"It, Being Dead, Yet Speaketh"[1]: The Recodification of the Federal Aviation Act of 1958

By Jol A. Silversmith

More than 20 years ago, the Federal Aviation Act of 1958 along with other federal statutes pertaining to aviation—which previously had resided in chapters of an appendix to title 49 of the U.S. Code—were repealed and recodified, as a new subtitle VII to title 49.[2] The recodification was specified to be "without substantive change"[3] and "not [to] be construed as making a substantive change in the laws replaced."[4]

Notionally, the 1994 directive that the recodification was not to have substantive consequences should not have been problematic. As a general proposition, the U.S. Supreme Court has explained that "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed."[5] Consistent with that general directive and the underlying statute, courts typically have emphasized that the current aviation statutes are to be interpreted consistent with their predecessors—even when changes in phraseology have occurred.[6]

But, in practice, challenges have arisen in remaining true to the Federal Aviation Act of 1958 (and other pre-1994 aviation statutes) even while drawing upon the post-1994 text of subtitle VII. For example, the current statute in title 49 that preempts state and local regulation of air transportation has substituted the word "price" for "rates" in its description of subject matter that may not be regulated by states and localities,[7] as well as omitted "rule" and "standard" from its list of the means by which such subject matter may not be regulated.[8] Less than a year after the recodification, the U.S. Supreme Court effectively resolved the disparities by specifying that these changes should not be read to have any substantive effect.[9] However, that is far from the only statute for which such an issue arises—and in other cases, there is no high court guidance, but considerable difficulty in determining how significant such textual changes are to statutory interpretation.

Is the Pre-Recodification Language Controlling?

Despite—or perhaps because of—the Supreme Court's guidance, a consequence of the recodification is that the Federal Aviation Act of 1958[10] (and the other pre-1994 aviation statutes that were separately enacted, such as the Aviation Safety and Noise Abatement Act of 1979[11] and the Airport and Airway Improvement Act of 1982[12]) continues to live on, in what might be described as a "shadow" existence—repealed and unpublished, but nevertheless controlling in the event that the terms of the statutes now enacted in subtitle VII substantively depart from those of their predecessors.

Although that proposition may be disconcerting, it does appear to be the approach most often taken by the federal courts—i.e., their interpretation of an aviation statute is governed by the language of its pre-1994 predecessor, even if absent that "shadow" on the current text they might have reached a different conclusion. For example:

- The Third Circuit recently held that even though current law requires that airport development plans be "consistent" with state-level plans, the use of a "reasonable consistency" standard by the Federal Aviation Administration (FAA) followed from the pre-1994 "reasonably consistent" language[13] because the textual change was semantic and not substantive.[14]
- The Tenth Circuit held that even though current law gives the FAA broad jurisdiction over "certificates," the language must be read in conjunction with the limited and specific set of certificates set forth in its pre-1994 counterpart,[15] which did not include the air traffic control specialist certificate at issue.[16]
- The D.C. Circuit has concluded to the extent the post-1994 statute generally requires that charges imposed on air carriers by airports be comparable, any ambiguity was resolved by the prior language,[17] which specifically within that directive permitted reasonable classifications—e.g., based on tenant or signatory status.[18]

State tribunals and federal agencies likewise have opined that in the event of a conflict, the current statutes must yield to the old language. For example, a Rhode Island trial court found that post-1994 law could be read to shield aircraft owners not in actual possession or control from vicarious liability for the negligence of lessees under state law, but the prior statute shielded owners/lessors only for security purposes,[19] and followed the latter as the standard.[20] The Department of Transportation (DOT), in resolving a dispute over the restrictions imposed by the Anti-Head Tax Act, held that even if the recodified language suggested that a municipality could impose taxes on airline

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passengers,[21] the intent of the passage as originally enacted was to limit state and local taxing authority.[22]

Is the Post-Recodification Language Controlling?

