Perspectives
on current developments

Private Schools, Tax Exemption, and the IRS

In the cloud of dust produced by the heavy feet of executive and legislative officials running for cover, some of the facts in the controversy over tax exemptions for private schools have been obscured. Regardless of its outcome, it is an interesting case study in the development of law through the interplay among Congress, the executive, and the courts. And if you think the problems will be settled by Congress's mere failure to enact any new legislation and the Internal Revenue Service's return to its prior interpretation of the law—then you probably have dust in your eyes.

The story begins in 1969, when a group of lawyers filed a class action suit in the United States District Court for the District of Columbia on behalf of black parents and students from Mississippi to enjoin the Internal Revenue Service from granting tax exemptions to private schools in that state suspected of racial discrimination. That suit, *Green* v. *Connally*, was initially contested by the IRS—not least of all because established law denied the plaintiffs' standing. In 1970, however, the service changed its position and took the plaintiffs' side on the general point at issue. It announced that henceforth it would require schools to certify that they did not discriminate on racial grounds; beyond that, it promised no specific procedures for enforcing its new policy. The plaintiffs, however, were not content with such generalities and pressed for a more sweeping remedy. A three-judge district court in the District of Columbia agreed with them. It enjoined the service from granting exemptions to the Mississippi schools unless they not only certified that their operations were not discriminatory, but also conducted publicity and recruitment campaigns aimed at black students and reported to the IRS on the results. The IRS acquiesced in these strictures in Mississippi but continued to follow a self-certification policy elsewhere in the nation.

The district court in *Green* based its decision not on the Constitution or federal civil rights laws, but on the Internal Revenue Code. Section 501(c)(3) of the code provides exemptions for organizations "operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." No one denied that the Mississippi schools were "educational," but the court took the novel position that they had to be "charitable" *as well.* After that leap, it was only a few skips to the proposition (drawing on the common law of charitable trusts) that no organization violating public policy could be considered charitable, to the proposition that racial discrimination violates public policy, and to the conclusion that private educational institutions that discriminate by race cannot claim the benefit of section 501(c)(3).

Although the IRS was perfectly happy with its new powers, the district court's decision did not go unchallenged. A group of white intervenors appealed to the Supreme Court, which affirmed it in 1971. Since, however, the affirmance was not accompanied by an opinion, the basis for the Court's action was unclear. The effect of the affirmance was further diminished by the Court's gratuitous observation in a later case that since the IRS had "reversed its position while the case was on appeal . . . the Court's affirmance in *Green* lacks the precedential weight of a case involving a truly adversary controversy." Since then, the D.C. circuit has affirmed the holding of *Green* (without opinion), as has the Fourth Circuit in the two cases now on appeal before the Supreme Court.

The issue of the meaning of section 501(c)(3) is further confused by later congressional action. In 1976, for example, Congress enacted a provision denying tax exemptions to social clubs that discriminate by race. On the face of things, this would suggest a congressional be-

lief that racial discrimination will not destroy an otherwise available exemption unless the law is amended to that effect. The legislative history, however, indicates that Congress assumed the *Green* decision to be law with respect to private schools. Or perhaps it indicates only that Congress accepted the permissibility, though not the inevitability, of the IRS's applying the statute in that fashion. Or that Congress accepted the fact, but not the correctness, of the *Green* decisions. Leaving such doubts aside for the moment, on with the story:

In 1975 the IRS took the next step. It moved to replace its process of self-certification with a nationwide system of required affirmative action and reporting similar to that imposed in Mississippi. These rules were put into effect without incident. Three years later, the service decided, under legal pressure from civil rights groups, that it needed to shift the burden of proof to the schools themselves. It proposed to supplement its 1975 procedures with a special set of rules for "reviewable schools," which it defined as schools "formed or substantially expanded about the time of desegregation of public schools" and having "an insignificant number of minority students." That definition would include almost all private schools in the South, both religious and secular; the schools set up by refugees from forced busing in the North; and many miscellaneous schools with the misfortune to be founded or expanded at the "wrong" time. If a "reviewable" school did not meet a specified quota of minority students, it would be required to prove its innocence by clear and convincing evidence of extensive minority recruitment and scholarship programs.

