

GOVERNMENT IN IGNORANCE OF THE LAW—
A PLEA FOR BETTER PUBLICATION OF
EXECUTIVE LEGISLATION

“We hear of tyrants, and those cruel ones: but, whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he had kept them from the knowledge of.”*

ADMINISTRATIVE regulations “equivalent to law”¹ have become important elements in the ordering of our lives today. Many cases have reiterated the rule that executive regulations properly made have “the force and effect of law.”² The volume of these rulings has so increased that full, accurate, and prompt information of administrative activity is now quite as important to the citizen and to his legal advisor as is knowledge of the product of the Congressional mill.³ There should consequently be no need to demonstrate the importance and necessity of providing a reasonable means of distributing and preserving the texts of this executive-made law.

Administrative rules and regulations in all their varied forms cross our paths in myriad ways. The President alone issued 674 Executive Orders, aggregating approximately 1400 pages, in the

* 5 BENTHAM, WORKS (1843) 547.

¹ This characterization is by the Supreme Court in *Hampton & Co. v. United States*, 276 U. S. 394, 409 (1928).

² *Maryland Casualty Co. v. United States*, 251 U. S. 342, 349 (1920). It is of course true that the regulation must be authorized by act of Congress and must be at least not inconsistent with existing statute (unless Congress has granted express authority to change the law; see notes 9-12, *infra*). These requirements, often expressed, doubtless serve to curb the ambit of executive activity. Few regulations, however, have actually been held to be invalid by the Supreme Court. *Cf. Waite v. Macy*, 246 U. S. 606 (1918); *Burnet v. Chicago Portrait Co.*, 285 U. S. 1 (1932).

³ We are not concerned here with the propriety of such delegations of legislative power, nor with the dangers to which they may lead even though published in a form which all may read. These questions have received much attention in England. See HEWART, *THE NEW DESPOTISM* (1929); REPORT OF THE COMMITTEE ON MINISTERS' POWERS (1932). See also CARR, *DELEGATED LEGISLATION* (1921); CHEN, *PARLIAMENTARY OPINION OF DELEGATED LEGISLATION* (1933); WILLIS, *THE PARLIAMENTARY POWERS OF ENGLISH GOVERNMENT DEPARTMENTS* (1933).

first fifteen months after March 4, 1933.⁴ This was a greater volume than that of the preceding four years, and nearly six times as great as that for the thirty-nine years from 1862 through 1900. Moreover, we are told by a committee of the American Bar Association:

“ The practice of filing Executive Orders with the Department of State is not uniformly or regularly followed, and the totals are really greater than above indicated. Some orders are retained or buried in the files of the government departments, some are confidential and are not published, and the practice as to printing and publication of orders is not uniform. Some orders are made known and available rather promptly after their approval; the publication of others may be delayed a month or more, with consequent confusion in numbering. The comparatively large number of recent orders which incorporate provisions purporting to impose criminal penalties by way of fine and imprisonment for violation is without numerical precedent in the history of the government.”⁵

In the first year of the National Recovery Administration, 2998 administrative orders were issued. In addition to these, the Recovery Administration has adopted numerous regulations and sets of regulations which are to be found scattered among 5991 press releases during this period. It has been estimated that the total amount of “law” evolved during the first year of the NRA’s activities exceeds 10,000 pages, probably a greater volume than the total amount of statute law contained in the United States Code.⁶

But this activity does not stop with the President and the NRA. There are many other departments and officials of the government in Washington who have authority to promulgate rules and regulations. The Agricultural Adjustment Administration has issued many series of regulations, more than usually complicated by supplements and amendments. The Treasury Department issues many regulations under the internal revenue laws and also under the customs acts; the Labor Department has its series of Immigration Rules and Regulations. The Postal Rules and Regula-

⁴ *Report of the Special Committee on Administrative Law*, in *ADVANCE PROGRAM OF THE 57TH ANNUAL MEETING OF THE AM. BAR ASS’N (1934)* 214. From March 4, 1933, to Oct. 15, 1934, the number of Executive Orders was 949. *N. Y. Times*, Oct. 21, 1934, § 8, at 3.

⁵ *Report of the Special Committee on Administrative Law*, *supra* note 4, at 215.

⁶ *Id.* at 215-16.

tions fill a considerable volume and are frequently amended. The regulations of the Veterans' Bureau have been compiled into two large volumes, already much out of date. There is an elaborate series of regulations under the Pure Food and Drug Act and related legislation.⁷ New boards and commissions have been established, such as the Securities and Exchange Commission and the Federal Communications Commission, whose regulations are of great importance. But included in this enumeration are only a few of the more important sources of administrative legislation. It is scarcely the beginning of a complete list.⁸ There are literally

⁷ Cf. *United States v. Antikamnia Chemical Co.*, 231 U. S. 654 (1914); *United States v. Shreveport Grain & Elevator Co.*, 237 U. S. 77 (1932). The regulations are prescribed by a Board consisting of the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce. See Act of June 30, 1906, c. 3915, § 3, 34 STAT. 768, 21 U. S. C. A. § 3 (1927).

