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I. INTRODUCTION

Two centuries ago, Chief Justice John Marshall wrote that "[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived."[1] Yet for more than half a century, Congress has forbidden judges to use the evidence before their own eyes when interpreting the federal Judicial Code. In what will come as a surprise to most readers, Congress has directed judges to ignore the plainly visible structure of logically organized parts and

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1. United States v. Fisher, 6 U.S. (2 Cranch.) 358, 386 (1805).

chapters with their identifying headings into which statutory sections have been placed through the 1948 enactment of Title 28 of the United States Code.[2]

In an uncodified provision, Congress instructed that "[n]o inference of a legislative construction is to be drawn" by the location of a section in a particular chapter in Title 28 nor by the "catchlines" for parts, chapters, and sections.[3] Thus, this little-known and half-hidden section casts the the Judicial Code's brightly-lit profile into jurisprudential darkness.

In the sculptures and statues that ornament our courthouses, the Roman goddess Justicia often is portrayed with the sword of justice in one hand, the scales for weighing just deserts in the other hand, and a blindfold across her eyes symbolizing her lack of preferential favor for any person.[4] While blindfolded to ward against the corruption of personal partiality,[5] the assumption remains that Lady Justice can still see the law clearly with the eyes of the mind. But when abstruse legislation clouds the legal mind,[6] Lady Justice must lift her blindfold so that the visible contours of the law come into sharper relief.[7]

Sixty years of legislatively-imposed blindness on the federal judiciary is more than enough. The time has long since passed to retire this mischievous provision, to introduce transparency to the interpretation of the provisions collected in Title 28, and to let the light shine upon the federal Judicial Code's carefully designed structure.

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2. *See* Act of June 25, 1948, ch. 646, 62 Stat. 869 (revising and codifying Title 28). *See also infra* Part II.

3. Act of June 25, 1948, ch. 646, § 33, 62 Stat. 869, 991.

4. *See* Dennis Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727, 1727, 1755 (1987). This familiar icon of Justice—"the oddly dressed woman with a set of attributes (scales, sword, and sometimes a blindfold)"—dates to the medieval and Renaissance periods. Judith Resnik & Dennis E. Curtis, *Representing Justice: From Renaissance Iconography to Twenty-First Century Courthouses*, 151 PROC. AM. PHIL. SOC'Y 139, 143–45 (2007). Beginning with Babylonian iconography, "one can trace Justice's roots through goddesses both Greek and Roman, from Themis and Dike to Iusitia," and into Christian representations in the Middle Ages of the Virtues. *Id*. As Judith Resnik and Dennis Curtis conclude in their study of the symbol, this particular image of Justice has achieved near-universal recognition and has enjoyed remarkable durability because "it has been deployed, politically, by governments seeking to link their rules and judgments to her legitimacy." *Id*. at 145.

5. Although understood today to "suggest[] judgment uncorrupted," placing a blindfold on an image of Justice during the Renaissance often carried "negative connotations," such as Justice's eyes being "bandaged to keep her from having to see the pain caused by the sanctions imposed in the name of the law," the eyes being covered to communicate "the pain of judgment," or Justice being blindfolded by a fool to lead her "astray." Resnik & Curtis, *supra* note 4, at 160–64. In more recent times, the blindfold has come to be commonly used as a celebrated attribute of the icon. *Id*. at 163.

6. *See infra* Parts III & IV.

7. *See infra* Parts V & VI.

II. INTERPRETING STATUTES IN CONTEXT AND THE 1948 STRUCTURAL REVISION OF THE JUDICIAL CODE

"It is a fundamental canon of statutory construction that words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[8] William Eskridge and Philip Frickey describe "the main lines of textual inquiry" as including consideration of "how the statutory provision at issue coheres with the general structure of the statute."[9] Given that statutory provisions typically are organized into separately-named parts and chapters within a particular legislative act or as codified within a title of the United States Code, the location of a particular statutory section within the broader structure of a legislative enactment may communicate essential information about how that section should be understood.[10]

The importance of structure may be especially evident when the interpretive question focuses on the basic nature of a provision, such as whether it states a jurisdictional, substantive, or procedural rule. Divining the essential nature of a statutory rule may be critical or dispositive to the outcome of a lawsuit. When a provision is embedded into jurisdictional bedrock, for example, the parties are deprived of the ability to decide which issues to litigate and which to waive or forfeit, the court assumes the burden to raise the matter sua sponte, and both the court and the parties may be prevented from reaching the merits.[11] Regarding the salience of structure on such a question, consider *Zipes v. Trans World Airlines, Inc.*,[12] in which the Supreme Court held that the timely filing of an employment discrimination charge with the Equal Employment Opportunity Commission was not a jurisdictional prerequisite to suit in federal court. The Court observed that the provision actually granting the court jurisdiction "contains no reference to the timely-filing requirement," while the provision setting the time limitation appears as an entirely separate section of the legislation.[13]

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8. Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 545–46 (2002).

9. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 354–44 (1990); *see also* United States v. Fausto, 484 U.S. 439, 449 (1988) (explaining that the conclusion that certain civilian employment matters are not subject to judicial review under the Civil Service Reform Act or otherwise "emerges not only from the statutory language, but also from . . . the structure of the statutory scheme").

10. *See* Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 128 S. Ct. 2326, 2336 (2008) ("find[ing] it informative that Congress placed" a statutory section within a particularly labeled subchapter).

11. *See infra* notes 178–80 and accompanying text.

12. 455 U.S. 385 (1982).

13. *Id*. at 383–94; *see also* Arbaugh v. Y&H Corp., 546 U.S. 500, 516 (2006) ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.").

The central place of structure in statutory construction may be a noteworthy common ground in the ongoing debate over methods of interpretation. Textualists, who are more likely to find "that the meaning of a statute is apparent from its text and from its relationship with other laws,"[14] may give greatest weight to structural context within a codified title. At the same time, those advocating alternative approaches to ascertaining or reconstructing legislative intent will also find salient evidence in the purposeful structure of a code. Intentionalists, moreover, will take note of statements in the legislative history behind a revision and codification of a set of laws that emphasize the importance that Congress attached to the coherent arrangement of chapters and sections.[15]

For the federal judiciary, the rules of the adjudicative game—the organization of the courts, jurisdiction and venue, procedure, and adoption of court rules—are to be found in various provisions of the Judicial Code, codified today in Title 28 of the United States Code. Any particular section addressing these court-related matters ideally should be interpreted so that it "fit[s] harmoniously within a set of provisions composing a coherent chapter of the Judicial Procedure part of the United States Code."[16] And, indeed, Congress adopted a careful and deliberate organization for Title 28 that should facilitate judicial interpretation. But the work of the code revisers and the action of Congress in enacting that meticulously designed structure appears to be of little avail in terms of judicial interpretation—a disappointing postscript to the 1948 codification.[17]

Prior to 1948, Title 28 of the United States Code had not been enacted as an integrated statute and thus served only as prima facie evidence of the law, making it necessary for lawyers and judges "to

14. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

15. William Eskridge, Philip Frickey, and Elizabeth Garrett question whether, in light of the less than "single-minded" nature of "actual legislative practice," the "whole act rule," by which a statutory provision is interpreted in a "holistic" manner within a statutory scheme, is consistent with an intentionalist approach to statutory interpretation. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 263 (2000). Nonetheless, they conclude that "on rule of law grounds," "there might be greater legal legitimacy, as well as aesthetic advantage, if courts presume coherence among statutes as well as within statutes." *Id*. at 264. In addition, when Congress passes a revision and codification of a title within the United States Code, there may be a stronger basis for believing that the integrated whole accurately reflects collective legislative intent. As confirmed by the history of the 1948 code revision that is sketched in the following text, when Congress undertakes to specifically revise and codify an entire Title, it is acting with unique, specific, and common intent to create that very "coherence among statutes." *See id*.

16. *See* Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 136 (1995) (Ginsburg, J., concurring) (discussing appellate review of remand orders in removed cases).

17. *See infra* notes 22–37 and accompanying text.

refer back to the Judicial Code of 1911 and to later volumes of the Statutes at Large in order to determine the exact text of any statutory provision."[18] In 1948, to address this unsatisfactory state of affairs and to bring the law up to date, Congress enacted the revised and reorganized provisions of the Judicial Code into positive law, through the codification of Title 28 of the United States Code.[19]

Regarding the project to revise and codify Title 28, which culminated in the 1948 Act, the Supreme Court said:

> This was scarcely hasty, ill-considered legislation. To the contrary, it received close and prolonged study. Five years of Congressional attention supports the Code. And from the start, Congress obtained the most eminent expert assistance available. The spadework was entrusted to two law-book-publishing firms, the staffs of which had unique experience in statutory codification and revision. They formed an advisory committee, including distinguished judges and members of the bar, and obtained the services of special consultants. Furthermore, an advisory committee was appointed by the Judicial Conference. And to assist with matters relating to the jurisdiction of this Court, Chief Justice Stone appointed an advisory committee, consisting of himself and Justices Frankfurter and Douglas.[20]

The textual framework of the Title 28 revision and codification was a clear, meaningful, and deliberately-constructed structure upon which judges, lawyers, and ordinary citizens could rely. Congress's conscientious purpose in classifying statutes within the Judicial Code's various parts, chapters, and subchapters is plainly stated in the House Report on the legislation:

> The first step in revision was the preparation of a preliminary analysis—the framework upon which to build the new title. In drafting this outline the old system of classification was discarded and modern subject matter arrangement was substituted. The material was divided into six major categories. Part I provides for organization of courts; part II treats of the attorneys and marshals; part III covers court officers and employees; part IV sets forth the

18. Alexander Holtzoff, *The New Federal Judicial Code*, 8 F.R.D. 343, 343–44 (1948-49).

19. Act of June 25, 1948, ch. 646, 62 Stat. 869. For a history of the enactment of the federal Judicial Code in Title 28, see generally 13 CHARLES A. WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3509 (2007); Holtzoff, *supra* note 18.

20. *Ex parte* Collett, 337 U.S. 55, 65–66 (1949).

> provisions on jurisdiction and venue; part V deals with procedure; and part VI takes up particular proceedings.
>
> Within these parts, the subject matter was arranged under appropriate chapter heads. The numbering system adopted makes adequate provision for future legislation. Chapters were given odd numbers, leaving the even numbers available for related chapters containing future acts. Sufficient section numbers were left between chapters to accommodate such growth.[21]

Unfortunately, while winding up the meticulous process of enacting the revision of Title 28, Congress apparently lost its nerve and was unwilling to allow these deliberate choices to be recognized by the courts as reflecting actual legislative intent. In a little-known and uncodified provision of the 1948 legislation, Congress precluded the courts from drawing a direct inference of legislative intent from the fact that a particular statutory section was classified within a certain chapter of Title 28 under a specific descriptive heading. Section 33 of the 1948 Revision of Title 28 reads: "No inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure, as set out in section 1 of this Act, in which any section is placed, nor by reason of the catchlines used in such title."[22]

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21. H.R. REP. NO. 80-308, at 5 (1947).