In contrast, the Ninth Circuit deployed a different approach to resolving textual differences—which could be construed to depart from both the specific terms of the recodification and the Supreme Court's guidance. Specifically, it read a post-1994 aviation statute to have a different substantive meaning than its predecessor[23]: The City of Los Angeles challenged an FAA policy that imposed new revenue-use obligations on airports that previously accepted federal grants. The Ninth Circuit concluded that it—in contrast to a federal district court—lacked jurisdiction to hear the appeal, based on the then current text of the statute, which authorized circuit appeals. As recodified in 1994, such appeals were stated to be allowed only for safety-related orders.[24] The City argued that the predecessor statute[25] had been understood to allow for the appeal to a circuit court of *all* FAA orders,[26] and the current statute should be given the same interpretation. But the Ninth Circuit concluded that the post-1994 statute should be read differently, based on the reasoning that the modified text embodied Congress's "understanding of the then-current substance of the statute. This trumps any alleged contradictory understanding, particularly when that understanding is squarely at odds with the current text."[27]

Congress subsequently amended the underlying statute to specifically allow the appeal to a circuit court of non-safety-related FAA orders, including those issued under part B of subtitle VII,[28] premised on the FAA's view that the law had been wrongly interpreted,[29] but not before other courts had specifically cited the *Los Angeles* precedent or applied similar reasoning.[30] Although this action resolved the immediate question of how the statute should be read, it also regrettably meant that the validity of the Ninth Circuit's interpretive approach was not carefully considered by other circuits, or reviewed by the U.S. Supreme Court.

The Ninth Circuit's efforts to find another path may be understandable, because continued reliance on the "shadow" of repealed statutes in lieu of their current text is an unappetizing practice.[31] But the court's stated logic does not provide a convincing alternative.[32] Nothing in the legislative history of the recodification implied, much less expressed, congressional intent that the jurisdictional statute at issue be given a new reading.[33]

Nor is it likely that Congress in 1994 understood the pre-recodification statute narrowly, given that circuit courts—including the Ninth—previously and routinely cited it as the basis for the appeal of all FAA orders.[34] Moreover, between the 1994 recodification and the 2003 amendment of the statute at issue, other circuit courts continued to routinely hear appeals of FAA orders that were not safety related, without any apparent doubt of their jurisdiction.[35] And the court's decision to construe a new congressional "understanding" from the recodified text standing alone not only contradicted circuit precedent,[36] but also has not been followed since.[37] Simply put, even if the Ninth Circuit's approach could have merit under appropriate factual circumstances—i.e., unambiguous substantive textual changes in a recodified statute—the circumstances under which it did so for the federal aviation statutes were not justified.[38]

Unresolved Interpretive Questions

Unfortunately, there is no clear answer as to whether the pre-recodification or post-recodification text of the federal aviation statutes should control in the event of a textual conflict. The U.S. Supreme Court's guidance creates a presumption that the prior text should control, but that presumption is rebuttable.[39] A recent high court decision regarding the interpretation of the Interstate Commerce Act (ICA)—with specific attention to its 1978 recodification in the first phase of the updates to title 49[40]—held that the pre-recodification language of the Carmack Amendment[41] is definitive.[42] This suggests that the presumption can be overcome—both for other components of title 49 and generally—only with difficulty.[43]

But three justices dissented, with Justice Sotomayor's opinion arguing that the present text is the best evidence of what the law has always meant—echoing although not citing the reasoning of the Ninth Circuit—as well as that reliance on the shadow of repealed statutes is improper.[44] Thus, practitioners are still left with uncertainty as to which interpretive approach a court would embrace for untested provisions of the Federal Aviation Act of 1958 and its sister statutes.[45]

Nor is this merely an academic question. There continue to be provisions of subtitle VII for which the post-recodification language appears to be at odds with the pre-recodification language, but which have not yet been confronted by the courts.

