

## The *Federal Register* of the United States: an alternative to an Official Gazette

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**Abstract:** The United States did not have a federal gazette or the equivalent for decades due to some unique characteristics of the people and the organization put in place after the American Revolution. An inherent fear of a potentially powerful and corrupt government led to an avoidance of official media, which in turn led to delays and confusion over executive rules and orders. In addition, the original design of the federal government did not anticipate a large and powerful executive branch that would be issuing orders, rules, and regulations. While the legislative branch did publish its activities in the *Congressional Record*, no such completion of actions by the many executive offices existed, leading to a great deal of confusion. Finally, in the 1930s, an unusual set of hidden lobbying within the judicial, executive, and ultimately the legislative branches of government brought about the overdue genesis of the United States' *Federal Register*.

**Keywords:** Gazette; *Federal Register*; press; America; United States

### Introduction

The people of the United States of America and the European colonists in America who predated them have always had a strong fear of powerful government and a great reluctance to allow any regime's control of information. To help limit the possible misuse of power by those in authority, the U.S. Constitution set up a balance between the three branches of government: the legislative, the judicial, and the executive. In addition, the First Amendment to the Constitution guarantees the outside influence of an independent press as a counterbalance against such possible power abuses. The tradition against a governmental medium is so strong that for one hundred sixty years, a thing such as an official gazette or the *Federal Register* did not – indeed could not – exist. In the early days of the new nation, the office of the President of the United States was primarily one of administering the will of Congress and the courts, not one involved in rulemaking, so that lawmakers and administrators did not even consider any compilation of executive orders. When power began to shift from Congress to the president,

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a suspicious legislature would not initially allow the publication of an official gazette, even as the need for a definitive source of executive orders and rules became obvious. Despite the apparent necessity, it took some unusual lobbying before such an important publication became possible.

## Background History

The American colonies that eventually became the United States were settled primarily by English emigrants, and the nation's political, legal, and publishing traditions owe much to their British roots. While the Puritans and others found ways to avoid censorship and restrictions on printing, political dissent also began to creep in, despite attempts to control it. The idea of 'liberty of the press' began to develop in England at least as far back as the sixteenth century. The news-sheets or corantos that were published faced little censorship as most of the information they contained was supplied by the government. King James I was unhappy with such corantos discussing the affairs of state, and he authorized only one group of publishers to print a gazette, with the imprimatur, «published by authority», which indicated that «its contents were subject to approval by the government» (COPELAND, 2006, pp. 44-59).

The very name «gazette» has two meanings in English. The term originated in Venice in the mid-sixteenth century with the meaning of news-sheet, or periodical publication with accounts of current events. Following the publication of an official English newspaper in 1665, the *Oxford Gazette*, later renamed the *London Gazette*, the term gazette gained the meaning of official government journal (CLARK, 1994, pp. 3-5)<sup>2</sup>. That authorized newspaper and journal of record for the king or queen of Great Britain, later the United Kingdom, published only sanctioned news and official notices, later adding commercial notices. A major source of foreign news was from official dispatches from the secretaries of state, and it included military dispatches, official Royal Proclamations, and news from the Court. While it began as a simple single page, printed on both sides, it expanded to as much as 584 pages in 1845 because of the number of commercial notices that the laws required to be printed in the *Gazette* (HANDOVER, 1965, pp. 12-25, 70-71). Its circulation was never as high as that of the commercial competition, to which shifted much of the news and commercial advertising. For example, in 1853, circulation of the *London Gazette* was at 350-400 copies, while *The Times* (of London) was at tens of thousands (HANDOVER, 1965, p. 77). The U.K. government today still publishes the daily *London Gazette* as an official journal. The issuing has been contracted out to a private company and while the primary means of dissemination is via the Internet, it is still available in printed form. While the *London Gazette* attempted to refrain from political bias, as an official Crown publication, its editorial selection and sources of news definitely supported the government that published it.

The American colonists imported British newspapers, including the official, heavily censored *London Gazette*, and it was important to them to avoid that control in America. However, this official publication did serve as a model for the commercial newspapers that developed in the colonies. The first newspaper published in the British Americas did not have the official authority to print and the colony's authorities suppressed it after just one issue. Benjamin Harris printed *Publick Occurrence* in the Puritan colony of Massachusetts in 1690, and his plan was to publish «Memorable Occurrents of Divine Providence» and «Circumstances of Publick Affairs», rather than official government notices. The local Governor's Council quickly put it out of business (HARRIS, 1690, p. 1; COPELAND, 2006, pp. 127-134).

<sup>2</sup> The *Oxford English Dictionary* includes under the definition of the noun gazette, «sometimes used gen. for the official journal of any government».

Fourteen years later, John Campbell was able to obtain government approval for his *Boston News-Letter*, noting in print just under the title that it was «Published by Authority». As an official newspaper, it did include the colony's governmental announcements and required private notices. As postmaster, Campbell had access to a great deal of correspondence and newspapers from England, and the *London Gazette* was a major source and model for this first regular American newspaper (CAMPBELL, 1704, p. 1; COPELAND, 2006, pp. 133-137; CLARK, 1994, pp. 3-4). It was not long before licensing of printing in the colonies faded away and the major cities of Boston, New York, and Philadelphia had competing newspapers and the idea of an official government newspaper faded away.

