



TITLE 51 OF THE U.S. CODE AND WHY IT MATTERS

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ON DECEMBER 18, 2010, President Barack Obama signed Public Law 111-314, an act felicitously captioned, “*To enact certain laws relating to national and commercial space programs as title 51, United States Code, ‘National and Commercial Space Programs.’*”¹ For those whose lives orbit around the topic of space travel, this sounds like an important new law – though in fact it probably is not, as the statute purports merely to “codify certain existing laws.”² But for the world of legal research, this is the dawning of a new day: The United States Code (USC) is changing.

Few things in American law have been as constant as the 50 Titles of the USC. The USC was first enacted in 1926, when Calvin Coolidge sat in the White House and most Americans were living on farms without electricity. While the individual sections within each Title constantly change to reflect the cascade of annual legislation emanating from Congress, the USC has divided all in-force, generally applicable American federal legislation into the same 50 subject-based Titles for 85 years. Some, like Title 4 – devoted to

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¹ 124 Stat. 3328 (2010).

² See *id.* § 2(a).

the Flag and Seal – have been barely used. Others, like Title 42 – Public Health and Welfare, grew into disorderly giants, stuffed to the gills with statutory enactments. One of the 50, Title 34 – The Navy, was literally abandoned, when it was consolidated into Title 10 – Armed Forces. But like the lost Dutchman, the 50 Titles sailed onward, with Title 34 crewless. Why was the arrangement so unyielding? Why yield now?

WHAT EXPERIENCE TEACHES ABOUT CODIFICATION EFFORTS

Creating a subject codification of federal law has always been a politically explosive process. How does one take the disparate enactments of the Congress, created over decades, and codify them into a comprehensible and useful form? Someone has to go through all of the volumes of session laws (known formally as the Statutes at Large), pull out the laws that are still in force, blend in amendments, and then fashion what is left into an organic whole built upon a coherent subject structure. The process inevitably involves moving language around, harmonizing odd bits into a sensible whole and, perhaps, dropping out some vestigial enactments that have only remained in force because no one has looked at them lately. The job is challenging, and the potential for errors of oversight or confusion is obvious. But there is more: The potential for the compiler to play a bit at law reform is ever-present. When one is blending together the mismatched sections of statutes, one can clean them up substantively as well as in form. Mix in the fact that there are many laws that live in the books which might not pass if re-introduced today, and one can see the welter of problems incident to bringing a re-organized subject compilation before a sitting legislature. Perhaps it is better to let sleeping laws lie . . .

The USC was not Congress's first effort to codify existing law; indeed, Congress attempted to pull off this organizational feat in the 1870s.³ It was a fine mess. The Revised Statutes of 1875 represent-

³ Dwan and Feidler, *The Federal Statutes, Their History and Use*, 22 MINN. L. REV. 1008 (1938), provides a marvelously detailed account of the Revised Statutes, and

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ed an attempt to publish all general in-force legislation enacted since 1789 in one place. The idea seemed to be a good one, and years of effort went into creating it. In the end, Congress enacted the Revised Statutes as a single piece of legislation, thus making it positive law and in essence repealing all federal legislative activity to that date. Positive law is a statement of the law itself; after 1875 there was no need to return to original enactments as enshrined in the Statutes at Large.

When the Revised Statutes of 1875 was passed, some feared that it would be rife with errors.⁴ Unfortunately, these critics were correct. The problems outlined earlier all came to pass. Mistakes had been made, experts fumed. Whether the problems were intentional or simply the product of attempting a Sisyphean task, the codification attempt had failed to live up to its goals and caused much unhappiness. Attempts to correct the errors in the 1875 codification led to the passage of the Revised Statutes of 1878 – but this was the last gasp for several generations. Indeed, Congress refused to declare the 1878 enactment positive law. Instead, it corrected errors in the 1875 codification and added in legislation enacted since 1874, but the new codification was declared to be only *prima facie* evidence of the law. The Statutes at Large version of legislation, at least for laws passed after 1874, was once again the true statement of the law.

After 1878, private publishers stepped in to help practitioners with changes in the law by producing their own sets of federal laws arranged by subject, but the lack of an official compilation was per-

indeed, the USC. In a charming reflection under a daggered footnote at the outset of the 21-page article, the authors state, “In an article of this length it is obviously impossible to treat either history or use of federal statutes in a complete manner; the authors do not purport to do so.” *Id.* at 1008. In fact it is a very comprehensive treatment, complete with a cast of characters worthy of *War and Peace*.

