

THE PROBLEM OF FEDERAL REGULATIONS

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During the 1976 election both candidates for President and virtually every candidate for Congress made "government regulations" an issue in the campaign. And somehow all candidates managed to be on the same side of the issue. All were against the "increasing flood of unintelligible, unfair, legalistic, gobbledygook regulations emanating from unknown Federal bureaucrats." The common thesis of the candidates might be summarized as follows: "Since bureaucrats do not periodically stand for reelection, they do not have to justify their actions to the public. Therefore, bureaucrats are free to, and do, callously disregard the dire effects that impractical, inconsistent, and unintelligible regulations have on the poor, well-meaning citizen."

Few, if any, federal officials, would defend the clarity of federal regulations. Most of the horrible things that have been said about the language of federal regulations are true. Reform is long overdue.

But, while most federal officials would concede that the 1976 campaigners had a point, most would also hastily point out that the problem is complex, that it has developed over many years, and not surprisingly that the solution is not an easy one, nor one that can be accomplished overnight.

One might well ask why is the problem so difficult to solve if there is widespread agreement that the problem exists and if the President, the Congress, and knowledgeable bureaucrats are in agreement that it must be solved. There are many reasons.

For one, there are thousands of federal employees who spend most of their day writing federal regulations. Yet, it is doubtful if any of them entered undergraduate or graduate school with an intent to prepare for a career in writing regulations. And yet writers of regulations come from all professional fields - lawyers and economists, accountants and educators, medical doctors and engineers of every variety. And, in fact, Ph.D.s of every variety. Many become quite good at their task and some few even stay in the field because they enjoy it. But for most the assignment is uninvited and they perform it unwillingly. Most move into something that they consider "meaningful" at the earliest opportunity. Thus, most regulations are written by people untrained for the task, unhappy about the assignment, and eager to move on to something else. Often, "anything else but regulations." Is it any wonder that most regulations are less than models of clear thinking or clear writing?

For another, most federal agencies produce regulations by a process that, like Topsy, "just grewed." Few federal administrators have ever said: (1) We have a new piece of legislation that requires us to issue implementing regulations. (2) The regulations will be the key to the success or failure of this new

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program. (3) The regulations must be based on the best thinking of our best people: economists, lawyers, social scientists, etc. (4) The regulations must be practical to be effective, so we must hear from the affected public before we make any final decisions. (5) Therefore, we must design a "regulatory process" that guarantees that all of the above will happen or we cannot possibly produce effective regulations, and without regulations we cannot have an effective program.

All of this may sound like extreme exaggeration, but it is not. Not only is it true that most federal agencies have not planned their regulatory process, it is also true that many agencies could not, if asked, even describe their own internal process.

Federal officials who are seriously interested in meaningful reform of the regulatory process must begin by asking and honestly answering some basic questions such as:

What is our philosophy of regulations? (Or do we have, or have we ever had one?)

What goals do we have in mind when we regulate?

Will our regulations achieve our desired goals?

Do we have people who can draft regulations that will achieve established goals?

Do we have a process designed to produce goal-oriented regulations?

Those officials who have already thought about a philosophy of regulation could probably begin by agreeing that:

(1) Most major federal domestic policy decisions, whether legislative or executive, are implemented through written regulations.

(2) Regulations, when properly issued, have the full force and effect of laws enacted by the Congress and signed by the President.

(3) Even the best policy decision will be thwarted if the implementing regulations do not work.

(4) Both the making of sound legislative and executive policy decisions and the conversion of those decisions into "regulations that work" require the involvement of highly competent lawyers and other professionals.

Given some such foundation of agreement it should be possible for each federal agency to design a process that will work for that agency. In its design, each agency must consider its own goals, its mandate from the President and the Congress, its staff expertise, and its need for effective public participation in the entire process.

