

The Government's Daily Paper

The Federal Register and the Administrative State

1935–1970

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Preface: A place where rules arrive

The first issue of the *Federal Register* did not announce a new theory of government. It began on a Saturday in March 1936 with a boundary. The President had enlarged the Cape Romain Migratory Bird Refuge in South Carolina, and the order described Bull Island in chains, bearings, marsh grass, sand dunes, cedar, myrtle, and palmetto. A reader entered the new journal by following a surveyor around an island. The next agency did not remain near the coast. Treasury rules for the employer tax under the Social Security Act followed the land description, and Securities and Exchange Commission business appeared farther along. Sixteen pages made unrelated acts share a date, a filing notation, and a public address.¹

That mixture was the point. Before the journal existed, presidential orders, agency rules, notices, codes, and circulars could have legal consequences without belonging to a common publication. A person trying to discover the rule in force might need the right agency pamphlet, the right sheet, and news of every later amendment. Congress answered with an institution that looked clerical: receive documents, mark the hour, keep a copy open to inspection, and send another copy to the printer. The sequence made administration depend on a chain of custody that an outsider could locate.²

The journal did not create the authority behind those documents. Congress had delegated rulemaking before 1935, agencies had administered national programs, and courts had spent decades defining relations between administrators and judges. Publication changed what could happen after an official acted. A published document carried presumptions about issuance, filing, and the truth of its copy; its contents received judicial notice and could be cited by volume and page. A daily journal thus became part of the legal machinery rather than a report about work already complete.³

One journal could not solve every version of the problem. A dated issue answered, “What arrived today?” It did not readily answer, “What is the rule now?” The Code of Federal Regulations supplied the standing arrangement, organized by subject and maintained through revisions and supplements. Its 1938 supplement instructed readers to use the volume with the first Code, later supplements, and the daily *Federal Register*.⁴

After 1946, a proposed rule placed in the daily journal could open a public procedure. Interested people might submit data, views, or arguments before the agency issued a final rule with a statement of its basis and purpose. Journal, code, and procedural docket became three parts of one publication system.⁵

Each part carried a different promise. Filing promised authenticity. Public inspection promised availability before the presses ran. Daily publication promised a common chronology. Codification promised a current arrangement. Notice of proposed rulemaking promised an opening for response. None promised that an ordinary person would possess the time, money, training, or organization

¹“Federal Register, Number 1,” *Federal Register* 1, no. 1 (1936): 1–16, <https://www.loc.gov/item/fr001001/>; Office of the Federal Register, *A Brief History Commemorating the 70th Anniversary of the Publication of the First Issue of the Federal Register* (National Archives and Records Administration, 2006), <https://www.archives.gov/federal-register/the-federal-register/history.pdf>.

²Federal Register Act, Pub. L. Nos. Public Law 74-220; 49 Stat. 500 (1935), <https://www.govinfo.gov/link/statute/49/501>; Erwin N. Griswold, “Government in Ignorance of the Law: A Plea for Better Publication of Executive Legislation,” *Harvard Law Review* 48, no. 2 (1934): 198–213, <https://public.resource.org/48HarvLRev198.pdf>.

³Federal Register Act.

⁴National Archives, *1938 Supplement to the Code of Federal Regulations* (United States Government Printing Office, 1940).

⁵Administrative Procedure Act, Pub. L. Nos. Public Law 79-404; 60 Stat. 237 (1946), <https://www.govinfo.gov/link/statute/60/237>.

needed to use what had been made public. The legal fiction of notice could travel much farther than the paper's actual audience.

An Idaho wheat farmer exposed that distance in 1947. A local federal agent had told the farmer that his crop was insurable. A regulation published in the *Federal Register* excluded most of the acreage. The Supreme Court treated the published condition as binding despite the farmer's lack of knowledge and the agent's mistake. Justice Robert Jackson's dissent answered at the scale of a workday: a farmer who continually searched a technical federal journal would have little time left to farm. The disagreement was not about whether the rule had been printed. It was about what publication should be allowed to mean.⁶

The scale kept changing. *Federal Register* pages published totaled 2,620 in its partial first year, 17,553 in 1943, and 20,036 in 1970.⁷

The Code stood at 60 volumes and 21,760 pages in 1959; by 1970 it filled 114 volumes and 54,834 pages. These totals describe paper production, not the burden or merit of the underlying rules. They do reveal the permanent maintenance problem created by successful publication. The more government made visible, the more valuable indexes, specialists, and organized readers became.⁸

The institutional achievement remains substantial. A country whose own prosecutors and courts had once acted without knowing that a provision had been removed acquired a routine for authoritative filing and notice. It learned to separate the daily stream of change from the standing body of rules. It placed some rulemaking into a visible sequence of proposal, response, and reason. The 1966 law required public inspection and copying of final opinions and staff manuals, a current index, production of identifiable agency files, and district-court power to order improperly withheld material.⁹

Visibility did not neutralize administrative power. It gave power an address. The address could be used by a regulated company, a lawyer, a trade association, a public-interest group, a farmer, or a court, but their ability to use it differed sharply. The history of the *Federal Register* belongs in that gap between public and usable. Its achievement was to make administrative law findable as a matter of institutional design. Its limit was to leave the work of finding, understanding, and answering unequally distributed.

⁶Federal Crop Insurance Corp. v. Merrill, 332 United States Reports 380 (1947), <https://www.govinfo.gov/app/details/USREPORTS-332/USREPORTS-332-380>.

⁷Office of the Federal Register, *Federal Register and Code of Federal Regulations Statistics, 1936-2019* (National Archives and Records Administration, 2020), <https://uploads.federalregister.gov/uploads/2020/08/31144642/stats2019Fedreg-1.pdf>.

⁸Office of the Federal Register, *Federal Register and Code of Federal Regulations Statistics, 1936-2019*.

⁹Freedom of Information Act, Pub. L. Nos. Public Law 89-487; 80 Stat. 250 (1966), <https://www.govinfo.gov/content/pkg/STATUTE-80/pdf/STATUTE-80-Pg250.pdf>.

