

**OPINIONS OF
ATTORNEYS
GENERAL**

VOL. 38

1934-1937

U.S. Dept. of Justice

OFFICIAL OPINIONS
OF
THE ATTORNEYS GENERAL
OF
THE UNITED STATES
ADVISING THE
PRESIDENT AND HEADS OF DEPARTMENTS
IN RELATION TO
THEIR OFFICIAL DUTIES

EDITED BY
GEORGE KEARNEY
AND
EMILY A. SPILMAN

SYLLABI PREPARED BY
W. O. BURTNER

VOLUME 38

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1937

For sale by the Superintendent of Documents, Washington, D. C. - Price \$1.50 (Buckram)

VOLUME 38

CONTAINING

THE OPINIONS OF THE ATTORNEY GENERAL

HON. HOMER CUMMINGS

of Connecticut

AND

OPINIONS BY ACTING ATTORNEYS GENERAL

HON. WILLIAM STANLEY

HON. J. CRAWFORD BIGGS

HON. STANLEY REED

HON. JOHN DICKERSON

HON. JOSEPH B. KEENAN

HON. HARRY W. BLAIR

ALSO CONTAINING CITATIONS OF ACTS OF CONGRESS, THE
UNITED STATES CODE, THE REVISED STATUTES, THE CON-
STITUTION, TREATIES AND CONVENTIONS, EXECUTIVE
ORDERS, OPINIONS OF THE ATTORNEYS GEN-
ERAL, AN INDEX TO SUBJECTS, AND
AN INDEX-DIGEST

together. Consequently, it is my view that there is no implied repeal, either partial or otherwise, of the prior act by the latter.

I see no reason, therefore, to change my opinion as expressed in my letter to you of September 26, 1935 (38 Op. 293.) As stated in that letter, I am of the opinion that, the contemplated interchange of property having been agreed to by the heads of both the War Department and the Navy Department, the proposed order is authorized under the provisions of the Act of July 11, 1919.

Respectfully,

STANLEY REED,
Acting Attorney General.

To the PRESIDENT.

QUESTIONS ARISING IN THE NATIONAL ARCHIVES ESTABLISHMENT UNDER THE FEDERAL REGISTER ACT

1. Documents required or authorized to be published under section 5 of the Federal Register Act are, with the exceptions noted, valid and operate as constructive notice to the persons designated as soon as they are filed with the Division of the Federal Register and made available for public inspection as provided in section 2 of the Act; and publication in the Federal Register is not essential to the validity of such documents.
2. The provisions of section 7 of the Act respecting validity and constructive notice do not apply to the compilation of documents referred to in section 11.

DEPARTMENT OF JUSTICE,
October 21, 1935.

SIR: Referring to the letter of your Assistant Secretary, Mr. Marvin H. McIntyre, dated October 14, 1935, I have the honor to state my opinion upon the following questions arising in the National Archives Establishment in connection with the administration of the Federal Register Act (Public No. 220, 74th Congress [49 Stat. 500]) and submitted in the Archivist's letter to you of October 10, 1935:

1. Is it necessary that documents required or authorized to be published under section 5 be both filed with the Division and published in the Federal Register in order for such documents to be valid or to serve as constructive notice under the provisions of section 7?

2. If both filing and publication are held to be necessary, will the validity or constructive notice of such documents date from the time of filing with the Division or from the time of publication in the Federal Register?

3. Do the provisions of section 7 apply to the compilation referred to in section 11 and do such provisions affect the validity and constructive notice of documents already issued which may or may not be included in the compilation?

Section 5 (a) of the Federal Register Act designates certain documents which are *required* by the Act to be published in the Federal Register. Section 5 (b) designates other documents which *may* be published in the Federal Register.

Section 2 provides that the original and two duplicate originals or certified copies of all documents required or authorized to be published under section 5 shall be filed with the Division of the Federal Register in the National Archives Establishment, and that thereupon the Director of the Division shall cause the day and hour of the filing to be noted on the originals and the copies. That section also provides that upon such filing of any such document the Director shall immediately make a copy thereof available for public inspection in the office of the Director and shall also immediately transmit a copy thereof to the Government Printing Office for printing in the Federal Register.

Section 3 requires the Government Printing Office to print all such documents in the Federal Register and to forthwith distribute them as specified in the Act.

Section 11 provides that within six months after the approval of the Act each agency of the Government shall prepare and file with the Committee created by the Act a complete compilation of all documents issued or promulgated prior to the date documents are required or authorized by the Act to be published in the Federal Register and which are still in force and effect and relied upon by the agency as authority for, or invoked by it in the discharge of, any of its functions and duties. That section further provides that the Committee shall make report concerning such compilation to the President, who shall determine which of such documents have general applicability and legal effect and

shall authorize the publication of such documents in a special or supplemental edition of the Federal Register.

Section 7 of the Act is as follows:

“ No document required under section 5 (a) to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in section 2; and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 5, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby. The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and, (d) that all requirements of this Act and the regulations prescribed hereunder relative to such document have been complied with. The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number.”

In view of these provisions it seems to be clear that documents required or authorized to be published under section 5 of the Act are, with the exceptions noted, valid and operate as constructive notice to the persons designated as soon as they have been filed with the Division and made available for public inspection in the manner provided in section 2 of the Act; and that publication in the Federal Register is not essential to their validity. It seems to be equally clear that the provisions of section 7 respecting validity and constructive notice do not apply to the compilations of documents referred to in section 11. The former section, insofar as it relates to documents described in the latter section, merely provides that the publication of such documents shall

create certain rebuttable presumptions and that the published contents of such documents shall be subject to judicial notice.

I am of the opinion, therefore, that the first and third questions presented by the Archivist should be answered in the negative. Because of the negative answer to the first question, no answer to the second is required.

Respectfully,

HOMER CUMMINGS.

To the PRESIDENT.

THOMAS JEFFERSON TERRITORIAL EXPANSION MEMORIAL

A proposed Executive order approving the establishment and authorizing the construction of the Thomas Jefferson Territorial Expansion Memorial, in accordance with the plans and specifications of the United States Territorial Expansion Commission at an estimated cost of \$30,000,000, recites: That the United States Territorial Expansion Memorial Commission created pursuant to public resolution approved June 15, 1934, recommended in its report of May 1, 1935, the establishment and construction of a permanent memorial, on the site and in accordance with the plans given in the report, at an estimated total cost of \$30,000,000; that the city of St. Louis, Missouri, has agreed to contribute the sum of \$7,500,000 to the estimated cost of the construction of the memorial; that the State of Missouri has consented to the acquisition by the United States of the lands necessary for such project; that the memorial will commemorate the territorial expansion of the United States and preserve the historical associations connected therewith for the benefit, education, and inspiration of the American people; and that the President finds that the construction of the Memorial will provide work relief and increase employment by providing for a useful project. It appears that only a part of the sum of \$22,500,000 to be contributed by the Government for the proposed project is now available.

Held: (1) The proposed project is one which the President is authorized to adopt and prosecute under title II of the National Industrial Recovery Act and the Emergency Relief Appropriation Act of 1935.

(2) The President has no authority to commit the Congress to future appropriations for the proposed project, and the Government may not legally accept the sum of \$7,500,000 from the City of St. Louis unless the authorization for the project provides for its construction and completion with funds now available and at the disposal of the President.

(3) Since the full sum of \$22,500,000 required to be contributed by the President is not now available for the project the proposed Executive order is unauthorized.