Thus far, this article has merely touched on the background and outlined the overall regulations problem. President Carter has made it clear both that he intends to have this problem addressed and that he desires significant reform to be achieved in the next few years. As the description of the problem indicates, meaningful reform will require the best efforts of thousands of bureaucrats and citizens who are knowledgeable and interested, whether professionally educated or not. Each group must play a role and each group has an important role to play. The remainder of this article will focus on the past role and potential future role of just one group. Lawyers. It will attempt to answer questions such as: How have lawyers contributed to the problem? How can lawyers be a part of the solution to the problem? And more importantly even, why should lawyers want to be a part of the solution?

REGULATIONS LAWYERS

To state that most professionally trained persons who find themselves writing or reviewing government regulations are eager to move on to something "more meaningful," is probably to understate the attitude of most young lawyers assigned to "regulations." People who go to law school want to "practice law." That means that while they may happily take a legal job with the federal government (at least in the current job market), they do so with the expectation that they can do "legal work." And what do they know of legal work? Well, they started with the lay image of what lawyers do that they took with them to law school. And after three years of study by the case method, that image has usually been reinforced. Lawyers argue cases. At the end of a case there may or may not be something called a "rule of law" to be learned for future reference. But there are surely two things. A winner! And a loser! Case law is advocacy law. It lends itself to box scores. A few years ago, a young federal lawyer less than a year after his admission to the bar was asked, "How did your latest 'case' go?" With an obvious glow, he answered "Won it, that makes me seven-zip." The "cases" referred to involved determinations of whether a medical problem was sufficiently serious to affect a person's ability to fly an airplane. The relevant expertise was almost entirely of a medical nature and it is a little hard to picture how the "opposing" lawyers could "win" or "lose" anything. But, no matter, this young man was trying cases, and he was batting one thousand. In short, he was doing what lawyers are trained to do.

Overstatement? Unfair generalization! Wouldn't it be fairer to say that the teaching of analytical skills is primarily what legal training is all about? Maybe. But maybe not. Practically everyone entering law school in the last several decades was admitted because they did reasonably well on the Law School Admissions Test (LSAT). And if they did do fairly well on the LSAT, that means that they already had the basic skills to analyze problems *before* they were admitted. Law school may have taught them how to use their innate talent to analyze legal problems. To what purpose were they taught to analyze legal problems? Why to represent a client or take a position, of course. Lawyers pride themselves on this ability. Give them a position, any position, and they will do the best they can. Oh sure, attorneys may feel that they have been given the weakest side to argue, but they will still muster the best argument they can. And, if after having been assigned the weakest position, they should prevail, well that is really a triumph. That is what lawyering is all about. That is what it means to be an *advocate*.

It may appear that this article has wandered somewhat astray from the announced subject. It has not. Lawyers do not volunteer to become regulations lawyers because they do not understand how they will be able to use their legal skills in an effective and personally rewarding manner. Lawyers feel this way because their primary understanding of the role of the lawyer is that of the lawyer as advocate.

Lawyers can make their way all through law school and well into practice without ever being introduced to the role of the "counselor at law." To understand and effectively perform this role, law students would have to learn that there are thousands of legal decisions that do not involve "winning" or "losing," "right" or "wrong," or "legal" or "non-legal" decisions. They would have to be introduced to the very difficult job of "counseling," of advising a

client who must make a policy decision and who wants to have the best possible legal advice before making that decision. They would have to learn that to give the kind of legal advice the policy maker needs and wants, they will have to learn how to say things like, "Well here are your legal options." "Here are the legal implications of the decision before you." "Here are the practical implications." "Here are the policy implications." "As your counselor, I will outline your legal and practical options and I will make a recommendation if you wish. But, as you know, you are faced with a policy decision and within this legal framework you must make that decision." Decisions that require this kind of legal advice are the kind of decisions that local, state, and federal legislators and administrators as well as business executives make all the time. And what profession makes up the largest percentage of local, state, and federal legislators and a high percentage of administrators and business executives? Lawyers do, of course. Obviously then it is not that legal training is inconsistent with the role of the "policy maker." Rather, it is that law school training does little to help the student understand that "counseling" and "policy advising" if not "policy making" are all legitimate and honorable legal functions.