22. Act of June 25, 1948, ch. 646, § 33, 62 Stat. 869, 991. A nearly identical uncodified provision applies to Title 18, the federal criminal code, which was revised and codified as part of the same 1948 Act. Act of June 25, 1948, ch. 645, § 19, 62 Stat. 683, 862 ("No inference of a legislative construction is to be drawn by reason of the chapter in Title 18, Crimes and Criminal Procedure, as set out in section 1 of this Act, in which any particular section is placed, nor by reason of the catchlines used in such title."). Similar language, reciting that no inference of a legislative construction is to be drawn from the placement of a section into a chapter or within the United States Code or from the caption or catchline of a provision, has been enacted as well with respect to the codification of other titles of the United States Code, including Title 13 (Census), Act of Aug. 31, 1954, ch. 1158, § 5, 68 Stat. 1024; Title 14 (Coast Guard), Act of Aug. 4, 1949, ch. 393, § 3, 63 Stat. 557; Title 26 (Internal Revenue Code), 26 U.S.C. § 7806(b) (2006); Title 31 (Money and Finance), Pub. L. No. 97-258, § 4(e), 96 Stat. 877, 1067 (1982); Title 36 (Patriotic and National Observances, Ceremonies, and Organizations), Pub. L. No. 105-225, § 5(e), 112 Stat. 1253, 1499 (1998); Title 39 (Postal Service), Pub. L. No. 91-375, § 11(b), 84 Stat. 719, 785 (1970); Title 40 (Public Buildings, Property, and Works), Pub. L. No. 107-217, § 5(f), 116 Stat. 1062, 1304 (2002); and Title 44 (Public Printing and Documents), Pub. L. No. 90-620, § 2(e), 82 Stat. 1238, 1306 (1968). While largely hidden provisions erasing the significance of the deliberately-enacted structure of a code in construing its provisions strike me as equally pernicious elsewhere in the law, my lack of expertise in fields such as criminal law and tax causes me to hesitate from proposing a repeal of these similar blindness directives. Making the case for unveiling the structure of Title 28 for forthright use in judicial interpretation is sufficient work for one article. Most importantly, as addressed above in the text, one of the most distinctive features and crowning achievements of the codification of Title 28 was its structure and classification of provisions into designated parts and chapters.

By enacting the § 33 codicil to the revision and codification of Title 28, Congress perhaps wished to avoid inadvertent changes in law.[23] To be sure, in general, the 1948 revision legislation was designed to clarify, simplify, and harmonize statutory provisions governing the judiciary rather than to make substantive changes in the law.[24] But while "the majority of the provisions of the Code constitute restatements of existing law, as is generally true of most codifications," the Judicial Code revisers deliberately introduced "[a] number of changes in the law," some of which were understood to be of "considerable consequence."[25] Major substantive changes in the Title 28 revisions enacted in 1948 included new provisions defining diversity of citizenship jurisdiction to include suits between citizens of the District of Columbia and citizens of different states, granting authority to district courts to transfer venue, directing that petitions for removal of cases from state to federal court are to be filed only in the federal court, and setting a uniform period for filing a notice of appeal in civil cases.[26]

And among those revisions to the Judicial Code in which the drafters took special pride was the careful classification of jurisdictional, substantive, procedural, and other provisions into designated parts and chapters.[27] "[F]ar from being a random collection of provisions," the organization of Title 28 was by conscious and scrupulous design.[28]

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23. Beyond reciting that the section "provides against any inference of a legislative construction by reason of the classification of any section in a particular chapter or by reason of the captions or catch lines used throughout the title," the legislative history sheds no light on the congressional purpose behind adoption of this veiling provision. H.R. REP. NO. 80-308, at 7 (1947).

24. *See* Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 279 (2003) ("The legislative history described revisions of Title 28 in general as stylistic rather than substantive, aimed at ending needless searches into the Statutes at Large, eliminating anachronistic provisions, and simplifying language.").

25. Holtzoff, *supra* note 18, at 345.

26. William W. Barron, *The Judicial Code*, 8 F.R.D. 439, 441–43 (1949) (quoting BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 19 (1924)).

27. *Revision of Titles 18 and 28 of the United States Code: Hearings on H.R. 1600 and H.R. 2055 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 80th Cong. 44 (1947) (statement of John F. X. Finn, former special counsel to the House Committee on Revision of the Laws) (stating that he was "proudest of the way this proposed code deals with jurisdiction, venue, removal of causes, full faith and credit, and evidence and procedure"); *see also* Holtzoff, *supra* note 18, at 344–45 (describing the revised Judicial Code "[i]n its arrangement" as being "a considerable improvement on its predecessor"); Albert B. Maris, *New Federal Judicial Code: Enactment by 80th Congress a Notable Gain*, 34 A.B.A. J. 863, 864 (1948) (saying that "the revisers have been particularly successful in arranging, in a logical and consistent way, the statutory material which remains in force"). For further discussion of the deliberate structural changes introduced into the Judicial Code, see also *infra* notes 173–75 and accompanying text.

28. Susan S. McDonald, *A Case of Statutory Misinterpretation: An 1839 Statute of Limitation on a Form of Debt Action is Being Misapplied to Limit Modern Regulatory Proceedings*, 49 AM. U. L. REV. 659, 673 (2000).

Moreover, by this "regrouping of sections," Congress was able to compare and reconcile "inconsistent or conflicting provisions that otherwise might pass unnoticed."[29]

William W. Barron, the chief reviser, explained that the Title 28 revision brought about

> a consolidation of varied and scattered sections pertaining to similar subject matter, a logical, orderly grouping of related principles. While no change was made for the sake of change, we have made the effort, in the words of [Justice] Cardozo, "to reckon our gains and losses, strike a balance and start afresh."[30]

Importantly, notwithstanding § 33, Congress affirmatively enacted the revised Title 28 as an integrated whole—complete with parts, chapters, and subchapters—and thereby embedded a restructured Judicial Code into positive law.[31]

Moreover, concerns about reading too much meaning into the structure of a revised and codified Title should be alleviated by the general presumption that changes made during a codification are for purposes of clarification, unless clear indication is present that a change in meaning was intended.[32] To say that an inference of legislative intent may legitimately be drawn from the structure of a code is not to say that such an inference will in every case outweigh other textual and contextual indicia of statutory meaning.[33]

In this respect, the primary information conveyed with clarity by the choice of organization within a code concerns the basic nature of a provision rather than its precise meaning in application.[34] Thus, classification of a section within a particular chapter does say something important, but it does not say everything or even most things about a

29. Barron, *supra* note 26, at 440.

30. *Id*. at 446 (quoting CARDOZO, *supra* note 26, at 19).

31. *See infra* Part IV.

32. *See* Keene Corp. v. United States, 508 U.S. 200, 209 (1993) (saying about the "comprehensive revision of the Judicial Code completed in 1948, we do not presume that the revision worked a change in the underlying substantive law 'unless an intent to make such [a] chang[e] is clearly expressed'" (quoting Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 227 (1957))); Anderson v. Pac. Coast S.S. Co., 225 U.S. 187, 198–99 (1912) ("The change of arrangement, which placed portions of what was originally a single section in two separated sections cannot be regarded as altering the scope and purpose of the enactment. For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed."); *see generally* 1A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 28:11, at 493 (5th ed.) (noting the presumption that a change in language "is for purposes of clarity rather than for a change in meaning").

33. *See infra* Part VI.

34. *See infra* Part III.

provision.[35] And placement within a particular chapter certainly suggests nothing that may contradict the plain operating language of the section or that would preclude simultaneous and careful consideration by a court of the legislative history, contemporary legal understanding, and other commonly-invoked sources and canons regarding the meaning of a particular statutory provision.

That consideration of structure, like every other rule or canon of statutory construction, is a tool of limited application is no reason to require a court to leave it in the tool-box when structure may be a useful guide to statutory understanding.[36] By directing the courts not to give any meaning to parts, chapters, and catchlines, § 33 prevents courts from making a complete examination of a statutory section within the Judicial Code and from deriving every piece of information necessary to give faithful meaning to the enacted text.[37]

III. UNJUST AND INCONSISTENT RESULTS WHEN THE JUDICIARY IS SUPPOSEDLY BLINDED TO STATUTORY STRUCTURE: TWO CASE EXAMPLES

Although § 33 of the 1948 Act codifying the Judicial Code[38] remains in force and has present-day practical effect,[39] judges and lawyers have little awareness of this disruption to the ordinary practice of statutory interpretation.[40] In the sixty years since the 1948 revision of Title 28, this uncodified constraint on judicial interpretation has been cited on only five occasions by federal courts at all levels—none later than 1958 and only once by the Supreme Court.[41]

In the single case in which the Supreme Court remarked on this provision, the structure of Title 28 would not have played a meaningful role in the Court's decision, even if it had been adduced as evidence of legislative intent. In *Ex parte Collett*,[42] the Court rejected the suggestion that the venue transfer statute applies only to civil suits for which special venue requirements were set out in neighboring provisions

35. *See infra* Part IV.

36. *See* Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 128 S. Ct. 2326, 2336 (2008) (saying that while "a subchapter heading cannot substitute for the operative text of the statute," that "[n]onetheless, statutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of a statute'" (citation omitted)).

37. *See infra* Part V.

38. Act of June 25, 1948, ch. 646, § 33, 62 Stat. 869, 991.

39. *See infra* Part III.A–B.

40. *See infra* notes 154–59 and accompanying text.

41. *Ex parte* Collett, 337 U.S. 55, 59 (1949); Steckel v. Lurie, 185 F.2d 921, 923 (6th Cir. 1950); Hernandez v. Watson Bros. Trans. Co., 165 F. Supp. 720, 721 (D. Colo. 1958); Du Roure v. Alvord, 120 F. Supp. 166, 170 (S.D.N.Y. 1954); Boye v. United States, No. 07-195C, 2009 WL 3824371, at *6 (Fed. Cl. Nov. 12, 2009).

42. 337 U.S. 55 (1949).

within the venue chapter of the Judicial Code.[43] The Court mentioned § 33 as disqualifying any argument based on placement of the venue transfer statute in this chapter.[44] Nevertheless, the Court observed that the plain language of the statute, which authorizes transfer of "any civil action," as well as the fact that other venue provisions in the chapter obviously apply generally to ordinary civil lawsuits, directed the result.[45] Thus, even if evidence of structure had been admissible, it simply had little relevance in that case.

