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COMMENTARY

**An Obscure Object Of Desire:
Minimizing the
Information Reporting Burden**

George P. Smith II*

We have also proposed abolishing almost 500 Federal advisory and other commissions and boards. . . . I know that the American people are still sick and tired of Federal paperwork and redtape. Bit by bit we are chopping down the thicket of unnecessary Federal regulations by which Government too often interferes in our personal business. We've cut the public's Federal paperwork load by more than 12 percent in less than a year. And we are not through cutting.

President Carter,
The State of the Union Address
14 Pres. Documents 90, 94
(Jan. 23, 1978, No. 3)

Last winter, President Carter—in a fireside chat from the White House—assured his listening and viewing audience that, “We will cut down on Government regulations . . . and we will make sure that those that are written are in plain English for a change.”¹ On March 23, 1978, he signed Executive Order 12044 entitled, “Improving Government Regulations” which was designed to stoke the fires of his earlier chat² and thereby make “Federal regulations clearer, less burdensome, and more cost-effective,”³ and written in such a plain English

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¹TIME, Jan. 16, 1978, at 60. See generally, Kathy Sawyer, “Carter Asks Sweeping Civil Service Changes—Plan Aimed at Making Government Responsive,” The Wash. Post, Mar 3, 1978, at 1, cols. 1-2.

See also, Stuart Auerbach, “Why Can't Lawyers Talk Like Us?,” The Wash. Post, Jan. 15, 1978, § B1, col. 1.

²14 Pres. Documents 556 *et seq.* (Mar. 27, 1978, No. 2).

³*Id.* at 561.

style as to allow the average small businessman to understand them.⁴ More specifically, the Order seeks to encourage broader public involvement by requiring departments and agencies to issue "early warnings" of new and significant regulatory activities being considered. To facilitate public input, the warning announcement must contain both the name and the telephone number of a specific official responsible in the area who can respond to public inquiries about pending regulations.⁵ The Order also requires that whenever a regulation will have a major economic consequence (i.e., result in an annual effect on the economy of \$100 million or more or a major increase in costs or prices for individual industries, levels of government or geographic regions) the agency will conduct a basic cost-effectiveness analysis designed to impose only minimum economic burdens on the private sector of the economy.⁶

The broad context of the problem of improving government efficiency in administrative decision making activities had been recognized by the 93rd Congress in its action creating a Commission on Federal Paperwork whose mandate was to study ways to allow the federal government "to minimize the information reporting burden."⁷ Yet, even before this effort, Congress created the Administrative Conference of the United States to develop improvements in legal procedures followed by federal agencies in their administrative and regulatory law making functions.⁸ Indeed, the Conference has shown itself to be a strong partner in promoting efforts designed to refine and strengthen the overall operations of the administrative process at the federal level. In fact, a ready conclusion which may emerge from the following analysis is that the Congress might have been well advised to entrust its study of federal commission paperwork to the Administrative Con-

⁴*Id.* at 562.

⁵*Id.*

⁶*Id.*

⁷Pub. L. No. 93-556, 88 Stat. 1789 (codified at 44 U.S.C. § 3501 (Supp. 1976)). Interestingly, the Government Accounting Office issued a report drawing on Bureau of Labor Statistics which revealed while industrial productivity increased at a low average of 1.6% during the past 10 years, the increase among federal employees for the same period averaged 1.2%. The GAO expressed the opinion that it was essential that production levels be increased significantly in both the federal and the private sectors—with government assuming a leadership role. See J. Young, "GAO Says the Government Lags Behind Industry in Work Productivity," *The Wash. Star*, June 2, 1978, § B-2, col. 1.

⁸The Administrative Conference was established in 1964 and activated in January, 1968. See 5 U.S.C. § 571-576 (Supp. 1977). See generally, *RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES* (1971), (1973), (1975).

ference and thereby save a considerable amount of money and paperwork at the outset.

The purpose, then, of this brief comment is to evaluate the work product of the Commission on Federal Paperwork and by so doing probe the persistent and vexatious conundrum of administrative efficiency at the federal level of the decisionmaking process. I shall also probe the effect that the report and its implementation will have on administrative law-making.

I.

The Commission on Federal Paperwork was created to bring a renewed effort to the continuing study and evaluation of both "the policies and procedures of the Federal Government which have an impact on the paperwork burden for the purpose of ascertaining what changes are necessary and desirable in its information policies and practices."⁹ Within two years from the date of its first meeting, the Com-

⁹44 U.S.C. § 3501 (Supp. 1976).