Is this hypothesis an exaggeration of the inadequacies of the average lawyer when he or she is assigned a job that does not involve advancing or defending a predetermined position? Maybe. But not by much! High level government counsel have been known to refuse to give an opinion on a policy decision, saying, "Don't ask me unless you want to know whether or not it's legal." Much to be preferred is the attitude of the counsel who, when told that his opinion wasn't being asked for, that he was to stick to answering "legal questions," stated, "Look, this is a dumb idea. As your counselor, I think I owe it to you to tell you that it is a dumb idea and why it is, even if it is legal. I don't think you want me to sit here silently and when it blows up in your face claim that all you asked me was whether it was legal. Of course, once I tell you what I think legally and otherwise, you are free to act as you choose."

But not all lawyers see this as their proper role. A former general counsel of a federal agency recently wrote that "The most important function that the general counsel . . . has is to protect the head of the department or agency from the 'tide'", which he defined to be "that body of thinking that is continually being developed by the so-called 'experts' and so-called 'brilliant minds' in the departments and agencies of the Government." He argued that the general counsel must stand up to an "erroneous tide" even though it might mean bucking all of the "experts" and "brilliant minds."

This former general counsel painted a picture in which the "lawyer" is the *last hurdle* to be surmounted by a "tide" that has otherwise swept cleanly through an agency. Unfortunately, this is exactly the role that many government lawyers play, and it is not surprising that it results in a negative image for agency counsel. If all of the "experts and brilliant minds" have had their go at an idea without the benefit of legal counsel until after the idea has become a "tide," a general counsel's cautions, no matter how well founded, will not be received enthusiastically. Counsel must be involved throughout the process and must serve as a "counselor" throughout the process. Sitting back, while others make bad judgments and mistakes and then pointing them out just when a "tide" is about to break, does not work. All it does is increase the negative image that already exists in too many federal agencies, where lawyers

are looked on as merely an initial block on a grid sheet that must be filled in or as a roadblock that must be overcome at the end of the decision making chain. Any general counsel who wants to be effective must work to shift the image and function of his or her staff away from that of a destroyer of the work of others to one of a contributor to the building of a policy that will endure because it achieves its purpose. To achieve this kind of positive image, the general counsel needs to be a counselor at law and needs to have a staff of attorneys who know how to counsel.

WHY LAWYERS ARE POOR DRAFTERS

If law schools have been doing such a lousy job of training "counselors," and if this kind of training is essential, how does one deny the fact that a large percentage of our local, state, and federal laws, whether of the statute or regulation variety, are in fact written or approved by lawyers, or both? The answer is that one does not deny this fact. One admits it and then concludes that just maybe the lawyers are the main problem. Most regulations are written or reviewed by lawyers who think like advocacy lawyers. That is, by lawyers who have learned law by the case method and who think in case terms. That is, in terms of winners and losers.

Let's view this problem primarily in terms of the kind of federal regulations that have increasingly been the subject of public criticism. As mentioned previously, virtually every candidate for federal office in 1976 ran "against" the voluminous, dumb, unclear federal regulations. How could regulations that are written by lawyers or reviewed by lawyers, or both, be so bad? The reasons are several. The first is that despite their above average educational level, lawyers are not trained to write. And even those few that do know how to write well rarely write clear, succinct regulations. Why not? Primarily because they do not write regulations from the perspective of someone who knows who the audience is and who attempts to communicate with that audience. Rather, they write regulations that "are enforceable." Because of their case study, litigation orientation, they think in terms of what happens when regulations are violated. The answer, of course, is that they must be enforced. And to be enforced they must be enforceable. So for the average "lawyer drafter," and "lawyer reviewer," the most important measure of any regulation is its enforceability. And the more airtight a regulation, the more enforceable it is. This has been the case for many years, but for most of those years it was not a major problem because the federal government was in the business of writing regulations that primarily affected big business. Thus, the fact that most regulations were unintelligible to the average citizen was unimportant.