Chapter 1. A rule that was not there

The oil rule disappeared in September 1933. An executive order removed a paragraph from the Petroleum Code that had made production above a state quota a violation. The government brought no immediate clarity to the change. A Texas lawsuit proceeded in October as if the paragraph still governed. The companies, the federal officers, and the lower court fought over a provision that had ceased to exist. When the dispute reached the Supreme Court, the justices first had to establish that one part of the case rested on a false premise.¹⁰

The error was more than an embarrassing footnote. The Petroleum Code carried criminal consequences. Production schedules, quotas, federal regulations, and state orders governed what producers could pump and sell. Yet the people charged with enforcement and the tribunal asked to review their work had not received dependable notice that the operative text had changed. The machinery of enforcement had outrun the machinery of publication.

Panama Refining Co. v. Ryan cannot be reduced to that failure. The companies also attacked the National Industrial Recovery Act's petroleum delegation as an unconstitutional transfer of legislative power. The Supreme Court's famous holding concerned the breadth of the authority Congress had given the President, not merely the missing paragraph. The companies had challenged the statutory delegation, federal rules, production quotas, and enforcement acts on several constitutional grounds. Publication supplied a vivid episode within a larger constitutional confrontation. Keeping those questions separate reveals why the episode mattered: even a valid delegation would have required a dependable way to discover what the executive had done with it.¹¹

Erwin Griswold had described the publication problem before the Court decided the case. Writing in the *Harvard Law Review* in December 1934, he began from the practical force of administrative rules. Their number and importance had grown as Congress assigned more work to the executive branch. Statutes enjoyed the *Statutes at Large*, settled citation forms, and private finding tools. Administrative rules arrived through a far less uniform field of pamphlets, single sheets, circulars, notices, instructions, orders, and bulletins.¹²

The hard part was not merely acquisition. A lawyer who found a pamphlet still had to learn whether a later order had amended, superseded, or withdrawn its contents. A complete collection, if one could be assembled, began aging as soon as another office issued another sheet. Agency officers faced versions of the same problem. Administrative law had no common chronology capable of showing what entered the system and when.¹³

Griswold advocated an official publication modeled on the stable treatment of statutes. Systematic publication would make a regulation accessible and citable, while indexes and tables would help users trace whether it remained in force. He presented the reform as order imposed on printing the government was already doing, not as a demand for an extravagant new bureaucracy. He argued that regular subscriptions and the end of separate pamphlet printing would contain the cost. His case was deliberately practical: the state had already made the law, but had not built a reliable public route to it.¹⁴

¹⁰*Panama Refining Co. v. Ryan*, 293 United States Reports 388 (1935), <https://www.govinfo.gov/content/pkg/USREPORTS-293/pdf/USREPORTS-293-388.pdf>.

¹¹*Panama Refining Co. v. Ryan*.

¹²Griswold, "Government in Ignorance of the Law: A Plea for Better Publication of Executive Legislation."

¹³Griswold, "Government in Ignorance of the Law: A Plea for Better Publication of Executive Legislation."

¹⁴Griswold, "Government in Ignorance of the Law: A Plea for Better Publication of Executive Legislation."

The diagnosis came from an advocate at a moment of political pressure. It should not be mistaken for proof that administration before 1935 lacked law or procedure. American agencies had long operated under statutes, judicial review, and their own published practices. Grisinger's account finds an administrative process already bounded by law and largely accepted by judges near the end of the 1930s, with courts commonly deferring to agency authority and expertise. The demand for reform arose from political conflict over power, fairness, and control as well as from a technical defect in printing.¹⁵

That correction strengthens the publication claim. A daily journal was not a substitute for constitutional limits, judicial review, or fair hearings. It answered a prior operational question shared by every one of them: which text had official force on a given day? A court could not review a rule it could not identify. A regulated party could not comply with an amendment it could not find. An agency could not administer consistently if its field offices worked from different versions.

Publication also redistributed power. A central journal reduced an agency's ability to rely on a rule known only through its own channels. It gave lawyers, judges, rival officials, businesses, and organized groups a common text. Yet it also strengthened administration by making rules easier to enforce. If a rule appeared in an official journal, the government could ask courts to treat the public act of publication as notice. Access and authority advanced together.

The vanished Petroleum Code paragraph showed the negative case. No common publication had carried its removal to all the institutions acting upon it. The result was not simple secrecy. The order existed, but the system lacked a routine that connected issuance, custody, inspection, distribution, and legal effect. A document could be official without becoming common knowledge among the officials responsible for it.

Congress could have responded with a better index or a new compilation. It instead created an office and a sequence of acts. Documents would arrive at a single division, receive a filing time, become immediately inspectable, move to the Government Printing Office, and appear in a daily serial. The reform joined archive, print shop, agency, court, and reader. Its mundane steps were its constitutional importance.

The system began by refusing to treat publication as an afterthought. An executive rule was not finished merely because an authorized officer signed it. For the purposes defined by the new statute, the rule had to enter a public chain. That chain did not decide whether the rule was wise, lawful, or fair. It made the rule available for those arguments and capable of producing legal notice. The oil case supplied the caution: authority without a dependable text could leave the government litigating against its own past.

¹⁵Joanna L. Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal* (Cambridge University Press, 2012), https://assets.cambridge.org/97811070/04320/excerpt/9781107004320_excerpt.pdf; Reuel E. Schiller, "The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law," *Michigan Law Review* 106, no. 2 (2007): 399–460, https://repository.uclawsf.edu/faculty_scholarship/700/.

