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Legal Status of the New Federal Code

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LEGAL STATUS OF THE NEW FEDERAL CODE†

Legislative History Must Furnish Answer to Question of Legal Status.—Code as First Proposed and Present Code as Passed by House, Amended by Senate and Finally Adopted.—Implications That Can be Drawn from Section 2 —View of Senate as to Sense in Which Code was to Become Law.—Evidencing the Code.—Its Future*

By Frederic P. Lee and Middleton Beaman

A NEW Federal Code entitled "The Code of the Laws of the United States of America" has been in force since June 30, 1926.[1] It is set forth as part of an Act, Public No. 440, 69th Congress, entitled "An Act to consolidate, codify, and set forth the general and permanent laws of the United States in force December 7, 1925, approved June 30, 1926, which reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the fifty titles hereinafter set forth are intended to embrace the laws of the United States, general and permanent in their nature, in force on December 7, 1925, compiled into a single volume under the authority of Congress, and designated "The Code of the Laws of the United States of America."

Sec. 2. In all courts, tribunals, and public offices of the United States, at home or abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States—

† We desired to present this matter to our readers because of its importance. In investigating the subject, this very able presentation came to our attention. Mr. Joseph R. Taylor, managing editor of the *American Bar Association Journal*, kindly gave us his consent to republish this article which appeared in the December, 1926, issue of the *American Bar Association Journal*. Editor.

* The writers are indebted to Walter H. McLennon, Esq., in charge American Law Section, Legislative Reference Service, Library of Congress, for many valuable criticisms and suggestions in the preparation of this article.

[1] Advance copies became available the last of September from the Superintendent of Documents, Government Printing Office, Washington, D.C. They sell for $3.00 per copy of 1704 double column quarto pages. Final copies which include such ancillaries as parallel reference tables to the Revised Statutes, Statutes at Large, United States Compiled Statutes, Annotated, and Federal Statutes Annotated, an index, a table of express repeals, the general and permanent laws of the first session of the 69th Congress, and the Constitution, Declaration of Independence, Articles of Confederation, and Ordinance of 1787, are now available for $4.00 per copy from the same person.

(*a*) The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish *prima facie* the laws of the United States, general and permanent in their nature, in force on December 7, 1925; but nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments.

(*b*) Copies of this Act printed at the Government Printing Office and bearing its imprint shall be conclusive evidence of the original of the Code in the custody of the Secretary of State.

(*c*) The Code may be cited as "U.S.C."

Immediately thereafter, without any intervening language except headings, follows the text of the Code itself.

The American Bar Association has urged for several years past the adoption of such a Code. To facilitate action it created a Special Committee on the Revision of the Federal Statutes. The committee effectuated the Associations's interest in the matter through co-operation with the appropriate committees of Congress.[2]

The Code originated in 1919 in the efforts of the late Representative E. C. Little of Kansas, chairman of the Committee on Revision of the Laws of the House of Representatives. It was a courageous undertaking for members of Congress in the midst of their many duties to supervise the preparation of a work having the magnitude of the Code, even when the staffs of two great publishing concerns were availed of for assistance in compiling the Code as finally enacted. It is therefore the more surprising to find that the Code as first prepared was in great part Mr. Little's individual work, and was completed only by reason of his own enormous labor and unfailing persistence. But even these labors would have been in vain had it not been for the co-operative efforts in the Sixty-ninth Congress of the Senate Select Committee on Revision of the Laws[3] and the House committee in which Representa-

[2] The Association's committee was created in pursuance of a resolution proposed by Thomas I. Parkinson of New York, former Legislative Counsel, United States Senate. Under the chairmanship of Paul H. Gaither of Pennsylvania, the committee conferred with the House and Senate Committees on Revision of the Laws, and reported that it had been instrumental in bringing the two committees together in the adjustment of differences that at one time threatened the success of the Code. See 50 Repts. Amer. Bar Assn. 526-7, and 51 Repts. Amer. Bar Assn., 497.

[3] The Senate committee was composed of Hon. Richard P. Ernst of Kentucky, chairman; Hon. George Wharton Pepper of Pennsylvania, and Hon. N. B. Dial of South Carolina; Senator Dial was subsequently succeeded by Senator William C. Bruce of Maryland. Senator Pepper was the member of the committee in charge of the Code on the floor of the Senate.

tive Roy G. Fitzgerald of Ohio had succeeded as chairman upon the death of Mr. Little. To the ability, energy and insistence of the leading members of these two committees is attributable the reconciliation of the differences between the two Houses and the production of a completed Code which was acceptable to the Congress. The saving of time and expense that will result to lawyers by reason of the existence of the Code must be obvious to the bar of the country; but it is doubtful whether the bar realizes the tremendous amount of labor given the project by those Members of Congress who were intimately concerned in the completion of the Code.