Unfortunately, the parsity of citations to § 33 does not necessarily mean its practical effect is feeble. First, because a court may silently defer to § 33, the court may thereby dodge the question of whether the outcome would have been different had the court conscientiously interpreted the governing statutory provision within its structural context. While at least one case example of apparent avoidance is described below,[46] we can never know on how many other occasions a statutory provision has been given an a-contextual and arguably mistaken reading because a federal court gave mute ascension to the congressional directive to ignore the structure of the Judicial Code. Second, whether by quiet circumvention or blissful ignorance, a court may interpret a section of the Judicial Code in a manner consistent with and informed by its structure, without ever acknowledging the contrary instruction of § 33.[47] Unless the court references the Judicial Code framework by chapter and verse, the reader may not be certain whether structure played a crucial interpretive role in the outcome or whether the consistency of the judicial treatment of the section with that structure was serendipitous.

That courts may sometimes depart from the command of § 33 and take the structure of the Judicial Code into account, while courts on other occasions may adhere to its confining injunction and refuse to consider structure, leaves litigants to the vagaries and injustice of discordant and capricious results. That questions implicating structure under the Judicial Code frequently involve jurisdictional versus procedural classifications means that an a-contextual interpretation may deprive a party of a federal forum or otherwise result in dismissal of a claim.

43. *Id.* at 58–59 (interpreting 28 U.S.C. § 1404 (2006)).
44. *Id.*
45. *Id.*
46. *See infra* Part III.A.
47. *See infra* Part III.B.

A. *Declining to Respect the Codification of the Statute of Limitations for the Court of Federal Claims in a Non-Jurisdictional Chapter*

The baneful effect of the blinding of the judiciary to manifest structural context within the Judicial Code was felt rather sharply in the Supreme Court's recent 2008 decision in *John R. Sand & Gravel Co. v. United States*.[48] As I have written previously, the *John R. Sand* case presented

> a question that seemingly only a lawyer could love (or care about): whether the statute of limitations governing non-tort money claims against the federal government in the United States Court of Federal Claims is *jurisdictional*. In other words, is this an ordinary statute of limitations, that is, an affirmative defense and a procedural time constraint that may be waived or forfeited by the government? Or is this instead a special and absolute rule of subject matter jurisdiction, one that cannot be relinquished and indeed that must be raised by the court on its own motion, even if both the claimant and the government agree that the lawsuit was timely filed?[49]

Yet the answer to the question of jurisdictionality in *John R. Sand* was anything but esoteric and abstract in its consequence. Categorizing a provision as jurisdictional or not determines whether the parties maintain control over what issues they choose to litigate, or instead whether a matter must be raised by the court sua sponte at each stage of the litigation, which in turn may mean that a decision on the merits may later be vacated, even if the parties had agreed that an element was satisfied.[50] Moreover, the Supreme Court generally presumes that procedural rules in federal government cases, including the application of statutes of limitations to statutory waivers of sovereign immunity, are to be applied in the same manner as with private litigants.[51] But if what

48. 552 U.S. 130 (2008). In the interests of full disclosure and because work on the case resulted in my first and consequential encounter with § 33, see *infra* notes 154–55 and accompanying text, I was co-counsel for the petitioner before the Supreme Court in this case.

49. Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 521 (2008).

50. *See also infra* notes 177–80 and accompanying text.

51. *See, e.g.*, Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 93–96 (1990) (holding that the limitations period on employment discrimination claims against the United States is subject to equitable tolling in the same manner as in cases among private litigants); Henderson v. United States, 517 U.S. 654, 663–71 (1996) (holding that service of process for claims against the federal government under the Suits in Admiralty Act may be accomplished under ordinary service provisions of the Federal Rules of Civil Procedure, notwithstanding a stricter

appeared to be a procedural or case-processing rule is instead designated as jurisdictional, the general presumption of procedural custom is thereby rebutted.

The petitioner in *John R. Sand* was not without forceful arguments against a jurisdictional reading of the statute of limitations at issue in that case.[52] The statute of limitations for non-tort money claims in the United States Court of Federal Claims is found in § 2501 of Title 28 of the United States Code: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."[53] The plain language suggests that the jurisdictional inquiry is to be separately completed before application of the time limitation. Jurisdiction is assumed in the first phrase of § 2501, before the time bar is set forth in the second phrase.[54] When the predecessor statute was enacted in 1863, the legislative history indicated that members of Congress expected this statute of limitations to apply to the government in the same manner as to private parties.[55] The contemporary legal understanding at the time of enactment was that a statute of limitations was a waivable defense.[56]

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requirement under the statute). On application of procedural rules in federal government cases, see generally Sisk, *supra* note 49, at 580–87.

52. *See generally* Sisk, *supra* note 49, at 587–94 (developing in detail the arguments against characterization of § 2501 as jurisdictional).

53. 28 U.S.C. § 2501 (2006).

54. *See* Grass Valley Terrace v. United States, 69 Fed. Cl. 341, 347 (2005) (referring to this understanding as the "plain English interpretation of the statute"); *see also* John R. Sand & Gravel Co. v. United States, 457 F.3d 1345, 1362 (Fed. Cir. 2006) (Newman, J., dissenting) ("The text of the statute confirms that the limitations period is applied to claims of which the Court of Federal Claims already 'has jurisdiction'"), *aff'd*, 552 U.S. 130 (2008); Howard Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547, 1550 (2008) (saying that "properly read, [§ 2501] addresses the time for bringing claims and not the jurisdiction of the Court of [Federal] Claims").

55. *See, e.g.*, CONG. GLOBE, 37th Cong., 3d Sess. 414 (1863) (statement of Sen. Sherman) ("As this bill proposes to throw open this court to all claimants, I think the same statute of limitations ought to be applied to existing claims as would be applied between private individuals."); CONG. GLOBE, 36th Cong., 1st Sess. 984 (1860) (statement of Sen. Bayard) (justifying the inclusion of a statute of limitations "because there can be no reason whatever for acts of limitation as between citizen and citizen, . . . which does not apply as between Government and citizen"). Nothing in the legislative history suggests that the statute of limitations was intended to be jurisdictional in nature.

56. During the period when the 1863 statute of limitations was enacted, statutes of limitations were understood to affect the remedy and not the underlying right of action. Campbell v. Holt, 115 U.S. 620, 624–29 (1885); Townsend v. Jemison, 50 U.S. (9 How.) 407, 413 (1850); M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 327–28 (1839). *See generally* JOSEPH K. ANGELL, A TREATISE ON THE LIMITATIONS OF ACTIONS AT LAW AND SUITS IN EQUITY AND ADMIRALTY § 22, at 17 (4th ed. 1861). A statute of limitations thus has been a classic example of an affirmative defense left to the defendant to raise and establish and subject to waiver or forfeiture. *See* FED. R. CIV. P. 8(c) (listing "statute of limitations" as among the "affirmative defenses" that a defendant "must affirmatively state"); Day v. McDonough, 547 U.S. 198, 205

Congress had selected language from typical state statutes of limitations of this mid-nineteenth-century period, thus drafting § 2501 to be what the Supreme Court later called an "unexceptional" statute of limitations.[57]

Indeed, in deciding the *John R. Sand* case, the Supreme Court disagreed with none of these points on their merits. Nonetheless, the Court ruled that the statute of limitations *did* have jurisdictional force, thus requiring a court to "raise on its own the timeliness of a lawsuit filed in the Court of Federal Claims, despite the Government's waiver of the issue."[58] The Court's decision was premised squarely and exclusively on stare decisis,[59] adhering to a nineteenth century line of cases[60] from a very early stage in the Court's sovereign immunity jurisprudence that reflected a rigid jurisdictional attitude toward then-novel legislation that afforded a general judicial remedy against the federal government for monetary claims.[61] Two Justices dissented, agreeing both that the jurisdictional rule reaffirmed by the majority had been expressly abandoned in prior decisions and that any ambiguity in the case-law "ought to be resolved in favor of clarifying the law, rather than preserving an anachronism whose doctrinal underpinnings were discarded years ago."[62]

Due to § 33, the petitioner in *John R. Sand* was deprived of effective use of yet another powerful argument against implying jurisdiction into a statute of limitations, one based directly upon the structure of Title 28. Because the 1948 revision and codification of Title 28 post-dated the Court's nineteenth century detour into jurisdictional analysis, this renewed legislative attention should have provided a basis for bringing

(2006) ("A statute of limitations defense . . . is not 'jurisdictional,' hence courts are under no *obligation* to raise the time bar *sua sponte*."); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (stating that, rather than being "a jurisdictional prerequisite," "a statute of limitations, is subject to waiver, estoppel, and equitable tolling").

57. *See* Franconia Assocs. v. United States, 536 U.S. 129, 145 (2002) (declaring unanimously—after re-examining the text and historical context of the predecessor statute—that § 2501 is an "unexceptional" statute of limitations, comparable in text to "[a] number of contemporaneous [nineteenth century] state statutes of limitations applicable to suits between private parties").

58. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 132 (2008).

59. *Id.* at 132–40.

60. *See, e.g.*, United States v. Wardwell, 172 U.S. 48, 50, 52 (1898) (declaring that the statute of limitations for the Court of Claims was "not merely a statute of limitations but also jurisdictional in its nature," although the jurisdictional question was not presented because the government was openly challenging the timeliness of the action in the courts); Kendall v. United States, 107 U.S. 123, 124–25 (1883).

61. *See* Sisk, *supra* note 49, at 550–52, 592–94.

62. *John R. Sand & Gravel Co.*, 552 U.S. at 140–43 (Stevens, J., dissenting).

the case law back onto the original path set by Congress.[63] Section 33, however, drained persuasive force away from this structural argument.

When we examine the jurisdictional and procedural statutes applicable to the Court of Federal Claims by how they were classified into specific statutory parts and chapters by Congress in the 1948 codification of Title 28, the structural framework of the Judicial Code strongly suggests that the statute of limitations did not limit the subject matter jurisdiction of the court.

In its revision of Title 28 of the United States Code, Congress reserved the fourth part for provisions on federal courts jurisdiction and venue: "Part IV—Jurisdiction and Venue." Chapter 91 of that part, titled "United States Court of Federal Claims," now contains sixteen sections expressly defining and limiting the court's subject matter jurisdiction. Nearly all the sections in Chapter 91 speak forthrightly in the language of "jurisdiction."[64] Thus, when Congress wishes to grant or withhold "jurisdiction" from the Court of Federal Claims, its choice of both text and code classification in this chapter of Title 28 shows that it knows how to do so in the most distinctive terms and by clear structural organization.