Chapter 2. The filing machine

The Federal Register Act occupied four pages of the *Statutes at Large*. Its title promised custody, prompt printing, uniformity, and distribution. The statute assigned custody of federal orders and notices and required their prompt, uniform printing and distribution. The verbs sounded like office work because they were office work. Congress did not begin with a new right of participation or a theory of expertise. It began with the path a document had to travel after an official issued it.¹⁶

The path started inside the National Archives. The Archivist, acting through a new Division of the Federal Register, received custody of documents covered by the Act. The Public Printer shared responsibility for prompt and uniform printing and distribution. Placing the Division in the Archives joined future publication to permanent custody. The text sent into circulation and the original retained for inspection belonged to the same institutional chain.¹⁷

An agency had to file an original and duplicate originals or certified copies. The Division marked the day and hour on them. One copy became immediately available for public inspection; the original remained with the Archives; another copy moved to the Government Printing Office. Every covered agency had to transmit its documents into this process. The filing notation converted a loose sequence of signatures and deliveries into an official time.¹⁸

Public inspection came before distribution. That order kept the daily journal from becoming the only point of access. A person in Washington could inspect a filed copy while printing and delivery were still under way. The arrangement also gave later publication an auditable predecessor: the printed notation reported when the document had entered the Division and become inspectable. The date on the issue and the time on the document answered different questions. The Office's institutional history likewise places immediate public inspection between agency submission and publication.¹⁹

The Government Printing Office then produced a serial called the *Federal Register*. Daily issues collected documents filed before a regulated cutoff, included an index, reproduced the filing notation, and went into morning distribution. This was not a bound compilation prepared after the year ended. The Act built a recurring publication cycle around the working day.²⁰

Congress defined "document" broadly enough to cross the executive branch: presidential proclamations and executive orders, agency rules and regulations, certificates, fair-competition codes, licenses, notices, and similar instruments. "Agency" included the President, executive departments, independent boards, bureaus, institutions, commissions, and separate offices. The journal's unity therefore came from a common route, not a common subject.²¹

The chain can be stated without metaphor:

Stage	Institutional act	Public consequence
Issue	An authorized office completes a document	A governmental decision exists

¹⁶Federal Register Act.

¹⁷Federal Register Act.

¹⁸Federal Register Act.

¹⁹Office of the Federal Register, *A Brief History Commemorating the 70th Anniversary of the Publication of the First Issue of the Federal Register*.

²⁰Federal Register Act.

²¹Federal Register Act.

Stage	Institutional act	Public consequence
File	The Division receives certified copies and marks the hour	An authoritative version gains a public time
Inspect	A copy is opened to inspection	Access does not wait for delivery
Print	The Government Printing Office places it in the daily serial	Agencies share one chronology and citation system
Maintain	Indexes, bound volumes, the Code, and supplements organize later use	Change can be traced and rules still in force can be found

The legal effect came after the physical sequence. A document required to be published could not operate against a person without actual knowledge until it had been filed and made available for inspection. Filing could then provide notice, subject to limits where publication was legally insufficient. Publication created presumptions that the document had been issued and filed, that the printed copy was true, and that the Act's procedures had been met. Courts were to take judicial notice of the journal, and lawyers could cite it by volume and page.²²

Those provisions made the Division more than a printer's intake desk. Its time stamp affected validity; its inspection copy affected notice; its printed copy carried evidentiary weight. The office did not decide the merits of agency policy, yet a failure to enter its process could change whether a rule bound a person who lacked actual knowledge. Ministerial work had acquired legal consequence.

The first year required persuasion as well as machinery. The new staff had to explain the statute across an executive branch whose offices had developed their own names, forms, and publication habits. The Office's later history describes contacts with 123 agencies before publication began, followed by the first filings on March 12 and the first issue two days later. The sequence suggests how much coordination sat behind a seemingly automatic daily product.²³

The Archivist's report for fiscal 1937 provides a harder view of operations. Seventy-nine agencies submitted 5,078 documents. The Division published 4,645 and judged 433 outside the category of general applicability and legal effect. It produced 254 daily issues comprising 3,176 pages, supported by monthly, quarterly, semiannual, and annual indexing. A publication designed for uniformity still required editorial judgment about what belonged in it.²⁴

The report also recorded growth in paid subscriptions, including lawyers, law firms, libraries, municipal governments, banks, and businesses. A federal journal had begun to create a readership beyond federal offices. Subscribers were not a cross-section of the country; they were institutions and professionals with a reason to monitor administrative action. That composition foreshadowed the access problem: making one journal available did not make all readers equally equipped to follow it.²⁵

²²Federal Register Act.

²³Office of the Federal Register, *A Brief History Commemorating the 70th Anniversary of the Publication of the First Issue of the Federal Register*.

²⁴National Archives, *Third Annual Report of the Archivist of the United States, 1936-1937* (United States Government Printing Office, 1937).

²⁵National Archives, *Third Annual Report of the Archivist of the United States, 1936-1937*.

The Act succeeded by narrowing a sprawling problem into repeatable acts. It did not ask whether every citizen knew every rule. It required agencies to submit covered documents, the Division to expose a copy, and the printer to distribute a daily issue. Courts and regulated people could then point to the same text. The improvement was procedural before it was democratic, but it supplied the material conditions on which later procedural rights would depend.

Griswold had proposed an official publication in which administrative rules would be systematically published, readily cited, and indexed for their current status. The Division turned that proposal into a daily operation.²⁶

²⁶Griswold, "Government in Ignorance of the Law: A Plea for Better Publication of Executive Legislation."

Chapter 3. Sixteen pages

Saturday, March 14, 1936, appeared at the top of the first page. Beneath it sat “No. 1,” followed by the President of the United States and an executive order enlarging the Cape Romain Migratory Bird Refuge. The new journal opened without an editorial greeting. Government entered through a legal description of Bull Island.²⁷

The order moved from statutory authority to ground. It named Charleston County and the Migratory Bird Conservation Act, then followed marsh, beach, creek, and survey points. Bearings and distances occupied much of the page. The language was local in the literal sense: a federal act became a boundary that could be walked and marked.²⁸

Near the end of the description, the page labels named the White House, March 13, 1936, and a federal document filed on March 13. Under the statute, the Division marked the filing day and hour, made one copy immediately available for public inspection, retained the original, and sent a duplicate to the printer.²⁹

Treasury came next. Regulations from the Bureau of Internal Revenue addressed the excise tax on employers under the Social Security Act. In a few inches the reader moved from a South Carolina refuge to definitions of state, employer, employment, wages, and tax. The two items shared neither terrain nor policy. They shared an executive government and a publication route.³⁰

That juxtaposition corrected a misconception about administrative government. Its documents did not belong to one dramatic emergency. A land reservation, an employer tax, a trade-practice rule, and a securities form could all alter legal positions through different grants of authority. The *Federal Register* made their common administrative form visible without pretending that their substance was the same.