The Code combines in a single volume under an orderly arrangement Federal statutory law which if sought from other official sources would require at best the use of the Revised Statutes of 1874 and Volumes 18 to 43 of the Statutes at Large. Without question the Code is a convenient document. It is also obvious that the new Code must be taken into account by all courts, public officers and members of the bar in any case or other matter involving Acts of Congress. There remain, however, the important questions: What is the legal status of the Code? To what extent does it supplant the Revised Statutes and the Statutes at Large? The answers to these questions depend upon what is expressly provided by sections 1 and 2 of Public No. 440, as interpreted by conclusions drawn from other provisions contained in the Code in its earlier stages, but omitted in the final enactment, from the debates on the floor of the Senate and House, upon the amendments made by the Senate to the bill as it passed the House, and from the committee reports.—in short, upon the legislative history of the Code.[4]

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[4] A court will take judicial notice of the legislative history of a Federal Statute in ascertaining its meaning. Thus, conclusions may be drawn from the fact that particular language has been omitted or supplemented during the legislative course of a bill. *Blake* v. *National Banks*, 23 Wall. 307, 317-320; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U.S. 1, 39-41; *Penn. R. R. Co.* v. *International Coal Mining Co.*, 230 U.S. 184, 197-9; *Lapina* v. *Williams*, 232 U.S. 78, 89-90; *Carey* v. *Donohue*, 240 U.S. 430, 436-7; *United States* v. *St. Paul M. & M. Ry. Co.*, 247 U.S. 310, 318; *United States* v. *Pfitsch*, 256 U.S. 547, 550-1. Cf. contra, *Pine Hill Co.* v. *U.S.*, 259 U.S. 191, 196. Committee reports are also admissible extrinsic aids in ascertaining the meaning given by the respective house to the provisions explained in the report unless discussion on the floor of the House affirmatively shows otherwise. *Blake* v. *National Banks*, 23 Wall. 307, 318; *Duplex Co.* v *Deering*. 254 U.S. 443, 474-5; *Ozawa* v. *United States*, 260 U.S. 178, 191.

Ordinarily the opinions of individual members of either House are not admissible to determine the meaning to be given to a particular provision of the statute. *Mitchel* v. *Great Works Milling, etc., Co.*, 17 Fed. Cas. 9,662, per Story, J.; *Aldridge* v. *Williams*, 3 How. 9, 24; *United States* v. *Union Pacific R. R. Co.*, 91 U.S. 72, 79; *United States* v. *trans-Missouri Freight Assn.*, 166 U.S. 290, 318;

THE CODE AS FIRST PROPOSED

The first draft of the Code was originated in 1919 in the Sixty-sixth Congress by the Committee on Revision of the Laws of the House of Representatives.[5] Subsequent redrafts were prepared in the Sixty-seventh and Sixty-eighth Congresses.[6] The Code was to be enacted as law and as such would repeal any prior Act "any portion of which is embraced in any section of this Code."[7] Further, copies, "printed at the Government Printing Office and bearing its imprint" were to be "competent and conclusive evidence of the law therein" in all courts.[8]

The Code as first proposed was in part like the Revised Statutes of 1874. Thus the Revised Statutes also repealed any prior Act "any portion of which is embraced in any section of said revision."[9] The printed volume of the Revised Statutes was to be "legal evidence" in all courts.[10] Both the Code and the Revised Statutes were to supersede the existing law. As said by Mr. Justice Brown with reference to the Revised Statutes,

> The main object of the revision was to incorporate all the existing statutes in a single volume, that a person desiring to know the written law upon any subject might learn it by an examination of that volume, without the necessity of referring to prior statutes upon the subject. If the language of the revision be plain upon its face, the person examining it ought to be able to rely upon it. If it be but another volume added to the prior Statutes at Large, the main object of the revision

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Duplex Co. v. *Deering,* 254 U.S. 443, 474; cf. contra, *United States* v. *Thind,* 261 U.S. 204, 214. An exception exists, however, in the case of remarks made by a member of either House participating in the preparation of the bill or by the member in charge of the bill upon the floor. The remarks of such members may be used in construing the provision discussed. *Acklin* v. *Peoples' Sav. Assn.,* 293 Fed. 392, 397; *Mennen Co.* v. *Federal Trade Commission,* 288 Fed. 774, 778, certiorari denied 262 U.S. 759; *United States* v. *Coca Cola Co.,* 241 U.S. 265, 281; *U.S.* v. *St. Paul M. & M. Ry. Co.,* 247 U.S. 310, 318; *Duplex Co.* v. *Deering,* 254 U.S. 443, 475.

[5] H.R. 9389, 66th Cong.

[6] H.R. 12, 67th Cong. and H.R. 12, 68th Cong.

