



A U.S. Senate committee hearing room. (Credit: Katherine Welles-stock.adobe.com)

Practice Notes

Five Things Every Judge Advocate Should Know About Federal Law (But May Be Afraid to Ask)

By Mr. Michael Jones

This is the third article in a series by Michael Jones concerning legislative affairs. The first piece in the series, A Primer for Judge Advocates on the National Defense Authorization Act, can be found in issue 3, 2022. The second piece in the series, The Army's Legislative Proposal Process: Advancing Army Initiatives Through Law, can be found in issue 1, 2023.

Judge advocates (JAs) at all levels should have a good working knowledge of the U.S. Code and how to find and research current and past Federal laws. After all, the U.S. Code provides the underlying foundation for many aspects of military legal practice.¹ Unfortunately, many attorneys may feel they do not have a strong

grasp of Federal law or how to research and employ it as part of their practice. This lack of understanding may result in researchers overlooking essential sources of information or failing to fully capture the precise nature of a statutory provision. During my tenure as the legislation attorney for the Office of the Judge Advocate

General (OTJAG), I have identified several areas where JAs can improve in applying and researching Federal law. So, without further ado, below are five things that every JA should know about Federal law.

1. What is the U.S. Code, and where can I find the best tools for researching it?

The U.S. Code compiles most of our current Federal public laws.² It contains “the general and permanent laws of the United States, organized into titles based on subject matter.”³ Currently, the U.S. Code consists of fifty-four separate titles and five appendices.⁴ When a new law amends an existing law, the U.S. Code is updated to reflect this change.⁵ The U.S. Code combines the original law with its amendments and removes the language that has been repealed or replaced.⁶ In short, it is the master list of Federal laws for the United States. The Office of Law Revision Counsel (OLRC), U.S. House of Representatives, prepares the U.S. Code and the Government Printing Office (GPO) publishes it.⁷ Updated versions of the U.S. Code are published every six years.⁸

JAs have many sources available to them to look up a specific section or research aspects of the U.S. Code. Practitioners who routinely access the U.S. Code primarily do so via the website that the OLRC maintains: uscode.house.gov.⁹ This website provides the full text of the official version of the U.S. Code and allows users to search the text and download entire titles and chapters.¹⁰ This site also provides classification tables, which identify where recently enacted laws will appear in the U.S. Code and which existing sections they amend (if any).¹¹ The OLRC produces this website using the same database it maintains for GPO to publish the print edition.¹² It is generally the most current version of the U.S. Code available for searching and browsing online, as OLRC staff updates it continuously throughout a congressional session.¹³

2. What is positive law codification?

Positive law has a legally significant and unique meaning in the context of the U.S. Code.¹⁴ Approximately half of the U.S. Code is positive law, while the other half is non-positive law.¹⁵ In essence, with regard to the U.S. Code, positive law and its

codification are primarily an organizational construct. Both positive and non-positive law titles contain laws, but the two types of titles are the result of different processes.¹⁶

Positive law codification is “the process of preparing and enacting a codification bill to restate existing law as a *positive law title* of the U.S. Code.”¹⁷ The resulting positive law conforms to Congress’s policy, intent, and purpose that existed in the original enactments; the restatement simply improves the law’s organizational structure, eliminates obsolete provisions, clarifies ambiguous provisions, resolves inconsistent provisions, and corrects technical errors.¹⁸ These positive law titles are *themselves* Federal law and can stand alone as legal evidence of the law.¹⁹ In other words, a positive law title is a comprehensive law that Congress has passed in the form of a title of the U.S. Code, and the organization, structure, designations, and text of the law are exactly as they appear in the U.S. Code.²⁰

Conversely, a non-positive law title compiles numerous separately enacted statutes that the editors of the U.S. Code have arranged into the title.²¹ These titles are not laws themselves—Congress has not enacted the title into law via positive law codification—and they serve only as *prima facie* evidence of the statutes that comprise them.²² The code itself explains further in § 204(a) of Title 1, which provides that,

The matter set forth in the edition of the Code of Laws of the United States current at any time shall, together with the then current supplement, if any, establish *prima facie* the laws of the United States, general and permanent in their nature Provided, however, [t]hat whenever titles of such Code shall have been enacted into *positive law* the text thereof shall be legal evidence of the laws therein contained²³

Consider a hypothetical document that contains separate but related factual sentences regarding a particular topic. While the facts are accurate, they overlap or even conflict in certain areas, and they could be better organized. If you wanted to rely on a specific factual statement within the document, you would first need to ensure that no other sentences amend or modify it.