Newspapers in the form of an official press or opposition voice came later to the largest, but more rural, American colony. Virginia Royal Governor Sir William Berkeley famously made it clear in 1671 that he would tolerate no printing press in his colony (BERKELEY, 1671, p. 239). Without a large urban population to support a commercial venture, it was not until 1736 that a printer, invited to the colony to be the official printer of the government, began publishing the *Virginia Gazette* (MELLEN, 2009, pp. 2, 31-32). Government support for this sole printer was important in this colony with no large city, and both the royal governor and the legislature (House of Burgesses) voted approval of a subsidy for printing of official documents. The governor apparently kept a tight control over the local gazette, and it did include official announcements (GREENE, 1963, pp. 287-289).

In the contentious political period following the Stamp Act crisis in the 1760s, the wish to have more rebellious sentiments in print led to newspaper competition in the colony, with two (and sometimes three) printers publishing newspapers all named the *Virginia Gazette*. The printers dared not use a different name, as that would mean losing official advertisements. Virginia's laws stated that notices must be published in the *Virginia Gazette*, so in an effort to get the revenue from printing those announcements, all of the competing newspapers had the same name (KOBRE, 1960, p. 179). One newly-minted newspaper put the phrase «Published by Authority» on what came to be called the masthead of their newspaper (RIND, 1767, p. 1). This phrase had previously been used for presses that operated with an official license but had never before been used in Virginia. William Rind apparently thought that as the newly appointed «Public Printer» for the colony, he now had the right to claim his *Virginia Gazette* was now the official newspaper. He was soon set straight by a letter published in the other version of the *Virginia Gazette*:

Several of your readers are very solicitous to know what authority you have for publishing a paper now, more than formerly. Some, I suppose of the most intelligent, allege that because you have had the good fortune (for certainly you cannot ascribe it to anything else) to be chosen Publick Printer, that gives you an exclusive privilege (PURDIE & DIXON, 12th February 1767, p. 2).

The *Virginia Gazette* Rind published at the end of December 1766 no longer included this claim. The newspaper in this colony – the largest and most powerful of the British colonies in what soon would become the United States – was no longer the official mouthpiece of the government, by popular demand. This was an important step towards freedom of the press, and a major move away from government-sanctioned media.

The experience in Virginia was a critical one as that was where the concept of a constitutional right to a free press originated (MELLEN, 2009). Out of that came the American tradition of the press as a balance against a potentially corrupt government and resistance to the idea of a newspaper run by that government. Rather than turning to a sanctioned press for news or even for official announcements, Americans instead turned to

commercial newspapers. This left the nation without a gazette in which to publicize executive rules and orders – an important omission. In addition, the office of the presidency was not considered to be a center of rulemaking – the laws were left to the Congress, and the administration was considered to be just that, where the legislative orders were to be carried out. Thus, while there was a mechanism to catalogue and publish the laws approved by Congress and signed by the chief executive, no publishing of executive rules or orders was even considered.

The records of the United States Congress have a much different history than do the records of the Executive Branch. The Senate initially closed its debates to the press, and the only extant records are the *Senate Journal*, which recorded actions but did not record the debates or any detail, and the personal journal of a Senator from Pennsylvania, William Maclay. The official journal of the House of Representatives did not include verbatim debates, but several politically partisan newspapers did cover this house of Congress. In 1800, the *National Intelligencer* (a newspaper supportive of soon-to-be president Thomas Jefferson and the Democratic-Republican Party) began publishing the debates in both the House and Senate, which had opened to the press in 1794. The printers of that newspaper became the *de facto* official government printer, with congressional printing contracts, and they eventually published detail of the debates on the floor of both houses with the *Register of Debates* and later the *Annals of Congress*, a record of past legislative debates and records.

By 1851, the *Congressional Globe* had contracts with both the House and the Senate to publish full debates and records of congressional action. That arrangement ended in 1873 with the beginning of an official government publication of legislative actions, the daily *Congressional Record*. Since 1845, the government has printed statutes passed during each session of Congress in the *United States Statutes at Large*. Beginning in 1926, Congress has also published a compilation and codification of federal law in the *Code of Laws of the United States of America*, commonly called the *U.S. Code* (RITCHIE, 1991, pp. 11-26; BYRD, 1991, pp. 4, 311-326).

The United States executive branch actually did have a form of federal gazette briefly during World War I. President Woodrow Wilson authorized the publication of the controversial *Official Bulletin of the United States* by his Committee on Public Information in 1917. This *Bulletin* printed proclamations and orders by the president, rules and orders by the executive departments, foreign correspondence, war casualties, and prisoners. According to John Walters, the author of a scholarly study on this publication, President Wilson saw this official newspaper as a way to keep the public informed about the war effort, a way to join other nations that issued such gazettes, and as a vehicle of propaganda: «It sought to rally public sentiment in favor of the war» (WALTERS, 1992, pp. 243-244).

Despite a reputation for accuracy, the *Bulletin* was heavily criticized, including by members of Congress, as being part of an «imperial presidency» (WALTERS, 1992, p. 244). As soon as the war ended, Congress put an end to the official publication after less than two years of printing, but it continued for some time as a private, commercial enterprise (WALTERS, 1992, p. 244; FEINBERG, 2001, p. 362). The legacy of this first attempt at an official gazette was a lasting suspicion of publications by the federal executive as being overly propagandistic and giving too much power to the executive branch.

