Letters

We welcome letters from readers, particularly commentaries that reflect upon or take issue with material we have published. The writer's name, affiliation, address, and telephone number should be included. Because of space limitations, letters are subject to abridgment.

The Adams Family of Lawsuits

TO THE EDITOR:

As a polemicist playing patty-cake with the segregation of our public schools, assistant professor Jeremy Rabkin ("Captive of the Court: A Federal Agency in Receivership," *Regulation*, May/June 1984) may get by, but for scholarship on the subject he gets an F.

Rabkin complains that the *Adams* case is an effort to make the government do its job. But he hides from the reader why this 1970 suit was necessary, namely, that back in July 1969, Attorney General John Mitchell and HEW Secretary Robert Finch publicly renounced the use of Title VI of the 1964 Civil Rights Act as a remedy for segregation even though it had proven to be the single most effective means of obtaining prompt desegregation.

Rabkin complains also that the suit has continued for many years. But he hides from the reader the reason why the suit has had to go on right up to the present, namely, that Education Secretary Terrel Bell bluntly says, referring to Title VI, "It seems that we have some laws that we should not have, and my obligation to enforce them is against my own philosophy."

Rabkin gives the show away when he says that Kenneth Adams should have sued his own school district to redress the segregation. For Title VI was passed for the express purpose of providing a "wholesale" effective method for enforcing the Constitution through the government agencies involved, in place of "retail" drawn-out individual suits against the segregating recipients of federal funds. This latter option was there before 1964; Rabkin in effect repeals Title VI.

While Rabkin's inexperience may explain his lack of scholarship, it hardly excuses dissemination of it by an ostensibly scholarly journal.

Joseph L. Rauh, Jr.
Rauh, Silard and Lichtman,
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TO THE EDITOR:

Important questions involving the separation of powers and checks and balances of our federal system inhere in the *Adams* litigation, but Jeremy Rabkin's angry and inaccurate account has not discovered them.

The fundamental issue may be illustrated by a hypothetical case. Suppose the Food and Drug Administration announced one day that it was ceasing all enforcement activity with respect to drugs used to combat a particular disease, despite the widely held belief that some of the drugs already on the market were dangerous. Suppose further that Congress, while continuing on the books the law that gave the FDA clear responsibility to deal with the matter, did not do anything to bring the agency to account for its abdication of duty. Would a federal court, in response to a suit brought by individuals who needed treatment for the disease, be justified in requiring the agency to perform its statutory mandate? If so, should the remedy be available only to the particular individuals who brought the suit or to all who might be harmed?

A reasonable answer to these questions is that a federal court, having power under the Constitution to adjudicate all cases arising under federal law (including controversies to which the U.S. government is a party), should intervene and that the enforcement remedy should benefit not just the parties who brought the suit but all who may suffer from the agency's continued failure to enforce the law. That, of course, is what happened in the *Adams* suit, which was precipitated by a 1969 declaration (which Rabkin conspicuously fails to note) by high Nixon administration officials that HEW would no longer perform its duty under the law to end subsidies to illegally segregated school systems.

It would also be reasonable to conclude that a court, in providing a remedy, should do no more than what is required to correct the violation of law and should avoid becoming unnecessarily entangled in the management and decision-making processes of the agency. The *Adams* case has been marked by such judicial restraint, as witness Rabkin's concession that neither the plaintiffs nor the court has sought to police the many "indulgent" settlements that HEW entered into after being required to enforce the law.

Rabkin wonders why respected legal scholars have "nodded in approval at the *Adams* litigation," while he alone views it as a "constitutional monstrosity." The answer is not difficult. Scholars have viewed the case dispassionately as exemplifying a serious search for the proper allocation of federal authority. In contrast, Rabkin's "analysis" is governed by his active dislike of the Supreme Court's decision in *Brown* v. *Board of Education* (a decision he sarcastically described in recent congressional testimony as part of the "sacred canon"), his strong distaste for the remedies that the Court has held are necessary to redress illegal racial segregation, and his unreasoning hatred of other civil rights laws such as the ban on discrimination against disabled people in federally funded programs (although Rabkin airily acknowledged in the same testimony that "it is certainly not nice to abuse people who have physical handicaps").

Rabkin is entitled to his views, but in the interest of fairness and accuracy he should acknowledge that his real quarrel is not with Judge Pratt and Joe Rauh alone, but with the Constitution, the Supreme Court, the Congress, and every President from Franklin Roosevelt through Jimmy Carter.

William L. Taylor,
Center for National Policy Review,
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JEREMY RABKIN responds:

Some readers of my article on the *Adams* litigation may well have wondered how the extraordinary pretensions of the lawyers involved could have received so little chal-

lenge or scrutiny over the past fifteen years. The letters here from Joseph Rauh and William Taylor go far in answering that question. As they demonstrate, anyone who challenges such activity must be prepared to face a barrage of epithets and innuendos, suggesting that the critic is some sort of racist or at least a wild-eyed fanatic. This is, of course, the same tactic civil rights activists have been employing for years to intimidate critics of quota schemes and busing experiments with school children. Fortunately, such tactics have, through sheer overuse, now lost much of the sting they once had.

