Perspectives
on current developments

The Private Attorney General Industry: Doing Well by Doing Good

A good idea tends to get run into the ground. Take the idea that certain sorts of litigation against the government ought to be made easier. In the bad old days, when a federal agency went beyond its assigned powers, even persons directly affected by its actions frequently could not challenge them. If, for example, the Tennessee Valley Authority began selling electricity beyond its legally prescribed area, the private utilities that were undersold at public expense did not necessarily have standing to sue. Since they had no "right" to be free from competition, governmental or otherwise, the harm done to them was no different as a legal matter from that done to the public at large. And the public's "right" to have agencies behave in accordance with law was to be vindicated through Congress and the Executive rather than through the courts.

This view of the world changed radically during the 1940s and 1950s as Congress (and ultimately the courts, without benefit of explicit legislative mandate) set about conferring standing on new classes of litigants. Any person "adversely affected or aggrieved" was given a right to be free of unlawful agency action. The theory advanced to support the new approach was that these plaintiffs were being enlisted as "private attorneys general" to benefit the society at large by keeping the agencies in line.

After a couple of decades the thought occurs: Gee, the *public* attorney general doesn't have to dig into his own pocket to do the public's work. Why should the private attorney general? Thus there arise federal statutes in various fields compensating private litigants for their attorneys' fees when they are successful in correcting agency malfeasance.

Time goes by and another inconsistency becomes apparent: The public attorney general isn't out of pocket even when he *loses*, presumably on the theory that it benefits the public to have these things sued out even when he turns out to be on the wrong side. So why not the same for the private attorney general? Enter provisions for the award of attorneys' fees to some litigants who sue the agencies and *lose*!

The inexorable logic marches on: Come to think of it, the public attorney general is not merely compensated for his out-of-pocket expenses; he's paid a *salary* for all the benefits his litigiousness brings to the Republic. So why not the same for the private attorney general as well? Thus, the *ne plus ultra* of attorneys' fees: awards to the loser based not upon what the nominal private attorney general (the plaintiff) is charged by his lawyers, but rather upon what the real private attorney general (the lawyers themselves) *could* have charged for their services on the open market.

That this is not all a bad dream is demonstrated by several cases recently decided by the U.S. Court of Appeals for the District of Columbia Circuit. On February 5, that court awarded attorneys' fees to the losers in three cases under the Clean Air Act—which, like other environmental statutes, specifies that the court may award attorneys' fees "where appropriate." In *Sierra Club* v. *Gorsuch*, the court noted that the Sierra Club and the Environmental Defense Fund had "extended great efforts to perform their advocacy tasks well" and had assisted the court in construing the statute—even though they had lost on all counts. In *Environmental Defense Fund* v. *Environmental Protection Agency*, the court awarded fees to the Environmental Defense Fund, which had lost on eleven of the thirteen issues in the case. And in *Alabama Power Co.* v. *Gorsuch*, the court awarded fees to the Sierra Club and the Environmental Defense Fund, which had lost on about half the issues, and to the government of the District of Columbia, which had lost on the *other* half (since it had taken the opposite position).

In the second of these cases, the court awarded fees adding up to more than the Environmental Defense Fund's lawyers had actually been paid. This was in accord with a standard of "adjusted market value" that the court had adopted in *Copeland* v. *Marshall,* a 1980 employment discrimination suit brought under Title VII of the Civil Rights Act, which permits "the court, in its discretion, [to] allow the prevailing party, other than the . . . United States, a reasonable attorney's fee." (The courts have managed to interpret this, by the way, to apply only to a prevailing *plaintiff,* and not to a prevailing *defendant.*) The plaintiff, Copeland, had been represented by the prestigious Washington law firm of Wilmer, Cutler and Pickering. The court ordered the Labor Department, Copeland's employer, to promote her, and awarded her and several other plaintiffs a total of $33,000 in back pay. It then awarded her lawyers $160,000 in attorneys' fees, basing the amount not on what Copeland had agreed to pay the law firm, nor even on what the law firm actually paid its partners and associates who worked on the case, but on the "market value" of their work. This was calculated by multiplying the number of hours the attorneys had worked by the hourly rate Wilmer, Cutler and Pickering usually charged its corporate clients—plus some adjustment upward for the high quality of the service it had provided.