## The Need Develops

Despite the problems with that first version of an executive gazette, publishing just the legislative record proved to be insufficient. By the 1930s, power was shifting from the legislative branch of the Congress to the president's executive branch (RITCHIE, 1991, p. 218). The United States experienced a great expansion of executive agencies and the resulting rules and regulations that flowed from such. The «New Deal» programs of

President Franklin Delano Roosevelt included dozens of new executive departments that issued new rules. The president alone issued 674 Executive Orders during the first fifteen months of his administration, which began in March 1933: «This was a greater volume than that of the preceding four years, and nearly six times as that for the thirty-nine years from 1862 through 1900» (GRISWOLD, 1934, pp. 198-199). There was no consistent system for publishing these new rules, which were to have the force of federal law. In an influential article published in the *Harvard Law Review*, Erwin Griswold, Harvard Law Professor, later Dean of the Harvard Law School and Solicitor General of the United States, wrote: «It seems scarcely adequate to say that what we find is chaos» (GRISWOLD, 1934, p. 204). While laws passed by Congress were published regularly and could be found in official publications, there was no such equivalent for rules and orders issued by the President or other executive branch agencies, and by 1934, this had become a problem. For those who were the subjects of those regulations, «this new body of 'executive legislation' was inaccessible and virtually hidden» (HEMPHILL, 2006, p. 2)<sup>3</sup>. It took a forceful lobbying campaign to bring order to this chaos.

This problem was, of course, not exclusive to the United States. Other nations had run into the same lack of organized publication and the ensuing confusion much earlier, thus establishing comprehensive systems for publication of administrative rules. In Great Britain, the old system of publishing official documents in the *London Gazette* or in other publications had become confusing by the nineteenth century: «This want of systematic publication has often made it difficult to discover when and how the statutory power of making 'Orders' has been most recently exercised», according to an editor of a compilation of British laws (GRISWOLD, 1934, p. 206). The *London Gazette* was finally supplemented in 1893, when the nation, now called the United Kingdom, passed the Rules Publication Act, requiring a separate printing in a systematic form, then published annually in the *Statutory Rules and Orders* (GRISWOLD, 1934, p. 207). Griswold's article points to similar arrangements in other English-speaking countries and notes that similar publications are common in 'Latin countries' as well. In Portugal, the *Gazeta de Lisboa* was begun in 1715, later replaced by the *Diário do Governo* (1820) and then by the *Diário da República* (1976), all serving a similar purpose. This article suggests that by the 1930s, the United States was the only 'nation of importance' to have no organized system of disseminating executive acts (GRISWOLD, 1934, p. 208).

The problems with this lack of coherent organization began to surface in the courts. One early example of the confusion over executive regulations that were never made public is the 1930 case of two schoolteachers from Illinois who had their Liberty Bonds stolen. In testimony before Congress, Judge Harold M. Stephens related how in attempting to get their money refunded, the schoolteachers' lawyer discovered a law that stated that stolen bonds could be replaced under regulations written by the Secretary of the Treasury. The attorney searched in vain to find such regulations. He finally contacted the Bond Division of the Treasury Department and learned that while there was such a regulation, it had been out of print for years. He was shown the rule, but also learned that it had been amended three or four times, but subsequently shoved into a drawer and these amended orders had never been printed (RUDDY & SIMMONS, 1944, p. 251).

The question of executive branch regulations and their publication came up again in two landmark 1934 Supreme Court cases commonly referred to as the *Hot Oil Cases*. The *New York Times* noted that attorney F. W. Fischer from Texas elicited a rare chuckle from the justices of the high court when he argued that «he was not able to find a copy of the Petroleum Code» that was the basis of his client's prosecution, and wondered whether or not a man can be prosecuted «for violation of an order 'issuing from some commission up here in Washington'»

3 Published anonymously, but Hemphill confirmed his authorship to this writer.

(TEXAS, 1934, p. 4)<sup>4</sup>. The federal government found itself in the embarrassing position of admitting some fault to the Supreme Court due to a failure to properly publicize regulations. The government had argued that some oil producers in Texas had produced more oil than federal quotas allowed but lost the case at the District Court level. It was only after appealing the case to the highest court in the land, that government attorneys discovered that the regulation upon which they based the case did not even exist (OIL SUIT, 1934, p. 6; GRISWOLD, 1934, p. 204)<sup>5</sup>. The Assistant Attorney General noted that his department found a flaw in the rules, that an Executive Order had deleted the quotas, but that alteration was not properly filed nor made public (RUDDY, 1944, p. 250). A printer had accidentally omitted the specific regulation that the government accused the Amazon Petroleum Company of violating, so the provision technically was not legal. The order itself was filed only months later with the State Department, as required, but that was after the case had already gone to trial (FEINBERG, 2001, p. 360).

Thus began some atypical behind-the-scenes lobbying by some powerful figures to make sure federal prosecutors would not be embarrassed again by repeating such an error. It took such manipulation to force Congress and a reluctant president, and it began right there in the high court. During arguments of the «Hot Oil Cases» before the Supreme Court, according to a 1934 article in the *Washington Post*, the justices questioned Assistant Attorney General Harold M. Stephens about where these laws are issued and whether or not they are published: «'Not that I know of', replied Mr. Stephens». He went on to admit it would be difficult to find these executive orders (FEINBERG, 2001, p. 366)<sup>6</sup>. The Supreme Court justices had already been advised by Stephens that the regulations had not been properly published, yet despite that, they probed deeply into the problem of records publication (FEINBERG, 2001, p. 366). One scholar of the *Federal Register* suggests that this severe questioning of the government in this case – especially by Associate Justice Louis Brandeis – and much of the subsequent publicity of this problem was an intentional effort to force the creation and publication of some sort of official record of executive government actions (FEINBERG, 2001, pp. 359-370). Later on the same October day that the oil case had to be dismissed, the Supreme Court justices all met with President Franklin Delano Roosevelt over tea at the White House (OIL SUIT, 1934, p. 6), but one can only speculate if the lack of an official federal gazette was a topic of discussion at that social occasion.

