

***The Federal Register:* Origins, Formulation, Realization, and Heritage**

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On this occasion, we celebrate a birthday. Seventy five years ago, President Franklin D. Roosevelt, on July 26, 1935, signed into law a brief legislative enactment, which he had not requested, authorizing and directing the publication of the *Federal Register*. It marked the second time the federal government would endeavor to maintain and utilize an official gazette.

The *Federal Register* was a response to a practical need: government was in ignorance of the growing body of administrative law. It was, as well, a response to potential tyranny. The intellectual progenitor of the gazette, Harvard University law professor Erwin Griswold, had prominently quoted the English philosopher and legal theorist Jeremy Bentham, who had written: “We hear of tyrants, and those cruel ones; but, whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he had kept them from the knowledge of.” The gazette was a response, also, to political interest — in particular, those opposed to the authority of expanding bureaucracy and the tide of administrative law resulting from the New Deal.

In my remarks today, I briefly explore the origins, formulation, realization, and heritage of the *Federal Register*. It is a dynamic history, and one which is still evolving.

While still a graduate student, Woodrow Wilson, later to be the 28th President of the nation, had come to recognize the importance of the communication function of newspapers. In his 1908 book, *Constitutional Government in the United States*, although still appreciative of the role of the press, he lamented the parochial nature of newspapers, writing:

One of the greatest disadvantages that public opinion labors under in the United States is that we have no national newspaper, no national organ of opinion. There is no newspaper in the United States which is not local, and narrowly local at that, both in the news that it prints and in the views that it expresses. Each paper makes such selections of general news as will interest the particular locality in which it is printed, and expresses such views of the nation’s affairs as local interest or information suggest.¹

Carrying these views into the White House in 1913, Wilson was ready to respond to a plea from the Secretaries of State, Navy, and War to create an authoritative agency “to assure the publication of all the vital facts of national defense” as the nation entered the hostilities of World War I. On April 13, 1917, one week after the United States had formally declared war on Germany, Wilson ordered the establishment of the Committee on Public Information (CPI) and designated George Creel, a former journalist and skilled practitioner of “spin,” as the chairman of the panel.

The publication Creel created was initially known as the *Official Bulletin of the United States*, and its inaugural issue appeared on May 10, 1917. Its content included every state paper, proclamation, executive order, and all presidential statements, pronouncements, and addresses since the entry of the United States into the war. The *Bulletin* also printed every order, pronouncement, and regulation issued by the departments, as well as those of most of the independent agencies.

With the exception of Sundays and holidays, the *Bulletin* was published daily. It was provided at no charge to public officials, including Members of Congress, major newspapers, and government agencies or those of a semi-public character, like the American National Red Cross, who were seemingly prepared to distribute it to a larger public. It was posted in every U.S. military camp, facility, and installation, foreign or domestic, as well as naval vessels, and some 54,000 post offices. Circulation increased from 60,000 copies in May 1917 to 115,000 in October 1918, but declined to 33,000 in March 1919. The last issue, as a government organ, was produced on March 31, 1919. The *Bulletin* grew from eight pages in May 1917 to 32, and sometimes more, in its final year.²

Congressional distaste for the CPI and the adversity of many Members to the *Bulletin* might have been predicted. The House and the Senate had registered their unwillingness to allow the use of appropriated funds to support public relations efforts in the executive branch in 1909, an objection which was established in permanent law five years later. Moreover, the CPI had been mandated by a presidential order, not congressional legislation. It was financed from a temporary war time fund which had been made available to the President, not a direct appropriation. And it resisted congressional inquiries regarding its activities and operations. Creel was, at a minimum, flippant, if not arrogant, in his relations with the House and the Senate, and had few, if any, supporters in either chamber. The fate of Creel and the CPI was sealed by the November 1918 elections when the President’s party lost majority control of both houses of Congress. On August 21, 1919, the President ordered the cessation of all CPI operations.

The flow of administrative orders, rules, and regulations subsided somewhat with the return to peace in 1919, but also returned to a fugitive condition. As the CPI was being dismantled, political scientist John A. Fairlie, fresh from his experience as chief of an orders and regulations office of the Army General Staff, wrote of the large volume of administrative regulations, and found, in the current situation, “a maximum of variety and confusion” in publication, as well as, among other problems, “no approach to uniformity in nomenclature.”³

A dozen years later, with the election of Franklin Roosevelt, his legislative triumphs in the famous Hundred Days of 1933 laid the groundwork for an explosion of administrative law in addition to the tidal wave of such pronouncements he generated from the White House and the existing regulatory agencies. This occurrence resulted in a coincidence of interests eager to realize a permanent official gazette for the federal government — those seeking better accountability and awareness of the ever growing body of administrative law and those opposed to the authority of expanding bureaucracy, so-called “wild cat” regulations, and the regulatory pronouncements of the New Deal.