There is of course another rationale for the awarding of attorneys' fees against the government, quite different from the "private attorney general" concept: It might simply be thought fair to compensate the citizen for what it actually costs him to extract justice from his government. This notion is to some extent embodied in the 1980 Equal Access to Justice Act, which provides for the award of fees in administrative and court litigation against agencies by (1) individuals with less than $1,000,000 net worth and (2) companies and associations with less than 500 employees and (except for tax-exempt entities such as most public-interest law firms) less than $5,000,000 net worth. (It is a relatively stingy fee provision, containing a limitation of $75 per hour, a requirement that the person seeking the fee be the "prevailing party," and even an exception where the agency's position was "substantially justified.")

But not only will a direct personal injury not help a litigant under the more liberal fee provisions of such statutes as the Clean Air Act; it may even categorically disqualify him! In *Alabama Power Co.* v. *Gorsuch,* the D.C. circuit court suggested that it might not be "appropriate" (the statutory standard, if it can be called a standard) to award fees to those with economic motives, since the fee provisions were meant to encourage litigation by persons who would not sue otherwise. Never mind that this conclusion rests on the questionable assumption that groups like the Sierra Club will be less likely to litigate than profit-seeking corporations and loss-averse individuals for whom compliance may be cheaper than litigation. And never mind even the inverted equity of a rule that covers your costs only if you are *not* suing to obtain something of value that has been wrongfully withheld. The important point is that the effect of the rule is to establish a policy directing the flow of litigation subsidies primarily to ideologically motivated law-reform or anti-law-reform organizations.

The D.C. circuit's view on this last point may well be in accord with the statutory intent. Whether it is or not, any change in the current situation will have to be sought in Congress; and the Reagan administration proposes just that. It has submitted legislation that will limit attorneys' fees under all statutes to the level provided for in the Equal Access to Justice Act. In addition, the award would have to bear a reasonable relation to the result achieved in the case. Only winners would qualify, and the client would have to certify that the fee was owed, was determined on an arm's-length basis, and will be paid to the extent not covered by the fee award. The proposal is sure to encounter vigorous opposition from the private attorney general industry, from the smallest San Francisco legal-aid storefront to the deep-pile conference rooms of Washington law firms.

What is ultimately involved here, however, may go far beyond the "private attorney general" issue. The law governing the award of attorneys' fees in federal litigation—not only against the government but against private parties as well—is an expanding wasteland of confusion. Such chaos often accompanies the initial attempt to abandon important and long-standing legal traditions. The accelerating pace of statutory change, one suspects, has more to do with the "individual justice" rationale than the "private attorney general" rationale. In an

age when corporations are tempted to describe their annual profits in multiples of annual attorney's fees instead of percentages of annual sales, the cost of obtaining justice, whether from the government or from a private party, is more often than not prohibitive. While we are not yet prepared to abandon in wholesale fashion the American rule that each party to litigation pays his own attorneys, and to adopt the English rule that loser pays all, we are gradually moving in that direction for federal claims through a disorganized and often inconsistent spate of preferential statutes. As one would expect, the earliest of these favor litigants whose causes society regards as particularly "just," or (to put it more cynically) whose numbers, cohesiveness, and political influence make the justice of their cause more readily apparent to elected officials. Civil rights claims were among the first; small business suits against agencies the most recent; and many more can be expected to follow, until the exception gobbles up the rule.

A New Deal for Utilities?