Whether or not they lobbied in person at the White House, it appears as though the Supreme Court Justices did some lobbying outside of the courtroom. With the urging of Justice Brandeis, future Supreme Court Associate Justice Felix Frankfurter (then a colleague of Griswold's at Harvard Law), and other powerful legal and legislative leaders, the problem of a lack of organized publicity of executive regulations became the focus of an important commentary by Griswold in the *Harvard Review* ([HEMPHILL], 2006, p. 2; FEINBERG, 2001, p. 364). He noted that the New Deal's National Recovery Administration – in just the first year – issued nearly three thousand administrative orders plus numerous other regulations, enough to fill an estimated ten thousand pages (this was probably more than all of the statute law, or laws passed by Congress, that were then in the current *United States Code*). This plus the regulations issued by dozens of other federal agencies created endless confusion. While such rules and regulations are often available in a published pamphlet, there was no practical way to determine whether or not such rules remain in effect or have later been modified or nullified. There was apparently no comprehensive collection of such in existence. Griswold noted that «there are literally dozens of agencies of the Federal Government which have

4 The court did find the regulation unconstitutional based on the opinion that Congress had in this case delegated legislative powers without clear guidelines, giving the president too much power.

5 *United States v. Smith*, no. 3, Oct. Term, 1934.

6 Franklyn Waltman, NRA Set-Up Made Target in High Court, *Washington Post*, 11<sup>th</sup> December 1934, 1-2, quoted in Feinberg.

power to promulgate rules and regulations». However, even within one department a consistent system was not in place, let alone between such departments. While Congress had granted to executive officers the power to regulate, amend, or even repeal statutes, it had become impossible to navigate the maze of such rules (GRISWOLD, 1934, pp. 199-201, 204). The article mentions that judges have noted the problem many times, including in the recent Supreme Court case and it had even been written about in lower court decisions:

No department ever sends its compilation of regulations to the judges. They are frequently amended, and, without special information from the department, no one can tell whether a particular regulation in some printed compilation was in force a year later ... It is a hopeless task for an appellate court to determine what such regulations were at any particular time (GRISWOLD, 1934, p. 209 fn 42)<sup>7</sup>.

As a brand-new member of academia at a young age, this was Griswold's first journal article. There was obviously some support from very high places to get it published quickly in such a prestigious and influential law journal. It was perhaps a fortuitous coincidence that it came out on the very day that the Supreme Court heard the «Hot Oil Cases».

Justice Brandeis, according to Lotte E. Feinberg, played a critical role in the creation of the *Federal Record* in an unusual «extrajudicial capacity». He intervened, the author posits, because of his longstanding preference of governmental openness and a concern over the accountability of a growing bureaucracy. As the power of the executive grew and the federal regulations spread, Brandeis apparently viewed transparency as the «key to safeguarding democracy». Feinberg infers that the severe questioning by the court and the newspaper, scholarly journal articles, and Congressional hearings that resulted from this was part of an intentional move by Brandeis to force the president's hand. She concludes that without such actions, the *Federal Register* would not have been created – at least not at that time (FEINBERG, 2001, p. 359 & 368).

In his January 7, 1935 decision in the petroleum production case, Chief Justice Charles Evans Hughes wrote that the attempted prosecution by the federal government for overproduction of oil beyond the assigned quota was not constitutional:

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 attack in this respect was on a provision which did not exist.

The high court made a strong statement that without proper publication, the Executive Orders at the basis of this prosecution were not constitutional (RUDDY, 1944, pp. 248-249)<sup>8</sup>.

A problem had become obvious: the executive branch of the federal government was issuing more rules and publishing them so haphazardly that the courts could no longer keep track of what was and what was not legal. These questions about executive regulations and their confusion in the courts led to some additional lobbying by some powerful individuals. As early as 1934, a committee of the American Bar Association recommended that such administrative rules be subject to a requirement for improved registration and publication. Later, in

<sup>7</sup> Nagle v. United States, 14S Fed. 302 (C. C. A. 2d, 1906).

<sup>8</sup> Panama Refining Co. v. Ryan, 293 U. S. 412 (1935).

testimony before Congress, members of that committee noted that administrative departments do not routinely file their regulations with the State Department, and these are often buried within departmental files and never made public. They testified that the large number of recent provisions that included criminal penalties made an immediate solution necessary (RUDDY, 1944, pp. 248-263).

There was also support and lobbying from within the Roosevelt administration to create a federal gazette. An attorney in the Agricultural Adjustment Administration, one of the alphabet agencies created by the White House to deal with the Great Depression, urged Edwin Griswold, then special assistant to the Attorney General, to write an internal memo outlining the need for such a publication. The suggestion, to be presented to the Cabinet Secretaries, was to call it the «Official Gazette», «Official Record», «Executive Record», or something similar. Two more Griswold memos followed that one, all supporting what appeared to be a needed new publication. One year earlier, Assistant General Counsel of the Treasury Department John G. Laylin also saw a need for a federal gazette, and wrote a memo to his superior, Secretary of the Treasury Henry Morgenthau, Jr. (WALKER, 2016)<sup>9</sup>. Interestingly, Laylin also later had suggestions for who should run the *Federal Gazette*, and one of his recommendations was Alger Hiss, who later was convicted for perjury in connection with accusations of being a spy for the Soviet Union (WALKER, 2016)<sup>10</sup>.