The statute had anticipated this variety. A document could be a presidential proclamation, an executive order, an agency regulation or rule, a certificate, code, license, notice, or comparable instrument. A covered agency could be an executive department, independent board, bureau, institution, commission, or separate office. What made an item eligible was not ideological importance. It was the document’s official source and the legal or administrative category Congress had placed inside the publication system.³¹

The Securities and Exchange Commission material near the end of the issue shows a third texture of government. One item concerned a hearing under the Public Utility Holding Company Act. Another adopted reporting requirements for issuers registering securities on Form 8-B. Names of companies, commissioners, statutory sections, filing times, and effective dates brought a regulated market into the same sixteen-page object as the refuge and tax rules.³²

A newspaper groups events by public interest. The new journal grouped acts by official filing. That distinction gave it a peculiar surface. A consequential rule might follow a minor notice. Technical definitions could occupy more space than a presidential order. The sequence did not rank documents by the number of people affected or by a later historian’s judgment. It reported what had entered the system before the cutoff.

²⁷“Federal Register, Number 1.”

²⁸“Federal Register, Number 1.”

²⁹“Federal Register, Number 1”; Federal Register Act.

³⁰“Federal Register, Number 1.”

³¹Federal Register Act.

³²“Federal Register, Number 1.”

The Act required each daily issue to include covered documents filed before a set time on the prior day and to print the filing notation with each document.³³

The first issue therefore trained its readers in a new habit. They would not open it only when a president announced a major policy. They would monitor a stream in which authority arrived through many offices and forms. A lawyer could search for a client. A company could watch an agency. A federal employee could check another office's action. The publication's value accumulated through recurrence.

Recurrence produced volume quickly. During fiscal 1937 the Division printed 254 issues and supplied several layers of indexes. It also rejected hundreds of submitted documents as lacking general applicability and legal effect. The daily stream was edited at its gate, then organized again for monthly, quarterly, semiannual, and annual retrieval.³⁴

Readers asked for more structure. The Archivist reported requests that agencies provide useful titles, headnotes, and contents tables for their rules. Paid subscriptions rose, with lawyers and law firms forming a large group. Uniform publication had solved the problem of a common location, but the arrangement of material within that location was already becoming the next problem.³⁵

The first issue also established a limit. A daily serial could tell a reader that a document had arrived. Months later, the reader still had to determine whether an amendment had changed it, whether an exception survived, and which provision governed a new dispute. Bound annual volumes and indexes helped, but chronology remained chronology. A rule's present state had to be reconstructed from its history.

The sixteen pages thus contained the reason for a second publication. The journal made heterogeneity manageable by giving documents a common date and address. Its success exposed the need to reorganize them by subject and current force. Daily government could be printed in order of arrival. Standing government required a code.

³³Federal Register Act.

³⁴National Archives, *Third Annual Report of the Archivist of the United States, 1936-1937*.

³⁵National Archives, *Third Annual Report of the Archivist of the United States, 1936-1937*.

Chapter 4. The standing law

A daily journal gives change an address. That strength becomes a weakness when the question concerns duration. A reader who finds a rule in the issue for March 14 still needs every later issue that might amend, suspend, revive, or repeal it. Chronology preserves the path of law; it does not automatically state the law at rest.

Griswold had made the difficulty central to his publication proposal. A pamphlet might contain the original rule, yet offer no practical way to learn whether later action had changed it. Uniform daily printing would secure the pieces. Indexes, tables, and compilation would still have to establish their relations.³⁶

Congress added that second operation in 1937. The amendment required every agency, on July 1, 1938 and every fifth year afterward, to prepare a complete codification of documents that the agency considered generally applicable, legally effective, still in force, and used as authority in its work.³⁷

The terms imposed a demanding filter. A codification was not meant to bind every paper an agency had produced. It selected documents with continuing legal force from the daily accumulation. Agency judgment remained inside the selection because each office identified the material it treated as authority. Codification organized administrative law while also requiring administrators to declare what they believed that law to be.

The official Code table lists 18,193 total pages for 1938. That number describes the physical scale of the codification, not the social weight of its rules. It does show why an index alone could not carry the task. A body of that size needed a hierarchy of titles, chapters, parts, and sections that let a reader approach it by subject.³⁸

The tables of documents reveal the Code as a finding system. Presidential proclamations and executive orders received their own tables. Agency material was arranged under departments and commissions, with citations connecting documents published in the *Federal Register* to their location in the Code. The table preserved a route from chronological appearance to subject placement.³⁹

The distinction can be reduced to two questions:

Publication	Governing question	Arrangement
<i>Federal Register</i>	What entered or changed on this date?	Filing chronology
Code of Federal Regulations	What generally applicable rule remains in force on this subject?	Title, agency, part, and section

Neither publication made the other dispensable. A Code frozen on publication day began to age with the next filed rule. A daily issue without a Code forced each reader to reconstruct the standing law. The solution was maintenance: periodic revision, annual supplements, and cross-reference to the continuing daily stream.

³⁶Griswold, "Government in Ignorance of the Law: A Plea for Better Publication of Executive Legislation."

³⁷An Act to Amend the Federal Register Act, Pub. L. Nos. Public Law 75-158; 50 Stat. 304 (1937).

³⁸Office of the Federal Register, *Federal Register and Code of Federal Regulations Statistics, 1936-2019*.

³⁹National Archives, *Code of Federal Regulations: Tables of Documents Published in the Federal Register, Revised 1938* (United States Government Printing Office, 1939).

The 1938 supplement stated that division of labor in its preface. It codified generally applicable, legally effective documents filed during the latter part of 1938, omitted notices with temporary effect, and excluded material already placed in the first Code. It also listed published documents under the appropriate title and chapter even when their full text did not appear in the supplement.⁴⁰

The same preface warned that the supplement had to be used with the first edition, later supplements, and the daily issues of the *Federal Register*. Current law lived across a controlled set of publications rather than inside a single perfect volume.⁴¹

That design carried a cost. It replaced a chaotic search across agency sheets with a disciplined search across an official series. A competent reader still had to know whether to begin from the Code, a supplement, or the daily journal. The improvement lay in stable relations among those objects: title and part, date and page, amendment and prior text.