A holding company, said Will Rogers, is a "thing where you hand an accomplice the goods while the policeman searches you." For most large businesses now, it is something a lot more innocuous: a single corporate roof under which they may conveniently house all the various businesses they own or control, often in unrelated industries, without mingling their actual operations. Almost all businesses can diversify as much as they like, with or without a holding company structure. The biggest exceptions are utilities and banks, which face restrictions on both participation in holding company structures and diversification generally.

With the rise of such "near-banks" as Sears Roebuck and American Express, the banking exception may not last long. Now the utility industry too has decided that it wants to play on the same terms as everyone else. It is calling for the reform, if not the full repeal, of the Public Utility Holding Company Act of 1935, the old New Deal statute that limits the use of holding companies and confines utility diversification within very narrow bounds. And it has mustered some impressive support, including the Securities and Exchange Commission (which is responsible for enforcing the act), the Department of Energy, and a Reagan administration interagency working group studying the financial health of the electric utility industry. Moreover, while parts of the industry are seeking only to reform the act, the administration is reportedly leaning toward total repeal. Committee hearings on several repeal and reform bills are under way on Capitol Hill.

Utility holding companies date back to the 1890s, but their real heyday was the 1920s, when demand for electrical power was growing rapidly in a largely unregulated environment. By 1932, according to a Federal Trade Commission report, 78 percent of electric power and 80 percent of interstate natural gas were controlled by holding company systems. Most criticism of the holding companies focused on a few big systems — examples of the so-called Power Trust. The system operated by Samuel Insull is the classic example. Insull's empire spread across thirty-two states and included not only electric companies but ice houses, textile mills, a paper mill, and a hotel. Through "pyramiding," the layering of one holding company on top of another, Insull controlled large amounts of capital with a relatively small investment. Before it collapsed in 1929, his system was more than ten layers deep. Pyramiding was alleged to abet various financial abuses, among which were "self-dealing," in which a holding company charged exorbitant management and engineering fees to its operating companies, and "write-ups," in which it misrepresented the value of newly issued securities.

Public discontent with both the size and structure of such operations led to the Public Utility Holding Company Act of 1935. The act required all utility holding companies, defined as companies that control or own at least 10 percent of the voting securities of a gas or electric utility, to register with the SEC, to simplify their corporate structure by removing such complexities as subholding companies, and to divest themselves of all facilities outside a contiguous geographic area or region. The act also empowered the commission to regulate many of the firms' financial practices and placed restrictions on utility diversification (see below).

The more jerry-built of the utility holding companies did not withstand the Depression anyway, since their pyramid structure made even a small loss at the operating level devastat-

ing to the company at the top. Between 1929 and 1936, fifty-three utility holding companies went into receivership or bankruptcy. The act's requirement for divestiture took care of most of the rest. Utility holding companies divested themselves of 759 companies by 1950, and the number of registered holding companies fell from 216 to 18 between 1938 and 1958. Only twelve registered holding companies survive—nine electric and three gas utilities.

Since the 1960s, enforcing the act has not taken much of the SEC's attention. Reviewing the new financings, mergers, and affiliate transactions of its twelve remaining charges is no major undertaking. The SEC also acts upon requests by firms for exemption from registration, and then polices compliance with the terms of the exemptions. It is authorized under the act to grant such exemptions for a variety of reasons—for example, because a holding company's utility activities are located largely in one state. Over eighty firms have been awarded exemptions on one basis or another.

Registered companies and their subsidiaries are allowed to diversify into "functionally related" businesses, which the commission has interpreted to mean such activities as pipeline construction, railroad operations, the sale of appliances, and insulation services. They can also produce coal, gas, and oil, but only if the bulk of the output is for their own use. Exempt companies can diversify into a broader (though ill-defined) range of areas, possibly including some unrelated areas, and may acquire a non-utility business without prior SEC approval. But the SEC can revoke their exemptions at any time, not only for violations of the terms of the exemption but also under a vague "public interest" standard. Thus the exempt firms must still keep one eye on the law's provisions and the other on the agency, which they say has a "chilling effect" on their diversification efforts.