The idea for a federal gazette met severe resistance from the top of the executive branch. The President of the United States and the General Council of the National Emergency Council, Donald Richberg, the man sometimes referred to as the «Assistant President» (ANNUNZIATA, 1974, p. 538)<sup>11</sup> apparently opposed the idea. One administration attorney noted that, «the President had a rather peculiar reaction to the suggestion for an official gazette... He seems to have thought it was something like a federal newspaper boosting the federal government» (FEINBERG, 2001, p. 365)<sup>12</sup> rather than the periodical publication of rules and regulations that was being proposed. Richberg said that after he presented the idea to FDR, he got back a message that read: «I do not want any federal paper established» (FEINBERG, 2001, p. 365). However, Roosevelt did not really like the existing commercial newspapers. He once told his wife that such papers were too long and had too much trivial material. He wrote to Eleanor that, «I am going to start a one-page paper. It will pay and print only news that really has some relative importance!» (GOODWIN, 1997, p. 694)<sup>13</sup>.

Despite his ideas about newspapers, the president apparently had «misgivings about possible misuse of the publication for propagandistic purposes». This hostility to the idea makes a great deal of sense when one considers the historic resistance in the United States to an official government gazette and the experience during President Wilson's administration with the *Official Bulletin*. Some of the administration people who had worked on the memo and design of the project had the distinct impression that the president had not really understood the detail of the proposed publication and believed what was being proposed was a «federal paper» (HEMPHILL, 2006, p. 2). Richberg apparently planned to let the idea die by simply filing the idea away, but others would not allow that to happen.

9 LAYLIN, John G. to Henry Morgenthau, Jr., 8<sup>th</sup> March 1936 (NAID 21925841), Activities Files, 1935-1968 (NAID 12011779), RG 64, Records of the National Archives and Records Administration, quoted in WALKER.

10 LAYLIN to R. D. W. Connor, 25<sup>th</sup> June 1935, file 8- John Laylin (NAID 21925841), Activities Files, 1935-1968 (NAID 12011779), RG 64, Records of the National Archives and Records Administration, quoted in WALKER.

11 BATES, March 1935; MITCHELL, 1935; CHILD, 1938, all quoted in ANNUNZIATA; also see The Presidency: Assistant President?, 12<sup>th</sup> November 1934. *Time*.

12 WYZANSKI, Charles to Erwin Griswold, 28 the September, 1<sup>st</sup> October, and 23<sup>rd</sup> November 1934, Box 32-24, Harvard Law Library, Manuscript Division, quoted in FEINBERG.

13 Franklin Delano Roosevelt to Eleanor Roosevelt, November 18, 1943, Roosevelt Family Papers Donated by the Children, Box 12, Franklin D. Roosevelt Presidential Library, Hyde Park, New York, quoted in Goodwin.

At this point, another important advisor to the president took up the case and lobbied FDR in person. In December 1934, Felix Frankfurter, then professor at Harvard Law School, sent a telegram to Roosevelt's private secretary, urging her to tell the president, «Hope it will not be necessary to make final decision regarding form and procedure for systematic publication of executive orders until I have had opportunity for talk with you. It happens to be a particular subject of mine and I am bringing a detailed scheme and draft for necessary legislation» (FRANKFURTER, 1934). Frankfurter, later made Supreme Court justice by Roosevelt, was a constant FDR supporter and adviser (JAFFE, 1969, pp. 366-375). Griswold, Frankfurter's associate just down the hall at Harvard Law, reported that his colleague believed that any resistance from the president to such a plan could easily be taken care of (FEINBERG, 2001, p. 365)<sup>14</sup>.

The constant lobbying and a real need for such a publication eventually softened the president's position. The topic came up in a meeting of the National Emergency Council on December 11, 1934. Solicitor General James Crawford Biggs pointed out to President Roosevelt and the others that Supreme Court Chief Justice Hughes was surprised earlier that day when he learned that Executive Orders are not printed. When the president noted that all the important executive orders were indeed printed, except for those that «have no reference to private citizens in any way», Biggs responded that one had to go to various departments to find them: «What the Court was complaining about was this; here is a regulation made by the Secretary of the Interior which makes certain acts offenses. It is the law, and yet you cannot find it. You have to search in that office for them. They are not available to the public». Secretary of Labor Frances Perkins, the first woman member of a president's cabinet, then noted that «they are not in a gazette».

The discussion then continued on to note that while some orders were printed, they did not appear to be in any pamphlet or organized gazette form. The president remarked that some trivial materials have never been printed, but rather kept in a file at the White House with a copy in the State Department. He went on to note that now some agencies had the delegated power to issue what were in essence Executive Orders. Secretary of the Interior Harold Ickes then queried: «I wonder if we ought not to publish them in pamphlet form, in view of the position of the Supreme Court?». The president concluded: «I think some steps should be taken immediately so that those will be available to the public through the regular sources of information». He then established an executive committee to address the situation (ROOSEVELT; National Emergency Council, 1965, p. 362).

