The Shadow Code: Statutory Notes in the *United States Code*[*]

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This article examines the history, creation, and purpose of statutory notes in the United States Code. It also explores the challenges statutory notes present in the research process and offers guidelines and best practices for researching and teaching about this often overlooked aspect of the United States Code.

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"A provision of a Federal statute is the law whether the provision appears in the Code as section text or as a statutory note."[1]

Introduction

¶1 In April 2017, the D.C. Circuit decided what some commentators called the "Snakes on a Plane" case.[2] The issue presented in that case was whether the Lacey Act's shipment clause prohibited the transportation of reticulated pythons and green anacondas from one state to another.[3] In dismissing one of the government's arguments, the court cited Congress's definition of "continental United States."[4] At first glance, there's not much to see here. Courts cite definitions from the *United States Code* all the time. But here the D.C. Circuit did not cite a *United States Code* section to define "continental United States." It cited a statutory note.

¶2 Statutory notes are provisions of law placed after the text of a *United States Code* section. They exist throughout the *United States Code* and are valid law despite their location in the Code. The first eight sections of the *United States Code* set forth definitions of words such as "county,"[5] "vessel,"[6] and "vehicle"[7] that apply to all acts of Congress. Yet the definition of "continental United States" is relegated to a statutory note.[8] Despite its location in the notes, the definition of "continental United States" is law: it was passed by Congress and signed by the President, and should be treated and relied upon like any other provision of law.[9] The problem is that it doesn't show up where most laws do, causing bewilderment and confusion even for experienced researchers.[10] And "continental United States" is not alone. Many statutes end up in notes to the *United States Code* rather than in Code sections. The inclusion of laws as statutory notes has several consequences. First,

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1. *Detailed Guide to the* United States Code *Content and Features*, OFF. L. REVISION COUNSEL: *UNITED STATES CODE*, http://uscode.house.gov/detailed_guide.xhtml#editorial [https://perma.cc/NY8K-78Y2] [hereinafter *Detailed Guide*].

2. Aaron L. Nielson, *D.C. Circuit Review—Reviewed: "Snakes on a Plane,"* YALE J. ON REG. NOTICE & COMMENT (Apr. 7, 2017), http://yalejreg.com/nc/d-c-circuit-review-reviewed-snakes-on-a-plane/ [https://perma.cc/9PW9-Z6E6]; Zoe Tillman (@ZoeTillman), TWITTER (Apr. 7, 2017, 7:28 AM), https://twitter.com/ZoeTillman/status/850354648590503938.

3. U.S. Ass'n of Reptile Keepers, Inc. v. Zinke, 852 F.3d 1131, 1134 (D.C. Cir. 2017).

4. *Id.* at 1140.

5. 1 U.S.C. § 2.

6. 1 U.S.C. § 3.

7. 1 U.S.C. § 4.

8. 1 U.S.C. § 1 note. One author has called statutes that affect the meaning of later-passed statutes, including 1 U.S.C. § 1, submarine statutes. Christian Turner, *Submarine Statutes*, 55 HARV. J. LEGIS. 185, 190 (2018). A note to a submarine statute is an even more troubling problem, raising the possibility of stealth submarine statutes.

9. Act of June 25, 1959, Pub. L. No. 86-70, § 48 (1959) (amending certain laws of the United States in light of the admission of the State of Alaska into the Union).

10. *See* Schwier v. Cox, 340 F.3d 1284, 1288 (11th Cir. 2003) (explaining that the district court mistakenly noted that "although section 7 was part of the Privacy Act that 'was passed into law as Public Law 93-579,' the fact that section 7 'was never codified, and appears only in the 'Historical and Statutory Notes' section of the United States Code,' made section 7 a mere 'historical footnote to the Privacy Act of 1974 [which] Congress has never reflected any intention of [codifying]'"); Michael J. Lynch, *The U.S. Code, the* Statutes at Large, *and Some Peculiarities of Codification*, 16 LEGAL REFERENCE SERVS. Q. 69, 80 (1997) ("It is astonishing that laws of general significance . . . should be found in the United States Code only in the notes.").

because these notes are separate from the main text, the *United States Code* is not a "unified and comprehensive text."[11] Second, this separation of the notes and main text makes researching federal statutory law more difficult. Because this system is not intuitive and contemporary researchers often assume that all current federal statutory law is found in the *United States Code*,[12] researchers are likely to struggle finding law in statutory notes. Novice researchers may find it nearly impossible to find law that exists in statutory notes.

¶3 Other commentators have discussed statutory notes too,[13] but this article goes beyond the existing literature in a few ways. First, this article provides a more detailed explanation of why statutory notes exist. Second, it provides a fuller picture of the extent to which statutory notes exist and play a role in the practice of law. Third, this article examines other factors that obscure statutory notes, including legal research providers' presentation of these notes and how this affects a legal researcher's ability to discover statutory notes effectively in the research process. Finally, this article presents best practices for researching and teaching statutory notes.

Editorial Versus Statutory Notes

¶4 At the outset it is important to establish that there are different types of notes in the *United States Code*. The official version of the *United States Code*, prepared by the Office of the Law Revision Counsel (OLRC),[14] contains a section of notes following the statutory text of each section of the Code. There are two main types of notes that are included—editorial notes and statutory notes.[15] Editorial notes are written by the OLRC and assist researchers in understanding a code section. Editorial notes "provide information about the section's source, derivation, history, references, translations, effectiveness and applicability, codification, defined terms, prospective amendments, and related matters."[16] Revision notes, for example, are a type of editorial note that briefly explain what changes were made to a section of the Code by certain amendments. This provides researchers with a useful way to narrow in quickly on which amendments to focus on in legislative history research. Another category of editorial notes, codification notes, provide information about a section's relationship with other sections.[17] While useful research tools, editorial notes are not law.

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11. Will Tress, *Lost Laws: What We Can't Find in the* United States Code, 40 GOLDEN GATE U. L. REV. 129, 153 (2010).

12. *See* Tobias A. Dorsey, *Some Reflections on Not Reading Statutes*, 10 GREEN BAG 2d 283 (2007) ("So we read the Code first. If it is clear, we read nothing else. If it is not clear, we look at the old Code. We no longer ask what Congress wrote; we ask what the Code says."). Even researchers who understand the evidentiary status of the *United States Code* may still forget to check the underlying law. *See* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1480 (2019).

13. *See* Lynch, *supra* note 10; Tress, *supra* note 11; Mary Whisner, *The* United States Code, *Prima Facie Evidence, and Positive Law*, 101 LAW LIBR. J. 545, 2009 LAW LIBR. J. 30.

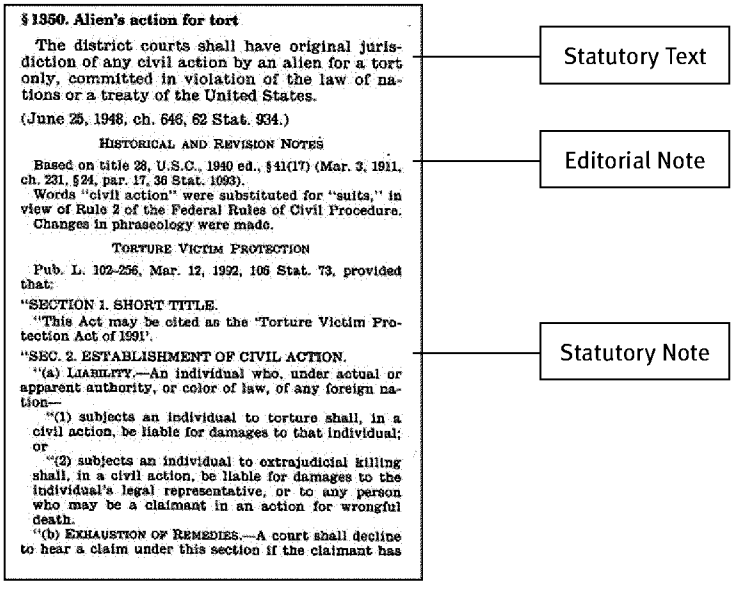
14. The OLRC is an independent office in the United States House of Representatives with duties to maintain and improve the *United States Code* and to prepare positive law codification bills. *Positive Law Codification in the United States* (2005), OFF. L. REVISION COUNSEL: *UNITED STATES CODE*, https://uscode.house.gov/codification/positive_law_codification.pdf (last visited July 30, 2020).

15. *Detailed Guide, supra* note 1, at https://uscode.house.gov/detailed_guide.xhtml#statutory [https://perma.cc/5VJ8-KM46].

16. *Id.* at https://uscode.house.gov/detailed_guide.xhtml#editorial [https://perma.cc/24MS-3CJD].

17. *See id.*

Figure 1
28 U.S.C. § 1350



¶5 Statutory notes, on the other hand, are law. The OLRC defines them as "provisions of law that are set out as notes under a Code section rather than as a Code section."[18] Unlike editorial notes, statutory notes have been passed into law and have the force of law despite not showing up as independent code sections.[19] The decision to place these provisions of law in statutory notes is an editorial decision made by the OLRC—a decision sometimes forced upon it—but their existence and location as statutory notes rather than code sections does not affect their meaning or validity.[20] Generally, statutory notes follow editorial notes, but the break is not clearly distinguished in the Code and can be difficult to spot. Statutory notes do not have a consistent heading within the Code and are generally identified by a heading that names the public law of origin.

¶6 Figure 1 shows 28 U.S.C. § 1350, commonly known as the Alien Tort Statute, and the beginning of its notes section. Following the text of § 1350 and its credits are editorial notes labeled "Historical and Revision Notes." Next appears a statutory note labeled "Torture Victim Protection." While the heading does not specify this as a statutory note, it does provide a unique heading related to the title of the public law—here the Torture Victim Protection Act of 1991. An even better indicator that

18. *Id. at* https://uscode.house.gov/detailed_guide.xhtml#statutory [https://perma.cc/VF7C-W46V].

19. *See* Richard J. McKinney, *The Authority of Statutes Placed in Section Notes of the* United States Code (2015), https://www.llsdc.org/assets/sourcebook/usc-notes.pdf [https://perma.cc/26G6-T5NT].

20. *Detailed Guide*, *supra* note 1, at https://uscode.house.gov/detailed_guide.xhtml#statutory [https://perma.cc/L7ZZ-GLUZ] (subheading on "Validity").

this is a statutory note is the phrase "Pub. L. . . . provided that:" followed by a quotation of statutory language.[21]

¶7 If the distinction between editorial and statutory notes isn't confusing enough, commercial versions of the *United States Code*, which most researchers use, add another wrinkle. These versions of the Code include an additional category of notes in the form of annotations consisting of citations to case law, legislative history documents, administrative regulations, and secondary sources. These notes appear near the editorial and statutory notes from the OLRC, and it is difficult to see where one ends and another begins unless a researcher is extremely familiar with the content of each. In fact, in some instances commercial publishers modify the OLRC's notes, making it even more difficult for researchers to understand who—the commercial code editors or the official codifiers at the OLRC—is providing the information.[22]

¶8 It's fairly obvious that editorial notes and commercial publishers' notes benefit researchers. Although these editorial notes are not law, they point to law and other helpful sources. Statutory notes, on the other hand, are law—so why aren't they contained in sections of the *United States Code*? The answer is multifaceted and more complicated than necessary. A partial answer is the existence of positive law and nonpositive law titles in the *United States Code*. "Positive law," in the context of the *United States Code*, means that a title of the Code has itself been enacted as a statute and is legal evidence of the law.[23] Nonpositive law titles, on the other hand, are merely compilations of statutes and are only *prima facie* evidence of the law.[24] Unfortunately, the current *United States Code* contains both positive and nonpositive law titles. To better understand the distinction between positive and nonpositive law, and to understand why this distinction exists and how it affects statutory notes, it's useful to examine briefly the history of the *United States Code*.

History of the *United States Code*

¶9 For the first many years of the United States' existence, there was nothing like the official United States Code we have today. Bills were passed into law and were then published as slip laws or session laws in newspapers or occasionally as their own collections.[25] The *Statutes at Large*, which began a more systematic publication

21. There are some slight variations on this, including "Pub. L. . . . provided:" or "Act . . . provided that."

22. Lexis, for example, provides editorial and statutory notes in a section labeled "Annotations," along with case notes. Westlaw adds citations to legislative reports, before other editorial notes begin. *Compare, e.g*, 8 U.S.C. § 1101 (note) *with* 8 U.S.C.S. § 1101 (note) *and* 8 U.S.C.A. § 1101 (note).

23. *See The Term "Positive Law,"* OFF. L. REVISION COUNSEL: *UNITED STATES CODE*, http://uscode.house.gov/codification/term_positive_law.htm [https://perma.cc/H6PV-NSB3]; *see also* Rob Sukol, *Positive Law Codification of Space Programs: The Enactment of Title 51,* United States Code, 37 J. SPACE L. 1, 10–11 (2011) (explaining the use and history of the term "positive law" with respect to the *United States Code* and the distinction between this narrow use and the general use of the term in legal philosophy).

24. *See Positive Law Codification*, OFF. L. REVISION COUNSEL: *UNITED STATES CODE*, http://uscode.house.gov/codification/legislation.shtml [https://perma.cc/QVB2-Y7Z2]; Sukol, *supra* note 23, at 11–12 ("Nonpositive law titles, as such, have not been enacted by Congress, but laws assembled in nonpositive law titles *have* been enacted by Congress.").

25. *See* Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1009 (1938); ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 100–04

of federal session laws, was first published in 1845.[26] In 1866, President Andrew Johnson "appointed a commission to revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in nature."[27] After many years of discussion and work, the *Revised Statutes* of 1873[28] were passed into law while simultaneously repealing all laws enacted prior to December 1, 1873, that were "embraced in any section" of the *Revised Statutes*.[29] Thus, the *Revised Statutes* of 1873 became legal evidence of the law (that is, actual evidence, stronger than *prima facie* evidence of the law). Researchers could now turn to the *Revised Statutes* of 1873 to determine what the law was, rather than resorting to the *Statutes at Large* or prior acts. While not referred to as such at the time, the *Revised Statutes* of 1873 are an example of positive law—a compilation that itself was officially passed into law through the legislative process.[30]

¶10 The success of the 1873 *Revised Statutes*, however, was short lived. Almost immediately, Congress began receiving reports of errors in this first *Revised Statutes* and, in response, appointed someone to prepare a new edition.[31] By 1877,

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(1990). During the early 19th Century, some federal laws were published in subject compilations, but these were only for specific topics such as public lands. *Id.* at 102–03. Attorney General Edmund Randolph saw the need for a code as far back as 1790. HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE 21, 468 (1937) (citing I Am. St. Papers, Misc. 21 (1790)).

26. Dwan & Feidler, *supra* note 25, at 1010.

27. *Id.* at 1013. While most efforts to consolidate and codify law focus on the need to improve access to the laws, at least one author has argued that having a systematic code lowers transaction costs for legislatures and "facilitates proliferation of laws." Dru Stevenson, *Costs of Codification*, 2014 U. ILL. L. REV. 1129, 1143.

28. These *Revised Statutes* have interchangeably been labeled with 1873 (date of the last laws in effect), 1874 (date of enactment), and 1875 (date of publication). ROY M. MERSKY & DONALD J. DUNN, FUNDAMENTALS OF LEGAL RESEARCH 153 (8th ed. 2002). For ease of reference, when referring to this edition, we will use the 1873 designation.

29. *Id.* While the attempt was to compile all statutes currently in force, a provision of the law itself allowed for the fact that some laws may have been missed. Those provisions remained in force. Summary of Events, *The Revised Statutes*, 9 AM. L. REV. 762, 767 (1875).

30. *See* JAMES CRAIG PEACOCK, NOTES ON LEGISLATIVE DRAFTING 46 (1961).

31. SURRENCY, *supra* note 25, at 107; Dwan & Feidler, *supra* note 25, at 1029 (reporting that 69 errors were discovered during the printing process, and an additional 183 were discovered over the next few years); Whisner, *supra* note 13, at 550. When debating the *Revised Statutes* of 1873, many congressmen and senators understood that there would be errors in the final version despite the many precautions that were taken. *See, e.g.*, 2 CONG. REC. 648 (Jan. 14, 1874) ("[T]he work is not perfect, though we have done all we can to make it perfect . . . If there should be discovered any amendments that are regarded as necessary and proper, they can be reported in a supplemental bill."); 2 CONG. REC. 649 (Jan. 14, 1874) ("I am willing to trust the Committee on Revision of the Laws on this question, with the distinct understanding if there be any mistake Congress will be frequently in session to enable us to remedy that mistake."); 2 CONG. REC. 827 (Jan. 21, 1874) ("I do not know that it is practicable to procure a revision in more perfect form. It is due to this Congress and to the legal profession and the country to say that absolute perfection is impossible. When all shall be done that can be done, the result will only approximate absolute accuracy."); 2 CONG. REC. 4284 (May 27, 1874 ("I have no expectation that this work is free from error. I have never known any revision of laws that was . . . I presume errors will be found here; and as they are developed they must be corrected by future legislation."). While any statutory revision process could produce errors, the process that led to the *Revised Statutes* of 1873 invited them. Commissioners were appointed to compile and revise the statutes and did so over a process of six years, in the process making some changes to the law as authorized under the law appointing them. 2 CONG. REC. 648 (Jan. 14, 1847). When the commissioners' work was presented to Congress, "the Committees on the Revision of the Laws of the Senate and of the House became satisfied that it was physically impossible to make a revision of the laws which contain any amendment, because if you allow one amendment in way of substance, the bill is open

Congress felt compelled to pass legislation that provided for the appointment of a commissioner to prepare a new edition of the Revised Statutes that would include the amendments passed since 1873.[32] In this act, Congress provided that the new edition of the Revised Statutes would again be "legal and conclusive evidence of the laws."[33] A year later, however, Congress changed course. Concerned that courts were unable to look back to the original acts because they had been repealed, Congress amended the 1877 act to make the forthcoming edition only *prima facie* evidence of the law.[34] In other words, the Revised Statutes of 1878 would be a useful compilation of statutes in force since 1873, but it could be rebutted by reference to a discrepancy in the Statutes at Large. It would not be positive law.

