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THE WHITE HOUSE

WASHINGTON

September 15, 1983

MEMORANDUM FOR HILDA SCHREIBER
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING *Orig. signed by FFF*
COUNSEL TO THE PRESIDENT

SUBJECT: Statement of Jonathan Rose Regarding
Legislation to Establish Administrative Law
Judge Corps (S. 1275) - September 20, 1983

Counsel's Office has reviewed the above-referenced proposed testimony, and finds no objection to it from a legal perspective.

FFF:JGR:aea 9/15/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE

WASHINGTON

September 15, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Statement of Jonathan Rose Regarding
Legislation to Establish Administrative Law
Judge Corps (S. 1275) - September 20, 1983

Assistant Attorney General Jonathan Rose proposes to deliver the attached testimony before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on September 20. Rose's proposed testimony considers general issues raised by S. 1275, which would create an independent administrative structure for the operation of agency level adjudication. The testimony expressly does not take a position on the desirability of such a general restructuring of the administrative law judge system. In essence, S. 1275 would remove administrative law judges from the particular agencies, and place them in an administrative law judge agency, where each administrative law judge would have responsibility for cases from different agencies. Rose's testimony reviews the pros and cons of such a proposal in a fairly neutral manner.

Rose then discusses alternatives to the creation of an administrative law judge agency, including the development of single-agency administrative courts, multi-agency administrative courts, and more limited administrative law judge corps proposals. In discussing some of the particulars of S. 1275, Rose's testimony is consistent with a defense of the prerogatives of the Executive, objecting, for example, to provisions for a nominating commission and selection of new administrative law judges by existing administrative law judges rather than the executive agencies.

The proposal to establish an administrative law judge corps is in the incipient stages, and Rose's testimony is generally noncommittal. I see no legal objections.

Attachment

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Subject: Statement of Jonathan Rose re: legislation
to establish an administrative law judge
Corps (S.1275) September 20, 1983

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DRAFT

STATEMENT
OF
JONATHAN C. ROSE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY
DEPARTMENT OF JUSTICE
CONCERNING LEGISLATION TO ESTABLISH
AN ADMINISTRATIVE LAW JUDGE CORPS (S. 1275)
BEFORE
THE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE
OF THE
UNITED STATES SENATE
SEPTEMBER 20, 1983

DRAFT

Mr. Chairman, I am pleased to appear before this Subcommittee to testify concerning the proposal to establish an Administrative Law Judge Corps.

In essence, the proposal would separate the administrative law judges from the agencies in which they are presently employed and establish an independent administrative structure for the operation of the system of agency-level adjudication. Similar proposals have been advanced periodically over the past fifty years as an alternative to existing systems of intra-agency adjudication. 1/ Independent systems of administrative adjudication, characterized as "central panel" systems, have in fact been established in a number of states. 2/

I would emphasize at the outset that we do not now take any position on the desirability of a general re-structuring of the administrative law judge system. A reform of this magnitude obviously calls for thorough reflection and study, including consideration of the views of each agency that utilizes administrative law judges.

1/ See Marquardt & Wheat, The Developing Concept of an Administrative Court, 33 Ad. L. Rev. 301, 305-10 (1981); Lubbers, A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level, 65 Judicature 266, 273 (1981).

2/ See The Central Panel System: A New Framework for the Use of Administrative Law Judges, 65 Judicature 231-65 (1981).

The issues raised by S. 1275 are, however, of great concern to the Department of Justice, 3/ and we are very interested in working with the Subcommittee in exploring the potential of this approach and other reforms. My testimony today will set out our initial comments and observations concerning the general concept of an independent system of administrative adjudication, alternative reform options that should also be considered, and the specific design of the system proposed in S. 1275.

