Perspectives
on current developments

Locking the Rascals in

Why hold elections? To let the voters throw the rascals out, as the saying goes, or—more soberly formulated—to let the voters change government policy. Yet depending on the outcome of a case now in the federal courts, it may soon become all but impossible for the voters to remove most policy-making federal officials—even if they are not covered by civil service protection.

The case involves the Federal Emergency Management Agency, which coordinates federal aid efforts in natural disasters, but it could as easily have arisen at almost any agency. Two days after President Reagan's inaugural, the agency's new acting director asked for the resignations of the nine regional directors he had inherited from the Carter administration. The regional directors held so-called Schedule C positions under the Civil Service Act, which means that they served at the pleasure of the President. All nine duly resigned. But then, for the first time in any presidential transition, four of them immediately filed suit in federal court to get their jobs back, claiming that it violated the First Amendment for the new administration to dismiss them because of their political beliefs—which is to say, their membership in the party defeated in the election.

Such a suit would have been unimaginable until 1976, when the Supreme Court decided *Elrod* v. *Burns*. That case arose in the very mother lode of patronage politics, Cook County, Illinois, where Democrat Richard Elrod had replaced an incumbent Republican sheriff. By statute, about half the department's employees were protected by civil service, with the rest being subject to dismissal by the new sheriff. Four Republican employees, sacked for want of Democratic sponsorship, challenged their firings in court.

A majority of the Supreme Court, although divided in its reasoning, took their side. The Court found that it violated the employees' First Amendment rights to fire them because they were Republicans. (Never mind that, as the dissent pointed out, they also seemed to have been *hired* because they were Republicans.) Three justices concluded flatly that non-policy-making personnel could not be fired for partisan reasons. Two other justices maintained that employees with confidential duties should not share in the protection.

The Court broadened that protection last year in *Branti* v. *Finkel*. The county legislature of Rockland County, New York, elects a public defender for a term of six years. In 1978 a Democrat defeated the Republican incumbent and promptly fired two Republican assistants. The two lawyers went to court.

The Supreme Court held that they had to be reinstated. This time six justices agreed on a rationale, though not the same one used in the Cook County case. Justice Stevens, speaking for the Court, said that the new test would be "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Under this rule, he noted, even some policy-making employees might be protected against discharge.

Among the dissenters, Justice Stewart insisted that the attorneys were confidential employees and entitled to no protection, while Justice Powell warned that the new standard was "vague" and "overbroad." The haziness of the "appropriate requirement" standard, indeed, seems likely to lead to a long procession of case-by-case determinations for myriad governmental offices.

It is scant wonder that the Court cannot divine the precise scope of a constitutionally mandated civil service, since that institution is not to be found in our constitutional tradition, but is entirely of the Court's own creation. During the 185 years before *Elrod* v. *Burns*, governments had been allowed to select their own

blends of spoils and civil service, and practices differed widely. It speaks well of the majority justices' capacity for growth and change that in the period since their respective appointments to the Court—appointments for which party affiliation was surely the first qualification—they came to realize the incompatibility of partisan selection with our fundamental social beliefs. (As Justice Powell suggests, the Court's reasoning in prohibiting partisan dismissal extends to partisan appointment as well.) But the timing of this new discovery is surely surprising. One would have expected it in the heyday of enthusiasm for the civil service system. That enthusiasm has given way in recent years to a more balanced view. A spoils system allows voters the fullest control of government, makes elected officials completely responsible for the actions of their underlings, and strengthens political parties; on the other hand, it can produce coercion of political belief and outright corruption. Civil service develops a pool of neutral government expertise, provides continuity, and may encourage more public spiritedness among politicians, since there is less booty for them to distribute; on the other hand, it eliminates one of the few built-in incentives for dismissing inefficient public employees, reduces participation in political party affairs, and abets the growth of entrenched and unresponsive bureaucracy.

The popular feeling of "government by bureaucracy"—and perhaps the reality of such a government—would likely be enhanced by a judicial decision in the *FEMA* case extending *Elrod* and *Branti* to federal employment. There is a conceivable basis for coming out differently: as the Court noted in *Elrod*, the so-called political question doctrine (excluding the Court from matters committed by the Constitution to other branches), and the doctrine of separation of powers, could not be invoked in the state cases. It is possible, then, that the Court's constitution-making in this area will yield a result similar to that of its venture into legislative apportionment, imposing upon the states a restriction not applicable to the federal government itself. (The states, according to the Court's ruling in *Reynolds* v. *Sims*, may not constitutionally have bicameral legislatures with one house apportioned by geography rather than population—though the United States Senate is O.K.) One should hope not. This is one of those situations in which worse is better. The extension of the Court's constitutionalized civil service (whatever its vague content may be) into the federal realm provides the best hope that it may reverse its earlier decisions—or find them reversed by constitutional amendment. Indeed, we hope the *FEMA* case is soon followed by the *Elrod* equivalent of *Davis* v. *Passman*—in which a *congressional* employee asserts a constitutional right not to be fired.