⁸ A list of a few of the rules and regulations issued during the past three years, made at random from the Monthly Catalogue of Public Documents, contains, e.g.: Revised regulations for cotton warehouses; Treas. Reg. 76, relating to shipment or delivery of manufactured tobacco, *etc.*, for consumption outside the United States; many amendments to the Army Reg.; National Guard Reg.; plant quarantine regulations; Reg. 7 of the War Claims Arbitrator; plant inspection and certification regulations to meet foreign sanitary requirements; regulations governing establishment and certification of aeronautical lights; insurance regulations of Federal Farm Loan Board; War Dept. Reg. under the general bridge law; regulations relative to loans for feed for livestock; amendment to regulations respecting game animals, *etc.*, in Alaska; regulations and rulings affecting agricultural experiment stations; Dept. of Commerce Reg. governing entry and clearance of aircraft; regulations governing deposit of postal savings funds; regulations for establishment of load lines for merchant vessels; Treas. Reg. 44, relating to taxes on lubricating oil, matches, soft drinks, and other products; Treas. Reg. 71, relating to stamp taxes; general regulations under the Agricultural Adjustment Act; field corn, jute, paper, and wheat regulations under the Agricultural Adjustment Act; Federal Radio Commission Rules governing operators' licenses; Treas. Reg. 79, relating to the gift tax; rules and regulations relating to the navigable waters of the United States; Agriculture Dept. Reg. governing sanitary handling and control of hides, *etc.*, offered for entry in the United States; regulations relating to highway construction under the NIRA, *etc.*; Civil Service Rules and Reg.; Rules and Reg. 7, governing medical care provided in the home to recipients of unemployment relief; Federal Radio Commission Rules governing amateur radio stations and operators; regulations under Cotton Act of April 21, 1934; regulations of the Farm Credit Administration governing loans in drought stricken areas; regulations governing exportation of silver; Federal Reserve Board Reg. relating to margin requirements; regulations of the Federal Housing Administration covering operations under Title II of the National Housing Act.

Many earlier instances of the issuance of administrative rules and regulations pursuant to statutory authority are discussed in Fairlie, *Administrative Legislation* (1920) 18 MICH. L. REV. 181.

dozens of agencies of the Federal Government which have power to promulgate rules and regulations.

Administrative rules and regulations are scarcely susceptible of accurate classification. It is obvious enough, however, that they must be considered frequently in order to determine the real statutory law upon a question. Congress may authorize executive officers to decide when a statute shall go into effect or when its operation shall be suspended.⁹ Provisions of this sort have been upheld from the beginning of our government,¹⁰ and they are frequently encountered at the present time.¹¹ Other statutes grant to executive officers the power in effect to amend or repeal

⁹ English statutes not infrequently include provisions under which administrative officers have power to amend or repeal an act of Parliament. See REPORT OF COMMITTEE ON MINISTERS' POWERS (1932) 36-38; WILLIS, PARLIAMENTARY POWERS OF ENGLISH GOVERNMENT DEPARTMENTS (1933) 200-03.

¹⁰ Cargo of the Brig AURORA v. United States, 7 Cranch 382 (U. S. 1813), involved § 4 of the Act of May 1, 1810, c. 39, 2 STAT. 605, 606, which provided that certain embargo acts which had previously expired should "be revived and have full force and effect" upon a proclamation of the President. The Court upheld a forfeiture following the proclamation by the President provided for in the statute. Instances of similar legislation are collected in *Field v. Clark*, 143 U. S. 649 (1892).

¹¹ See Act of Aug. 19, 1890, c. 802, § 3, 26 STAT. 320, 328, 33 U. S. C. A. § 61 (1928) ("this act shall take effect at a time to be fixed by the President by proclamation"). Recent examples are rather numerous. The National Industrial Recovery Act, c. 90, § 2(c), 48 STAT. 195, 15 U. S. C. A. § 702(c) (1933), provides that it shall expire two years after its enactment "or sooner if the President shall by proclamation . . . declare that the emergency recognized by section 1 has ended." A similar provision is contained in the Agricultural Adjustment Act, c. 25, § 13, 48 STAT. 31, 39, 7 U. S. C. A. § 613 (1933). The Corporation of Foreign Bondholders Act, c. 38, § 211, 48 STAT. 74, 92, 95, 15 U. S. C. A. § 7711 (1933), provides that it "shall not take effect until the President finds that its taking effect is in the public interest and by proclamation so declares." The Act of May 28, 1934, c. 365, 48 STAT. 811, forbids the exportation of arms to the Chaco on proclamation of the President. See also Act of March 3, 1931, c. 411, § 1, 46 STAT. 1494, 40 U. S. C. A. § 276a (President may suspend "prevailing rate of wages" law); §§ 401, 402 of the Act of March 9, 1933, c. 1, 48 STAT. 6-7, 12 U. S. C. A. §§ 445, 347b (§ 402 gives the President power to extend the operation of the statute for one year); Act of April 21, 1934, c. 157, 48 STAT. 598, 599, 7 U. S. C. A. § 701 (same—Cotton Act); Act of March 24, 1933, c. 8, § 1, 48 STAT. 20, 12 U. S. C. A. § 347d; § 12A(1) of the Federal Reserve Act, as amended by § 8 of the Act of June 16, 1933, c. 89, 48 STAT. 162, 172, 12 U. S. C. A. § 264; Act of Jan. 20, 1934, c. 3, 48 STAT. 318, 15 U. S. C. A. § 601a; Act of June 19, 1934, c. 674, 48 STAT. 1178, 1179, 31 U. S. C. A. § 316b.

