

The *United States Code*, Prima Facie Evidence, and Positive Law*

Mary Whisner**

Ms. Whisner examines the history of the U.S. Code, explaining why it is only “prima facie evidence of the law,” and discusses the efforts of the Office of the Law Revision Counsel to enact Code titles into positive law.

[W]e no longer read the statutes. Not in the sense that Frankfurter did. Frankfurter actually did read the actual statutes. He did not read the United States Code; he read the Statutes at Large. He jauntily described himself as “one for whom the Statutes at Large constitute his staple reading.” Frankfurter, in other words, did not read imitation law; he read real law. So did everyone else, in Frankfurter’s day.

Nowadays, we don’t. We read imitation law.¹

¶1 Pretty much every legal researcher in the United States has to deal with federal statutes. Even in what is mostly a state practice, federal issues arise. Just handling divorces? Think about possible social security benefits post-retirement and who will claim the kids as dependents on federal tax returns. Defending clients charged with state crimes? Remember the criminal procedure guarantees from the United States Constitution. Helping a client set up a business? Don’t forget federal labor, trademark, tax, and environmental laws.

¶2 Most of us can find our way around the *United States Code*, *United States Code Annotated*, *United States Code Service*, and *United States Statutes at Large*. But I still had some questions about codification, so I went exploring, and in this article I will share with you what I learned.

The Basic Spiel

¶3 First there are the basics that we often teach to students:

- When a law is enacted—passed by the House and the Senate and signed by the President—it is given a public law number reflecting when it was passed (which

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1. Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2d 283, 283 (2007) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 527 (1947)). While he was expressing his own views and not those of his employer, readers might want to know that Mr. Dorsey is Assistant Counsel in the Office of the Legislative Counsel, U.S. House of Representatives.

“Congress”) and the order it came within that Congress. For example, Pub. L. No. 108-1 was the first law of the 108th Congress.²

- Laws are published in chronological order in *United States Statutes at Large* (Stat.).
- Because that chronological arrangement isn't efficient for researchers (imagine looking at every volume since 1935 to find all the amendments to the Social Security Act!), the laws are sorted into subjects (“codified”) in the *United States Code* (U.S.C.).
- The U.S.C. is divided into fifty titles with broad subjects—e.g., title 7, Agriculture; title 8, Aliens (i.e., immigration and naturalization); title 20, Education. You can't assume too much about the title groupings though. For instance, federal employment discrimination laws are in title 42, Public Welfare, and not title 20, Labor, as you might guess.
- Titles are divided into sections. If you look at the table of contents, you'll see that they're grouped into chapters and subchapters, but you don't cite those—just the title and the section.
- Small changes are made in codification to make cross-references work—for instance, changing a reference to a section within the act to a section in the Code.³
- Private publishers put out annotated editions of the *United States Code*—*United States Code Annotated* (U.S.C.A.) and *United States Code Service* (U.S.C.S.)—that are even more useful for researchers. They include the text of the laws, with the same numbering as U.S.C., and following each section of the code they also list relevant secondary sources and give brief summaries of cases.⁴
- These sets are generally much more current than the U.S.C.—another big bonus for researchers. You update by checking pocket parts and supplements at the end of the sets. The versions on Westlaw or LexisNexis are even more up to date.

¶4 Sometimes a student asks, “If the U.S.C. is easier for researchers, why would we ever look at *Statutes at Large*?” I start with this answer: Sometimes you care about the whole act as Congress passed it, before it was split up and codified, and sometimes you want to see when a particular provision was added. Moreover, if there's any change in language between *Statutes at Large* and U.S.C., the language

2. An item beyond the basic spiel: this numbering system began with the 85th Congress, in 1957. See Charles S. Zinn, *Revision of the United States Code*, 51 LAW LIBR. J. 388, 389 (1958). Before then, the number of the Congress was not included.

3. Compare National Labor Relations Act (“Wagner Act”), ch. 372, § 8, 49 Stat. 449, 452 (1935) (making it an “unfair labor practice for an employer . . . [t]o interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7”), with 29 U.S.C. § 158(a)(1) (2006) (making it an “unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title”).

