

ARE YOU POSITIVE ABOUT “POSITIVE LAW”?

BY DRUET CAMERON KLUGH

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Teachable Moments for Students ... is designed to provide information that can be used for quick and accessible answers to the basic questions that are frequently asked of librarians and those involved in teaching legal research and writing. These questions present a “teachable moment,” a brief window of opportunity when—because he or she has a specific need to know right now—the student or lawyer asking the question may actually remember the answer you provide. The material presented in this column is not meant to be an in-depth review of the topic, but rather a summary of the main points that everyone should know. It is a companion to the **Teachable Moments for Teachers** column that gives teachers an opportunity to describe a special moment of epiphany that changed their approach to presenting a particular topic to their students. Readers are invited to submit their own “teachable moments for students” to the editor of the column: Barbara Bintliff, University of Colorado Law Library, Campus Box 402, Boulder, CO 80309, phone: (303) 492-1233, fax: (303) 492-2707.

The topic of “positive law” relates to the ultimately controlling version of laws enacted by our Congress. Most researchers can put their hands on a copy of the USCA or the USCS. Yet is that enough? Positively not! Those annotated editions are unofficial versions of the *United States Code*. The language of the *Code* itself is the final authority for some titles only. For others, one must review the *Statutes at Large*. The split between these two sources has a long and convoluted history.

Among the concepts that law librarians nationwide try to instill in researchers is, ascertain what law controls. Typically, the discussion of primary and secondary sources is straightforward with myriad examples of statutes, regulations, and precedential case law in the former category. It sounds easy enough to remember, but when the pressure is on, can researchers put their hands on

the sources they need? Many legal work environments may have limited library materials, so it is particularly important that the opportunity be taken in an academic setting, where primary resources are usually abundant, to acquaint researchers with what law is authoritative.

This column deals with determining the controlling version of federal legislation, the United States statutes. It is not unusual for the interpretation of a statute to be extremely important, hence our delicious forays into legislative intent (but that’s another topic!). It is less common for the *actual*/wording of a statute to be the crux of an issue, but the situation may arise.¹ When it does, the researcher needs to know where exactly to turn.

Congress has given us direction in Title 1 of the *United States Code* (USC) at section 204. Subsection (a) states that the current version of the USC with its supplement “shall ... establish prima facie the laws of the United States.” However, the USC provides **legal evidence** (emphasis added) of the laws only when “titles of such Code shall have been enacted into positive law.” *Black’s Law Dictionary*[®] indicates that positive law typically consists of enacted law.² In this context, then, there are steps through which an act may go that will determine which final version is the “ultimate” version to be looked to for understanding and interpretation. It will be enacted as a slip law, included in the *United States Statutes at Large* (*Statutes at Large*), and then may be subsequently enacted again. Helpfully, the *Code* reproduces a list of titles enacted as positive law following 1 USC § 204.³

In order to understand this process better, let’s look at the history behind it.⁴ Currently, at the end of each congressional session, all slip laws are

¹ See, e.g., *Five Flags Pipe Line Co. v. Department of Transp.*, 854 F.2d 1438 (D.C. Cir. 1988) and *Tripp v. Executive Office of the President*, 200 F.R.D. 140 (D.D.C., April 5, 2001).

² Bryan A. Garner, Ed., *Black’s Law Dictionary* 1182 (7th edition 1999).

³ The following titles of the *Code* 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, 44, 46, 49, and the Internal Revenue Code (Title 26).

⁴ For an excellent recap of the process and history of federal legislation, see J. Myron Jacobstein, Roy M. Mersky & Donald J. Dunn, *Fundamentals of Legal Research* Chapter 9 (7th edition 1998).

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published in numerical order in the *Statutes at Large*. As this set was first published in 1846, the legislation from 1789 forward was published retroactively and included at that time. Of the set, volumes 1–5 cover the public laws, volume 6 the private laws, and volumes 7 and 8 the treaties, from 1789 to 1845 (1st to 28th Congresses); volume 9 covers the 29th–31st Congresses; volumes 10–12 cover the 32nd through the 37th Congresses. Starting in 1936 (75th Congress 1st Session), one numbered volume was issued per session; that pattern continues today. When the statutory volume is published, its contents supersede the slip laws as authoritative.