With its 1978 proposals, the IRS for the first time encountered significant opposition. The expense of mandated scholarship programs would have bankrupted many of the new schools, especially those run by poorer fundamentalist congregations. Parents condemned what they perceived as interference with their First Amendment rights, and objected to the presumption of guilt attached to their schools. The IRS received 150,000 letters on the proposal, the most in history on any subject.

Congress received a few letters as well. The next year, it curbed the authority of the IRS in the area by attaching two different amendments to the Treasury appropriation bill: one barring the use of funds to implement the 1978 proposals, and a second barring the use of funds "to formulate or carry out any rules, policy, procedure, guideline, regulation, standard, or measure" leading to the loss of tax exemption "unless in effect prior to August 22, 1978." Together, the two amendments seemed to lay the 1978 proposal to rest.

The District of Columbia courts, however, were still open. Two suits were at hand. One was the familiar *Green* v. *Connally* case. This time the plaintiffs had reopened it in order to ask the court to impose the 1978 rules in Mississippi. In the other case, entitled *Wright* v. *Miller*, the plaintiffs were asking the court to impose the 1978 rules everywhere else in the country. It was in fact during the settlement negotiations in these two suits—from which the IRS, incidentally, excluded the representatives of private schools—that the IRS agreed to adopt the 1978 rules. When Congress intervened and the settlement became impossible, the suits naturally proceeded.

The IRS once again proved a cooperative defendant on the issue of substantive law (though it continued to challenge the plaintiffs' standing). Its *Green* brief argued:

> . . . the restrictions in the Appropriations Act place the Service in a serious dilemma. On the one hand, the Service has now concluded that its current procedures and guidelines are inadequate to implement fully the Service's obligation to deny tax exemption to discriminatory private schools. On the other hand, the Service is prevented from implementing new rules in this area because of the Congressional action. Thus, defendants believe that the Congressional action conflicts with Code Section 501(c)(3) as interpreted by the *Green* court and other courts.

It is unclear why later congressional action cannot conflict with earlier congressional action. One would suppose that is what distinguishes preexisting statutes from preexisting constitutions. Nonetheless, the service asked the court to resolve its "dilemma" by "declaring the riders unconstitutional" or by at least interpreting the riders to bar only the implementation of new rules by administrative fiat, and not the execution of new court orders to the same effect.

Ultimately, the District of Columbia Circuit Court of Appeals agreed with the second argu-

ment. On June 18, 1981, a panel of that court held by a 2–1 vote that "the riders . . . do not purport to control judicial dispositions," and remanded the case to the district court so that it could decide whether to impose the 1978 rules. (The case is now on appeal.)

Congress could see a nationwide court order coming, and acted immediately to head it off. On July 30 the House, by a vote of 337–83, added a new rider to the old ones, forbidding the enforcement of *court orders* entered after August 22, 1978. The new rider was approved by the Senate Appropriations Committee, and was made part of the continuing resolution passed at the end of the session. Thus, in a constitutional impasse perhaps unique in American history, the legislative branch has barred the executive branch from carrying out the orders of the judicial branch.

So the regulation of private schools had proceeded through three stages: the 1970 settlement in which the IRS first asserted its power; the 1975 rules in which it imposed affirmative action and reporting requirements on private schools; and the 1978 initiative in which it established racial quota requirements—which, if not met, would shift the burden of proof and impose even greater affirmative action obligations. While the third stage was being thrashed out between the courts and Congress, the first two stages were under challenge too. Bob Jones University and Goldsboro Christian Schools had sued to save their tax exemptions, and had lost in the Fourth Circuit on the basis of *Green*. These cases were decided under the 1975 procedures, and thus did not raise the issue of the 1978 rules and the resulting congressional riders. (On the other hand, they raise some additional issues—such as whether First Amendment religious liberties prevent denial of the exemption and what constitutes "prohibited" discrimination—that will not be pursued here. The issue of First Amendment religious liberty was important enough to provoke *amicus* briefs on behalf of Bob Jones before the Supreme Court from the National Council of Churches and the National Jewish Commission on Law and Public Affairs.)

In the appeal of those cases to the Supreme Court, the government once again changed its position to agree with the plaintiffs—but this time all hell broke loose. And that is where the reader came in.

