

## How to Write an Impeachment Order\*

By Joseph Kimble

*Obtuse, archaic, and verbose legal language... is surely even today a major reason for antipathy toward the legal profession.*

—Peter M. Tiersma<sup>1</sup>

*If lawyers everywhere adopted this goal [of writing in plain language], the world would probably change in dramatic ways.*

—Bryan A. Garner<sup>2</sup>

Let's hope that the next presidential impeachment does not happen for at least another 130 years, if at all. By then, you and I will hardly care, unless the genetic research into prolonging life has paid off for us in miraculous ways. So I don't expect to ever see my suggestions find their way into an order on articles of impeachment. I offer them to posterity—and to current judges who might find them generally useful in writing orders of any type.

You may have noticed that during the recent proceedings the administrators sometimes rooted around in the Andrew Johnson impeachment for procedural and linguistic precedent. Of course, lawyers tend to do that—follow the old forms—which is one reason why legal writing has been so bad for centuries.<sup>3</sup> Chalk it up to habit and inertia, proclivities that are all too human. But please don't believe that just because a form has been around a long time, it must be tried and true. We greatly exaggerate the extent to which legal terms have been settled or fixed by precedent.<sup>4</sup> And no amount of precedent can justify the syntax, sentence length, verbosity, organization, and design of traditional forms and "models."

Judicial orders are a perfect example. They don't *have to* be written the way they usually are, they don't *have to* be stilted,

but they usually are because that's the traditional style. Few writers will break free.

At any rate, it will probably happen that the administrators of the next impeachment trial will look to this last one. Regardless of the outcome, they'll find the orders below. (Think of looking for food and finding a very old sandwich.) Perhaps—not likely, but perhaps—some future scholar will also find this article and my suggested rewording. Then the administrators, including the presiding Chief Justice, will at least have a choice between legalese and plain language. No doubt they will be grateful for this good fortune and will enter my name into the Congressional Record. Ah, posthumous fame.

But I'd happily settle for less. I hope some judges will read this article—and some lawyers who prepare orders for judges to sign—and our profession will dump a little legalese as it sails into the new millennium. I hope some judges will make it known that they want orders to be written in the new, the modern, the plain style. If judges will only lead the way, lawyers will follow. And I can't think of an easier starting point than orders.

### The Orders on the Articles of Impeachment

Here's the main order that ended the impeachment trial earlier this year:

*The Senate, having tried William Jefferson Clinton, President of the United States, upon two articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present not having found him guilty of the charges contained therein: it is, therefore, ordered and adjudged that the said William Jefferson Clinton be, and he is hereby, acquitted of the charges in this said article [these said articles?].<sup>5</sup>*

Notice some of the familiar characteristics of legalese—even in just this one sentence:

- The sentence is too long. You might argue that the colon provides a break, but

the colon is incorrect because the first half of the sentence won't stand as an independent clause. The colon should be a comma. (And the comma after *The Senate* should go.)

- The sentence is contorted. It begins with two long clauses (so-called absolute clauses): *The Senate having tried... and two-thirds of the Senators present not having found... And each of those two clauses has a reduced internal, or embedded, clause: [that are] exhibited against him and [that are] contained therein. Then, finally, we get the independent clause: it is, therefore, ordered... Linguists call this kind of sentence "left-branching" because readers have to fight through incidental branches of meaning before getting to the main point in the independent clause, the linguistic trunk.<sup>6</sup> This structure is all too common in legal writing: *If... and if... and if..., then Pierce may...* No good. Readers would rather see the main subject and verb early on. Sometimes the remedy is to put multiple items, such as conditions or rules, in a list at the end of the sentence—so that it branches right. Sometimes the remedy is to convert to more than one sentence.*

- We get an odd negative: *two-thirds of the Senators present not having found him guilty.*

- We get inflated words: *upon* instead of *on*, and *exhibited* instead of *brought*.

- We get one of our beloved doublets: *ordered and adjudged.*

"Plain Language" is a regular feature of the **Michigan Bar Journal**, edited by Joseph Kimble for the State Bar's Plain English Committee. The assistant editor is George Hathaway, chair of the Committee. The Committee seeks to improve the clarity of legal writing and the public opinion of lawyers by eliminating legalese. Want to contribute a plain English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901. For information about the Plain English Committee, see our website—[www.michbar.org/committees/penglish/pengcom.html](http://www.michbar.org/committees/penglish/pengcom.html)

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• We get two of the worst antique words: *hereby* and *said* (in place of *the, this, or those*). Look at the two uses of *said*: *the said William Jefferson Clinton and this said article*. The *said* *said*s are as useless as lipstick on a carp. What in the world impels us to talk like this? Why not go all the way and make it *the said Senators*?