4. U.S.C.A. tends to have the same wording as U.S.C. On the other hand, the U.S.C.S. editors go back to the wording from *Statutes at Large*. Compare 29 U.S.C.A. § 158(a)(1) (West 1998) (“the rights guaranteed in section 157 of this title”), with 29 U.S.C.S. § 158(a)(1) (LexisNexis 1988) (“the rights guaranteed in section 7 [29 USCS § 157]”).

in *Statutes at Large* governs. The *United States Code* is only prima facie evidence of the law for much of the code. But some titles (marked with asterisks at the front of the bound volumes) have been enacted into positive law.

¶5 And that's where the questions can start us on our way out to sea. What is "positive law"? What difference does it really make in practice? How often does it come up that there's a typo or some other change in the *United States Code*? What other changes would there be, anyway? Why did Congress enact those titles as positive law? Is Congress going to enact any more?

¶6 After we look at sample pages from the official and annotated codes, someone often asks, "If U.S.C.A. and U.S.C.S. are so handy, why should we bother with U.S.C.?" Short answer: Because the *Bluebook* says you have to. A longer answer would add that it's often helpful to be able to see a chapter or subchapter printed on big pages without annotations to figure out how the sections fit together. Sometimes you want a copy of just the statute, without all the pages of annotations in between sections. And then one could add: "Well, because it's official, and if there's a typo in one of the others, the U.S.C. version would count." But then you'd only have somebody ask: "Come on, how often does that really happen?"⁵

¶7 It is questions like these that I want to address here. We still won't have time to spell out all the details about positive law and codification in a short class, but we will know more ourselves and be better able to answer student questions.⁶

Prima Facie Evidence of the Law

¶8 The *United States Code* self-referentially provides that it is "prima facie" evidence of the general and permanent laws in force at a given date—except that the titles that have been enacted as positive law are "legal evidence of the laws therein contained"⁷ In contrast, the *Statutes at Large* are "legal evidence of laws"⁸ The difference between prima facie and legal evidence is this:

If you go into court and cite a section of the *United States Code*, your adversary may bring in a dozen *Statutes at Large* to show that what is in the *Code* is not an accurate statement. As a result, he may prevail because the *Statutes at Large* are legal evidence of the law, whereas the *Code* is only prima facie evidence.⁹

¶9 And there are cases where that has happened. For example, the Treasury Department once relied on a provision in the *United States Code* that did not reflect an amendment, so the agency's regulation imposed a requirement on taxpayers that

5. I was able to find only one court decision arising from one of the commercial publishers getting it wrong. *Springfield Terminal Ry. Co. v. United Transp. Union*, 767 F. Supp. 333, 346–47 (D. Me. 1991) (statute correctly reproduced in U.S.C.A. but incorrectly reproduced in U.S.C.S. and Lexis).

6. Mike Lynch wrote an article that answers many questions about codification. Michael J. Lynch, *The U.S. Code, the Statutes at Large, and Some Peculiarities of Codification*, LEGAL REFERENCE SERVICES Q., no. 1, 1997, at 69.

7. 1 U.S.C. § 204(a) (2006).

8. *Id.* § 112.

9. Zinn, *supra* note 2, at 389–90.

was not in the current statute. The I.R.S. tried to collect, based on the regulation, but the court went back to the *Statutes at Large* and held for the taxpayer.¹⁰

¶10 Another example, while harder to explain, illustrates some of the benefits and hazards of codification. Section 4 of the Clayton Act creates a private cause of action—with treble damages—for “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws”¹¹ In the 1934 *United States Code*, that section was codified in title 15, section 15 (as it is still, with amendments).

¶11 What laws are “the antitrust laws”? They’re listed in section 1 of the Clayton Act:

“[A]ntitrust laws,” as used herein, includes the Act entitled “An Act to protect trade and commerce against unlawful restraints and monopolies,” approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled “An Act to reduce taxation, to provide revenue for the Government, and for other purposes,” of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled “An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled ‘An Act to reduce taxation, to provide revenue for the Government, and for other purposes,’” approved February twelfth, nineteen hundred and thirteen; and also this Act.¹²

In the 1934 *United States Code*, this definition appeared in title 15, section 12 as: “‘Antitrust laws,’ as used in sections 12 to 27, inclusive, of this chapter, includes sections 1 to 27, inclusive, of this chapter.” Right there you can see an advantage of codification: the definition in the code is much easier to read than the one in the session law, isn’t it?¹³

¶12 In 1936, section 1 of the Robinson-Patman Act¹⁴ explicitly amended section 2 of the Clayton Act, codified at 15 U.S.C. § 13.¹⁵ The other three sections of the Robinson-Patman Act did not explicitly amend the Clayton Act, but they were codified nearby, in new sections 13a, 13b, and 13c. The 1940 *United States Code* (and later editions) did not change the definition of “antitrust laws.”