There is plenty of room for valid criticism of the administration's handling of this matter —perhaps on policy grounds (if total elimination of the ban on tax exemptions for "segregation academies" was really its original intent); and then perhaps on technical grounds (if the IRS's originally announced intention of reversing the regulations was meant to apply even to Mississippi, where there was still an outstanding court order in *Green*); and surely on the grounds that legislation to plug the discrimination loophole left by the abandonment of *Green* should have been part of the original package. But what has been lost in the dust is the fact that the administration's determination to get rid of *Green* is eminently sound, and should have the support of a Congress that purports to be an implacable foe of excessive agency and judicial power.

It seems clear that Congress would vote against tax-exempt status for private schools that discriminate on the basis of race. It also seems clear that the *Green* court, and the IRS, were engaging in an audacious bit of activism when they said Congress had already done so. It was, moreover, a seminal sort of activism, since it opened the tax-exemption section of the Internal Revenue Code to continuing policy making by the IRS and the courts. For if, in order to qualify for the "educational" exemption, an institution must also be "charitable" (and thus comply with all important public policies), then presumably the same condition attaches to all the other exemptions as well, notably the "religious" exemption. And if the public policy against racial discrimination is thus imported into the Internal Revenue Code, then so, presumably, are other public policies that can be identified by the service or the courts. Since, for example, there is a clear public policy against discrimination on the basis of sex, it follows very nicely that private boys' schools or girls' schools cannot be tax-exempt —or even, for that matter, religions that refuse to ordain women.

It is doubtful that the present IRS, or even the present D.C. circuit, is about to adopt such a position. But the point is that a statute which *permits* them to adopt such a position places entirely too much power in their hands. So also does a statute which permits them to convert a ban on racial discrimination into a requirement for quotas or minority scholarships.

The administration is correct that the neat way to solve the former difficulty is to amend the statute to make clear that it does deny tax-exempt status to institutions that discriminate by race, but does not confer a public-policy hunting license upon the IRS and the courts. Events have shown, however, that it is not a politically feasible approach. It would take a long time to explain the *Green* case on the evening news; but it takes only a moment to note that the administration is asserting the current availability of tax exemptions for schools that discriminate.

The only way out is the way we came in—through the courts. The Supreme Court's 1974 disclaimer of having adopted the *Green* theory suggests an awareness of the problem. Our prediction is that the Court will preserve the ban on racial discrimination by tax-exempt institutions through reliance on congressional acceptance of that IRS policy displayed in post-*Green* legislative enactments; but will consign *Green* itself to the (one would hope) bygone era of runaway judicial activism to which it properly belongs. The administration could accommodate itself to that approach—and make the road easier for the Court—by interpreting what now seems to be the almost certain congressional refusal to pass its proposed statute as an affirmation of that legal state of affairs, and by adjusting its legal position accordingly.

Thus the future harm that might be wrought by past judicial activism will be avoided. It should be noted, however, that past effects will not be undone. By reason of this interplay among the administrative, judicial, and legislative process, Congress will have "voted" to deny the tax exemptions without ever having to face down a filibuster on the issue.

The remaining problem of what the IRS is permitted to demand—or may be required by the courts to demand—as proof of nondiscrimination is perhaps more difficult. Its solution will require the continued involvement of our reluctant legislators when the IRS is unduly demanding (as it was in 1978) or, for that matter, unduly lenient. But the courts, we predict, will take themselves out of the action, by returning to the traditional doctrine of standing, which denies citizen A the right to sue to increase citizen B's taxes. Which is to say that the function of the courts is not to make sure that the laws are faithfully executed, but only to come to the aid of particular individuals whom the law or its execution has harmed. We may be wrong in this prediction—but if so, the constitutional confrontation presented by the 1981 rider to the Treasury appropriations is merely the first of many.

Dispatch from the Nut Wars

The battle between import protection and free trade is waged only in part over highly visible issues like quotas on automobiles or trigger prices on steel. Just as vital, but far less obvious, is "back-door protectionism"—involving government purchasing policies, quality standards, product-testing rules, patent and copyright laws, and other measures that by accident or design discriminate against imports. Since the decisions on these issues are not made by the agencies normally concerned with foreign trade, the issues can be overlooked even on those (rare) occasions when Washington is following a deliberate free trade policy.

Thus it came as something of a departure last June 8 when the bold economists of the Office of Management and Budget marched valiantly into the latest skirmish of the Nut Wars. This was the controversy over whether or not the Agriculture Department should amend its official quality standards for filberts, sometimes known as hazelnuts. According to critics, the standard as amended would have no effect at all on domestic-grown filberts—but would neatly bar most foreign-grown filberts from American shores.