When not engaging in *ad hominem* invective, both letters seem to me to confirm the principal points in my article. Both Rauh and Taylor make much of the 1969 statement by John Mitchell and Robert Finch that the Nixon administration would rely on court action rather than funding termination to enforce Title VI. The fact is that Title VI does not require enforcement by funding termination, so the Mitchell-Finch statement was in no way tantamount to a refusal to enforce the law. Indeed, as I pointed out in the article, the Nixon administration achieved more dramatic progress in desegregation in the three years following this policy statement than has ever been achieved by OCR before or since. Yet Rauh and Taylor repeatedly imply that the alternative to *Adams* was complete nonenforcement; telling Kenneth Adams to sue his own school district, Rauh says, "in effect repeals Title VI."

Why did the litigation have to drag on long after the Nixon administration left office? Rauh provides a retrospective justification: continuing the suit gave him a chance, ten years later, to challenge the enforcement policies of Terrel Bell, who (Rauh broadly hints) opposes the Civil Rights Act of 1964 and thus cannot be trusted to run the department he was appointed to run. Of course, this innuendo about Secretary Bell's views is quite unsupportable, a charge that might be considered libelous were it not so patently ludicrous. Yet even this preposterous charge against a Reagan appointee does not explain why Rauh thought it necessary in the intervening years to sue President Ford's appointees and then sue Joseph Califano, Pat Harris, and Shirley Hufstedler, each in turn, during the Carter administration, on the same claim of inadequate enforcement of Title VI. Were all of these well-known figures closet racists as well, Mr. Rauh? Or was their fault simply that they were not in complete agreement with Joseph Rauh on how to run the federal agency assigned to their care by successive presidents?

Regarding Taylor's hypothetical example of nonenforcement by the FDA, I must first repeat that complete refusal to enforce is not what we are talking about in *Adams*. And I doubt that Taylor's hypothetical case, taken literally, has any bearing on real-world disputes. It is quite difficult to conceive of a circumstance in which the FDA would proclaim a policy of total nonenforcement and find Congress responding with a shrug of indifference, as Taylor posits. It is true that the FDA has frequently decided to permit particular drugs to stay on the market when public interest groups have urged that they be recalled. I am aware of several suits growing out of such disputes and I am not aware of any in which the public interest groups have prevailed. Nor can I conceive of a situation in which a judge would be justified in directing the FDA on its affirmative regulatory duties at the behest of a private citizen. The one case that fits this description, *American Public Health Association* v. *Veneman*, seems to me a clear instance of indefensible judicial activism.

I might add that the D.C. Court of Appeals itself now seems to be coming around to this view. In September it remanded an appeal in one part of *Adams* to Judge Pratt and directed him to determine how the "plaintiffs" in the case could possibly have standing to maintain this extraordinary suit. To paraphrase Taylor, it is becoming evident that his quarrel is not with me but with the D.C. Court of Appeals—and more generally with the U.S. Congress, which left these civil rights laws under the care of an executive agency, and with the U.S. Constitution, which leaves executive agencies under the care of the President and his appointees.

Taxi Reform at the FTC

TO THE EDITOR:

Since I am an admirer of Edmund Kitch's seminal study of Chicago taxicab regulation, my initial reaction to the Federal Trade Commission's recent challenge of anticompetitive taxi restrictions in Minneapolis and New Orleans was to applaud. As Kitch's essay in your May/June issue makes clear, the costs of these restraints on trade are substantial and unnecessary ("Taxi Reform—The FTC Can Hack It," *Regulation*). Fewer cabs are available to serve customers, cab drivers and owners earn monopoly profits at customer expense, and riders are forced to use more expensive or less desirable options. It seemed that the commission, long known for wasting its antitrust enforcement money on trivial or harmful pursuits, was finally tackling a worthwhile project. However, a closer examination raises serious questions as to whether the FTC complaints are a good idea. . . .

The commission properly does not argue that all regulation is inappropriate. It simply charges that the cities have gone too far in limiting the number of cabs and fixing prices. Nonetheless, the cities can counter that their regulations serve other important public interests such as ensuring adequate driver training and integrity, protecting consumers from price gouging (particularly at airports and in the inner city), and controlling auto congestion. A lower-priced ride that takes longer may be the market's but not necessarily the community's most desired solution.

The cities should be free to balance these interests against the benefits of competition in deciding how far regulation should go. Until now, antitrust agencies and the courts have been reluctant to interfere with such balancing except in egregious situations—usually where the regulation is imposed by private groups.

These questions also suggest we ought to have greater respect for the principles of federalism and local autonomy than Kitch offers. He does not show, for example, that the citizens of Minneapolis or New Orleans have not made a reasoned or at least deliberate choice. So long as no barrier prevents the proponents of deregulation from making their case in those cities, we owe great respect to the legislative choices of their city councils, which may have been unpersuaded by the modest results of the Seattle experiment in taxi deregulation.