¶13 In the 1950s, some plaintiffs sued for treble damages under section 3 of the Robinson-Patman Act. Would that be allowed? On the one hand, the Robinson-Patman Act was codified within the range for “antitrust laws” listed in 15 U.S.C. § 12. On the other hand, section 3 of the Robinson-Patman Act isn’t listed in the definition of “antitrust laws” in the Clayton Act. (It was passed later, so how could it be?) The Supreme Court said that the location of the codified sections did not make them part of the “antitrust laws”: “[T]he 1940 codification was a palpable error. Moreover, this codification seems to us . . . to be manifestly inconsistent with the Robinson-Patman Act, and in such circumstances Congress has specifically

10. *Royer’s, Inc. v. United States*, 265 F.2d 615 (3d Cir. 1959).

11. Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914).

12. *Id.* § 1, 38 Stat. at 730.

13. The session law’s definition also cries out for the convenience of popular names. See Mary Whisner, *What’s in a Statute Name?*, 97 LAW LIBR. J. 169, 2005 LAW LIBR. J. 9.

14. Robinson-Patman Antidiscrimination Act, ch. 592, § 1, 49 Stat. 1526, 1526 (1936).

15. Clayton Act § 2, 38 Stat. at 730–31.

provided that the underlying statute must prevail.”¹⁶ While we think of the *United States Code* as law, Congress did not vote on and the President did not sign the 1940 *United States Code*—so it was necessary to go back to the session laws to see what was enacted.¹⁷

Why Only Prima Facie Evidence?

¶14 Why is the *United States Code* only prima facie evidence of the laws? The rule could certainly be otherwise. Congress could have said that the *United States Code* is the definitive statement of the law, without resort to *Statutes at Large*, as some states do for their codes.¹⁸ Why didn’t it? The short answer is: because too many mistakes find their way into a project as big as a code of all the laws of the United States. The Senate insisted that the new code not be binding, just in case.

¶15 The first official codification of federal laws was the *Revised Statutes of the United States*. In 1873, the code was enacted as law (you’ll find it in volume 18 of *Statutes at Large*), and it repealed all earlier statutes.¹⁹ But, alas, there were inaccura-

16. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 379–80 (1958) (Harlan, J.) (footnote omitted). This was a much closer question than my summary indicates. Before the case reached the Supreme Court, the circuits were split. And Justice Harlan’s position prevailed by only 5–4. There is a lot of statutory interpretation to untangle—but here I just want to illustrate the point that if there’s a conflict between the *United States Code* and the *Statutes at Large*, the latter wins.

17. The Robinson-Patman Act was amended in 1938:

[N]othing in the Act approved June 19, 1936 (Public, Numbered 692, Seventy-fourth Congress, second session), known as the Robinson-Patman Antidiscrimination Act, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

Act of May 26, 1938, ch. 283, 52 Stat. 446. At least, I think it was amended. But should we worry that the amendment had a typo? The original act was number 592, not 692. Not something anyone should lose sleep over; I just noticed it.

18. See 1A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 28:2, at 638 (6th ed. 2002):

A revision of previously enacted legislation with the elimination of repealed laws, the inclusion of proper amendments, and the systematic arrangement of the laws by subject matter when enacted by the legislature becomes an official code. The form and language of its enactment becomes the latest statement of the legislature and, if the legislature so provides, controls over all prior expressions on the same subject.

19. Section 5595 of the *Revised Statutes* stated:

The foregoing seventy-three titles embrace the statutes of the United States general and permanent in their nature, in force on the 1st day of December one thousand eight hundred and seventy-three, as revised and consolidated by commissioners appointed under an act of Congress, and the same shall be designated and cited, as The Revised Statutes of the United States.

18 Stat. 1085, 1085 (1874). The *Revised Statutes* continued:

All acts of Congress passed prior to said first day of December one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general and permanent in their nature: *Provided*, That the incorporation into said revision of any general and permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local, or temporary character, shall not repeal, or in any way affect any appropriation, or any provision of a private, local or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of Congress passed prior to said last-named day no part of which are embraced in said revision, shall not be affected or changed by its enactment.