The filbert fracas began on August 1, 1980, when the state of Oregon tightened its standards for the maximum percentage of shelled nuts that could allowably suffer from various defects. "Decay" was shifted from one list of defects (including peccadillos like "serious shriveling" and discoloration) with a combined tolerance of 5 percent, to another list (including such abominations as "rancidity" and "insect injury") with a combined tolerance of 1 percent.

That automatically set in motion a number of changes in the federal filbert marketing order, which regulates the handling of filberts grown in Oregon and Washington. Why should that be so? Because the federal order, as it

stands now, simply adopts the Oregon No. 1 quality standard, whatever it may be, as the federal standard. Since Oregon grows many more filberts than Washington, and since the handful of filberts grown in the other forty-eight states does not fall under the order, this is a convenient enough policy, although it might be thought a rather extreme case of federal delegation of power. The federal order, however, also bans the *import* of any filberts which do not comply with the domestic (Oregon) standard. The secretary of agriculture can, if he sees fit, set a standard for filbert imports that is not identical, but merely "comparable" to the domestic standard. If he does not, the domestic standard applies, and the state of Oregon decides what kind of filberts the rest of the country can lawfully import (though not what they can grow).

As luck would have it, Oregon chose a standard that would have no effect on its own filberts, all or nearly all of which would apparently pass the test, but would block imports quite effectively. This is because imported filberts, most of which come from the Black Sea regions of Turkey, are air-dried in the traditional way and shipped at ambient temperatures, whereas the American nuts are uniformly machine-dried, inspected as soon as they are shelled, and then shipped under refrigeration. According to Agriculture Department estimates, 46 percent of shelled filbert imports surveyed recently would fail the new and stricter test. Importers often would not know in advance whether a particular shipment would pass the test, however, and a nutty cargo turned back at an American port would have to spend another eight weeks at sea for the return trip. The combination of uncertainty and expense would be enough, importers say, to keep out 80 percent of the foreign nuts.

Here a digression is in order on the workings of agricultural marketing orders. There are forty-eight such orders for fruits, vegetables, and specialty crops, administered by marketing boards that are picked by growers in a given geographical area. (They range from the mighty California orange boards to the lowly Hop Administrative Committee, which despite its name is not in charge of high school dances.) In recent years marketing orders have come under increasing scrutiny from economists as possible restraints on competition. Last year the President's Task Force on Regulatory Relief targeted them for review, and on November 4 the Agriculture Department responded with an economic analysis. In that analysis, the department endorsed some of the traditional rationales for the orders (market stability, protection of growers from "disastrously" low prices), but also for the first time acknowledged that many provisions, including quality standards, could reduce competition and efficiency. More recently yet, on January 25, the department issued new "Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders," which stated, among other things, that the "use of quality regulations primarily as a form of supply control is contrary to Administration policy."

Under six of the present marketing orders, including that for filberts, the board can order producers to withhold some supplies from the "primary" market (in-shell filberts, sold mostly at Christmas time) and dump them instead on the "secondary" market (shelled filberts, sold mostly for use in candy and coffee cake). Since the primary market is more price-inelastic than the secondary market, this allocation results in cartelized price discrimination. Oregon growers have kept their sales of in-shell filberts within a narrow range in the past two decades, while their sales of the shelled type (on a market dominated by Turkish imports) fluctuated wildly. Lately the Oregon growers have moved into the shelled market in a big way, their sales zooming from 1,311 tons five years ago to 10,800 tons last year. Production is expected to keep rising, and Oregon expects to have enough capacity to take over the whole shelled market soon. That is where the Turks come in—or, more accurately, get ushered out.

The department announced a final rule on September 25, 1980, phasing in the new Oregon standard for imports. Almost at once its position began to come under continuous shelling. The importers succeeded in staying the rule, and they petitioned the department to adopt a "comparable" rather than identical standard for imports, either by writing a separate standard for sun-dried unrefrigerated nuts or by putting "decay" in a category of its own with 2 percent tolerance. The growers' Filbert Control Board recommended sticking with the Oregon standard. On April 8 the department backtracked, and issued new proposed rules for public comment—including both the original proposal and the importers' alternatives. The

new proposals would also adopt the 1980 Oregon standard verbatim, instead of by reference, as the federal standard—thus "unhinging" the federal standard from any changes that Oregon might make in the future, but not from the one at issue.