I. General Considerations

Under the existing system of administrative adjudication, the judges who hear and decide cases arising under administrative programs are in most instances employees of the agencies responsible for administering the programs. A number of considerations have been advanced for and against the consolidation of this adjudicatory function in a separate agency that would handle the cases of all agencies that presently utilize administrative law judges:

3/ The current system of administrative adjudication ultimately derives from the recommendations of the Attorney General's Committee on Administrative Procedure, which laid the groundwork for the Administrative Procedure Act. See Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 43-60 (1941); The Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 190-93, 244-49 (1946).

A. Positive Considerations

Independence. A frequently emphasized objective of the Administrative Law Judge Corps proposal is that of assuring that judges will both actually be and appear to be free of improper influences and partiality. The most serious potential problem presented by the current system is that of conflict arising in an agency over management initiatives that are perceived as inimical to impartial adjudication. While few agencies have experienced such extreme situations, concerns have sometimes been stated over the possibility in more ordinary circumstances of subtler forms of pressure or bias arising from the status of administrative law judges as employees of the agencies whose cases they decide. 4/

More Varied Caseloads. While there is currently some provision for inter-agency assignment of administrative

4/ See Floyd Lewis, The Administrative Law Judge System 32 (Congressional Research Service of the Library of Congress 1982); Lubbers, supra note 1, at 274; Statement of Loren A. Smith, Chairman of the Administrative Conference of the United States, on S. 1275 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary 3, 6 (June 23, 1983) [hereafter cited as "Smith Statement"]; Statement of Judge Victor W. Palmer on Behalf of the Federal Administrative Law Judges Conference Concerning S. 1275 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary (June 23, 1983) [hereafter cited as "ALJ Conference Statement"].

law judges, for the most part such judges hear cases arising under the programs administered by their employing agencies. This degree of specialization may not be conducive to the breadth of perspective one would wish to see in judges. A monotonous caseload over a period of years may also have an intellectually deadening effect, adversely affecting the quality of decisions. 5/

The Administrative Law Judge Corps proposal offers some definite advantages over the current system in this regard. The usual formulations of the proposal contemplate that the judges of the Corps would be organized into a number of courts or divisions. The jurisdiction of a division would not, in most instances, be confined to the cases of a single agency, but would extend over the cases generated by a number of agencies whose programs have a general or specific similarity in subject matter. 6/ In addition to offering current administrative law judges a more varied and stimulating caseload, the prospect of a diversified work

5/ See Lubbers, supra note 1, at 274. See generally Pfeiffer, Hearing Cases Before Several Agencies -- Odyssey of an Administrative Law Judge, 27 Ad. L. Rev. 217 (1975).

6/ See, e.g., Lubbers, Federal Administrative Law Judges: A Focus on Our Invisible Judiciary, 33 Ad. L. Rev. 109, 123 (1981); ALJ Conference Statement, supra note 4, at 28-29; Letter of Leland E. Beck, Counsel, Administrative Office of the United States Courts to Honorable Strom Thurmond Concerning S. 1275, at 2 (June 28, 1983); Harves, Making Administrative Proceedings More Efficient and Effective: How the ALJ Central Panel System Works in Minnesota, 65 Judicature 257, 261 (1981); Marquardt & Wheat, supra note 1, at 314.

experience could make service as an administrative law judge more attractive, increasing the pool of candidates for selection.

Fungibility. A related potential benefit of a unified Corps is freer transferability of judicial resources to meet shifting caseloads. Administrative caseloads may change rapidly in response to changes in administrative policy or new legislation. Prompt adjustments meeting these changes currently depend on the limited possibility of inter-agency loan of judges. 7/

Efficiency. Administrative centralization would promote efficiency by eliminating redundancies in support services and facilities which occur among the roughly 30 agencies that currently employ administrative law judges. Potential improvements include, for example, consolidation of law libraries, clerks' offices, and case-tracking and case-reporting systems. 8/

Facilitation of Other Judicial Reform Measures. The workload problems of the courts and the expense and delay that

7/ See ALJ Conference Statement, supra note 4, at 3; Smith Statement, supra note 4, at 2; Lubbers, supra note 1, at 274.