An example is the statute authorizing the DOT to bring a civil action to enforce requirements that appear in part A of subtitle VII.[46] This statute is a successor to a statute that previously authorized the DOT to bring a civil action to enforce requirements of the Federal Aviation Act of 1958.[47] If the directive that the recodification has made no substantive change to the law is to be applied, the DOT may not judicially enforce statutes that now appear in part A but previously were not part of the Federal Aviation Act of 1958,[48] and conversely may judicially enforce statutes that previously were part of the Federal Aviation Act of 1958 but do not appear in part A.[49] Alternatively, if the Ninth Circuit's line of reasoning is applicable, by recodification Congress intended that only—but that all of—part A be judicially enforceable by the DOT post-1994, even if that should appear to be a substantive change that was not unambiguously intended by Congress.[50]

This uncertainty is further compounded by congressional statements subsequent to the 1994 recodification to the effect that certain new statutes were confusing because they departed from the language of their predecessors, even though corrections have not always been forthcoming. Notably, in the subsequent Congress a revision was proposed to the Anti-Head Tax Act, to correct an alleged error in the recodification. The revision was not ultimately enacted, but a conference report stated that "the managers continue to believe that the recodification of section 1113 was done incorrectly and would expect that the new section 40116 would continue to be interpreted in the same way."[51] Although the legal authority of such legislative statements is uncertain,[52] as a practical matter they are unsettling because they bring into question to what extent other post-1994 statutes may be an unreliable embodiment of the law—a concern that applies with equal force irrespective of whether the new text or the old text ultimately is definitive.[53]

Conclusion

As a matter of habit, many practitioners still often use pre-1994 terminology—such as citations to the Federal Aviation Act of 1958—but, if specifically asked, likely would presume that any kinks in the 1994 recodification of the federal aviation statutes had been resolved long ago; i.e., that the language of subtitle VII is a generally reliable statement of the law, and that any recodification errors had been identified and corrected. Unfortunately, that is not the case. Textual differences with potentially substantive consequences linger, and the courts have not provided clear guidance as to whether conflicts should be resolved in favor of the pre-1994 or post-1994 language. Thus, when aviation law matters turn on specific statutory phraseology, practitioners must consult both the current and the repealed law—and be prepared for a quagmire if there are any differences. Regrettably, a decades-old effort to bring clarity to the Transportation Code has not fulfilled its goals but rather has created new uncertainty.

Endnotes

1. A pseudonymous author in 1905 observed that the Court of Appeal of England and Wales had relied upon a repealed statute in interpreting a current statute—a practice which he described as evidence that "that the evil that statutes do lives after them"—and implicitly invoked Hebrews 11:4: "Therefore it, being dead, yet speaketh." J.A.S., *Notes on Recent Cases*, 31 L. Mag. & Rev. 221, 225 (1905) (citing Parker v. Talbot, [1905] 2 Ch. 643 (Eng.)).

2. Pub. L. No. 103-272, 108 Stat. 745 (1994). The recodification project began nearly 30 years earlier, and encompassed all of the federal transportation statutes. H.R. Rep. No. 103-180, at 1–3 (1st Sess. 1993); S. Rep. No. 103-265, at 1–2 (2d Sess. 1994).

3. Pub. L. No. 103-272, § 1(a).

4. *Id.* § 6(a); *see also* S. Rep. No. 103-265, at 3–5.

5. Finley v. United States, 490 U.S. 545, 554 (1989) (quoting Anderson v. Pac. Coast S.S. Co., 225 U.S. 187, 199 (1912)); *see also* 2 U.S.C. § 285b(1); H.R. Rep. No. 103-180, at 5 (citing *Finley* and other precedents, and explaining: "As in other codification bills enacting titles of the United States Code into positive law, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation when it can be inferred that a change of language is intended to change substance. In a codification law, however, the courts uphold the contrary presumption: the law is intended to remain substantively unchanged.").

6. *See, e.g.*, Bower v. Fed. Express Corp., 96 F.3d 200, 204–05 (6th Cir. 1996) (holding that FedEx was an "air carrier" as defined in both the pre- and post-recodification versions of the Air Carrier Access Act); Cont'l Airlines, Inc. v. Kiefer, 920 S.W.2d 274, 278 (Tex. 1996) (discussing the recodification of the preemption provisions added by the Airline Deregulation Act of 1978; *see infra* note 8).