OMB weighed in with a letter suggesting that the Oregon rule might fail a cost-benefit test. Comments poured in by the hundred from public-spirited consumers in rural Oregon (pro) and East Coast port cities (con). The two biggest filbert users, Peter Paul Cadbury (candy) and Entenmann's (pastry) came to Turkey's defense, pointing out—cruel blow!—that many consumers seemed to think Turkey's filberts tasted better than Oregon's. Three consumer activist groups, Consumers' Union, Consumers for World Trade, and Community Nutrition Institute, condemned the Oregon proposal as anticompetitive.

Filbert growers, however, were playing for keeps. They challenged the generally held view that decayed nuts were, if not pleasant, then at least harmless. Decay produces a host of new chemical substances, after all, and surely some of them are toxic. They warned ominously that filberts were similar to pecans, which are prone to carcinogenic aflatoxin mold. Nonsense, replied the consumer groups; the Food and Drug Administration has determined that a 5 percent tolerance level poses no health risks at all, and in any case processors winnow out decayed nuts before they reach consumers.

Whatever their outcome, the Nut Wars have surely produced a regulatory first: an industry claiming that its own product causes cancer (if only in a lesser degree than its competitors), and a consumer group pooh-poohing the idea.

Venue Reform: Sue West, Young Man?

For several years, some advocates of regulatory reform have been pressing to amend the federal venue provisions applicable to suits filed against the government. The subject raises substantial questions of fairness, practicality, and even basic governmental philosophy.

The dictionary definition of venue is "the particular . . . geographical area in which a court with jurisdiction may hear and determine a case." Assuming that federal district courts or federal courts of appeals have jurisdiction over a particular dispute, the venue statutes determine which district court or court of appeals may hear it. Traditionally, these statutes have been designed to serve the convenience of the parties and the witnesses. Thus, a civil suit between two private parties in federal district court would ordinarily be tried in the district where the plaintiffs or defendants happen to reside or where the cause of action arose, not in Washington, even if the federal issue presented was of national or even distinctively "Washington" concern, such as the separation of powers.

The current rules governing district court suits against the United States, its officers, or agencies permit suit in any district in which (1) a defendant in the action resides (for federal agencies, this almost always includes the District of Columbia); (2) the cause of action arose (for example, a suit against the FBI for illegal search and seizure might be brought where the search and seizure occurred); (3) real property involved in the action is situated (for example, a suit to evict federal personnel from privately owned land might be brought where the land is located); or (4) the plaintiff resides, if no real property is involved in the action. For those suits against federal agencies that may be initiated in courts of appeals rather than district courts (which generally include pre-enforcement challenges to the validity of agency rules), the venue provisions are more particularized, generally contained within the substantive statute under which the agency is acting. But most of these statutes include the District of Columbia as one of the available forums.

These venue rules for suits against the government, like venue rules governing private litigation, almost invariably permit a choice among several potential forums. And the choice is the plaintiff's. Needless to say, in making that choice, the plaintiff will not always consult the convenience of *both* parties. He will sometimes deliberately select a court that is downright inconvenient for the other side. In fact he will sometimes select a court for a reason that has nothing to do with anyone's convenience—notably because he believes it is well-disposed toward the legal arguments he wishes to raise, or even toward his interest group (big busi-

ness, labor, the poor, draft evaders, whatever). This is the phenomenon known as "forum-shopping." Until men become angels, it is unavoidable so long as a *choice* of venue is provided. As long as the plaintiff has a choice, he will choose selfishly.

The present system provides some minimal protection against these base inclinations. Carrying forward the common law doctrine of *forum non conveniens* ("inconvenient forum"), federal law permits the district court in which a suit is filed to transfer the case to another district "for the convenience of the parties and witnesses in the interest of justice." This power is invoked only seldom—and, needless to say, never for the reason that the court chosen is too well-disposed to the plaintiff's case.

