

# Administrative Law - The Effect of Publication in the Federal Register

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### Repository Citation

William J. Kohlmetz, *Administrative Law - The Effect of Publication in the Federal Register*, 32 Marq. L. Rev. 58 (1948).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol32/iss1/5>

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# COMMENTS

## ADMINISTRATIVE LAW—THE EFFECT OF PUBLICATION IN THE FEDERAL REGISTER

The Federal Crop Insurance Act<sup>1</sup> created the Federal Crop Insurance Corporation as a wholly Government-owned enterprise for the purpose of insuring producers of wheat against crop losses due to unavoidable causes, including drought. The Corporation promulgated regulations specifying the conditions on which it would insure wheat crops, including a provision making "spring wheat which has been reseeded on winter wheat acreage" ineligible for insurance. The Wheat Crop Insurance Regulations were duly published in the Federal Register.<sup>2</sup> Thereafter, without actual knowledge of this provision, plaintiff applied to the Corporation's local agent for insurance on his wheat crop, and informed the local agent that most of said crop was being reseeded on winter wheat acreage. This information was not included in the written application forwarded by the local agent. The Corporation accepted the application subject to the terms of its regulations. Most of the plaintiff's crop on the reseeded acreage was destroyed by drought. *Held*: The Corporation is not liable for the loss on the reseeded acreage. The Wheat Crop Insurance Regulations, after publication in the Federal Register, bind all persons who seek to come within the Federal Crop Insurance Act, regardless of lack of actual knowledge of the regulations. *Federal Crop Ins. Corporation v. Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. — (1947).

Mr. Justice Frankfurter, writing for the five member majority, based his holding principally upon section 7 of the Federal Register Act<sup>3</sup> which provides that the publication of documents in the Federal Register shall constitute constructive notice to any person subject thereto or affected thereby. Said section further provides that the contents of the Federal Register shall be judicially noticed. In one of his opinions, the Attorney General even dispensed with the need for publication in the Federal Register as a condition precedent to constructive notice when he wrote:<sup>4</sup>

"[D]ocuments required or authorized to be published under section 5 of the [Federal Register] Act. . . operate as constructive notice to the persons designated as soon as they have been filed with the Division [of the Federal Register] and made available for public inspection in the manner provided in section 2 of the

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<sup>1</sup> Act of February 16, 1938, c. 30, sec. 503, 52 Stat. 72, 7 U.S.C.A. sec. 1503 (1947).

<sup>2</sup> 10 Fed. Reg. 1586 (February 7, 1945).

<sup>3</sup> 49 Stat. 502, 44 U.S.C.A. sec. 307 (1947).

<sup>4</sup> 38 Op. Atty. Gen. 359, 361 (1935).

Act; and. . . publication in the Federal Register is not essential to their validity."

The court in the case of *United States v. Krepper*<sup>5</sup> adopted and affirmed the opinion of the Attorney General.

The decision in the principal case affirms similar rulings of lesser courts which held that publication of O.P.A. maximum price regulations<sup>6</sup> and publication of an Interstate Commerce Commission's general order<sup>7</sup> in the Federal Register gave constructive notice of the contents thereof. The decision in the principal case also corrects prior rulings of the Circuit Court of Appeals for the 8th Circuit,<sup>8</sup> and for the 9th Circuit,<sup>9</sup> each of which held that publication of administrative regulations in the Federal Register created a *rebuttable* presumption. Constructive notice by definition is not rebuttable.<sup>10</sup> Story defines it as follows:<sup>11</sup> "Constructive notice is in its nature no more than evidence of notice the presumption of which is so violent that the court will not even allow of its being controverted."

The Supreme Court of Idaho in ruling on the principal case<sup>12</sup> chose to disregard the fact that the plaintiff received constructive notice of the Wheat Crop Insurance Regulations after they had been published in the Federal Register, and ruled in favor of the plaintiff on the ground of estoppel. The court said:

"However, the appellant urges. . . that the regulation in question has the force and effect of a law; that under the federal Register Act the respondents had constructive notice of its contents; and that the same was binding upon the respondents. The regulation in question is not a law. . . . [T]he ultimate question in this case is not one of constructive notice but of equitable estoppel."