Statutes frequently make reference to Executive Orders or regulations already issued, so that the effect of the statute cannot be determined without examination of executive acts which are now quite inaccessible. See *e.g.*, § 704 of the Revenue

acts of Congress.¹² It is clear, therefore, that no search of the statutes can be complete until the applicable executive pronouncements have been examined. When the legal effect of a statute depends upon an administrative ruling, the order bringing the statute to life or tolling its existence should be as readily available as the statute itself.

The sphere of administrative activity is of course not limited to instances of the sort just mentioned. Congress has power to provide that the violation of an executive regulation shall be a criminal offense, though the regulation was not announced until after the enactment of the statute.¹³ The first act passed by the Seventy-Third Congress on the first day of its special session¹⁴ granted to the President broad powers to prescribe regulations concerning gold, and the violation of these regulations was made subject to a fine of \$10,000 or to imprisonment for not more than ten years. Numerous prosecutions have been brought under this and subsequent related legislation.¹⁵ The National Industrial

Act of 1928, c. 852, 45 STAT. 880, 26 U. S. C. A. § 2704; Act of Feb. 27, 1933, c. 128, § 7, 47 STAT. 1124; Act of March 2, 1934, c. 38, 48 STAT. 362, 391.

¹² Thus, the Act of Sept. 7, 1916, c. 451, § 3, 39 STAT. 729, 46 U. S. C. A. § 804 (1928), established the United States Shipping Board and defined its powers. Although Congress has never repealed that statute, the Shipping Board no longer exists. It was abolished by Executive Order No. 6166, issued under the authority of the Act of March 3, 1933, c. 212, 47 STAT. 1489, 1517-18, 5 U. S. C. A. §§ 124, 126. Similarly, §§ 349 and 350 of the REVISED STATUTES (1878), as amended, 38 STAT. 497 (1914), 5 U. S. C. A. § 297 (1927), provide that the Solicitors of the Treasury and of the Departments of Labor and of Commerce are officers of the Department of Justice and responsible to the Attorney General. This statute has never been amended or repealed by any act of Congress. Nevertheless, pursuant to Executive Order No. 6166, *supra*, these Solicitors are now officers of their respective departments, and responsible to the heads of those departments. A number of other similar illustrations may be derived from the same executive order.

The Securities Exchange Act of 1934, c. 404, 48 STAT. 881, 15 U. S. C. A. §§ 78a *et seq.*, gives the Federal Reserve Board, in paragraphs (b) and (e) of § 7, and the Securities and Exchange Commission, in § 12(e), power to prescribe regulations "notwithstanding the provisions" of other sections of the Act. See also the Act of Feb. 23, 1934, c. 23, 48 STAT. 354, providing that on certification by the President that a locality is a "distressed emergency area", loans may be made "without regard to the foregoing limitations" of the statute.

¹³ *United States v. Grimaud*, 220 U. S. 506 (1911); *McKinley v. United States*, 249 U. S. 397 (1919); *Avent v. United States*, 266 U. S. 127 (1924).

¹⁴ Act of March 9, 1933, c. 1, 48 STAT. 1, 12 U. S. C. A. § 95(b).

¹⁵ See *United States v. Campbell*, 5 F. Supp. 156 (S. D. N. Y. 1933). The press has carried accounts of other cases.

Recovery Act¹⁶ has likewise been the source of a maze of rules, in the form of codes and otherwise, the violation of which is punishable by fine or imprisonment. Similarly the Securities Exchange Act of 1934¹⁷ grants a very comprehensive rule-making power to the Securities and Exchange Commission, and expressly makes criminal and subject to severe penalties the violation of any rule or regulation made under the Act.¹⁸

And apart from criminal liabilities, the everyday affairs of the citizen are hedged about by a multitude of requirements based solely on some administrative pronouncement. Can a taxpayer tell what tax he owes merely by reading the current revenue act? Every lawyer knows he cannot. The Internal Revenue Regulations are at least as important as the act itself.¹⁹ And the same is true of the Immigration Rules,²⁰ and of the rules of the Veterans' Administration,²¹ and of a hundred and one odd other bureaus and functionaries which make up this complex government. And both the number and importance of administrative regulations have enormously increased in the present era when Congress has devolved so much responsibility upon the executive branch of the government.

Congressional enactments are readily available to the profession. The bound volumes of the Statutes at Large provide a uniformly understood mode of citation, while private initiative has supplied a number of independent compilations, complete with

¹⁶ Act of June 16, 1933, c. 90, 48 STAT. 195, 15 U. S. C. A. §§ 701 *et seq.*, 40 U. S. C. A. §§ 401 *et seq.*

¹⁷ Act of June 6, 1934, c. 404, 48 STAT. 881, 15 U. S. C. A. §§ 78a *et seq.*

¹⁸ Section 32 does contain the unusual provision that no person shall be subject to imprisonment for violating a rule or regulation made under the Act if he proves that he had no knowledge of the rule or regulation. This provision, however, does not prevent the imposition of a fine which by the terms of the Act may be as much as \$10,000. This partial relaxation by Congress of the common-law attitude toward ignorance of the law is apparently based on the experience that no reasonable means exists for ascertaining the content of administrative rulings. Though the relaxation of the penalty may be proper, it would seem preferable to take steps also to remove the difficulty.