8/ See ALJ Conference Statement, supra note 4, at 2-3; Lubbers, supra note 1, at 274.

accompany litigation provide particular currency to efforts to find alternatives to litigation. One approach that holds promise in certain areas is the replacement of judicial proceedings by less formal and more efficient administrative processes. 9/ We have, for example, stated support for broadened use of administratively imposed civil penalties in program fraud cases. 10/ Expressed concerns over the impartiality of the administrative adjudication process are one ground of objection or resistance to such reforms. The establishment of a more clearly independent system of administrative adjudication could help meet this type of objection.

B. Negative Considerations

Lack of accountability. The concern may be raised that separating judges from the agencies whose cases they decide would reduce accountability and foster irresponsible behavior. An

9/ See generally Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 1979 Recommendations and Reports of the Administrative Conference of the United States 203, 203-205 (1981); Goldschmid, An Evaluation of the Present and Potential Use of Civil Money Penalties As a Sanction by Federal Administrative Agencies, 2 Recommendations and Reports of the Administrative Conference of the United States 896, 900-02, 925-27 (1973); H. Friendly, Federal Jurisdiction: A General View 129-33 (1973); Erwin N. Griswold, Cutting the Cloak to Fit the Cloth, The Brendan F. Brown Lecture Delivered at Catholic University Law School, at 14 (March 23, 1983).

10/ See Program Fraud Civil Penalties Act: Hearing on S. 1780 Before the Senate Comm. on Governmental Affairs, 97th Cong., 2d Sess. 11-29 (1982) (testimony of Assistant Attorney General J. Paul McGrath).

obvious reference point for this concern is the activism that is sometimes seen in the Article III judiciary.

This concern is not insubstantial, but a number of considerations limit its force. The function and authority of administrative law judges are, to begin with, more limited than those of Article III judges -- the jurisdiction of administrative law judges is confined to the cases generated by certain administrative programs 11/ and they have no authority to invalidate acts of Congress. The agencies that presently employ administrative law judges have various mechanisms for intra-agency review of their decisions, 12/ and the agencies' control over the final disposition of cases generated by their programs would not be affected by the proposal of S. 1275. 13/

To the extent that excesses of authority or incompetence may occur among administrative law judges, it is not

11/ These cases, however, exceed in number the caseload of the Article III judiciary and include many proceedings of great complexity and importance. See Lubbers, supra note 6, at 109-10; Lewis, supra note 4, at 10-11.

12/ A comprehensive survey of existing intra-agency review systems appears in a recent report prepared under contract for the Administrative Conference. See Ronald A. Cass, Agency Review of Administrative Law Judges' Decisions (ACUS Contract No. T-18632428).

13/ The bill contemplates that a two-year study of agency review would be undertaken after the Corps was established, resulting in recommendations to Congress and the President, but that creation of the Corps would not in itself have any effect on review authority.

apparent that the current system provides effective means for dealing with the problem. 14/ Administrative law judges are already made independent of their employing agencies in many respects, 15/ and management initiatives that are perceived as affecting the decision of cases are likely to be resisted. Perhaps the main implication of the concern over accountability -- together with the arguable deficiencies of the current system in this regard -- is that care should be taken in the design of an independent adjudicatory system to insure that it incorporates adequate mechanisms of oversight and accountability. 16/ Proponents of the Corps proposal have suggested that creation of such mechanisms could more readily be accomplished in the context of an independent, unified Corps, and have advanced this consideration as a positive ground for enactment of the proposal. 17/

Loss of Expertise. A second objection is that the current system of single-agency specialization ensures that a judge acquires a high degree of expertise in his agency's cases.

14/ See the sources cited in note 16 infra.

15/ See Lubbers, supra note 6, at 111-12; Lewis, supra note 4, at 4-5.