<sup>5</sup> "It is true that Executive Order No. 8985 of the President . . . was dated December 19, 1941, and was not filed with the Federal Register until December 20, 1941, at 11:45 a.m., and was published in the daily issue of the Federal Register on December 23, 1941. . . . The filing of the Executive Order with the Federal Register on December 20, 1941, would make the order legally effective as of the hour and date of filing which would be at 11:45 a.m. on December 20, 1941." 159 Fed. (2d) 958, 964 (1946).

<sup>6</sup> Maximum rent regulations: *Henderson v. Baldwin*, 54 Fed.Supp. 438 (1942); *Henderson v. Nixon*, 66 Idaho 780, 168 Pac. (2d) 594 (1946); maximum selling price of buses: *Slack v. Glenwood Sightseeing Bus Co.*, 47 N.Y.S. (2d) 876 (Misc., 1944).

<sup>7</sup> *United States v. Alabama Highway Express*, 46 Fed.Supp. 450 (D.C. Ala., 1942).

<sup>8</sup> *Kempe v. United States*, 151 Fed. (2d) 680, 684 (1945).

<sup>9</sup> *Flanagan v. United States*, 145 Fed. (2d) 740, 741 (1944).

<sup>10</sup> "[C]onstructive notice is a creature of the statute, and is ineffectual unless provided by statute; has the same effect as actual notice; means notice imputed to one not having actual notice; an inference of notice not rebuttable; a conclusive presumption that cannot be controverted." *Ex Parte Caplis*, 275 Fed. 980, 986 (D.C. Tex., 1921).

<sup>11</sup> Story, *Commentaries on Equity Jurisprudence*, (14th Edition by Lyon) sec. 529 (1918).

<sup>12</sup> *Merrill v. Federal Crop Insurance Corp.*, 67 Idaho —, 174 Pac.(2d) 834, 835 (1946).

In direct conflict with the decision of the Idaho court that the regulation of the Federal Crop Insurance Corporation is not a law, some 25 years earlier the United States Supreme Court in the case of *Maryland Casualty Co. v. United States*<sup>13</sup> said:

"It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision."

Mr. Justice Jackson wrote the dissenting opinion in the principal case for four members of the Court.<sup>14</sup> He thought that the Court should follow the insurance business principle, which requires that the writings which pass between the insurer and the policyholder must embody the entire contract. He also criticized the constructive notice afforded by publication in the Federal Register in the following language:

"It may be well enough to make some types of contracts with the Government subject to long and involved regulations published in the Federal Register. To my mind, it is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops. Nor am I convinced that a reading of technically-worded regulations would enlighten him much in any event."

This dissenting opinion raises two questions: (1) Should the hard facts of this particular case negate the express provisions of the Federal Register Act? (2) Should the Federal Register Act be amended so as to abolish the constructive notice of regulations which results from publication therein? The Iowa Supreme Court answered the first question when it said:<sup>15</sup> "Hard cases must not be allowed to make bad equity, any more than bad law." To answer the second question one must inspect the history and the purpose of the Federal Register.

Prior to the enactment of the Federal Register Act, no facilities existed within the Executive branch of the Federal Government for the

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<sup>13</sup> 251 U.S. 342, 349, 40 S.Ct. 155, 64 L.Ed. 297 (1920).

<sup>14</sup> Mr. Justice Black and Mr. Justice Rutledge dissented, and Mr. Justice Douglas joined in the dissenting opinion of Mr. Justice Jackson.

<sup>15</sup> *Moore v. Pierson*, 6 Iowa 279, 297, 71 Am.Dec. 409 (1858); also: ". . . there is often great danger of forgetting that there is virtue and truth in the maxim that 'Hard cases are the quicksands of the law.'" *Metropolitan Nat. Bank of Kansas City, Mo. v. Campbell Commission Co.*, 77 Fed. 705, 710 (1896).

central filing and publication of all of the various Presidential proclamations, Executive orders, administrative rules and regulations, and similar documents which had general applicability and the force of law. The United States was the only English-speaking country which had not established some form of official gazette for the promulgation of administrative regulations. As early as 1893, by the Rules Publication Act,<sup>16</sup> Great Britain organized her counterpart to the Federal Register. Thereafter, Australia, New Zealand, Northern Ireland, India, South Africa, and Canada passed similar enactments. France, Germany, and most Latin American countries also had established similar publications.