¶11 At the turn of the 20th Century, there was a move for the creation of an official United States Code that would organize and compile all law that was currently in force by topic. In 1897, Congress authorized the appointment of a commission to revise and codify United States criminal and penal laws.[35] In 1899, this charge was expanded to also include laws surrounding jurisdiction and practice of courts of the United States.[36] And, finally, in 1901, Congress empowered the commission to revise and codify all federal laws of a permanent and general nature.[37] One house report explains that there was "a widespread demand upon the part of the legal profession and of that considerable part of the general community directly interested in the application and enforcement of the law for a clear, perspicuous, and systematic compilation of the laws of the United States."[38]

¶12 After a number of years of work, Congress passed a Criminal Code in 1909 and a Judicial Code in 1911—both as positive law.[39] The Committee on Revision of Laws next turned its sights to revising and codifying all permanent and general law, presenting Congress with the first version of a comprehensive Code in 1919.[40] This draft, along with several later drafts, would have repealed prior Acts and enacted the code as positive law.[41] Each of these drafts was rejected by the Senate after errors were discovered, likely reminding Senators of the error-prone 1873 Revised Stat-

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to the amendment of every member who may think that any branch of the law needs change." *Id.* To remedy this problem, the committees appointed Thomas Jefferson Durant to review the work of the commissioners and eliminate any changes they had made. *Id.* Durant spent nine months on this work, but errors naturally persisted because the goal of the work changed from a revision that allowed for some change in the law where necessary to a strict restatement of existing law. *Id.* at 650.

32. 19 Stat. 267 (1877).

33. *Id.*

34. 20 Stat. 27, ch. 26 (1878); 7 CONG. REC. 1137 (Feb. 18, 1878); 7 CONG. REC. 1376–77 (Feb. 27, 1878).

35. 30 Stat. 58 (1897).

36. 30 Stat. 1116 (1899).

37. 31 Stat. 1181 (1901).

38. H.R. REP. NO. 59-3200, at 2 (1906).

39. 35 Stat. 1088 (1909); 36 Stat. 1087 (1911). Interestingly, Congress passed the Criminal and Judicial Codes as positive law, repealing all prior acts and portions of the Revised Statutes covered by the new codes. A house report accompanying one of the criminal code bills indicates that the Committee considered subject by subject revision and codification as the preferable way to approach the process based on the unsuccessful 1873 Revised Statutes. *See* H.R. REP. NO. 59-3200, *supra* note 38. Unfortunately, Congress abandoned that approach with the 1926 Code.

40. Frederic P. Lee & Middleton Beaman, *Legal Status of the New Federal Code*, 12 A.B.A. J. 833, 834 (1926).

41. *Id.*

utes.[42] With the help of legal publishers, the Committee on Revision of the Laws presented a new proposed Code to Congress in 1926.[43] This bill contemplated enacting the Code into positive law, but with a grace period for errors to be discovered and changed before the Code became positive law.[44] While the House passed this version of the bill, Senators ultimately felt uncomfortable repealing all prior law in favor of the new code and instead opted to make the Code *prima facie* evidence of the law only.[45] Those in favor of positive law enactment were disappointed but took solace in the fact that positive law codification would happen relatively quickly.[46] How very wrong they were.

¶13 The process of positive law codification began in 1940, but the first positive law bills did not pass until 1947, more than 20 years after the creation of the *United States Code*.[47] Between 1924 and 1947, all titles of the Code were nonpositive law titles. In addition to leaving the Code as merely *prima facie* evidence of the law, this state of affairs meant that when amending a statute Congress would amend the underlying act, not the Code itself.[48] That began to change when positive law titles

42. William L. Burdick, *The Revision of the Federal Statutes*, 11 A.B.A. J. 178, 181 (1925) (some 600 errors were discovered, although Burdick argued that only 100 or so were of importance); Dwan & Feidler, *supra* note 25, at 1021; Whisner, *supra* note 13, at 552 n.32 (quoting Rep. Roy G. Fitzgerald).

43. Whisner, *supra* note 13, at 551.

44. S. REP. NO. 69-832, at 3 (1926) ("It is further desired to call attention to and emphasize the fact that this compilation, unlike many of its predecessors is complete within itself and can be used without the necessity of having to consult the Revised Statutes and the 24 volumes of the Statutes at Large, published since the Revised Statutes."); Lee & Beaman, *supra* note 40, at 835 (describing the "twilight zone" system that would allow for correction of the Code before it officially became positive law).

45. *See* 67 CONG. REC. 12,074 (1926); GEORGE WHARTON PEPPER, PHILADELPHIA LAWYER 164 (1944) (describing Sen. Pepper's role in devising the plan to pass the Code as evidence of the law and to enact the Code as positive law at a later time). After positive law codification of 13 titles, Charles Zinn, participating in proceedings of the American Association of Law Libraries in 1958, remarks that very few errors had been found in these titles. Charles S. Zinn, *Revision of the* United States Code, 51 LAW LIBR. J. 388, 395 (1958).

46. 67 CONG. REC. 12075 (1926) (Mr. Madden expressed that "the practical effect, of what has been done, if followed up, would result in a very short time in getting a codification of the laws which could be presented as the laws of the land in cases before the court" and judged that it could be done in three Congresses. Mr. Fitzgerald hoped that the Code would become positive law after a few years of experience with it.) Lee and Beaman, writing in 1926, thought that one probable path for the Code would be that if it was shown that a limited number of errors were discovered in the next few years, Congress would pass an Act causing the Code to become law. Lee & Beaman, *supra* note 40, at 838.

47. *See* Tress, *supra* note 11, at 137. Some of this time was considered a testing period in which errors could be identified. *See* Zinn, *supra* note 45, at 391. Even in 1941, the Committee on the Revision of the Laws was optimistic that positive law codification for the entire Code would not take long. *Preface* of UNITED STATES CODE, at ix (1940) ("It is fervently hoped that the program of enacting the Code into positive law, title by title, to improve its present status as merely prima facie evidence of the law, will meet with success in the not too distant future.").

48. There appears to have been some confusion in the House shortly after enactment of the Code, as to whether new amendments should be to the Code or the underlying statute. 69 CONG. REC. 2091 (1928) ("If no one has looked into the question as to just what recognition should be given, I think it ought to be referred to a committee selected to give it study and determine whether or not it would be safe, in bringing in bills to amend statutes, to refer only to the new code of laws and not to the other sources that existed before the new code of laws."). Lee and Beaman, on the other hand, understood that the underlying act, not the Code, would have to be amended. Lee & Beaman, *supra* note 40, at 837 ("If law is to be changed by orderly process of express repeal and amendment, the basic statutes as appearing in the Revised Statutes and Statutes at Large must be repealed or amended. . . .

were enacted in 1947. Title 17, Copyrights, was one of the titles enacted into positive law in 1947. As part of this process, Congress examined title 17, which was prepared by codifiers, to determine whether it was in accordance with the acts that had been passed by Congress throughout its history. Once Congress felt comfortable that title 17 accurately reflected the law, it enacted the title as positive law and repealed prior provisions of the *Revised Statutes* and *Statutes at Large* codified in title 17.[49] Now, title 17 would be irrebuttable, legal evidence of the law, and Congress would not need to amend underlying acts but could amend title 17 directly.

¶14 Positive law codification has moved slowly since 1947. To date, 27 of the current 54 titles have been enacted into positive law in the 93 years since the creation of the *United States Code*.[50] And while those 27 titles make up half of the titles in the *United States Code*, they account for roughly only a quarter of the total pages

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[T]he only result produced by an amendment of the Code would be to make it incorrect as a reproduction of those statutes.").

49. An Act to Codify and Enact into Positive Law Title 17 of the *United States Code*, Entitled "Copyrights," ch. 281, 61 Stat. 652 (1947).

50. OFF. L. REVISION COUNSEL: *UNITED STATES CODE*, http://uscode.house.gov/browse.xhtml [https://perma.cc/NGJ8-U6HF] (indicating with a star, as enacted positive law, exclusive of any appendix, titles 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, 51, and 54). There are currently 54 numbered titles in the *United States Code*, but title 53 is reserved and has no content. While title 26 has never technically been enacted into positive law, the Internal Revenue Code has been enacted as a separate code and therefore is positive law. *See* Whisner, *supra* note 13, at 554 n.48. At least one legal research textbook states that failure to enact title 26 into positive law was a drafting oversight. MILES O. PRICE & HARRY BITNER, EFFECTIVE LEGAL RESEARCH 23 (1953). The Office of Law Revision currently has nine codification bills prepared for titles 5, 6, 10, 41, 48, 49, 51, 54, and 56, https://uscode.house.gov/codification/legislation.shtml;jsessionid=EE50F8E2BA6A60655B580DD2EF1B873F#current_plaw [https://perma.cc/PE4D-JVNM]. Each bill has been submitted to the House Judiciary Committee pursuant to 2 U.S.C. § 285b and accompanied by a report authored by OLRC explaining the codification bill. The Judiciary Committee has introduced none of the codification bills prepared by OLRC. (*See, e.g.*, Positive Law Codification Title 5, U.S. Code, draft bill submitted on September 18, 2017, and resubmitted on June 14, 2019, to the House Judiciary Committee in the 116th Congress, https://uscode.house.gov/codification/t5/index.html [https://perma.cc/UZF9-EAVA]; Positive Law Codification Title 6, U.S. Code, draft bill submitted on January 6, 2017, and resubmitted on December 18, 2019, to the Judiciary Committee, https://uscode.house.gov/codification/t6/index.html [https://perma.cc/8HV2-BTYV]; Positive Law Codification Title 10, providing for technical corrections to Section 2631 submitted to the Judiciary Committee on October 20, 2018, and resubmitted on March 6, 2019, to the Judiciary Committee, https://uscode.house.gov/codification/t10/index.html [https://perma.cc/6Z2N-SA95]; Positive Law Codification Title 41, U.S. Code draft bill submitted on July 7, 2012, and most recently resubmitted on March 6, 2019, to the Judiciary Committee, https://uscode.house.gov/codification/t41/index.html [https://perma.cc/7EJC-ZF3U]); Positive Law Codification Title 48, U.S. Code, draft bill submitted on June 26, 2019, to the House Judiciary Committee, https://uscode.house.gov/codification/t48/index.html [https://perma.cc/FY7Z-A3JH]; Positive Law Codification, Title 49, U.S. Code, draft bill submitted on March 7, 2018, and resubmitted on March 22, 2019, to the House Judiciary Committee, https://uscode.house.gov/codification/t49/index.html [https://perma.cc/NAW8-JWLE]; Positive Law Codification Title 51, U.S. Code, draft bill initially submitted on July 28, 2015, and most recently resubmitted and updated on August 15, 2019, to the House Judiciary Committee, https://uscode.house.gov/codification/t51/index.html [https://perma.cc/J5HZ-SW5V]; Positive Law Codification, Title 54 U.S. Code, draft bill initially submitted on April 8, 2016, and recently resubmitted on March 6, 2019, to the House Judiciary Committee, https://uscode.house.gov/codification/t54/index.html [https://perma.cc/6DR8-HWE2]; and Positive Law Codification, Title 56, U.S. Code, draft bill submitted on April 26, 2016, and updated and resubmitted on September 1, 2017, to the House Judiciary Committee, https://uscode.house.gov/codification/t56/index.html [https://perma.cc/UTR3-ZJ7X]. Although the House Judiciary Committee has the jurisdiction over the introduction of codification bills, it seems plausible that this responsibility could move to another House committee.

of the Code.[51] For these titles, what the *United States Code* says is law. For the other 27 nonpositive law titles,[52] what the *United States Code* says is only *prima facie* evidence of the law and can be rebutted by the *Statutes at Large*. While this distinction is important, it is largely academic.[53] Only rarely does a discrepancy between text in a nonpositive law title and the *Statutes at Large* occur or significantly influence the outcome of a dispute.[54] But how positive and nonpositive law titles are amended does have a more consistent impact on researchers, as it can affect where statutory provisions are placed in the Code.[55] Understanding the differences in the amendment process for both types of titles can help researchers be better prepared to deal with statutory notes in their research.

Creation of Statutory Notes

¶15 One of the core distinctions between positive and nonpositive law titles in the *United States Code* is how they are assembled and amended. Positive law titles can be changed only by direct amendment by Congress, and the amendments must reference a change to the title and section of the Code. On the other hand, nonpositive law titles can be arranged or rearranged by the OLRC.[56] These code sections are subsequently amended by reference to the act or public law provisions under revision. The OLRC does not make any substantive changes to the law, but because nonpositive law titles are only compilations of the public laws in force, the OLRC

51. This estimate was arrived at by totaling the number of pages in the 2012 edition of the *United States Code* for positive law titles and nonpositive law titles. In 2013, former Law Revision Counsel, Peter G. LeFevre, estimated that 70% of the code was not positive law. LeFevre, *The* United States Code*: Its Accuracy, Accessibility, and Currency*, ADMIN. & REG. L. NEWS, Winter 2013, at 10, 11. One legislative drafter lamented the "sorry state of the United States Code" in 1961, when 16 of the 50 titles were enacted into positive law. PEACOCK, *supra* note 30, at 45. One can only imagine what he would think today with only a modest increase in the number of positive law titles and the number of *United States Code* volumes ballooning from 10 in 1958 to 34 in 2012.

52. One of which, title 53, is currently reserved and has no content.

53. However, it is likely still shocking to many practitioners who use it frequently. *See* William Li et al., *Law Is Code: A Software Engineering Approach to Analyzing the* United States Code, 10 J. BUS. & TECH. L. 297, 300 (2015).

54. *But see* Panjiva, Inc. v. U.S. Customs & Border Protection, 342 F. Supp. 3d 481, 487–90 (S.D.N.Y. 2018) (holding that court must look to *Statutes at Large* instead of text of 19 U.S.C. § 431 to discern meaning of statute); ROBERT C. BERRING & ELIZABETH A. EDINGER, FINDING THE LAW 129 n.18 (12th ed. 2005) (citing cases in which difference between the *United States Code* and *Statutes at Large* was at issue).

55. While beyond the scope of this article, the positive/nonpositive law distinction also affects other aspects of the research process. Katz and Bommarito developed a model to measure complexity in the *United States Code*, defining complexity as "the human capital expended by a society when an end user is required to review and assimilate a body of legal rules." Daniel Martin Katz & M.J. Bommarito II, *Measuring the Complexity of the Law: The* United States Code, 22 ARTIFICIAL INTELLIGENCE & L. 337, 340 (2014). Interestingly, the five most complex titles of the *United States Code*, according to Katz and Bommarito's unnormalized score—which simulates "the complexity of reading and assimilating the entire content of a given Title," and does not control for title size, *id.* at 363—are all nonpositive law titles, while nine of the 10 least complex titles are positive law titles. *See id.* at 366–67 tbl.11. Of course, Katz and Bommarito do not take statutory notes into account in their measure of complexity.

56. *See* Daniel B. Listwa, *Uncovering the Codifier's Canon: How Codification Informs Interpretation*, 127 YALE L.J. 464, 475 (2017) (citing an email from Robert Sukol, Deputy Law Revision Counsel, explaining that the OLRC decides where to place provisions in nonpositive law titles based upon their own reading of the statute).

has the power to "classify newly enacted provisions of law" in nonpositive law titles without direction from Congress.[57] The differences in the OLRC's power with respect to positive and nonpositive law titles explains why some statutory notes exist.

Positive Law Titles—OLRC's Forced Hand

¶16 Failure to amend positive law titles directly is one reason why statutory notes exist in the *United States Code*. When the OLRC receives a public law from Congress, it looks to see whether provisions in the statute amend an existing positive law title of the *United States Code*. If so, the changes are made as directed.[58] For example, a portion of the recently passed FIRST STEP Act dealing with the use of restraints on prisoners during pregnancy provides: "Chapter 317 of title 18, United States Code, is amended by inserting after section 4321 the following . . . ."[59] This is a direct amendment by Congress because it specifies what changes are to be made to a positive law title in the *United States Code*. In this instance and others like it, the OLRC simply follows the instructions given by Congress.

¶17 Many laws, however, do not directly amend positive law titles. They create freestanding provisions with no direction as to where in the Code they should go. In such cases, the OLRC's first task is to determine whether the provisions of an act are general and permanent in nature. Provisions that are not general and permanent are not included in the Code.[60] If a provision is general and permanent, then the OLRC must decide—through a process called classification—where the provision will be placed in the Code.[61] If the OLRC classifies a provision in a nonpositive law title, the provision can simply be inserted into that title.[62] If, on the other hand, the OLRC decides the provision should go into a positive law title, then it lacks the authority to insert the new law directly into the Code, and it must add it as a note.[63]

¶18 Thus, in some instances, entire acts with important substantive provisions are relegated to statutory notes. The Torture Victim Protection Act of 1991 is such an example; this statute established a civil cause of action against someone who subjects an individual to torture or extrajudicial killing "under actual or apparent

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57. 2 U.S.C. § 285b(4) (one of the functions of the OLRC is "[t]o classify newly enacted provisions of law to their proper positions in the Code where the titles involved have not yet been enacted into positive law.").

58. *See* TOBIAS A. DORSEY, LEGISLATIVE DRAFTER'S DESKBOOK: A PRACTICAL GUIDE 54 (2006).