Less Paperwork for Generic Drugs?

In many ways the latest controversy at the Food and Drug Administration seems quite familiar. On one side are Carter administration regulators and Ralph Nader groups, and on the other Reagan administration deregulators and large, profitable drug companies. One side argues for regulation on grounds of basic fairness and equity, and because progress in health care and even human lives may be at stake. The other side maintains that regulation would impose a large and quite unnecessary compliance burden on private business and drive up both consumer prices and federal spending, all for benefits that are nebulous at best.

This time, however, there is a new wrinkle. The starry-eyed idealists demanding regulation are the large corporations. And the hard-nosed skeptics brandishing pocket calculators are the "public interest" groups.

The point at issue is whether the agency will permit makers of low-cost generic drugs to market their products without lengthy testing. This would be the effect of a policy adopted by the Carter administration during its closing weeks, pulled back on February 10 by incoming Health and Human Services Secretary Richard Schweiker, and then reinstated by Schweiker on April 16. The policy would allow generic drug makers to cite previously published medical research in their new drug applications (NDAs) instead of requiring them to carry out their own clinical tests of safety and effectiveness. According to the generic firms, such tests would represent pure regulatory waste, since they would tell the FDA nothing it did not already know.

But to firms in the business of inventing and patenting new drugs, the "paper" NDA seems manifestly unfair. A company that in-

vents a new drug, they point out, must spend $70 million on the average to market it, much of which goes toward proving its safety and effectiveness to the FDA. A generic imitator who can get a free ride on this research can undercut the pioneer firm's price when the latter's patent expires. Worst of all, getting the original approval from the FDA can take from seven to ten years of the seventeen-year patent term. If the generic imitator could short-circuit this lengthy approval process, the originating firm might have only a few years of sole production—barely enough to build up a market—before competition comes in. With their potential profit from inventions cut short in this way, the pioneer firms say, they would have less of an incentive to embark on the risky and arduous process of new drug development. The result would be fewer new lifesaving drugs. A disturbing side effect is that pioneering firms might refuse to publish the results of their clinical tests for fear they would be used by generic applicants.

The proponents of "paper" approval have some strong arguments of their own. According to Mark Novitch of the FDA, the expense of compiling new test data from scratch would be enough to keep generics out of all but the most "tremendous" markets for drugs coming off patent. Since the prices of generics are often as much as 30 to 50 percent below those of branded drugs, that would impose heavy costs on drug consumers (including the federal government, which now pays for a fair proportion of all prescription drugs). The Federal Trade Commission's Bureau of Economics has estimated that from $444 to $817 million a year could be saved by full substitution of generics.

If generic firms are compelled to conduct original testing, they will have to run tests on human patients, some of whom will be placed in control groups that receive placebos or treatments less effective than the drug being tested. While the FDA is authorized to waive placebo testing in extreme situations, any unnecessary testing involving sick patients would raise ethical questions. In addition, requiring generic firms to conduct full testing is a very odd way to compensate inventors. For most drugs, if the rule keeps generics out, it would amount to an infinite (or at least indefinite) patent—hardly a defensible idea. For those drugs important enough to attract generics in spite of the rule, it would afford little protection other than imposing the usual regulatory delay upon new en-

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"The chef's salad is beautifully prepared and finely seasoned. The generic salad contains the same ingredients simply thrown on the plate."

trants. Thus the scheme would overcompensate most inventors, the exception being those who invent the most valuable substances.

The reader may wonder why, since branded prescription drugs and generic copies have been around for a long time, paper NDAs have only recently become a regulatory issue. The answer is that we are now seeing a delayed effect of the famous Kefauver amendments of 1962, which required drug applicants to prove effectiveness as well as safety and which greatly increased the cost of filing NDAs. Only in the past few years have patents begun expiring on the post-1962 drugs on whose NDAs millions of dollars apiece were expended by the pioneer companies. The "free rider" issue is thus coming up now for the first time.