The acquisitions that utilities might make, if the act were repealed, fall into three categories: horizontal, vertical, and "diagonal" (or conglomerate). Each type of diversification poses its own problems for utility regulators. Horizontal mergers that combine utilities operating in different geographic areas raise the remote possibility that a nationwide electric or gas utility, like American Telephone and Telegraph in telephones, might arise and gain market power over suppliers. But such a combine would probably not get very far, since the Federal Power Act and most state regulators also impose curbs on geographic expansion. Vertical acquisitions by a utility of its suppliers or customers would give state regulators more work policing the "transfer prices" at which goods changed hands between different parts of the company. Even "diagonal" or conglomerate mergers raise the cross-subsidization issue—that is, the possibility that the utility will use the attribution of joint costs to shift some of its monopoly profits into the unregulated side of the business.

State regulators worry that their legal powers and staff capabilities would prove inadequate to the task of allocating costs properly among the various parts of a diversified utility and determining transfer costs for transactions between affiliates. The National Association of Regulatory Utility Commissioners opposed diversification in a 1972 report, and at present is approaching the issue with great caution. Similar worries have led the Justice Department's Antitrust Division to express public misgivings about vertical utility diversification. The proposals for change have also drawn fire from consumerist groups and from the American Public Power Association, which represents government-owned utilities that buy wholesale electrical power from private utilities.

Cross-subsidization, of course, is a double-edged sword: some state regulators may be tempted to hold down rate increases by unrealistically attributing to the monopoly side of the business the earnings of profitable non-utility affiliates. Both that and the opposite danger are less under a holding company arrangement than under a structure whereby the utility operates the related business directly, since the holding company format segregates the firm's operations more completely. And if state regulators are too grasping it is relatively easy to spin off a separately incorporated business.

Those who favor repealing the federal act point out that state regulators do have wide authority to police transfer prices and cost allocations, and that the cost of beefing up their oversight staffs may be small compared with the potential efficiency gains of diversification. Moreover, any states that disagree can enact or strengthen their own anti-diversification laws—which might or might not be desirable, but would at least allow experimentation in the

more venturesome states, unlike the present federal control.

Diversification of utilities into other industries should not reduce the competitiveness of those industries; utilities are not as large as a lot of the firms, such as oil companies, with whom they would probably be competing. Moreover, other state and federal laws, as well as conventional accounting practices and the watchfulness of investment and commercial bankers, may be sufficient safeguards against remaining forms of abuse. Practices like "self-dealing" and "write-ups," for instance, are already regulated under other New Deal laws such as the Securities Acts of 1933 and 1934 and the Federal Power Act.

Diversification (and more liberal use of the holding company structure, which makes diversification easier) would give utilities greater flexibility in obtaining outside capital, and would let them hedge their risks by investing in businesses that run counter to their own earning cycle. Utility managers' knowledge and experience might be transferable to other areas, and diversification might make working at a utility more attractive to managerial talent. But not only would utility managements be allowed to buy other firms: other firms would be allowed to buy them, although the consent of other regulators would still be required under various federal and state statutes. The prospect of successful takeover offers by non-utilities for utility companies, followed by the ouster of their top personnel, has led some to suggest that if the utility managements knew what was good for them they would oppose repealing the act.

The Hazards of Hazard Labeling

During its first year, the Reagan administration busied itself weeding and pruning the formidable thicket of existing federal regulations. Then on March 19, 1982, it came forward with its first major new planting: the Occupational Safety and Health Administration's chemical labeling (or "hazard communication") proposal. It was a big one by any standard: OSHA itself reckons that it would cost industry $582 million in start-up costs and $228 million a year in ongoing costs.