[7] 10742, H.R. 9389, 66th Cong.; 10742, H.R. 12, 67th Cong., and 10742, H.R. 12, 68th Cong.

[8] 10746, H.R. 12, 68th Cong.; 10746 H.R. 12, 67th Cong., omitted the words "and conclusive."

[9] Where the language in the Revised Statutes cannot possibly bear the same construction as the revised and repealed Act, full effect must nevertheless be given to the Revised Statutes. *United States* v. *Bowen,* U.S. 508, 513. See also cases cited in 1 Fed. Stat. Ann. (2d ed.) 182, note 4. The same result would have been true of the Code as originally proposed. See H. Rept. No. 68, 67th Cong.

[10] 18 Stat. 113; and 19 Stat. 269, am. 20 Stat. 27.

is lost, and no one can be certain of the law without an examination of all previous statutes upon the same subject.[11]

However, the Revised Statutes were unlike the Code (both as first proposed and as finally enacted), in that the Code was never and is not now, either in fact or in intent, a revision of the laws, as opposed to a compilation, whereas the Revised Statutes, in the language of the Supreme Court,

. . . . are not a mere compilation and consolidation of the laws of Congress in force on December 1, 1873. The object of that revision was to simplify and bring together all statutes and parts of statutes which, from similarity of subject, ought to be brought together, to expunge redundant and obsolete enactment, and to make such alterations as might be necessary to reconcile contradictions and amend imperfections in the original text of the preexisting statutes.[12]

The Senate did not find satisfactory the work of the House on the Code as first proposed. In considering the measures passed by the House in the Sixty-seventh and Sixty-eighth Congresses, the Senate Select Committee on the Revision of the Laws reached the conclusion that the large number of alleged errors called to the attention of the committee from various sources were preventable. The Senate committee in its report stated that

The committee is sensible of the impatient desire of many that H. R. 12 should be enacted forthwith. It is not easy to resist the pressure for immediate enactment exerted by persons of standing and influence who are, however, imperfectly informed and therefore disqualified from expressing really weighty opinions. Over against their urgency the committee sets the facts above summarized and the specifications contained in the appendix (to the report).[13]

[11] *Hamilton* v. *Rathbone,* 175 U.S. 414, 421.

[12] *Dwight* v. *Merritt,* 140 U.S. 213, 217, italics ours.

[13] S. Rept, 722, 68th Cong. This report lists some 60 odd pages of alleged errors in the Code as passed by the House in the 68th Congress. See also speech of Senator Ernst, chairman of the committee, in 64 Cong. Rec. 5087, 5092.

During the second session of the 68th Congress, the Senate committee obtained the benefit of the research of an independent committee as to the accuracy of the results that could be obtained from a code prepared in the manner followed by the House committee. This independent committee selected by the Senate committee was composed of Professor J. P. Chamberlain of the faculty of political science and director of the Legislative Drafting Research Fund of Columbia University, Dean William E. Mikell of the University of Pennsylvania Law School, and Professor Noel T. Dowling of the Columbia University Law School and former assistant counsel in the office of the Legislative Counsel, United States Senate. The findings and recommendations of the independent committee were heard at joint sessions of the Senate and House committees during January and February, 1925.

For a criticism of the position taken by the Senate committee, see William L. Burdick, The Revision of the Federal Statutes, 11 *A.B.A. Jour.* 178. Professor Burdick of the University of Kansas, was one of the revisers employed by the House Committee.

In view of the conclusions of the Senate Committee that the further perfection of the Code was necessary, the committee urged the creation of a special commission to undertake the codification. A resolution providing for the commission passed the Senate and was reported to the House.[14] It failed of enactment, however, because of the crowded condition of the House calendar during the few remaining days of the Sixty-eighth Congress.

The Present Code as Passed by House

In the interim between the Sixty-eighth and Sixty-ninth Congresses, the differences between the House and Senate committees were reconciled and a new plan was devised. With the consent of both committees, the West Publishing Company and the Edward Thompson Company, publishers of United States Compiled Statutes Annotated and Federal Statutes Annotated, respectively, were employed under a small appropriation of the Senate committee to undertake the work of codification and compilation. To meet the fear that, despite the care with which the work was done, errors might creep in, a new system was adopted, and, as explained in the Report of the Senate committee,[15] it was provided that the passage of the Code should not

> . . . . repeal at once all legislation of a general and permanent character not contained therein, for it is provided that until July 1, 1927, only corresponding provisions contained in Acts passed prior to December 7, 1925, which are substantially identical with matter in this code are repealed. The prescribing of a period within which provisions of this code must give way to corresponding provisions contained in the Statutes at Large and Revised Statutes, when inconsistent therewith, allows ample time for amendatory legislation to correct errors and mistakes in the code.
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> At the expiration of this period, namely, July 1, 1927, the code repeals all statutes of a general and permanent nature not contained therein. This twilight zone, as it may be termed, during which the Revised Statutes and the Statutes at Large are final authority in cases of inconsistency between the code provisions and the corresponding provisions in the Revised Statutes and Statutes at Large, furnishes a factor of safety which no previous compilation of the laws has contained, and prevents any embarrassment which might otherwise arise from mistakes and omissions in this code.