When the FDA approved the first paper NDA in 1979, research drug firms sued to prevent any further approvals on grounds that the FDA had adopted the policy without a public hearing or formal rulemaking. The judge advised the plaintiffs to petition the FDA for redress before running to court with their complaint. The agency rejected their petition on December 12 of last year, still without a hearing or rulemaking. There were new lawsuits. On February 10 incoming Secretary Schweiker postponed adoption of the policy for purposes of review and because of the continuing litigation. There were reasons for caution. The FDA had rejected the manufacturers' petition during the "midnight" transition period; in addition, approving a batch of generics would be an irrevocable decision, while staying the policy would only postpone its benefits temporarily. Still, Schweiker came under ferocious attack from Rep. Albert Gore (Democrat, Tennessee) of the House Commerce Committee, and on April 16 he agreed to let the policy go through. The FDA reportedly intends to use paper NDAs only as an interim measure, however, while it prepares a more comprehensive policy on post-1962 drugs.

No one on the one side of the controversy can reasonably deny that paper NDAs would save consumers money on existing drugs, and no one on the other side can reasonably deny that they would lower the incentive to discover lifesaving drugs. So the question is: should a chance to save lives, however minute, outweigh a chance to save money, however enormous? The "public interest" groups would probably avoid putting it in those terms. But they should not apologize for their position; it is quite a respectable one.

In approving the paper NDA policy, Schweiker endorsed an idea that may offer a way out of their dilemma: extending the life of drug patents beyond the seventeen years set by current law. One such bill, introduced by Senator Charles Mathias (Republican, Maryland), would extend such patents to cover up to seven years of regulatory delay, thus guaranteeing most inventors about the same basic period of sole production. Such a solution would still give the generic manufacturer the "free ride" on the inventor's testing costs, but at least the inventor would have something closer to the full seventeen-year patent term to recoup those costs.

Much A-Brew about Nothing

" 'Tis no sin for a man to labor in his vocation," observed Shakespeare's Sir John Falstaff. His corporate namesake, the Falstaff Brewing Corporation, has been seeking to uphold this maxim in a year-long fight with Nebraska's liquor regulators. At issue is Falstaff's right to sell private label beer from its Omaha brewery to Nebraska supermarket chains. According to the Nebraska Liquor Control Commission, the brewery's production of Scotch Buy beer exclusively for Safeway supermarkets violates a state law forbidding brewers from giving "anything of value" to retailers.

The controversy began in April of last year, when the state attorney general's office filed a complaint with the commission against Falstaff and two grocery chains, Safeway and Hinky Dinky. Hinky Dinky was apparently wishy-washy, and went quietly, agreeing in January to drop its private label brew. But Falstaff and Safeway, while allowing the factual basis of the charge ("I will answer it straight," said Sir John. "I have done all this. That is now answered"), denied that anything of value had been given. Safeway, after all, had paid for its beer just like anyone else, and even sold it at a discount.

No matter, said the attorney general's office. The state law was designed to guarantee equality among retailers, and what could be

more unequal than an exclusive brand? Falstaff should either make Scotch Buy available to all comers on the same terms or stop producing it, a state official said. Furthermore, to quote the *Omaha World-Herald*'s summary of the official's position, "companies like Safeway are so large and financially sound that they can afford to sell their own private brands, thus giving them an unfair competitive edge over smaller merchants."

It is doubtful that the jovial Sir John himself thought economies of scale unfair, either in men or in beer. As to the latter, he took the principled consumerist view: the more and the cheaper, the better, thought he. He also had a more subtle understanding of brand loyalty than the Nebraska attorney general: "I would to God thou and I knew where a commodity of good names were to be bought." He even had a few words of warning appropriate for legislators who try to guarantee equality among unequal competitors: "Thou art essentially mad, without seeming so."

The corporate Falstaff, like that of the plays, was not one to suffer indignity quietly. The firm's chairman took out a full-page newspaper ad offering $25,000 to anyone who could prove that private label beer was illegal in any other state. He scored local officials for their lukewarm support of his cause ("Call you this backing? A plague upon such backing!"). And he spurned attempts in the state legislature to declare the beer legal, preferring to seek vindication in the courts (" 'Tis no matter; honor pricks me on").

The dispute came to a head, so to speak, on March 20, when Falstaff announced that it would stop making beer at its Omaha brewery, explaining that it no longer felt welcome in the state. Workers and their families marched on City Hall on behalf of the company. Editorials expressed support. Politicians roused themselves from their torpor and began viewing with concern, noting with alarm, and seeing light at the end of tunnels. Some even took the more pragmatic (and not entirely unpleasant) step of flying from Nebraska to San Francisco to confer with brewery officials.