The proposal contains two basic requirements. First, chemical manufacturers would have to assess the health and safety hazards of the chemicals they produce by reviewing the scientific literature on each chemical. Second, all manufacturers would have to inform employees in detail of the chemical hazards present in the workplace. Specifically, manufacturers would have to:

- Compile lists of all hazardous chemicals known to be present in the workplace and furnish such lists to employees or their representatives and to OSHA (under limited trade-secret protections).
- Label every container with the identity of any hazardous chemicals it contained, along with appropriate warnings.
- Label every container of hazardous chemicals that left the workplace with the name, address, and telephone number of its manufacturer.
- Make available to employees "material safety data sheets" for every hazardous chemical. Chemical manufacturers would have to prepare these sheets and send them to customers with their initial shipments of those chemicals.
- Provide employees with information and training on both the nature of the chemicals used in the workplace and on how to identify hazards and protect against them.

The chemical labeling proposal is a much-modified descendant of a "midnight" rule proposed by the Carter administration on January 16, 1981. That proposal was in most respects even broader. It would have applied several stringent provisions to all manufacturing industries that use chemicals, rather than just chemical manufacturers, and it would have defined "containers" of chemicals to include such things as pipes, pumps, and valves. The required labels would have been much more extensive and detailed, calling for chemical names, common names, and special identifying numbers for each chemical present in a concentration of 1 percent or greater and for each suspected carcinogen present in a concentration of 0.1 or greater. Indeed, Reagan officials argued that the earlier proposal would not be very effective at informing workers because of the stupefying complexity of the labels.

In keeping with its decision to proceed with a somewhat toned-down version of the Carter proposal, OSHA presented the administration's regulatory reviewers with a somewhat

toned-down version of the regulatory analysis it had prepared for that earlier proposal. The new analysis, like the old, relied in part on the questionable data OSHA compiled when it was pursuing its "generic cancer policy" a few years back. It cited, for example, a highly dubious report issued by the Toxic Substances Strategy Committee in 1980 under the auspices of the Council on Environmental Quality, and the 1978 "Califano report," on which the TSSC report's discussion of occupational cancer was in turn based. The Califano report charged that as much as 38 percent of all cancer might be occupational in origin. As William Havender noted in these pages last year ("Politicians Make Bad Scientists," *Regulation*, November/December 1981), later research has shown those two reports to be gravely erroneous. In particular, two of the world's leading cancer epidemiologists, Sir Richard Doll and Richard Peto, after exposing the reports' errors in the pages of the *Journal of the National Cancer Institute*, gave as their "best estimate" that occupational exposure accounted for 4 percent of all cancer, or about 17,000 cases a year. Other previously published estimates, except for that in the Califano report, range no higher than 5 percent.

Perhaps in embarrassment over its source, OSHA chose what it termed a "conservative" 10 percent for purposes of estimating the benefits of its labeling rule. The agency then assumed, without citing any evidence, that hazard labeling would lead to a 20 percent decline in the number of cancer deaths caused by chemicals in manufacturing. Thus it ultimately concluded that the rule would prevent 4,000 cancer deaths a year. If we take that figure and Doll and Peto's estimate of occupational exposure, instead of OSHA's, this proposed venture in full disclosure would succeed in ending almost a quarter of all job-related cancer—an impressive feat, especially since the important known workplace carcinogens, such as asbestos, vinyl chloride, coke oven emissions, and arsenic, are already controlled and labeled under existing OSHA regulations.

OSHA did not specify how it expects hazard warnings to lead to lower illness rates. Presumably workers newly apprised of these dangers will demand risk premiums, handle some chemicals more carefully, perhaps refuse to work with others, and demand safer manufacturing systems. Many of these changes would clearly be quite costly to implement, but OSHA does not take their expense into account in its cost-benefit analysis.