59. FIRST STEP Act, Pub. L. No. 115-391, § 301(a), 132 Stat. 5194, 5217 (2018).

60. *See* Tress, *supra* note 11, at 139.

61. *About Classification of Laws to the* United States Code, OFF. L. REVISION COUNSEL: *UNITED STATES CODE*, https://uscode.house.gov/about_classification.xhtml [https://perma.cc/XP44-5D59] [hereinafter *About Classification*]; Charles J. Zinn, *Codification of the Laws*, 45 LAW LIBR. J. 2, 3 (1952) (stating that new laws are inserted where the average user is most likely to look for them).

62. Although OLRC has discretion to include the provisions as statutory notes as well. *See infra* notes 90–114 and accompanying text.

63. *See* Lynch, *supra* note 10, at 78; Nicholas Triffin, *Questions and Answers*, 77 LAW LIBR. J. 182, 184 (1984) ("[T]itles that have been enacted into positive law can be changed (by addition of new sections and amendment or repeal of existing sections) only by Congress. Thus, if Congress enacts a provision that should (by virtue of the subject matter) be set out in a title that has been enacted into positive law, but the provision was not enacted as an amendment of that title, we will classify the provision as a note under the appropriate section of the title."). In some instances, the OLRC adds these types of acts to an appendix. *See* McKinney, *supra* note 19. For purposes of this article, we treat statutory provisions that end up in notes or an appendix the same because both are separate from code section text.

authority, or color of law, of any foreign nation."[64] In the text of the enacted bill, Congress did not specify the particular *United States Code* title where it would be placed. The OLRC decided it fit best near 28 U.S.C. § 1350, "Alien's action for tort." Title 28, however, is a positive law title, and because Congress did not draft it into title 28, the OLRC was powerless to do so. Consequently, the Act in its entirety is found in the *United States Code* only as a note.[65]

¶19 There are a few potential explanations for Congress's failure to amend a positive law title directly to include an entire act. First, Congress may simply have made an error and neglected to amend a positive law title directly. Charles Zinn, who was in charge of the codification process shortly after positive law codification began, indicated that it had been a struggle to educate Congress to draft bills to amend positive law titles directly.[66] He feared that as positive law titles increased, bills would "be drafted in general terms without reference to the applicable Title of the United States Code."[67] Federal drafting manuals emphasize that drafters must be very familiar with the differences between positive and nonpositive law titles so as to draft correctly.[68] Without further investigation, it is impossible to say how often lack of direct amendment occurs simply by mistake, but the current system certainly invites error when legislation must be drafted a certain way depending on the title to which it will belong in the Code.

¶20 Even more likely than mistake is the possibility that the frenetic nature of a legislative session makes it difficult to get it right all of the time.[69] Because of the time pressures of drafting legislation, the OLRC is in a better position to classify the Code, but its hands are tied if an act drafted as a freestanding law has a natural place in a positive law title. Because these new acts do not have a predestined place in the Code, legislative drafters may not have the time to decide where the act should appear in the Code. As the Torture Victim Protection Act teaches us, however, failure to designate a place for a new act in a positive law title can result in an unnatural placement of important laws in statutory notes.

¶21 While entire acts are often the most noticeable omissions from statutory text, portions of acts frequently become statutory notes. One example that raised concerns for researchers in the 1980s was the Privacy Act of 1974.[70] Sections 3 and

64. Pub. L. No. 102-256, § 2(a), 106 Stat. 73, 73 (1992).

65. 28 U.S.C. § 1350 note (2018). Besides the fact that a statutory note is more difficult to find than a statutory section, other concerns can also arise based on the positioning of an act as a note to a particular subsection rather than as an independent section. *See* William J. Aceves, *Correcting an Evident Error: A Plea to Revise* Jesner v. Arab Bank, PLC, 107 GEO. L.J. ONLINE 63, 63 (2018) (criticizing Justice Kennedy's characterization of the Torture Victim Protection Act as a cause of action under the Alien Tort Statute based upon the OLRC's placement of the statutory note).

66. *See* Zinn, *supra* note 45, at 394 ("One of our problems is trying to educate other committees of Congress to draft their bills in terms of the titles that have so far been enacted into law. We have been fairly successful to date, but as we broaden the scope of our work and get more into the field of other committees, I am afraid we are going to have a situation comparable to that which existed after the enactment of the Revised Statutes.").

67. *Id.*

68. DORSEY, *supra* note 58, at 53; LAWRENCE E. FILSON & SANDRA L. STROKOFF, THE LEGISLATIVE DRAFTER'S DESK REFERENCE 416 (2d ed. 2008); ARTHUR J. RYNEARSON, LEGISLATIVE DRAFTING STEP-BY-STEP 86 (2013).

69. *See* Tress, *supra* note 11, at 151.

70. Triffin, *supra* note 63, at 184; Alice I. Youmans et al., *Questions and Answers*, 78 LAW LIBR. J. 585, 592 (1986).

4 of that Act directly amended title 5 of the *United States Code*, while the remaining seven sections did not and were added as notes to 5 U.S.C. § 552a.[71] Researchers were particularly concerned with section 7 of the Act, which made it unlawful for a government agency to deny benefits provided by law to anyone who refused to disclose his or her social security number.[72] This important provision, which one federal appellate court described as one of only two substantive provisions in the Act,[73] was relegated to a statutory note because it did not directly amend title 5 as did other sections of the same Act.[74]

¶22 Similarly, when Congress passed a law regulating armor piercing ammunition in 1986, the Act defined "armor piercing ammunition," in part, as a "projectile or projectile core which may be used in a handgun."[75] The legislative history of this Act shows there was concern in the Senate that an earlier amendment of the bill without a definition of "handgun" would "provide another giant loophole for the criminals."[76] A definition of "handgun" was eventually added before final passage of the bill, but it did not directly amend title 18 of the *United States Code* and was, therefore, inserted as a note to 18 U.S.C. § 921.[77] Researchers using the definition of "armor piercing ammunition" found in 18 U.S.C. § 921(a)(17)(B) should be familiar with the applicable definition of "handgun." Yet the definition had to be relegated to a statutory note.[78]

¶23 Two more recent examples can be seen in the "America Invents Act" and the "FIRST STEP Act."[79] Passed in 2011, the "America Invents Act" was a significant revision of patent law.[80] During debate over the Act, Congressman Smith of Texas offered an amendment that added a provision prohibiting the patenting of inven-

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71. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896.

72. *Id.* § 7, 88 Stat. at 1909.

73. Schwier v. Cox, 340 F.3d 1284, 1287 (11th Cir. 2003).

74. Interestingly, in this example one commentary opined that the inclusion of § 7 as a note "helps to [e]nsure that researchers will not overlook that portion of the statute." Youmans et al., *supra* note 70, at 592. While including the section in a note is surely a better option than not including it at all, it begs the question of how it is possible that an important provision is not included in a statutory section.

75. Act of Aug. 28, 1986, Pub. L. No. 99-408, § 1, 100 Stat. 920, 920.

76. 132 CONG. REC. 3893 (Mar. 6, 1986).

77. The last section of the Act states:

> For purposes of section 921(a)(17)(B) of title 18, United States Code, as added by the first section of the Act, "handgun" means any firearm including a pistol or revolver designed to be fired by the use of a single hand. The term also includes any combination of parts from which a handgun can be assembled.

§ 10, 100 Stat. at 922.

78. An interesting question arises here. The Brady Handgun Violence Prevention Act passed in 1993 added its own definition of "handgun" to 18 U.S.C. § 921. While the definitions of "handgun" in 18 U.S.C. § 921(a)(29) and 18 U.S.C. § 921 note are similar, they are not identical. Researchers looking today at the definition of "armor piercing ammunition" under 18 U.S.C. § 921(a)(17) are likely to scan the rest of the definitions and come across the definition of 18 U.S.C. § 921(a)(29) and think that it's applicable. 18 U.S.C. § 921 note, however, tells us explicitly that for purposes of 18 U.S.C. § 921(a)(17) its definition of handgun applies. On the other hand, 18 U.S.C. § 921(a) tells us that the definitions apply to the chapter.

79. America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011); FIRST STEP Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

80. EDWARD D. MANZO, THE AMERICA INVENTS ACT: A GUIDE TO PATENT LITIGATION & PATENT PROCEDURE ix (2013).

tions "directed to or encompassing a human organism."[81] While most of the substantive changes to title 35, a positive law title, directly amended current statutory sections, this amendment did not. The amendment was agreed to and became part of the final bill, leaving this provision as a statutory note to 35 U.S.C. § 101.

¶24 As with the "America Invents Act," the bulk of the "FIRST STEP Act" directly amended sections of title 18 of the United States Code, properly placing the provisions in code sections. Some provisions of this criminal justice reform legislation, however, including provisions regarding reports, appropriations, statutory construction, faith-based considerations, data collection, and a provision requiring the Director of the Bureau of Prisons to make feminine hygiene products available to prisoners for free, did not explicitly amend title 18.[82] Because title 18 is a positive law title, OLRC's hands are tied and options limited: these provisions can only be added to title 18 as statutory notes.[83]

¶25 In each of these examples, it is clear that Congress knew that the title in question needed to be directly amended because at least some of the act did so. What is less certain, then, is why certain provisions were not directly amended. One possibility, as mentioned above, is that the hustle and bustle of the legislative process can produce such an oversight. This seems to have been the case with the armor piercing ammunition law that added a definition for "handgun" toward the end of the legislative process to appease some senators. The original bill properly amended title 18, but instead of incorporating the new definition of "handgun" into the amending portions of the bill, the Senate simply tacked it onto the end of the bill, banishing it—likely unwittingly—to a statutory note.

¶26 Another possibility, which likely occurs more frequently, has to do with preferences in legislative drafting. Frequently, statutory provisions that do not directly amend positive law titles are of a certain type, such as short titles, effective dates, appropriations, severability provisions, rules of construction, and directions to agencies. At least one federal legislative drafter points out that nonbinding provisions are excluded from the Code.[84] Other legislative drafting manuals show a distaste among drafters for including provisions in legislation that are "not legally useful," such as "findings that are nothing more than rhetoric, definitions that merely state the obvious, and precatory language . . . that has no binding effect."[85] Drafters are also encouraged to avoid severability provisions because severability is the default rule.[86] When these types of provisions are included in legislation that is meant for a positive law title, it is likely that legislative drafters are purposefully avoiding direct amendment so as not to include these types of provisions in the

81. 157 CONG. REC. H4451 (June 22, 2011).

82. *See* FIRST STEP Act, *supra* note 79.

83. The other option OLRC has is to find a nonpositive law title in which to include these provisions or leave them out of the Code completely.

84. RYNEARSON, *supra* note 68, at 83.

85. *See* DORSEY, *supra* note 58, at 177; *see also* FILSON & STROKOFF, *supra* note 68, at 1217 (discouraging findings and purposes because they are not legally useful).

86. SENATE LEGISLATIVE DRAFTING MANUAL 49 ("Consequently, a severability clause is unnecessary."); HOUSE DRAFTING MANUAL 32–33 (explaining that general severability provisions are unnecessary); FILSON & STROKOFF, *supra* note 68, at 182–83 (calling inclusion of severability clauses in legislation a "questionable practice"); DORSEY, *supra* note 58, at 228; DONALD HIRSCH, DRAFTING FEDERAL LAW 20 (1980).

code.[87] The sections of the Privacy Act of 1974, for example, that did not directly amend title 5 included a short title, findings, creation of the Privacy Protection Study Commission, directions to the Office of Management and Budget, an effective date, and appropriations.[88] The FIRST STEP Act reveals similar provisions that likely purposefully did not directly amend title 18.[89]

¶27 To be sure, when a positive law title is not amended directly—that is, when the legislation fails to specify the title and section being amended—the result is the same: the act or provisions must be excluded from the positive law title because the OLRC does not have the authority to insert a new law directly into the Code. Thus, those provisions are added as statutory notes. Being familiar with this rule can help researchers working in areas covered by positive law titles be more aware of the possibility that substantive (and other relevant) provisions of law could be found in statutory notes.

Nonpositive Law Titles

¶28 While failure to amend positive law titles directly may seem like a strange reason for the existence of statutory notes, at least the rule is clear: if Congress does not directly amend a Code section and the OLRC classifies it in a positive law title, it *must* appear as a statutory note. In certain instances, however, failure to amend a positive law title directly is not the cause of a statutory note. Statutory notes appear in nonpositive law titles as well. In fact, the first statutory notes appeared in the 1940 edition of the *United States Code* before any title was enacted into positive law.[90] The preface to that edition lists "additional notes" as one of the reasons the Code was expanded to four volumes.[91] Examination of the 1940 edition reveals a limited number of statutory notes, including savings clause provisions,[92] effective date provisions,[93] and some more substantive provisions.[94] The inclusion of statutory notes in nonpositive law titles in 1940 and today is an editorial decision made by the OLRC.[95] Unfortunately, because of the complex nature of the *United States Code* and the classification process, there is no single, simple explanation for when statutory provisions become statutory notes in nonpositive law titles.

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87. A potential downside of positive law codification is that it will likely increase the number of statutory notes in the *United States Code* because legislative drafters will avoid direct amendment in order to keep out provisions of these types that the OLRC has shown a willingness to include in the Code.

88. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896. One section that did not directly amend title 5 and that seems to be a substantive provision was section 7, which forbid federal, state, or local agencies from denying individuals any right, benefit, or privilege provided by law based on a failure to provide a Social Security Number. *Id.* at 1909.

89. *See supra* note 82 and accompanying text.

90. *See generally* UNITED STATES CODE (1940).

91. *Preface* of UNITED STATES CODE, at ix (1940) (other stated reasons included the addition of a number of laws and the use of "a more legible type").

92. *E.g.*, 12 U.S.C. § 640a note (1940).

93. *E.g.*, 42 U.S.C. § 408 note (1940).

94. *E.g.*, 42 U.S.C. § 1001 note (1940) (providing that tax not be collected under certain acts for services, rendered prior to January 1, 1940, for salvaging timber or clearing debris left by hurricane).

95. *See Detailed Guide*, *supra* note 1, at https://uscode.house.gov/detailed_guide.xhtml#statutory [https://perma.cc/7KGP-G8GC].

¶29 The OLRC's general preference is to classify statutory provisions as Code sections rather than statutory notes.[96] Even with that general preference, however, there are several types of provisions that the OLRC "normally" classifies as statutory notes.[97] These include "effective dates, short titles, savings, and statutory construction," as well as findings and severability provisions.[98] Additionally, "provisions that are somewhat less than general or permanent, but still relate to existing Code sections, such as those requiring studies or reports, implementation of regulations, or the establishment of a task force" normally become statutory notes.[99] Researchers should not be surprised to find these types of provisions appear as statutory notes in nonpositive law titles.

¶30 These exceptions to the general preference of classifying provisions as Code sections have exceptions of their own, however. For example, provisions normally classified as statutory notes "should be classified as sections where they are part of an entire hierarchical unit that is being added to the Code."[100] Additionally, "[p]rovisions involving the creation of an office should be classified as sections, while provisions that establish minor offices should be classified as notes."[101] Even more general provisions that might otherwise be classified as a code section may be classified as notes if they are "closely tied to an existing Code section."[102]

¶31 One of the principles that emerges for why some statutory provisions end up as statutory notes in nonpositive law titles is act-Code coherence. This is the idea that, to the extent possible, the OLRC attempts to keep the language of an act together "in order to make the law accessible and understandable to the reader."[103] Act-Code coherence does not explain all statutory notes, but it can help researchers understand certain decisions that at first may seem confusing. Take, for example, a provision from the Immigration Technical Corrections Act of 1988 that clarified a definition found in 8 U.S.C. § 1101(a)(27)(I), regarding residence in the United States of an employee of an international organization. Because title 8 is a nonpositive law title, the OLRC could conceivably have included this as a separate subsection of 8 U.S.C. § 1101(a)(27)(I). However, this provision did not amend the underlying Immigration and Nationality Act (INA), and simply inserting it would have broken up the INA as it appears in the Code.[104] Instead, this provision was added as

96. *See* Email from Ralph Seep, Law Revision Counsel, U.S. House of Representatives, to authors (June 25, 2019, 09:53 EST) (on file with authors).

97. *About Classification*, *supra* note 61.

98. *Id.*; *accord* Email from Ralph Seep, *supra* note 96.

99. *About Classification*, *supra* note 61.

100. Email from Ralph Seep, *supra* note 96.

101. *Id.*

102. *Id.*

103. *Id.*; *see also* McKinney, *supra* note 19 ("Generally, it seems, the codifiers like to place a statute's language all together in the U.S. Code without breaks from other statutes."). *Detailed Guide*, *supra* note 1 ("In the case of a nonpositive law title, the organization of the title since 1926 has been determined by the editors of the Code and has generally followed the organization of the underlying acts as much as possible."). Often the complexity of federal legislation that spans multiple topics makes it impossible to maintain act-Code coherence. *See About Classification*, *supra* note 61.

104. In order to force the provision into the INA, Congress would have had to amend the INA by stating something like, "Section x of the Immigration and Nationality Act is amended to read . . . . " In the absence of such a directive, the OLRC would generally avoid placing the new provision in statutory text in the midst of the INA. *See* McKinney, *supra* note 19 (stating that it has been "a fairly hard rule in recent decades" not to "combine a new statutory provision with an existing code section

a statutory note, despite being essential to understanding 8 U.S.C. § 1101(a)(27)(I). In fact, this provision is so essential that when the OLRC prepared a bill to enact title 8 into positive law in 1995, it moved this provision out of the notes and into a section. [105] The bill ultimately failed, leaving title 8 as a nonpositive law title and this definition as a note.