¹⁹ *Fawcus Machine Co. v. United States*, 282 U. S. 375 (1931), *United States v. Kirby Lumber Co.*, 284 U. S. 1 (1931), and *Burnet v. Guggenheim*, 288 U. S. 280 (1933), may be referred to, among many cases, as instances in tax litigation where a regulation played a crucial if not controlling part.

²⁰ *Cf. Philippides v. Day*, 283 U. S. 48, 50 (1931); *Costanzo v. Tillinghast*, 287 U. S. 341, 345 (1932). ²¹ *Cf. Smith v. United States*, 292 U. S. 337 (1934).

tables, by which the status of any legislative enactment of the past may be told quickly and accurately — whether it has been amended, repealed, superseded, or is still in force. But what do we find as to the form of that most important group of legislative pronouncements, the administrative rules and regulations? It seems scarcely adequate to say that what we find is chaos.²² If a pamphlet is discovered which purports to contain the rules and regulations in question, there is no practicable means of telling whether the entire regulation or the article in question is still in force, or, as is so often the case, has been modified, amended, superseded, or withdrawn. There is no feasible way of determining whether or not there has been any subsequent rule or order which might affect the problem. The rules and regulations are most often published in separate paper pamphlets. Many of them, including most of the Executive Orders of the President, are printed on a single sheet of paper, fragile and easily lost. An attempt to compile a complete collection of these administrative rules would be an almost insuperable task for the private lawyer. It seems likely that there is no law library in this country, public or private, which has them all. Even if a complete collection were once achieved, there would be no practicable way of keeping it up to date, and the task of finding with requisite accuracy the applicable material on a question in hand would still often be a virtual impossibility.²³ The officers of the government itself frequently do not know the applicable regulations. 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.²⁴

²² "In the matter of publication there is a maximum of variety and confusion. Not only is there no general system, but no department has developed a system for itself. . . . There is no approach to uniformity in nomenclature. Rules, Regulations, Instructions, General Orders, Orders, Circulars, Bulletins, Notices, Memoranda and other terms are given to different series of publications by different government offices, with no clear distinction as to the meaning of these terms." Fairlie, *supra* note 8, at 199.

²³ The mere listing of a few of the regulations as they are now made public (*cf.* note 8, *supra*) illustrates the real difficulty of citing material of this sort at the present time and the even greater difficulty of finding a specific regulation when it has been cited.

²⁴ *United States v. Smith*, No. 3, Oct. Term, 1934, *appeal dismissed on motion of the appellant*, Oct. 1, 1934. See *N. Y. Times*, Oct. 2, 1934, at 6.

And yet these ephemera have the "force and effect of law". Such a situation is none the less intolerable because we have never known anything better. Is there no alternative? On the contrary, the solution is amazingly simple. All that is needed is an official publication, analogous to the Statutes at Large, in which all rules and regulations shall be systematically and uniformly published.²⁵ In such a publication lawyers could readily find the full and complete text of any regulation.²⁶ Regulations could be readily cited and could be made just as accessible as the statutes of Congress are now. Moreover, with the help of indices and tabulations (such as are now included in the United States Code and its supplements, and in several private publications) one could readily determine whether a particular rule or regulation was still in force, and if not, the extent to which it had been changed or modified or superseded.²⁷

²⁵ The definition of rules and regulations to be covered in carrying such a scheme into effect should be both specific and inclusive. This has been attempted in § 2 of the draft bill (see p. 214, *infra*) by specifying proclamations, Executive Orders, rules and regulations, and then following this by a provision in very general terms modeled after § 4 of the English Rules Publication Act, 1893 (see note 31, *infra*).

Proclamations of the President are required to be published under the present law. See the Act of Jan. 12, 1895, c. 23, 28 STAT. 601, 615, 1 U. S. C. A. § 30 (1927). See also the Act of July 31, 1876, 19 STAT. 102, 105, 44 U. S. C. A. § 321 (1928); Act of Jan. 12, 1877, c. 18, § 2, 19 STAT. 221, 43 U. S. C. A. § 686 (1928), repealed by the Act of Dec. 16, 1930, c. 14, 46 STAT. 1029. Since proclamations are executive acts and not congressional acts, it seems better to provide for their publication with other executive activity of a legislative nature. There is no need, however, to publish proclamations in both places, and consequently the Act of Jan. 12, 1895, and the Act of July 31, 1876, *supra*, should be amended so as to make them inapplicable to proclamations if another scheme of publication is adopted.