The Vice-President's Task Force on Regulatory Relief approved the proposal over the initial objections of the Office of Management and Budget. Perhaps this means that the administration's review process flinched in its first confrontation with a major new regulatory initiative. Or perhaps it merely means that the review process does not concentrate its attention on rules that provoke little political controversy. For while the proposal had drawn the opposition of a few OMB economists, all of the interested parties—chemical manufacturers and users, unions, congressional committees—supported it. The chemical industry, for its part, may have had strategic considerations at stake: concern for its public image, commitment to a position originally taken for defensive reasons, fear that worker "right-to-know" legislation (already passed by twelve states and two cities) will spread to more, worries about exposure to product liability suits, and perhaps even the desire to place the smaller chemical firms (less well represented in Washington) at a competitive disadvantage. OSHA estimates that 60 percent of the chemical industry is already in compliance with the major provisions of the proposed rule.

State Taxes and Federal Dilemmas

State taxation of national and multinational corporations belongs to that category of topics columnist William Safire has called "three-bowlers": the reader's face will plop down into his cereal bowl three times before he finishes the article. It provides, however, a good illustration of the deepening conflict between two of the Reagan administration's most firmly held principles: leaving business alone and leaving the states alone. Business complains that the patchwork of state tax laws is inconsistent and unfair; but the only way to reform matters is to limit one of the states' primordial powers.

Ever since the beginnings of large-scale enterprise in the United States, state governments have wrestled with the problem of how to tax businesses that operate across state lines. In the case of the corporate income tax, now used by all but six states, the problem is espe-

cially knotty: each state must determine how much of a national or international firm's overall income is "really" earned in that state. Neither of the two basic methods that states use to do this, "separate accounting" and "apportionment," is completely satisfactory.

Under separate accounting, the state tries to segregate a firm's operations in the state from its other operations for tax purposes. If, for example, the firm is a manufacturer and retailer of men's clothing, with its factory within the state and all its retail outlets elsewhere, the state would try to calculate the profit attributable to the manufacturing portion of the business. Even in this simple and unrealistic example, the process obviously involves a lot of questionable assumptions. In the real-life context of an integrated company, it borders on pure fiction.

Under apportionment, the more popular method of determining in-state income, a state assumes that a firm's multistate operations are indivisible, and calculates the share of profit earned in the state simply by taking the firm's overall profit and multiplying it by the percentage of total operations that are carried on in the state. The latter percentage is in turn derived under an apportionment formula that takes account of the location of such operational elements as property, payroll, and sales. For example, if a state uses a formula giving equal weight to each of the three factors, and a firm has 10 percent of its property, disburses 10 percent of its payroll, and makes 40 percent of its sales within the state, then 20 percent of its overall income will be subject to taxation by the state. These apportionment formulas sometimes apply not just to a firm itself, but to all its parent, sister, and subsidiary firms as well, if they are all engaged in a combined ("unitary") operation. And state tax laws can define "unitary" very broadly, to take in, for example, subsidiaries that are not wholly owned.

Apportionment avoids the "separate accounting" fiction of separable businesses in each state. Instead, it adopts the fiction that all of a business's operations are equally profitable. The result is that a firm that loses money on its operations in a state can still owe the state a substantial tax bill if it is profitable elsewhere.

The methods various states use in applying their apportionment formulas are confusing and often inconsistent. Some states allocate sales to the buyer's state, others to the seller's. Some states use only two factors instead of three in their formulas; Iowa uses only one. Some states exclude certain types of earnings from apportionable income, such as earnings from real estate, interest, and dividends; a growing number of states do not.

To some extent, these inconsistencies must result in double (and triple, quadruple and so forth) taxation. Two states may, for example, claim the same sale in their apportionment formulas—one because the buyer was located within the state, the other because the seller was. If these inconsistencies were random, there might be an offsetting amount of what one might call "zero" taxation—sales, for example, picked up by the apportionment formulas of no state—so that businesses taken as a whole might not suffer multiple taxation. But of course the inconsistencies are not random, because of what Justice Felix Frankfurter called the "natural temptation of the states to absorb more than their fair share of interstate revenue." States with more buyers than sellers are inclined to ascribe sales to the buyers' side; those that are rich in industrial property are likely to give that factor greater weight in their apportionment formulas; and so forth.