¶32 Similarly, an important statutory provision affecting the Fair Labor Standards Act is only included as a statutory note in the *United States Code*. Section 207 of the Fair Labor Standards Act, found at 29 U.S.C. § 207, requires employers to pay overtime to employees working more than 40 hours a week.[106] However, 29 U.S.C. § 213(b)(1) exempts certain employees from overtime compensation.[107] In 2008, Congress passed a law that removed a class of employees from the 213(b)(1) exemption.[108] Unfortunately, Congress did not amend the FLSA when passing this provision, so OLRC did not insert it as a code section or part of a code section. Instead, it did the next best thing and inserted that provision and its definition of "covered employee" as a statutory note.

¶33 In other instances, the OLRC attempts to be faithful to the structure of an act passed by Congress even if this means relegating certain provisions to statutory notes. Congress passed the Better Online Ticket Sales Act of 2016 (BOTS Act) to "prohibit the circumvention of control measures used by Internet ticket sellers."[109] Section 2 of the Act, which enumerates the prohibited conduct, exceptions, and enforcement of the Act, was added as a new statutory section in title 15.[110] Section 3 of the Act, however, which provides the essential definitions for section 2—including "commission," "event," "event ticket," and "ticket issuer"—was added as a statutory note.[111]

¶34 To understand the placement of these definitions in a statutory note, it's useful to compare the BOTS Act with the Consumer Review Fairness Act (CRFA). Both were passed on December 14, 2016, and ended up beside each other in the *United States Code* as §§ 45b and 45c of title 15.[112] The Acts were drafted slightly differently, however, leading to a major difference in the way their definitions are presented in the Code. As in the BOTS Act, section 2 of the CRFA provides the heart of the Act and is included as a Code section. Unlike the BOTS Act, however,

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representing a previous Act that Congress did not specifically amend").

105. H.R. 1292, 104th Cong. (1995).

106. 29 U.S.C. § 207.

107. 29 U.S.C. § 213(b)(1).

108. SAFETEA-LU Technical Corrections Act of 2008, Pub. L. No. 110-244, § 306(a), (c), 122 Stat. 1572, 1621 (2008).

109. S. REP. NO. 114-391, at 1 (2016).

110. Better Online Ticket Sales Act of 2016, Pub. L. No. 114-274, § 2, 130 Stat. 1401, 1401 (codified at 15 U.S.C. § 45c).

111. *See* 15 U.S.C. § 45c note. In addition to highlighting the importance of examining the statutory notes, this example also demonstrates the importance of editorial notes. A researcher analyzing 15 U.S.C. § 45c may look for definitions nearby in the table of contents. Doing so would lead them to 15 U.S.C. § 44, which provides definitions for the subchapter. However, a codification note for 15 U.S.C. § 45c provides that it was enacted as part of the BOTS Act of 2016 "and not as part of the Federal Trade Commission Act which comprises this subchapter." So, while § 45c is included in the Federal Trade Commission Act subchapter, its inclusion as part of the subchapter was an editorial decision.

112. *Compare* Consumer Review Fairness Act of 2016, Pub. L. No. 114-258, 130 Stat. 1355, *with* BOTS Act of 2016, Pub. L. No. 114-274, 130 Stat. 1401. It is useful to point out that the addition of these new sections would not have been possible if title 15 were positive law.

the definitions of the CRFA are included in section 2 and are, therefore, part of the Code section. In the BOTS Act, the definitions were included in a final, separate section that begins "In this Act."[113] In order to be faithful to the structure of the Act, the OLRC did not include this definitions section as a separate statutory section. While it is understandable that the OLRC would be deferential to acts as passed by Congress, from a researcher's perspective it is troubling to have two neighboring sections laid out so differently.[114]

¶35 Statutory notes exist in nonpositive law titles for a variety of reasons. OLRC's general preference is to classify statutes as code sections rather than statutory notes, but classification is extremely complicated and has many moving parts. OLRC attorneys are guided by a number of rules and principles when deciding whether to create a statutory note, but the decision is ultimately editorial. Where possible, OLRC tries to maintain act-Code coherence or to otherwise be faithful to the structure as passed by Congress, which leads to some similar provisions being placed in code sections and others in statutory notes. Because there is no definitive rule on when certain provisions end up in statutory notes in nonpositive law titles, researchers must always be on the lookout for these provisions.

Extent of the Problem

¶36 Earlier research has identified the problem of statutory notes in the *United States Code* but has stopped short of attempting to determine the extent of the problem.[115] A likely reason this research has not been attempted is its difficulty. As discussed above, statutory notes are mixed with a variety of other notes, and there is no easy way to separate relevant statutory notes from others. One way to get some idea of the number of laws that are relegated to statutory notes is to examine the number and types of notes that appear in court opinions. While this will not uncover all substantive or legally significant provisions found in statutory notes, it can provide a good picture of how often these statutory notes are used by litigants and judges and provide examples of important laws that are found in statutory notes. To limit the results to a manageable number,[116] we searched U.S. Supreme

113. A companion bill, H.R. 5104 (2016), incorporated its definitions into the heart of the Act. If this bill would have passed, it is likely that the definitions would be part of 45b, not a statutory note. *See* H.R. 5104, 114th Cong. (2016).

114. While the CRFA and the BOTS Act are examples of OLRC being faithful to the structure Congress gave to the Acts, they are also examples of OLRC bending the rule of act-Code coherence. OLRC inserted both acts in the middle of a subchapter of title 15 that contains the Federal Trade Commission Act. This insertion is mentioned in an editorial note after each section. 15 U.S.C. § 45b note; 15 U.S.C. § 45c note.

115. Michael Lynch remarked that "the way seems tedious" in pursuing a project like this. Lynch, *supra* note 10, at 80.

116. To determine the number of cases that referred to notes, the authors began by searching all state and federal cases in Westlaw for *note /5 U.S.C.* This brought back 10,000 results, which is Westlaw's maximum, meaning that there were more than 10,000 cases corresponding to this result. After examining some of these results, it became clear that "44 U.S.C. s 3501 note" would need to be excluded from the search because this statutory note contains the E-Government Act of 2002, which requires decisions of the United States Court of Federal Claims to be posted to its website. This instruction, with a citation to 44 U.S.C. § 3501 note, appears in the first footnote of many cases from the United States Court of Federal Claims since 2002. *See, e.g.*, Encinias v. Sec'y, Health & Human Servs., 2017 WL 2417773 (Fed. Cl. 2017) (It appears that there are nearly 8,000 cases that contain a citation to "44 U.S.C. s. 3501 note." This is interesting in itself because many of these are about disputes regarding a litigant's right to prevent certain decisions from being posted to the Federal Court of

Court and U.S. court of appeals decisions in Westlaw from 2008 to 2018.[117] After eliminating false positives,[118] we found 605 U.S. Supreme Court and U.S. court of appeals cases over this 10-year period that cited a statutory note.[119] Forty-eight of these cases came from the U.S. Supreme Court.[120] We also examined a smaller slice

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Claims website). With this amendment, the most fruitful search for finding statutory notes in caselaw was *(note /5 U.S.C.) % "44 U.S.C. s 3501"*. This search still resulted in over 10,000 results, so the authors determined that it would be beneficial to restrict the results to the last 10 years. Doing so whittled the results down to 4854 cases. While this was more manageable, the authors decided to focus on U.S. Supreme Court and Federal Court of Appeals opinions to bring the number of opinions down even more.

117. The exact search used was *(note /5 U.S.C.) & DA(aft 12-31-2007 & bef 01-01-2019) % "44 U.S.C. s 3501"*. This resulted in 1316 cases before irrelevant results were removed.

118. Several different uses of the word "note" caused false positives. *See, e.g.*, Doe v. United States, 853 F.3d 792, 798 (5th Cir. 2017) ("We note that 5 U.S.C. § 551 . . . ."); United States v. Michaelis, 737 F. App'x 842, 843 (10th Cir. 2018) ("[P]assing counterfeit Federal Reserve notes, in violation of 18 U.S.C. § 472 . . . .").

119. It's important to point out that this number is likely underinclusive because of the way statutory notes are cited in court opinions. In 1997, Michael Lynch observed that researchers citing to a statutory note must cite to the *Statutes at Large*. *See* Lynch, *supra* note 10, at 79. *The Bluebook* seemed to support this approach until 2015, when the 20th edition added a section directing that references to statutory notes cite to the *United States Code*. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 12.3.1(h), at 124 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015). In practice, some courts follow *The Bluebook*, while others cite the *Statutes at Large* and the *United States Code* as parallel citations. There seems to be little consistency in how statutory notes are cited. Because of this inconsistency, it is likely that some opinions have cited only to *Statutes at Large* and are missed by the above search. *See, e.g.*, Youmans et al., *supra* note 70, at 590–91 (citing a district court decision, Greater Cleveland Welfare Rights Org. v. Bauer, 462 F. Supp. 1313 (N.D. Ohio 1978), that cited to the public law version of the Privacy Act of 1974 rather than its *United States Code* note citation); Glenn v. Holder, 690 F.3d 417, 420 (6th Cir. 2012) (citing § 4710 of the Hate Crimes Act instead of 18 U.S.C. § 249 note).

120. Pereira v. Sessions, 138 S. Ct. 2105, 2124 (2018) (citing 8 U.S.C. § 1101 note); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1397 (2018) (citing 28 U.S.C. § 1350 note); Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 824 (2018) (citing 28 U.S.C. § 1610 note); Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2154 (2016) (citing 35 U.S.C. § 321 note); Bank Markazi v. Peterson, 136 S. Ct. 1310, 1318 (2016) (citing 28 U.S.C. § 1610 note); Lockhart v. United States, 136 S. Ct. 958, 973 (2016) (citing 18 U.S.C. § 2251 note); FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 770 (2016) (citing 16 U.S.C. § 2642 note); Kellogg Brown & Root Servs., Inc. v. United States *ex rel.* Carter, 135 S. Ct. 1970, 1975 n.1 (2015) (citing 50 U.S.C. § 1541 note); Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 89 (2015) (Thomas, J., concurring in judgment) (citing 49 U.S.C. § 24101 note); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 300 (2014) (Thomas, J., concurring) (citing 15 U.S.C. § 78j-1 note); Exec. Benefits Ins. Agency v. Arkison, 573 U.S. 25, 36 (2014) (citing 28 U.S.C. § 151 note); Nautilus, Inc. v. Biosig Instruments, Inc., 572 U.S. 898, 902 n.1 (2014) (citing 35 U.S.C. §§ 2 note, 111 note, 119 note); Paroline v. United States, 572 U.S. 434, 475 (2014) (Sotomayor, J., dissenting) (citing 18 U.S.C. § 2251 note); Daimler AG v. Bauman, 571 U.S. 117, 122, 141 (2014) (citing 28 U.S.C. § 1350 note); United States v. Kebodeaux, 570 U.S. 387, 392 (2013) (citing 10 U.S.C. § 951 note); Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 11 (2013) (citing 22 U.S.C. § 2751 note); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 117 (2013) (citing 28 U.S.C. § 1350 note); *id.* at 125 (Kennedy, J., concurring) (same); Clapper v. Amnesty Int'l U.S.A., 568 U.S. 398, 413 (2013) (citing 50 U.S.C. § 401 note); United States v. Alvarez, 567 U.S 709, 743 (2012) (Alito, J., dissenting) (citing 18 U.S.C. § 704 note); Dorsey v. United States, 567 U.S. 260, app. B at 283 (2012) (quoting a public law containing reference to 28 U.S.C. § 994 note); Mohamad v. Palestinian Auth., 566 U.S. 449, 451 (2012) (citing 28 U.S.C. § 1350 note); FAA v. Cooper, 566 U.S. 284, 297 (2012) (citing 5 U.S.C. § 552a note); Sackett v. EPA, 566 U.S. 120, 123 n.1 (2012) (citing 28 U.S.C. § 2461 note); Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 373, 383 (2012) (citing 47 U.S.C. § 227 note); Sorrell v. IMS Health Inc., 564 U.S. 552, 600 (2011) (citing 42 U.S.C. § 1320d-2 note); Chamber of Commerce v. Whiting, 563 U.S. 582, 590 (2011) (citing 8 U.S.C. § 1324a note); Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 n.75 (2011) (citing 8 U.S.C. § 1324a note); NASA v. Nelson, 562 U.S. 134, 145 (2011) (citing 44 U.S.C. § 2111 note); Holder v. Humanitarian Law Project, 561 U.S. 1, 7 (2010) (citing 18 U.S.C. § 2339B note); Kawasaki Kisen

of U.S. district court cases and found 514 cases citing statutory notes over the five-year period from 2014 to 2018.

¶37 Examining these cases more closely reveals that federal courts cite a wide variety of notes. Some of the more commonly cited acts that appear as statutory notes include the Torture Victim Protection Act,[121] the Terrorism Risk Insurance Act,[122] the Carriage of Goods by Sea Act,[123] the General Aviation Revitalization Act,[124] the Internet Tax Freedom Act,[125] and the Hyde Amendment.[126] Other statutory notes cited in case law include directions to agencies,[127] rules of construction,[128] effective dates,[129] findings and purposes,[130] and savings provisions.[131] Some notes even appear to be provisions that the OLRC may have considered "less than general or less than permanent" enough to become code sections, including many in the area of immigration and nationality law, such as the Nicaraguan Adjustment and Central American Relief Act[132] and the Cuban Refugee Adjustment Act of 1966.[133]

¶38 A closer look at these results reveals an interesting comparison between statutory notes in positive law titles and those in nonpositive law titles. In federal appellate courts, statutory notes in positive law titles were cited in 373 cases, while

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Kaisha Ltd. v. Regal-Beloit Corp., 561 U.S. 89, 93 (2010) (citing 46 U.S.C. § 30701 note); Astrue v. Ratliff, 560 U.S. 586, 595 (2010) (citing 28 U.S.C. § 2412 note); *id.* at 599 (Sotomayor, J., concurring) (citing 5 U.S.C. § 504 note); Rodearmel v. Clinton, 560 U.S. 950, 950 (2010) (citing 5 U.S.C. § 5312 note); Samantar v. Yousuf, 560 U.S. 305, 308 (2010) (citing 28 U.S.C. § 1350 note); Salazar v. Buono, 559 U.S. 700, 716 (2010) (citing 16 U.S.C. § 431 note); Noriega v. Pastrana, 559 U.S. 917, 920, 927 n.13 (2010) (Thomas, J., dissenting from denial of cert.) (citing 28 U.S.C. § 2241 note (2006)); Citizens United v. FEC, 558 U.S. 310, 413 (2010) (citing 2 U.S.C. § 437h note); Dist. Att'ys Office v. Osborne, 557 U.S. 52, 63 (2009) (citing 42 U.S.C. § 14,136 note); Boyle v. United States, 556 U.S. 938, 944 (2009) (citing 18 U.S.C. § 1961 note); AT&T Corp. v. Hulteen, 556 U.S. 701, 713 (2009) (citing 42 U.S.C. § 2000e note); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 506 (2009) (citing 47 U.S.C. § 303 note); Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi, 556 U.S. 366, 368 (2009) (citing 28 U.S.C. §§ 1605 note, 1610 note); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 259 n.6 (2009) (citing 42 U.S.C. § 1981 note); Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163, 175 (2009) (citing 42 U.S.C. § 2210 note); Negusie v. Holder, 555 U.S. 511, 540 (2009) (citing 8 U.S.C. § 1231 note); Summers v. Earth Island Inst., 555 U.S. 488, 490 (2009) (citing 16 U.S.C. § 1612 note); Davis v. FEC, 554 U.S. 724, 732 (2008) (citing 2 U.S.C. § 437h note); Boumediene v. Bush, 553 U.S. 723, 733 (2008) (citing 50 U.S.C. § 1541 note); Medellin v. Texas, 552 U.S. 491, 520 (2008) (citing 8 U.S.C. § 1231 note).

121. 28 U.S.C. § 1350 note.

122. 28 U.S.C. § 1610 note.

123. 46 U.S.C. § 30701 note.

124. 49 U.S.C. § 40101 note.

125. 47 U.S.C. § 151 note.

126. 18 U.S.C. § 3006A note.

127. California v. Azar, 911 F.3d 558, 578–79 n.6 (9th Cir. 2018) (quoting § 104 of HIPAA, codified at 42 U.S.C. § 300gg-92 note, requiring coordination of Secretaries of Treasury, Health and Human Services, and Labor).

128. Correa-Ruiz v. Fortuno, 573 F.3d 1, 9 (1st Cir. 2009) (quoting rule of construction found in 29 U.S.C. § 623 note).

129. Goodwin v. Reynolds, 757 F.3d 1216, 1218 n.1 (11th Cir. 2014) (citing the effective date of a 2011 amendment to 28 U.S.C. § 1441 note).

130. Alexander v. Wash. Metro. Area Transit Auth., 826 F.3d 544, 547, 550 (D.C. Cir. 2016) (quoting the findings and purposes of the ADA Amendments Act of 2008, codified at 42 U.S.C. § 12101 note).

131. Wood v. Comm'r of Soc. Sec., 861 F.3d 1197, 1204 (11th Cir. 2017) (citing savings provision of Equal Access to Justice Act, codified at 28 U.S.C. § 2412 note).