The situation was becoming grave. In the autumn of 1934, the ever growing deluge of fugitive administrative regulations and orders became dramatically evident. Government attorneys bringing a lawsuit before the Supreme Court were embarrassed to find that their case was based upon a nonexistent regulation.⁴

Shortly thereafter, in December, when the so-called “hot oil” cases — *Amazon Petroleum Corporation v. Ryan* and *Panama Refining Company v. Ryan* — came before the High Court for argument, another such troubling revelation would occur, and the impetus for a federal gazette would be set in motion. At issue was the constitutionality of the National Industrial Recovery Act (NIRA), which, in one of the many provisions of the statute, authorized the President to prohibit the shipment in interstate commerce of petroleum produced in excess of quotas fixed by the states. Subsequently, the Court, in an 8-1 decision, held the “hot oil” provision to be an unconstitutional delegation of legislative power to the President.

The *Amazon* case, it was discovered by Department of Justice attorneys after the Supreme Court had granted certiorari and agreed to hear arguments, was flawed. On September 13, 1933, the President had issued an executive order, the fifth and final such directive in a series, modifying provisions of the Petroleum Code issued pursuant to the NIRA. When this executive order was printed, a portion of the original document, affecting a section that the Amazon Petroleum Corporation challenged one month later in its lawsuit, was inadvertently omitted. It was reinstated by an order of September 25, 1934, after the *Amazon* case had been appealed to the Supreme Court. In his majority opinion for the Court, Chief Justice Hughes commented on the situation, writing:

The controversy with respect to the provision of section 4 of article III of the Petroleum Code was initiated and proceeded in the courts ... upon a false assumption. That assumption was that this section still contained the paragraph (eliminated by the Executive Order of September 13, 1933) by which production in excess of assigned quotas was made an unfair practice and a violation of the code. Whatever the cause of the failure to give appropriate public notice of the change in the section, with the result that the persons affected, the prosecuting authorities, and the courts, were alike ignorant of the alteration, the fact is that the [legal] attack in this respect was upon a provision which did not exist.⁵

Although attorneys from the Petroleum Administration, who had been involved in litigating the *Amazon* case in the lower courts, had discovered the flaw, they believed that,

because the omission of the amending paragraph was inadvertent, it had not been legally deleted. Consequently, they did not raise the matter in proceedings in the lower courts. Department of Justice lawyers had a different view and, when they discovered the error in August 1934, the decision was made to notify the Court, which, nonetheless, accepted the case without reservation.

With the Court aware of the flaw in the *Amazon* case, Associate Justice Louis D. Brandeis apparently sought to utilize the situation to not only heighten public awareness of the chaotic condition of administrative law, but also to possibly bring order to the situation with an official gazette, which had been lately discussed in various quarters. It seems likely that he discussed the larger conditions surrounding the omitted paragraph with his fellow justices. He also prevailed upon his friend, Felix Frankfurter at the Harvard Law School, to enlist Erwin Griswold to write an article on the proper publication of administrative rules, regulations, and orders for the *Harvard Law Review*. Griswold, after serving five years in the Solicitor General's office, had recently joined the Harvard faculty in the fall of 1934. He had long been concerned about, as well as personally frustrated by, the problem of finding current regulations, and had participated in the spring of 1934 in a small, informal group of government attorneys who thought that publication of an official gazette should be undertaken. Griswold's article, with an appended draft bill, which the author said was "wholly tentative and is merely designed to indicate some of the provisions which might be included in such an enactment," appeared in the December issue of the *Harvard Law Review*. He described the prevailing situation regarding the status of administrative rules and regulations as "chaos."⁶ Concurrently, the *Panama* and *Amazon* cases were argued before the Supreme Court on December 10 and 11, where Justice Brandeis, as well as some of his colleagues, raised several questions about the origins, publication, and quantity of administrative orders, regulations, and codes, much to the surprise and consternation of the attorney appearing for the government in the cases. Nonetheless, awareness of the need for better accountability of administrative law through some publication arrangement was surely increased, and a means of remedy was available with Griswold's draft legislation.