During the first fifteen months after March 4, 1933, the President alone issued a volume of Executive orders six times greater than had been issued for the 39-years from 1862 through 1900.<sup>17</sup> Prior to 1936, administrative regulations were generally printed in separate paper pamphlets which were easily misplaced. Citation of such pamphlets was difficult, and an adversary had even greater difficulty in locating the source cited since there was no standard form of citation, and since no law library had any means of knowing whether its files of such pamphlets were current and complete. One of the greatest practical problems in the field of administrative legislation has been, and to some extent still remains, to determine what rules and regulations have been adopted.<sup>18</sup> In 1934 Professor Griswold, in referring to the appeal of *United States v. Smith*,<sup>19</sup> wrote:<sup>20</sup>

"We have recently seen the spectacle of an indictment being brought and an appeal taken by the government to the Supreme Court before it was found that the regulation on which the proceeding was based did not exist."

The Federal Register was established under the provisions of Public Act Numbered 220, Seventy-Fourth Congress, approved July 26, 1935.<sup>21</sup> The first issue was published under date of Saturday, March 14, 1936. Since then it has been published by the Division of the Federal Register, and has been distributed by the Government Printing Office on every week day, Tuesday through Saturday, except on days following legal holidays. Some idea of the amount of material dis-

<sup>16</sup> 56 & 57 Vict. c. 66.

<sup>17</sup> Griswold, "Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation," 48 Harv.L.Rev. 198, 199 (1934).

<sup>18</sup> Jaffe, "Publication of Administrative Rules and Orders," 24 Am. Bar Assn.J. 393 (1938).

<sup>19</sup> *United States v. Smith*, No. 3, Oct. Term, 1934, *appeal dismissed on motion of appellant*, Oct. 1, 1934. See N.Y. Times, Oct. 2, 1934, at p. 6.

<sup>20</sup> *Supra* note 17 at p. 204.

<sup>21</sup> 49 Stat. 500, 44 U.S.C.A. c. 8B (1947).

seminated by this publication may be learned from the following table showing the total number of pages printed during each calendar year:

1936	2,411 pages	1942	11,134 pages
1937	3,140 pages	1943	17,553 pages
1938	3,194 pages	1944	15,194 pages
1939	5,007 pages	1945	15,508 pages
1940	5,307 pages	1946	14,736 pages
1941	6,877 pages	1947	8,902 pages

Sections 5 and 12 of the Federal Register Act<sup>22</sup> limit the documents which may be published in the Federal Register to: all Presidential proclamations and Executive orders which have general applicability and legal effect, or which establish, amend or revoke Civil Service Rules; those documents which the President shall determine to have general applicability; and those documents which an Act of Congress shall require to be so published. These sections also forbid the publication of: comments or news items of any character; treaties or international agreements made by the President; or documents affecting only Federal agencies and Federal employees. Section 4 of the Act<sup>23</sup> provides that the Federal Register is for the use of the Executive branch alone, and not for the general use of the Legislative and Judicial branches of the Government.

One must not get the impression that the Federal Register is merely a newspaper without suitable index for reference purposes. The legislation which brought about the establishment of the Federal Register also laid the foundation for the Code of Federal Regulations. The latter annually codifies the documents which were initially published in the daily issues of the Federal Register. Section 11 of the Federal Register Act<sup>24</sup> provides:

"On July 1, 1938, and on the same date of every fifth year thereafter, each agency of the Government shall have prepared and shall file with the Administrative Committee a complete codification of all documents which, in the opinion of the agency, have general applicability and legal effect and which have been issued or promulgated by such agency and are in force and effect and relied upon by the agency as authority for, or invoked or used by it in the discharge of, any of its functions or activities on June 1, 1938 or on the same date of every fifth year thereafter."