132. Pub. L. No. 105-100 (codified at 8 U.S.C. § 1101 note).

133. Pub. L. No. 89-732 (codified as amended at 8 U.S.C. § 1255 note).

those in nonpositive law titles were cited in 246 cases.[134] In federal district courts, 345 statutory note citations were to positive law titles while 172 were to nonpositive law titles. At the outset of our research, we had guessed that because of the nature of the amendatory process for positive law titles, statutory notes in these titles would have appeared much more frequently in case law than those in nonpositive law titles. While statutory notes from positive law titles were more common, the disparity was not as great as we expected. This important finding demonstrates that researchers cannot focus merely on notes in positive law titles, but must be on the lookout for statutory notes in nonpositive law titles as well.[135]

¶39 While surveying case law will provide some indication of the extent to which statutory notes are used in practice, citations tell only a fraction of the story. Likely, only a small portion of statutory notes will ever appear in court opinions. In order to get an accurate count of statutory notes, we identified textual patterns common to all statutory notes. While statutory notes cannot be identified by a particular title, they generally begin with the phrase "Pub. L. [public law number] provided that:" followed by a quotation of statutory text.[136] After identifying these patterns, we ran a Python script on the 2018 edition of the *United States Code* to extract all statutory notes and, after excluding short title and effective date statutory notes, found 14,522 statutory notes in the 2018 *United States Code*. Including short title and effective date statutory notes raises the total to 32,424.[137] Table 1 shows the breakdown of statutory notes by title of the *United States Code*, organized by the number of statutory notes, exclusive of short title and effective dates. The total number of statutory notes is also included, along with a size rank of each title so that researchers can compare the relative size to the number of statutory notes.[138] Positive law titles are marked with an asterisk.

¶40 This title breakdown can be helpful to researchers as they navigate different portions of the *United States Code*. Researchers working in title 10 (Armed Forces) or title 49 (Transportation), for example, are much more likely to encounter statutory notes than those focused on title 11 (Bankruptcy). This table provides additional evidence that statutory notes are just as prominent in nonpositive law titles as positive law titles. In fact, more than half of statutory notes are found in nonposi-

134. This total exceeds the number of cases citing statutory notes because some cases cite multiple statutory notes. *See, e.g.*, Vance v. Rumsfeld, 701 F.3d 193, 198, 201, 206 (7th Cir. 2012) (citing the Detainee Treatment Act, 10 U.S.C. § 801 note, and the Torture Victim Protection Act, 28 U.S.C. § 1350 note).

135. Statutory notes in title 8, Aliens and Nationality, made up nearly 40 percent of citations of nonpositive law notes in federal appellate cases and nearly 15 percent in federal district court cases. It is likely that statutory notes are prevalent in title 8 because the statutory provisions target groups of people and may not be considered generally applicable. Future researchers may want to explore further what impact, if any, this has on immigration law and policy.

136. Other versions include, "Act . . . provided that:" and "Section . . . provided that:."

137. At the beginning of our research, we estimated the number of statutory notes based on a search of the *United States Code* index. Searching for statutory notes in the 2012 *United States Code* index results in 44,491 entries for statutory notes, which we believed to be overinflated because index terms are indexed under more than one heading. The total of 32,424 statutory notes appears to be a plausible number based on the number of index entries.

138. The size rank was first used by Katz and Bommarito in 2010 and is based on the number of "tokens" in each title of the Code. "Tokens" are described as "contiguous strings of text, which are often words but may also be numbers, citations, or abbreviations not formally considered words." Katz & Bommarito, *supra* note 55, at 353. We used the Katz and Bommarito definition to update the rankings based on the 2018 U.S. Code.

Table 1

Statutory Notes, 2018 *United States Code*

United States Code title	Statutory Notes (Excluding Short Titles & Eff. Dates)	Total Statutory Notes	Size of Title Rank
42-The Public Health and Welfare	2280	5737	1
*10-Armed Forces	1922	2802	7
26-Internal Revenue Code	964	5909	2
*49-Transportation	844	1024	10
22-Foreign Relations and Intercourse	705	1158	8
15-Commerce and Trade	585	1242	4
16-Conservation	552	1036	3
*5-Government Organization and Employees	498	1036	17
*38-Veterans' Benefits	489	1317	13
7-Agriculture	445	888	5
12-Banks and Banking	388	839	6
21-Food and Drugs	362	654	11
*28-Judiciary and Judicial Procedure	327	562	27
50-War and National Defense	276	450	18
8-Aliens and Nationality	274	571	24
*23-Highways	271	375	31
*31-Money and Finance	269	394	29
33-Navigation and Navigable Waters	238	395	15
*18-Crimes and Criminal Procedure	229	571	16
2-The Congress	217	481	22
19-Customs Duties	211	478	14
20-Education	183	583	9
*46-Shipping	182	245	25
43-Public Lands	163	233	20
47-Telecommunications	141	257	26
29-Labor	128	376	12
*37-Pay and Allowances of the Uniformed Services	114	380	37
25-Indians	102	223	19
6-Domestic Security	96	152	28
*51-National and Commercial Space Programs	85	103	46
*14-Coast Guard	81	103	41
34-Crime Control and Law Enforcement	76	246	21
*44-Public Printing and Documents	68	114	43
*41-Public Contracts	64	87	38
30-Mineral Lands and Mining	59	123	23
*1-General Provisions	58	62	56

United States Code title	Statutory Notes (Excluding Short Titles & Eff. Dates)	Total Statutory Notes	Size of Title Rank
*39-Postal Service	58	125	44
48-Territories and Insular Possessions	58	97	34
5-Appendix	57	95	48
*40-Public Buildings, Property, and Works	56	75	35
*17-Copyrights	51	134	33
45-Railroads	46	141	30
*35-Patents	43	130	47
*36-Patriotic and National Observances, Ceremonies, and Organizations	40	51	36
*54-National Park Service and Related Programs	34	61	42
*13-Census	26	37	53
*11-Bankruptcy	25	83	32
*32-National Guard	23	32	50
52-Voting and Elections	17	67	40
*3-The President	15	24	52
24-Hosptials and Asylums	9	16	51
*4-Flag and Seal, Seat of Government, and the States	8	19	55
18-Appendix	5	12	49
11-Appendix	2	4	45
27-Intoxicating Liquors	2	5	54
28-Appendix	1	8	39
*9-Arbitration	0	2	57

tive law titles,[139] although this is partially because nonpositive law titles make up approximately three-quarters of the *United States Code*. It is important to note, however, that for many positive law titles, the number of statutory notes is larger than would be expected based on the size of the particular title. While this is true for some nonpositive law titles, it appears to be more true for positive law titles and gives credence to the idea that positive law titles increase the possibility for statutory notes because OLRC cannot add provisions to code sections themselves if provisions do not directly amend a positive law title.

¶41 An additional way to understand the extent of statutory notes is to examine the OLRC's classification table, known as Table III. Table III provides information about where each section of a public law was classified in the *United States Code*.[140] Table III is helpful for researchers who want to track where provisions of a public

139. Of 14,522 statutory notes (excluding short titles and effective dates), 8,642 are found in nonpositive law titles.

140. *About the Table III Tool*, OFF. L. REVISION COUNSEL: *UNITED STATES CODE*, https://uscode.house.gov/table3/table3explanation.htm [https://perma.cc/9RAJ-WJKA].

Table 2

Statutory Notes, 2012–2016

Year	# of Public Laws classified	# of statutory notes	Average notes per Public Law
2012	95	554	5.8
2013	84	674	8.0
2014	127	917	7.2
2015	81	971	12.0
2016	135	822	6.1
Total	522	3,938	7.5

law have gone once added to the Code, which also makes it a useful tool in understanding how many provisions end up as statutory notes. Because Table III provides information about statutory notes that have been repealed or eliminated, it is difficult to arrive at an accurate count of current notes that exist in the Code through a simple search.[141] We can look closely at certain years, excluding notes that have been repealed or eliminated, to get a snapshot of the number of statutory notes entering the Code during a particular time period. Over the five-year period, seen in Table 2, from 2012 to 2016, 3938 statutory notes were added to the *United States Code*. These notes came from 522 unique public laws that were classified to the *United States Code*, meaning that during this time period, each public law produced, on average, approximately 7.5 statutory notes. These numbers include short titles and effective dates, but comparing these numbers to the overall statutory note total of 32,424, we find that 12% of all statutory notes were added during this 5-year time period. It appears likely this trend will continue.

The Shadow Code

¶42 The structure and organization of the Code itself, with its division between code sections and statutory notes, fosters the idea that statutory notes are something less than law. This idea is so pervasive that OLRC points out multiple times on its website that the placement of a statutory provision in a statutory note does not affect its validity as law.[142] Court opinions show that federal judges and attorneys have at times misinterpreted the significance of statutory notes and how they operate.[143] Law librarians have even questioned whether statutory notes are valid

141. A search for *nt* in Table III results in 62,061 hits. The way Table III is set up makes it difficult to perform a simple search to eliminate false hits that occur when the status of the note is labeled as "Elim." (eliminated) or "Rep." (repealed).

142. *See About Classification*, *supra* note 61; *Detailed Guide*, *supra* note 1.

143. *See* Sanders v. Allison Engine Co., Inc., 703 F.3d 930, 939 n.6 (6th Cir. 2012) ("Section 4(f) of FERA is not codified in the text of § 3729, and is instead in the historical and statutory notes accompanying the section . . . The United States argues that this counsels against crediting the argument that the definitions in § 3729, which specifically apply for "purposes of this section," should be used to define terms used in § 4(f) or in the note to § 3729."); Schwier v. Cox, *supra* note 10, at

law.[144] This confusion is understandable because the division between laws in code sections and laws in statutory notes is not intuitive. The official print version of the United States Code even puts statutory notes in a smaller font, further obscuring their importance.[145]

¶43 The Code's structure casts a shadow over valid laws that exist in statutory notes, making them far more difficult to find. For example, a researcher could read the text of 29 U.S.C. § 213, the Fair Labor Standards Act provision referenced above that exempts certain employees from overtime compensation under 29 U.S.C. § 207, and have no idea that there is a statutory provision that removes a certain class of employees from this exemption. Without knowing better, this researcher would have no reason to stray beyond the text of the statute she has read. Fortunately, legal researchers can turn to other resources such as secondary sources, cases, and administrative materials to understand that this provision exists, but should this be necessary? Novice researchers would have little chance to discover this and other important provisions.

¶44 While the simple fact that some binding law appears in statutory notes at all is enough to obscure these provisions, several other factors push statutory notes further into the shadows. First, the classification process leads to the placement of similar provisions in both Code sections and statutory notes. This lack of consistency makes it difficult for researchers to know when they should look for statutory notes. Second, the placement of editorial and statutory notes together with no clear distinction makes it difficult for researchers to find statutory notes or to understand their importance. Finally, legal research systems, primarily Westlaw, hide statutory notes from researchers, making them nearly invisible unless a researcher knows where to look.

1288; Pennie v. Twitter, Inc., 281 F. Supp. 3d 874, 889 (N.D. Cal. 2017) (inferring that codification of statutory note necessary to amend another statutory provision); Sciortino v. Pepsico, Inc., 108 F. Supp. 3d 780, 797 n.5 (N.D. Cal. 2015) (court rejected defendant's position at oral argument that statutory note from Nutrition Labeling and Education Act should not merit weight); Murkledove v. Astrue, 635 F. Supp. 2d 564, 580 (N.D. Tex. 2009) ("To begin with, the 1985 enactment of a note cannot be used to change the clear language of the 1980 amendment of the EAJA."); Baez v. United States, 715 F. Supp. 2d 1165, 1178 (D. Or. 2010) (court disagreed with defendant that Cuban Refugee Adjustment Act was placed in statutory note by Congress); Kostan v. Ariz. Nat'l Guard, 50 M.S.P.R. 182 (1991) ("When the instant case was appealed to the Federal Circuit, the intervenor [National Guard Bureau] brought to the attention of the court an uncodified provision of the National Guard Technicians Act that was not considered in Gordon."); Appellant's Opening Brief, United States v. Morales-Hernandez, No. 18-10491 (9th Cir. May 11, 2020), 2020 WL 2543989, at *8 ("The *Karingithi* Court overlooked—because neither party addressed and the relevant law is not codified (or searchable) in Title 8 of the United States Code—that Congress *did* in fact address Immigration Court jurisdiction [in a statutory note]."); Brief of Appellee, Nat'l Home Eq. Mortg. Ass'n v. Face, 239 F.3d 633 (4th Cir. 2001) (Nos. 99-2331, 99-2386), 1999 WL 33613774, at *8 ("Defendants rely on an uncodified note appearing at 12 U.S.C. § 3801 to urge this court to strike down the OTS regulation, to refuse deference to its opinion, and to conclude the Virginia law governs AMTs with respect to limits on prepayment penalties."); Amandeep S. Grewal, *Legislative Entrenchment Rules in the Tax Law*, 62 ADMIN. L. REV. 1011, 1045 (2010) (explaining that the Tax Court in *Cap. One Fin. Corp. v. Comm'r* erroneously dismissed taxpayer's arguments based on an assumption that a provision in the Tax Code nullified provisions in a statutory note).

144. Youmans, *supra* note 70, at 590.

145. As it was before there was an official code, *see, e.g.*, 1 FEDERAL STATUTES ANNOTATED ii (William M. McKinney & Charles C. Moore eds., 1903) ("The notes, constituting the matter of the smaller type, are of course, the work of the editors.").

Inconsistency

¶45 First, the classification process does not allow for a definitive categorization of the types of provisions that appear as statutory notes. The Office of the Law Revision Counsel's website indicates that there are certain types of statutory notes normally classified as such, including "effective dates, short titles, savings, and statutory construction. Statutory notes also include provisions that are somewhat less than general or less than permanent, but still relate to existing Code sections, such as those requiring studies and reports, implementation of regulations, or the establishment of a task force."[146] While these types of provisions may *normally* be classified as statutory notes, the lack of a concrete rule leaves researchers in the precarious position of not knowing when a particular provision will be in a code section or a statutory note. This is not to say that OLRC does not apply its rules consistently. Classification is a complicated process that requires the application of many rules and precedents, and ultimately difficult decision-making. The inconsistency discussed here refers to the simple fact that statutory provisions of the same type can be found in both code sections and statutory notes throughout the Code.

¶46 There are many examples of each type of statutory provision listed above being found in both code sections and statutory notes, and in both positive and nonpositive law titles.[147] Title 29, for example, requires a study by the Secretary of Labor in § 624 but also in a note to § 622.[148] The Consumer Review Fairness Act (15 U.S.C. § 45b) is a good example of a statutory section that contains rules of construction, savings provisions, and an effective date, in addition to substantive law, in a code section.[149] Additionally, 15 U.S.C. § 45b contains definitions, while 15 U.S.C. § 45c's definitions are in a statutory note. This lack of consistency in location is one of the most vexing research problems surrounding statutory notes. Researchers must not only learn of the existence of statutory notes, but must also deal with the fact that there is no consistent rule regarding which types of provisions end up as statutory notes.[150]

¶47 The recent reclassification of title 34 of the *United States Code* illustrates this problem. In an effort to clarify the law in the area of crime control and law enforcement, the OLRC moved provisions from titles 18, 28, and 42[151] to an empty

146. *About Classification*, *supra* note 61.

147. *See, e.g.*, 2 U.S.C. § 5623, 2 U.S.C. § 182a note, 42 U.S.C. § 9652, 42 U.S.C. § 401 note (effective dates); 20 U.S.C. § 5981, 20 U.S.C. § 6301 note, 25 U.S.C. § 3321, 25 U.S.C. § 4001 note (short titles); 22 U.S.C. § 6615, 22 U.S.C. § 3657 note, 16 U.S.C. § 3643, 16 U.S.C. § 3102 note (savings provisions); 22 U.S.C. § 7104d, 22 U.S.C. § 2778 note, 8 U.S.C. § 1643, 8 U.S.C. §1324b note (statutory construction); 29 U.S.C. § 624, 29 U.S.C. § 622 note, 12 U.S.C. § 5227, 12 U.S.C. § 1843 note (studies/reports); 16 U.S.C. § 521h, 16 U.S.C. § 796 note, 15 U.S.C. § 78w, 15 U.S.C. § 1602 note (implementation of regulations); 42 U.S.C. § 280g-10, 42 U.S.C.A. § 1396a note (West 2019), 10 U.S.C. § 1794, 10 U.S.C. § 7431 note (task forces).

148. *Compare* 29 U.S.C. § 624, *with id.* § 622 note.

149. 15 U.S.C. § 45b.

150. This article does not head down the difficult road of determining which types of provisions, if any, *should* end up as statutory notes. It is very likely that some provisions, like short titles, have a place as statutory notes, but a broader discussion is needed to determine the benefits and drawbacks of such an approach. One possible approach is that followed by the Code of Federal Regulations, which only publishes regulations "having general applicability and legal effect." 44 U.S.C. § 1510; *see also* 1 C.F.R. § 8.1 (2020).

151. Titles 18 and 28 are positive law titles; title 42 is a nonpositive law title.

title 34.[152] In doing so, the OLRC was able to move 41 statutory notes into sections of the *United States Code*. These former notes comprised a variety of types of provisions, including findings,[153] rules of construction,[154] severability,[155] definitions,[156] and reports.[157] This should be seen as a positive step for researchers, who can now find these provisions more easily. At the same time, however, a number of statutory notes from title 42 remained as such, despite their similarity to other notes moved to sections in title 34.[158]

¶48 Researchers also confront inconsistency when acts that are obvious candidates for Code section placement, such as the Torture Victim Protection Act, do not directly amend positive law titles. Researchers looking for the Federal Advisory Committee Act, the Inspector General Act of 1978, or the Ethics in Government Act of 1978 shouldn't have to consider whether these important laws are in Code sections or an appendix to the Code, but they do. The mere fact that some substantive acts of general application such as these can end up in statutory notes or appendices should worry researchers. Luckily, after allowing these laws to languish for 40 years outside Code sections, the OLRC recently proposed a draft bill that would transfer these three acts into Code sections in title 5. Other important acts have not been so lucky. Unfortunately, as is the case with many positive law bills, this bill remains stalled in the House Committee on the Judiciary.[159]

Placement

¶49 Another reason statutory notes get lost is that they are lumped together with editorial notes. The lack of a clear distinction between the two makes them appear to be of the same value. While there is a pattern to identify statutory notes,[160] it is not intuitive or clear. This makes statutory notes less findable for all but extremely well-informed researchers. Compounding this is the fact that editorial notes appear before statutory notes. Researchers who read past the statute will find headings such as "Historical and Revision Notes" or "References in Text," which provides little incentive or warning that statutory text may lie ahead. In some cases, editorial notes are extensive and, at first glance, provide similar information to statutory notes. The editorial notes to 8 U.S.C. § 1101, for example, include "references in text," "codification," and "amendment" notes and span eight pages of the print Code before they give way to statutory notes.[161] At least five of these pages are

152. Title 34 had been vacant since it was repealed in 1956, and its contents regarding the Navy moved to title 10. *See* An Act To revise, codify, and enact into law, title 10 of the United States Code, "Armed Forces", and title 32 of the United States Code, entitled "National Guard," ch. 1041, 70A Stat. 1 *et seq.* (1956).