It seems particularly inappropriate for a federal agency without expertise in local transportation issues to be intervening here, since there is no special national issue or

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federal expertise in the area. Taxi regulation does not heavily burden interstate commerce—as raisin regulation did when it was preserved for state regulation by the Supreme Court in 1943—or otherwise misuse a local monopoly position to the particular disadvantage of outside citizens.

Nor has the FTC so exhausted its examination of national antitrust issues that it has nothing better to do. The commission has too long neglected its assigned role of advising Congress and the President on improving the antitrust laws. It should give a higher priority to addressing the existing legislative restrictions on competition —from the Robinson-Patman Act's prohibition of price competition to the many unjustified industry exemptions from antitrust. Similarly, many of the practices of executive-branch agencies deserve scrutiny, especially competitive restrictions such as sealed bid requirements or sole source contracting exceptions (particularly by the Pentagon). These anticompetitive practices cost consumers far more in overcharges than does taxi regulation. And if for political reasons the FTC must focus on the less significant taxi issue, should it not focus its fire first on the documented overregulation of taxis in Chicago and New York? Fairness as well as sound policy argue for proceeding first against the worst abuses.

My dispute is not with Kitch's basic position—that taxi regulation is often unnecessary and should be cut back. He is clearly correct there. But these local problems do not warrant a single federal solution. The FTC should be spending its antitrust resources on anticompetitive problems more pressing and costly than possible overcharges by a few cabs in two middle-sized American cities.

Ernest Gellhorn,
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EDMUND KITCH responds:

Dean Gellhorn quite properly reminds us that complete analysis of an FTC enforcement action requires us to compare it with all other possible allocations of the commission's resources. Although that is a desirable norm, my essay on the FTC's taxi initiative was written within the constraint that almost always frames actual policy making—namely, that of addressing one issue at a time.

My recommendation was that Congress respond to the Supreme Court's *Boulder* decision by continuing to leave cities open to antitrust injunctions but relieving them and their officials of liability for either treble or single damages. I am pleased that Congress basically followed this approach in the subsequently enacted Local Government Antitrust Act of 1984. I think that the availability of the FTC as a "back-up" agency in cases of serious abuse made many members of Congress more comfortable with their vote to eliminate the damage remedy.

Congress has made it clear that it wants to continue the FTC, but divining the purpose that Congress intends for it to serve is difficult, not only for FTC officials and interested scholars, but for Congress itself—as witness the frequency with which Congress has recently seemed surprised by what the FTC has done. Historically, the antitrust mission of the FTC was closely associated with the protection and preservation of small businesses, especially those participating in fragmented, multi-tiered distribution systems. In spite of the FTC's efforts, however (and the efforts of the Congress and the state legislatures), the constituency for that policy no longer exists—a victim of strong technological and economic forces. The mission itself has fallen into intellectual disrepute. . . .

Congress has ignored, however, forceful suggestions such as the one by now-Judge Richard Posner that the FTC be abolished in light of the obsolescence of its former mission. As best as I can make out, Congress now sees the FTC as a sort of roving ombudsman of competition, charged to receive complaints, search for harmful arrangements, provide Congress with information, and occasionally put a burr under someone's saddle. . . .

It is no easy task, of course, to intervene constructively in private markets, if only because of the power of markets to get things right in the first place. Gellhorn makes the same point about political systems—a point that can be extended to the national policies he criticizes. The economic policies and activities of the national government are subject to relatively intense and continuing scrutiny from a host of sophisticated institutions. A small ear at the FTC for harmful practices at the local level seems to me a reasonable use of some of the FTC's resources. ■

Statement required by the Act of August 12, 1970, Section 3685, Title 39, United States Code, showing the ownership, management and circulation of REGULATION, Publication No. A465930. Published bimonthly (six issues annually), at annual subscription price of $18.00, at 1150 Seventeenth Street, N.W., Washington, D.C. 20036 for September 24, 1984.

The names and addresses of the Publisher and Managing Editor are: Publisher, William J. Baroody, Jr., 1150 Seventeenth Street, N.W., Washington, D.C. 20036; Managing Editor, Anne Brunsdale, 1150 Seventeenth Street, N.W., Washington, D.C. 20036.

The Owner is the American Enterprise Institute for Public Policy Research, 1150 Seventeenth Street, N.W., Washington, D.C. 20036, a nonprofit, educational organization.

Known bondholders, mortgagees, and other security holders owning or holding 1 percent or more of total amount of bonds, mortgages or other securities: None.

The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes have not changed during preceding twelve months.

	Average No. Copies Each Issue during Preceding 12 Months	Actual No. of Copies of Single Issue Published Nearest to Filing Date
Total No. Copies Printed	7,967	8,000
Paid Circulation		
Sales through dealers and carriers, street vendors and counter sales	247	237
Mail subscriptions	4,404	4,212
Total Paid Circulation	4,651	4,449
Free Distribution by Mail, Carrier or Other Means—samples, complimentary, and other free copies	1,862	2,048
Total Distribution	6,513	6,497
Copies Not Distributed		
Office use, left over, unaccounted for, spoiled after printing	1,454	1,503
Distributed to news agents but not sold	0	0
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(Signed) William J. Baroody, Jr.,
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