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The disillusionment of knowing.

Posted on [January 26, 2015](#) by [Catherine Lemmer](#)

Last week, while researching amendments to the Freedom of Information Act ([5 USCA §552 \(2015\)](#)), I spent a fair amount of time looking for a public law section in the U.S. Code because I failed to remember that Title 5 is a *positive law* title. A positive law title in the U.S. Code is itself a federal statute because the title is adopted in its entirety by Congress. A non-positive law title in the U.S. Code is defined as an editorial compilation of federal statutes. This is an important distinction. Positive law titles are legal evidence of the law because all prior versions have been repealed. Other titles in the U.S. Code are *prima facie* evidence of the law ([1 USC §204 \(2015\)](#)). These later titles are presumed to be the law but are rebuttable if conflicting acts of Congress are presented. The topic is detailed in [Ben Keele's AALL Spectrum](#) article [Splitting Hairs: What Subtle Distinctions Teach Us About Authority](#). You can also read in more detail about the difference of positive and non-positive titles at the [Office of the Law Revision Counsel – United States Code](#) and in [Mary Whisner's](#) 2009 Law Library Journal article, [The United States Code, Prima Facie Evidence, and Positive Law](#).

I had the text of [Public Law 111-83](#) from the Statutes at Large and was tracking the amendments in the code. Section 564 of the public law includes the magic language for positive law amendments, “Section 552(b) of title 5, United States Code, is amended by striking paragraph (3) and inserting the following . . .” Section 565 of the public law does not include this language and is relegated to a “note” in the official United States Code by the [Office of the Law Revision Counsel](#). Section 565 is also buried in the historical and revision notes in both the USCA and the USCS.

I was left with two questions after my interaction with the positive law aspect of Title 5. First, how should we teach this concept in our legal research class? Unlike common law research, statutes tends to be more comforting for novice researchers. For the most part they are unlikely to encounter the “did I find everything?” common law conundrum. Yet here is a legislative example in which actual law is obscured by placement in a revision

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note. I contemplated a wide variety of possible exercises that would educate my students but not freak them out — everything from asking them to find section 565 of Public Law 111-83 in the U.S. Code to asking them to simply explain why section 565 was merely a note to the relevant U.S. Code section. I haven't come up with a good answer yet, and I am interested in hearing any suggestions.

The second and cynical question is this: if the bill drafter understood the relevance of the necessary prefatory language and used it in section 564, why did the drafter fail to include the required prefatory language in section 565?

Ironically, I was not even interested in nor researching the context of Section 565. I simply read Section 565 because my eye caught a reference on the page to the terms “protected document” and “Secretary of Defense.” Section 565 prevents the disclosure of photographs taken during the period from September 11, 2001, through January 22, 2009, that relate “to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside the United States.” My work with the [Gitmo Observer](#) project and travel to Guantanamo Bay as a NGO Observer in December 2014 has caused me to pay attention to the actions of the U.S. government on these matters (see the [Pay Attention](#) post on my blog [rightangleresume](#)). Therefore, I went on a quest to see how this new provision operated only to have to find it (or not) deep within the notes rather than where it would be expected in 5 U.S.C. §552.

Before I conclude that the lack of magic amending language in Section 565 was an act of obfuscation by the U.S. government, I have got some legislative history work to do on the drafting of these two provisions. Maybe what I discover will make a good legislative history assignment!

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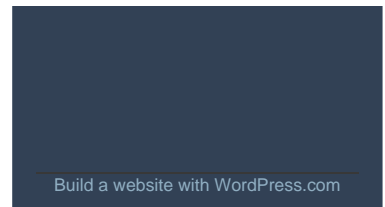


About Catherine Lemmer

A life long learner interested in most aspects of the creation, use, management, and control of information.

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