153. 34 U.S.C. § 30501; *id.* § 40902.

154. *Id.* § 30506.

155. *Id.* § 30505.

156. *Id.* § 40903.

157. *Id.* §§ 41301, 41306, 40721.

158. *See, e.g., id.* § 10651 note (findings); *id.* § 10321 note (statutory construction); *id.* § 40701 note (reports to Congress).

159. *Positive Law Codification, Title 5*, United States Code, OFF. L. REVISION COUNSEL: *UNITED STATES CODE*, http://uscode.house.gov/codification/t5/index.html [https://perma.cc/3R2V-YB5D].

160. *See supra* note 113 and accompanying text.

161. *Compare* 8 U.S.C. § 1101, at 593–605 (13 pages of statutory text), *with id.* § 1101 note, at

amendment notes that quote portions of public laws to tell researchers what has been added or deleted over the years, making them look quite similar to statutory notes. All of this, in addition to the fact that there is no specific heading to label the break between editorial and statutory notes, makes it more difficult for researchers to appreciate the importance of statutory notes and to discover them.

¶50 Another problem with placement is that the Code sections to which statutory notes are attached do not always provide legal researchers with notice that statutory notes may be lurking. Much of this problem has to do with freestanding provisions that may or may not relate closely to sections of the Code that already exist. The OLRC does its best to place statutory notes with relevant code sections, but it can be difficult to find a fit that is useful to researchers. Because of this, OLRC often adds statutory notes to the first section of a statutory chapter. This causes two problems. First, these beginning sections can be the home for many statutory notes, making them even more difficult to sift through. For example, 8 U.S.C. § 1101 has 52 statutory notes, without counting short title and effective date notes. Second, beginning sections are often definition sections that may be unlikely candidates for housing important statutory notes. The Carriage of Goods by Sea Act, for example, a law that appears frequently in appellate court decisions, is a note to a Code section that contains one definition.[162] Inexperienced researchers may not think to check for statutory notes in a common section such as this.

Legal Research Providers

¶51 While some scholars have highlighted the existence of statutory notes, none has looked closely at how legal research systems help or hinder researchers in finding applicable statutory notes. Michael Lynch came the closest in 1997 when he noted that one statutory note he examined was found easily in the *United States Code* index while another was not.[163] Since that time, legal research has moved primarily online, and the way that legal research vendors present information may be less consistent across systems than it was in the days of print. This is especially true as more legal research systems enter the market. Examining how various legal research systems allow for browsing, searching, and index access to statutory notes can help alert researchers to limitations in certain research systems and can help uncover the best ways to research statutory notes.

¶52 Shortly after President Donald Trump fired FBI Director James Comey and began the search for his replacement, Professor Will Baude[164] pointed out that the text of 28 U.S.C. § 532 states that "[t]he Attorney General may appoint a Director of the Federal Bureau of Investigation."[165] Puzzled because of news reports that the President was the one with authority to appoint the director, Baude turned to the

606–13 (eight pages of editorial notes on references in text, amendment, etc.), *and id.* § 1101 note, at 613–36 (24 pages of statutory notes).

162. *See* 46 U.S.C. § 30701.

163. Lynch, *supra* note 10, at 79–80. Lynch ultimately concluded that determining whether the index was a good locator of statutory notes would take a larger study. *Id.* at 80.

164. We credit Baude's article, William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1 (2015), as the inspiration for this article's title.

165. Will Baude, Opinion, *Reminder: The* United States Code *Is Not the Law*, Wash. Post: Volokh Conspiracy (May 15, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/05/15/reminder-the-united-states-code-is-not-the-law/?utm_term=.dd2a8177d732 [https://perma.cc/8HWB-A5NU].

notes of 28 U.S.C. § 532 to find Public Law 90-351, which gave the President power to appoint an FBI director, "by and with the advice and consent of the Senate."[166] After alerting readers to this example of the fact that the *United States Code* does not contain all law, Baude points out that "other than a momentary confusion, nothing much ended up turning on this—especially since you can find the reference in the formal notes to the now-obsolete Section 532."[167] But what if finding the formal notes is not so easy? Baude links to Cornell Law School's Legal Information Institute website, which has a tab for the statutory text and a tab for notes, making the notes relatively easy to find if you know they're potentially important.[168] The printed official version of the *United States Code* provides the notes directly after the statutory text, although the mixture of editorial notes and statutory notes can cause confusion for the researcher. Most legal research providers follow one of these options for presenting *United States Code* notes: tabs[169] or after-text.[170]

¶53 Westlaw is the only major legal research provider that breaks the mold here, but not in a good way. Westlaw's approach to presenting statutory notes makes them much more difficult to find. Take 28 U.S.C. § 532 as an example. The trend of Westlaw's approach to statutes since it rolled out WestlawNext has been to clear up the statutory text page. Case annotations (called "Notes of Decisions" in Westlaw) and other editorial content are presented via a variety of tabs. There are benefits to being presented with only the statutory text of a *United States Code* section. Since "we're all textualists now,"[171] it makes sense for researchers to focus on the text first and then move on to annotations and legislative history. But, as we've discussed, sometimes the text isn't in a *United States Code* section, but in statutory notes, and these are obscured in Westlaw.

¶54 When presented with a *United States Code* section like 28 U.S.C. § 532 in Westlaw (see figure 2), there is no indication on the face of the page that statutory notes even exist. Instead, researchers are presented with the section text and a number of tabs that lead to other related documents. There are tabs for "Notes of Decisions" (which most legal researchers should recognize as containing case annotations), "History," "Citing References," and "Context & Analysis." None of these identifiers gives researchers a good idea of whether there are statutory notes and where to find them. Researchers may think "Context & Analysis" is the right tab, but this simply leads to references to secondary sources and applicable Topics and Key Numbers. "History" is, in fact, the tab that eventually leads the researcher to statutory notes—which is far from obvious.

166. *Id.*

167. *Id.* That said, putting notes in a tab may make them more difficult for certain users to find.

168. *See id.*

169. *See, e.g.*, Cornell Law Sch. Legal Info. Inst., *28 U.S. Code § 532. Director of the Federal Bureau of Investigation*, LAW.CORNELL.EDU, https://www.law.cornell.edu/uscode/text/28/532?qt-us_code_temp_noupdates=1#qt-us_code_temp_noupdates [https://perma.cc/M2HE-BFCT].

170. Lexis Advance, Fastcase, Casemaker (adding these are "Notes from the Office of Law Revision Counsel"), Casetext, and Bloomberg Law. At the time of this writing, Ross Intelligence did not include any notes in their *United States Code* database.

171. Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes, at 8:09 (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation [http://perma.cc/3BCF-FEFR].

Figure 2

28 U.S.C.A. § 532 as presented on Westlaw

Reprinted with permission of Thomson Reuters

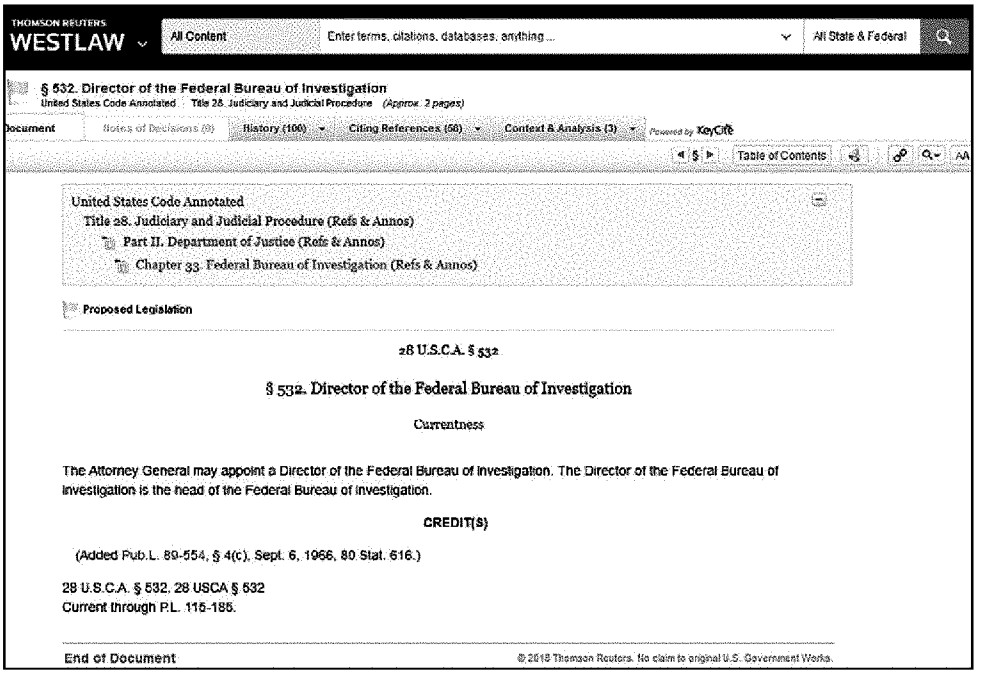


Figure 3

28 U.S.C.A. § 532's History Tab Drop-Down Menu in Westlaw

Reprinted with permission of Thomson Reuters

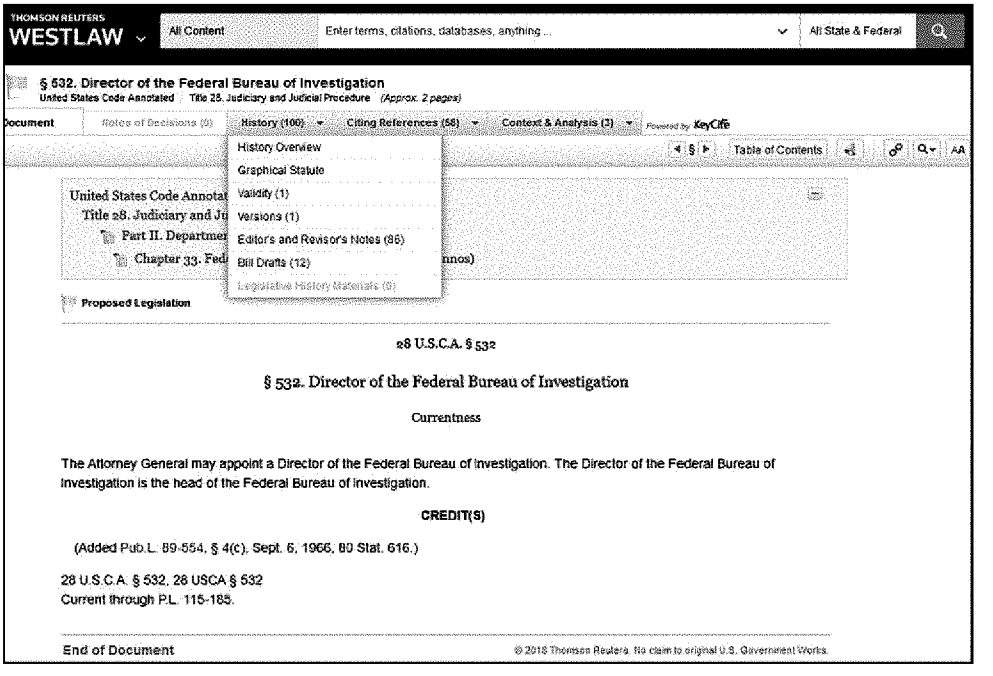
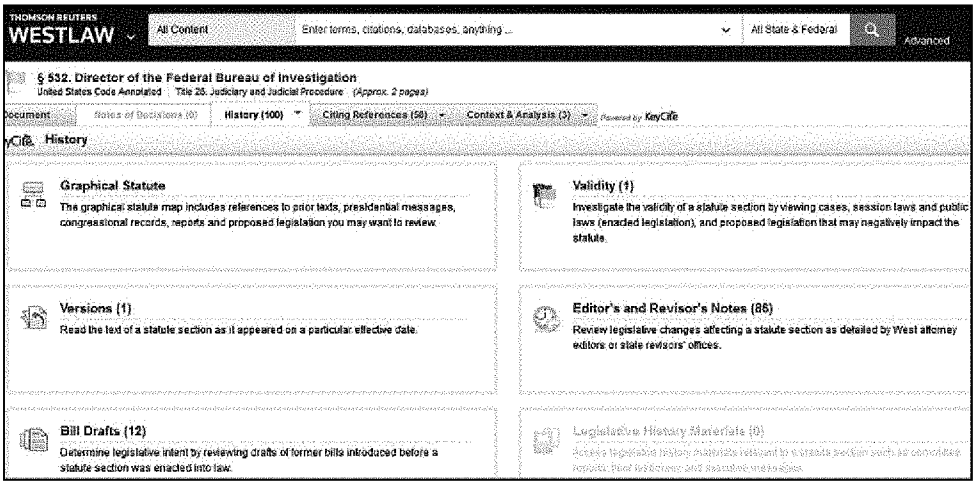


Figure 4
28 U.S.C.A. § 532's History view in Westlaw
Reprinted with permission of Thomson Reuters



¶55 Hovering over the "History" tab (see figure 3), researchers are given a list of subsections that includes "Historical Overview," "Graphical Statute," "Validity," "Versions," "Editor's and Revisor's Notes," "Bill Drafts," and "Legislative History Materials." Again, there is no clear winner here. Researchers who understand the existence of statutory notes may select "Editor's and Revisor's Notes," but those researchers are likely few.

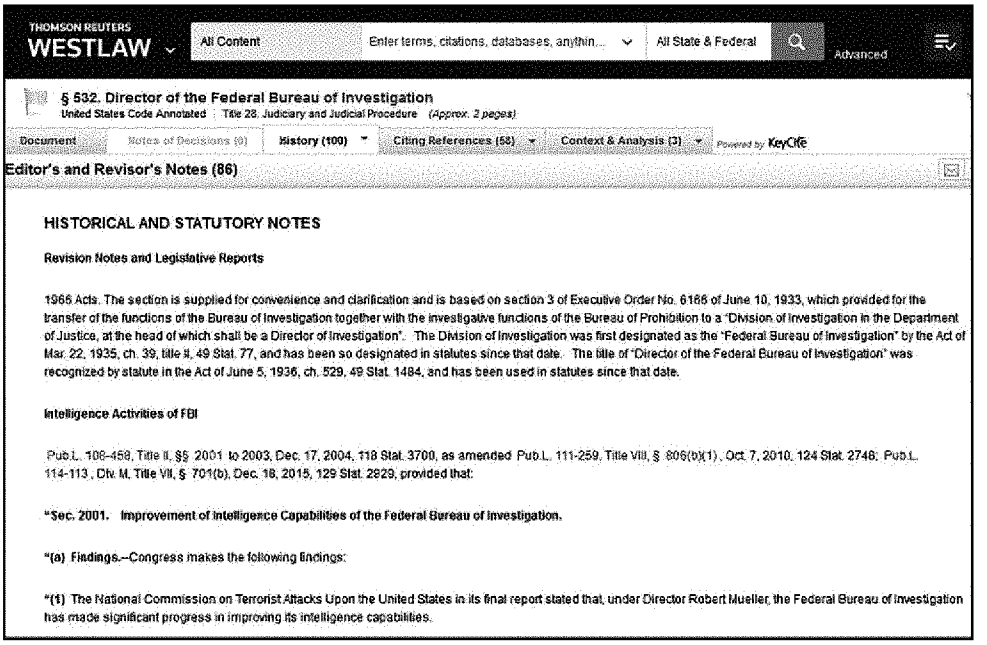
¶56 Alternatively, researchers can click directly on the "History" tab, which gives a description of each of these categories (see figure 4). This may lead researchers further away from finding statutory notes, however, because the description for "Editor's and Revisor's Notes" states this content will allow researchers to "review legislative changes affecting a statute section as detailed by West attorney editors or state revisors' offices." That may be true for state codes, but is inaccurate with regard to the *United States Code*. The notes for *United States Code* sections are not created by West attorney editors but by the OLRC. Additionally, while the phrase "Editor's and Revisor's Notes" may technically be correct for editorial notes, it's unlikely to help most researchers who are unfamiliar with the process of the creation of the *United States Code* and the OLRC's role.

¶57 Clicking on "Editor's and Revisor's Notes" takes researchers to a reproduction of the Historical and Revision Notes that are included with the official *United States Code*, which includes statutory notes (see figure 5).[172] Interestingly, at this point Westlaw does more accurately describe them as "Historical and Statutory Notes," after the more general "Editor's and Revisor's Notes" heading.[173]

172. While the notes for 28 U.S.C. § 532 in Westlaw are a replica of the print, many other note sections in Westlaw add legislative reports before the official notes. *See, e.g.*, 8 U.S.C. § 1101 note.