This hypothetical document is one way to think about the structure and organization of a non-positive law title. If an editor were to take all those related sentences in the hypothetical document, organize them into a single presentation or theme, remove duplications, eliminate inconsistencies, place them into a logical structure, and have this new version approved as official, their process would be akin to positive law codification. The underlying information remains essentially the same, but the organization and content are altered to improve accuracy and usability.

Suppose Congress needs to modify a provision of non-positive law. In that case, Congress will directly amend the existing, underlying statute as it appears in the *Statutes at Large*.²⁴ In contrast, when Congress modifies a provision of positive law, it will amend the U.S. Code directly.²⁵ The U.S. Code currently has twenty-seven positive law titles, including Title 10—*Armed Forces* and Title 37—*Pay and Allowances of the Uniformed Services*.²⁶

3. What are statutory notes, and why should JAs care?

If a JA were tasked with researching the law concerning the rights of a victim under the Uniform Code of Military Justice (UCMJ), they would probably begin by looking at 10 U.S.C. § 806b (Article 6b of the UCMJ), which details a list of victim rights.²⁷ While some may be tempted to analyze the statutory text of § 806b and consider their inquiry complete, if they utilize the OLRC’s U.S. Code website and scroll down just a bit further within § 806b, they come upon a section titled “Statutory Notes and Related Subsidiaries.”²⁸ Within this section, users will find a provision titled “Notice to Victims of Alleged Sex-Related Offense of Pendency of Further Administrative Action Following a Determination Not to Refer to Trial by Court-Martial,” which further expounds on the victim notification requirements and includes specific actions that must be taken as part of the notification process.²⁹ This provision is an example of a statutory note.

A statutory note is a valid provision of law that is set out as a “note” under a U.S. Code section rather than as part of the U.S. Code section itself.³⁰ Creating the note is



(Credit: Tony Webster)

an editorial decision and does not affect the content's meaning or validity.³¹ In other words, a statutory note is a legitimate statutory provision organized separately from the other statutory text for clarity or order. JAs should neither question nor disregard the legal impact of statutory notes, as they often provide useful additional authorities or important clarifications.³²

When researching sections of the U.S. Code, checking for statutory notes to ensure you have considered all the relevant information on a topic is a helpful habit. As with the example above, if a practitioner failed to discover the existence of the note in 10 U.S.C. § 806b (Article 6b of the UCMJ), they would be unaware of a critical provision relating to the intersection of the notice requirements in cases not referred to court-martial and the Privacy Act of 1974 (5 U.S.C. § 552a).³³

4. What is a committee or conference report, and how do they relate to Federal statutes?

When researching unclear or ambiguous legal provisions, JAs may be asked to determine Congress' intent concerning a specific law or portion of a law. Congressional intent can help determine how to interpret or apply a particular provision of law. It can be gleaned from the statutory text itself, or it may be taken from other sources that

are commonly referred to as "legislative history."³⁴

Two significant sources of legislative history are the committee report and the conference report.³⁵ Almost every major piece of Federal legislation has reports associated with it, as each chamber's associated committee typically prepares one.³⁶ Reports generally consist of a reprint of the bill's text, a description of the purposes of the various provisions, and reasons for the committee's recommendations on the bill.³⁷ There is often a "section-by-section" analysis of the bill that can be very useful to researchers.³⁸ When a conference committee is appointed to draft a compromise bill that is acceptable to both the House and the Senate, it will issue a conference report.³⁹ Conference reports are extremely useful when researching legislative history because they come at the end of the legislative process and report on the final version of the bill's text.⁴⁰