• We get other unnecessary words: *contained therein* and *in this said article*. There are no other charges in sight except the charges in the articles of impeachment. This is the kind of overprecision, or false precision, that is so often put forward to rationalize legal writing.

Here's an alternative. Which one do you vote for?

*The Senate has tried William Jefferson Clinton, President of the United States, on two articles of impeachment brought by the House of Representatives. Fewer than two-thirds of the Senators present have found him guilty of those charges. Therefore, it is ordered that President Clinton be acquitted.*

Or you could whittle down that version even further:

*After a trial on two articles of impeachment against the President, William Jefferson Clinton, fewer than two-thirds of the Senators present have found him guilty. Therefore, it is ordered that he be acquitted.*

Now, the proceedings were not yet formally completed. One last order had to be entered:

*Ordered, that the Secretary be directed to communicate to the Secretary of State, as provided in Rule XXIII of the Rules of Procedure and Practice in the Senate when sitting on impeachment trials, and also to the House of Representatives, the judgment of the Senate in the case of William Jefferson Clinton, and transmit a certified copy of the judgment to each.<sup>7</sup>*

Thus were listeners and readers treated to a few more characteristics of legalese:

• The sentence is again long and contorted. The main trouble here is the big gap between the infinitive verb form (*to com-*

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*municate*) and the object (*the judgment*). Good writers try to keep the subject, verb, and object fairly close together.<sup>8</sup>

• We get needless complexity, or so it seems. The Secretary is directed to communicate the judgment and to transmit a certified copy of the judgment. But isn't that all one operation? Presumably the Secretary does not phone in the judgment and follow with a certified copy.

• We get unnecessary information: "as provided in Rule XXIII of the Rules of Procedure and Practice in the Senate when sitting on impeachment trials." Would a federal judge write, "It is ordered that the motion for summary judgment is granted and the complaint is dismissed, as provided in Federal Rule of Civil Procedure 56(b)"? If the reference to the Senate's rules has to stay, it could be relegated to parentheses.

• We get unnecessary prepositional phrases: *the judgment of the Senate* instead of *the Senate's judgment*; and *in the case of William Jefferson Clinton* instead of *in this case*. Besides, we know what case it is by now.

• For good measure, we get Roman numerals: *Rule XXIII*.

Here's an alternative:

*It is ordered that the Secretary send a certified copy of the Senate's judgment to the Secretary of State (as provided in Rule 23 of the Senate's rules in impeachment trials) and also to the House of Representatives.*

Or if it's really necessary to communicate the judgment and also transmit a certified copy, then a list would work nicely:

*It is ordered that the Secretary:*

- (1) *communicate the Senate's judgment to the Secretary of State (as provided in Rule 23 of the Senate's rules in impeachment trials);*
- (2) *communicate the judgment to the House of Representatives; and*
- (3) *send a certified copy of the judgment to both.*

### One More Example

Let's take another example, this one from Irwin Alterman's excellent book on writing

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court papers.<sup>9</sup> As you can see, I'm not alone in thinking that court orders contain "an unbelievable amount of gibberish."<sup>10</sup> Alterman says that orders "confirm Mellinkoff's statement that some legal writing is not written for anyone; it is written just to be written."<sup>11</sup> Below, without interruption, is one of Alterman's examples and his comments on the example. (Incidentally, the introductory matter, before the order itself, he calls "recitals.")

#### Traditional Style:

*Defendant having filed a motion for summary judgment, the plaintiff having filed a brief in opposition thereto, the matter having come on for hearing, the court being fully advised in the premises, and the court having denied the motion, now therefore*

*It is hereby ordered . . .*

#### Suggested Style:

*Defendant moved for summary judgment. The parties filed briefs and the court heard argument. The court decided to deny the motion for the reasons stated in the bench opinion (or written opinion) of \_\_\_\_\_,*

*It is [therefore] ordered:*

- 1.
- 2.
- 3.

#### Alterman's Comments:

- Even the official federal forms fall into the trap of the traditional style. See Fed. R. Civ. P. Forms 31-32.
- The suggested form is not one long assemblage of "having" clauses.
- The form omits *the court being fully advised in the premises*, which is self-serving nonsense.
- The form does not try to summarize the court's reasoning.
- The form avoids the redundant *ordered, adjudged, and decreed*.

### But Where's the Dignity?

I can hear the response. Some will argue that formal acts deserve formal language—and that plain English is not suitable for the solemn and weighty matter of a judicial order, let alone an order on articles of impeachment. The answer to that is twofold.

