water Resources Development Act of 1996 (33 U.S.C. 2201 note)"; "section 3 of the Federal Advisory Committee Act (5 U.S.C. App.)". If a provision does not appear in the Code at all, the parenthetical aid may include the public law number or Statutes at Large citation, or both. For example: "section 701 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010 (Public Law 111–80)"; "section 101 of the Water Resources Development Act of 1996 (110 Stat. 3662)".

With rare exceptions, it is unnecessary to specify that you are citing to a statute "as amended". Upon enactment, amendments are considered executed, even though nothing physically happens to the slip law or Statutes at Large, and any future reference is considered to be to the statute as amended.

IV. Organization within a bill

The section is the basic unit of organization of a bill, and thus of an enacted statute. Section 104 of title 1, United States Code, provides that a section "shall contain, as nearly as may be, a single proposition of enactment". The terminology for referring to units within a section has become highly standardized and should be carefully followed to avoid confusion. The breakdown of a section is as follows:

SECTION 1. ("SECTION" for 1st section and "SEC." for subsequent sections, followed by Arabic numeral)

(a) (Subsection) (lower-case letter)

(1) (Paragraph) (Arabic numeral)

(A) (Subparagraph) (upper-case letter)

(i) (Clause) (lower-case Roman numeral)

(I) (Subclause) (upper-case Roman numeral)

In larger bills, sections may be organized into higher-level units. The terminology for such units varies from bill to bill, but the following terms are often used (from the highest level to the level immediately above a section): title I, subtitle A, chapter 1, subchapter A, part I, subpart 1.

V. General template for structuring content

The Office generally tries to organize the content of a bill, and provisions within a bill, according to the template below. We do not always follow this template, but it is often our starting point when we think about how to put together a draft.

- General rule: State the main message.
- Exceptions: Describe the persons or things to which the main message does not apply.
- Special rules: Describe the persons or things to which the main message applies in a different way or for which there is a different message.
- Transitional rules.
- Other provisions.
- Definitions.
- Effective date (if appropriate—see below).
- "Authorization of appropriations" provisions (if appropriate—see below).

VI. The legislative thought process

A. The need for legislation

The first step in the legislative thought process is identifying the problem to be solved. What is the end goal?

The next step is articulating a policy for achieving that goal. By what specific means will the problem be solved? Sometimes, a legislative solution will not be appropriate because of the difficulty of stating a policy with enough specificity, insurmountable problems with enforcement, or constitutional limitations. Additionally, the policy may already be accomplished by existing statutes or regulations, or it may be more appropriate to try to persuade an agency to enforce existing law in a different way than to pass new legislation. If new, binding legislation is not appropriate or desirable but Congress still wants to express its views on a policy, it may do so through a nonbinding resolution or sense of Congress provision.

B. Key drafting questions

Once the decision has been made to proceed with new, binding legislation, the following key questions should be answered to produce a draft that accomplishes the intended policy and avoids unintended consequences:

- What is the scope of the policy—To whom or what does it apply?
    - For example, does a policy that applies to the States also apply to the territories and the District of Columbia? Does a policy that applies to "Federal funds" apply to Federal loan guarantees? Does a policy that applies to individuals also apply to corporations?
    - Should there be any exceptions or special rules for particular persons or things?
- Questions of administration—Who will be responsible for carrying out the policy?
    - Are the States or the Federal Government responsible?
    - If the Federal Government, which particular entity in the Federal Government?
        - Will the policy be administered by one entity or many?
        - Should a new entity be created to administer the policy?
- Questions of enforcement—What if the policy is not followed?
    - Will people be encouraged to follow the policy through incentives or punished for violating it (carrots versus sticks)?
    - If there are going to be penalties, should they be criminal or civil?
- Questions of timing
    - Should the policy take effect on the date of enactment or at some later time?
    - How much lead-time will agencies or private actors need to prepare to implement the policy?
    - Are there constitutional or other legal restrictions on applying the policy immediately?
    - Should the policy apply to different persons or things at different times?
    - If the policy affects current programs or current behavior, should there be any transitional rules?