A story is told about two young men who went up for a ride in a hot-air balloon and who got lost in the clouds. After drifting around for some time, they were relieved to suddenly break through the clouds and find themselves only 30 or 40 feet off the ground. But they were way out in the country and had no idea where they were. Fortunately, they spotted a man walking along on the ground below them. They quickly got his attention and one of them yelled down to him, "Can you tell us where we are?" The man looked up and said, "Yes, you are in a hot-air balloon." One of the men in the balloon turned to his companion and said, "Isn't that just our luck? The first person we see has to be a lawyer." The other responded, "How do you know that?" and the first one said, "Well, didn't you hear that answer - absolutely accurate

but totally useless.”

The problem with many federal regulations (and many other legal documents) is that for the very people to whom they are directed they are totally useless because they have been crafted by lawyers whose main goal was to make sure they were absolutely accurate.

DO REGULATIONS REALLY AFFECT THE PUBLIC?

For many years lawyers (and also technical experts to whom federal regulations may be understandable) could argue with some validity that most regulations were not, and could not be, aimed at the average citizen. If regulations on how to build jet aircraft for commercial airlines are complex and complicated, few people are likely to complain. In the first place, these regulations are largely written by aerospace engineers or lawyer/engineer teams, and are written for aerospace engineers. If the technical experts at Boeing, Lockheed, and Douglas understand the regulations, then virtually the entire audience outside the federal government that is interested understands. And if to make this type of regulation “air tight” it is necessary to make them complex and difficult to understand, who is likely to quarrel? After all, when dealing with the safety of upwards of 100 passengers per planeload, safety and virtually 100 percent safety is far more important than whether the average citizen understands them.

But, starting in 1966, Congress began to delegate to Executive Branch agencies the authority to issue a different kind of regulation. Under the Environmental Protection Act and Occupational Safety and Health Acts (1969, 1970), regulations have been issued that affect small businesses throughout the country. Yet, these regulations are as complex as any ever written.

In 1974, Congress passed the Privacy Act with strong Presidential support. Under this act, each federal agency was required to issue regulations to tell the public what their rights are under the act with respect to any records kept by that agency. Typically, an agency's regulations began with a section that reads as follows:

To the extent that portions of systems of records described in notices of governmentwide systems of records published by the Civil Service Commission are identified by those notices as being subject to the management of an officer of this agency, or an officer of this agency is designated as the official to contact for information, access or contest of those records, individual requests for access to those records, requests for their amendment, and review of denials of requests for amendment shall be in accordance with the provisions of 5 CFR part 297, subpart A, section 297.101, *et seq.*, as promulgated by the Civil Service Commission.

And for most agencies, what followed thereafter was, if anything, probably worse.

Grant regulations that determine the distribution of billions of federal dollars have driven potential recipients to distraction. Having a Ph.D. in the subject area involved is no guarantee that an educator, for example, will be able to fathom the regulations that govern the distribution of federal education dollars.

Examples abound. For many years the Federal Communications Commission (FCC) has had regulations to govern the use of CB radios. These regulations

were written in the same style as most federal regulations, which means that they would be virtually meaningless to the average CB operator. Recently, the FCC decided to do something about this problem. The commission issued a new set of regulations¹ rewritten to reach the intended audience. A before and after example follows:

BEFORE

§95.465 Operation by, or on behalf of, persons other than the licensee.

(a) Transmitters authorized in this service must be under the control of the licensee at all times. A licensee shall not transfer, assign, or dispose of, in any manner, directly or indirectly, the operating authority under his station license, and shall be responsible for the proper operation of all units of the station.

AFTER

CB Rule 27 Who Is Responsible For Transmissions Made Under The Authority Of My License?

You are responsible for all transmissions which are made by you or others under the authority of your license, including transmissions which are against these rules. Because you are responsible for all transmissions, you should be certain that anyone operating under your license understands and obeys the rules.

THE CARTER ADMINISTRATION'S PROGRAM

President Carter has since his inauguration repeatedly addressed the problem of federal regulations. He has made it clear that he wants new regulations to be issued only when they address a real problem and only when they speak clearly to the people affected by them. He wants each federal agency to set up a program to review its present regulations. He wants obsolete regulations eliminated and unclear regulations restated in plain English. He has indicated the seriousness of his intent by issuing Executive Order 12044 directing federal agencies to work toward these goals.² For the first time in history, President Carter sought public comment before issuing the final Executive Order. The President certainly appears to be serious. But valid questions remain. Can his stated goals be achieved? And if they can, do they apply only to federal regulations? What about legislation – at the federal, state, and local level?