All of this becomes relevant to regulatory reform because of environmental laws, the Sagebrush Rebellion, and the D.C. circuit court. Many suits challenging agency actions that affect the environment or that relate to the use of public lands are brought in the District of Columbia—which is not only not "down home" but is also the seat of what is thought to be the most environmentally minded court of appeals in the country. The purpose of the proposals to change existing venue provisions is to remove such litigation from that forum, and to require it to be brought in the locale affected by the challenged action.

Fairness. The charge of those who favor the venue change is (to quote a position paper of the Capital Legal Foundation) that "special interest groups whose views often coincide with those of the D.C. judges have exploited their ability to lay venue in D.C." That is doubtless true. It is also true that special interest groups whose views coincide with those of the judges in other circuits have exploited their ability—in the same types of cases—to lay venue elsewhere. There are "horror stories" of environmentalist plaintiffs racing to get their cases heard in Washington; and there are "horror stories" of anti-environmentalist plaintiffs racing to get their cases heard elsewhere. It is the entirely ordinary result of the general rule that the plaintiff picks the turf.

It is not the fact, however, that a wildly disproportionate amount of environmental litigation finds its way into the D.C. courts. Indeed, the proportion is much less than one might expect, given the fact that so many of the lawyers interested and expert in that field are in Washington, and given the further fact that several important statutory provisions permit suit only in the District of Columbia. In the twelve-month period ending June 30, 1978, only 37 of the 519 environmental cases filed in district courts were brought in the District of Columbia and only 33 of the 155 environmental cases filed in courts of appeals. As of September 1980, the Justice Department reported that only 37 of 339 National Environmental Policy Act cases being handled by its Lands Division were in the District of Columbia, and only 25 of 649 environmental cases being handled by its Civil Division.

The case for the change, therefore, must rest not upon any systematic or one-sided abuse of the current provisions, but upon the argument that venue in the District of Columbia is simply inappropriate. If that argument is to proceed from the traditional purposes of venue provisions (as opposed to some newly framed purposes that will be discussed below), it is an exceedingly difficult argument to run. Convenience for the parties? Well, the defendant (the U.S. government or government agency) will always be based in D.C.—and if the plaintiff also likes that forum, what could be more convenient? To be sure, there may be other parties who wish to intervene on behalf of the government, or who wish to challenge the government's action on other grounds, and they may prefer other locations. But venue in Washington satisfies *at least* the government and one of the private parties—which is not only no less, but more than any other district can a priori guarantee.

But what about the convenience of witnesses? Most of these cases—and almost all of them in the courts of appeals—involve no witnesses, since they consist of review of a record made before the agency to determine whether that record supports the agency action. If for any reason the record is inadequate, the court remedies that deficiency not by taking evidence, but by remanding the case to the agency so that it may do so. The record itself—and the agency, if the case is remanded—is ordinarily located in the District of Columbia.

In short, if one consults the normal purposes of venue provisions, one might conclude that it is desirable to eliminate the choice of venue *outside* the District of Columbia; but

In Brief–

Setback for Legislative Veto. In January, the Department of Justice won two significant victories on the legislative veto, one within the administration and one in the courts.

When President Reagan took office, it was uncertain whether his new administration would oppose the legislative veto's constitutionality in any context. Some presidential advisers, notably David Stockman, favored the device—as did some of the most influential Republicans on the Hill. On the other side of the issue was Attorney General William French Smith, supported by officials at Defense and State concerned about the effect of the veto in such contexts as the AWACS sale.

By last fall, it was clear that the veto's advocates were losing—but it was an orderly retreat. Justice Department spokesmen were permitted to assert that the device was unconstitutional when applied to rulemaking. It was made known, however, that the President would not veto pending regulatory reform legislation solely because it contained a legislative veto provision that extended only to rulemaking by independent agencies; and some independent agency officials asserted on the Hill that the administration did not really oppose the device in that context. It was also not at all clear whether the administration would hold the device unconstitutional in the context most favored by OMB, reorganization plans.

These rear-guard positions have now fallen. In the brief filed with the Supreme Court on January 12, in *Chadha* v. *INS*, the government opposed the legislative veto in all contexts and without reservation. It specifically repudiated the 1977 opinion of Attorney General Griffin Bell backing the constitutionality of Jimmy Carter's reorganization plan legislation.