7. Prior to the 1994 recodification, "rate" was not a statutorily defined term; subsequently, the definition of "price" included but was not limited to a "rate." *See* 49 U.S.C. § 40102(a)(39).

8. *Compare* 49 U.S.C. § 41713(b)(1) ("[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier[.]"), *with* 49 U.S.C. app. § 1305(a)(1) (1988) (recodified as 49 U.S.C. § 41713) ("[N]o State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier[.]").

9. Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 223 n.1 (1995). Congressional reports stated that "rule" and "standard" had been deleted because they were redundant, H.R. Rep. No. 103-180, at 305, and that "price" had been substituted for "rates" so that identical terms would be used in statutes applicable to air carriers and statutes applicable to motor carriers, H.R. Rep. No. 103-677, at 83–84 (2d Sess. 1994).

10. 49 U.S.C. app. §§ 1301 *et seq.* (1988) (recodified as 49 U.S.C. §§ 40101 *et seq.*).

11. 49 U.S.C. app. §§ 2101 *et seq.* (1988) (recodified as 49 U.S.C. §§ 47501 *et seq.*).

12. 49 U.S.C. app. §§ 2201 *et seq.* (1988) (recodified as 49 U.S.C. §§ 47101 *et seq.*).

13. *Compare* 49 U.S.C. § 47106(a)(1) (requiring that "the project [be] consistent with plans (existing at the time the project is approved) of public agencies authorized by the State in which the airport is located"), *with* 49 U.S.C. app. § 2208(b)(1) (1988) (recodified as 49 U.S.C. § 47106) (requiring that "the project [be] reasonably consistent with plans (existing at the time of approval of the project) of public agencies authorized by the State in which the airport is located"). *See also* H.R. Rep. No. 103-180, at 398.

14. Tinicum Twp., Pa. v. DOT, 685 F.3d 288, 299 (3d Cir. 2012); *see also* City of Bridgeton v. FAA, 212 F.3d 448, 463 (8th Cir. 2000).

15. *Compare* 49 U.S.C. § 44709(b)(1) (granting the administrator the authority to "issue an order amending, modifying, suspending, or revoking . . . any part of a certificate issued under this chapter"), *with* 49 U.S.C. app. § 1429(a) (1988) (recodified as 49 U.S.C. § 44709) (granting the administrator the authority to "issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate (including airport operating certificate), or air agency certificate"). *See also* H.R. Rep. No. 103-180, at 348.

16. Newton v. FAA, 457 F.3d 1133, 1142–43 (10th Cir. 2006).

17. *Compare* 49 U.S.C. § 47107(a)(2) (requiring assurances that "air carriers making similar use of the airport will be subject to substantially comparable charges—(A) for facilities directly and substantially related to providing air transportation; and (B) regulations and conditions, except for differences based on reasonable classifications, such as between—(i) tenants and nontenants; and (ii) signatory and nonsignatory carriers"), *with* 49 U.S.C. app. § 2210(a)(1)(A) (1988) (recodified as 49 U.S.C. § 47107) (requiring assurances that "each air carrier using such airport (whether as a tenant, nontenant, or subtenant of another air carrier tenant) shall be subject to such nondiscriminatory and substantially comparable rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation and such nondiscriminatory and substantially comparable rules, regulations, and conditions as are applicable to all such air carriers which make similar use of such airport and which utilize similar facilities, subject to reasonable classifications such as tenants or nontenants, and signatory carriers and nonsignatory carriers"). *See also* H.R. Rep. No. 103-180, at 401.

18. Port Auth. of N.Y. & N.J. v. DOT, 479 F.3d 21, 41 (D.C. Cir. 2007).

19. *Compare* 49 U.S.C. § 44112 (exempting from liability "[a] lessor, owner, or secured party"), *with* 49 U.S.C. app. § 1404 (1988) (recodified as 49 U.S.C. § 44112) (exempting from liability "by reason of such interest or title" a "person having a security interest in, or security title to, any civil aircraft, aircraft engine, or propeller" and a "lessor of any such aircraft, aircraft engine, or propeller"). *See also* H.R. Rep. No. 103-180, at 328.