Griswold knew that, shortly before the publication of his article and the arguing of the "hot oil" cases before the Supreme Court, President Roosevelt had rejected the idea of creating an official gazette, saying something to the effect that he would not have "the government in the newspaper business." Griswold regarded the comment as, "of course, a misunderstanding — and very disappointing." Nonetheless, he still circulated the published article, and soon came in contact with Representative Emanuel Celler (D-NY), who had entered Congress in 1923 and, by 1934, was chairing a subcommittee of the House Committee on the Judiciary. Visiting Celler to discuss his article and draft bill, Griswold found "he was immediately much interested" and, thereafter, "the matter was in Celler's skillful hands."⁷

Celler introduced a revised version of Griswold's bill on March 1, 1935, as H.R. 6323. Further refined, it was favorably reported from committee three days later, and came under brief debate in the House on April 1 when it was adopted with one moderate amendment. The following day, the bill was received in the Senate, and was favorably reported from committee

without amendment two weeks later. It eventually came before the Senate on June 10, when five amendments refining the language of the legislation were offered by Majority Leader Alben W. Barkley and adopted without discussion or objection. The modified bill was then passed. A conference committee report accepting the Senate version of the bill was approved in the Senate on July 11 and in the House on July 22, clearing the measure for the President's signature on July 26. The Federal Register Act was law.

Several months passed, however, before the new gazette became a reality. The delay was due to the issuance of regulations governing its publication not being prescribed until February 18, 1936 — perhaps a reflection of Roosevelt's disinterest in the matter. Shortly thereafter, on March 14, 1936, the first issue of the *Federal Register* rolled off the presses.

The legislative history of the Federal Register Act reflects very little opposition to the creation of the gazette. Those opponents who did emerge — such as John J. Cochran (D-MO) and John Taber (R-NY) — were fiscal conservatives who were concerned about cost, increased bureaucracy, and government expansion. Cochran introduced a bill in early 1936, before the first issue of the *Register* was published, to repeal the legislative charter for the gazette. It subsequently died in committee. There was also some talk of denying funding for the production of the *Register* if experience demonstrated that it was unnecessary.

Of course, funding for the *Register* was not only continued, but its charter was amended in 1937 to establish the *Code of Federal Regulations* (CFR). Furthermore, in the aftermath of World War II, Congress completed work on the Administrative Procedure Act of 1946, which, although it did not amend the Federal Register Act, certainly had considerable impact upon the gazette with its requirements for the publication of a wide variety of administrative law instruments.

The *Register* would also have progeny — creations of the Office of Federal Register (OFR) staff. These included a more detailed and resourceful *United States Government Manual*, for which OFR personnel assumed responsibility in 1948; the *Public Papers of the Presidents of the United States*, launched in 1957 and subsequently including volumes on Presidents Hoover, Truman, and every succeeding Chief Executive; and, finally, the *Weekly Compilation of Presidential Documents*, which made its debut in August 1965.

With the 1993 enactment and implementation of the Government Printing Office Electronic Information Access Enhancement Act, the *Federal Register* and many of its derivative products became publicly available without charge via the Internet. Such developments, however, remain for others to review, consider, and assess. To conclude here, it may be said that the *Federal Register* is the offspring of a union between an attorney and a librarian. Some union ... some offspring!

Happy birthday, *Federal Register*!

Endnotes

1. Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908), p. 126.
2. James R. Mock and Cedric Larson, *Words that Won the War: The Story of the Committee on Public Information, 1917-1919* (Princeton, NJ: Princeton University Press, 1939), p. 68, 93-94; U.S. Committee on Public Information, *Complete Report of the Chairman of the Committee on Public Information, 1917: 1918: 1919* (Washington: GPO, 1920), pp. 63-67.
3. John A. Fairlie, "Administrative Legislation," *Michigan Law Review*, vol. 18, Jan. 1920, p. 199.
4. *United States v. Smith*, 292 U.S. 633 (1934), appeal dismissed on the motion of the appellant without consideration by the Court.
5. *Panama Refining Company v. Ryan*, 293 U.S. 388 at 412.
6. Erwin N. Griswold, "Government in Ignorance of the Law — A Plea for Better Publication of Executive Legislation," *Harvard University Law Review*, vol. 48, Dec. 1934, pp. 204, 212.
7. Erwin N. Griswold, *Ould Fields, New Corne: The Personal Memoirs of a Twentieth Century Lawyer* (St. Paul, MN: West Publishing Company, 1992), p. 118.

Biographical profile

For over three and a half decades, Harold C. Relyea was a Specialist in American National Government with the Congressional Research Service (CRS) of the Library of Congress. A member of the CRS staff since 1971, he held both managerial and research positions during his career. He testified before congressional panels on various occasions, and, during that time and since, served as an expert resource for other organizations. In addition to his CRS duties, Dr. Relyea has prepared books and monographs, and authored numerous articles for scholarly and professional publications in the United States and abroad. An undergraduate of Drew University, he received his doctoral degree in government from The American University. His biography appears in *Who's Who in America* and *Who's Who in the World*.