The bill embodying this new method and creating the twilight zone system was passed by the House on April 19, 1926,[16] and was reported by the Senate committee without change.

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[14] S. J. Res. 141, 68th Cong., as reported to the House of Representatives, February 24, 1925, and H. Rept. No. 1573, 68th Cong.

[15] S. Rept. 832, 69th Cong., p. 4; see also H. Rept. 900, 69th Cong.; and 2 of H.R. 10,000, 69th Cong., as passed by the House of Representatives and as reported to the Senate.

[16] H.R. 10,000, 69th Cong.

The Senate Amendments

Upon the report of the new Code to the Senate, further objection developed. The twilight zone system was thought by several Senators to be insufficient protection against errors. Inasmuch as the only practical method of passage of the Code through the Senate was by unanimous consent, a compromise had to be reached. This was done. The twilight zone was made permanent. Committee amendments were reported and adopted, embodying the compromise and changing the entire legal effect of the Code. The Code was not to be enacted as ordinary law. The matter set forth in it was only to establish prima facie the laws of the United States in force on December 7, 1925. The section in the House bill repealing prior legislation reproduced in the Code was eliminated. Further it was provided (Sec. 2 of the Act as finally passed) that

> . . . . nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any sections of this Code and the corresponding portion of legislation heretofore enacted, effect shall be given for all purposes whatsoever to such enactments.

The amendments thus made by the Senate were agreed to by the House and form part of Public No. 440 as enacted.

The Code as Law

When it was finally determined that the Code should not at any specified date supersede existing law, two alternatives as to the statutory mechanics involved were open to the Congress in providing for the new system. The Congress could fail to enact the Code but in lieu thereof enact a statute stating that the matter set forth as the Code in a document (to be identified in such statute) should establish prima facie the laws.[17] On the other hand, the Congress could include the Code as a part of the statute enacted. It chose the latter alternative.

The language of Section 2 of Public No. 440, quoted at the beginning of this article, specifies that nothing in the Act shall be construed "as enacting as new law any matter contained in the Code." From this language the implication can be drawn that the Congress regards the Code as enacted and as law but not as new law, i.e., only as a re-enactment of existing law. Further, Section 2 provides that in case of inconsistency between the Code and the provisions of the Revised Statutes and Statutes at Large "effect shall be given for all purposes whatsoever" to the Revised Statutes and Statutes at Large. From

[17] This alternative was chosen by Congress in the case of the supplementary volumes to the revised Statutes, see 21 Stat. 308, 26 Stat. 50.

this the implication can be drawn that in case no inconsistency is present, the Code is to be given effect for all purposes whatsoever. Are these implications correct?

The difficulty may be illustrated by the question that will arise in case of an amendment or repeal. Suppose an amendment is desired to be made to the Railroad Safety Appliance Acts. Is it to be made to Title 45 of the Code which contains the corresponding provisions, or to the Safety Appliance Acts as found in the Statutes at Large?

If the Code is enacted as law, as suggested by the first implication drawn above, Title 45 rather than the Statutes at Large must be amended, otherwise the law will not be changed. If, however, Title 45 does not correctly reproduce the Statutes at Large, as has been suggested by the railway labor organization,[18] it then, under the terms of Section 2, only prima facie establishes the law, and effect is to be given for all purposes whatsoever to the Statutes at Large. Therefore an amendment to Title 45 would not be an amendment of that which is law and which is to be given effect by the courts, but would be an amendment of that which is shown not to be law and to which the courts are directed not to give effect. The results leaves those who claim that the Code is enacted as law in the position of treating it as law when consistent with preexisting law but not when inconsistent.

Any such result produces an impossible situation. If the Congress is to determine in each instance the question as to whether the Code correctly reproduces existing law, then it is determining the question which the Senate, at least, felt it could not determine as to all the Code provisions as a whole. It was for this very reason that the Code was not to supersede the corresponding provisions of the Revised Statutes and Statutes at Large. There seems no reason to feel that the situation is materially altered when a limited number of provisions of the Code are in question. An individual Senator, or Senate committee, or the Senate itself, cannot be expected to determine with an accuracy that would in every case meet with the approval of the House of Representatives, the President, and the courts, that the provision of the Code attempted to be amended was or was not consistent with the corresponding provision in the Revised Statutes or Statutes at Large.

The committee amendment offered on the floor of the Senate did not contain the last sentence of subdivision (*a*) of Section 2, which reads as follows:

> In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments.