Less than three weeks later, on January 29, the United States Court of Appeals for the District of Columbia Circuit sustained the Justice Department's position against the legislative veto as applied to rulemaking by independent agencies. In *Consumer Energy Council* v. *FERC*, a three-judge panel that spanned the spectrum of judicial philosophy on the court (Judges Wilkey, Edwards, and Bazelon) declared ineffective the House of Representatives' veto of incremental pricing rules issued by the Federal Energy Regulatory Commission under the Natural Gas Policy Act of 1978.

The lengthy opinion is based on the broadest possible grounds, and calls into question the use of the legislative veto in all contexts —even that of the 1973 War Powers Resolution. Since the Ninth Circuit, which decided the *Chadha* case now on appeal to the Supreme Court, also found the legislative veto unconstitutional, both circuits that have ruled on the issue are in agreement. The *FERC* case doubtless increases the government's chances for victory on the merits in *Chadha*, and strengthens the administration's hand against the inclusion of a legislative veto in the pending regulatory reform legislation.

Update: Has Regulation Peaked in the Andes? The Andean Pact, a common market treaty covering five South American nations, was among the first international agreements to impose tight controls on multinational investment and the movement of technology across borders (see Richard Berryman and Richard Schifter, "A Global Straitjacket," *Regulation*, September/October 1981). Now, even as various United Nations bodies consider whether to adopt similar controls worldwide, the pioneer Andean effort shows signs of unraveling. *Business Week* reports that there is growing discontent over a rule calling on member governments to take a stake in those foreign-owned firms that benefit from the pact's tariff reductions. Last year Peru threatened to pull out unless the rule was revised. Venezuela, another member, has introduced measures to soften the effect of the treaty's capital flow regulations on multinational firms.

surely not within it. The same conclusion would follow, by the way, if one were to consider the convenience of counsel (which, under current law, is not an appropriate factor to consult). The government's lawyers are mostly in Washington, and the expert private attorneys on both sides of environmental issues are concentrated there as well. Even when an environmental suit is tried outside the District of Columbia, it is common to find Washington lawyers representing private parties on both sides of the case.

Practicality. The proponents of the venue change do not want merely to get these cases *out* of the District of Columbia (though most of them would view that alone as a worthy goal); they also want to get them *into* the locales that are affected by the decisions that will be made. That desire raises some issues of governmental philosophy to be discussed below; but simply as a matter of practicality, how is it to be achieved?

The new proposals seek in various ways to locate the suit where the relief sought would "directly" or "substantially" affect the residents of the judicial district. In some cases this determination may be easy to make. Where the relief sought is revocation of Nuclear Regulatory Commission licensing of a nuclear plant, presumably those "directly" affected would be the residents of the district where the plant is

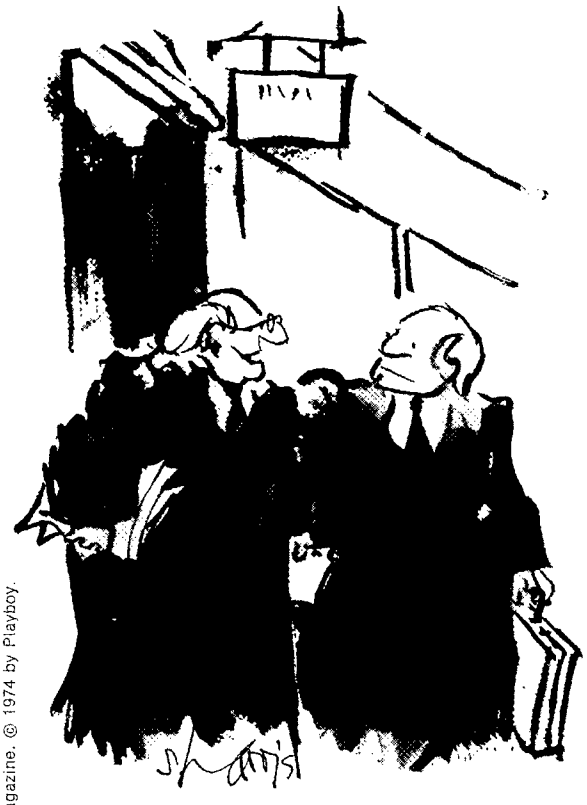
located and of the districts scheduled to receive the generated electricity. But try a harder case: a suit seeking to set aside as too stringent the Environmental Protection Agency's standard on auto emissions. Which districts contain residents who are "directly affected"? Those with auto manufacturing plants? Those with auto dealerships? Those in which polluting autos will be driven? Or consider an Agriculture Department order requiring a specified beef content for hot dogs. Are beef producers "directly affected" by a suit seeking to set it aside? Hog producers? Consumers at large? Or only the owners of packing plants?