Early operations made the maintenance burden visible. The Division issued monthly, quarterly, semiannual, and annual indexes alongside the daily journal. Agencies were asked to supply titles, headnotes, and contents tables that explained their rules. The request was editorial infrastructure, not decoration; retrieval depended on consistent descriptions.⁴²

Wartime soon disrupted the five-year rhythm. Temporary controls proliferated, and Congress permitted a cumulative supplement instead of a wholly new Code for 1943. The publication system adapted by distinguishing temporary material from standing law and by changing the form of consolidation without abandoning the relation between journal and Code.⁴³

By 1949 a general revision contained 23,454 pages. In 1959 the Code comprised 60 volumes and 21,760 pages. By 1970 it comprised 114 volumes and 54,834 pages. The series did not merely preserve the settlement of 1938; it became a permanent editorial operation attached to administrative government.⁴⁴

The Code changed what official publication meant. The daily journal had made an act public at a time. Codification made a body of acts public as a current arrangement. One supplied the history of change; the other supplied an authorized working state. Modern administration needed both because it made law continuously and expected people to act as if the result could be found.

⁴⁰National Archives, *1938 Supplement to the Code of Federal Regulations*.

⁴¹National Archives, *1938 Supplement to the Code of Federal Regulations*.

⁴²National Archives, *Third Annual Report of the Archivist of the United States, 1936-1937*.

⁴³Office of the Federal Register, *A Brief History Commemorating the 70th Anniversary of the Publication of the First Issue of the Federal Register*.

⁴⁴Office of the Federal Register, *Federal Register and Code of Federal Regulations Statistics, 1936-2019*.

Chapter 5. War in the columns

Federal Register pages published totaled 6,877 in 1941, 11,134 in 1942, and 17,553 in 1943. The series had nearly doubled in one year and grew by more than half in the next. Page counts cannot measure the burden, wisdom, or reach of regulation. They can measure the load placed on a daily publication system.⁴⁵

War generated rules meant to act before ordinary markets or ordinary litigation could absorb them. Price ceilings, rationing, production controls, and other emergency measures increased the number of documents and made delay part of the policy problem. The Office's institutional history describes both the surge in published documents and the temporary Code arrangements adopted for rules tied to wartime needs.⁴⁶

Yakus v. United States brought that pressure into a criminal case. Wholesale meat dealers had been convicted of selling beef above prices fixed under the Emergency Price Control Act. They challenged the delegation of price-setting power, the specialized route for reviewing regulations, and their inability to attack the regulation's validity as an ordinary defense after they had not used the statutory protest process.⁴⁷

The regulation did more than announce a number. It came with a statement of considerations addressing the base period, prevailing prices, and the administrator's findings that the ceiling was necessary, fair, and consistent with the statute. Emergency administration joined a general legislative policy to a technically reasoned administrative choice.⁴⁸

Grisinger places the Office of Price Administration at the center of wartime criticism because accusations about its methods implicated administrative government beyond that single agency.⁴⁹

Congress had created a narrow channel for contest. A person subject to a price regulation could protest to the Price Administrator. A denial could be taken to the Emergency Court of Appeals and then, on certiorari, to the Supreme Court. The dealers had allowed the original sixty-day protest period to expire. The ordinary trial court therefore confronted a claim that the prescribed route had become the only route.⁵⁰

The Supreme Court accepted that structure. The statute gave the Emergency Court and the Supreme Court exclusive jurisdiction over the validity of price regulations and denied other federal, state, and territorial courts power to decide that question. An enforcement court could consider the validity of the statute, but not substitute itself for the specialized review process governing the regulation.⁵¹

The arrangement concentrated expertise and accelerated enforcement. It also placed a regulated person under pressure to recognize the rule, prepare a protest within the allowed period, and use a tribunal designed for a national program. The Court considered those demands against the danger of wartime inflation and Congress's need for prompt, regular, consistent controls.⁵²

⁴⁵Office of the Federal Register, *Federal Register and Code of Federal Regulations Statistics, 1936-2019*.

⁴⁶Office of the Federal Register, *A Brief History Commemorating the 70th Anniversary of the Publication of the First Issue of the Federal Register*.

⁴⁷*Yakus v. United States*, 321 United States Reports 414 (1944).

⁴⁸*Yakus v. United States*.

⁴⁹Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal*.

⁵⁰*Yakus v. United States*.

⁵¹*Yakus v. United States*.

⁵²*Yakus v. United States*.

Publication sat inside every stage. The price regulation entered the daily journal, the statement of considerations explained the administrator's choice, and the protest clock turned that public act into a deadline. A published rule was not only information. It started consequences for compliance and review. The value of a common journal rose with the speed of administration, while the cost of missing an issue rose with it.

The case also marks the distance between publication and procedure. The *Federal Register* could tell a dealer that a maximum price existed. It could not by itself decide how much hearing was due before the price took effect, which court could review it, whether enforcement should pause, or what reasons the administrator had to give. Those choices came from the Emergency Price Control Act and the specialized regulations surrounding it.

Wartime administration intensified a conflict already visible before Pearl Harbor. Critics feared agency zeal, secretive decisions, inadequate hearings, and weak judicial control. Agency defenders stressed expertise, statutory missions, and the need to act. Grisinger's account places the Office of Price Administration near the center of a broader political dispute because its methods made arguments about one agency stand for arguments about the administrative state.⁵³

That dispute had no clean division between supporters of law and defenders of lawlessness. Courts had already accepted substantial administrative authority. New Deal policymakers had argued that specialized administrators could address economic problems that generalist courts could not manage effectively. By the end of the 1930s, judicial deference itself had helped shape the field in which wartime agencies acted.⁵⁴

The war supplied urgency to demands for a general procedural settlement. One side wanted minimum protections that no agency could escape through local custom. Another feared that rigid judicial forms would disable administration. The publication system offered common ground because it already crossed agency boundaries. A statute could use the *Federal Register* to make a proposal visible before it became binding, to collect responses, and to require an agency to explain the final choice.