Id.

cies in the code—plenty of them. Sixty-nine errors were caught while the volume was still in production and were corrected in a statute that was published as an appendix.²⁰ Over the next few years, people found 183 more errors (and one error in the correcting statute), leading to another statute with corrections.²¹

¶16 The *Revised Statutes* were not kept up to date. Research became increasingly cumbersome, causing one judge to remark:

The labor which I have hundreds of times performed in running down a given subject or possible legislation on one subject through many volumes of Statutes at Large since 1878 is something that, although I am pretty well hardened to it, I shudder to contemplate.²²

¶17 One alternative to slogging through all the session laws passed after the *Revised Statutes* was to use a pamphlet of compiled laws prepared by an administrative agency. But those pamphlets were not official and contained only the laws the agency selected. The same judge reported:

Since I have been a judge I have not infrequently had a man, when I referred to some general statute which I thought controlled the special matter he was arguing to me, pull out of his pocket or from his papers on the table one of these executive pamphlets and reproachfully say to me, “Well, your honor, that isn’t in this book.” The situation is both difficult and ridiculous.²³

¶18 In 1919, a team began work on new code that would encompass all the laws currently in force. The House Committee on the Revision of the Laws of the United States appointed a Reviser of Statutes, who was joined in his work by some high-powered legal minds. The reviser was William Burdick, a law professor from the University of Kansas and Kansas Commissioner of Uniform State Laws. Others on the team included Harvard law professors Joseph Beale and Austin Scott²⁴ and Clinton Bunn, who had already compiled the statutes of Oklahoma and Nebraska.²⁵

20. Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1014 (1938) (citing Act of Feb. 18, 1875, ch. 80, 18 (pt.3) Stat. 316).

21. Act of Feb. 27, 1877, ch. 80, 19 Stat. 240 (correcting errors and supplying omissions in 179 sections of the *Revised Statutes*). See also Act of April 27, 1876, ch. 84, 19 Stat. 38 (correcting one word of one section).

22. William L. Burdick, *The Revision of the Federal Statutes*, 11 A.B.A. J. 178, 179 (1925) (quoting Judge [Charles Merrill] Hough’s testimony at a hearing by the House Committee on Revision of the Laws, September 26, 1919).

23. *Id.*

24. Yes, the *Scott on Trusts* man.

25. See Burdick, *supra* note 22, at 180 & n.6; Dwan & Feidler, *supra* note 20, at 1019. Dwan and Feidler said that the code reviser from Oklahoma was Clinton Dunn, but Burdick said it was Clinton Bunn. Because Burdick was there, I thought he was more likely to be correct, but a typo could have slipped in either way. I resolved the conflict by turning to *Who’s Who in America*, which reported that Clinton Orrin Bunn was

mem., from Okla., Conf. of Commissioners on Uniform State Laws, 1911-1915 . . . [author of] Constitution and Enabling Act of Oklahoma (annotated), 1907; Oklahoma Civil and Criminal Procedure, 1910; Common Sense Law Making, 1912; . . . Editor of Revised Laws of Oklahoma, 1910 (official statutes); . . . Compiled statutes of Oklahoma, 1921; statutes of Nebraska, by apptmt. of State of Neb., 1921; reviser of U.S. Laws, and Code, 1923, by apptmt. of Hon. E.C. Little, chmn. Commn. on Revision of Laws of Nat. Ho. of Rep.; apptd. by Porto Rican Govt. to revise codes and laws of Porto Rico, Jan. 1924.

13 WHO’S WHO IN AMERICA 579 (Albert Nelson Marquis ed., 1924). Mr. Bunn died on Dec. 3, 1924—before the *United States Code* finally made it through Congress. He was only forty-six. 14 WHO’S WHO IN AMERICA 376 (Albert Nelson Marquis ed., 1926).