16/ With respect to performance evaluation and mechanisms of accountability generally, see Lewis, supra note 4, at 34-40; Scalia, The ALJ Fiasco -- A Reprise, 47 U. Chi. L. Rev. 57 (1979); Lubbers, supra note 1, at 274; Rich, Adapting the Central Panel System: A Study of Seven States, 65 Judicature 246, 254 (1981); Harves, supra note 6, at 263.

17/ See Lewis, supra note 4, at 35, 40; Lubbers, supra note 1, at 274.

Judges of a unified administrative judiciary would hear a broader range of cases. This could result in more limited familiarity with cases arising under particular programs, affecting the quality of decisions and requiring litigants to put more work into "educating" judges concerning the applicable law and pertinent background information. 18/

This objection goes more to the question of design than to the validity of the basic concept. If a particular class of administrative cases can be handled best by fully specialized judges, a court or division could be established whose jurisdiction would be limited to that class of cases. In other areas, in which the benefits of a more generalist perspective predominate, a division's jurisdiction could extend over cases generated by a number of different programs or agencies. 19/

Availability of Alternatives. A final possible objection is that many of the benefits asserted for an Administrative Law Judge Corps could be realized -- and are currently realized in some areas -- through more modest measures that show greater sensitivity to the special needs and characteristics of

18/ See Lubbers, supra note 1, at 274; Smith Statement, supra note 4, at 4, 6.

19/ Case-by-case assignment on the basis of required expertise is an additional option that is presently employed in some of the state central panel systems. See Rich, supra note 16, at 253-54; Harves, supra note 6, at 261.

the various agencies and programs. Alternative reforms are discussed at length in the next part.

II. Alternative Reforms of a More Limited Character

A. Single-Agency Administrative Courts

Congress has established two agencies that effectively function as independent administrative courts. These are the Federal Mine Safety and Health Review Commission 20/ and the Occupational Safety and Health Review Commission. 21/ These agencies are wholly adjudicatory in character and are headed by Presidentially appointed commissions. 22/ They are institutionally autonomous from the Labor Department, which administers the programs that generate their cases. This model might be considered if a need exists in other areas for an adjudicatory capacity that is fully independent from the administering agency.

Another approach which achieves the same result is the creation of more conventionally structured courts whose

20/ See generally 30 U.S.C. § 823; S. Rep. No. 181, 95th Cong., 1st Sess. 13 (1977); Lubbers, supra note 1, at 273.

21/ See generally 29 U.S.C. § 661; Lubbers, supra note 1, at 273.

22/ In structural terms these are two-tier courts, consisting of a lower tier of administrative law judges and the Commission itself which reviews their decisions.

jurisdiction is confined to cases generated by a single agency's programs. The Tax Court (I.R.S. cases) is an example.

Within particular agencies measures may be taken to insulate adjudicatory activities from control or influence by officials with potentially conflicting programmatic responsibilities. In the Labor Department, for example, a statutorily established Benefits Review Board heads the adjudicatory system for cases arising under the Longshoremen's and Harbor Workers' Compensation Act. The Board consists of three members appointed by the Secretary of Labor. 23/

B. Multi-Agency Administrative Courts

A second alternative possibility is adjudicatory commissions or courts whose jurisdiction would include cases generated by a number of different agencies. This general approach can be adapted in various ways to suit the needs and characteristics of particular programs. An inter-agency adjudicatory body could be headed by a Presidentially appointed commission, or by a board or commission chosen by the heads of the various agencies whose cases it would handle. 24/ It could

23/ See generally 33 U.S.C. § 921; H.R. Rep. No. 1441, 92d Cong., 2d Sess. 11-12, 21 (1972).

24/ The single-agency Occupational Safety and Mine Safety systems involve Presidentially appointed Review Commissions.
(Footnote Continued)

be made fully independent of the administering agencies, on the model of the single-agency Occupational Safety and Mine Safety Review Commissions, or could remain subject to the review authority of those agencies. The commission or other governing body of an inter-agency adjudicatory capacity could function as an appellate tier in relation to the decisions of its judges, or could be limited to administrative functions.