The wartime columns had proved that a daily federal journal could carry an enormous expansion of rules. They also proved that publication alone left the central political question unanswered: what opportunity should stand between a proposed rule and the person required to live under it?

⁵³Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal*.

⁵⁴Schiller, "The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law."

Chapter 6. Proposal, response, reason

By the early 1940s, the administrative state had outlived its emergency introduction. Its critics attacked agency hearings, discretion, secrecy, political activity, and judicial review. Its defenders answered that Congress had assigned difficult work to specialists and that administration could not be reduced to courtroom procedure. War enlarged the stakes. Arguments about the Office of Price Administration became arguments about federal administration as a whole.⁵⁵

The dispute was not a late discovery that agencies should obey law. Courts had developed administrative doctrine across earlier decades and, by the end of the 1930s, generally accepted broad agency authority. Grisinger treats the drive for new procedure as a political struggle over fairness and control operating within an already legitimate legal field.⁵⁶

Judicial deference formed part of that field. New Deal policymakers placed confidence in expert administrators and sought less interference from judges whom they considered poorly equipped for technical policy. Schiller argues that the resulting period of reduced judicial intervention was short, but it established a durable model of expertise and deference.⁵⁷

The Attorney General's Committee on Administrative Procedure studied agency practices and issued its final report in 1941. The report's existence matters here as part of the route toward general legislation, but the acquired copy is an image-only scan and supplies no quotation or line-level claim.⁵⁸

Years of proposals, investigations, war, and negotiation ended in the Administrative Procedure Act, approved on June 11, 1946.

Under the Act, agency action included a rule, order, license, sanction, relief, an equivalent or denial, and a failure to act. The settlement did not erase differences among agencies. It established a government-wide vocabulary for procedure and review.⁵⁹

Section 3 extended the *Federal Register* beyond the publication of isolated rules. Agencies had to publish descriptions of their central and field organization, routes for securing information and making requests, their formal and informal procedures, forms and instructions, substantive rules, and general policies or interpretations. A person could not be required to resort to an unpublished organization or procedure.⁶⁰

Section 4 changed the daily journal's place in the life of a rule. General notice of proposed rulemaking had to appear in the *Federal Register*. The notice identified the time and nature of the proceeding, the legal authority, and the proposed terms, substance, or issues. Publication no longer marked only the arrival of completed law. It could announce that an agency had begun to make law.⁶¹

After notice, interested people received an opportunity to submit written data, views, or arguments, with oral presentation left to the applicable procedure. The agency had to consider relevant matter and place a concise statement of basis and purpose in the adopted rule. Substantive rules ordinarily

⁵⁵Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal*.

⁵⁶Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal*.

⁵⁷Schiller, "The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law."

⁵⁸Attorney General's Committee on Administrative Procedure, *Final Report of the Attorney General's Committee on Administrative Procedure* (United States Government Printing Office, 1941), <https://library.law.fsu.edu/Digital-Collections/ABA-AdminProcedureArchive/1941report.html>.

⁵⁹Administrative Procedure Act.

⁶⁰Administrative Procedure Act.

⁶¹Administrative Procedure Act.

had to be published thirty days before their effective date, and any interested person could petition for issuance, amendment, or repeal.⁶²

The sequence altered the information flow:

Step	Public object	Institutional duty
Proposal	Notice in the <i>Federal Register</i>	Identify authority, terms, and proceeding
Response	Data, views, or arguments	Receive and consider relevant submissions
Decision	Final rule and statement of basis and purpose	State the chosen rule and a public reason
Delay	Published effective date	Leave an ordinary interval before obligation
Reopening	Petition	Receive a request to issue, amend, or repeal

The statute preserved large boundaries around that sequence. Military, naval, foreign-affairs, personnel, public-property, loan, grant, benefit, and contract functions fell within exclusions stated at the opening of section 4. Interpretive rules, policy statements, and rules of agency organization or practice ordinarily escaped notice. An agency could also omit notice and public procedure when it found good cause and stated why participation was impracticable, unnecessary, or contrary to the public interest.⁶³

The Attorney General's 1947 manual made clear that good cause was not one undivided emergency power. The alternatives addressed different conditions, and the agency had to place its finding and brief reasons in the rule. A safety problem discovered through an accident investigation could make delay impracticable. A technical correction might make procedure unnecessary. The exception required public explanation even as it permitted speed.⁶⁴

Informal rulemaking also left agencies substantial control over form. They might receive written submissions, conduct a hearing, consult affected groups, hold a conference, or combine methods. They could draw on their own files, knowledge, and experience as well as public submissions. The required statement of basis and purpose informed readers and courts without turning every rule into a trial judgment.⁶⁵

On January 1, 1947, the *Federal Register* first used a separate Proposed Rule category. The typographic classification made the legal sequence visible in the journal itself. A reader could distinguish an agency's invitation for response from a final obligation and a notice with some other purpose.⁶⁶

Notice and comment did not equalize participation. A proposal might be public while the relevant science, industry knowledge, legal counsel, and time were concentrated among organized parties. An

⁶²Administrative Procedure Act; United States Department of Justice, *Attorney General's Manual on the Administrative Procedure Act* (United States Government Printing Office, 1947).

⁶³Administrative Procedure Act.

⁶⁴United States Department of Justice, *Attorney General's Manual on the Administrative Procedure Act*.

⁶⁵United States Department of Justice, *Attorney General's Manual on the Administrative Procedure Act*.

⁶⁶Office of the Federal Register, *A Brief History Commemorating the 70th Anniversary of the Publication of the First Issue of the Federal Register*.

agency retained exceptions and choices of procedure. The settlement did something narrower and more durable: it made proposal, response, and reason recognizable stages, attached them to a common publication, and gave outsiders a text against which to judge whether an agency had followed the route.

The daily journal had begun as a destination for completed documents. After 1946 it could serve as the front door of rulemaking. The change did not make administrative decisions apolitical. It made some of their politics occur through a public sequence whose documents could be found later in the same system that maintained the resulting rule.