By the next month, Congressman Emanuel Celler introduced a bill in Congress based in part on the legislation Griswold had proposed in his law journal article, with several important alterations. During meeting of the National Emergency Council, Richberg reported to the president on the progress of this bill through the House and Senate (FEINBERG, 2001, pp. 366-367; ROOSEVELT; National Emergency Council, 1965: 19<sup>th</sup> February & 12<sup>th</sup> March 1935, pp. 441-442 & 452-453). The House and Senate revised Celler's original bill several times, and it eventually passed and was signed by the president in July 1934. The controversial name of *Official Gazette* put forward by Griswold had disappeared and the suggestion that the Librarian of Congress compile the collection was also deleted (GRISWOLD, 1934, pp. 208, 215). The new legislation used the name *Federal Register* to remove any taint that the idea of a newspaper or gazette might imply.

The act required the publication of documents, «including any Presidential proclamation or Executive order and any order, regulation, rule, certificate, code of fair competition, license, notice, or similar instrument issued, prescribed, or promulgated by a Federal agency», which was then defined as specifically from the

<sup>14</sup> Wyzanski to Griswold, November 26, 1934, quoted in Feinberg.

executive branch, and not from the legislative nor judicial branches. The description of what should be published here was narrow enough to avoid the kind of editorial or propaganda publication that the president and others were concerned about: «in no case shall comments or news items of any character whatsoever be authorized to be published in the *Federal Register*». To be enforceable in the future, all executive actions now needed to be printed in the *Federal Register*. The act required that a new division be set up in the National Archives to take charge of the compilation and publication of the new *Federal Register* (Federal Register Act, 26th July 1935, pp. 500-503).

THE NATIONAL ARCHIVES  
LITTEA  
SCRIPTA  
MANET  
OF THE UNITED STATES

# FEDERAL REGISTER

Volume I 1934 Nos. 1-121

Saturday, March 14, 1936

No. 1

PRESIDENT OF THE UNITED STATES.

EXECUTIVE ORDER

ENLARGING CAPE ROMAIN MIGRATORY BIRD REFUGE

South Carolina

By virtue of and pursuant to the authority vested in me as President of the United States, and in order to effectuate further the purpose of the Migratory Bird Conservation Act (45 Stat. 1222), it is ordered that the following-described area, acquired by the United States, in Charleston County, South Carolina, with all buildings thereon, be, and it is hereby, reserved and set apart for the use of the Department of Agriculture, subject to valid existing rights, as an addition to the Cape Romain Migratory Bird Refuge, established under the said Migratory Bird Conservation Act:

Thence with mean high water along sandy beach and sand dunes,

N. 31°09' E. 17.19 chs.;  
N. 65°02' E. 2.81 chs. to the northeasterly point of Bull Island; thence,  
S. 37°27' E. 2.12 chs.;  
S. 22°29' E. 19.23 chs. to corner No. 2, a point on the northeasterly end of the cocohere of Bull Island, facing the Atlantic Ocean; from this corner a U. S. B. S. standard concrete post marked "2 WC COR 2 BULLS ISLAND 1935", set 18 in. in the ground for a witness corner on the west slope of a grassy sand dune about 2.09 chs. northeast of a dense growth of cedar, myrtle, and palmetto, bears S. 71°30' W. 0.69 ch. distant; from which witness corner a U. S. C. & G. S. concrete monument marked "BULL 1934" bears N. 67°48' W. 3.16 chs. distant; an 18 in. cedar blazed and scribbled "BT WC COR 2" bears S. 13°00' W. 2.23 chs. distant; and palmettos were blazed for witness trees;

Thence, with mean high water along the east shore of Bull Island, with the meanders thereof, between the beach and a thick growth of pine, cedar, and palmetto,

S. 22°04' E. 2.82 chs.;  
S. 12°07' E. 9.15 chs.;  
S. 15°31' W. 19.17 chs.;

### Image 1 – *Federal Register*, No. 1, March 14, 1936.

The new Division of the *Federal Register* published the first issue on March 14, 1936. It was 16 pages long, but it also included the second issue, just half a page long. It is perhaps no coincidence that the first entry in this initial issue was an executive order from the president enlarging a bird refuge. President Roosevelt was an avid birder (BRINKLEY, 2016). The *Associated Press* reported that the president himself was the author of this first article (Associated Press, 15<sup>th</sup> March 1936, p. 110), although it was in fact an Executive Order issued and signed by the president. This order included detailed map coordinates for the expanded Cape Romain Migratory Bird Refuge on Bull Island in South Carolina with specific «meanders thereof». This first *Federal Register* also included regulations from the Bureau of Internal Revenue on new excise taxes on employees for the new Social Security Act (specifically including detailed definitions of what comprised an 'employee' for this regulation and how the tax was to be collected), notice of a hearing by the Department of Agriculture regarding the handling of milk in the St. Louis, Missouri area, trade practice rules for the vegetable ivory (tagua nut) button industry from the Federal Trade Commission, and new rules from and a hearing scheduled by the Securities and Exchange Commission.

The next issue, number 2, dated March 17, 1936, begins on page 16 with a single entry regarding regulations from the Treasury Department, Internal Revenue Bureau regarding a carrier tax on railroads (National Archives and Records Administration, *Federal Register* #1, 14<sup>th</sup> March 1936: 1-16). Some fifteen thousand copies of the first issue were printed («Federal Register Makes Bow...», 12<sup>th</sup> March 1936) and by the end of the first full year of operation, the director reported 1,901 paid subscribers and some six thousand copies sent to members of Congress and other federal agencies (KENNEDY, 15<sup>th</sup> April 1937, p. 4; CONNOR, 1939, pp. 39-40).