More conventionally structured courts whose jurisdiction encompasses cases arising under a number of different programs are an additional option in this category. An existing example is the Claims Court, which hears various types of claims against the government that may result from the activities of almost any agency. 25/ Another example is the Court of International Trade, whose jurisdiction includes customs and international trade cases arising under programs administered by the Treasury, Commerce and Labor Departments. 26/

(Footnote Continued)

Appointment of the governing body of an inter-agency adjudicatory system by the heads of the affected agencies may be compared to the selection of the single-agency Benefits Review Board, described in the preceding part, by the Secretary of Labor.

25/ See 28 U.S.C. §§ 1491-1508.

26/ See 28 U.S.C. §§ 1581-83.

C. An Administrative Law Judge Corps Covering a Limited Range of Agencies.

A final possibility would be to establish an Administrative Law Judge Corps along the general lines of S. 1275 that would incorporate the judges from a large number of agencies, but not all. Testimony at the first day of hearings on this bill suggested a limited trial version of the Corps that would cover 15 agencies that employ relatively small numbers of judges. A Corps following this design would have about 70 judges. 27/

This particular approach seems questionable since the interest of an agency in participating in such an experiment would not obviously be correlated with the number of judges it employs. The intimation in the proposal that agencies using small numbers of judges do not consider them important to their operations and would not resist their incorporation into a larger system 28/ is dubious. If a limited Corps is to be created on a trial basis, a more realistic possibility might be to have it cover all agencies that have a positive attitude toward participating, without regard to the number of judges they employ.

27/ See Smith Statement, supra note 4, at 7-9.

28/ See id. at 9.

III. The Design of the Specific Proposal of S. 1275

We have a number of concerns over particular features of the design of the system proposed in S. 1275. It would be premature at this point in the development of the proposal to undertake a fully detailed technical assessment; my remarks here will be limited to the largest substantive issues.

A. Composition of the Governing Body

The bill provides that the governing body of the Corps is to be a Council composed of the chief judges of the divisions of the Corps and the chief judge of the whole system. These would, of course, all be administrative law judge.

We think that broader representation is desirable. The Council would not itself be a court; it would be an administrative body responsible for realizing the Corps' essential objective -- the provision of just and efficient adjudicatory services to the various agencies and the public affected by their programs. Representation of administrative law judges on such a body is appropriate, but other perspectives would be equally valuable. For example, there would be value in having on the Council such persons as leading legal scholars in the areas of administrative law or adjudication; persons with experience as judges in the federal or state courts; persons with experience as chief administrative law judges in state systems; and persons with experience

as high-level administrators in executive or independent agencies. It would accordingly be preferable to have a mixed Council or Commission at the head of such an adjudicatory system, including both administrative law judges and other persons with pertinent experience or expertise.

B. Powers of the Governing Body

The powers proposed for the Council of the Corps are in some respects excessive. One example is the Council's authority over the constitution and jurisdiction of the divisions of the Corps. In functional terms these divisions would be the courts of the administrative judiciary. The bill would accordingly give the Council authority to create and abolish the administrative judiciary's courts and to define the jurisdiction of those courts. Needless to say, the Article III judiciary has been given no such authority with respect to its court structure. Decisions of this sort are essentially legislative in character and should be made by Congress and the Executive.

C. Selection of the Governing Body

The procedure specified in the bill for selection of the Council of the Corps (however it may be constituted) includes some highly questionable features. The members of the Council would be chosen by the President, subject to Senate confirmation,

from lists of nominees proposed by a Nomination Commission. 29/ Two of the members of the Nomination Commission would be chosen by the chief judges of D.C. courts. 30/ This seems arbitrary. If the judiciary is to participate in the selection of such a Commission, the Chief Justice should do the selecting, following the general practice in assignments to special commissions by the judiciary. The bill also provides that two members of the Nomination Commission would be chosen by the heads of certain private organizations (a section of the American Bar Association and the Federal Administrative Law Judges Conference). 31/