- What is the relation between the policy and existing law—Must existing law be amended to avoid conflicts with the policy?

VII. Amending statutes

A. Deciding whether a bill should be freestanding or amendatory

Many considerations go into deciding whether a bill should be a "freestanding" statement of law that is not incorporated as part of another statute or should amend an existing statute. They include the following:

- Is there an existing statute pertaining to the agencies, persons, or subject matter involved?
- If there is such a statute, is the new policy temporary or permanent? It may be better to avoid cluttering up the existing statute with temporary provisions, despite the related content.
- Would it be helpful for the definitions, enforcement provisions, rules of construction, or other general provisions of any such statute to apply in the case of the new policy?

B. Distinguishing material "outside the quotes" from material "inside the quotes"

Material that is being added to an existing statute is shown in quotation marks. As a shorthand, drafters often speak of freestanding material (whether an entire bill or a freestanding portion of a bill that also amends existing law) as being "outside the quotes" and the material being added as being "inside the quotes". Even if all of the substantive provisions of a bill are inside the quotes, it will still have technical provisions that are freestanding, most notably amendatory instructions that indicate where in the existing statute the new material is to be placed.

When an amendatory provision becomes law, any new material being added will become part of the existing statute. Accordingly, it must be written as if it is in that statute. For example, references inside the quotes to "this Act" are to the statute being amended, not the new bill. Similarly, references inside the quotes to "section 5" are to section 5 of the statute being amended. Also, remember that all of the definitions, enforcement provisions, rules of construction, and other general provisions that apply to the portion of the statute where the new material is being placed will apply to that new material.

See Example 2 at the end of this document for a section of a bill that adds a new subsection to an existing statute.

VIII. Use of particular legislative provisions

A. Purposes and findings provisions

The Office discourages the use of a statement of purpose that merely summarizes the specific matters covered by a bill. At a minimum, such a statement is redundant if the operative text of the bill already states exactly what is required, permitted, or prohibited. More importantly, any differences between such a statement and the operative text may be construed in ways that are difficult to anticipate. There may be cases, however, where a statement of the objective of a particularly complex provision may be useful in clarifying Congress's intent behind the provision.

Findings provisions are also generally unnecessary. In some instances, though, they may be helpful in establishing Congress's power to regulate a certain activity (e.g., showing how an activity affects interstate commerce).

B. "Authorization of appropriations" provisions

In order to maintain the delineation between the jurisdiction of the authorizing committees and the Appropriations Committee, House Rule XXI creates a point of order against unauthorized appropriations in general appropriations bills. An appropriation in such a bill is out of order unless the expenditure is authorized by existing law. Note, however, that if the point of order is not raised or is waived and the bill is enacted, the appropriation will be valid.

Language requiring or permitting government action carries an implicit authorization for an unlimited amount of money to be appropriated for that purpose. The reason for including an "authorization of appropriations" provision is to limit the authorization to the amount or fiscal years stated. Accordingly, a provision that authorizes the appropriation of "such sums as may be necessary", without specifying the years for which appropriations are authorized, is superfluous and should not be used.

Several of the protocols that the House majority leadership uses in considering whether to schedule legislation for the floor involve authorizations of appropriations. For more information, see http://majorityleader.gov/Protocols.

C. Effective date provisions

Unless otherwise provided, a bill takes effect on the date of its enactment. An effective date provision should only be included if another effective date is intended. In a bill making amendments, any effective date provision with respect to when the amendments take effect should be stated, outside the quotes, as applying to "the amendments made by this [provision]", not the provision itself.

IX. Three important conventions

A. The terms "means" and "includes"

The basic distinction between these two terms is that "means" is exclusive while "includes" is not. If a definition says that "the term 'X' means A, B, and C", then X means *only* A, B, and C and cannot also mean D or E. If a definition says that "the term 'X' includes A, B, and C", then X must include A, B, and C, but it may also include D or E, or both. Thus, the phrase "includes, but is not limited to" is redundant. In fact, using it in some places out of an abundance of caution could cause a limitation to be read into places where it is not used.