First, formality is a dangerous thing; it often degenerates into pomposity. A writer can get away with saying *transmit* instead of *send*, or with the occasional extra word or longish sentence. But when you are persistently formal and long, you wind up with the kind of writing in the three orders

we just looked at. Certainly, no one will claim—will they?—that those orders are eloquent, elegant, or poetic.

Second, I submit to you that the suggested alternatives are not undignified or even informal. They are simple and straightforward, the way an order should be. The notion that plain language is drab and undignified is one of the great myths—along with the myth that it's usually at odds with settled precedent, the myth that it's not precise, the myth that it's child's play, and the myth that it's only about short sentences and short words. Plain language is, if anything, more precise than traditional legal writing; it takes hard work and embraces a wide range of principles; it can be forceful and literary; and it's fitting for any occasion.<sup>12</sup> Plain English is the American idiom.

### So Who Cares?

After all this, you may be thinking, What's the big deal? Nobody (except fussy-budgety writing teachers) complains about court orders. They don't cause any trouble. They are just a short instruction that embodies a previous decision or result. They have minimal content. Their style is not important.

Well, I say that habits of mind are important. The intractability and incremental growth of forms (they never get shorter) is important. The compelling evidence that lawyers overrate traditional style—and that plain language is decidedly more clear and effective—is important.<sup>13</sup> The myths about plain language are important. A dismissive attitude toward plain language is important.<sup>14</sup> The public's attitude toward our profession is important. The constant criticism, the ridicule, the parodies of legal style—centuries of it—is important.<sup>15</sup> And a willingness to learn and change is important.

So I say that the style of every piece of legal writing is important because, as Blake wrote, it lets us "see a World in a Grain of Sand."<sup>16</sup> Every piece of legalese reflects on the state of our professional currency, our language.

How do you write an impeachment order? The same way you should write any legal sentence, paragraph, page, or document. In plain language. ■

#### Footnotes

1. Peter M. Tiersma, *Legal Language* 42 (1999).
2. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 661 (2d ed. 1995).

3. See Bryan A. Garner, *The Elements of Legal Style* 4 (1991) ("We have a history of wretched writing, a history that reinforces itself every time we open the lawbooks."); John M. Lindsey, *The Legal Writing Malady: Causes and Cures*, N.Y. L.J., Dec. 12, 1990, at 2 (describing lawbooks as "the largest body of poorly written literature ever created by the human race").
4. See David Mellinkoff, *The Language of the Law* 278-79, 375 (1963). ("[T]he formbooks . . . were decorated with decisions that had never passed on the language or arrangement of the form . . . [Moreover,] that vast storehouse of judicial definitions known as *Words and Phrases* . . . is an impressive demonstration of lack of precision in the language of the law. And this lack of precision is demonstrated by the very device supposed to give law language its precision—precedent."); Mark Adler, *Tried and Tested: The Myth Behind the Cliché*, *Clarity* No. 34, Jan. 1996, at 45 (showing how a typically verbose repair clause in a lease is not required by precedent); Benson Barr et al., *Legalese and the Myth of Case Precedent*, 64 *Mich B.J.* 1136 (1985) (finding that less than three percent of the words in a real-estate sales contract had significant legal meaning based on precedent).
5. 145 Cong. Rec. S1459 (daily ed. Feb. 12, 1999).
6. See Bryan A. Garner, *Securities Disclosure in Plain English* 53-56 (1999).
7. Cong. Rec., *supra* note 5.
8. See Bryan A. Garner, *The Winning Brief* 167-70 (1999); Richard C. Wydick, *Plain English for Lawyers* 43-45 (4th ed. 1998).
9. Irwin Alterman, *Plain and Accurate Style in Court Papers* § 6.06, originally published in 2 *T.M. Cooley L. Rev.* 243, 291-93 (1984).
10. *Id.* at 84.
11. *Id.* (quoting David Mellinkoff, *Legal Writing: Sense and Nonsense* 65 (1982)).
12. See Joseph Kimble, *Answering the Critics of Plain Language*, 5 *Scribes J. Legal Writing* 51 (1994-1995).
13. See Mellinkoff, *supra* note 4; Tiersma, *supra* note 1; Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 *Scribes J. Legal Writing* 1 (1996-1997).
14. See, e.g., George Hathaway, *A Plain English Lawyer's Oath (Part 2)*, 78 *Mich B.J.* 64, 66 (1999) (noting the Michigan Supreme Court's rejection of a plain-English lawyer's oath even as an optional alternative to the current oath).
15. See Robert Eagleson, *Plain English: Changing the Lawyer's Image and Goals*, *Clarity* No. 42, Sept. 1998, at 34.
16. From the poem "Auguries of Innocence."