All of which was of no avail before the stern and incorruptible jurists of the Liquor Control Commission. Their two-to-one verdict, rendered April 2, found Falstaff guilty as charged and ordered it to abandon its arrangement with Safeway ("Truly, mine Host, I must turn away some of my followers"). In particular, the commission declared that "the word 'give' found within Neb. Rev. Stat. SS. 53-168 (2) (Reissue 1978) is susceptible to a broader definition than to mean only 'gift' " ("Have I lived to stand at the taunt of one who makes fritters of English?") and "can and hereby is taken to mean 'deliver, furnish, transfer, provide, and/or sell.' " ("O, thou hast damnable iteration!")

If it is illegal for Falstaff not only to *give* Safeway anything of value, but even to *sell* it such a thing, one wonders how any brand of beer at all is to change hands. Is Nebraska going Dry?

The Falstaff affair seems to have ended happily, however. The state legislature moved quickly to make private label beer legal again, and the company relented on its threat to close the Omaha brewery. We think Sir John would have drunk to that.

Grass-Roots Lobbying: Propaganda Non Grata

These have been frustrating times for hunters of that wily and fleet-footed creature, the grass-roots lobbyist. Pursued by baying regulators, blunderbussed by congressional critics, beleaguered grass-rootsers have kept right on voicing opinions, discussing legislation, and even dissenting from government policy. And if a last-ditch attack by the Internal Revenue Service is turned back, they will soon be able to work the grass roots with near impunity.

Grass-roots lobbying is the practice of seeking to influence legislation, not by approaching legislators directly, but by urging fellow citizens to do so. In its purest form it employs mass mailings or newspaper ads to induce voters to send ready-made postcards or clip-along-dotted-line forms to their representatives. The controversy over grass-roots lobbying extends, however, to a far greater range of activities, including speeches, phone calls, and publications of all sorts.

According to its critics, grass-roots lobbying poses two dangers. The first is that legislators may be unable to tell the artificial cards and letters instigated by the grass-roots lobby-

ist from the genuine cards and letters arising from spontaneous public opinion. The second is that those who have the financial means to broadcast their opinions widely will "drown out" those who are less well off. Whether by mimicking genuine opinion or by competing with it, on this view, the grass-roots lobbyist is in effect poaching on the preserve of public opinion.

There is no lack of would-be gamekeepers, but their efforts have mostly come to grief. Several years ago, for instance, former Senator Thomas McIntyre (Democrat, New Hampshire) and others asked the Federal Trade Commission to investigate the "idea advertising" of Mobil and other oil companies for possible deceptive statements. The FTC begged off, citing the First Amendment. Massachusetts passed a law forbidding corporations from speaking out on referendum issues. The Supreme Court struck the law down in its 1978 *Bellotti* decision, citing the First Amendment. New York prohibited utilities from venting controversial opinions through paid advertisements or through inserts in customer bills. The Supreme Court struck both prohibitions down last year, citing the First Amendment. Senator Lawton Chiles (Democrat, Florida) introduced a law requiring disclosure and record-keeping by grass-roots lobbyists. Editorialists around the nation cried fie, citing the First Amendment, and the bill failed to pass. The Securities and Exchange Commission even got into the act last September when one of its staff reports proposed mandatory disclosure of corporate grass-roots advocacy. That proposal was quietly shelved after the election.

Only one agency is still out on the trail: the Internal Revenue Service. On November 25, IRS proposed stiff new rules that would greatly widen the definition of nondeductible grass-roots lobbying and would increase tax and accounting burdens on businesses, associations, and foundations that engage in public advocacy. Businesses have long been unable to deduct the cost of their efforts either to influence public opinion on legislation or, in most cases, to influence legislation directly. (Appearances before legislative bodies and contact with their "own" representatives are exceptions.) The new IRS rules, however, go far beyond previous practice. Trade associations would have to compute the proportion of their outlays spent on nondeductible grass-roots advocacy, and their members would not be able to claim a business deduction for that proportion of their membership dues. In addition, in what an American Bar Association committee called a "major departure from past administrative practice," the IRS would scrap the "substantiality" test whereby grass-roots lobbying is ignored if it represents only a small part of an association's activity. And IRS would for the first time require associations and firms to compute the indirect costs of grass-roots efforts, including an appropriate percentage of clerical salaries, utilities, and rent. These too would be nondeductible.

Under the new regime, an advertisement would be wholly nondeductible if even a small portion of it contained an implicit opinion on legislation. And the test of "implicit opinion" would be stringent indeed. A legislative analysis universally agreed to be fair and impartial, for instance, would be considered implicitly partial for tax purposes if a business sent it out to an audience which it could reasonably predict would favor one side of the issue. A topic could be considered legislative, moreover, even if no legislation on the subject were proposed, had ever been proposed, or were remotely likely to be proposed. An environmentalist foundation that mused in its magazine that America would be a nicer place if there were no more cars could not plead that no bill was pending to outlaw cars; it would be sufficient that its wish could not be fulfilled without an act of Congress.