[18] 67 Cong. Rec. 11996-7, daily ed., June 25, 1926.

This sentence was added on the floor of the Senate at the instance of Senator Reed of Missouri, as shown by the following colloquy between the Senator and Senator Pepper:[19]

Mr. Reed, of Missouri: Mr. President, before the enactment is finally disposed of, let me say that I surely do not want to cavil about the matter, but I think the language that is taken out[20] ought to be restored, by which I mean the express declaration that if there is any difference between the text as appearing in the so-called code and the various laws and acts here intended to be codified, that the text of the law or act shall govern. The Senator from Pennsylvania has worked on this matter and is a very profound lawyer, but I am not always willing to leave the question in such shape that we must have a profound lawyer to understand it. I would like to make it so plain that it cannot be misunderstood. I think the amendment ought to be so drawn that the laws or acts as printed now in the Statutes of the United States should be higher evidence than that which is contained in the code. I do not want to delay the matter a moment. I am earnestly in favor of getting the bill passed.

Mr. Pepper: The committee are entirely of the same mind as the Senator from Missouri. It was only a question as to the way in which most effectively to attain his purpose. We thought that as long as no part of the code is enacted into law, it was not necessary to provide that in case of inconsistency between that which is not law and that which is law the law should govern. But if the Senator thinks that it would clarify the situation to retain the language which was originally proposed, I call his attention to it as it appears in the document which I hand him and which reads this way:

"In case of any inconsistency, arising through omission or otherwise between the provisions of any section of this code and the corresponding portion of legislation heretofore enacted, effect shall be given for all purposes whatsoever to such enactment."

Mr. Reed, of Missouri: I think that will make it safe.

Mr. Pepper: I am authorized to accept that for the committee as a part of the amendment, provided on further consideration the Senator from Missouri still thinks it is necessary to provide that in case of a conflict between what is not law and what is law, the thing that is law shall control.

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[19] 67 Cong. Rec. 11998, daily ed., June 25, 1926. See also the following statement:

Mr. Pepper. . . . . In effect, the Congress of the United States goes into the business of making a compilation of the law and the publication thereof; and the only legislative function that is performed in connection herewith, apart from authorizing the printing and distribution, is a provision that this body of statute material shall be accepted as *prima facie* evidence of the law in the courts and in the departments, and for other public purposes. 67 Cong. Rec. 11995, daily ed., June 25, 1926.

[20] The bill as passed by the House in section 6 of Title 1 contained a sentence which was almost identical with the sentence above quoted and which was stricken out by the amendment as proposed by the committee.

Mr. Reed, of Missouri: I recognize the fact that it seemingly ought not to be necessary to say that, but all lawyers recognize the fact that this may appear much plainer to us who discuss the matter and know its history than it may appear to some court. It may be remedied finally on appeal and the true construction reached.

In view of the above expressions, it seems unfair to draw from the language of Section 2 the implication that the Code is enacted into law in any ordinary sense, even in those cases in which it is found that its provisions are consistent with the corresponding provisions of the Revised Statutes and the Statutes at Large. Literally, it is true that the Code was enacted. Further, it is a portion of a Congressional Statute, and as such is a part of the supreme law of the land. Nevertheless, it would seem that the understanding of the Senate and of the House is clearly that the Code was not to become law in the ordinary sense. If the provisions of the Code are not law in the ordinary sense of superseding prior conflicting enactments, it is difficult to find that the Code is law for the purpose of setting forth that which is to be amended or repealed in the future. It would seem that despite the fact that the code was included in Public No. 440 as part of the Congressional statute it is to be given an effect as though it were not included but was merely referred to as a compilation which might be availed of in establishing the law.[21]

The view of the Senate itself may be ascertained from the following colloquy.[22]

Mr. Willis: Mr. President, at this point I desire to submit one more question to the Senator in charge of the bill. In view of the statement just made by the Chair that the bill is before the Senate as in Committee of the Whole and open to amendment, I want to be sure that there is to be no mistake about this matter. Is it the Senator's understanding that the document of 1,700 pages is the document that is now being acted upon when it is stated by the Chair in the usual and proper form that "the bill is now before the Senate as in Committee of the Whole and open to amendment?" In other words, is it proposed to enact that document of 1,700 pages? If so, a different situation obtains.

Mr. Pepper: Mr. President, the situation is precisely that which was developed by the colloquy between the Senator from Ohio and me at an earlier stage of the discussion. The matter contained in the fifty titles—the matter, in other words, which accounts for the bulk of the document upon the Vice-President's desk—is not matter which it is now proposed to enact into law. To use the illustration which the Senator gave a while ago, it is an exhibit annexed to a statutory enactment.