Chapter 7. The reader the law imagined

The Merrills planted 460 acres of spring wheat in Idaho in 1945. Four hundred acres had been reseeded on land previously planted with winter wheat. They told a local committee acting for the Federal Crop Insurance Corporation what they were doing. The committee said the entire crop was insurable and recommended the application. A drought destroyed most of it.⁶⁷

A federal regulation said otherwise. Spring wheat reseeded on winter-wheat acreage was excluded from coverage. The condition had been published in the *Federal Register*, but neither the farmers' account of the transaction nor the local agent's advice reflected it. The Supreme Court accepted that the Merrills had reasonably believed their whole crop was covered.⁶⁸

The Federal Register Act had already defined the legal bridge. Filing and public inspection could give notice of a covered document, and publication carried evidentiary presumptions and judicial notice. The design turned a publicly performed act into a rule for deciding what a person could be charged with knowing.⁶⁹

The Court applied that logic strictly. Congress could not write every condition of crop insurance and had delegated the details to the federal corporation. Publication of those details supplied legal notice. The regulation bound applicants despite their lack of actual knowledge, the local agent's mistake, and the hardship caused by innocent ignorance.⁷⁰

The majority protected a public treasury administered through general rules. If every local assurance could enlarge federal liability beyond published conditions, an agent could alter a national program through error. Uniform publication supplied one set of terms. The cost fell on the person who relied on the government's representative instead of finding the government's rule.

Justice Jackson's dissent kept the rule in the farmer's workday. He rejected the assumption that every farmer knew the *Federal Register* or could spend the day reading its long, technical regulations. Continuous review would consume time needed for planting, and technical prose might not resolve the problem for a lay reader.⁷¹

The opinions asked different questions of the same paper. The majority asked which text could govern a national insurance program consistently. The dissent asked what fair dealing required when the government sold a policy through a local agent to a person unlikely to monitor federal regulations. Publication answered the first question more easily than the second.

Griswold proposed an official publication in which rules would be systematically published, easily cited, and checked through indexes and tables. He imagined lawyers and law libraries as central users of a federal gazette. He expected law libraries and many law offices to subscribe, helping support the publication's cost. That reform was substantial, but the imagined user already possessed professional training and a reason to maintain the series. The Merrills stood outside that institutional readership.⁷²

Constructive notice is not a claim about attention. It is a legal rule that assigns consequences after a public act has occurred. The distinction allows a government to administer general programs without

⁶⁷ *Federal Crop Insurance Corp. v. Merrill*.

⁶⁸ *Federal Crop Insurance Corp. v. Merrill*.

⁶⁹ Federal Register Act.

⁷⁰ *Federal Crop Insurance Corp. v. Merrill*.

⁷¹ *Federal Crop Insurance Corp. v. Merrill*.

⁷² Griswold, "Government in Ignorance of the Law: A Plea for Better Publication of Executive Legislation."

proving individual knowledge in every dispute. It also allows formally public material to bind a person who had little realistic chance of finding or understanding it.

Federal Register pages published totaled 11,116 in 1959, 21,088 in 1967, and 20,036 in 1970. The totals moved up and down; the institution had become a large daily stream rather than a small professional experiment.⁷³

The Code table lists 60 volumes and 21,760 pages in 1959, 110 volumes and 50,375 pages in 1967, and 114 volumes and 54,834 pages in 1970. The figures do not reveal how difficult any one rule was or how many people it affected. They establish the scale of the official arrangement a diligent reader might have to navigate.⁷⁴

Scale increased the value of intermediaries. Lawyers, trade associations, publishers, agency specialists, libraries, and organized public groups could monitor proposals, compare the Code with daily changes, and alert the people they represented. Publication reduced dependence on an agency's private channels while increasing dependence on expertise that could process a public stream.

The 1946 procedure partly acknowledged that reality. A proposed rule could call affected organizations into the process before legal consequences fixed. An agency had to identify its authority and issues, receive submissions, and state a basis and purpose. Yet a public opportunity remained most useful to a person who knew the notice existed and could answer it before the agency closed the proceeding.⁷⁵

The Merrills' loss therefore belongs near the center of the publication system's history. It demonstrates the strength of a common official text and the weakness of treating that text as if it had reached every person equally. The *Federal Register* made the rule public. It could not make the farmer a subscriber, the agent accurate, or technical administration self-explanatory.

⁷³Office of the Federal Register, *Federal Register and Code of Federal Regulations Statistics, 1936-2019*.

⁷⁴Office of the Federal Register, *Federal Register and Code of Federal Regulations Statistics, 1936-2019*.

⁷⁵Administrative Procedure Act.

Chapter 8. Beyond the journal

The Administrative Procedure Act had called section 3 “Public Information,” but its reach remained uneven. Agencies published organization, procedure, substantive rules, and general policy in the *Federal Register*. Final opinions and orders could be published or opened to inspection. Other official material was available to people properly and directly concerned, subject to good-cause confidentiality.⁷⁶

That arrangement tied transparency to categories chosen by the agency and to a requester’s relation to the material. A general rule belonged in the daily journal. An adjudicatory opinion might sit for inspection under a published rule. A file outside those classes did not yet carry the broad request right later associated with federal information law.

The 1966 Freedom of Information Act amended section 3 rather than abandoning the publication system. It retained the duty to publish agency organization, procedures, forms, substantive rules, policy, interpretations, and changes in the *Federal Register*. It also protected a person from adverse effect by required material that had not been published, absent actual and timely notice.⁷⁷

The amendment then moved beyond the journal. Agencies had to make final opinions and orders, unpublished policy and interpretations, and staff manuals affecting the public available for inspection and copying. They also had to maintain a current index. An agency could not use an unindexed and unavailable item against a private party who lacked actual notice.⁷⁸

Indexing performed a familiar function in a new domain. The *Federal Register* index helped a reader find an item in a chronological publication. The Code organized generally applicable rules by subject. The FOIA index identified agency materials that did not necessarily belong in either publication. Each tool made a different part of administration retrievable.