The regulations would apply to just about all forms of communication not strictly limited to an in-house audience. A trade association could discuss legislation in a newsletter to its members, but would be in trouble if it sent copies to public libraries or the press. An executive speaking to a civic group might face tax consequences if legislative matters came up during a question-and-answer session. An otherwise deductible advertisement would be disallowed if it invited readers to write for further information and the information included opinions on legislation. Aside from a narrow exemption for material sent to the scientific and academic community, almost all communications would be potentially suspect.

Not surprisingly, the IRS has been inundated with comments, ranging from polite con-

cern to outrage. Trade associations and their members have led the charge; some argue that the rules' complex accounting requirements would be even more burdensome than the added taxes. Other opposition has come from foundations and labor unions, as well as from newspapers and broadcasters fearful that the costs of preparing editorials might be disallowed. The American Bar Association committee on taxation says that the rules would "have a 'chilling effect' on the exercise of the constitutionally guaranteed right of free speech" and would "tend to restrict the free exercise of institutional political speech at a time when the exercise of such speech is gaining increased recognition." The ABA committee also finds the proposed definition of a grass-roots communication "unduly broad and subjective."

On the other side are groups such as Common Cause, which asserts that if the guidelines were narrower the government would be subsidizing corporate speech. All that the rules would do, these groups maintain, is force corporations to pay for their own propaganda. But while deductibility of expenses in individual income taxes may arguably reflect some sort of special favor by the government, deductibility in corporate income taxes surely reflects no such thing. There, deductibility is the rule rather than the exception, since the object of the corporate income tax is to capture a share of the funds distributed to, or saved on behalf of, the stockholders. Generally speaking, all the money the firm spends to further its business interests is deductible. If corporate deductibility is a subsidy, therefore, the government is massively subsidizing every business, and the only way to end subsidies would be to apply the 46 percent corporate tax rate to a firm's sales instead of its net profits.

The Internal Revenue Code's treatment of grass-roots advocacy is at any rate not primarily motivated by abstract questions of tax equity. In the view of the leading congressional voice on the matter, Representative Benjamin Rosenthal (Democrat, New York), "Congress enacted the grass-roots lobbying provisions of the Tax Code because it wished to discourage powerful economic interests from dominating public debate on legislative matters." That is to say, Congress wanted not merely to "chill" but actively to hinder corporate speech, basing its action on the "drowning out" argument.

The Supreme Court said in its *Bellotti* decision that the "drowning out" rationale for suppressing corporate speech is "wholly alien to the First Amendment." It seems unlikely, however, that the Court would strike down the mere denial of a deduction (as opposed to an absolute prohibition of the sort involved in *Bellotti*) on this basis: In 1970, in *U.S.* v. *Consumers Power*, it declined an opportunity to do so, letting stand a lower court decision that disallowed a deduction for an advocacy ad. On the other hand, the Court ruled in its 1974 *Big Mama Rag* decision that a tax provision can violate the First Amendment if it is so vague as to invite politically motivated enforcement. The Tax Code's provision on lobbying and its implementing regulations must give concern on this score.

A curious sidelight to the grass-roots lobbying issue is that the federal government itself, according to the General Accounting Office, conducts extensive grass-roots lobbying with taxpayer funds. Such activity is of course prohibited by statute, for the distinctive reason that some people's money should not be used to support other people's politics. Nonetheless, last year GAO turned up evidence that the Interior Department's Office of Surface Mining carried out a coordinated grass-roots campaign to defeat a bill that would have turned much of the agency's power over to state governments. Congressional investigators uncovered internal memos detailing how agency employees organized a lobbying coalition of private groups, generated home-state mail, and even drew up plans to juggle grant announcements to affect wavering members of Congress. And turning to more recent issues: On May 1, GAO reported that the Legal Services Corporation had "engaged in and allowed its grant recipients to engage in lobbying activities prohibited by Federal law" in attempting to defeat proposed cuts in its budget.

One step that the new administration could take to remedy what may be widespread abuse is to issue government-wide guidelines implementing the law against agency lobbying —so as to clarify the line between informing the public and lobbying it. Even with such a measure, however, the line would remain less than sharp; and even assuming no violation of the law by the agencies, the federal government's ability to mobilize public opinion would

remain substantial. That is all the more reason to be cautious in closing off potentially effective countermeasures from the private sector, as the new IRS rules would do. Even taking the view that the nondeductibility rule for corporate lobbying is necessary and appropriate to prevent the "drowning out" of other public debate, the law surely should not adopt a definition of lobbying that is so unrealistic or impose record-keeping and accounting costs that are so high as to dry up this element of the debate entirely.