This outside group produced a draft, reviewed by the House Committee. In 1920, it was introduced in and passed by the House (unanimously!) but died in the Senate. The next year, after some corrections, it passed the House (again, unanimously) but died (again) in the Senate.²⁶

¶19 In 1924, after the addition of laws passed since the last draft, it passed the House (again, unanimously), but was reported unfavorably by the Senate Committee on the Revision of the Laws of the United States.²⁷ “Despite the great care that had been exercised and the unquestionable ability of the revisers, the Senate Committee had discovered six hundred errors.”²⁸

¶20 Or at least the committee listed six hundred items it believed to be errors. William Burdick, the leader of the revisers, was unimpressed by the committee’s list:

[M]any of them are without merit, and some of them even frivolous. More than half of them are merely typographical errors, such as misspelled words, errors in figures, and other oversights of proof readers. Half of the remaining half are matters of mere opinion, the statement being repeatedly made that section so and so is “superseded” by some other section. Other criticisms refer to statutes found in the Revised Statutes of 1874-78 but “omitted” in the present compilation. For example, it is said that sections 18 and 19 . . . of the Revised Statutes are not included in the bill. It is to the writer absolutely inexplicable why such a statement should be made. It is true that those sections are not included in the bill. It is also true that they were intentionally omitted. . . . [Those sections] dealt with the law relating to the election of United States Senators by the legislatures of the respective states. They were a part of the law done away with by the adoption of the 17th amendment to the Federal Constitution providing for the election of such officials by the people. Why any person should cite such an “omission” in criticism of the bill, the writer is unable to understand.²⁹

¶21 Whether or not the committee’s enumerated errors were legitimate problems, they did serve to put a brake on the bill. So the House and Senate Committees formed a new plan. They brought in private publishers who had already produced unofficial compilations of the statutes—West Publishing Company (*United States Compiled Statutes Annotated*) and Edward Thompson Company (*Federal Statutes Annotated*) to build on the work of the previous team. They had their work checked by experts from various government agencies and by Professor Joseph P. Chamberlain of Columbia.³⁰

¶22 To allow time to discover and correct errors, the Senate Select Committee on Revision of the Laws proposed a “twilight zone”—a period during which earlier statutes would not be repealed and the code would not yet be positive law.³¹ But the Senate was more cautious than its committee and insisted that the code would be only prima facie evidence of the laws.³² And that is what was enacted—a code that

26. Dwan & Feidler, *supra* note 20, at 1019.

27. *Id.* at 1019–20.

28. *Id.* at 1020.

29. Burdick, *supra* note 22, at 181.

30. Dwan & Feidler, *supra* note 20, at 1020.

31. *Id.* at 1020–21. S. REP. NO. 69–832 (1926), reprinted in 67 CONG. REC. 10,479 (1926). The twilight zone was included in the House version of the bill that first passed the House. See 67 CONG. REC. 12,075 (1926) (statement of Rep. Fitzgerald).

32. Dwan & Feidler, *supra* note 20, at 1021. See 67 CONG. REC. 11,966–67 (1926) (discussion on

purported to cover all the general and permanent laws then in effect, but allowed for the possibility of errors or omissions, to be resolved by resort to the *Statutes at Large*.³³

¶23 In retrospect, it appears that the Senate's caution was well placed. In 1928, the legislative reference service of the Library of Congress prepared a list of several hundred provisions of permanent law that had been left out of the *United States Code*.³⁴

¶24 Although accepting the Senate's requirement that the code be only prima facie evidence of law, Representative Roy G. Fitzgerald, the chairman of the House Committee on Revision of the Laws, hoped, that "[e]ither officially or unofficially, if time shows that this work can be relied upon, it will become more and more the exemplification of the law of the United States." Perhaps one day, Congress would be able to pass an act that "will cause the code officially to supersede and positively repeal all other legislation."³⁵

¶25 Fitzgerald said that he and his committee also had "other ambitions." They hoped to "present from time to time different titles of this code with real revisions, so that the obsolete matter may be cut out and the law may be stated tersely and clearly."³⁶ He didn't serve long enough to see it happen, but eventually Congress did take up the project of revising and enacting individual titles.

Senate floor). During debate in the House, Rep. Roy G. Fitzgerald stated:

Without this qualification or amendment it would have been impossible, apparently, for this bill to pass the Senate because the scope of this work is so large and the chance for error is so great that with all the safeguarding provisions which the House has introduced into Title 1, there was still felt apprehension of danger from error, even with the provision for postponement of its taking effect to July 1, 1927, which would permit a session of Congress for the correction of errors to intervene. The Senate felt that still the danger was too great to assume the responsibility of passing a bill of this magnitude and having it absolutely replace all the laws of the United States as was done by the Revised Statutes in 1874.