20. Coleman v. Windham Aviation, Inc., No. Civ.A. K.C.2004-0985, 2005 WL 1793907, at *2–6 (R.I. Super. Ct. July 18, 2005). Although other courts have disagreed about the actual meaning of the law, they have agreed about the primacy of the old text. Vreeland v. Ferrer, 71 So. 3d 70, 79 (Fla. 2011) ("Given that . . . the revision of Title 49 was not intended to [e]ffect any substantive change, the Congressional intent behind the enactment of section [1404] still remains."). *But see* Mangini v. Cessna Aircraft Co., No. X07CV0440014675, 2005 WL 3624483, at *5 (Conn. Super. Ct. Dec. 7, 2005) (alternatively holding that new language was in harmony with prior language or that new language was an exceptional case and substantively changed prior language).

21. *Compare* 49 U.S.C. § 40116(c) ("A State or political subdivision of a State may levy or collect a tax on or related to a flight of a commercial aircraft or an activity or service on the aircraft only if the aircraft takes off or lands in the State or political subdivision as part of the flight."), *with* 49 U.S.C. app. § 1513(f) (Supp. 1990) (recodified as 49 U.S.C. § 40116) ("No State . . . or political subdivision thereof shall levy or collect any tax on or with respect to any flight of a commercial aircraft or any activity or service on board such aircraft unless such aircraft takes off or lands in such State or political subdivision as part of such flight."). *See also* Sw. Air Ambulance, Inc. v. City of Las Cruces, 268 F.3d 1162, 1168 & n.3 (10th Cir. 2001); H.R. Rep. No. 103-180, at 272.

22. Tinicum Twp. Privilege Fee Proceeding, Order No. 2008-3-18, at 23–31 (Dep't of Transp. Mar. 24, 2008). The DOT also opined that the pre-recodification definition of "air carrier" was definitive in *Los Angeles International Airport Rates Proceeding*, Order No. 95-6-36, at 55 n.39 (Dep't of Transp. June 30, 1995), *remanded on other grounds*, 103 F.3d 1027 (D.C. Cir. 1997), and maintained that position in *Port Authority*, 479 F.3d at 32—although the Second Circuit found that the DOT's reading of the pre-recodification definition was in error. *See supra* text accompanying note 18; *cf.* Nat'l Transp. Safety Bd., B-316860 (Comp. Gen. Apr. 29, 2009) (finding that NTSB had authority to enter into real property leases based on pre-recodification statutory language).

23. The Ninth Circuit has an unfortunate tendency of misreading the scope of federal aviation statutes. *See, e.g.*, Nw., Inc. v. Ginsburg, 134 S. Ct. 1422, 1434 (2014) (holding its narrow reading of § 41713(b) preemption to be inconsistent with precedent); Jol A. Silversmith, *You Can't Regulate This: State Regulation of the Private Use of Unmanned Aircraft,* 26 Air & Space L., no. 3, 2013, at 1, 26 n.29.

24. 49 U.S.C. § 46110(a) (1994) ("[A] person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Administrator of the Federal Aviation Administration with respect to aviation safety duties and powers designated to be carried out by the Administrator) under this part [Air Commerce and Safety] may apply for review of the order by filing a petition for review in the United States Court of Appeals[.]").

25. 49 U.S.C. app. § 1486 (1988) (recodified as 49 U.S.C. § 46110) ("Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this chapter . . . shall be subject to review by the courts of appeals of the United States[.]").

26. *See* City of Grapevine, Tex. v. DOT, 17 F.3d 1502 (D.C. Cir. 1994).

27. City of L.A. v. FAA, 239 F.3d 1033, 1035–36 (9th Cir. 2001).

28. Pub. L. No. 108-176, § 228, 117 Stat. 2490, 2532 (2003) (amending § 46110(a) by striking "safety" and replacing "under this part" with "in whole or in part under this part, part B, or subsection (*l*) or (s) of section 114"); *see also* St. John's United Church of Christ v. City of Chi., 401 F. Supp. 2d 887, 903 n.10 (N.D. Ill. 2005), *aff'd on other grounds*, 502 F.3d 616 (7th Cir. 2007).