B. The terms "shall" and "may"

The term "shall" means that an action is required; the term "may" means that it is permitted but not required. While this might seem obvious, a common misconception concerns the phrase "may not", which is mandatory and is the preferred language for denying a right, power, or privilege (e.g., "The Secretary may not accept an application after April 1, 2011."). "Shall not" perhaps

sounds stronger and is usually construed to have the same meaning, but it is subject to some (rather arcane) interpretations that are best avoided.

C. Use of the singular preferred

In general, provisions should be drafted in the singular to avoid the ambiguity that plural constructions can create. Take, for example, this provision: "Drivers may not run red lights.". It is ambiguous as to whether there is any violation unless *multiple* drivers run *multiple* red lights. This problem can be avoided by rewriting the provision as follows: "A driver may not run a red light.".

Section 1 of title 1, United States Code, provides that in determining the meaning of any statute, unless the context indicates otherwise, singular terms include the plural and plural terms include the singular. In the simple example above, this rule of construction would eliminate the ambiguity by instructing that the reader substitute "driver" for "drivers" and "red light" for "red lights". But it is preferable for a provision to be clear on its face, and the rule of construction also works in the other direction to foreclose any argument (however tenuous) that the redrafted provision applies to only one driver.

X. Sources and additional information

The following sources were used in the preparation of this document and provide valuable additional information for anyone interested in legislative drafting or the organization of Federal law:

- *House Legislative Counsel's Manual on Drafting Style* (originally prepared by Ward M. Hussey and revised by Ira B. Forstater), available on the Office's website at http://www.house.gov/legcoun/HOLC/Drafting_Legislation/draftstyle.pdf.
- Lawrence E. Filson and Sandra L. Strokoff, *The Legislative Drafter's Desk Reference*, 2nd. ed. (Washington, D.C.: CQ Press, 2008).
- *Preface* and *Editor's Note* to the 2006 edition of the United States Code.
- Tobias A. Dorsey, *Legislative Drafter's Deskbook: A Practical Guide* (Alexandria, VA: TheCapitol.Net, 2006).

XI. Examples

The examples begin on the top of the next page.

Example 1— Section 102(a)(1) of the Family and Medical Leave Act of 1993 (Public Law 103–3)

Example 1A—Section as enacted (original slip law) [back to text]

SEC. 102. LEAVE REQUIREMENT. 29 USC 2612.

(a) IN GENERAL.—

(1) ENTITLEMENT TO LEAVE.—Subject to section 103, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

Example 1B—Section as it appears in title 29, United States Code [back to text]
(Subparagraph (E) is included because the U.S. Code, unlike the original slip law, reflects amendments by later statutes. Note that title 29 has not been enacted into positive law—see section III.B., above.)

§ 2612. Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

Example 1C—House Office of the Legislative Counsel compilation of section [back to text]

(Note that this is identical to the original slip law, except that it reflects the addition of subparagraph (E) by a later statute.)

SEC. 102. [29 U.S.C. 2612] LEAVE REQUIREMENT.

(a) IN GENERAL.—

(1) ENTITLEMENT TO LEAVE.—Subject to section 103, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

Example 2—H.R. 627 (enrolled as passed both houses in the 111th Congress)

[back to text]

(Section 102 of H.R. 627 adds a new subsection (j) to section 127 of the Truth in Lending Act. Note that the amendatory instructions are outside the quotes while the new subsection is inside the quotes. This image was taken from the drafting software used by the House Office of the Legislative Counsel, which shows the material inside the quotes in blue.)

Sec. 102. Limits on fees and interest charges.

(a) **In general**.—Section 127 of the Truth in Lending Act (15 U.S.C. 1637) is amended by adding at the end the following:

[Style of Quoted-Block: OLC]

"(j) **Prohibition on penalties for on-time payments**.—

"(1) **Prohibition on double-cycle billing and penalties for on-time payments**.—Except as provided in paragraph (2), a creditor may not impose any finance charge on a credit card account under an open end consumer credit plan as a result of the loss of any time period provided by the creditor within which the obligor may repay any portion of the credit extended without incurring a finance charge, with respect to—