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63. As part of the 1948 Act, a slight change was made in the language of the statute of limitations, 28 U.S.C. § 2501, substituting the words "has jurisdiction" for "cognizable by" in describing the claims falling within the authority of the Court of Federal Claims. The 1863 predecessor statute read: "[E]very claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues." Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 765, 767. As currently codified, the statute speaks of the Court of Federal Claims as having "jurisdiction." 28 U.S.C. § 2501 (2006). The word "cognizable" means "'within [the] jurisdiction of [a] court or power given to [a] court to adjudicate [a] controversy.'" FDIC v. Meyer, 510 U.S. 471, 476 (1994) (quoting BLACK'S LAW DICTIONARY 259 (6th ed. 1990)). In *John R. Sand & Gravel Co.*, the Court said that it would not presume this revision worked a change in the substantive law without a clear expression by Congress. *John R. Sand & Gravel Co.*, 552 U.S. at 134–36 (majority opinion). As neither party suggested that "has jurisdiction" and "cognizable by" were anything other than synonymous, the Court unsurprisingly found "no such expression of intent here[]" to change the meaning based solely on its text. *Id.* at 136. By contrast, after briefing by the parties regarding § 33, the Court chose not to address the classification of the statute of limitations into a procedural chapter in the 1948 revision.

64. Most of the sections in this chapter state that "[t]he United States Court of Federal Claims shall have jurisdiction" over a defined claim or set of claims. 28 U.S.C. §§ 1491, 1494–97, 1499, 1503, 1505, 1507–08. A few sections state that "[t]he United States Court of Federal Claims shall not have jurisdiction" over a defined set of other claims. *Id.* §§ 1500–02, 1509. There are only two exceptions to this pattern of language expressly granting or withholding "jurisdiction." First, the unique provision for congressional reference of claims to the Court of Federal Claims, *id.* § 1492, does not speak in jurisdictional terms because it does not grant jurisdiction as such. Second, the provision waiving sovereign immunity for claims alleging infringement of patents and copyrights by the United States, *id.* § 1498, confers jurisdiction by creating an exclusive action in the Court of Federal Claims.

By contrast, § 2501,[65] as the general statute of limitations for claims before the Court of Federal Claims, is codified in a separate part of Title 28 titled "Part VI—Particular Proceedings" and in Chapter 165 titled "United States Court of Federal Claims Procedure." In addition to setting the time for filing suit, the sections in this chapter address such procedural, non-jurisdictional matters as aliens' privilege to sue;[66] appearance of parties before the court, presentation of evidence, examination of witnesses, rules of practice and procedure, and holding trials;[67] the qualifications of witnesses;[68] discovery;[69] new trials and stays of judgment;[70] payment of judgments;[71] and the conclusiveness of judgments.[72] None of the provisions in Chapter 165 speak in the language of "jurisdiction"—except to confirm the court's previous exercise of or the availability of subject matter jurisdiction over the claim to which the court is to apply the procedural rule.[73]

Accordingly, the designation of § 2501 within a procedural chapter as enacted by Congress in the 1948 revision should have confirmed that this was indeed an ordinary and unexceptional statute of limitations that should be construed and applied according to common legal standards. Even the government, in its brief before the Supreme Court in *John R. Sand*, acknowledged that given the deliberate structural arrangement of Title 28, it is likely that the 1948 code "*revisers* did not understand the preexisting six-year filing requirement to be a limit on the Court of Claims' jurisdiction."[74]

But none of that mattered. Through § 33, Congress had effectively instructed the courts to ignore this organization and classification. And the Supreme Court apparently obliged.

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65. *Id.* § 2501.
66. *Id.* § 2502.
67. *Id.* § 2503.
68. *Id.* § 2506.
69. *Id.* § 2507.
70. *Id.* § 2515.
71. *Id.* § 2517.
72. *Id.* § 2519.
73. *See id.* § 2501 ("Every claim of which the United States Court of Federal Claims *has jurisdiction* shall be barred unless the petition thereon is filed within six years after such claim first accrues.") (emphasis added); *id.* § 2502(a) ("Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the United States Court of Federal Claims if the subject matter of the suit is otherwise *within such court's jurisdiction*.") (emphasis added); *id.* § 2510(a) ("The Comptroller General may transmit to the United States Court of Federal Claims for trial and adjudication any claim or matter of which the Court of Federal Claims might *take jurisdiction* . . . .") (emphasis added).
74. Brief for the United States at 34, *John R. Sand & Gravel Co.*, 552 U.S. 130 (2008) (No. 06-1164).

B. *Honoring the Jurisdictional and Non-Jurisdictional Classification of Statutory Sections in the Federal Tort Claims Act*

The Federal Tort Claims Act (FTCA)[75] is the most comprehensive and commonly invoked waiver of federal sovereign immunity for tort claims against the federal government.[76] Under the FTCA, the United States is liable on the same basis and to the same extent as recovery would be allowed for a tort committed under like circumstances by a private person in that state.[77]

While the FTCA waives the federal sovereign immunity for tort claims generally, the United States remains the beneficiary of several special rules and protections, notably including: restrictions on the standards of liability (such as the exclusion of strict liability);[78] numerous defined exceptions to liability that bar certain types of claims (such as claims for assault, libel, misrepresentation, and interference with contract)[79] or that preclude liability arising out of certain governmental activities (including discretionary or policymaking functions,[80] transmission of mail,[81] and military combat);[82] restrictions on damages available (precluding prejudgment interest and punitive damages);[83] and the exclusion of certain categories of people from eligibility to seek a damages remedy under the FTCA (federal civilian employees covered by a compensation act[84] and military service members injured incident to service).[85]

In *FDIC v. Meyer*,[86] the Supreme Court considered whether the Federal Tort Claims Act superseded another statute that generally permits a particular agency to sue and be sued. By express statutory directive, the FTCA is the exclusive venue for suits against agencies that are authorized to sue and be sued in their own name *if* the claim is

75. 28 U.S.C. §§ 1346(b), 2671–80 (2006).

76. GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT § 3.02, at 104 (4th ed. 2006).

77. United States v. Olson, 546 U.S. 43, 44 (2005).

78. *See* Laird v. Nelms, 406 U.S. 797, 797–803 (1972) (construing 28 U.S.C. § 1346(b)(1), making the government liable for the "negligent or wrongful act or omission" of any government employee, as encompassing only fault-based causes of action, such as negligence or intentional wrongdoing).

79. 28 U.S.C. § 2680(h).

80. *Id.* § 2680(a).

81. *Id.* § 2680(c).

82. *Id.* § 2680(j).

83. *Id.* § 2674.

84. Federal Employees' Compensation Act, 5 U.S.C. § 8116(c) (2006).

85. *See* Feres v. United States, 340 U.S. 135, 141–46 (1950) (holding that claims by military personnel for injuries sustained incident to service should be excluded from the FTCA).

86. 510 U.S. 471 (1994).

"cognizable" under the FTCA.[87] Defining "cognizable" as meaning that a claim is within the adjudicative authority of a court, the Court ruled that the "inquiry focuses on the jurisdictional grant provided by § 1346(b)."[88]

Subsection 1346(b) not only speaks in the language of jurisdiction but also is codified in Chapter 85 of the Judicial Code, which bears the legend "District Courts; Jurisdiction." Focusing on this section, the Supreme Court in *Meyer* described the jurisdictional directions for FTCA claims:

> Section 1346(b) grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity and "render[ed]" itself liable. This category includes claims that are:
>
> > "[1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).
> >
> > A claim comes within this jurisdictional grant—and thus is "cognizable" under § 1346(b)—if it is actionable under § 1346(b). And a claim is actionable under § 1346(b) if it alleges the six elements outlined above.[89]

Accordingly, as confirmed by its jurisdictional language and its location within a jurisdictional chapter of the Judicial Code, § 1346(b) demarks the jurisdictional compass of federal court authority over tort claims against the United States, setting forth six requisite jurisdictional elements. Thus, for example, whether a government employee was "acting within the scope of his . . . employment," and whether the "circumstances" are such that a "private person" would be liable are

87. 28 U.S.C. § 2679(a).

88. *Meyer*, 510 U.S. at 476.

89. 510 U.S. at 477 (citations omitted); *see also* Feres v. United States, 340 U.S. 135, 140–41 (1950) (describing § 1346(b) as conferring jurisdiction, while regarding other provisions in the FTCA as prescribing what claims are allowable, to be determined by courts in exercising that jurisdiction).

jurisdictional questions that must be satisfactorily answered before the court has the authority to adjudicate the claim.[90]

By contrast, the remaining statutory sections that comprise the FTCA are located in a separate chapter of the Judicial Code, namely Chapter 171 which is designated "Tort Claims Procedure." By virtue of being classified in a non-jurisdictional chapter, and even more specifically in a chapter that is reserved for standards and rules of "procedure," these additional statutory provisions presumably should not be given a jurisdictional construction. Thus, while §§ 2671 through 2680 of the FTCA[91] set forth additional standards, prerequisites, directions, and exceptions which are enforceable expressions of legislative intent, the presence or absence of these elements generally does not have a jurisdictional effect so as to deprive the court of any authority to proceed. If the parties should stipulate to or waive objections respecting these elements, the action could proceed without the court being obliged to act sua sponte to ensure that each provision was satisfied.

And, indeed, the courts appear to have arrived at just that conclusion about the distribution of jurisdictional and non-jurisdictional elements in the FTCA, although without directly referencing the chapter structure of the Judicial Code in doing so. Thus, for example, § 2674 of the FTCA[92] more specifically describes the standard of liability and adds exclusions of governmental liability for "interest prior to judgment" and "for punitive damages." When the Supreme Court construed this prohibition on awards of punitive damages in *Molzof v. United States*,[93] it rejected the government's suggestion of a special definition that would limit governmental liability to strictly compensatory damages, instead adopting the traditional common-law understanding of punitive damages as that which is designed to punish a party for egregious misconduct.[94] In relying on ordinary principles of statutory construction, rather than applying the kind of strict and jurisdictional construction often applied to the core of a statutory waiver of sovereign immunity,[95] the Court rejected the government's "restrictive reading of the statute."[96] In fact, after quoting the punitive damages limitation as

90. *See* 28 U.S.C. § 1346(b).

91. *Id.* §§ 2671–80.

92. *Id*. § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.").

93. 502 U.S. 301 (1992).

94. *Id*. at 304–12.

95. *See* Sisk, *supra* note 49, at 562–66.