Sec. 3(a) The Commission shall study and investigate statutes, policies, rules, regulations, procedures, and practices of the Federal Government relating to information gathering, processing, and dissemination, and the management and control of these information activities. The Commission shall consider—

(1) the nature and extent of current Federal requirements for information from other public and private entities;

(2) the effect of existing statutes on the information requirements of the Federal Government and authorities of existing Federal agencies to collect information;

(3) the nature and extent of management and control over the determination of Federal information needs and the choice of information gathering, processing, and dissemination methods;

(4) the nature and extent to which Federal agencies cooperate with State and local governments and private agencies in collecting, processing, and disseminating information;

(5) the procedures used and the extent to which considerations of economy and efficiency impact upon Federal information activities, particularly as these matters relate to costs burdening the Federal Government and providers of information;

(6) the ways in which policies and practices relating to the maintenance of confidentiality of information impact upon Federal information activities; and

(7) such other matters as the Commission may decide affect Federal reporting requirements.

(b) The Commission shall ascertain what changes are possible and desirable in existing statutes, policies, rules, regulations, procedures, and practices relating to Federal information activities in order to—

(1) assure that necessary information is made available to Federal officials and those acting on behalf of Federal officials;

(2) minimize the burden imposed by Federal reporting requirements on private citizens, recipients of Federal assistance, businesses, governmental contractors and State and local governments;

mission was charged with the responsibility of making its final report. Its existence ceased one-hundred twenty days after submission of the report. It thereby became one of the shortest-lived administrative agencies in the history of federal administrative law.¹⁰

On October 3, 1977, the Final Summary Report of the Commission on Federal Paperwork was submitted to Congress.¹¹ A tightly organized document, the Report consists of some sixty-seven pages—complete with impressive statistical information. Some eighteen program study areas were evaluated. These studies considered both paperwork and information management problems arising as a consequence of specific legislation or from broad governmental activities.¹² Three basic recommendations, however, provide an agenda for future reform.

Before an analysis of these three principal Recommendations is undertaken, one rather astonishing statistic which points up the gravity of the situation must be noted: best estimates of the total costs of Federal paperwork can be set at more than \$100 billion a year—or some \$500.00 for each person in the country.¹³

II.

The Paperwork Commission identified unnecessary paperwork as symptomatic of a much larger and more pervasive problem; namely,

(3) guarantee appropriate standards of confidentiality for information held by private citizens or the Federal Government, and the release thereof;

(4) provide that information held by the Federal Government is processed and disseminated to maximize its usefulness to all Federal agencies and the public;

(5) reduce the duplication of information collected by the Federal Government and by State and local governments and other collectors of information; and

(6) reduce the costs of Federal paperwork.

¹⁰The Office of Management and Budget is charged with a duty to formulate the views of the executive agencies on the Commission's recommendations, to implement the recommendations of the Commission when they are in conformance with OMB policy and propose legislation which is determined necessary to effectuate the Commission's recommendations—again, when such recommendations are determined to be in conformance with OMB policy. Finally, the OMB is directed to submit a final report of its efforts in this respect within two years. 44 U.S.C. § 3501 (Supp. 1976).

¹¹A REPORT OF THE COMMISSION ON FEDERAL PAPERWORK: FINAL SUMMARY REPORT (Oct. 3, 1977).

¹²The program areas studied were: consumer credit protection; education; employment and training; energy; environment and impact statements; equal employment opportunity; health programs; housing; occupational safety and health; pension reform; procurement; public works; segmented financial reporting; small business loans; social services; statistics; taxation; welfare administration reform.

Thirteen process studies focused upon fundamental institutional reforms which cut across organizational boundaries and were not limited by specific program legislation. And—finally—impact studies were undertaken as a response to various individual citizens, organized labor and business concerns.

¹³*Supra* note 11, at 5.

confusing organization. A confused administrative organization model promotes, in turn, confused, improper and inefficient management practices of line and staff and equally improper informational flow processes. In order to combat this rampant confusion, a new philosophy is needed; and this philosophy has been termed, "Service Management"¹⁴—which in turn forms the very nucleus of the Second Recommendation made by the Commission.

Service Management involves developing and promoting a basic shift in perspective to compel the federal official to examine the *consequences* of legislative as well as administrative action for those who are directly affected by such actions. In order to make Service Management a viable concept, a set of rather ill-defined analytic tools and techniques is called for to "shape the distribution of rights, obligations, benefits and burdens" for future program design and administration.¹⁵

The principle of Service Management appears to be nothing more than a statement of a "given" in legislative and administrative decision-making. The average lawmaker, either at the congressional or the administrative level, is normally *aware* of the *consequences* of any decision that is made. Inter-agency and intra-agency comment, together with public hearings, ensure the decisionmaker a full opportunity to be apprised of the consequences of alternative modes of decisionmaking. Perhaps a more direct inquiry would be whether, over the course of time, the decisionmakers have become desensitized or immunized to the continuing need to evaluate and re-evaluate the public perception of important issues that demand reconsideration on a timely basis. One must surely question the open-ended purpose of Service Management and whether the term, itself, is but artful administrative jargon.

Interestingly, the task of implementing the principle of Service Management by attitudinal changes is at the very center of the total program initiative suggested by the Paperwork Commission. As a consequence of this pivotal linkage, the ultimate worth or utility of the Commission's recommendations are, of necessity, brought into question.