29. S. Rep. No. 108-41, at 22–23 (1st Sess. 2003); *see also* H.R. Rep. No. 108-334, at 153 (1st Sess. 2003).

30. *See* Cmtys. Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 683 (D.C. Cir. 2004); Comm. to Stop Airport Expansion v. FAA, 320 F.3d 285, 288–91 (2d Cir. 2003); City of Alameda v. FAA,

285 F.3d 1143, 1144–45 (9th Cir. 2002); *cf.* Alliance for Legal Action v. FAA, 69 F. App'x 617, 620 (4th Cir. 2003); Anagost v. FAA, No. 97 C 4375, 1997 WL 792978, at *4 n.6 (N.D. Ill. Dec. 27, 1997).

31. *See infra* note 44 and accompanying text (discussing Justice Sotomayor's dissent).

32. The Ninth Circuit also appears to have erroneously believed that the appeal in *Grapevine* was explicitly authorized by former 49 U.S.C. app. § 1486 because it concerned a "Federal Aviation Program" under the Federal Aviation Act of 1958, and distinguished the case on that basis. *City of L.A.*, 239 F.3d at 1036. But in fact *Grapevine* concerned the approval of an airport layout plan—implicating former 49 U.S.C. app. § 2208, the predecessor of 49 U.S.C. § 47106—which was *not* a statute within the chapter comprising the Federal Aviation Act of 1958.

33. H.R. Rep. No. 103-180, at 378–79; S. Rep. No. 103-265, at 377.

34. Clark v. Busey, 959 F.2d 808, 811 (9th Cir. 1992) ("[T]he court of appeals' jurisdiction is exclusive with regard to review of final FAA actions."); *see also* City of Alexandria v. Helms, 728 F.2d 643, 645 (4th Cir. 1984); State of N.Y. v. FAA, 712 F.2d 806, 809 (2d Cir. 1983). *But see* City & Cnty. of San Francisco v. Engen, 819 F.2d 873, 875 (9th Cir. 1987).

35. *See, e.g.*, Boca Airport, Inc. v. FAA, 389 F.3d 185 (D.C. Cir. 2004); Wilson Air Ctr., LLC v. FAA, 372 F.3d 807 (6th Cir. 2004); Friends of Richards-Gebaur Airport v. FAA, 251 F.3d 1178 (8th Cir. 2001); Arapahoe Cnty. Pub. Airport Auth. v. FAA, 242 F.3d 1213 (10th Cir. 2001); City of Bridgeton v. FAA, 212 F.3d 448 (8th Cir. 2000); Penobscot Air Servs., Ltd. v. FAA, 164 F.3d 713 (1st Cir. 1999).

36. Schwarder v. United States, 974 F.2d 1118, 1121 n.1 (9th Cir. 1992) ("In the absence of a clear Congressional intent to change the meaning of [a section], we may not infer a revisionary purpose from a change in the language of the section alone.").

37. *In re* Korean Air Lines Co., Ltd., 642 F.3d 685, 693 n.5 (9th Cir. 2011) (reading definition of "air carrier" at 49 U.S.C. § 40102(a)(2) to include proviso of former 49 U.S.C. app. § 1301 that was omitted in 1994 recodification); *see also supra* note 22.

38. Another set of circumstances under which the Ninth Circuit's approach may be valid is if there is ambiguity as to whether a recodified statute continues to impose criminal penalties, such as ICA-based fines. *See, e.g.*, United States v. RSR Corp., 664 F.2d 1249, 1253 (5th Cir. Unit A 1982) ("The problem is that although this is what Congress clearly meant to say, intended to say, and wanted to say, still Congress did not say it."); United States v. Faygo Beverages, Inc., 733 F.2d 1168, 1170 (6th Cir. 1984) ("[I]t would be unreasonable to require persons confronted with the plain language of a criminal statute to go beyond that statute in order to determine whether Congress really meant what it clearly said."). The underlying error at issue in these cases specifically was corrected by Pub. L. No. 97-424, § 427, 96 Stat. 2097, 2168 (1983).