For example, in December 2022, Congress passed the National Defense Authorization Act for Fiscal Year 2021 (2021 NDAA).⁴¹ Accompanying that bill was a conference report that included a reprint of the legislative text and additional information and explanation on various provisions.⁴² For example, the 2021 NDAA contained section 542, entitled "Qualifications of Judges and Standard of Review

for Courts of Criminal Appeals."⁴³ The conference report included the following language for that provision:

Qualifications of judges and standard of review for Courts of Criminal Appeals (sec. 542)

The House bill contained a provision (sec. 540J) requiring a minimum of 12 years of experience in law practice to qualify as a military judge on the Court of Criminal Appeals. The provision would also amend Article 66 of the Uniform Code of Military Justice (10 U.S.C. 866) to require the Court of Criminal Appeals, when considering appeals of court-martial convictions, to consider whether the finding is correct only upon a specific showing by the accused of deficiencies of proof. Under the provision, the Court could set aside and dismiss a finding if convinced that the finding was against the weight of the evidence. Further, the provision would require the entire Court of Criminal Appeals to review a determination by a panel of the Court that a finding of guilty was clearly against the weight of the evidence.

The Senate amendment contained a similar provision (sec. 532).

The Senate recedes with an amendment that would remove the requirement for the entire Court of Criminal Appeals to review a determination by a panel of the Court that a finding of guilty was clearly against the weight of the evidence and would amend Article 67 of the Uniform Code of Military Justice (10 U.S.C. 867) to authorize the United States Court of Appeals for the Armed Forces to review such a determination.⁴⁴

As evidenced by the text above, the report language offers further explanation and background information on the provision and how the two chambers arrived at the final version of the language. When JAs are tasked with interpreting an ambiguous provision or simply trying to understand how Congress arrived at the final text of

a provision of law, committee reports and conference reports often provide valuable insight. While reports are not technically part of the U.S. Code itself, they are part of a code section's legislative history and are a valuable tool for statutory research and interpretation.

5. Where can I find a “master list” of statutory definitions for military terms?

The Rosetta Stone is one of the British Museum's most famous artifacts.⁴⁵ The stone provided essential clues that helped experts learn to read Egyptian hieroglyphs, materially enhancing their understanding of the ancient writings.⁴⁶ If there is anything close to a Rosetta Stone for JAs regarding the U.S. Code, it is 10 U.S.C. § 101. This section provides the closest thing to a master list of definitions used throughout Title 10.⁴⁷ It defines more than fifty common terms critical to military practice, provides construction rules,⁴⁸ and is updated frequently to reflect new or amended terms.⁴⁹

For example, 10 U.S.C. § 101(a)(4) defines “Armed Forces” as “the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard.”⁵⁰ Similarly, 10 U.S.C. § 101(a)(5) defines “uniformed services” as (A) the Armed Forces; (B) the commissioned corps of the National Oceanic and Atmospheric Administration; and (C) the commissioned corps of the Public Health Service.”⁵¹

While some practitioners may use these terms interchangeably within the military, they have distinct meanings in the U.S. Code. Improper use can inadvertently include or exclude military elements and result in confusion, potential denial of rights and benefits, or material increases or decreases in certain costs. This is just one of many examples that demonstrate how 10 U.S.C. § 101 can inform a JA's research or legal products. When researching the meaning of a military term, 10 U.S.C. § 101 is a good place to start, especially if you are searching for a precise legal definition within a statutory provision.

Conclusion

Much of a JA's legal practice includes work with regulations, instructions, and case law. However, Federal statutes provide the underpinning for many of these legal resources.

Understanding how Federal law is structured, organized, and interpreted provides a significant advantage when performing legal research or advising military clients. While this article was not intended to make you an expert on all aspects of Federal law, it will hopefully inform your practice and improve your research abilities. **TAL**

Mr. Jones is an Attorney-Advisor in the Legislation Division in the Office of the Judge Advocate General at the Pentagon.