29/ The bill properly provides that the President may reject lists and require the submission of additional lists. While Congress may impose qualifications for Presidential appointments and define the general class from which appointments are to be made, this does not mean that the President can be compelled to appoint persons whom he considers unsuitable for the position. A list submitted to the President therefore must contain a sufficient number of candidates to afford the President "ample room for choice." See 13 Op. A.G. 516, 524-25 (1871); see also 29 Op. A.G. 254, 256 (1911); 41 Op. A.G. 291, 292-93 (1956). In our view requiring selection from a list of three nominees would not comply with that requirement if the President were not given the right to reject a list which does not contain any acceptable nominees.

30/ The bill provides that two members are to be chosen by the "[t]he chief judge of the United States Court of Appeals for the District of Columbia Circuit" and "[t]he chief judge of the United States District Court for the District of Columbia."

31/ The bill provides that two members are to be chosen by "[t]he Chairman of the Administrative Law Section of the American Bar Association" and "[t]he President of the Federal Administrative Law Judges Conference."

The remaining member of the Commission would be chosen under the bill by the Chairman of the Administrative Conference.

Giving representatives of private organizations a statutory role in the selection of public officials (the members of the Council) is troubling in principle.

A more basic question is why there should be any use of a Nomination Commission, as opposed to straightforward selection by the President subject to Senate confirmation. Testimony at the initial hearing on S. 1275 suggested that the purpose is to secure a de-politicized system of merit selection for the members of the Council. 32/ It is not apparent, however, that it would have that effect. Perhaps the two members of the Commission from the judicial branch would be free of political involvements, but it is much less clear that the same would be true of the other members. The same objective could be achieved more simply and effectively by a provision in the bill stating that the President's appointments to the Council are to be made on merit alone, excluding consideration of such factors as party affiliation, patronage and personal favoritism. 33/

32/ See ALJ Conference Statement, supra note 4, at 29-30.

33/ Cf. 26 U.S.C. § 7443 (judges of the Tax Court to be appointed by the President, subject to Senate confirmation, "solely on the grounds of fitness to perform the duties of the office").

D. Selection of New Administrative Law Judges

The bill provides that new administrative law judges would be chosen by the Council of the Corps from registers of eligibles maintained by the Office of Personnel Management (OPM). In comparison, administrative law judges are now chosen by the employing agencies from OPM's registers of eligibles.

The best procedure for selecting administrative law judges merits serious consideration by Congress, 34/ and some changes in the existing procedure would obviously be required as part of a general re-structuring of the administrative law judge system. We think, however, that the specific alternative proposed in S. 1275 would not be sound. Since the members of the Council would all be administrative law judges, the effect would be that administrative law judges would be appointed exclusively by administrative law judges. No other class of federal public servants has been made self-selecting. It would be unwise to take this approach in relation to administrative law judges. 35/

34/ See generally Scalia, supra note 16, at 58-62; Lubbers, supra note 6, at 112-23; Lewis, supra note 4, at 11-30.

35/ The specific concern relating to self-selection would apply with less force if the governing body of the Corps had a varied membership, see section III.A supra, but many other factors would also have to be considered in devising a selection process for such a system. Various reform proposals concerning selection are discussed in the sources cited in note 34 supra.

E. Discipline

Under the proposal of the bill, judges of the Administrative Law Judge Corps would be subject to removal, suspension, reprimand and other disciplinary measures on a finding by the Merit Systems Protection Board that there is good cause for such action. To advise the Council concerning disciplinary measures, two judges from each division would be elected by that division to a Complaints Resolution Board. A complaint would be referred to a three-judge panel of members of the Complaints Resolution Board who serve in different divisions from the judge who is the subject of the complaint. The subject of the complaint would have two peremptory challenges to members of the panel. The panel would advise the Council concerning the action to be taken. If the panel recommended taking no action against the judge, the Council would be bound by that recommendation unless it found that extraordinary circumstances warranted overriding it.