The IRS rules should go back to the drawing board. Incidentally, IRS rules are covered by the new executive order requiring cost-benefit analysis and OMB clearance—but are not covered by proposals pending on Capitol Hill to put some parts of the executive order into law. IRS rulemaking has traditionally enjoyed a sort of sacrosanctity: most of it is not technically subject to the notice-and-comment procedures of the Administrative Procedure Act because it is merely "interpretative" of the law, and it is generally given a wide berth by executive branch managers because it is so technical and seems to be merely routine law enforcement. The grass-roots lobbying rules—like the IRS proposal last year that would have subjected private schools to onerous antidiscrimination requirements in order to qualify for the charitable deduction—demonstrate that such sacrosanctity is a great luxury. The power to make tax rules, it appears, involves the power to destroy.

Reversing the D.C. Circuit at the FCC

The Supreme Court's March 24 decision in *FCC* v. *WNCN Listeners' Guild* marks the end of an extraordinary dispute between the U.S. Court of Appeals for the District of Columbia and the Federal Communications Commission. It may also mark the beginning of a new era in the relationship between the regulatory agencies and that court.

The dispute involves the FCC's ongoing effort to give radio station owners more latitude in deciding what programming to broadcast (see Perspectives, *Regulation,* March/April 1981). The specific point of controversy first arose back in 1970, in *Citizens' Committee to Preserve the Voice of the Arts in Atlanta* v. *FCC.* The owner of two stations in Atlanta had applied to the FCC for permission to sell the stations to a new owner, who planned to change their programming format from classical to semiclassical and popular music. Despite challenges by various groups, the commission granted the application without a hearing. It found that the transfer would be in the public interest because, among other things, the existing format was unprofitable for the stations, another Atlanta station broadcast classical music during the day, and community attitudes generally favored the format change. No hearing was necessary, it said, because the statutory prerequisite of a "substantial and material question of fact" did not exist. The D.C. circuit reversed the commission, holding that a hearing was required.

The startling part of the court's decision was not its finding that there existed, as to the format issue, "questions of fact" that were "substantial" (which certainly seemed to be the case); but rather its determination that those questions were "material" to the FCC's decision concerning transfer approval. For while the commission had, over the years, never brought itself to uttering the dread regulatory heresy that entertainment format (short of obscenity or indecency) was simply none of its business, it had in fact behaved in that fashion—requiring that program format be specified in applications for license grants, renewals, and transfers, but never denying an application on the ground that the proposed format would not serve the public interest, so long as it could find that the format had substantial public support. (Of course the latter finding could always be made since, in selecting its format, the applicant was, to put it mildly, hardly indifferent to public appeal.)

In the Atlanta case, the court was suggesting that this was not enough and that the commission had a positive responsibility to ensure that the stations in a community serve all significant programming tastes that can feasibly be served. "[I]t is surely in the public interest," the court said, "as that was conceived of by a Congress representative of all the people, for all major aspects of contemporary culture to be accommodated by the commonly owned resources whenever that is technically and economically feasible." And lest it be thought that

In Brief–

Non-Carcinogen of the Month. The Food and Drug Administration is quick to accept the results of animal tests when they suggest a hazard. One wonders, therefore, what they will make of a new report by researchers at the Oak Ridge National Laboratory. It shows that a food additive, butylated hydroxytoluene (BHT), has a significant effect on the health of laboratory mice—for the better. Mice fed a high dosage of BHT lived more than 25 percent longer on average than mice who went without it, according to the researchers' report in the July 1979 *Journal of Gerontology*. Moreover, the researchers observed that "throughout most of their life span, BHT-treated mice were generally heavier, their hair coats were much smoother, and they were healthier in appearance." The health-conscious reader will be glad to learn that BHT is widely used as a preservative in cereals, pastries, breads, and many other common foods.

Crimestopper's Notebook. The Reagan administration proposed on May 5 to legalize a social abomination that enlightened government has spent nearly forty years trying to suppress. Hardened addicts of the vice, often quite elderly, can be identified by the needles they carry and the wicker baskets, often cleverly disguised as fruit bowls or bird nests, in which they conceal their contraband.

The offense in question is knitting—to be exact, knitting at home for pay in defiance of federal labor regulations. Since the 1940s, "homework" has been illegal in seven needle trades, one reason being that it is notoriously difficult to enter people's living rooms to enforce wage-and-hour and labor relations laws (and, more recently, OSHA regulations). Even more to the point, garment unions and major apparel manufacturers do not want the competition. They warn that once workers get a taste of home knitting they will move on to stronger stuff, like embroidering handkerchiefs and tatting little doilies. And where will it all end?