[21] It should be noted that in the bill as passed by the House the sections declaring the legal status of the Code were part of the Code itself (chapter 1 of Title 1); whereas, in the Act as passed, the two corresponding sections do not form part of the Code.

[22] 67 Cong. Rec. 11999, daily ed., June 25, 1926.

The only thing that we are enacting into law is the statutory declartion as to what effect is to be given to that large document. We are not enacting the document as such; I take it that it is not necessary to read the document as such, to comply with the rules of the Senate. The enacting portion of this measure is that only which is of legal effect and which declares the status of the matter contained in the large volume.

Mr. Willis: Then, when the Chair states the usual and correct form, as he has stated it, that the bill is before the Senate as in Committee of the Whole and open to amendment, it is not in the mind of the Chair or in the mind of the Senator that we are enacting this document? If not, what is the resolution, the bill, or other paper upon which we are acting?

Mr. Reed, of Missouri: Will the Senator from Pennsylvania let me answer that question?

Mr. Pepper: I yield to the Senator from Missouri.

Mr. Reed, of Missouri: Mr. President, the Senator from Pennsylvania did me the compliment of asking my opinion a while ago in regard to one matter. Therefore, I venture to make a suggestion here. In my opinion, what we are doing is exactly this, and we could do it in this form: "Be it enacted, That the Congress of the United States hereby authorizes Document A"—if we call it that—"to be printed and distributed to the lawyers of the United States who see fit to pay for it; and be it further enacted, That the document shall be admitted as *prima facie* evidence of the law of the land; but in any case where there is a dispute between that document and the law of the land as elsewhere officially printed, the official print shall govern."

All we are doing is authorizing the printing and publishing of the document. That is what we get down to.

Mr. Pepper: Mr. President, I take it, supplementing the very clear statement which has been made by the Senator from Missouri, with which I entirely concur, the thing that is open to amendment is not the matter contained in the fifty titles of the Code but that portion which precedes the Code and which is the legislation to which the Senator from Missouri has referred to and as to which the Chair, as I understand, has made his statement.

Mr. Willis: And the Senator fully agrees with the interpretations now placed upon the proposed action by the Senator from Missouri?

Mr. Pepper: Yes, Mr. President.

Mr. Willis: Very well; I have no objection, with that understanding.

The views of the House appear to be the same, as shown by the debate on the adoption of the Senate amendments. Mr. Fitzgerald of Ohio, Chairman of the House Committee on Revision of the Laws in support of his motion to concur in the Senate amendments, stated—[23]

The amendments which would most interest the House is the amendment which strikes out the entire first title of the code and substitutes other language for it. This amendment strikes out the re-enacting and repealing provisions and provides that the code shall be evidential

[23] 67 Cong. Rec. 12132, daily ed., June 26, 1926.

only. The bill as it passed the House provided that the code would, on July 1, 1927, replace absolutely all the general and permanent laws in force December 7, 1925. As amended by the Senate, this codification now becomes simply an evidential document. It is an authoritative statement by Congress of what the law is presumed to be and it shall be considered as such by the courts of the United States and all officials as *prima facie* evidence but as *prima facie* evidence only of the law.

It does not, as did the bill in the House, re-enact any of the laws, nor does it, as the bill as passed by the House, repeal any of the laws. The law remains exactly as it is, but this codification is stamped by Congress officially as the collection in convenient form of that law, and always subject to the original statutes.

This amendment was imposed upon the House and the committee of the Senate by the Senate. Without this qualification or amendment, it would have been impossible, apparently, for this bill to pass the Senate because the scope of this work is so large and the chance for error is so great that, with all the safeguarding provisions which the House had introduced into Title 1, there was still felt apprehension of danger from error, even with the provision for postponement of its taking effect to July 1; 1927, which would permit a session of Congress for the correction of errors to intervene. The Senate felt that still the danger was too great to assume the responsibility of passing a bill of this magnitude and having it absolutely replace all the laws of the United States as was done by the Revised Statutes in 1874.

The above conclusions would seem to be strengthened by taking into account several sections in the bill as passed by the House which were stricken out by the Senate amendment: Such as the section repealing the Acts produced in the Code; the section providing that the repeal should not affect acts done or rights accruing, nor affect the right to any office or change the term thereof; the section providing that all offenses committed prior to the repeal might be prosecuted as if the repeal had not been made; the section providing that statutes of limitations existing at the time of the passage of the Code should remain in force as to all acts committed prior to the repeal; the section providing that the arrangement and classification of the several sections and the insertion of section headings were made for convenience and not as part of the law;[24] and the section providing that the enactment of the Code was not to affect or repeal Acts passed since December 7, 1925,

[24] Mr. Walsh: I inquire whether that portion of section 6 preceding the word "until" therein should not remain. It reads as follows:

"The arrangement and classifications of the several sections of this code and the insertion of section headings have been made for convenience and are no part of the law."