⁴ Because this codification only covered enactments through 1874, some refer to it as the Revised Statutes of 1874. It took effect in 1875, however, so most authorities use the term Revised Statutes of 1875. The fact that there is disagreement about the very title of the compilation is a tip-off that all was not beer and skittles in the process.

ceived as a problem. Jurists such as Judge Charles Hough of the Second Circuit were clear on this point: “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 the Statutes at Large since 1878 is something that, although I am pretty well hardened to it, I shudder to contemplate.”⁵ After World War I, efforts to produce something useful increased in intensity. Professor William Burdick of the University of Kansas Law School headed up a group asked to work things out. A phalanx of respected practitioners, famous law professors, and legislative experts labored over a series of drafts. In the end, Congress also turned to two legal publishers – the West Company and the Edward Thompson Company, each of which had been organizing federal law using their own systems – to assist them. Even then Congress remained skittish. Though the House passed several versions of the new federal codification, the Senate kept rejecting them. In the end, compromise was reached in 1926.⁶ To achieve the Senate’s cooperation, Congress enacted the USC as *prima facie* evidence of the law rather than as positive law. If the researcher could return to the original legislation as printed in the Statutes at Large and show that it was different, the Statutes at Large version prevailed.

The newly adopted USC was published by the Government Printing Office, which also publishes an annual supplement and republishes the USC incorporating those supplements every six years.

⁵ As quoted in Burdick, *The Revision of the Federal Statutes*, 11 A.B.A. J. 178, 179 (1925).

⁶ The incomparable Mary Whisner of the Gallagher Law Library at the University of Washington School of Law covers the terrain of the political battles in her article, *The United States Code, Prima Facie Evidence and Positive Law*, 101 LAW LIB. J. 545-56 (2009) (available at www.aallnet.org/products/pub_llj_v101n04/2009-30.pdf). I will not recompile her helpful footnotes here. If you wish to go deeper, she can take you there. Professor Burdick’s article (see note 5, *supra*) also describes these struggles, and predates the eventual passage of the bill. He claims that the draft USC was the most voluminous piece of legislation in history, consisting of over two million words – making it longer than the Institutes of Justinian. One wonders how, in the days before computer software, he knew that there were two million words in the bill.

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West immediately published an annotated version of the USC – the U.S. Code Annotated (USCA) – which prevailed over all competitors until the 1970s, when Bancroft Whitney launched the U.S. Code Service (USCS). Each set largely reprints the text of the USC, but includes commentary, historical notes, and case law annotations. The USCA remains dominant, but the USCS has held its own and has forced some innovations on the USCA.

For a decade or two in the late 20th Century, a program to enact individual Titles of the USC as positive law was actively pursued – and about half of the Titles were so enacted.⁷ But that project bogged down for all the reasons discussed above. And that is where things stood until December 2010.

WHAT LIES AHEAD

Public Law 111-324 is the final iteration of HR 3227, introduced by Congressmen John Conyers of Michigan and Lamar Smith of Texas. The bill went through six versions, but there was surprisingly little public notice paid to it. The House Judiciary Committee Report on the bill makes a brief statement assuring the public that Title 51 is being enacted into positive law, but that it is not intended to change any existing laws. The Report then provides a laundry list of cases that deal with the process of enacting individual Titles of the USC into positive law, but says nothing about the structure of the USC itself.⁸

As noted above, Title 51 is devoted to National and Commercial Space Travel. While one's views on space exploration may be strong, it is a non-controversial beginning for the enterprise of changing the USC. But it is only a beginning. The Office of Law Revision Counsel appears to be retracing Professor Burdick's path: A rash of new Titles are on the way, and several of them, such as Title 52 – Voting and Elections, and Title 55 – Environment, will be forays into very touchy territory.⁹ Will Congress truly re-enact as posi-

⁷ See uscode.house.gov/about/info.shtml (listing positive-law Titles).

⁸ House Report 111-325.

⁹ The Office of Law Revision Counsel sets out the program of revision at its web-

tive law all of the environmental legislation that is currently viable? Could there be a bit of controversy over recasting in a new arrangement all federal laws on elections and voting? Space travel this is not. The battles over the passage of the Revised Statutes and the original USC provide hints as to what may lie ahead.

The appearance of the first new Title of the USC in 85 years means more than just a chance for legal publishers to sell new sets of books to those who still use paper. It signals a new attempt at rationalization that inevitably will collide with political reality. One might hope that the Congress would calmly accept the logical, non-partisan re-arrangement of laws that touch upon sensitive areas. Surely our federal legislators are less partisan and paranoid than their counterparts from the 1870s. Or not.

No matter how it plays out, all existing research books are now wrong. There are 51 Titles in the USC. More will be on the way. The stage is being set for what could be some battles royal. It would be good to be aware of what this means, and what may be coming. You are now on notice.