²⁶ Express provision should be made so as to include a rule or regulation made not immediately under the provisions of a statute, but pursuant to some delegation, as for instance, a rule made under a previous rule or regulation, or Executive Order. Most rules and regulations of the NRA are of this sort. See BLACHLY AND OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION (1934) 27. See also the Executive Order of Oct. 29, 1934, reorganizing the National Emergency Council, and authorizing the executive director (Donald R. Richberg) "to prescribe such rules and regulations as he may deem necessary." N. Y. Times, Nov. 1, 1934, at 1, 3. Rules made under such a delegation might be included in a publication scheme by making it apply to rules and regulations made "directly or indirectly" under any statute. The omission of such a provision in the English Act has been criticized. See CARR, DELEGATED LEGISLATION 46.

²⁷ Although rules and general orders of courts are often not strictly statutory rules and regulations, it would be a matter of great convenience to have them

The condition in which we find ourselves is not novel, nor is the solution suggested original.²⁸ As long ago as 1890, the same difficulty was faced in England. The words of the editor of the first English compilation of rules and orders describe a situation quite parallel with that here today:

"These Orders, Rules, or Regulations (which may be referred to generally as 'Orders') are now numerous and important. They are, when duly made, tantamount to Acts of Parliament, and in many cases the Act giving the authority to make the Order specifically declares that the Order when made shall have effect as if enacted in the Act.

"The Orders have not hitherto been published in a systematic manner, some of them appearing in official documents, such as the London Gazette or a Parliamentary Paper or a Stationery Office Publication, while a portion of them can only be found either in papers printed for the department concerned, and circulated by the department among the authorities or persons immediately interested, or in text books.

"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."²⁹

A more recent writer says that until a systematic form of publication was adopted

"delegated legislation was almost undiscoverable. Part of it was buried in the pages of the 'London Gazette', the arid nature of which still justifies Macaulay's criticisms; the rest was scattered over Parliamentary Papers or other departmental documents or files without any definite system."³⁰

Beginning in 1890, statutory rules and orders of a public and general nature were collected and published in England pursuant to a direction made by the Lord Chancellor and the Treasury.

printed in the same series. Provision is made for this in § 5 of the draft bill (see p. 215, *infra*), with a qualified exemption of the rules of district courts, whose bulk might be so great as to offset the advantage derived from printing.

²⁸ For earlier discussions of the problem in this country, see Fairlie, *supra* note 8; COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES (1927) 194-97; HART, THE ORDINANCE MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES (1925) 315-21. See also *Report of the Special Committee on Administrative Law*, *supra* note 4; BLACHLY AND OATMAN, *op. cit. supra* note 26, at 260-61.

²⁹ STATUTORY RULES AND ORDERS (1890) v.

³⁰ CARR, DELEGATED LEGISLATION 44.

Shortly afterwards the Rules Publication Act, 1893,³¹ was enacted. Pursuant to that Act regulations were prescribed by the Treasury with the concurrence of the Lord Chancellor and the Speaker of the House of Commons.³² Under this authority rules and regulations in England are published separately in systematic form as soon as issued, are collected annually into one bound volume uniform with the statutes, and indices and cumulations are published at frequent intervals, showing quickly and accurately the exact state of the regulations on any problem.³³

Such a systematic scheme for the publication of administrative rules and regulations is in force in other English-speaking jurisdictions. Statutes similar to the English model have been enacted in Australia³⁴ and in Northern Ireland.³⁵ There is a statute to

³¹ 56 & 57 VICT. c. 66. Section 1 of this Act provides that, at least forty days before making any rule or regulation, notice of the proposal to make the rule and of the place where the draft rules may be obtained must be published in the London Gazette. During those forty days any public body may obtain copies of such draft and may make any representations and suggestions, which shall be taken into consideration before the rules are finally settled. Section 2 allows a rule-making authority to prescribe provisional rules during the forty-day period in cases of urgency or for any special reason. Section 3 provides for the numbering and publication of the rules in accordance with regulations made by the Treasury with the concurrence of the Lord Chancellor and the Speaker of the House of Commons. This publication may differentiate between rules of a public nature, and those which are local and personal or private. Section 4 defines the "statutory rules" which are covered by the statute.

For a discussion of some of the questions which have arisen under this statute and for an indication that it has not completely solved the problem in England, see CARR, *DELEGATED LEGISLATION* c. V; Macassey, *Law-Making by Government Departments* (1923) 5 J. SOC. COMP. LEG. (3d ser.) 73. See also HEWART, *THE NEW DESPOTISM* 82-90.

³² STATUTORY RULES AND ORDERS (1894) No. 734.

³³ The various forms in which regulations are published in England are outlined in the REPORT OF THE COMMITTEE ON MINISTERS' POWERS 47.

³⁴ The RULES PUBLICATION ACT, 1903, 2 COMMONWEALTH ACTS 105, was substantially identical with the English Act of 1893. This was amended by the RULES PUBLICATION ACT, 1916, 14 COMMONWEALTH ACTS 17, so as to eliminate the requirement of giving notice before the publication of new rules and regulations. Doubtless this amendment was the result of war-time conditions.

Under this legislation a volume of COMMONWEALTH STATUTORY RULES is published annually, with tables and index. There is also a compilation in four volumes of STATUTORY RULES FROM 1901 TO 1927 MADE UNDER COMMONWEALTH ACTS AND IN FORCE ON 31ST DECEMBER, 1927.