39. *See supra* note 5; *see also* Fleming Foods of Tex., Inc. v. Rylander, 6 S.W.3d 278, 284 (Tex. 1999) ("[G]eneral statements . . . that 'no substantive change in the law is intended' must be considered with the clear, specific language used[.]" (footnote omitted)).

40. Pub. L. No. 95-473, 92 Stat. 1337 (1978); *see also* H.R. Rep. No. 95-1395, at 4–5 (2d Sess. 1978).

41. *Compare* 49 U.S.C. §§ 11706, 14706, *with* 49 U.S.C. §§ 20(11), 319, 1013 (1976). An intervening additional recodification of the Carmack Amendment occurred in 1995. Pub. L. No. 104-88, § 102, 109 Stat. 803, 804 (1995) (replacing former 49 U.S.C. §§ 10730 and 11707).

42. Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 561 U.S. 89, 107 (2010). This approach appears to conform with most prior circuit court rulings on the ICA. *See, e.g.*, Atchison, Topeka & Santa Fe Ry. v. Lennen, 732 F.2d 1495, 1497 (10th Cir. 1984) ("[W]e must resolve any substantive conflicts between the original language . . . and the [recodified] language . . . in favor of the original language."); Kansas City S. Indus., Inc. v. ICC, 902 F.2d 423, 436–38 (5th Cir. 1990). *But see* Cosby v. ICC, 741 F.2d 1077, 1080 (8th Cir. 1984); Michael F. Sturley, *Maritime Cases about Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 49 J. Mar. L. & Com. 1, 28 (2009) (contending that "[d]espite the strong language in the [1978 Carmack Amendment] statement of purpose, the equally unambiguous language of the substantive provision should nevertheless control"). Additionally, one circuit has held that an apparent drafting oversight in the 1978 recodification of the ICA did not have the effect of rendering unenforceable a criminal penalty that Congress "intended merely to transplant." United States v. Rossetti Bros., 671 F.2d 718, 720 (2d Cir. 1982). *But see supra* note 38.

43. *Kawasaki,* 561 U.S. at 107 ("Congress in the statute itself stated that it was recodifying Carmack and instructed that this recodification 'may not be construed as making a substantive change in the la[w].' By interpreting the current version of the Carmack Amendment to cover cargo originating overseas, the Court of Appeals disregarded this direction and dramatically expanded Carmack's scope beyond its historical coverage." (alteration in original) (citations omitted)).

44. *Id.* at 126–27 (Sotomayor, J., dissenting) ("[The majority's] view of statutory interpretation would give rise to an unwieldy—and unjust—system. I would have thought it beyond cavil that litigants are entitled to rely on the currently applicable version of enacted statutes to determine their rights and obligations.").

45. Conflicts between the terms of recodified statutes and their predecessors appear to have received little scholarly attention overall—although allegiance to the pre-recodification text generally appears to have been advised. *See, e.g.*, Dennis R. Bailey, Michael S. Jackson & Bruce A. Rawls, *1975—A Code Odyssey: A Critical Analysis of the Alabama Recodification Process*, 10 Cumb. L. Rev. 119, 156–57 (1979) (state statutes); Thomas William Baker, *Transportation—Interstate Commerce Act—ICC Has Plenary and Exclusive Jurisdiction over Joint Through Routes between Outlying Possessions or Territories and the United States*, 13 Vand. J. Transnat'l L. 885, 893 (1980) (ICC jurisdictional statutes); Jim Behnke, *Safety Jurisdiction over Natural Gas Pipelines*, 19 Energy L.J. 71, 104–10 (1998) (title 49 pipeline statutes); Mark Cohen, *Criminal Contemnor of Injunction Issued Pursuant to NLRA Has No Right to Jury Trial*, 10 Suffolk Univ. L. Rev. 374, 381 n.39 (1976) (National Labor Relations Act); William Higgs, *Fourth Circuit Review:*

Administrative Law, 39 Wash. & Lee L. Rev. 435, 454–55 (1982) (Trade Secrets Act). *But see* Fred A. Dewey, *Statutory Right to Recover Damages for Injuries to Person or Property Caused by a Criminal Act,* 34 U. Cin. L. Rev. 138, 141–42 (1965) (describing as "an absurdity" a scenario in which "the bench, bar, and citizenry cannot safely rely on the Revised Code, no matter how clear its provisions, but must always consult the repealed General Code to ascertain the meaning of the substituted section").