The examples could be multiplied. Generations of lawyers, stretching back to the dawn of recorded time, have nourished themselves on the fees from arguments over whether an "effect" has occurred; and gotten downright fat on the fees from arguments over the further refinement of whether the effect has been "direct." Such arguments are, alas, often necessary to determine the merits of a case. But the most rudimentary cost-benefit analysis (speaking of regulatory reform) suggests the expense is not worth it merely to determine the preliminary question of where a suit may be brought. And on top of the lawyers' fees, consider the possible delay: years arguing over venue before the argument on the merits even begins.

This is not to say that workable venue changes are beyond human wit. The Clean Air Act might be amended, for example, to require that challenges to EPA's auto standards be brought in a judicial district where an affected automaker is located. And similar specifications could be made in the statutes on hot dogs and nuclear plants. But such a precise and targeted approach is unacceptable to the present proponents of venue reform. It is, as the Capital Legal Foundation says, too "cumbersome and time-consuming for Congress," and thus amounts to "not a proposal for change, but a recommendation for inaction." Come to think of it, that kind of thinking—the desire for a "quick fix" that won't take too much of Congress's time on the specifics—is what gave us most of the problems we have with the environmental laws in the first place.

Philosophy. Even a targeted approach would not affect the most upsetting aspect of the venue proposals: the philosophy of government that they implicitly (and perhaps inadvertently) embody. It is no secret that the major purpose of the changes is to shift environmental cases to courts that are likely to restrict the scope of the environmental protection laws. However desirable such restriction may be (and this journal can hardly be accused of environmental extremism), one must question the desirability of achieving it through the device of venue. It is one thing for private parties to scramble for the "most favorable court"; it is quite another for the law itself to do so. When built into the fabric of the law, legal realism suddenly becomes political cynicism. "Let's face it," the venue proposals in effect proclaim, "we have a government of men, not of laws—so why not acknowledge it, and allocate litigation accordingly?" Surely in this matter hypocrisy is the beginning of virtue. The consequences of acknowledging that our various courts systematically reach different results—and of fixing venue accordingly—are unacceptably corrosive.

Some of the proponents of venue change are attracted by an argument which is not quite



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"The opportunity to be fair and just is rewarding—but what I especially like is taking the law into my own hands."

so simple as "we want the environmentalists to lose" and which has some of the ring of healthy federalism. To quote, again, the Capital Legal Foundation, the purpose of the change is to give "local courts . . . the opportunity to exercise their understanding of local problems, people, customs, economics, and concerns in deciding cases. Local judges are the most, not least, qualified to resolve local issues."

It is a false federalism. These are in fact *neither* local judges, *nor* local issues. They are federal judges, charged with deciding whether federal agencies have properly applied a federal law. If that law should have been a federal law in the first place (which Congress has already decided), then surely its application should be uniform nationwide. Factories in New Mexico should not be able to pollute more than factories in Massachusetts simply because the residents of New Mexico have a lesser abhorrence of smog and a greater fear of unemployment. We have established a national standard for both the abhorrence and the fear. Perhaps that was a mistake. But if so, the remedy is to repeal the federal law, establish a lower federal minimum of environmental protection, and permit New Mexico and Massachusetts to diverge by enacting different state standards above the minimum—not replace a democratic federation of fifty states with a judge-ruled federation of ten divergent circuits. And it is not only tolerable, but downright desirable, that the western senator who votes for a statute giving some vague charter to a new federal agency should know that the content of that charter will often be determined for his constituents—as it is for others—by some back-East, citified judge.

The problem of vague agency charters underlies this dispute, of course, as it does so many of the issues of modern regulatory reform. When the statute is clear concerning what the agency is supposed to do, it does not make a whole lot of difference whether the judge who applies it wears a ten-gallon hat or a homburg. Venue reform is as unlikely to solve the central problem of imprecise delegation to the agencies as are other fashionable shortcuts such as the legislative veto and the Bumpers amendment. It has the distinctive vice, however, of accepting—indeed, embracing—regionalized application of supposedly national law.