Multiple taxation could take place under the "separate accounting" approach as well, since each state can be generous to itself in locating the imaginary line between in-state and out-of-state profits. To add to the problem, states adopting either approach may apply special tax rules to their "own" firms—firms headquartered within their boundaries. A few jurisdictions, for example, tax the entire dividend and investment income of the firms headquartered there. Since other states include this income in their separate accounting or apportionment formulas, multiple taxation seems inevitable. In short, states are faced with what may be an irresistible opportunity to import income into their jurisdiction in order to tax it.

The problem posed is not just domestic but international as well. A growing number of states extend unitary taxation to the incomes of affiliated firms worldwide, not just nationwide. Thus a foreign parent corporation may be forced to disclose its income, payroll, and sales, along with the value of its property holdings, even if it does no business in the United States,

and even if such disclosure is itself forbidden by foreign law. Not surprisingly, foreign governments perennially lodge diplomatic protests.

Businesses also say that for a variety of reasons, including differing accounting methods, profits and property values abroad are not strictly comparable to those in this country and ought not to be lumped together. A foreign subsidiary may earn large profits on paper because of currency fluctuations, but may still be unable to pay any dividends to its parent firm. That is why the Internal Revenue Service generally does not tax the profits of U.S.-owned firms operating abroad until those profits take the form of dividends, and even then not until the dividends are returned to this country. But many states, through the operation of their apportionment formulas, manage in effect to tax income earned overseas even though it has not been repatriated or even taken the form of dividends. The IRS also allows a tax credit for income taxes paid to foreign governments, in order to keep from duplicating tax burdens; states generally do not.

The time was when the Supreme Court strove mightily to protect interstate business from these problems by invoking the commerce clause of the Constitution and the due process clause of the Fourteenth Amendment. Curiously enough, however (or perhaps not so curiously, depending upon the touchstone of analysis), during the past twenty-five years, even as it has been drastically reducing the scope of "states' rights" in other fields, the Supreme Court has displayed an increasing reluctance to interfere with state taxation of interstate business. The due process constraints have been reduced to (1) the requirement of a "minimal connection" between the interstate activities and the taxing state, and (2) the caution that the tax cannot be "out of all appropriate proportion to the business transacted" within the state, whatever that means. A commerce clause prohibition against multiple taxation has been retained, but rendered utterly ineffective by a requirement that the protesting business (1) demonstrate not merely the *risk* but the *actuality* of multiple taxation (which turns out to be almost impossible for various reasons); and (2) demonstrate *which* of the taxing jurisdictions is "at fault in a constitutional sense" (which is utterly impossible, absent some federal rule as to how income must be computed).

The reasons for the Supreme Court's abstention are persuasive (except for the fact that the Court has not chosen to invoke them in other fields). As expressed in an opinion declining to invalidate Iowa's single-factor apportionment formula:

> Accepting appellant's view of the Constitution . . . would require extensive judicial lawmaking. Its logic is not limited to a prohibition on use of a single-factor apportionment formula. The asserted constitutional flaw in that formula is that it is different from that presently employed by a majority of States and that difference creates a risk of duplicative taxation. But a host of other division of income problems create precisely the same risk and would similarly rise to constitutional proportions. . . .
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> The prevention of duplicative taxation, therefore, would require national uniform rules for the division of income . . . . [This] would require a policy decision based on political and economic considerations that vary from State to State. . . . It is to [Congress], and not this Court, that the Constitution has committed such policy decisions.

Three more tax apportionment cases were argued before the Court on April 19. Unless the Court alters its basic approach, which seems both unlikely and undesirable, they will not resolve much. The monkey, then, if a monkey it is, will remain on Congress's back. Congress has moved to shake the simian off, or actually just to shift his position, only on rare occasions. The last was in 1959, when it acted to reverse a Supreme Court ruling that permitted a state to tax the income of a business that had no connection with the state other than to solicit orders within it and ship goods into it. Since then, as the Supreme Court has persisted in its hands-off attitude, pressure has mounted for further congressional action. A special House subcommittee recommended further federal preemption in 1964. Legislation to do that has been introduced in every Congress since then and has passed the House twice.