³⁵ The statute now in effect is the RULES PUBLICATION ACT (NORTHERN IRELAND) 1925, 15 & 16 Geo. V, c. 6. Under this Act, an annual volume of STATUTORY RULES AND ORDERS OF NORTHERN IRELAND is published.

the same effect in Canada.³⁶ Annual compilations of rules and regulations are published by government authority in India,³⁷ New Zealand,³⁸ and South Africa,³⁹ though apparently without statutory sanction. Similar publications are common in the Latin countries. Indeed, apart from the United States, it would be very difficult to find a nation of importance which does not use some method to make available and accessible a record of the acts of its executive authorities.

The cost of such a publication would obviously not be prohibitive. It would readily command a considerable sale, for all law libraries and many law offices would find it essential to be on the regular subscription list. Moreover, there would be a substantial saving in that rules and regulations so published would not require publication in separate pamphlet form as is now the case. In other words, the adoption of a systematic scheme of publication would not mean more printing but simply the introduction of some semblance of order into the printing which is now done.

If such a project should be adopted, numerous subsidiary questions would require attention. It would be necessary to determine the form and content of the publication, and the "Official Gazette" of other countries might be offered as a model. The establishment of a publication in that form would, indeed, be a great step forward, but it would likewise have its drawbacks. An "Official Gazette" might tend to be no more than a federal newspaper, puffing the activities of the Federal Government; and, in any event, its pages would be cluttered up with a great many items of no permanent importance, such as notices, lists of pending bills, news items, and so on.⁴⁰ The result would be that purchasers

³⁶ CANADA REV. STAT. (1927) c. 162, §§ 28-30.

³⁷ The latest cumulation is *GENERAL RULES AND ORDERS MADE UNDER ENACTMENTS IN FORCE IN BRITISH INDIA* (3d ed. 1926). There is also a supplement covering the period 1926-1930.

³⁸ Rules and regulations are officially published in the *New Zealand Gazette*. A compilation of rules, regulations, and by-laws is privately published at intervals of two or three years.

³⁹ Compilations of regulations are published at intervals of a few years by order of the Minister of Justice.

⁴⁰ A publication in the form of an "Official Gazette" would also be likely to include a great number of administrative rulings, that is, decisions and opinions in particular cases. Such decisions do not represent the exercise of any statutory power and their publication with true rules and regulations would serve only to give them a dignity which they do not deserve.

and libraries must fill their shelves with pages of material for which they have no use, and the task of searching for rules and regulations is made that much more difficult. Moreover, a publication in the form of an "Official Gazette" would have to appear at regular intervals, while the material with which we are concerned does not lend itself to regularity in its natal days.

These objections may be met by providing not for a heterogeneous publication like an "Official Gazette" but simply for the systematic and uniform publication of the rules and regulations themselves as they are issued, just as the acts of Congress are now printed in slip form immediately after becoming law. It should be made the duty of every government department or official who exercises the power to make rules and regulations to send a copy forthwith to the Public Printer, and that official should assign it a definite number⁴¹ and print it in a series, all in the same type and general style, including all rules and regulations.⁴² At the end of each calendar year, the rules and regulations so published should be gathered together in a bound volume or volumes, arranged systematically, with a complete index and proper tables showing the effect of the rules and regulations issued during the year on the statutes and on other regulations. So far as rules and

⁴¹ Unless the rules as published are given consecutive whole numbers there is no way of knowing whether all of them are present. Under the present chaotic system, Executive Orders are sometimes given numbers which contain fractions, and other Executive Orders are given no numbers at all. See HART, *op. cit. supra* note 28, at 318. If a new scheme of publication were adopted, it would seem desirable to eliminate this difficulty by an express provision.

⁴² If a uniform system of publication for rules and regulations were adopted, there should be no more need for proving them in evidence in any litigation than there is for offering statutes in evidence. And to prevent filling the pages of records with such material, it should be made plain that courts may take judicial notice of the officially printed copies of statutory rules and regulations. The Supreme Court takes such notice now. *Caha v. United States*, 152 U. S. 211 (1894); *Thornton v. United States*, 271 U. S. 414 (1926). But the practice in the lower courts is far from uniform. *Cf. Sprinkle v. United States*, 141 Fed. 811, 819 (C. C. A. 4th, 1905) (Internal Revenue Regulations noticed); *Nagle v. United States*, 145 Fed. 302 (C. C. A. 2d, 1906) (Postal Regulations not noticed). In the last case the court used language strangely pertinent here: "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." *Id.* at 306.

regulations are of an interpretative nature, the requirement of prompt publication would seem to be a reasonably adequate safeguard to the public. But where a rule or regulation establishes or defines a criminal offense or provides for a penalty, there should be a provision under which such a rule or regulation would not be effective until actually published.

