



U.S. Department of Justice
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Counselor to the Attorney General 11/19/81

TO: Hank Habicht
Carolyn Kuhl
John Roberts
Bruce Fein

FROM: Ken Starr

For your comments.

The era of deregulation and budget cuts is upon us, and cries of wolf abound. Fears are spreading in some circles that even if one remains un-RIFed, one's job as a government lawyer-regulator will be a mere shell of what was once a booming public law practice.

The concerns are, I believe, overdrawn. Regulation ^{of private enterprise} is here to stay. ~~Regulation is now and will remain in the age of deregulation a vital part of the constructive services to be rendered by the federal government.~~ What we in government service are experiencing is ~~therefore~~ not a return to the days of old -- of nonregulation. Instead, we are participating in a systematic effort to curb what is uniformly viewed to have been federal regulatory excess, with highly undesirable economic consequences ^{having} ~~attaching~~ to the imposition of needless or ill-conceived regulatory constraints. ~~In fact,~~ ^S strong bipartisan support has existed for some time ~~now~~ both for deregulation and for imposing real controls over the rapid growth in federal spending. Both sides of the political aisle are committed to the principle that, in the wake of the regulatory zeal of the past and the demonstrable inflationary results of those regulatory excesses, deregulation is an important weapon to help bring about, as few economic policy tools can, a reduction both in inflation and in unemployment.

The question before us is whether there is another side of the deregulatory coin that hits closer to home -- that

At the very least, the dramatic growth in the number of attorneys in the Executive Branch -- from 10,547 in 1970 to 17,068 in 1980, has ~~not~~ ^{will} ~~not~~ ^{likely} abated, ~~stopped~~

with the unleashing of competition in the marketplace and the curbing of regulatory zeal in the government, government law practice will become a no-growth victim of deregulation.

In one sense, the answer is yes. While regulation is forever with us, the era of deregulation and ~~budget cuts~~ ^{budget cuts} necessarily means fewer opportunities -- at least in sheer numbers -- for government lawyers of the future. Curbs in spending, particularly with respect to the funding of government operations, will ^(similarly) mean as a general rule fewer jobs in future years. ~~The total number of lawyers in government service will, over the next several years, likely remain stable or perhaps decline somewhat.~~

But that is not the only perspective. While the raw numbers of ~~opportunities~~ ^{lawyer slots} may shrink, the professional opportunities within government law practice are greatly enhanced in the era of deregulation. As quantity declines, the quality is going to increase.

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^{More broadly, Reagan}
As the Administration introduces greater rationality in the regulatory process, through such vehicles as Executive Order 12291 and the work of the President's Task Force on Regulatory ~~Reform~~ ^{Relief}, government lawyers are ~~now being put to~~ ^{face} more demanding and ~~creative~~ ^{existing} challenges than before. With the requirement embodied in the Executive Order that, unless otherwise prohibited by law, regulations be subjected to an exacting cost-benefit analysis, the government lawyer will now be put to a more rigorous, lawyerlike task of justification ~~than ever before.~~ In the good old days, which

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really were not so good, the government lawyer could rely upon the traditional rationale that the department or agency ^{was} ~~is~~ the expert, that it had regulated in that fashion since ^{the} ~~the~~ ^{creation} ~~days~~ of Franklin Roosevelt, and that ^{the} ~~that~~ regulation ^{was} ~~is~~ legally unassailable as long as the agency, with its presumed expertise, ^{could} ~~can~~ explain it and had abided by minimal procedural formalities.

Now the challenge is to produce better, more ^{sensible} ~~justifiable~~ regulations. This means that greater creativity will be required on the part of government lawyers (as well as private practitioners) to fashion ^{and administer} ~~regulatory~~ patterns that make sense. Blunderbuss regulation -- like the suggestion for ^{warning for warning that other water in a bar} ~~putting warnings on shoes to the effect that~~ ^{that shoes may not fit right} ~~the shoes may not fit right~~ -- simply does not lend itself to ~~creative~~ innovative lawyering. To the contrary, the ease of justification under the traditional system tended to result in the regulators ^{not} ~~even~~ understanding, or at least giving the appearance of not understanding, the workings of the industry being subjected to the regulation. Ease of regulatory justification encouraged slipshod regulatory work, with rationales that were long on policy and short on hardnosed practicality.

In a word, the government lawyer cannot get away any longer with the reasonable exercise of discretion, without more. Now the government lawyer must start making the case. That's a positive development.

What this may mean over the long haul is as unclear as ~~anything else over the long haul~~, save for Keynes' maxim about the certainty that lies ahead in the long run. But to hazard a prediction, lawyers whose ~~creative~~^{abilities} powers are now to be genuinely tested will become better lawyers, and will likely be as attractive -- and indeed more necessary than ever -- to the private sector upon walking through to the other side of the revolving door.

The cadre of government lawyers may therefore stabilize or even decline in size. But the government will need, now more than ever, skilled attorneys to carry out more demanding lawyering activities. That should result in the government's being more attractive, not less so, as a place for genuinely useful public service. And it should make the process of government lawyering more interesting, and more ~~fun~~^{challenging}, than ever before.