Treaties with our trading partners offer another possible way to ameliorate the worldwide, though not the domestic, problems. A 1977 tax convention between the United States and the United Kingdom did address the apportion-

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benefit of their constituencies. As political scientist Morris Fiorina maintains, one congressman's out-of-control bureaucracy is another's bread and butter. The problem is not that bureaucracies are unresponsive, but rather that the congressional committee system forces them to be responsive only to the interests represented by members of their oversight subcommittees.

The performance of regulatory agencies thus grows out of congressional institutions. Fiorina puts it this way:

> In the end, the majority of our bureaucratic failures seem to have a large element of congressional failure underlying them. Wasteful, deceptive, disingenuous, paternalistic, and captive bureaucrats work in harmony with wasteful, deceptive, disingenuous, paternalistic and captive congressmen. . . . The bureaucrats catch a disproportionate share of the public relations flak, while the congressmen appropriate a disproportionate share of the political credit, in return for which they shelter the bureaucrats.

INTERVENTION IN the regulatory process, whether by the courts or by altering administrative procedures or structure, may thus have little beneficial effect. This explains in large measure why regulatory reform, pursued by every president since World War II, remains an elusive goal. The fundamental problem is not runaway bureaucracy but congressional politics. ■

Selected References

Harold H. Bruff and Ernest Gellhorn, "Congressional Control of Administrative Regulations: A Study of Legislative Vetoes," *Harvard Law Review* 90, 1977, p. 1369.

Morris P. Fiorina, "Bureaucratic (?) Failures: Causes and Cures," Formal Publication No. 43, Center for the Study of American Business, Washington University, St. Louis, October 1981.

Ernest Gellhorn, "The Wages of Zealotry: The FTC under Siege," *Regulation*, January/February 1980, pp. 33-40.

Barry R. Weingast and Mark J. Moran, "Bureaucratic Discretion or Congressional Control: Regulatory Policymaking by the Federal Trade Commission," Working Paper No. 72, Center for the Study of American Business, Washington University, St. Louis, January 1982.

James Q. Wilson, *Politics of Regulation* (New York: Basic Books, 1980).

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ment of the income of British parent firms. But the Senate ratified the convention (in July 1978) only after adopting a "protocol of reservation" nullifying the applicable clause—in order, it said, to give Congress an opportunity to consider the issue further.

State tax authorities contend that any preemptive move by Congress would offend the principles of federalism, in which the fiscal independence of the states is surely of great importance. They also note that, to some extent at least, the desire to attract business makes excessive taxation a self-limiting phenomenon. (A case in point: in apparent recognition of the fact that investors are increasingly reluctant to build new plants in states with strong unitary tax laws, California's lower house recently voted to abandon attribution of the income of the foreign components of foreign parents except for firms involved in energy, steel, and agriculture.)

Of course, the problem could theoretically be solved without federal action, through adoption of uniform state laws—an approach that has worked in some fields where state interests are perhaps less intense (such as the Uniform Commercial Code, adopted by forty-nine states). The Commissioners on Uniform State Laws proposed a tax statute twenty-five years ago, but few states have adopted it. Hope for a state-devised solution sprang anew with the ratification of the Multistate Tax Compact (in effect, a tax treaty among the ratifying states) fifteen years ago. But only nineteen states are currently members, and even they have effectively devised means of dividing up among themselves more of the income pie than is on the plate.

As confused as the substantive law now governing the taxation of interstate businesses may be, it is in a way a refreshing demonstration of the vitality of the federal system—at least where the federal courts are willing to keep their hands off. The individual states, it would appear, are in fact not impotent to prevent congressional incursion upon their powers. One might wistfully hope that they held some other powers as close to their bosom as the power to tax.