46. 49 U.S.C. § 46106 ("The Secretary of Transportation [among others] may bring a civil action against a person in a district court of the United States to enforce this part or a requirement or regulation prescribed, or an order or any term of a certificate or permit issued, under this part.").

47. 49 U.S.C. app. § 1487 (1988) (recodified as 49 U.S.C. § 46106) ("If any person violates any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this chapter, the Board or Secretary of Transportation [among others] may apply to the district court of the United States . . . for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, condition, or limitation[.]").

48. *See, e.g.*, 49 U.S.C. app. §§ 1159a, 1159b (1988) (recodified as 49 U.S.C. § 41310(b)–(c)) (discrimination); 49 U.S.C. app. § 2225 (1988) (recodified as 49 U.S.C. § 44913(b)) (explosives detection).

49. *See, e.g.*, 49 U.S.C. app. § 1344(h) (1988) (recodified as 49 U.S.C. § 47124(b)(2)) (air traffic control contract tower program).

50. An alternative, practical solution would be to hold that 49 U.S.C. § 46106 actually enables the judicial enforcement of all subtitle VII–based requirements, irrespective of their current or past designation. Certain precedent and guidance suggest that is in fact the case. *See, e.g.*, FAA Airport Compliance Manual, FAA Order No. 5190.6B, § 16.2(b)(3) (Sept. 30, 2009); FAA Compliance and Enforcement Program, FAA Order No. 2150.3B, ch. 5, § 15(j) (Oct. 1, 2007); City of Naples Airport Auth. v. FAA, 409 F.3d 431, 432 (D.C. Cir. 2005). But that admittedly would not resolve the general interpretive question that is raised by this article, which is not limited to that statute.

51. H.R. Rep. No. 104-848, at 93 (2d Sess. 1996) (reporting on the bill that ultimately became Pub. L. No. 104-264, 110 Stat. 3213 (1996)). The House bill would have stricken the phrase "subsection (c) of this section and" from 49 U.S.C. § 40116(b). *See also* H.R. Rep. No. 104-714, at 48–49, 59–60 (2d Sess. 1996); S. Rep. No. 104-333, at 21, 28 (2d Sess. 1994). This legislative language was mentioned, but not relied upon, by the DOT in *Tinicum Township Fee Proceeding*, Order No. 2008-3-18, at 31–32 (Dep't of Transp. Mar. 24, 2008).

52. *Compare* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (noting that failed legislative proposals are "a particularly dangerous ground on which to rest an interpretation of a prior statute"), *with* Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980) (noting that "while arguments predicated upon subsequent congressional actions must be weighed with extreme care, they should not be rejected out of hand"). *See also* Michael F. Sturley, *Admiralty's Greatest Hits:* Panama Railroad Co. v. Johnson, 39 J. Mar. L. & Com. 43, 54–62 (2008) (noting that revisions to the recodified jurisdictional provisions of the Jones Act had been proposed but not fully enacted, leaving unresolved whether substantive changes had been made to the law).

53. Certain other corrections to the recodified statutes were proposed in 1998. S. Rep. No. 105-278, at 1–13, 17, 20 (2d Sess. 1998). Although not enacted in that Congress, they subsequently were included in Pub. L. No. 106-181, §§ 104, 135, 718, 720, 114 Stat. 61 (2000). But in the accompanying 1999 report, only one of them was again specified to be a correction to a recodification error. H.R. Rep. No. 106-167(I), at 123–24 (1st Sess. 1999).