WHO's Minding the Store. During the debate over the World Health Organization's infant formula marketing code, some U.S. officials warned that the code would lead to other types of regulation by the United Nations and its affiliates: an "international FTC," in the words of Health and Human Services Secretary Richard Schweiker. Others dismissed these concerns as alarmist. Now the director general of WHO, Dr. Halfdan Mahler, has told Schweiker (according to the Pharmaceutical Manufacturers Association newsletter) that his office has budgeted funds for the drawing up of an international pharmaceutical marketing code.

At the same time, the director general of the United Nations Educational, Scientific, and Cultural Organization is drafting specific proposals for the planned New World Information Order, to be brought up at the next UNESCO meeting in 1983. If these projects are brought to completion, there may be an "international FDA" and an "international FCC" to go along with the "international FTC."

Paternalism Tiptoes on. Who says the Consumer Product Safety Commission serves no useful function? On April 3 a nonprofit group asked the commission to set standards for shoes, particularly women's shoes, whose "inadequacies in sizing, shape, and/or construction" endanger the podiatric wellbeing of hapless American consumers. The Community Health Information Council's petition suggested that the agency require a warning label on offending shoes. There is a simpler approach: if the shoe doesn't fit, don't wear it.

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by "culture" the D.C. circuit meant only classical music and the arts, it later ordered the commission to hold a format-change hearing in a case entitled *Citizens' Committee to Keep Progressive Rock* v. *FCC* (1973).

The commission was less than zealous in complying with the court's mandate, even with respect to the narrow requirement that it hold hearings in such cases. (With some reason: in many cases the mere prospect of an expensive hearing is enough to quash a station sale.) And it was downright obstinate in refusing to accept the underlying affirmative responsibility to ensure diversity in entertainment programming.

The issue came to the first of several climaxes in 1974, with the D.C. circuit's decision in *Citizens' Committee to Save WEFM* v. *FCC*. There not only had the commission refused to order a hearing in a format-change license transfer on the usual ground of no substantial factual dispute, but also, to add insult to injury, six of the seven commissioners had joined in a separate opinion defending the commission's past policy of leaving entertainment programming to market forces. Well, you can imagine how mad that made the D.C. circuit! Sitting in its full assembly of ten judges instead of in the usual three-judge panel, the court once again reversed the FCC and required a hearing; and then, noting "this court's role as the sole forum for appeals from FCC licensing decisions," it went on to say:

> We think it axiomatic that preservation of a format [that] would otherwise disap-

> pear, although economically and technologically viable and preferred by a significant number of listeners, is generally in the public interest . . . [A] policy of mechanistic deference to "competition" in entertainment program format will not focus the FCC's attention on the necessity to discern [adequate] reasons before allowing diversity . . . to disappear from the airwaves.

It is at this point that the story becomes extraordinary. The FCC of course complied with the D.C. circuit's order in the *WEFM* case and held the required hearing. But on the more general issue of its substantive responsibility to ensure program diversity, it simply refused to go along. Instead it issued a formal Notice of Inquiry, the purpose of which it described as follows:

> Over the years, the Commission has sought to avoid dubious intrusions into the broadcaster's programming judgments. . . . Now, however, the policy suggested by the Court of Appeals seems to require a much closer scrutiny of proposed changes in the programming decisions of broadcasters. We seriously question whether, under the Act's public interest standard, such close scrutiny is necessary or appropriate. . . . For this reason, we are instituting this inquiry to examine whether the Commission should play any role in dictating the selection of entertainment formats.

In short, the commission was asking the public to comment on whether the commission should do what the D.C. circuit had told it to do. And you can imagine how mad *that* made the D.C. circuit!

After considering public comments, the commission issued a Memorandum Opinion and Order which cited the statement, oft repeated in the D.C. circuit's own opinions, that "agencies and courts together constitute a 'partnership' in furtherance of the public interest," and then proceeded as follows:

> When such "partners" come to a point of fundamental disagreement, it is incumbent upon us to take a step back and rethink our entire position if this relationship is to be creative rather than destructive. . . . Our reflection, aided by extensive public comment on virtually every aspect of this matter, has fortified our conviction that our regulation of entertainment formats as an aspect of the public interest would produce an unnecessary and menacing entanglement in matters that Congress meant to leave to private discretion. . . . Any such regulatory scheme would be flatly inconsistent with our understanding of congressional policy as manifested in the Communications Act. . . .

The commission announced that its "new policy," which flatly contradicted that set forth by the court in *WEFM*, would be adopted in sixty days, barring application for judicial review. Well, you can imagine . . . !