Mr. Pepper: May I answer the Senator in this way, that the first part of what he has just read from Section 6 we omitted from the amendment because it is a declaration that certain things are no part of the law, and inasmuch as we are now taking steps to set forth the code in such fashion as none of it will

which Acts were to have full effect as if passed after the enactment of the Code. Under the system adopted by the Senate it was considered unnecessary to take care of cases of conflict caused by the different dates on which the reproduced matter was enacted.[25]

Desirable as it may be that codification of the Federal laws should not result in merely "another volume added to the Statutes at Large," as Mr. Justice Brown stated it, that is exactly what has been done in the case of the Code. The result is attributable to the refusal of the Senate to assume the responsibility of passing a bill of such magnitude and having it absolutely replace the laws of the United States, as was done by the Revised Statutes of 1874.[26] In consequence, it may be concluded that the Code differs from a private compilation of Federal Statutes Annotated, United States Compiled Statutes Annotated, or Barnes Federal Code, only in that it is officially sanctioned, available for a relatively moderate price, and may be offered "in all courts, tribunals, and public offices of the United States at home or abroad, of the District of Columbia, and of each State, Territory or insular possession of the United States" as establishing prima facie the laws of the United States, general and permanent in their nature, in force December 27, 1925.[27] It follows from this that no change in law will be effected by an amendment to the Code. If a law is to be changed by orderly process of express repeal and amendment, the basic statutes

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be law, we thought it unnecessary to provide that the section headings, and so forth, should not be a part of the law. 67 Cong. Rec. 11997, daily ed., June 24, 1926.

[25] Mr. Bratton: . . . . It is quite common in enacting compilations of this kind to state expressly that in cases of conflict between two or more provisions found in the compilation reference may be had in solving the conflict to the dates upon which the respective statutes were enacted. Does the Senator from Pennsylvania think such a provision should be inserted in the enacting part of this compilation, or would the courts have the power to do that independently of any such provision in this enactment?

Mr. Pepper: The committee had contemplated the necessity of some such provision in case the original plan had been followed of seeking the enactment of the code as a body of law. In that case the effect of simultaneous enactment of all the provisions would have rendered it important to safeguard the situation in the way the Senator has indicated. Under the present proposal, however, the matter contained in the code is not enacted into law at all. It is merely set forth under the authority of Congress for the convenience of its users, and is given an evidential effect, but in no way supersedes the existing law, or itself becomes law. 67 Cong. Rec. 11995, daily ed., June 25, 1926.

[26] See statement of Chairman Fitzgerald of House committee noted above.

[27] See the statement (during the debate on the motion to concur in the Senate amendments) of Representative Ramseyer of Iowa on the floor of the House, concurred in by Representative Fitzgerald of Ohio, chairman of the House Committee on Revision of the Laws:

as appearing in the Revised Statutes and Statutes at Large must be repealed or amended. It may further be observed that, since the only utility of the Code is to form a convenient method of presenting the statutes in force on December 7, 1925, the only result produced by an amendment of the Code would be to make it incorrect as a reproduction of those Statutes.

EVIDENCING THE CODE

Subdivision (*b*) of Section 2 of Public 440, provides that

> Copies of this Act (which includes the Code) printed at the Government Printing Office and bearing its imprint shall be conclusive evidence of the original of the Code in the custody of the Secretary of State.

The effect of this provision can be understood by having regard to the method of establishing the ordinary statute of Congress.

Upon the passage of the bill by both Houses, an enrolled copy thereof, signed by the President of the Senate and the Speaker of the House, is transmitted to the President of the United States for his signature. If signed or permitted by the President to become law without his signature, the enrolled copy is transmitted by the President to the Secretary of State. If returned by the President to the Congress and passed over his veto, the enrolled copy is transmitted to the Secretary of State by the President of the Senate, or the Speaker of the House of Representatives, in whichever House the bill was last approved. This enrolled copy in the custody of the Secretary of State is known as the original.[28] The Secretary of State thereupon caused it to be reprinted at the Government Printing Office in pamphlet form and subsequently in the form of the Statutes at Large.

The Courts will take judicial notice of Acts of Congress and the enrolled copy constituting the original is the document of which judicial

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Mr. Ramseyer: . . . . I should like to ask the gentleman a few questions, the first of which is this: There are some private compilations of the United States statutes. I think the West Publishing Company has one.

Mr. Roy G. Fitzgerald: Yes.

Mr. Ramseyer: The only difference between such a private compilation and the one which the gentleman is now presenting, is that this codification of the law, if taken into court with reference to any particular section of the code, would be taken as *prima facie* evidence that that is the law. To be absolutely certain about what the law is, you would still have to go through the numerous statutes at large and prove up what the law is; that is, if any question should arise as to that particular section that you are presenting to the court being the the law, then you would have to bring in the acts and prove it up.