Id. at 12,074.

33. The first *U.S. Code*, published in 1926, stated prior to the text of the statutes:

Be it enacted by the Senate and House of Representatives . . ., That the fifty titles hereinafter set forth are intended to embrace the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925, compiled into a single volume under the authority of Congress, and designated "The Code of the Laws of the United States of America."

Sec. 2. In all courts, tribunals, and public offices of the United States, at home or abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States—

(a) The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish prima facie the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925; but nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments.

(b) Copies of this Act printed at the Government Printing Office and bearing its imprint shall be conclusive evidence of the original of the Code in the custody of the Secretary of State.

(c) The Code may be cited as "U. S. C."

Act of June 30, 1926, ch. 712, 44 Stat. 1.

34. This list was reprinted in the *Congressional Record*. 69 CONG. REC. 4278–81 (1928).

35. 67 CONG. REC. 12,074 (1926) (statement of Rep. Fitzgerald). It seems that at least part of his wish has come true—unofficially, many people do regard the *United States Code* as "the exemplification of the law of the United States."

36. *Id.*

Title by Title Enactment

¶26 Congress did not enact any titles as positive law for some time. But in the early years of the code, it did do some clean-up work. For instance, in 1933, it repealed twenty-eight sections of the *Revised Statutes* that had been codified in the *United States Code* but were obsolete.³⁷ In 1940, a law streamlined some government purchasing provisions and repealed a list of sections or parts of sections of *Statutes at Large*, insofar as they were incorporated in the *United States Code* (mostly in title 41, Public Contracts).³⁸

¶27 In 1941, several bills were introduced to codify title 1³⁹ and title 3,⁴⁰ but it was not until July 30, 1947, that the first titles were enacted: titles 1, General Provisions; 4, Flag and Seal; 9, Arbitration; and 17, Copyrights. A chronology of the enactment of titles as positive law is shown in Table 1. I imagine that some titles were easier than others. Title 4, Flag and Seal, might have been straightforward. On the other hand, Title 10, National Defense, took ten years⁴¹ and employed fifty-two Defense Department lawyers, up to twenty at a time, requiring a budget of \$3 million.⁴²

¶28 Until 1974, codification fell under the jurisdiction of the House Judiciary Committee and “[t]he committees with jurisdiction over the subject matter found in the titles . . .” And those committees “generally do not regard revision work as a priority item. Their heavy agendas and other pressing matters usually precede work on codification and revision.”⁴³ The Office of Law Revision Counsel was created in 1974 as part of a reorganization of House governance and committees.⁴⁴ This office has several responsibilities, including assigning places in the *United States Code* to new legislation and preparing titles for enactment as positive law.

¶29 When Congress amends a law in one of the titles it has not enacted as positive law, then it refers to the original law (for instance, the Truth in Lending Act⁴⁵). If it amends something in a title that is positive law (for instance, title 4), then it refers directly to the title and section being amended.⁴⁶ Compare these two recent

37. Act of Feb. 28, 1933, ch. 131, 47 Stat. 1349.

38. Act of Oct. 10, 1940, ch. 851, 54 Stat. 1109.

39. H.R. 4280, 77th Cong. (1941), *referenced in* 87 CONG. REC. 2949 (1941).

40. H.R. 5169, 77th Cong. (1941), *referenced in* 87 CONG. REC. 5524; H.R. 5027, 77th Cong. (1941), *referenced in* 87 CONG. REC. 5060.

41. Peter G. LeFevre, Office of Law Revision Counsel, *Laws and Codes: How Do They Do That?*, Program Presented at the 102nd AALL Annual Meeting, Washington, D.C. (July 26, 2009).

42. 120 CONG. REC. 32,978 (1974).

43. *Id.*

44. Act of Dec. 27, 1974, Pub. L. No. 93-554, 88 Stat. 1771, 1777 (codified as amended at 2 U.S.C. §§ 285–285g (2006)).

45. The Truth in Lending Act (TILA) is Title I of the Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968).

46. Drafters do not always remember to amend a positive law title. The Wounded Warrior Act, Pub. L. No. 110-181, 122 Stat. 430 (2008), did not directly amend or add new sections to title 10, Armed Forces. Since the title is positive law, the Law Revision Counsel can’t add new sections—they have to be enacted. So the forty-five sections of the Wounded Warrior Act will be codified as a note to 10 U.S.C. § 1071. This example was given by LeFevre, *supra* note 41.