Reaction to this new federal publication was not universally positive, even from within the president's own political party. Even before the Division of the Federal Register published that first issue, the Chairman of the House Committee on Expenditures in Executive Departments, Democrat John J. Cochran, introduced a bill to eliminate what he called a «useless idea» and to save the taxpayers money. Some strong lobbying quickly stopped that move, but Cochran did not cease his disparagement. The first issue, he said, confirmed his opinion that the new *Federal Register* would contain a lot of «bull», with the first item on birds on Bull Island, and with only 69 paid subscribers (*Jefferson City [MO] Post-Tribune*, 19<sup>th</sup> March, p. 2). One news article noted that some congressmen believed this new federal publication would have a very short life. According to the most vocal critic, Representative Louis Ludlow, a Democrat from Indiana: «There is no sense to publishing it and I don't think there is or will be any demand for it. I've asked the public printer to inform me how it sells» (Associated Press, 1936, p. 110). Worries about First Amendment freedoms and a concern that the government was publishing such a 'newspaper' were perhaps behind Ludlow's concern as the congressman had been journalist – in fact, a reporter who covered politics – before he himself became a politician (Biographical Directory).

There were diverse reactions from journalists around the country. The *New York Times* claimed in their headline that «Uncle Sam Issues Daily Newspaper», a description scrupulously avoided by the creators and one that no doubt troubled the president. The article described the *Federal Register* as designed after the *Congressional Record* and was «the closest approach heretofore in American history to the official gazettes of other great capitals». The news story also noted that the statute that authorized the publication strictly forbade editorial comment (SULLIVAN, 15<sup>th</sup> March 1936, p. 85). The *Houston Post* agreed that it was «a Government Newspaper» and claimed that it was the fruition of an idea by William Jennings Bryant to have a daily newspaper published by the government (*A Government Newspaper*, 18<sup>th</sup> March 1936). However, an article published in a newspaper industry magazine commented on a first issue that was «in no way resembling a daily newspaper», perhaps the result of a more careful reading. The style of writing in this new publication was that of a «legal mouthpiece» (*New U.S. Daily*, 21<sup>st</sup> March 1936), more closely resembling the composition of government regulations than the prose of journalists, who had an eye to interest readers, cultivate higher circulation, and increase profits.

While the administration appeared to avoid the use of the word «gazette», or a description of this new publication as a newspaper, the majority of journalists and critics of the idea did not buy into that avoidance and typically referred to the *Federal Register* as a gazette or newspaper. One newspaper in Huron, South Dakota noted that there were problems in court cases that pointed to a need for an official gazette, «such as most foreign governments issue», but then went on to note the lack of editorial comment and that «news will be strictly limited to official utterances of responsible authorities... The *Federal Register* will no doubt find a warm welcome among newspaper editors, students of government, and especially lawyers» (*The Federal Register*, 6<sup>th</sup> April 1936, p. 4)<sup>15</sup>. A column from the Newspaper Enterprise Association that ran in several

15 While this article noted no author nor news service source, the same story ran in other newspapers.

newspapers suggested that readers would find the material «a bit dull», and suggested that the first issue should be dedicated to the Supreme Court, as it was the «spanking» the justices gave the Justice Department lawyers that led to the birth of the publication (DUTCHER, 18<sup>th</sup> January 1935, p. 2). A column from the *Philadelphia Inquirer* was even more cutting in its criticism of the new venture of the Roosevelt administration: «While a degree of professional delicacy is felt in criticizing a newcomer in the newspaper field, it is difficult to discern any prospective wide popularity for the *Federal Register*». Although containing no comics, the writer suggested that humor could certainly be added, «merely by recording some of the ludicrous projects of the WPA» (*Philadelphia Inquirer*, 19<sup>th</sup> March 1936, p. 4).

### **The *Federal Register* Today**

The *Federal Register* today does not actually resemble a newspaper, except for the fact that it is published daily. It does resemble official gazettes from around the world in that it contains official notifications of government actions. It does not, on the other hand, include what we would call news, editorial comment, official advertisements, nor commercial notices. As a thick booklet with the dimensions of just over 54 cm by 41 cm, it looks nothing like a newspaper. The writing is somewhat dense when compared to a typical newspaper style; it is more the language of lawyers and regulations, somewhat difficult to read and full of bureaucratic terminology. It is considered to be the official public record of actions or revisions to the *U.S. Code of Federal Regulations*. The Office of the Federal Register (renamed in 1957), a division of the National Archives and Records Administration, publishes it on the morning of the day following every business day.

The printed *Federal Register* typically runs about 250 pages of recycled paper. While Griswold originally estimated it would require perhaps four or five hundred pages be printed each year, and that some days it would not even need to be published, that proved to be a gross underestimate. In the year 2000, there were 83.294 pages printed, averaging 333 pages each day (FEINBERG, 2001, p. 367). The *Register* includes presidential proclamations, other presidential documents, executive orders, federal agency regulations, notices of interest to the public, proposed rules, and requests for public comment<sup>16</sup>. The same organization also publishes an annual *United States Government Manual* (now online only) that contains information on various federal agencies of the executive, judicial, and legislative branches, indexes for information published, and an annual edition of the *Code of Federal Regulations* that now contain more than 185 000 pages. The *Code* is an organized compilation of administrative law and the *Federal Register* is, in actuality, a daily edition of revisions to the annual *Code of Federal Regulations* (HEMPHILL, 2006, p. 16).