Considerations of some difficulty are encountered in the obvious fact that all rules and regulations cannot feasibly be published. Many of them are of purely private concern, as for instance, Executive Orders exempting an individual from the civil service acts or allowing an individual to remain in the government employ after the retirement age. Other regulations relate solely to the internal administration of the government departments. There is no need to make these public, and it is appropriate that many of them should not be. With respect to so-called "local" regulations, however, this is not wholly true. Any regulation which might affect the public as such, or any considerable body of it, should be published, even though it is not of general concern.⁴³

The proper selection of rules and regulations for publication can be more readily left to administrative action than to exact definition in the statute. The English Act gives the authority to make rules on this question to the Treasury with the concurrence of the Lord Chancellor and the Speaker of the House of Commons; but if a legislative officer were given such authority in this country, there might be some question of an unconstitutional interference with the separation of powers.⁴⁴ Such power might better be given to the Secretary of State and the Attorney General, acting with the approval of the President. The Secretary of State now has charge of publishing the statutes; the Attorney General's concern is obvious. And approval of the regulations by the President would be appropriate because of the great importance of the subject matter.⁴⁵

⁴³ Failure to publish local rules has been criticized in England. See Macassey, *supra* note 31, at 75. And it would appear to be desirable not to provide for any exemption for local regulations here, except for regulations relating exclusively to territories, insular possessions, or the District of Columbia.

⁴⁴ *Cf.* 37 OPS. ATT'Y GEN. 56 (1933).

⁴⁵ It is assumed that the regulations prescribed in England would be a useful model. See STATUTORY RULES AND ORDERS (1894) No. 734, published also in CARR,

An important question is the agency to be charged with the actual publication of the series of rules and regulations. The statutes are now published under the supervision of the Department of State. Other possible agencies would include the Department of Justice or the Library of Congress. In view, however, of the fact that speed of publication would be a very important element in the scheme and that the Public Printer is in direct charge of the establishment where the rules and regulations would be printed, it would seem that he would be the official who could supervise the publication most efficiently. If the task were given to the Department of Justice, that department might have a tendency to undertake to revise the content of the rules and regulations. This would be undesirable both because it would delay the publication and because the Department of Justice is often called upon to advise the other departments with respect to the administration of rules and regulations after they have been promulgated. The Department of Justice should be left free to act in its traditional semi-judicial capacity in such cases. The Department of State would not be likely to provide that prompt publication which would be so necessary to the effective working of the scheme, while the Library of Congress is primarily fitted to be a repository and to conduct research rather than to act as the supervisor of a current publication.

Finally, the adoption of a scheme of publication for the future would solve only part of the problem. There would still remain the great mass of regulations in force when the new system went into effect. Provision should therefore be made for the compilation of a comprehensive collection of all such regulations. The preparation of such a compilation might well be entrusted to the Library of Congress. That organization has recently produced an admirable index of the federal statutes,⁴⁶ and it could be expected to handle the difficult task of gathering together all past rules and regulations in a wholly satisfactory manner.⁴⁷

DELEGATED LEGISLATION 59-61, and REPORT OF THE COMMITTEE ON MINISTERS' POWERS 120-21.

⁴⁶ McCLENON AND GILBERT, INDEX TO THE FEDERAL STATUTES (1933).

⁴⁷ Two editions of the compilation of statutory rules and orders have been published in England. The first, in eight volumes, included the rules and orders in effect prior to 1890. The second, in thirteen volumes, was published in 1904, with

A complete index of all rules and regulations in force should also be published at frequent intervals. Such an index should include references not only to the regulations themselves but also to the statutory authority under which the regulations are made. The index now published at three-year intervals in England⁴⁸ furnishes a useful model for a similar publication here.

In order to suggest more specifically the form in which this project might be carried out there is included in an Appendix a draft of a bill to provide for the publication of rules and regulations. This draft is of course wholly tentative and is merely designed to indicate some of the provisions which might be included in such an enactment. There are obviously many other points which merit consideration,⁴⁹ but such a draft as this may serve to focus attention on the problem and to provide some sort of a basis for formulating a solution. It seems highly desirable that if such a project is put into effect it be done by statute, and not, as has been suggested elsewhere, by an Executive Order. It is very unlikely that any permanent solution of the problem could be achieved through a publication set up by administrative action. During the War, an "Official Bulletin" was established by executive authority. But this was by no means complete, no provision was made for its continuance, and few people today remember its existence. This is also true of a private publication of the same period.⁵⁰ There appears every likelihood that any such publication set up by executive action today would meet a similar fate.

the title STATUTORY RULES AND ORDERS REVISED TO DECEMBER 31, 1903. In this edition each title was paged separately so that it could be separately sold.

⁴⁸ INDEX TO THE STATUTORY RULES AND ORDERS IN FORCE ON JUNE 30, 1933 SHEWING THE STATUTORY POWERS UNDER WHICH THEY ARE MADE (13th ed. 1933).

⁴⁹ Among these are the following: (1) Provision should be made for an appropriation to carry the act into effect. It is not, however, customary to include the appropriation in the enabling act itself. It will doubtless be desirable to handle the question by including an annual item in the appropriation for the Government Printing Office.

(2) It might be desirable to include in the statute an express provision for the free distribution of the statutory rules and regulations in their various forms to government officers. This might be done by providing that distribution should be made to the officers and agencies to whom pamphlet copies of the statutes are distributed under § 195 of Title 44 of the United States Code, and in the quantities provided in that section.