The stated Presidential goals are achievable but they will not happen overnight nor will they happen without a lot of work. As previously stated, most present regulations were written by people who neither asked for, nor were trained for the job. Thus, training of the drafters is one priority. But training of drafters alone is not enough. There must also be training of the policy makers. Policy makers must realize that as federal administrators a high percent of their policy decisions must be implemented through regulations. They must understand that the best policy decision will not work if the implementing regulations do not work. This means that high level policy makers may no longer content themselves with "making policy" and leaving the job of "getting out the regulations" to lower level employees who are ill trained and ill chosen for the job.

During his first month in office, President Carter took a lot of heat from what critics labeled a totally impractical request – that his Cabinet level officials read the regulations put before them before they sign them. Together with this, the President requested that the drafter be identified. It soon became clear that Cabinet officers could not in the long run comply with the President's request unless they were relieved of all other duties and spent 20 out of every

1. 43 Fed. Reg. 13,975 (Apr. 3, 1978).
2. 43 Fed. Reg. 12,659 (Mar. 24, 1978). *See also*: Improving Government Regulations: The President's Remarks on Signing Executive Order 12044, 14 Weekly Comp. of Pres. Doc. 556 (Mar. 23, 1978); Improving Government Regulations: Statement on Executive Order 12044, *id.* at 561; Improving Government Regulations: Memorandum From the President for the Heads of Executive Departments and Agencies, *id.* at 562; Improving Government Regulations: Letter to the Heads of Independent Regulatory Agencies, *id.* at 563.

24 hours reading regulations. But within a few weeks the President's request had a significant effect on the regulatory climate in Washington. The reason why is because the President had put his finger on an anomaly that had existed for many years. Traditionally, regulations were *signed* by officials who had not read them. The signer usually read a brief covering memo describing the regulations in very general terms. And *quite often the only person within an agency who had read the regulations from front to back was the anonymous non-policymaking drafter*. The President's request turned this practice on its head. The official who was to sign the document was asked to read it in full and the drafter was named. That the first part of this practice lasted only a few weeks is not an indication of its failing. As President Carter stated, it was not necessary for Cabinet level officials to spend more than a few weekends reading "their" regulations to get a pretty good idea of the problem that was generating complaints from throughout the country.

The stage is now set for significant drafting reform. If this reform is to be more than a passing fancy, a number of things must happen. Policy makers must take a continuing interest in their regulations. This means that they must make certain that the regulatory process within their agency works. For the process to work, it must be a planned, well thought out process. It must ensure that technical experts, policy makers, lawyers and any other relevant group (such as the affected public), within and without the agency, all have an opportunity for meaningful participation in the process. This means, of course, that policy makers must understand the process involved. They must realize that it is a legislative/policy making process, and they must not allow the lawyers, whether within the agency or without, to turn that process into an adjudicatory one.

Citizens frequently complain about the pace of Congressional action. But no one has ever suggested that reform could be achieved by applying to Congress the attributes of the judicial process. That the judicial process does not lend itself to making the legislative-like policy decisions in an efficient manner would appear to be so fundamental as not to need stating. Unfortunately, it is not. Since, as previously stated, lawyers like to adjudicate, they will, given an opportunity, turn any proceeding, no matter how policy oriented, into a trial. Lawyers outside of government will do this, arguing in all good faith that due process for their client requires it. "How can I protect the interests of my client if I cannot cross examine the government's witnesses?" And government attorneys with equal fervor and justification will play the same game. After all, they like to cross examine, too - so they will demand an opportunity to "prove" their case and then to get at those outside witnesses who question that case. The lawyers within the Federal Trade Commission and those that practice before it have already made a mess of the so-called "hybrid" rulemaking procedures under Title II of the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act (P.L. 93-637). At the rate they are going, attorneys, within and without the FTC, will make the Food and Drug Administration's infamous peanut butter proceeding, which took more than nine years, appear a model of efficiency.