173. After this article was posted on SSRN, Westlaw did away with the label of "Historical and Statutory Notes" and began using more specific labels, such as "Historical Notes," "Statutory Notes," and "Savings Provisions," to refer to different types of notes. We applaud Westlaw for moving in the direction of trying to clarify this confusing research area. We note, however, that there is still a

Figure 5
28 U.S.C.A. § 532's "Editor's and Revisor's Notes" in Westlaw
Reprinted with permission of Thomson Reuters



¶58 Understanding the importance and existence of statutory notes can be difficult enough when this content appears directly after a Code section, but when they are hidden from view, as they are when browsing the *United States Code Annotated* in Westlaw, researchers who do not know about statutory notes are at a serious disadvantage. Even researchers familiar with statutory notes may find it difficult to locate them or to remember to check for them when they are buried within Westlaw. Missing a statutory note can mean missing a relevant and meaningful provision of law. As detailed below, Westlaw should consider some revisions to its presentation of statutory notes to better assist legal researchers.

Research

¶59 Federal law researchers should be familiar with statutory notes and how to find them. Unfortunately, legal researchers have been given little guidance in locating statutory notes. No current legal research text that the authors are aware of discusses strategies for finding statutory notes.[174] Most legal research texts today don't mention

ways to go as some categories, such as "Savings Provisions," are themselves statutory notes and should be labeled as such.

174. Marjorie Dick Rombauer's *Legal Problem Solving*, last published in 1991, provides this guidance: "The variety of sometimes crucial information that may be provided in these fineprint notes is such that you should always scan all the notes to consider possible relevance to your problem." MARJORIE DICK ROMBAUER, LEGAL PROBLEM SOLVING 232 (5th ed. 1991).

statutory notes at all, and those that do touch on the topic do so only briefly.[175] In the balance of this article, we enumerate certain general principles that legal researchers should be familiar with to research statutory notes. We then examine useful research tools, including secondary sources, statute compilations, searching, and indexes that should be used in statutory notes research, and identify limitations.

General Principles

¶60 With a research subject as unique as statutory notes, it's useful to begin with a summary of general principles, which have been explored more fully above. Researchers who understand these principles will be better prepared to identify and find statutory notes in their research.

Statutory notes exist and are law.

¶61 Researchers must understand that not all notes in the *United States Code* are editorial. Some contain law that may be relevant to their case. The placement of a provision of law as a statutory note does not affect its validity.[176]

Statutory notes are identifiable—if you know what to look for.

¶62 While difficult to spot at first glance, statutory notes do have a somewhat consistent pattern that researchers can use to identify them. They are often introduced by a unique heading that describes their public law of origin. They then identify the citation beginning with the public law number, followed by "provided" or "provided that," and then a quotation of the statutory provision. For example, *Pub. L. 102-256, Mar. 12, 1992, 106 Stat. 73, provided that: ". . ."*

Statutory notes appear in both positive and nonpositive law titles.

¶63 While statutory notes *tend* to appear more often in positive law titles, there are many statutory notes in nonpositive law titles as well.

All types of provisions can be Code sections or statutory notes.

¶64 Researchers should not be fooled into thinking certain types of provisions always show up in either statutory notes or Code sections. Because of historical preference or a focus on act-Code coherence, there is no way to say definitively that a certain type of provision always shows up as a statutory note or a Code section.

Know your research service and helpful research sources.

¶65 The presentation of statutory notes differs from vendor to vendor. Researchers must be aware of how their provider displays (or hides) statutory notes. Researchers should also be familiar with research sources that help identify statutory notes.

Secondary Sources

¶66 Because statutory notes are in the shadows of traditional code research, secondary sources can be an extremely valuable way to find some notes. Secondary

175. *See* J.D.S. ARMSTRONG & CHRISTOPHER A. KNOTT, WHERE THE LAW IS 40–45 (4th ed. 2013) (briefly discussing statutory notes); KENT C. OLSON, PRINCIPLES OF LEGAL RESEARCH 79 (2d ed. 2015) (mentioning statutory notes).

176. *Detailed Guide*, *supra* note 1.

sources provide researchers with analysis of a particular research topic and citations to relevant primary sources. While the depth and quality of individual secondary sources varies, experts regularly suggest beginning research with these sources to leverage work that has already been done.[177] Secondary source authors are often experts in their fields, which means they should be familiar with the nuances of the topic and legislation that affects it. These qualities lend themselves well to identifying and being familiar with provisions found in statutory notes.

¶67 Information on the Torture Victim Protection Act, for example, can be found in multiple secondary sources. Treatises like Wright and Miller's *Federal Practice and Procedure* and *Litigating International Torts in U.S. Courts*, legal encyclopedias like *American Jurisprudence, 2d* and *Corpus Juris Secundum*, and traditional research tools such as *Causes of Action* and *American Law Reports* all discuss the Torture Victim Protection Act.[178] Researching by subject in these secondary sources would lead researchers to this important cause of action and alert them to the fact that it is found in a statutory note. This would likely be a much quicker solution to finding this statutory note than searching the Code.

¶68 While secondary sources can be useful tools for finding statutory notes, they are not without limitations. Some topics of interest simply are not covered in relevant secondary sources. Additionally, certain statutory notes that are only part of a larger act, such as implementations of regulations or rules of construction, may not be singled out in a secondary source. So, while researchers should use secondary sources to be directed to some statutory notes, they cannot rely on them entirely to direct them to all statutory notes. Researchers should be familiar with important secondary sources in their research area and use them when possible.

Statute Compilations

¶69 Another useful research tool to find some statutory notes is a statute compilation. Statute compilations are unofficial documents that "incorporate[] the amendments made to the underlying statute since it was originally enacted."[179] In other words, these statute compilations start with a complete statute and bring in all subsequent amendments to make the underlying law current. They are distinct from the *Statutes at Large* in that they meld multiple public laws to state only the law that is currently in force. They are different from the *United States Code* in that the law is kept together rather than scattered throughout the Code and the original title and session law section numbering is retained. Statute compilations can be thought of as an intermediate step between the *Statutes at Large* and the *United States Code* and are primarily created for major acts otherwise found in nonpositive

177. *See, e.g.*, Shawn G. Nevers, *Smart Researchers Save Time by Starting with Legal Treatises*, STUDENT LAW., Dec. 2009, at 8, 8; OLSON, *supra* note 175, at 309; DEBORAH A. SCHMEDEMANN ET AL., THE PROCESS OF LEGAL RESEARCH 59 (9th ed. 2016).

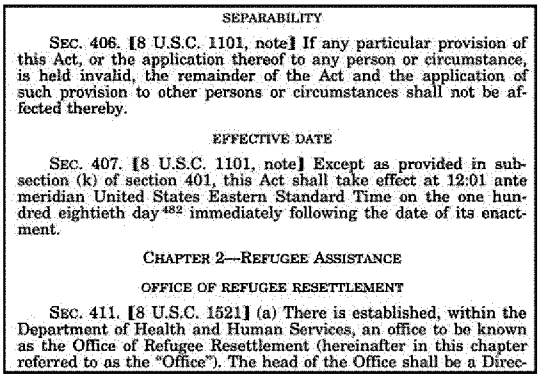
178. THOMAS A. DICKERSON ET AL., LITIGATING INTERNATIONAL TORTS IN U.S. COURTS § 13:3 (2017); 14A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3661.4 (4th ed. 2013); 3C AM. JUR. 2D *Aliens and Citizens* § 2099 (2014); 3 C.J.S. *Aliens* § 178 (2013); 21 CAUSES OF ACTION 2D 327 (2003); James L. Buchwalter, Annotation, *Construction and Application of Torture Victim Protection Act of 1991, 28 U.S.C.A. § 1350 note*, 199 A.L.R. FED. 389 (2005).

179. House Office of the Legislative Counsel, *About Statute Compilations*, GOVINFO.COM, https://www.govinfo.gov/app/collection/comps [https://perma.cc/FRF6-JKVA].

law titles of the Code.[180] The Consumer Product Safety Act, for example, has been amended many times since its enactment in 1972. Looking at the *Statutes at Large*, a researcher would have to find the original Act and all later amendments in various volumes of the *Statutes at Large* and then piece them together. A statute compilation brings these changes together. Statute compilations are produced by several different groups, including the House Office of the Legislative Counsel (HOLC), federal agencies, and private publishers.[181]

¶70 One benefit of using a statute compilation in researching statutory notes is that provisions of law that were part of the original act that were moved to statutory notes are returned to their original placement.[182] For example, § 406 of the INA contains a separability provision and § 407 contains an effective date provision that were both classified as statutory notes to 15 U.S.C. § 1101. In the HOLC's statute compilation of the INA, both of these provisions are included as sections with a reference to where they are found in the *United States Code* (see figure 6).

Figure 6
Portion of Immigration and Nationality Act—HOLC[183]



SEPARABILITY

SEC. 406. [8 U.S.C. 1101, note] If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

EFFECTIVE DATE

SEC. 407. [8 U.S.C. 1101, note] Except as provided in subsection (k) of section 401, this Act shall take effect at 12:01 ante meridian United States Eastern Standard Time on the one hundred eightieth day[482] immediately following the date of its enactment.

CHAPTER 2—REFUGEE ASSISTANCE

OFFICE OF REFUGEE RESETTLEMENT

SEC. 411. [8 U.S.C. 1521] (a) There is established, within the Department of Health and Human Services, an office to be known as the Office of Refugee Resettlement (hereinafter in this chapter referred to as the "Office"). The head of the Office shall be a Direc-

¶71 Perhaps an even more useful research feature is that statute compilations often refer researchers to statutory note provisions that are not part of the underlying act but are closely related.[184] In essence, these notes serve a similar function to statutory notes in the *United States Code*, but statute compilations generally make these notes easier to find and more clearly show that they are valid law. The HOLC's INA compilation, for example, includes the provision that affects the interpretation of 8 U.S.C. § 1101(a)(27)(I) and is included as a note to 8 U.S.C. § 1101, as shown in figure 7. This INA compilation provides a footnote at the beginning of the sec-

180. Of course, unlike the *Statutes at Large* or the *United States Code*, these statute compilations are not official.

181. *See* Jarrod Shobe, *Codification and the Hidden Work of Congress*, __ UCLA L. REV. ___ (forthcoming 2020) (manuscript at 36), https://ssrn.com/abstract=3361281 [https://perma.cc/M23X-EL36].

182. *Id.* at 37–38.

183. Immigration and Nationality Act, As Amended Through P.L. 116-133, Enacted March 26, 2020, https://www.govinfo.gov/content/pkg/COMPS-1376/pdf/COMPS-1376.pdf [https://perma.cc/W958-XL27].

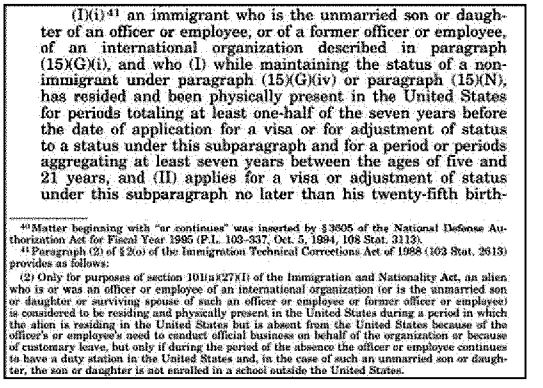
184. These notes are often part of an amendment to the underlying public law but do not amend the public law directly.

tion alerting the reader that this change came from the Immigration Technical Corrections Act of 1988. Because the footnote is placed with the relevant subsection instead of at the end of an extremely long section, the researcher can more easily understand the applicability of the note. The note also stands alone rather than being encumbered by a number of other editorial and statutory notes.[185]

¶72 In this example, the statutory note applies directly to the INA provision referred to; in other instances, one provision of an amending public law may directly amend the act while other provisions do not. These additional provisions are added as statutory notes to the *United States Code*, and some statute compilations will include them near the added provision. In the example in figure 8, the researcher is alerted to the fact that subsection (h) was added to the Securities and Exchange Act of 1934 by a certain provision of Public Law 103-202. The compilation footnote then explains that other related provisions—set out as statutory notes in the *United States Code*—were part of the same public law and provides the text of these provisions and their *United States Code* citations.

¶73 Researchers should be familiar with statute compilations and use them when available. But, like treatises and topic guides, statute compilations have some limita-

Figure 7
Immigration and Nationality Act—HOLC



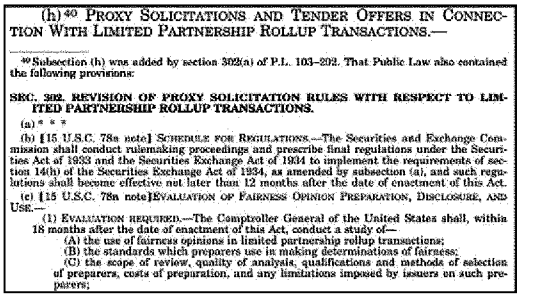
(I)(i)[41] an immigrant who is the unmarried son or daughter of an officer or employee, or of a former officer or employee, of an international organization described in paragraph (15)(G)(i), and who (I) while maintaining the status of a nonimmigrant under paragraph (15)(G)(iv) or paragraph (15)(N), has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of application for a visa or for adjustment of status to a status under this subparagraph and for a period or periods aggregating at least seven years between the ages of five and 21 years, and (II) applies for a visa or adjustment of status under this subparagraph no later than his twenty-fifth birth-

[40] Matter beginning with "or continues" was inserted by § 3505 of the National Defense Authorization Act for Fiscal Year 1995 (P.L. 103-337, Oct. 5, 1994, 108 Stat. 3113).

[41] Paragraph (2) of § 2(o) of the Immigration Technical Corrections Act of 1988 (103 Stat. 2613) provides as follows:

(2) Only for purposes of section 101(a)(27)(I) of the Immigration and Nationality Act, an alien who is or was an officer or employee of an international organization (or is the unmarried son or daughter or surviving spouse of such an officer or employee or former officer or employee) is considered to be residing and physically present in the United States during a period in which the alien is residing in the United States but is absent from the United States because of the officer's or employee's need to conduct official business on behalf of the organization or because of customary leave, but only if during the period of the absence the officer or employee continues to have a duty station in the United States and, in the case of such an unmarried son or daughter, the son or daughter is not enrolled in a school outside the United States.

Figure 8
Securities and Exchange Act of 1934—HOLC



(h)[40] PROXY SOLICITATIONS AND TENDER OFFERS IN CONNECTION WITH LIMITED PARTNERSHIP ROLLUP TRANSACTIONS.—

[40] Subsection (h) was added by section 302(a) of P.L. 103-202. That Public Law also contained the following provisions:

SEC. 302. REVISION OF PROXY SOLICITATION RULES WITH RESPECT TO LIMITED PARTNERSHIP ROLLUP TRANSACTIONS.

(a) * * *

(b) [15 U.S.C. 78n note] SCHEDULE FOR REGULATIONS.—The Securities and Exchange Commission shall conduct rulemaking proceedings and prescribe final regulations under the Securities Act of 1933 and the Securities Exchange Act of 1934 to implement the requirements of section 14(h) of the Securities Exchange Act of 1934, as amended by subsection (a), and such regulations shall become effective not later than 12 months after the date of enactment of this Act.

(c) [15 U.S.C. 78n note] EVALUATION OF FAIRNESS OPINION PREPARATION, DISCLOSURE, AND USE.—

(1) EVALUATION REQUIRED.—The Comptroller General of the United States shall, within 18 months after the date of enactment of this Act, conduct a study of—

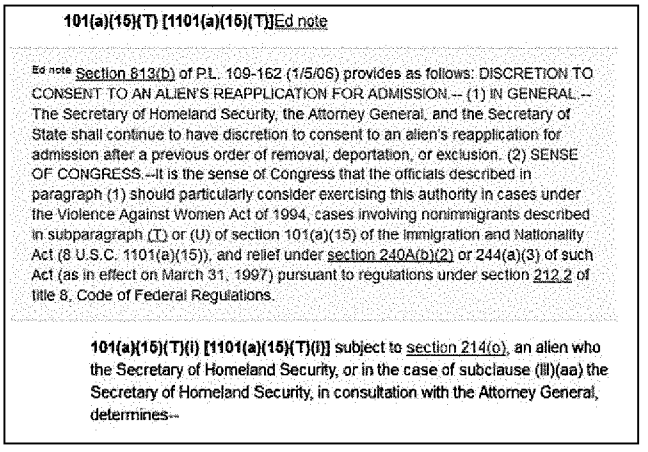
(A) the use of fairness opinions in limited partnership rollup transactions;

(B) the standards which preparers use in making determinations of fairness;

(C) the scope of review, quality of analysis, qualifications and methods of selection of preparers, costs of preparation, and any limitations imposed by issuers on such preparers;

185. *See supra* notes 161–62 and accompanying text.

Figure 9
Immigration and Nationality Act—AILA
(Image from AILALink, the American Immigration Lawyers Association's subscription database.)


101(a)(15)(T) [1101(a)(15)(T)]Ed note

Ed note Section 813(b) of P.L. 109-162 (1/5/06) provides as follows: DISCRETION TO CONSENT TO AN ALIEN'S REAPPLICATION FOR ADMISSION.-- (1) IN GENERAL.-- The Secretary of Homeland Security, the Attorney General, and the Secretary of State shall continue to have discretion to consent to an alien's reapplication for admission after a previous order of removal, deportation, or exclusion. (2) SENSE OF CONGRESS.--It is the sense of Congress that the officials described in paragraph (1) should particularly consider exercising this authority in cases under the Violence Against Women Act of 1994, cases involving nonimmigrants described in subparagraph (T) or (U) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)), and relief under section 240A(b)(2) or 244(a)(3) of such Act (as in effect on March 31, 1997) pursuant to regulations under section 212.2 of title 8, Code of Federal Regulations.