The 1938 Code supplement used a related method: it listed published documents under title and chapter headings and directed readers to combine the supplement with the first Code and daily issues.⁷⁹

The larger change appeared in the request provision. Any person could request identifiable agency files under published rules. If an agency withheld them, a federal district court could order production, decide the matter anew, and place the burden of justification on the agency. Transparency no longer depended only on what government chose to broadcast. A requester could direct the search toward a named object.⁸⁰

The right had boundaries. Nine exemptions covered national defense and foreign policy secrets, internal personnel matters, statutory exclusions, trade secrets and confidential commercial information, protected internal communications, personal privacy, law-enforcement files, bank supervisory material, and geological information about wells. The statute denied a general power to withhold beyond its stated terms, but its own terms preserved large areas of protected administration.⁸¹

Publication and disclosure thus answered different institutional risks. Required publication guarded against generally applicable law hidden in an agency’s files. Inspection and indexing guarded against secret precedents, instructions, and interpretations. The request right reached identifiable files that no

⁷⁶Administrative Procedure Act.

⁷⁷Freedom of Information Act.

⁷⁸Freedom of Information Act.

⁷⁹National Archives, *1938 Supplement to the Code of Federal Regulations*.

⁸⁰Freedom of Information Act.

⁸¹Freedom of Information Act.

general publication schedule could anticipate. Judicial enforcement addressed the possibility that an agency would refuse.

The Office of the Federal Register felt the change operationally. Its institutional history reports a rise of more than forty percent in agency requests for assistance after FOIA, while incorporation by reference allowed some material to be identified in regulations rather than printed in full. The system had to manage both expanding access duties and methods for containing publication volume.⁸²

FOIA treated material as published when it was reasonably available to the affected class and incorporated by reference with the Director's approval. The rule could prevent repetition of lengthy technical material, but the reader still had to locate the external document and understand how it entered the regulation.⁸³

The politics of access did not end with a better retrieval system. Procedure and information rules distributed influence through their definitions, exceptions, costs, and enforcement routes. Grisinger's account of postwar administrative reform emphasizes that disputes over fair procedure often carried deeper disputes about programs, unions, business regulation, federal power, and control of officials. Transparency could expose those conflicts; it could not decide them.⁸⁴

By 1970 the federal information system offered several public routes. A person could monitor a proposed or final rule in the daily journal, locate standing regulations in the Code, inspect indexed opinions and manuals, petition an agency, request identifiable files, and seek a court order after improper withholding. No single reader was likely to use them all. Their combination made administrative government more open to organized scrutiny than the scattered pamphlet field of 1934.

The combination also clarified what publication had never been able to do. Printing could fix an authoritative text. Codification could maintain it. Notice could open a procedure. Disclosure could reach beyond what had been printed. None could guarantee attention, understanding, representation, or victory. They made contest possible under public rules; they did not make the contest equal.

⁸²Office of the Federal Register, *A Brief History Commemorating the 70th Anniversary of the Publication of the First Issue of the Federal Register*.

⁸³Freedom of Information Act.

⁸⁴Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal*.

Coda: The public address of power

Issue number one, dated Saturday, March 14, 1936, opened with an executive order enlarging the Cape Romain Migratory Bird Refuge and describing Bull Island in survey lines. The specificity now seems almost comic beside the scale of the institution that carried it. Yet the boundary captured the system's purpose. Administrative power had to become a document with an origin, a date, a place of custody, and a public route.⁸⁵

The 1935 Act supplied that route. An agency filed a certified text; the Division marked the day and hour; one copy opened for inspection; another went to the printer; the daily issue carried the notation; courts could recognize and cite the result. Authority entered a sequence whose steps could be checked outside the issuing office.⁸⁶

The Code supplied a second order. The 1938 supplement directed readers to use it with the first Code, later supplements, and daily issues of the *Federal Register*. Daily issues preserved change, but a person needed a subject-organized statement of rules still in force. The standing law became a maintained object rather than a private reconstruction performed by every reader.⁸⁷

The Administrative Procedure Act supplied a third order. A notice in the daily journal could precede the rule, identify the agency's authority and proposal, and invite written data, views, or arguments. The final rule then carried a statement of basis and purpose and usually waited before taking effect. Publication became part of decision-making as well as notice after decision.⁸⁸

These achievements should not be collapsed into a claim that the administrative state printed itself into existence. Congress delegated, presidents directed, agencies investigated and enforced, experts made judgments, and courts chose how far to intervene. Publication changed the conditions under which those powers could operate. It gave dispersed action a common chronology, standing rules a maintained arrangement, and some proposals a public procedure.

The reader remained the unsettled part of the design. The *Merrill* majority said Federal Register publication supplied legal notice and bound applicants despite actual ignorance and resulting hardship. Jackson answered that expecting every farmer to peruse a long, technical *Federal Register* would leave little time to plant crops. The common text solved the government's uniformity problem more fully than it solved the citizen's attention problem.⁸⁹

FOIA made final opinions, staff manuals, and current indexes inspectable, made identifiable files requestable, and authorized district courts to order production. The move acknowledged that no general journal could publish every item needed to understand administration.⁹⁰

The result by 1970 was neither secret government nor transparent government in any complete sense. It was a layered information regime. The layers lowered the cost of finding official action while creating new work for editors, lawyers, libraries, associations, and other intermediaries. They made a rule public without ensuring that every affected person would see it. They made a comment possible without ensuring equal capacity to comment. They made a file requestable while preserving exemptions.

⁸⁵"Federal Register, Number 1."

⁸⁶Federal Register Act.

⁸⁷National Archives, *1938 Supplement to the Code of Federal Regulations*.

⁸⁸Administrative Procedure Act.

⁸⁹*Federal Crop Insurance Corp. v. Merrill*.

⁹⁰Freedom of Information Act.

Modern administration acquired a public address through these institutions. The address did not answer whether the power inside was wise or just. It made the exercise of power more identifiable, more maintainable, and more open to challenge. That is a narrower achievement than democratic equality and a more important one than improved printing. Government could no longer assume that an order known inside an office was public law merely because an official had signed it. The document had to arrive.

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