TABLE 1
Codification Chronology⁴⁷

Year	Title(s) Adopted as Positive Law	Number of Titles So Far
1926	First edition of <i>United States Code</i>	0
1947	First titles enacted as positive law: 1, General Provisions; 4, Flag and Seal; 9, Arbitration; 17, Copyrights	4
1948	3, The President; 18, Crimes and Criminal Procedure; 28, Judiciary and Judicial Procedure	7
1949	14, Coast Guard	8
1952	35, Patents	9
1954	13, Census; [26, Internal Revenue Code ⁴⁸]	10
1956	10, Armed Forces; 32, National Guard	12
1958	23, Highways; 38, Veterans' Benefits	14
1960	39, Postal Service	15
1966	5, Government Organization and Employees	16
1968	44, Public Printing and Documents	17
1970	(39 revised)	17
1974	Office of Law Revision Counsel created ⁴⁹	17
1976	(17 revised)	17
1978	11, Bankruptcy; 49, Transportation, Subtitle IV	19+
1982	31, Money and Finance	20+
1983	46, Shipping, Subtitle II; Transportation, Subtitle I	20+
1986	46, Shipping, Subtitle II, Part C; (26, Internal Revenue Code)	20+
1988	46, Shipping, new chapter (chapter 105)	20+
1994	49, Transportation, Subtitles II, III, V-X	21+
1998	36, Patriotic and National Observances, Ceremonies, and Organizations	22+
2002	40, Public Buildings, Property, and Works	23+
2006	46, Shipping, complete	24

47. This table is adapted from 1 U.S.C. § 204 note (2006) (order changed from title-number to chronological).

48. Title 26 is not a positive law title, but:

The Internal Revenue Code of 1954 was enacted in the form of a *separate code* by act Aug. 16, 1954, ch. 736, 68A Stat. 1. Pub. L. 99-514, §2(a), Oct. 22, 1986, 100 Stat. 2095, provided that the Internal Revenue Title enacted Aug. 16, 1954, as heretofore, hereby, or hereafter amended, may be cited as the "Internal Revenue Code of 1986". The sections of Title 26, United States Code, are identical to the sections of the Internal Revenue Code.

Id. (emphasis added). This is a little hard to wrap your head around. Title 26 is *not* positive law, but the Internal Revenue Code (which is the same as 26 U.S.C.) *is* positive law. See *Young v. IRS*, 596 F. Supp. 141, 149 (N.D. Ind. 1984).

49. There's some irony in the fact that the statute creating the Office of Law Revision Counsel does not follow the normal pattern. Usually, you can go from a U.S.C. citation to the Stat. citation and see the provisions that were codified there, right? In this case, all you see in *Statutes at Large* is a reference to another document:

examples:

Session law amending law that is not in a title enacted as positive law:

SEC. 101. PROTECTION OF CREDIT CARDHOLDERS.

(a) ADVANCE NOTICE OF RATE INCREASE AND OTHER CHANGES REQUIRED.—

(1) AMENDMENT TO TILA.—Section 127 of the Truth in Lending Act (15 U.S.C. 1637) is amended by adding at the end the following:

“(i) ADVANCE NOTICE OF RATE INCREASE AND OTHER CHANGES REQUIRED.—

“(1) Advance notice of increase in interest rate required.—In the case of any credit card account under an open end consumer credit plan, a creditor shall . . .⁵⁰

Session law amending law that is in a title enacted as positive law:

SEC. 2. DISPLAY OF FLAG ON NATIONAL KOREAN WAR VETERANS ARMISTICE DAY.

Section 6(d) of title 4, United States Code, is amended by inserting “National Korean War Veterans Armistice Day, July 27;” after “July 4;”⁵¹

¶30 When Congress enacts something new, without reference to an earlier statute, if it is general and permanent, the office assigns it to an appropriate place in the code.