Judicial review was of course sought, and the result was the D.C. circuit's opinion in the *WNCN* case, which held the commission's Policy Statement "to be unavailing [*unavailing!*] and of no force and effect." The opinion's tone of *lèse-majesté* is sufficiently conveyed by the following passage:

> The Commission repeatedly referred to *WEFM* as representing the "policy" of the Court of Appeals, and contrasted it unfavorably with the "policy" of the Commission. It called upon this court, as its so-called "partner" in the regulatory process, to step back and recognize that its "policy" is superior to our own.
>
> We should have thought that *WEFM* represents, not a *policy*, but rather the *law* of the land as enacted by Congress and interpreted by the Court of Appeals, and as it is to be administered by the Commission. This court has neither the expertise nor the constitutional authority to make "policy" as that word is commonly understood. . . . That role is reserved to the Congress, and, within the bounds of delegated authority, to the Commission. But in matters of interpreting the "law" the final say is constitutionally committed to the judiciary. . . . Although the distinction between law and policy is never clearcut, it is nonetheless a touchstone of the proper relation between court and agency that we ignore at our peril.

The FCC appealed to the Supreme Court and was completely vindicated. In its opinion rendered on March 24, the Court repeated what it had said less than three years earlier in the last major showdown between the D.C. circuit and the FCC, where the lower court was reversed for attempting to dictate FCC policy on the issue of cross-ownership between broad-

cast media and newspapers: "A reviewing court . . . is not empowered to substitute its judgment for that of the agency."

Having dropped two bouts in a row, the last virtually a challenge match lost in most humiliating fashion, the D.C. circuit might have been expected to become more circumspect in converting its policy preferences into law. However, ...

Last April, less than a month after *WNCN* was handed down, the D.C. circuit decided *Gottfried* v. *FCC*. The petitioners in the suit were challenging the license renewals of eight Los Angeles television stations on the grounds that they had not made any special provisions (such as closed-caption programming) for the needs of the hard-of-hearing and the deaf. They cited section 504 of the Rehabilitation Act of 1973, which provides that "no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from . . . participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The FCC declined to hold a hearing on the renewal applications, on the ground that the petition did not raise any "substantial or material question of fact."

The D.C. circuit reversed the commission's action as to the one public television station involved, holding that section 504 applied to the station because it received federal funds and that the FCC's "public interest" mandate requires it to consider a licensee's compliance with statutory obligations of this sort. The court further found that section 504 did not apply to the seven commercial stations, rejecting the argument that the grant of a broadcast license constituted "Federal financial assistance"; and though it found that the "public interest" mandate of the Communications Act required the commission to take into account "the national policy of extending increased opportunities to the hearing impaired," it did not find that obligation alone to require a renewal hearing in the case at hand. All of those determinations are debatable, but they all clearly involve questions of law. The court went on, however, to assert that "some accommodations for the hard of hearing are required of commercial stations," and to warn that while it was willing to "defer today" to the judgment of the commission, "judicial action might become appropriate at a later date" if the commission did not "act realistically to require, in the public interest, that the benefits of television be made available to the hard of hearing now."

This last determination—characteristically taking the form of an obiter dictum and therefore not subject to appeal—assuredly does *not* address a question of law. In taking account of what the court appropriately found to be the "national policy" of assisting the hard-of-hearing (appropriately, though not necessarily correctly: Congress, after all, had sought to limit section 504 to federal grantees), the commission might well find that there are feasible actions the commercial stations should take. But it might also find the opposite, and the record before the D.C. circuit could not possibly support a categorical judgment that the latter finding would be an abuse of discretion. The court was, in other words, not only substituting its judgment for the agency's, but rushing to pronounce a judgment before the agency had even done so.

A few years ago, an unappealable decision-by-dictum such as this would have effectively determined communications policy. Even if the FCC courageously chose to ignore the court's mandate, its licensees (perhaps no less courageous, but having real money on the line) would surely comply, for fear of later being held in violation of their public interest obligations. Now, however, the innovative course charted by the commission in the *WNCN* case has shown the way to recapture policy-making authority: The FCC should simply convert the D.C. circuit's policy dicta from declaratory sentences to questions and set them down for rulemaking. If the court says "some accommodations for the hard of hearing are required of commercial stations," the commission should issue a Notice of Inquiry asking, "Should some accommodations for the hard of hearing be required of commercial stations?" And then it should proceed, as Congress intended, to make that policy judgment for itself—confident that the Supreme Court, at least, will sustain that judgment so long as it is "based on consideration of permissible factors and is otherwise reasonable." The process, of course, subjects the D.C. circuit court to a certain amount of indignity, but that is entirely of its own creation.