96. *Molzof*, 502 U.S. at 310.

found in § 2674, the Court referred to the "jurisdictional grant over FTCA cases" as being separately found in § 1346(b).[97]

Similarly, with respect to the exceptions to liability under the FTCA found in § 2680,[98] in *Indian Towing Co. v. United States*[99] and *Block v. Neal*,[100] the Supreme Court noted the government's concessions that the discretionary function exception[101] did not apply in these cases—waivers the Court did not question as it would have been obliged to do sua sponte were it a jurisdictional element.

In the recent *Dolan v. U.S. Postal Service* decision,[102] the Court explained that it was inclined to construe exceptions to the waiver more narrowly, so as not to defeat the sweeping purpose of the FTCA in waiving sovereign immunity.[103] If these standards, restrictions, or exceptions were instead jurisdictional limitations, the presumption would be in the other direction, as the burden lies with the party seeking to invoke the limited subject matter jurisdiction of the federal courts.[104]

For comparative purposes, special attention should be drawn to the statute of limitations governing FTCA claims. The limitations period is not established through the general section waiving sovereign immunity and simultaneously conferring district court jurisdiction[105] nor in any other section classified in a jurisdictional chapter of the Judicial Code. Rather, § 2401(b)[106] is located in Chapter 161 of Title 28, which is headed "United States as Party Generally." In language with significant parallels to the statute of limitations for non-tort money claims in the United States Court of Federal Claims,[107] Subsection 2401(b) provides:

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97. *Id.* at 305.

98. 28 U.S.C. § 2680.

99. 350 U.S. 61, 64 (1955).

100. 460 U.S. 289, 294 (1983).

101. 28 U.S.C. § 2680(a).

102. 546 U.S. 481 (2006).

103. *Id.* at 491–92; *see also* United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992) (saying that the Court has "narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress' clear intent, as in the context of the 'sweeping language' of the Federal Tort Claims Act").

104. *See* Thomson v. Gaskill, 315 U.S. 442, 446 (1942) ("[I]f a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by competent proof."); Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941) ("[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of [the statute allowing removal of cases from state to federal court]."); Grace v. Am. Cent. Ins. Co., 109 U.S. 278, 283 (1883) ("[T]he presumption is that a cause [brought in federal court] is without its jurisdiction unless the contrary affirmatively appears.").

105. 28 U.S.C. § 1346(b).

106. *Id.* § 2401(b).

107. *Id.* § 2501; *see supra* Part III.A.

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after . . . notice of final denial of the claim by the agency to which it was presented.[108]

Although previously describing this FTCA statute of limitations as a "condition of [the] waiver" of sovereign immunity,[109] the Supreme Court has never characterized it as jurisdictional nor addressed the question of whether it is subject to equitable tolling. Reasoning that the FTCA contains "a garden variety limitations provision,"[110] nearly every court of appeals to address the question has concluded or suggested that the FTCA provision falls within the presumption of *Irwin v. Department of Veterans Affairs*[111] that statutes of limitations in federal government cases are subject to equitable tolling.[112] As "[t]he *sine qua non* of a jurisdictional rule is a demand for strict and nonwaivable compliance with its terms,"[113] whatever label the courts might apply to the provision, a holding that the FTCA statute of limitations may be equitably adjusted confirms its non-jurisdictional nature.[114]

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108. 28 U.S.C. § 2401(b).

109. United States v. Kubrick, 444 U.S. 111, 117–18 (1979).

110. Perez v. United States, 167 F.3d 913, 917 (5th Cir. 1999).

111. 498 U.S. 89, 94–95 (1990).

112. *See, e.g.*, T.L. *ex rel*. Ingram v. United States, 443 F.3d 956, 963 (8th Cir. 2006); Rakes v. United States, 442 F.3d 7, 24–25 (1st Cir. 2006); Hughes v. United States, 263 F.3d 272, 278 (3d Cir. 2001); *Perez*, 167 F.3d at 917; Glarner v. U.S. Dep't of Veterans Admin., 30 F.3d 697, 701 (6th Cir. 1994); Pipkin v. U.S. Postal Serv., 951 F.2d 272, 274–75 (10th Cir. 1991); *see also* Schmidt v. United States, 933 F.2d 639, 640 (8th Cir. 1991) (holding that strict compliance with FTCA statute of limitations is not a jurisdictional prerequisite). *But see* Marley v. United States, 567 F.3d 1030, 1034–35 (9th Cir. 2009) (holding, with reliance on *John R. Sand & Gravel Co.*, 552 U.S. 130 (2008), that the FTCA statute of limitations is jurisdictional and that the doctrines of equitable estoppel or equitable tolling do not apply); Wukawitz v. United States, 170 F. Supp. 2d 1165, 1169 (D. Utah 2001) (holding that Congress did not intend to permit equitable tolling of the FTCA statute of limitations); Ugo Colella & Adam Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*, 31 SETON HALL L. REV. 174 (2000) (arguing that the legislative history of the FTCA indicates Congress did not intend the statute of limitations to be subject to equitable exceptions); Richard Parker & Ugo Colella, *Revisiting Equitable Tolling and the Federal Tort Claims Act: The Impact of* Brockamp *and* Beggerly, 29 SETON HALL L. REV. 885 (1999) (same).

113. Sisk, *supra* note 49, at 554.

114. *See* Bowles v. Russell, 551 U.S. 205, 214 (2007) (holding that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement," meaning that the "Court has no authority to create equitable exceptions to jurisdictional requirements."); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (noting that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"); Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 60 (2008) ("Defects in subject matter

None of the court decisions declining to confer jurisdictional significance or effect on the substantive standards, the exceptions to liability, and the statute of limitations to the FTCA has expressly cited the placement of these provisions in non-jurisdictional chapters of Title 28. Yet, recalling the Supreme Court's drawing of the jurisdictional line through the six elements found in the one statutory section that is classified in a jurisdictional chapter and appreciating the court rulings that decline to categorize as jurisdictional the various other statutory provisions which are not codified in a jurisdictional chapter, the results rather neatly track the framework of Title 28. This may simply be a coincidence, or it may be adequately explained by the clear use of jurisdictional language in § 1346(b) and the absence of such language in other FTCA sections. Still, one might be forgiven for suspecting that some judges may have peeked at the structure of the Judicial Code in making decisions classifying the basic nature of these statutory provisions.

In any event, the very same arguments based upon both language and structure should apply with full force to the statute of limitations for non-tort money claims against the federal government that are brought in the Court of Federal Claims.[115] Instead, giving rise to an anomaly in the law and disharmony with code structure, similarly worded statutes of limitations that are both codified in non-jurisdictional chapters have been given contradictory readings. This disparate treatment could and should be avoided by encouraging the courts in every case to give heed to the structure of the Judicial Code.

IV. SUBVERTING FAITHFUL JUDICIAL INTERPRETATION OF STATUTORY LAW

On at least some occasions, the courts appear to have heard and heeded the call of § 33 to ignore the structure of the Judicial Code.[116] Still, might there be a plausible basis for urging the courts instead to ignore § 33? Or, more in keeping with the principle of judicial candor,[117] might the courts have a legitimate basis for forthrightly refusing to listen to § 33? If § 33 either fails to clearly limit the judiciary's choices among the available tools of statutory construction or improperly constrains the courts or the legislature in performance of their constitutional responsibilities, then it may be nullified without the need for affirmative legislative annulment.

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jurisdiction cannot be forfeited, waived, or consented to; they are not subject to principles of estoppel; and they can be raised at any time and by any party, including a court sua sponte.").

115. *See* 28 U.S.C. § 2501 (2006); *see also supra* Part III.A.

116. *See supra* Part III.

117. *See infra* note 164.

First, § 33 of the 1948 Act instructs the reader that "[n]o inference of a legislative construction is to be drawn" by reason of the chapters and catchlines that form the framework of the Judicial Code.[118] An ingenious exponent might insist that this interpretive directive is without functional efficacy because it aims at the wrong target, that is, it speaks to an assessment of legislative intent rather than a judicial interpretation of the authoritative text. Taking literally its prohibition of reliance on structure as a basis for drawing an "inference of legislative construction," § 33 arguably fails to circumscribe the textualist judge who focuses upon the language enacted by Congress and has no interest in divining the underlying legislative intent.[119] As the nation's most prominent textualist jurist, Justice Antonin Scalia, puts it, the judge should decide "on the basis of what the legislature said," rather than "on the basis of what [the legislature] *meant*."[120] In the instance of the Judicial Code, what Congress "said" is to be found in both the phrasing of individual statutory sections and the wording of parts and chapters and catchlines. In sum, because a textualist jurist draws no "inference of legislative construction" whatsoever, the argument could be made that § 33's attempt to regulate how judges ascertain legislative intent is a misdirected nullity.[121]

But this dismissal of § 33 as an empty gesture might fairly be characterized as too clever by half. Precisely because such a reading of § 33 would deprive language enacted by Congress of having any consequence, the textualist judge who sidestepped this provision arguably would contradict his or her own text-focused theory of judging. As William Eskridge, Philip Frickey, and Elizabeth Garrett ask, "[i]f the statutory text tells the judge to follow legislative intent, what is the textualist to do?"[122] And, of course, a judge who did not strictly adhere to a textualist approach to statutory interpretation would not blanch at the statutory reference to "legislative construction" (even

118. Act of June 25, 1948, ch. 646, § 33, 62 Stat. 869, 991.

119. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (1997) (arguing that the judge should focus upon the text of the statute—"what the lawgiver promulgated"—rather than seek to give effect to the intent of the legislature—"what the lawgiver meant"); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 684 (1997) (citing Max Radin's "compelling indictment of legislative intent" as a basis for statutory interpretation, including the argument that "a search for legislative intent is futile").

120. Scalia, *supra* note 119, at 18.

121. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 955 (4th ed. 2007) (posing the question of how a judicial textualist, such as Justice Scalia, should respond to interpretive directives that contradict the textualist premises for appropriate interpretation of a statute).

122. *Id.*

if that judge found this particular directive to be disquieting for other reasons).

Moreover, despite the quaint parlance of "inference of legislative construction," the meaning of § 33 is clear in forbidding interpretive reliance upon the structure and labeling of the Judicial Code. Thus, whatever the respective merits of a textualist versus an intentionlist (or other) approach to statutory interpretation in general, this particular interpretive directive can be implemented, if awkwardly for other reasons, without engaging in any subjective inquiry into legislative intent.

Second, the discomfort that a judge might experience in obeying a statutory directive that demands deliberate disregard for a visible part of the legislative product could be the symptom of other and more fundamental infirmities in § 33. Does § 33 trespass on the constitutional responsibilities of the Judicial Branch in faithful interpretation of statutory law or interfere with the constitutional prerogatives of the Legislative Branch in exercising its powers without being regulated by the dead hand of prior legislative actors?