Mr. Roy G. Fitzgerald: The gentleman is correct. 67 Cong. Rec. 12132, daily ed., June 26, 1926.

[28] 204 R.S.

notice is taken. This original is binding upon the court and is the document by which the court will be finally governed.[29] In addition to taking judicial notice of an original of an Act of Congress, certain other documents constitute admissible evidence of an Act of Congress.[30] Thus the printed volumes of the Revised Statutes are legal evidence of the laws and treaties therein contained.[31] The printed volume of the second edition of the Revised Statutes which is a republication, not a reenactment of the Revised Statutes, is also legal evidence of the laws therein contained.[32] Finally, the pamphlet copies of the Acts of Congress and the bound copies of the Statutes at Large are legal evidence of the laws and treaties therein contained.[33] Any of these volumes may, therefore, be offered in evidence to establish an Act of Congress. Such volumes are, however, only evidence and may be outweighed by contradictory evidence of higher authority. Such evidence would be the original, in the custody of the Secretary of State, of the Revised Statutes or of the particular Act of Congress in question.

In the case of the Code, however, the process above described is reversed. The printed volumes from the Government Printing Office are not merely legal evidence of the original of the Code in the custody of the Secretary of State. They are conclusive evidence of it. There-

[29] *Field* v. *Clark*, 143 U.S. 649.

[30] The customary practice of speaking of offering "evidence" to establish an Act of Congress has been followed in this article. Strictly, the term is inappropriate and misleading. See the case of *Gardner* v. *The Collector*, 6 Wall. 499, where the enrolled bill of the statute under examination was signed by the President with the month and day attached to his signature but not the year. It was sought to establish the year by reference to the records of Congress, but counsel contended that if the President's record is defective "in respect to the year when it was made, no resort can be had to extrinsic evidence to supply that defect." The Supreme Court stated:

"The Statute under consideration is a public statute, as distinguished from a private statute. It is one of which the courts take judicial notice, without proof, and, therefore, the use of the words 'extrinsic evidence' is inappropriate. Such statutes are not proved as issues of fact as private statutes are. But if we suppose the phrase to have been used to express the source of information to which the court may resort, the proposition is still inadmissible . . . .

"We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." (Page 511.)

[31] 18 Stat. 113.

[32] 19 Stat. 269, am. 20 Stat. 27.

[33] 28 Stat. 615; 908 R.S.

fore, the original of the Code in the custody of the secretary of State may not be used to contradict the printed volume, which is the sole means of finding out what Congress put into the Code. The legal effect given to the matter contained in the Code, after being thus evidenced, has been explained above. Of course, the first two sections of Public No. 440, inasmuch as they constitute no part of the Code, may be established in the same fashion as any other Act in the Statutes at Large.[34]

THE FUTURE OF THE CODE

Two probabilities are apparent as to the future of the Code. If it is shown in the next few years that the Code has but a small percentage of error, there is the chance that the Congress will pass an Act causing the Code to become a law in the ordinary sense in that it will supersede and repeal all corresponding provisions of the Revised Statutes and the Statutes at Large. In the second place, the Code may become the basis of a real revision of the laws. Despite its title, the Code, as originally proposed, did not contemplate a real revision. The Code as finally promulgated no longer purports in its title to revise the Acts of Congress, but merely to consolidate, codify, and set them forth. Many of its provisions are inconsistent; many are obsolete; others are repetitions or lacking in clarity. In the view of Mr. Fitzgerald of Ohio, Chairman of the House Committee on Revision of the Laws,

> If this committee, of which I have the honor to be chairman, retains the confidence of the House, it is our intention to present from time to time different titles of this code with real revisions, so that the obsolete matter may be cut out and the law may be stated tersely and clearly.[35]

A revision title by title gives that time for detailed consideration and intensive co-operation with the various branches of the Government concerned which is not possible in revision *en bloc*. It is the method by which the Federal Judicial Code and the Penal Laws were revised. It is submitted that it is the only method by which such great subjects as the revenue, immigration and naturalization, railroad, public land, banking, military, naval, navigation, and other Federal laws may be adequately revised. The Code, if brought up to date at least once a decade, affords the basis by which this intensive revision may be greatly facilitated.

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[34] Section 5 of Public 441, which deals with the printing, publication, and distribution of the Code, provides that Public No. 440 containing the Code shall be published as Part 1 of Volume 44 of the Statutes at Large. As so published Public No. 440 will be legal evidence of these first two sections, subject, of course, to impeachment by the original in the custody of the Secretary of State.

[35] 67 Cong. Rec. 12132, daily ed., June 26, 1926; see also, 67 Cong. Rec. 11998, daily ed., June 25, 1926.