There are several drawbacks to the *Statutes at Large*:

- They are arranged chronologically, rather than by topic, with no cumulative subject index.
- Amendments and repealers are not integrated.
- Publication runs about two years behind.

To remedy these problems, the statutes are codified, thus bringing the current text of public laws together by subject. This process was initiated in 1866 when Congress authorized President Andrew Jackson to appoint a revision commission to review federal law. That first time, the *Statutes at Large* were codified as the *Revised Statutes of the United States*. You may see the title referred to alternately as

- *The Revised Statutes of 1873* (indicating the last year of laws contained therein)
- *The Revised Statutes of 1874* (indicating the date of enactment)
- *The Revised Statutes of 1875* (indicating the date of publication)

These *Revised Statutes of 1873/4/5* were submitted to Congress as a bill, and became public law. The bill included a title specifically repealing each prior public law that it encompassed. After it was passed and signed by the president, the *Revised Statutes of 1873/4/5* became positive law and thus superseded the *United States Statutes at Large* as the final law of the land.

Unfortunately, this first edition included many mistakes and unauthorized changes. In 1878, a second edition was authorized to bring the *Revised Statutes*' contents up to date, include intervening

legislation that had been passed into law, and correct all errors of the first edition. Again unfortunately, this second edition was never enacted into positive law, and remained only prima facie evidence of the laws up to that time. It would be almost 50 years before Congress would again authorize the publication of codified law.

During that time, the first edition of the *Revised Statutes of 1873/4/5* and the subsequent volumes of the *Statutes at Large* composed the controlling positive law of the nation. In 1926, and again in 1934, 1946, 1952, 1958, 1964, 1970, 1976, 1982, 1988, and 1994, those laws were cumulated and integrated as the *United States Code*. Yet no edition of the USC has been passed into positive law. Rather, in 1974, Congress established the Office of the Law Revision Counsel⁵, in the House of Representatives, whose responsibilities include revising the USC, one title at a time, for enactment as positive law and classifying newly enacted sections of law for their proper inclusion in the USC (2 U.S.C. § 285b).

The good news is that the revision process is almost half completed. The bad news is that the revision process is only half completed—24 of the 50 titles of the USC have been enacted into positive law. That leaves researchers checking to see if the laws they are working with have been enacted into positive law in the USC or must be reviewed in *Statutes at Large* from the legislation's first enactment.

The question of which version is positive law can come up in other ways as well. It reared its head on the law-lib e-mail list back in January 2001 with an inquiry regarding the weight to be given a statutory note.⁶ In that scenario, the section of a public law had been assigned by the Law Revision Counsel as a note in the USC, but that didn't change its status as positive law.⁷ A

⁵ See <<http://law2.house.gov/uscode.htm>> for current information on this project.

⁶ See the thread on Statutory Notes on the law-lib archives at <<http://lawlibrary.ucdavis.edu/LAWLIB/Jan01/subject.html#start>>.

⁷ See the fine compendium of legislative information put together by the Law Librarians Society of Washington, D.C., Inc. in their Legislative Source Book at <www.llsdc.org/sourcebook/index.html>.

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similar question was featured in the “Questions and Answers” section of the *Law Library Journal* back in 1986.⁸ In that case, it was noted that “[e]xclusion of a statute or section of a statute from the *Code* in no way affects the validity of the statute. . . . Mistakes involving exclusion from or inclusion in the *Code* by the Office [of the Law Revision Counsel] do not operate to change the construction or effect of laws.”⁹ To see if a statutory section has been encoded, refer to the Tables volumes of the USC, *United States Code Annotated*[®] (USCA[®]), or *United States Code Service*.

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⁸ See the well-detailed answer compiled by Alice I. Youmans, Joan S. Howland, and Myra K. Saunders at 78 *Law Library Journal* 585, 590 (1986).

⁹ *Ibid.* at 592.