The traditional and majority view among scholars is that "Congress has the constitutional power to adopt interpretive instructions for courts' use in interpretation."[123] In a comprehensive analysis of the question, Nicholas Rosenkranz concludes that, with exceptions where a particular provision overrides constitutional default rules demanding a clear legislative statement or prospectively delegates legislative power to define statutory terms, "[m]ost of the interpretive decisions courts make—whether choosing a dictionary, referencing a canon, or spurning pre-enactment legislative history—may be regulated by Congress."[124] Indeed, Rosenkranz opines that the legislative power to issue instructions to the courts on how to interpret statutes "is an exceptionally potent one."[125]

123. Adam W. Kiracofe, Note, *The Codified Canons of Statutory Construction: A Response and Proposal to Nicholas Rosenkranz's Federal Rules of Statutory Interpretation*, 84 B.U. L. REV. 571, 591 (2004); *see also* 1A SINGER, *supra* note 32, § 27:4, at 473 ("There should be no question that an interpretive clause operating prospectively is within legislative power."); Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438, 448 (1950) ("Any serious suggestion at this day that since interpretation is a judicial function a general interpretive act, applicable only to future statutes, would be unconstitutional, could hardly be taken seriously.").

124. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2140 (2002); *see also* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1502 (2000) ("Congress makes the laws that the courts must apply, and it is appropriate for Congress, as for any giver of binding instructions, to give instructions about how those who must carry out the instructions should understand them.") (footnote omitted).

125. Rosenkranz, *supra* note 124, at 2140.

But other scholarly voices have been raised in dissent against the conventional wisdom. Drawing upon *Marbury v. Madison*'s venerable principle that it is "the province and duty of the judicial department to say what the law is,"[126] these scholars argue that "[t]he legislature has the power to make the laws, while the judiciary declares what those laws mean."[127] Larry Alexander and Saikrishna Prakash contend that "[b]ecause the lodestar of statutory interpretation is the discernment of the statute's meaning, binding rules of interpretation of whatever sort must be ignored when an interpreter decides that the meaning of a statute differs from the constructed 'meaning' derived from the application of binding rules of construction."[128] Linda Jellum concludes that, while "[t]he legislature may legitimately try to influence the interpretive outcome to promote specific policy choices," the Legislative Branch would violate separation of powers principles by "attempting to control the interpretive process."[129] In particular, Jellum argues that an interpretive directive crosses the constitutional line and invades the judicial territory when it seeks to "identify what evidence a court may consider when interpreting statutes"[130] (a negative conclusion that presumably would encompass a directive that the judiciary may not consider the "evidence" of code structure when giving meaning to a statutory section).[131]

In addition to creating a potential collision with the judiciary's duty of faithful interpretation of statutes, the binding effect of prospective interpretive rules on future Congresses may invalidly constrict the free exercise of the constitutional legislative power. Laurence Tribe argues that Congress may not limit the effect of statutes enacted in the future or require future Congresses to use certain language to accomplish a legislative purpose.[132] Relying "upon the limiting provisions" of such statutes "restrictively to construe a statute that other interpretive indicia,

126. 5 U.S. (1 Cranch.) 137, 177 (1803).

127. Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211, 221 (1994).

128. Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMM. 97, 99–100 (2003).

129. Linda D. Jellum, *"Which is to Be Master," The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 840 (2009).

130. *Id.* at 882.

131. *See id.* at 849 (listing "components" of a statute, including "titles," as falling into the "intrinsic" category of sources of meaning for statutes).

132. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 2–3, at 125–26 n.1 (3d ed. 2000); *see also* Alexander & Prakash, *supra* note 128, at 105 ("Congress may not force a future Congress to use particular language to legislate. If a meaning emerges from a statute, that meaning must control, rather than some artificial meaning that emerges from an inflexible adherence to rule of interpretation promulgated by a prior Congress.").

taken as a whole, suggest is best read" to mean something different, Tribe argues, "would seem to raise serious constitutional questions."[133]

As most of the constitutional objections to statutory interpretive directions have focused on those that operate prospectively and thus purport to dictate the meaning of statutes enacted by future Congresses, even some scholars raising constitutional questions concede that "Congress could enact mandatory rules of interpretation that are to apply to the very act which created the mandatory rules of interpretation."[134] However, an interpretive directive that is attached to the codification of a title of the United States Code, which will be the subject of dynamic ongoing modification across the decades,[135] is difficult to classify into a single retrospective or prospective category.

More pointedly, § 33 is not a typical interpretive directive that forthrightly defines a term, establishes a presumption, or sets out a tie-breaking rule of construction to be used when the text of the underlying statute fails to provide a clear answer in a particular case. As Alan Romero reports, "[v]irtually all interpretive directions apply only when a statute is ambiguous and needs to be interpreted."[136] The defense of interpretive instructions against the argument that they "impinge on the federal judiciary's interpretive power" is most trenchant when such provisions are understood as "designed solely to clarify potential ambiguities in the law."[137] Section 33, however, does not modestly certify a particular canon of interpretation to be employed when the text is ambiguous. Rather, § 33 commands the courts to elide part of the statutory text itself.

In 1948, when Congress passed Title 28 into positive law, it promulgated not only the wording of each individual provision but also

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133. 1 TRIBE, *supra* note 132, at 125. *But see* Rosenkranz, *supra* note 124, at 2117–18 (saying the "simple answer" to Tribe's objection is that a rule of statutory construction does not add to the constitutional requirements for a future Congress to enact legislation "because the rule itself may be suspended or repealed by an act that comports with Article I, Section 7"); Siegel, *supra* note 124, at 1504 n.235 (arguing that "the legislature, in passing any statute, may always exclude it from the operation of any previously passed interpretive statute," so an interpretative statute does "not really detract from the legislature's power").

134. Alexander & Prakash, *supra* note 128, at 98 n.2.

135. On the frequency of amendments by Congress to Title 28, see *infra* note 164–65 and accompanying text.

136. Romero, *supra* note 127, at 228; *see also* Reves v. Ernst & Young, 507 U.S. 170, 183–84 (1993) (holding that the interpretive clause directing that the Racketeer Influenced and Corrupt Organizations Act (RICO) be given a "liberal construction" does not substitute for "the normal means of interpretation" but "only serves as an aid for resolving an ambiguity" (internal quotations and citation omitted)); Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 245 (1996) (explaining generally that "the plain meaning of the statute provides a check on the use of [interpretive] canon[s]" by the courts).

137. *See* Kiracofe, *supra* note 123, at 596.

the designated parts, chapters, and subchapters into which those provisions were located.[138] The visible body of the Judicial Code is not something outside of the text but rather is composed of a lexical spine to which every section of Title 28 is joined. The arrangement of parts, chapters, and subchapters is marked by black lettering and is carried out by words, no less than the content of the particular statutory sections that are assembled within that textual architecture. Thus, strictly speaking, judicial attention to the structure of the Judicial Code does not involve the mere application of a canon of construction but rather is part and parcel of the primary interpretive focus upon the text itself.[139]

Now Congress certainly could codify a title of the United States Code without arranging sections within parts, chapters, and subchapters, and eschewing any catchline appellation, which plainly would preclude any interpretive exercise based upon structure. That Congress theoretically could enact a code as a hodgepodge of provisions assembled at random, however, is no answer to the straightforward observation that Congress did something quite different with the revision and codification of Title 28. Nonetheless, one still might suggest, Congress surely could codify a statutory title that was structured in a particular manner for the convenience of the legislators during their consideration, while directing that this framework was not to be enacted into law. Indeed, § 33 might be defended as simply accomplishing that modest purpose of demoting the structure of the Judicial Code to something less than the force of law.

But, again, the constitutionally-salient fact remains that Congress chose to instantiate the structure of the Judicial Code into the law when codifying Title 28. The 1948 legislation that enacted Title 28 into positive law—the act which "passed the House of Representatives and the Senate" and was "presented to the President of the United States" pursuant to Article I, § 7 of the Constitution[140]—consisted of a Judicial Code that was divided into parts, chapters, and subchapters and that bore headings for divisions and sections.[141] Thus, within the meaning of Article I, § 7, the whole of Title 28, including its lexical structure, became "a Law."[142] The constitutional question then becomes whether Congress may extract a promise from the judiciary to avert the juridical eye from part of the completed legislative action.

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138. *See* Act of June 25, 1948, ch. 646, 62 Stat. 869.

139. *See* Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638, 644–45 (1990) (explaining that "basic principles of statutory construction . . . require giving effect to the meaning and *placement* of the words chosen by Congress" (emphasis added)).

140. U.S. CONST. art. I, § 7, cl. 2.

141. *See* Act of June 25, 1948, ch. 646, 62 Stat. 869.

142. *See* U.S. CONST. art. I, § 7 (declaring the legislative actions that create "a Law").

To again quote Justice Scalia, "[t]he text is the law, and it is the text that must be observed."[143] Even assuming the general constitutional validity of statutory interpretive directions, no regulation of the courts may "undermine the essential functions of the judiciary."[144] By directing the interpreter to disregard part of the "Law," § 33 may simultaneously contribute to the constitutional delinquency of the Legislative Branch by allowing it to disavow its own legislative act and commit a constitutional trespass against the Judicial Branch by interrupting the conscientious exercise of "[t]he judicial Power of the United States."[145]

Nor can an interpretive provision attached to an act of Congress serve to undo what Congress through the main body of the same act has manifestly done. If dissatisfied with the structure of a code, Congress may subsequently repeal it, thereby erasing it from the United States Code. Congress may not, however, simultaneously enact and repeal the same line of text through a single legislative act, for such an internal inconsistency would abrogate the very law-creating character of the act. Even if such an oxymoron could qualify as a proper exercise of the legislative power, § 33 does not purport to negate or withdraw any part of the enactment. Rather, § 33 seeks to veil part of the legislative action in darkness, with instructions to the courts not to shine a light on to what Congress has done.

In the end, we return to the inescapable fact that Congress's organization and classification of statutory provisions into designated parts and chapters within a newly-codified Title 28 was anything but accidental. As discussed previously and as is further emphasized below, the Title 28 revisers in drafting the revision and codification and the Congress in then enacting the legislation did not regard the structure of the Judicial Code as merely ornamental and without substantive import for the public.[146] Quite to the contrary, the coherent and organized treatment of jurisdiction, venue, removal of causes, full faith and credit, and evidence and procedure were proudly highlighted as among the great successes of the revision. And, again, when Congress took final action on the legislation to revise and codify Title 28, it did not leave behind the structure of the Judicial Code, as mere scaffolding to be broken down after construction, but rather cemented the entire integrated compilation into positive law.