Does this indicate bad faith on the part of attorneys, ignorance, or other causes? Undoubtedly the answer is that there are a number of causes. Ignorance clearly is one of them, and may well be the primary cause. Few law school graduates, for that matter few law professors, have a clear understanding of the basic difference between adjudication and rulemaking. And yet, the difference

is fundamental and not all that difficult to comprehend.

When a federal administrator must make policy decisions, that administrator desires all of the relevant information he or she can get. But that administrator is rarely helped by the kind of judicial proceeding that involves sworn witnesses, cross-examination, etc., that serve us well in the criminal field. Lawyers must either learn how to function effectively in the legislative-like rule making arena or they will find themselves excluded altogether on the legitimate ground that their presence serves only to gum up the works.

Policy decisions are rarely all right or all wrong. Yet, if our society is to function, policy decisions must be made. Thus, a certain amount of regulation is needed. Lawyers cannot be allowed to foul up the works by introducing formal legal proceedings when they are totally inappropriate.

Nor can lawyers or any other group continue to write the very rules which govern our own day-to-day activities in a language that virtually no one can understand.

Would the avoidance of adjudicatory type proceedings for legislative decisions put a lot of attorneys out of work? Frankly, I doubt it. But there is no way to know for sure until it is given a fair try. Presently many federal attorneys play a very small role in the rulemaking process. Sometimes this is because the agency has learned from sad past experience that to achieve any efficiency, they must keep the lawyers out as much as possible. This is too bad because often agencies make mistakes that well trained lawyers could help them avoid. And, in fact, well trained lawyers who understand and who are interested in the rulemaking process would enhance and not hinder that process. But unfortunately there are not enough lawyers with these qualifications around. Given the kind of enforcement-, litigation-oriented, "win/lose" lawyers populating many government agencies, it is not difficult to understand why many program people do their best to "keep the lawyers out."

Of course, if lawyers ever learned what the rulemaking process was all about, they might find it quite interesting. They might find that they could perform the kind of counselor role that would make them a real and wanted member of their agency's policy making team. They might even find themselves invited in at the earliest stages of policy making when they can really make a contribution. They might make themselves indispensable to that process as a contributor to successful policy decisions that can be implemented through clear, concise regulations.

It is no accident that when dealing with the legal profession and with legal instruments, the public often feels like Alice in Wonderland. In explaining the rule about jam to Alice, the Queen of Hearts said "The rule is jam tomorrow and jam yesterday, but never jam today." "It must come sometimes to jam today," Alice objected. "No, it can't," said the Queen, "It's jam every other day. Today isn't any other day."

It is time that lawyers stopped hiding behind the Queen's logic or illogic. If the rule is "no jam, at all, ever," then we should say so. The public may not like the rule. They might seek to have it changed. But in the meantime they could at least understand it.

CONCLUSION

President Carter has since his inauguration repeatedly addressed the problem of unclear and unnecessary federal regulations. The President has made it

clear that he desires significant reform to be achieved in the next few years. He has indicated the seriousness of his intent by doing something that no President has ever done before, that is by giving the public an opportunity to comment on a draft Executive Order before issuing it in final form. Thus, the stage is set for significant reform. As the description of the problem indicates, meaningful reform will require the best efforts of thousands of bureaucrats and citizens who are knowledgeable and interested, whether professionally educated or not. Each group must play a role and each group has an important role to play. Lawyers, in particular, will have to make a major contribution if there is to be reform. In order to play their part, lawyers must learn how to function effectively in the rule-making arena. That means they must learn more about the informal rule-making process. They must learn more about the role of the government lawyer as counselor and about writing regulations that communicate policy to the public through the use of plain English and good drafting techniques. Lawyers who can think only in trial-like "win/lose" terms will find it difficult to learn this role and to make a contribution to significant and meaningful reform. If lawyers do not make that contribution, the American public will be a loser but lawyers as a group will lose even more.