Printing and online posting of the documents is the responsibility of the United States Government Publishing Office, formerly known as the Printing Office (they print all of the official government journals in-house, including the *Congressional Record*.) In the 1970s, the printing transitioned from hot metal presses to electronic photocomposition. While printed copies of the above are still available, the *Federal Register* and the other publications are now available online at <https://www.archives.gov/federal-register/publications>. The day's issue appears on the web at about 6 a.m. Eastern Time, and the publishers estimate that about 150 000 people will have searched for information in the *Federal Register* by the end of that same

16 In 1947, the Administrative Procedure Act changed the character of the *Federal Register* by requiring agencies to publish proposed rule changes and request public comment, thereby making the Register a part of the rulemaking process itself.

day (HEMPHILL, 2006, p. 16). Approximately 450 copies of each issue are printed currently. Prior to web publication in 1994, some 20 000 copies were printed daily for distribution free to federal offices and for sale (MACAFEE, 2019). Before web access supplanted paper copies, the print tally grew to as many as 26 000 in 1996 (HEMPHILL, 2019).<sup>17</sup>

As an example of the current *Register*, the March 1, 2019 printed issue contains notices, rules, and proposed rules from many agencies, ranging from the Agricultural Marketing Service, the Defense Department, the Drug Enforcement Administration, the Homeland Security Department, to the Workers Compensation Office). In one entry, the Coast Guard (part of Homeland Security) is requesting public comments on the collection of information on undocumented vessels: «Since the September 11, 2001 terrorist attacks on the United States, the need has increased for identification of undocumented vessels to meet port security and other missions to safeguard the homeland». This item goes on to note that the individual states follow a standard numbering system for about 12 million boats, and the Coast Guard gathers and uses that information to help with law enforcement. Also included here is a 73-page-long «Part II» from the Commerce Department, National Oceanic and Atmospheric Administration, that contains a proposed rule that is based on a request from the U.S. Navy «for authorization to take marine mammals incidental to the use of Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA) sonar systems onboard U.S. Navy surveillance ships...» (National Archives and Records Administration, 1<sup>st</sup> March 2019, p. 6953-7260).

While this specific issue contains no presidential proclamations or documents, the daily *Federal Register* commonly includes such. For example, on April 30, 2019, a «Presidential Proclamation for National Physical Fitness and Sports Month» was included: «To address this issue, I have directed the President's Council on Sports, Fitness, and Nutrition to work with the White House and the Secretary of Health and Human Services (HHS) to develop a national strategy to increase youth sports participation» (TRUMP, 2019, p. 19689). At the end of the print edition is a Reader Aids page that includes informational phone numbers, websites, and email addresses.

The subscription information on the back page notes that an annual subscription would cost \$929, or approximately €829. That would include a printed copy of the monthly *Federal Register Index*. The single printed issue cost \$22, or approximately €19.62 (National Archives, 2019, p. i).

## Conclusion

A deep-seated American fear of a powerful, corrupt, and authoritarian government and competition over the balance of governmental power led to a lengthy avoidance of an official government gazette. This delay was despite a growing executive branch, increasing regulations, and the inherent need for a systematic publication. Communication media in the United States became decidedly commercial rather than governmental. Official notices tended to be published as advertisements in privately-owned newspapers rather than in an official government publication. This resulted in a structure in direct contrast to the United Kingdom's example of the *London Gazette*, while also leading to confusion about executive orders and regulations. Eventually, after the need was clearly established and after much lobbying from powerful people, Congress and the president

<sup>17</sup> *Office of the Federal Register Publications*, August 1, 1996 (unpublished document produced by Government Publishing Office for the OFR), quoted by Hemphill.

established the *Federal Register* in the 1930s. While this filled the need for compilation and publication of executive orders, proclamations, and rules, it was a much different publication from the gazette model used in many nations. It has tended to avoid any news, political bias, or propaganda.

According to a law journal article looking back at the creation of the *Federal Register*, the situation had become so dire that a fourth branch of government had developed: «the regulatory branch». The number of regulations, rules, and orders issued by federal government executive officials had become uncontrolled. While created by administrative decree, these nonetheless have the strength of laws passed by the legislature, in that they state what a person may or may not do. The daily *Federal Register* gives the American citizen an account of such governmental administrative action, and how such activities may affect his or her basic rights, as stated in the United States *Declaration of Independence*, the citizens' «Life, Liberty and the pursuit of Happiness» (RUDDY, 1944, p. 263)<sup>18</sup>.

### Appendix A – Directors of the *Federal Register*

Years	Name	Previously
1935-1959	Bernard R. Kennedy	Retired Army Major
1959-1970	David C. Eberhart, Jr.	Register editor
1970-1979	Fred J. Emery	FAA regulatory attorney
1981-1989	John E. (Jeb) Byrne	Journalist and press secretary
1989-1995	Martha L. Girard	Federal Register executive
1995-1997	Richard Claypoole	Archivist
1996-2012	Raymond A. Mosely	National Archives executive
2012-2015	Charley Barth	Government records specialist
2015-present	Oliver Potts	Government regulatory attorney

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<sup>18</sup> Thomas Jefferson, United States *Declaration of Independence*, 1776, quoted in Ruddy.

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