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143. Scalia, *supra* note 119, at 22.

144. Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 728 (2007).

145. U.S. CONST. art. III, § 1.

146. *See supra* notes 21, 27–31 and accompanying text, and *infra* notes 152, 173–75 and accompanying text.

In any event, the maladroit "inference of legislative construction" language in § 33 and the constitutional dubiety of a legislative attempt to blind the eyes of the judiciary to a central element of what Congress has enacted should prompt us to question the wisdom of the provision as a matter of policy. Whatever the constitutional strengths or defects of interpretive directives generally or this provision specifically, scholars agree that Congress always remains free to unburden itself of a prior directive that it concludes no longer serves the public interest.[147] Textually ambiguous or not, constitutionally valid or not, § 33 should be repealed.[148]

V. MAKING THE CASE FOR REPEAL OF LEGISLATION THAT BLINDS THE COURTS TO STRUCTURAL REALITY

Section 33 of the 1948 revision and codification of Title 28 instructs the courts to ignore what a simple reading of the table of contents to the Judicial Code makes readily apparent.[149] By denying that any meaning may be attached to the structure of the Code, § 33 not only withdraws an important tool of statutory construction from the judiciary's tool-box, but undermines the rule of law by blinding the judiciary to the black-and-white format of Title 28, as enacted into positive law.[150]

Whatever uneasiness Congress may have harbored in 1948 that caused it to divert judicial attention from the very structural revisions Congress was enacting Title 28 to produce,[151] there is no apparent contemporary reason to preserve the false directive of § 33. For at least two reasons, this pernicious provision should be repealed.

First, § 33 is dishonest legislation, or at least misleading, because it surreptitiously rewrites Title 28 of the United States Code to erase the palpable organization that is manifest to any reader. Judge Albert Maris of the United States Court of Appeals for the Third Circuit, who had been appointed by Chief Justice Stone to chair the committee of the Judicial Conference working with Congress on the Title 28 revision, observed later that same year after the 1948 enactment:

> A glance at the new Act will demonstrate that the revisers

147. *See* 1 TRIBE, *supra* note 132, § 2-3, at 125 ("[T]he power of Congress *legislatively* to bind subsequent Congresses is limited, for any statute that purported to direct or to forbid subsequent Congresses to do certain things or to follow certain procedures could be repealed, as could any other law, by another duly enacted statute."); Rosenkranz, *supra* note 124, at 2120 (arguing that the answer to any objections about the constitutional validity of statutory interpretive directions is that a current Congress always may exercise the legislative power to repeal the acts of prior Congresses).

148. *See infra* Part V.

149. Act of June 25, 1948, ch. 646, § 33, 62 Stat. 869, 991.

150. *See also supra* Part IV.

151. *See supra* notes 23–33 and accompanying text.

> have been particularly successful in arranging, in a logical and consistent way, the statutory material which remains in force. The law has been made easily accessible, not only to the lawyer, but to the layman as well.[152]

While a "glance" at Title 28 does indeed demonstrate a "logical and consistent" arrangement of the statutory material, § 33 cloaks the brightly-lit profile observed by both the lawyer and layman in jurisprudential darkness.

In this respect, § 33 foments a paradoxical form of artifice, because it effectively declares that the visible structure of Title 28 is only an illusion and is without meaning, while the classification of statutory provisions into sections that are collected with related provisions into carefully designed and described chapters remains immediately and obviously apparent to any reader of the legal text. In truth, and notwithstanding § 33, this comprehensive statutory framework was painstakingly and deliberately constructed by the 1948 code revisers and was then enacted by Congress as positive law, as the previous discussion confirms.[153] Thus, with one legislative action (the enactment of Title 28 with a plain and visible structure), Congress says one thing, but with another (the veiling directive of § 33), Congress says another.

Especially because it is an uncodified provision, § 33 is likely to be overlooked even by a reasonably diligent legal researcher. Of the many scholars in the fields of federal courts and civil procedure who reviewed a draft of this Article or with whom I have discussed this matter, most of whom have an encyclopedic knowledge of the Judicial Code, nearly all acknowledged that they too had not previously known of the existence of § 33. Despite toiling in the vineyard of the Judicial Code for twenty years as a practitioner, teacher, and scholar, when I began work on the opening brief for the petitioner before the Supreme Court in *John R. Sand & Gravel Co. v. United States*,[154] I failed to discover this codicil to the 1948 revision until my co-counsel, Jeffrey Haynes, brought to our attention the results of his diligent research.

Both to avoid being embarrassed by having failed to mention this uncodified provision, should the government's counsel uncover it and invoke it in the respondent's brief, and because we were ethically obliged to bring mandatory authority to the attention of the Supreme Court,[155] we forthrightly surfaced § 33 in our brief. In so doing, we

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152. Maris, *supra* note 27, at 864; *see also* S. REP. NO. 80-1559, at 1–2 (1948) ("The statutory material presently in force has been arranged in the bill in a logical and consistent way, rendering it easily ascertainable.").

153. *See supra* Parts III & IV.

154. *See supra* Part III.A.

155. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2002) (saying the lawyer "shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction

realized that § 33 unavoidably withdrew some of the persuasive power from our structural argument and forced us to frame this point as a species of a textual argument based on comparison of the differing language of statutory sections in different chapters of Title 28. My guess is that most advocates would have overlooked § 33 and made the structural argument without qualification, either improperly or to their chagrin when opposing counsel or the Court adduced it.

In sum, § 33 sets up the very kind of pitfall for the unwary that the code revisers intended to eliminate through their studious re-organization of the judicial code in Title 28.[156]

Given the heavy reliance by the public on the United States Code (as found in every law library and every computer database),[157] an uncodified statutory section left out of a finished title may be the modern equivalent of what Justice Scalia describes as "one of emperor Nero's nasty practices," which was "to post his edicts high on the columns so that they would be harder to read and easier to transgress."[158] Lon Fuller contended that secret law so contradicts the internal morality of the law as to not truly count as law at all.[159]

To be sure, directed as it is to the judiciary in its interpretive task, § 33 does not bring about the direct injustice of punishing a person for failing to obey a secret law, because no ordinary citizen obeys a rule or canon of statutory construction. Nonetheless, as outlined previously, the

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known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel").

156. *See infra* notes 173–75 and accompanying text.

157. *See Revision of Titles 18 and 28 of the United States Code: Hearings on H.R. 1600 and H.R. 2055 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 80th Cong. 20 (1947) (statement of Judge Albert Maris, then chairman of the U.S. Judicial Conference Committee on the Revision of the Laws who oversaw codification of Title 28) (explaining that the United States Code "is a tool that is very useful, and it is widely used, not only by judges, but by lawyers and by the public," and therefore codification of Title 28 as positive law with "all the laws grouped appropriately" is vitally important so that the public may rely upon this title of the United States Code).

158. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989). I do not mean to suggest that every uncodified statutory provision is an offense against the principle of open and honest government. Most uncodified provisions enacted as part of new legislation are innocuous or auxiliary clauses that are operative primarily for a short period after enactment when attention is still drawn to the original legislative act, such as provisions stating the effective date, setting out transitional rules, requiring studies or reports by government agencies, or providing for severance of invalidated parts of the statute so that other parts remain in effect. By contrast, § 33 is everlasting in effect on interpretation of Title 28, both as originally codified and as regularly amended. Furthermore, in contrast with typical uncodified provisions, § 33 contradicts, rather than facilitates, the positive effect of the legislation.

159. LON L. FULLER, THE MORALITY OF LAW 39 (1964) ("Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that . . . is kept secret from him . . . .").

vagaries that it produces in results is a matter of justice denied.[160] Nor is § 33 secret in the most formal sense, as it is part of the public laws—though few would know to look for it outside of the supposedly comprehensive Judicial Code. But Congress revised and codified Title 28 in 1948 precisely because "the public is entitled primarily to know what the laws of its country are, and . . . to have those laws presented to it in the clearest, most concise and most understandable form."[161] Section 33 contradicts that congressional guarantee of transparency and open government.

Second, § 33 is a continuing obstacle to faithful interpretation by the courts of the statutory provisions codified in Title 28 of the United States Code.[162] Pretending that there is no structure to Title 28, as § 33 demands, does not spare the courts from having to classify statutory provisions according to their nature. Instead, it forces the courts to undertake that classification work in a less than fully-informed (or fully-transparent) manner. Indeed, given human nature, judges having to ascertain the character of a provision are likely to be influenced by the evidence before their own eyes—as they can plainly see the section, sub-chapter, chapter, and part structure laid out in Title 28—even if those judges are obliged by the directive of § 33 to pretend otherwise.[163] This is no way to run the enterprise of statutory construction or ensure judicial sincerity in offering genuine public reasons for decisions.[164]

Because § 33 has permanent interpretive force, reaching out across the decades, Congress is well justified in removing its continuing mischievous effects. Repealing § 33 shows no unseemly disregard for the legislative intent of a past Congress, for this uncodified directive is not confined in application to the legislative actions of the past. As a brief perusal of the notes in the United States Code Annotated quickly reveals, Congress has amended Title 28 on dozens of occasions since 1948, acting on a nearly annual basis to incorporate new language or

160. *See supra* Part III.

161. *Revision of Titles 18 and 28 of the United States Code: Hearings on H.R. 1600 and H.R. 2055 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 80th Cong. 10 (1947) (statement of Rep. Keogh, Chairman of the House Committee on the Revision of the Laws).

162. *See supra* Part IV.

163. *See supra* Part III.B.

164. *See* Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 988 (2008) ("Since it is usually wrong to deceive others, judges should be truthful about the reasons for their decisions."); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (arguing that requiring judges to provide candid reasons for their decisions "serves a vital function in constraining the judiciary's exercise of power" and that a lack of candor "serves to increase the level of cynicism about the nature of judging and of judges"); *see also* Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 140 (1998) (arguing that judicial candor is especially important in jurisdictional rulings because "clarity is particularly welcome in this field [of federal court jurisdiction] given the plethora of other roadblocks to understanding").

new sections into the part, chapter, and subchapter structure of the Judicial Code.

Surely it is not likely that the average member of Congress is any more aware of this uncodified blinding instruction than the average judge, lawyer, or federal courts scholar. Thus, our federal legislative representatives almost certainly are regularly asked to vote on revisions and additions to the visible framework of the Judicial Code under the mistaken impression that legislative choices to locate provisions within that structure means something. Thus, as discussed previously,[165] Congress itself has been blinded by § 33, without even being aware that its legislative arrows may fail to reach a partially hidden target.