Notes

1. See generally 10 U.S.C. (organizing and defining the roles and missions of the Department of Defense and the U.S. Armed Forces).
2. *The United States Code*, U.S. SENATE, https://www.senate.gov/pagelayout/legislative/one_item_and_teachers/usCode_page.htm (last visited Oct. 4, 2024).
3. *About the United States Code and This Website*, OFF. OF L. REVISION COUNSEL, https://uscode.house.gov/about_code.xhtml (last visited Oct. 4, 2024).
4. *Id.*
5. *The United States Code*, *supra* note 2.
6. *Id.*
7. *About the United States Code and this Website*, *supra* note 3.
8. *How to Find the U.S. Code*, U.S. SENATE, https://www.senate.gov/legislative/HowTo/how_to_us_code.htm (last visited Oct. 4, 2024).
9. *U.S. Code*, OFF. OF L. REVISION COUNSEL, <https://www.uscode.house.gov> (last visited Oct. 4, 2024). This assertion is based on the author's recent professional experiences as the Legislative Attorney, Office of the Judge Advocate General from Aug. 2019 to present [hereinafter Professional Experiences].
10. *How to Find the U.S. Code*, *supra* note 8.
11. *See id.*
12. *About the United States Code and this Website*, *supra* note 3.
13. *See id.*
14. *Positive Law Codification*, OFF. OF L. REVISION COUNSEL, <https://uscode.house.gov/codification/legislation.shtml> (last visited Oct. 4, 2024).
15. See Sam Wice, *When to Refer to the U.S. Code Versus the Underlying Statute*, NOTICE & COMMENT: YALE J. ON REGUL. (July 25, 2018), <https://www.yalejreg.com/nc/when-to-refer-to-the-u-s-code-versus-the-underlying-statute>.
16. See *Positive Law Codification*, *supra* note 14.
17. *Id.* (emphasis added).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

23. 1 U.S.C. § 204(a) (emphasis added).
24. *Positive Law Codification*, *supra* note 14.
25. See Wice, *supra* note 15.
26. See *Positive Law Codification*, *supra* note 14.
27. UCMJ art. 6b(a) (2021).
28. See 10 USC 806b: Art. 6b. Rights of the Victim of an Offense Under This Chapter, U.S. CODE, [https://uscode.house.gov/view.xhtml?req=\(title:10%20section:806b%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title10-section806b\)&f=tree-sort&edition=prelim&num=0&jumpTo=true](https://uscode.house.gov/view.xhtml?req=(title:10%20section:806b%20edition:prelim)%20OR%20(granuleid:USC-prelim-title10-section806b)&f=tree-sort&edition=prelim&num=0&jumpTo=true) (last visited Oct. 4, 2024).
29. See *id.*; *Detailed Guide to the United States Code Content and Features*, OFF. OF L. REVISION COUNSEL, http://uscode.house.gov/detailed_guide.xhtml#xhtml (last visited Oct. 4, 2024).
30. See *Detailed Guide to the United States Code Content and Features*, *supra* note 29.
31. *Id.*
32. See *id.*
33. See 10 U.S.C. § 806b note.
34. ARTHUR J. RYNEARSON, *LEGISLATIVE DRAFTING STEP-BY-STEP* 147 (2013).
35. *Legislative History Research Guide*, GEORGETOWN L. LIB. (Sept. 26, 2024), <https://guides.ll.georgetown.edu/c.php?g=278869&p=1862825>.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. See *id.*
41. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388.
42. See H.R. REP. NO. 116-617 (2020).
43. § 542, 134 Stat. at 3611.
44. H.R. REP. NO. 116-617, at 1605 (2020).
45. *Everything You Ever Wanted to Know About the Rosetta Stone*, BRITISH MUSEUM (July 14, 2017), <https://www.britishmuseum.org/blog/everything-you-ever-wanted-know-about-rosetta-stone>.
46. *Id.*
47. See 10 U.S.C. § 101 et seq.
48. 10 U.S.C. § 101(g).
49. See 10 U.S.C. § 101.
50. 10 U.S.C. § 101(a)(4).
51. 10 U.S.C. § 101(a)(5).