⁵⁰ LAPP, FEDERAL RULES AND REGULATIONS (1918).

Certainly it cannot be denied that the need for putting order into our administrative material is very great. It seems equally certain that the institution of some regular and systematic scheme of publication provides a simple, inexpensive, and wholly effective means of solving the problem. Until some such measure is adopted, it may well be said that our government is not wholly free from Bentham's censure of the tyrant who punishes men "for disobedience to laws or orders which he had kept them from the knowledge of".

Erwin N. Griswold.

HARVARD LAW SCHOOL.

APPENDIX

AN ACT To provide for the uniform publication of rules and regulations.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. This Act may be cited as the "Statutory Rules and Regulations Publication Act, 1935".

Sec. 2. As used in this Act —

The term "statutory rules and regulations" means

- (a) Proclamations by the President;
- (b) all Executive Orders by the President, including all instances of the exercise by the President of any power conferred on him by statute;
- (c) all rules and regulations, by whatever name called, promulgated by any executive department, administration, independent establishment, board, commission, official, group of officials or other rule-making authority; and
- (d) all other rules, regulations or orders, by whatever name called, made directly or indirectly under the expressed or implied authority of any act of Congress.

The term "rule-making authority" includes every authority authorized to make any statutory rules and regulations.

Sec. 3. (a) All statutory rules and regulations made after the effective date of this Act shall forthwith after they are made be sent to the Public Printer, and shall, in accordance with regulations made by the Secretary of State and the Attorney General, with the approval of the President, be numbered in consecutive whole numbers (the numbers to start anew annually), and, except as provided by the regulations, printed and sold by him.

(b) Regulations made under the authority of this section may provide for the different treatment of statutory rules and regulations which are of the nature of public acts, and of those which are of the nature of personal or private acts; and may determine the classes of cases in which the exercise of a statutory power by any rule-making authority relates solely to the internal administration of an agency of the government; and may provide for the exemption from this section of any such classes; except that no regulation shall be made dispensing with the requirement that any statutory rule or regulation subject to the provisions of Section 8 of this Act shall be printed. Regulations made under this section may provide that statutory rules and regulations relating exclusively to territories, insular possessions, or the District of Columbia, shall not be published, or may be published in a separate series. Regulations made under this section may also provide for the separate publication of all statutory rules and regulations relating exclusively to the Patent Office.

Sec. 4. Any statutory rules and regulations may, without prejudice to any other mode of citation, be cited by the number assigned to them as provided in Section 3(a), together with the calendar year. Printed copies of statutory rules and regulations bearing the imprint of the Government Printing Office, shall be the subject of judicial notice in all the courts of the United States, and of the several states, territories, and possessions.

Sec. 5. (a) The provisions of this Act shall also be applicable to all rules and general orders of courts of the United States, whether issued pursuant to an authority granted by an act of Congress or not. The clerk of any court promulgating any such rules or orders shall send them forthwith to the Public Printer who shall assign to them their appropriate number in the annual series of statutory rules and regulations and shall print and sell them. All such rules and general orders of courts shall be included in the compilations and indices to be prepared under Sections 6 and 7 of this Act.

(b) The regulations made under Section 3 of this Act may provide that the requirement of printing contained in this Section shall not be applicable to the rules of District Courts.

Sec. 6. At the close of each calendar year, the Public Printer, under regulations made as provided in Section 3(b) of this Act, shall have compiled and printed a compilation of the statutory rules and regulations, and rules and general orders of courts, for that year, together with a complete index and appropriate tables. There shall be included in this annual volume a list by number and title of all statutory rules and regulations which, pursuant to the regulations aforesaid, are not printed in full. The annual volume provided for by this Section shall be made available to the public by the first of March of the following year.

Sec. 7. The Librarian of Congress is authorized and directed to have compiled and published at the Government Printing Office a complete collection of all statutory rules and regulations and rules and general orders of courts which are in force at the date this Act takes effect. This compilation shall be printed in a style which is uniform with the annual volumes of statutory rules and regulations to be published as provided in Section 6 of this Act. In making and publishing this compilation, the Librarian of Congress may in his discretion omit any statutory rules and regulations and any rules and general orders of courts which are of the classes which need not be printed under the regulations established under Sections 3(b) and 5(b) of this Act.

Sec. 8. No statutory rule or regulation establishing an offense or defining an act which pursuant to an act of Congress is punishable as a crime (whether a petty offense, misdemeanor or felony), or subject to a penalty, shall be valid and effective until published as provided in Section 3 of this Act.

Sec. 9. The twenty-fifth paragraph of Section 73 of the Act of January 12, 1895, c. 23, 28 STAT. 601, 615 (U. S. C., Title 1, Sec. 30), is amended by striking out the word "proclamations". So much of the Act of July 31, 1876, c. 246, 19 STAT. 102, 105 (U. S. C., Title 44, Sec. 321), as requires the publication of proclamations in a newspaper is repealed.

Sec. 10. Nothing in this Act shall affect the validity or effect of any statutory rules or regulations which are in effect or have been in effect prior to the effective date of this Act.

Sec. 11. This Act shall take effect two months following its enactment. The regulations provided for in Section 3 of this Act shall be established prior to such effective date.