VI. STRUCTURAL CONTEXT AS A REINVIGORATED TOOL TO CONSTRUCTION OF THE JUDICIAL CODE

Finally, a few words are in order about how interpretation of Title 28 might look in the brighter light that would come with the dawn of a new day after repeal of § 33. While attention to structure would bring about some changes—among other things clarifying that some statutory provisions do or do not have a jurisdictional or non-jurisdictional character and bringing about consistent treatment of similarly-worded and codified provisions—dramatic changes need not be feared.

To say that an inference of legislative construction *may* be drawn by reason of the location of a statute in a designated part or chapter having a distinct caption would not be to say that any particular inference *must* be drawn in every case, much less that other compelling evidence of statutory meaning would be neglected. In *United States v. Fisher*,[166] the two-hundred-year-old decision quoted at the beginning of this Article, Chief Justice Marshall agreed that the name of a legislative act cannot "controul plain words in the body of the statute."[167] Nonetheless, he explained, when ambiguity is present, "the title claims a degree of notice, and will have its due share of consideration."[168]

Even more directly on point with respect to the importance of location of a section within a statutory structure is the Supreme Court's decision in *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.*,[169] from the 2007 Term. In concluding that the transfer of an asset by a debtor in bankruptcy is eligible for a statutory exemption from a stamp tax only when transferred after confirmation of a Chapter 11 plan by the bankruptcy court, the Court found "it informative that Congress placed [the statutory section providing for an exemption from the tax] in

165. *See supra* Part IV.
166. 6 U.S. (2 Cranch.) 358 (1805).
167. *Id.* at 386.
168. *Id.*
169. 128 S. Ct. 2326 (2008).

a subchapter entitled, 'POSTCONFIRMATION MATTERS.'"[170] The Court acknowledged that "a subchapter heading cannot substitute for the operative text of the statute," but emphasized that titles and headings "'are tools available for the resolution of a doubt about the meaning of a statute.'"[171] The Court then reiterated that "[t]he placement of [the tax exemption section] within a subchapter expressly limited to postconfirmation matters undermines [the respondent's] view that [the section] covers preconfirmation transfers."[172]

Repealing § 33 and fully restoring the vitality of contextual analysis as part of the interpretive enterprise for the Judicial Code would not mean that the answers are always foreordained. Identifying the part or chapter in which a statutory provision is located may not yield the full operative meaning of the language, especially as we move from the basic classification of a statutory section to more detailed questions of application of the statutory provision. Examining the statutory structure serves as a tool to interpretation, not a talisman.

John F. X. Finn, former special counsel to the House Committee on Revision of the Laws, testified at the 1947 legislative hearings on the codification of Title 28 that he was "proudest of the way this proposed code deals with jurisdiction, venue, removal of causes, full faith and credit, and evidence and procedure."[173] Finn explained that while such words as "jurisdiction" and "procedure" may be "but labels to the layman," "[t]o lawyers they are the pitfalls of litigation."[174] In describing the work of the Title 28 revisers, Finn concluded that "[w]ise judges and lawyers have objectively and dispassionately explored these pitfalls and covered them with well-drawn statutes so that postwar justice may be sure-footed, courageous, impartial, and serene."[175]

It is on these categorizing questions about the basic nature of a statutory provision that the classification features of Title 28 are most likely to be edifying to judges interpreting the Judicial Code. The organizational structure of Title 28 is less likely to shed light on the precise meaning of a particular provision in application within its category. But, similarly, that a roadmap does not also provide information about the repair, maintenance, and operation of a vehicle of transportation does not make the roadmap any less valuable for its intended purpose.

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170. *Id.* at 2336.

171. *Id.* (quoting Porter v. Nussle, 534 U.S. 516, 528 (2002)).

172. *Id.*; *see also* United States v. Bowen, 100 U.S. 508, 513 (1879) (interpreting a statute based on "the reasonable force of the language used in that section, taken in connection with the whole of the chapter devoted to that subject, and the accepted canons of interpretation").

173. *Revision of Titles 18 and 28 of the United States Code: Hearings on H.R. 1600 and H.R. 2055 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 80th Cong. 44 (1947).

174. *Id.*

175. *Id.*

As the Title 28 code revisers recognized, identifying a provision as one of "jurisdiction" or "evidence" or "procedure" may make a significant difference in terms of how that provision operates.[176] As discussed previously,[177] whether a statutory provision is found to be jurisdictional or procedural may have significant consequential effects, such as whether the provision may be waived or forfeited or whether a statute of limitations in a government-related case should be applied in the same manner as in private litigation.

If a statutory provision is mistakenly characterized as jurisdictional in nature, unfortunate consequences follow closely behind. The determination of which issues deserve to be litigated (or instead may be waived or forfeited) is taken out of the hands of the parties (both claimants and the government).[178] The party that prevails on the merits may be deprived of victory by a belated jurisdictional ruling after trial. When a provision is declared jurisdictional, the courts are "forced to raise and answer new, sometimes difficult, and often fact-based issues sua sponte."[179] As the recently departed David Currie lamented about the duty of the courts to "investigat[e] the existence of jurisdiction on their own and at any stage of the proceedings," this is an "expensive habit."[180]

Moreover, while the categorization of a statutory section in a jurisdictional or procedural chapter would be weighty evidence that it has the same nature as the accompanying chapter catchline, a more complete analysis of all the evidence bearing on interpretation may rebut that presumption in exceptional cases. Even after a repeal of § 33, some statutory provisions may be "jurisdictional even though expressed in a separate statutory section from jurisdictional grants."[181]

For example, although not placed into a jurisdictional chapter under Title 28, the statutory requirement of a timely notice of appeal in a civil case[182] might remain a jurisdictional mandate.[183] The traditional rule had been that filing a timely notice of appeal is "an event of jurisdictional significance" because "it confers jurisdiction on the court

176. *See supra* Parts II & V.

177. *See supra* Part III.A.

178. Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 10 (2008) ("Waiver, consent, and forfeiture allow the parties to designate which issues require court decision and which are of such relative unimportance to the parties that they would rather forgo the costs of litigating them.").

179. Sisk, *supra* note 49, at 545.

180. David P. Currie, *The Federal Courts and the American Law Institute (pt. 2)*, 36 U. CHI. L. REV. 268, 298 (1969).

181. Barnhart v. Peabody Coal Co., 537 U.S. 149, 159 n.6 (2003).

182. 28 U.S.C. § 2107 (2006).

183. *See* Bowles v. Russell, 551 U.S. 205, 206–07 (2007) (holding that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement).

of appeals and divests the district court of its control over those aspects of the case involved in the appeal."[184] Similarly, under the Federal Tort Claims Act, the prior filing of an administrative claim is an absolute prerequisite to any judicial proceeding,[185] even though that statutory mandate is not located in a jurisdictional chapter.[186] First, the explicit and emphatic textual "command that an 'action shall not be instituted . . . unless the claimant shall have first presented the claim to the appropriate Federal agency'"[187] must be given full effect by the courts. While structure conveys some evidence of a provision's nature, the express and specific language of a statutory section takes priority over classification in a chapter or subchapter. Second, the prior administrative filing direction might be given jurisdictional significance to uphold the congressional intent to allow the agency to explore settlement before the burdens of litigation are imposed on the courts and the government and to satisfy the general principle of exhaustion of administrative remedies.[188]

To be sure, restoring the proper place of structure in statutory interpretation might provoke a judicial reexamination of the jurisdictional assumptions made with respect to such matters as the time for filing a civil notice of appeal or the priority of an administrative claim for seeking tort damages against the federal government. And such a reconsideration might well be a salutary development, leading to a loosening of the strictures of jurisdictional absolutes while not altering basic procedural expectations in the general run of cases. Even if these jurisdictional holdings by the courts were overturned after consideration of the structure of the Judicial Code, the courts likely would conclude that a timely notice of appeal and prior resort to administrative remedies remained mandatory statutory requirements whenever a party properly raised the issue.[189] As Judge Frank Easterbrook has written, "[t]he law is full of rules that are mandatory in the sense that courts must enforce them punctiliously if a litigant insists. Rules are not jurisdictional, however, no matter how unyielding they may be, unless they set limits

184. Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982) (per curiam); *see also* Philip A. Pucillo, *Jurisdictional Prescriptions, Nonjurisdictional Processing Rules, and Federal Appellate Practice: The Implications of* Kontrick, Eberhart & Bowles, 59 RUTGERS L. REV. 847, 874 (2007) (referring to "the Court's traditional understanding that the requirements for the filing of a timely notice of appeal in a civil case are jurisdictional prerequisites").

185. McNeil v. United States, 508 U.S. 106, 110–12 (1993).

186. *See* 28 U.S.C. § 2675 (2006).

187. *McNeil*, 508 U.S. at 111 (quoting 28 U.S.C. § 2675).

188. *Id.* at 111.

189. *See* Scott Dodson, *The Failure of* Bowles v. Russell, 43 TULSA L. REV. 631, 643–47 (2008) (arguing that the Supreme Court mistakenly characterized the time limit to file a civil notice of appeal as jurisdictional and instead should have treated the appeal time as mandatory, thus not susceptible to equitable adjustment but subject to waiver by the parties).

on the federal courts' adjudicatory competence."[190] Only if the parties waived or forfeited objections to defects in procedural rules, or powerful equitable bases existed for adjusting them in compelling cases, could non-jurisdictional statutory requirements be set aside.

In sum, repeal of § 33 would not prescribe outcomes to every question of interpretation. Rather, removing the legislative directive for judicial blindness would allow for a healthy construction by the courts of a statutory text in full contemplation of all canons and elements, including textual context within a statutory scheme and code.

VII. CONCLUSION

The standard treatise on statutory construction states that "[b]ecause a code represents and contains a systematic arrangement of laws, the position in which a provision appears in an enacted code has greater weight for purposes of interpretation than the position of a provision in a regular act."[191] When it comes to Title 28 of the United States Code, however, Congress's uncodified § 33 mandates exactly the opposite—that the deliberate structure of the Judicial Code be given no weight at all for purposes of interpretation.

Repealing § 33 would allow judges to forthrightly consider the structure of Title 28 as objective evidence of congressional intent with respect to the Judicial Code. Congress thereby would send the clear signal that the structure of Title 28—including the meaningful categories of jurisdictional grants, chapters of procedural rules, etc.—is and should be common grist for the interpretive mill. Allowing the consideration of structure when interpreting the Judicial Code will lift the blindfold from Lady Justice so that the contours of the law may be fully revealed.

190. Farzana K. v. Ind. Dep't of Educ., 473 F.3d 703, 705 (7th Cir. 2007); *see also* Dodson, *supra* note 178, at 9–11.

191. 1A SINGER, *supra* note 32, § 28:11, at 494.