101(a)(15)(T)(i) [1101(a)(15)(T)(i)] subject to section 214(o), an alien who the Secretary of Homeland Security, or in the case of subclause (III)(aa) the Secretary of Homeland Security, in consultation with the Attorney General, determines--

tions. First, statute compilations are not created for acts found in positive law titles of the Code.[186] Therefore, research on statutory notes in positive law titles—a majority of notes found in our survey of notes cited in federal appellate courts—would not be benefited by looking at statute compilations. Second, statute compilations are most often created for large, complex laws that are amended frequently. While this is extremely helpful for acts such as the INA or the Social Security Act, smaller acts such as the BOTS Act are unlikely to have their own statute compilation. Third, researchers must know where they need to look before statute compilations can help them find statutory notes—they must know in which haystack to look before effectively searching for their needle.[187] This makes statute compilations quite valuable for researchers who know they will be looking amidst the INA or the Securities and Exchange Act, but for researchers who aren't that far along, statute compilations may be of less help initially. Finally, not all statute compilations are created equal. While the text of the acts are the same across statute compilations, the statutory notes that are included can be different. For example, as shown in figure 7, the HOLC version of the INA contains a statutory note pertaining to § 101(a)(27)(I). The American Immigration Lawyers Association's INA compilation, popular among practitioners, does not include this statutory note. It does, however, include a statutory note relevant to § 101(a)(15)(T), shown in figure 9, that the HOLC version does not. The differences between statute compilations mean researchers cannot be assured that they are seeing all relevant statutory notes when using a statute compilation.

Searching

¶74 Searching the *United States Code* in the various commercial research systems does yield results from statutory notes in addition to section text. A researcher looking for information on the appointment of the director of the FBI could run a

186. *See* House Office of the Legislative Counsel, *supra* note 179.
187. *See* Thomas Keefe, *Finding Haystacks: Context in Legal Research*, 93 ILL. B.J. 484 (2005).

search for something like *director /s "federal bureau of investigation" /s appoint!*[188] and be led to 28 U.S.C. § 532 within the first few results, depending on the system. Because the statutory text is followed by the notes, a researcher can look for the highlighted search terms and see them in full. This is true even on Westlaw, which does not initially show the notes with the statute.[189] The fact that running a search does bring back statutory notes in search results, however, does not alleviate the problem that arises if a researcher does not understand the importance of statutory notes. Here, for example, the highlighted search terms show up in the text of 28 U.S.C. § 532 as well as in the notes. Unless a researcher understands the importance of statutory notes, she may never venture below the code section text.

¶75 However, statutes don't always lend themselves to effective searching. Statutory language is often technical, and a legal researcher often must have the precise language to find relevant results,[190] especially if statutory searching is not aided by annotations.[191] Statutes are usually situated in a statutory scheme that is most easily explored by browsing.[192] Because statutory notes are not always directly related to the code section they are associated with, it isn't enough to be led by a search to one code section and then browse the rest of the statutory scheme to discover the law. More often, researchers must hit a statutory note precisely with a search or they will miss it altogether without other research strategies.

Index

¶76 While searching has become the preferred method of legal research these days, there is something to be said for the use of indexes when looking for statutory notes. Because of the technical language used in statutes, legal research textbooks consistently encourage the use of indexes when dealing with statutory research.[193]

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188. Of course, among the many providers, the exact Boolean symbols for truncation, proximity, etc., will slightly vary.

189. When research for this article began, a search in Westlaw retrieved only portions of the statutory notes that contained the search terms. The note provisions were divorced from any context and gave little guidance about where they came from. Additionally, paragraphs with matching search terms were simply listed one after another with no separation between the ending and beginning of different public laws. For example, the search referenced in this paragraph provided hits in six different paragraphs that were listed one right after another. We applaud Westlaw for improving its presentation of search results that include statutory notes.

190. *See* OLSON, *supra* note 175, at 63 (explaining that wording of statutes is often "more vague and technical than language in other legal writing," making it more difficult to come up with search terms).

191. In some instances, discovering statutory notes via search is aided by annotations. The Torture Victim Protection Act, for example, has a number of case annotations in Westlaw and Lexis that are included when searching the Code. While case annotation references to the Act are mixed with annotations referencing the Alien Tort Statute (the law contained in § 1350 itself), they can still be useful for exposing the statutory note. Many statutory notes, however, have never been cited by courts. A lack of court citations—with their richer and more varied descriptive text—makes discovery of statutory notes (as well as code sections) via keyword searching much more difficult.

192. *See* ARMSTRONG & KNOTT, *supra* note 175, at 15–16 ("[B]rowsing the Code will play an important part in statutory research, as sections proximate to a retrieved section will quite probably also be relevant to a researcher's concerns.").

193. *See id.* at 15 ("The most efficient way to locate statutes pertaining to a particular set of circumstances is through a code index. Thus, the very first step in most legal research using primary materials is to consult the index of the appropriate statutory code."); MERSKY & DUNN, *supra* note 28, at 177; OLSON, *supra* note 175, at 63 (explaining that despite some flaws, "an index may nonetheless allow you to zero in on statutes that are directly on point more quickly than a full-text keyword search"); AMY SLOAN, BASIC LEGAL RESEARCH 172 (6th ed. 2015).

Statutory notes are no exception to this. As mentioned above, the General Index to the *United States Code* contains more than 44,000 entries that reference statutory notes.[194] These entries can often be much more accessible to a researcher than trying to construct a search. For example, instead of coming up with a precise search, a researcher could go to the index and find a section for "Federal Bureau of Investigation" and a subsection for "Director," under which he or she will find a number of citations to relevant *United States Code* sections. Entries for "compensation," "confirmation," and "succession to office," among others, provide citations to statutory notes.

¶77 Unfortunately, most legal researchers will not have access to the General Index of the *United States Code*. Unlike the Code itself, the General Index is created and supplied by Thomson Reuters and is not available for free online.[195] Westlaw does provide a version of this index. Using it, however, requires a knowledge of how to find statutory notes on Westlaw as described previously.[196] This is because when researchers click on an index entry such as "Federal Bureau of Investigation – Director – Confirmation: 28 USCA § 532 NT," they are taken to 28 U.S.C.A. § 532, not to its notes. Researchers with little knowledge of statutory notes may not even think to look for statutory notes. Lexis also provides online indexing to its *United States Code Service*,[197] but its index references suffer from the same problem of linking researchers to the text of the section rather than to the statutory note.

Improving Research Access

¶78 Legal research providers need to be aware of the importance of statutory notes and make them accessible to researchers. Westlaw in particular needs to reenvision its presentation of statutory notes so as not to obscure further an already difficult-to-find source. Despite moving notes to a tab, Westlaw still keeps presidential memoranda visible beneath statutory sections.[198] At the very least, statutory notes should appear here, too. Westlaw could also consider adding a new tab for editorial and statutory notes, or at the very least renaming the current "Editor's and Revisor's Notes" to "Editorial or Statutory Notes." This could also include an entirely new way of imagining how statutory notes are portrayed.

¶79 The OLRC could also help researchers by more clearly labeling editorial and statutory notes. Some division already exists, with editorial notes generally appearing directly after a statutory section and statutory notes following editorial notes. Neither is labeled as such, however, making it difficult for researchers and legal research providers to quickly see a distinction. Statutory notes, for example, are each labeled with a heading that reflects the subject of the public law that is the subject of the statutory note. Clearly labeling the division between editorial notes and statutory notes could help researchers be attuned to the different types of notes

194. *See supra* note 137 and accompanying text.

195. *See* 38 UNITED STATES CODE, at ii (first volume of General Index, stating that "[t]he General Index material contained in this volume was created and supplied by Thomson Reuters which claims a copyright therein"). HeinOnline, another commercial subscription legal research provider, also maintains online, searchable copies of all official *United States Code* editions, including General Index volumes.

196. *See supra* ¶53.

197. Lexis's *United States Code Service* index is very difficult to find and would benefit from being more prominently displayed.

198. *See, e.g.*, 8 U.S.C.A. § 1103 (West 2020); 34 U.S.C.A. § 40901 (West 2020).

that may affect them. Inclusion of an appropriate tag in the xhtml version of the Code could allow legal research providers to programmatically highlight or extract statutory notes and make them more visible to researchers.

¶80 Will Tress has proposed the creation of an unofficial government-provided electronic version of the *United States Code* that could be used to experiment with bringing notes into the text of a statutory section.[199] One of the current limitations to such an idea is the fact that it is extremely difficult even to identify statutory notes in a programmatic fashion. Clearly labeling statutory notes as such would allow legal research providers to identify these important notes at a much lower cost than currently. Reducing that cost could incentivize legal research providers to begin experimenting with ways to display statutory notes in a more useful manner. While we support Tress's ideas of experimentation in an unofficial *United States Code*, we find it more plausible that commercial legal research providers would be in a better position to pull this off.

¶81 While these proposals would help alleviate some of the frustration in finding statutory notes, they ultimately do not fix the Code's underlying structural problems that lead to statutory notes. More sustained discussion is needed to address these problems. At first glance, it may seem like the best solution is to push for increased positive law codification. However, despite OLRC's efforts, this appears to be a low priority for Congress. While an uptick in positive law codification would help the Code move away from the bizarre split system between positive and nonpositive law it currently occupies, it would likely lead to even more statutory notes. The upcoming centennial of the *United States Code*'s creation in 2026 may provide an opportunity to evaluate where the Code should be moving in its next 100 years.

Best Practices for Teaching Law Students About Statutory Notes

¶82 Researchers and lawyers should follow the guidelines listed above, but legal research teachers, law librarians, and others providing practical instruction on legislation should help their students develop comfort in this area. As law librarians instruct students on statutes and statutory research, instruction about statutory notes should become part of the canon. Teachers must acknowledge the complexities of statutory notes research, making space for it in the legal research curriculum.

¶83 Research instruction about statutory notes should address three complex features of the Code. First, students should understand the story of the contemporary *United States Code* and how it came to be. Next, students should understand the distinction between positive law and nonpositive law and its implications for research. Finally, students need to know what forms of statutory law evade codification in traditional Code sections and how to find those provisions. As they teach, instructors can incorporate each of these concepts into the foundational concepts of statutory research.

¶84 The *United States Code* in its current form is one of several publications memorializing legislation; it is not the only one, but it is distinct in its topical arrangement. Although the story of codification has a rich history, students need to understand the basic history as described earlier in this article. The story of the

199. *See* Tress, *supra* note 11, at 163.

Revised Statutes sets the stage for understanding the distinction between positive and nonpositive law. To underscore this distinction, teachers can present an enacted positive law codification statute. Using this unique form of legislation makes clear the nature of positive law titles: they are the law because the title and all of its underlying sections and subsections have been approved by Congress and signed by the President. Title 54—National Parks Service and Related Programs—makes a clear example of a title recently enacted into positive law. Enacted into positive law by Public Law 113-287, the statute describes the title as follows:

> [A] restatement of existing law relating to the National Park Service and related programs as a new positive law title of the United States Code. As with all positive law codification measures, the enactment of title 54, United States Code, did not create new law or change the meaning or effect of existing law. Instead, the organizational structure of the existing law was improved, and ambiguities, contradictions, and other imperfections in the law were removed. Detailed information about Public Law 113-287 is available in the accompanying House Report 113-44.[200]

Students can locate the bill, committee reports, and floor activity, and review the legislative history of Public Law 113-287 as with any other statute.

¶85 Those titles that have not been subjected to this legislative process remain nonpositive law wherein the Code contains only prima facie evidence of the law. For these titles the public laws contained in the *Statutes at Large* are legal evidence of the law. In practical terms, teachers should underscore that for nonpositive law titles, when there is an inconsistency between the statutory language in the Code and the *Statutes at Large*, the text in the *Statutes at Large* governs. Legal research teachers can make this concept clear by using two sources: a federal statute and case law. 1 U.S.C. § 112 provides that "The United States Statutes at Large shall be legal evidence of laws."[201] Similarly, Section 204(a) of the same title provides that the United States Code "establish[es] prima facie the laws of the United States, general and permanent in their nature, in force . . . . Provided, however, that whenever titles of such *Code* shall have been enacted into positive law the text thereof shall be legal evidence of the laws. . . ."[202]

¶86 There are dozens of cases—and even a Topic and Key Number in the West Digest—that announce this principle. The leading case is *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.* In a matter turning on the use and precise placement of quotation marks in an amending statute, the Court made a close interpretation of statutory history to determine whether 12 U.S.C. § 92 (appearing in the 1952 edition of the Code, but noted as repealed in subsequent editions) had been repealed or not, holding:

> Though the appearance of a provision in the current edition of the *United States Code* is "prima facie" evidence that the provision has the force of law, 1 U.S.C. § 204(a), it is the Statutes at Large that provides the "legal evidence of laws," § 112, and despite its omission from the Code section 92 remains on the books if the Statutes at Large so dictates. [203]

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200. *Positive Law Codification: Title 54, United States Code,* OFF. L. REVISION COUNSEL: *UNITED STATES CODE*, http://uscode.house.gov/codification/t54/index.html [https://perma.cc/Q85K-HUQY].

201. 1 U.S.C. § 112.

202. 1 U.S.C. § 204(a).

203. 508 U.S. 439, 448 (1993). *See also* United States v. Carroll, 105 F.3d 740, 744 (1st Cir. 1997). This case involved the placement of a comma in a statute, and there was a discrepancy about

¶87 After teaching about positive and nonpositive law titles, instructors can help students understand how amending these different types of titles can affect the creation of statutory notes. For example, it is instructive for students to be able to explain why the Torture Victim Protection Act of 1991 is codified in a statutory note: as explained above, title 28 is a positive law title, and reading the enacted bill, students will see that Congress failed to specify where in the Code the Act should be inserted.[204] Students should also be taught the types of statutory provisions that are commonly found as statutory notes in both positive and nonpositive law titles. Instructors must make sure, however, to teach students that there are many exceptions to this. They could refer to the many examples provided in this article (or others that they find) to demonstrate this point.

¶88 In the classroom, students find the process of codification as well as the research implications of positive law abstract. Asking students to become codifiers and attempt the process using a simple public law can make the process more concrete. Moreover, this type of short exercise brings all the concepts described above together. Using Public Law 116-12, an act to clarify the grade and pay of podiatrists employed by the Department of Veterans Affairs, students codify provisions, create statutory notes, and see the implications of the positive/nonpositive law distinction.[205] Additionally, this exercise shows how one relatively short public law amends several different code sections.[206]

¶89 To conduct this exercise, first ask students to determine whether the title is positive or nonpositive law. Students can use the OLRC's website to confirm that title 38 has been enacted into positive law, but they should also note that the Act begins with the words "to amend title 38, United States Code." These words signal a positive law title. (A law in a nonpositive law title would be amended with reference to the section number from the original public law.) Next, students can move through the Act, section by section, to determine the location of those sections in the Code.

¶90 Finally, researching statutory notes can be explained by showing how to find any of the examples presented in this article with the research principles explained above. Then students should be asked to solve a research problem that requires them to find a statutory note. Students won't fully grasp how to conduct the research or the importance (and difficulty) of it until they've had a chance to try it themselves.

¶91 To be sure, requiring students to determine at the outset of their statutory research whether a statute they are searching for may be codified in a nonpositive or positive law title may be pedagogically unrealistic. Instead, students should always consult secondary sources when they are conducting statutory research. Congressional Research Service (CRS) reports can be the first stop for students

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the existence of the comma between the *Statutes at Large* and the *Code*. The Court stated, "[such conflicts are] rare, but, when they occur, the rendition of the law contained in the Statutes at Large controls."

204. Torture Victim Protection Act of 1991, H.R. 2092, 102d Cong. (1992) (enacted), https://www.congress.gov/bill/102nd-congress/house-bill/2092/text [https://perma.cc/LT97-5A4X].

205. This example was provided by OLRC. E-mail from Robert Sukol, Deputy Law Revision Counsel, OLRC, to authors (July 1, 2019, 14:17 EDT) (on file with authors).

206. *Id.* OLRC states that this statute demonstrates how many Code sections are amended in one Public Law section.

looking to learn more about a statute, its legislative history, and its construction. For nearly all super statutes and many less complex statutes, there is a CRS report. Today, CRS reports are freely searchable and available on the website everycrs report.com.[207] Additionally, ProQuest, Lexis Advance, Westlaw, and Bloomberg, among other sources, have CRS reports. These are an invaluable source for understanding the nuances of specific statutes.

¶92 For statutory research instruction, teachers can emphasize that although full-text searching may be the most sophisticated, it is among the most difficult methods for locating relevant code sections. In other words, full-text searching on its own should be avoided. Using an index for statutory research helps students see the broad range of statutes that could be relevant. Likewise, indexes provide distinct entries for statutory provisions that appear as notes along with traditional code sections.

Conclusion

¶93 Statutory notes exist throughout the *United States Code* for a variety of reasons. As the Code grows in size and volume, the problem of statutory notes will persist. Likewise, the slow pace—and near standstill—of the enactment of positive law titles of the Code by Congress contributes to the complexities and codification challenges facing the Office of Law Revision Counsel as they fulfill their duties. Legal researchers must be familiar with statutory notes—why they exist and how to find them—in order to accurately research federal law. While there is currently no perfect research tool for researching statutory notes, several different tools are available to help researchers find statutory notes. As legal researchers are more aware of statutory notes and take them into consideration in their research process, they can help to bring statutory notes out of the shadows.

207. EVERYCRSREPORT.COM, https://www.everycrsreport.com [https://perma.cc/JY9F-V668].