The First Recommendation of the Commission calls for a change in the existing federal organizational structure by "consolidating the central administrative function of government into a Department of Administration with cabinet level status."¹⁶ It is certainly distressing to learn that while President Carter is seeking, through his plan for

¹⁴*Id.* at 2.

¹⁵*Id.*

¹⁶*Id.* at 19.

re-organization, to abolish "almost 500 Federal advisory and other commissions and boards," the Paperwork Commission advocates creating yet a new super agency. This recommendation follows the predictable bureaucratic mind-set: namely, when in doubt, create another agency. The capability for resolving individual bureaucratic problems is to be found within the troubled agency *itself*—and certainly not within the halls and filing cabinets of yet another administrative bureaucracy.

The Third and final Commission Recommendation calls for a new spirit of leadership from national leaders in both the public and private sectors to "expand the attack on excessive and unnecessary paperwork with new initiatives."¹⁷ With three such ill-defined and vague Recommendations one can surely ask whether the Commission affirmed the congressional purpose of its enabling legislation "that it is the policy of the Federal Government to minimize the information reporting burden,"¹⁸—or whether the Commission is guilty of perpetrating a fraud on the beleaguered taxpayers by carrying out a relatively meaningless and costly study.

III.

Education, or re-education is the key to any successful venture in attacking the problem of inefficiency—no matter whether it is to be found in the public or private sector of the economy. Forced learning under the guise of President Carter's Executive Order 12044, "Improving Government Regulations," is a solid, positive approach to problem resolution in this area. But, the Executive Order and the Recommendations of the Commission on Federal Paperwork can go only so far. Similarly, self evaluation studies by administrative agencies and sophisticated out-of-house operations such as the Administrative Conference on the United States—although important—fall short of the goal of improvement. In order to shift a perspective, a spirit of renewal and self improvement or awareness must be charted. Regrettably, all too many federal employees in the mid-decisional level of the organization management chart are complacent and bored with their positions. They are guilty of mind-set and are totally unresponsive to innovation.¹⁹ There must be a continuous flow of ideas and spirit to and from all levels of the administrative decisionmaking organization to promote a partnership of interest and co-operative action.

¹⁷*Id.* at 22, 23.

¹⁸44 U.S.C. § 3501 (Supp. 1976).

¹⁹See generally, Miller, "Bureaucracy Baiting," *THE AMERICAN SCHOLAR* 205 (Spring 1978).

Inextricably related to the need to shape new perspectives is the need to teach—at least for the lawyer—and guide the development of appropriate writing styles, devoid of burdensome and confusing legalese. Efforts must be made early in one's legal training in law school to assist him to first recognize, and then to pursue, good analytic and concise legal writing styles.²⁰ Internal consistency of terminology, expression and word arrangement are the end result.²¹ Legal writing and legal drafting are so inextricably related that it is exceedingly difficult to distinguish the two areas for separate consideration.²² It is rather obvious that one must first know how to write effectively before approaching any drafting problem. Reducing the various broad principles of legal drafting to a common core was undertaken by the American Bar Foundation with modest success in 1965.²³ It remains for teams of specialists in the areas of regulatory law to write a set of coordinated texts covering the peculiarities of those fields.

The work of the Federal Paperwork Commission is not necessarily to be discounted as an exercise in futility; for if it but serves as a medium of educating concerned public servants to the cost and counter-productivity (indeed, waste) of thoughtless, unprogrammed exercises, it will have realized an important purpose. *Awareness*, then, is the watchword for initial advancement in this area of management.

²⁰The books used in legal writing courses taught in law schools are not of uniform quality. The strongest books would include: R. COOK, *LEGAL DRAFTING* (Rev. ed. 1951); F. E. COOPER, *WRITING IN LAW PRACTICE* (1963); R. DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* (1965); E. D. RE., *BRIEF WRITING AND ORAL ARGUMENT* (4th ed. 1974); W. P. STASKY, R. J. WERNET, JR., *CASE ANALYSIS AND FUNDAMENTALS OF LEGAL WRITING* (1977).

See generally, A. D. VANNOSTRAND, C. H. KNOBLAUCH, P. J. MCGUIRE, J. PETTIGREW, *FUNCTIONAL WRITING* (1978). A far too simplistic and degradingly mechanical treatment of legal writing is to be found in H. WEIHOFEN, *LEGAL WRITING STYLE* (1961).

²¹Smith, Review, *Fundamentals of Legal Drafting*, 64 MICH. L. REV. 767, 768 (1966).

²²*Id.*

²³The Foundation commissioned Professor Dickerson to undertake this project which resulted in his publication of *FUNDAMENTALS OF LEGAL DRAFTING* (1966); *see generally*, R. DICKERSON, *PROFESSIONALIZING LEGISLATIVE DRAFTING* (1973).