The Code of Federal Regulations, comprising 16 volumes, was first published in 1939 and contained all of the rules and regulations of administrative agencies in force as of June 1, 1938. This Code is broken

<sup>22</sup> 49 Stat. 501 and 503, 44 U.S.C.A. secs. 305 and 312 (1947).

<sup>23</sup> 49 Stat. 501, 44 U.S.C.A. sec. 304 (1947).

<sup>24</sup> 49 Stat. 503 as amended by 50 Stat. 304, 53 Stat. 1435, 56 Stat. 1045, 44 U.S.C.A. sec. 311 (1947).

down into fifty titles which closely parallel the titles of the United States Code.<sup>25</sup> These titles are also used in the Federal Register as a key to the rules and regulations which are published therein. For the period from 1938 to 1943, a cumulative supplement to the Code was published. The Preface to this 10-volume supplement states:<sup>26</sup>

"This Cumulative Supplement contains a codification of documents filed during the period June 2, 1938, to June 1, 1943, inclusive, which supplement the first edition of the Code of Federal Regulations and which were still in force and effect on June 1, 1943. . . . This Supplement should be used not only in conjunction with the first edition of the Code of Federal Regulations, but also in conjunction with subsequent Supplements and with the daily issues of the FEDERAL REGISTER."

An annual supplement to the Code is also published to codify the rules and regulations published in the Federal Register during each calendar year. In addition to the Code of Federal Regulations, a monthly, a quarterly, and an annual index to the Federal Register are also published to facilitate reference to documents published therein. These indexes are arranged both alphabetically and under the individual titles of the Code of Federal Regulations.

Is the Federal Register to be criticized because it furnishes constructive notice to all persons affected by the regulations and documents published therein? These regulations implement, apply, and interpret many of the Federal statutes. "All persons are charged with knowledge of the provisions of statutes and must take notice thereof."<sup>27</sup> It readily follows that if no person generally is excused because of his ignorance of the law,<sup>28</sup> to the same extent he should not be excused because he is ignorant of rules and regulations which implement and apply that law. Would anyone deny that the United States Code, or the statutes of the individual states are, in the words of Mr. Justice Jackson, "voluminous and dull publications?" Are not these statutes technically-worded and very often unenlightening to the unlettered man? If it promotes justice to hold every person accountable for complying with the statutes, it should not be unjust to hold them also accountable for the administrative rules and regulations published in the Federal Register. "Rules, regulations, and general orders enacted by administrative

<sup>25</sup> Thirty-two of the titles of the Code of Federal Regulations coincide by actual title number and title caption with the titles of the United States Code. Other titles coincide by title caption but not by title number. E.g. Title 37, Code of Federal Regulations is captioned, "Patents and Copyrights"; while Title 17, United States Code is captioned "Copyrights" and Title 35, United States Code is captioned "Patents."

<sup>26</sup> CFR, Cum.Supp., iii (1943).

<sup>27</sup> 39 Am.Jur., Notice and Notices, sec. 25 (1942).

<sup>28</sup> "It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411, 8 L.Ed. 728 (1833).

authorities pursuant to the powers delegated to them have the force and effect of law. . . . Thus, administrative regulations are held to be 'laws' or 'statutes' "<sup>29</sup>

The case of *Todd v. Securities and Exchange Commission*<sup>30</sup> shows the result of non-publication of administrative regulations in the Federal Register, and also emphasizes the practical difficulty of enforcing such regulations should the Federal Register cease to be the medium by which constructive notice of such regulations is given:

"While such reports [of the Federal Trade Commission] are public records, the statements of fact set forth in them are not binding upon this petitioner. Litigants are not bound to take notice of executive decisions on legal questions [citations omitted], and a fortiori, they are not bound to take notice of the statements of fact embodied in public records compiled by administrative agencies."

The Federal Register and the Code of Federal Regulations play the same role in the field of Administrative Law, that the United States Code plays in the fields of Criminal and Civil Law.

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<sup>29</sup> 42 Am. Jur., Public Administrative Law, sec. 102 (1942).

<sup>30</sup> 137 Fed. (2d) 475, 479 (C.C.A. 6, 1943).