¶31 Before beginning work on this piece, I had the impression that no new titles had been enacted for a long time, decades perhaps. But I was wrong. Granted, the pace of codification has been less than rocket-like, but there were two new titles in the 1990s and two in this decade. The office currently has several titles in the works.⁵² As of this writing, H.R. 1107, which would enact title 41, Public Contracts, has passed the House and is before the Senate.⁵³ There is a discussion draft of Title

Effective on January 2, 1975, the provisions of Title II of House Resolution 988, Ninety-third Congress, relating to: Sec. 202. Early Organization of the House; Sec. 203. Legislative Classification Office; Sec. 204. The House Commission on Information and Facilities; Sec. 205. *Office of the Law Revision Counsel*; Sec. 206. Review of Committee Jurisdiction; Sec. 207 (c) and (d) Technical and Conforming Provisions; and Sec. 208. Compilation of the Precedents, shall be the permanent law with respect thereto.

Act of Dec. 27, 1974, 88 Stat. at 1777 (emphasis added). That paragraph is unnumbered, smack in the middle of an appropriations act that spanned pages 1771–84.

Simple resolutions (as opposed to concurrent or joint resolutions) concern “the rules, the operation, or the opinion of either House alone.” CHARLES W. JOHNSON, *HOW OUR LAWS ARE MADE*, H.R. Doc. 108-93, at 88 (2003), available at <http://www.senate.gov/reference/resources/pdf/howour-lawsaremade.pdf>. It’s exceptional for a simple resolution to be “permanent” and “general” enough to be codified. In this case, both houses adopted it by reference in Pub. L. No. 93-554. Section 204 of H.R. Res. 988, which pertains to the Office of the Law Revision Counsel, is published at 120 CONG. REC. 33,317 (1974). (As printed in the *Congressional Record*, the provisions relating to the Office of the Law Revision Counsel are in Section 204 even though they are cited as section 205 in the *Statutes at Large*.)

50. Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24 §101, 123 Stat. 1734, 1735.

51. Korean War Veterans Recognition Act, Pub. L. No. 111-41 §2, 123 Stat 1962, 1962 (2009).

35, Patents, Trademarks, and Other Intellectual Property, but it has not yet been introduced.⁵⁴

¶32 While I was surprised to see this work underway—and one title so close to enactment—what really startled me was the prospect of *new* titles. Yes, after being encompassed within 50 titles for its entire life, the *United States Code* is poised to move beyond—to 51, National and Commercial Space Programs; 52, Voting and Elections; 53, Small Business; 54, National Park System; and 55, Environment.⁵⁵ The prospect of title 55 is particularly exciting. Over the decades, a wide range of topics have been shoehorned into title 42, the Public Health and Welfare; it's a huge title, with over 7000 pages.⁵⁶ Title 55 will pull out the environmental laws and organize them in a more coherent way.

Conclusion

¶33 The *United States Code* is a staple of legal research because—complex and confusing as it might be—it is much easier to use and deal with than the potentially dozens of volumes of *Statutes at Large* on a given topic. But legal researchers should be mindful that much of the *United States Code* is still only *prima facie* evidence of the laws, while the *Statutes at Large* are legal evidence of the laws. As more titles are enacted as positive law, the balance will shift, but it will be a very long time until the entire code is positive law.

52. Office of the Law Revision Counsel, U.S. House of Representatives, Codification Legislation, <http://uscode.house.gov/codification/legislation.shtml> (last visited Aug. 10, 2009). A brochure from the office provides an excellent overview of the process of—and reasons for—preparing titles for enactment as positive law. OFFICE OF THE LAW REVISION COUNSEL, U.S. HOUSE OF REPRESENTATIVES, POSITIVE LAW CODIFICATION IN THE UNITED STATES CODE, available at <http://uscode.house.gov/codification/Positive%20Law%20Codification.pdf> (last visited Aug. 10, 2009).

53. Office of the Law Revision Counsel, U.S. House of Representatives, Codification of Title 41, United States Code, “Public Contracts,” <http://uscode.house.gov/cod/t41> (last visited Aug. 17, 2009). Interestingly, a little bit of title 41 became the sole source of law on its subject almost seventy years ago. Just before the United States entered World War II, a law repealed certain provisions of the *Revised Statutes* that were incorporated in the *United States Code*. See *supra* ¶ 26.

54. See Office of the Law Revision Counsel, U.S. House of Representatives, Amendment of Title 35 United States Code, <http://uscode.house.gov/cod/t35> (last visited Aug. 17, 2009).

55. Office of the Law Revision Counsel, *supra* note 52.

56. LeFevre, *supra* note 41.