The proposed disciplinary process raises a number of basic problems. We doubt that a process involving normally dispositive recommendations by a panel composed entirely of professional colleagues of the person complained about would appear fair or impartial to complainants and the general public. It is unsound in principle to give the judge accused of misconduct a voice in the selection of the panel that will look into the charges against him (through peremptory challenges) if no comparable voice is given to the complainant. It is unclear why

adverse action by the Council against the panel's recommendation is limited to extraordinary circumstances; the bill contains no corresponding provision stating that the Council must take adverse action recommended by the panel in the absence of extraordinary circumstances.

A better approach might be a simple provision giving the Council authority to remove an administrative law judge on specified grounds after notice of charges and opportunity for a hearing. 36/ This simple approach is followed in all existing statutory provisions for removal of other types of judges and judicial officers. 37/ The authority to impose lesser disciplinary sanctions could also be assigned to the Council without the surrounding complications that presently appear in the bill.

* * *

In sum, the Department of Justice views this proposal with interest and looks forward to working with the Subcommittee in its further exploration and development. The point of essential interest raised by the proposal is the possibility of more extensive use, in appropriate areas, of administrative courts or

36/ This suggestion is conditioned on the earlier suggestion that the Council have a varied membership. See section III.A supra.

37/ See 28 U.S.C. § 176 (removal of Claims Court judges by Federal Circuit); 26 U.S.C. § 7443(f) (removal of Tax Court judges by President); 28 U.S.C. § 153(b) (removal of bankruptcy judges by circuit councils); 28 U.S.C. § 631(i) (removal of magistrates by district courts).

other adjudicatory bodies whose jurisdiction includes cases arising from a number of agencies or programs. We think that work in this area is most likely to be productive if a flexible range of options is kept in mind, including the intermediate possibilities noted earlier in my testimony. 38/

The specific design of the system proposed in S. 1275 raises a number of problems. These include the composition and powers of the governing Council; the process for selecting new judges; and the disciplinary process. My general comment on the design of the proposal is that it appears to involve too reactive a response to particular problems and aggravations that have arisen under the current system and does not, in some respects, adequately consider what alternative arrangements would best serve the objectives of the reform and the public interest.

I would be pleased to answer any questions the Subcommittee may have.

38/ See text accompanying notes 20-28 supra.

THE WHITE HOUSE

WASHINGTON

September 16, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Statement of Dan K. Webb Regarding
Vote Fraud - September 19, 1983

United States Attorney Dan Webb, of the Northern District of Illinois, proposes to deliver the attached testimony at a hearing of the Subcommittee on the Constitution of the Senate Judiciary Committee on September 19. Webb's testimony begins with an overview of his office's involvement in vote fraud investigation, and a review of the applicable federal statutes. Webb then proceeds to discuss his office's investigation of the November 1982 election, principally in the Chicago area. The proposed testimony discusses particular instances of vote fraud, with a detailed discussion of the difficulties presented by registration of aliens. Webb concludes by noting that there were fewer instances of vote fraud in the February and April Chicago mayoral elections, and attributes this, at least in part, to his office's activities with respect to the November 1982 election. Webb reaffirms his office's commitment to investigate and prosecute cases of vote fraud in the Northern District of Illinois. I see no objections.

Attachment

THE WHITE HOUSE

WASHINGTON

September 16, 1983

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING *Orig. signal by FFF*
COUNSEL TO THE PRESIDENT

SUBJECT: Statement of Dan K. Webb Regarding
Vote Fraud - September 19, 1983

Counsel's Office has reviewed the above-referenced proposed testimony, and finds no objection to it from a legal perspective.

FFF:JGR:aea 9/16/83

cc: FFFielding
JGRoberts
Subj.
Chron

SEP 11 9 1983
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WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

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Received (YY/MM/DD) 1 / 1Name of Correspondent: C. Marshall Cain☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: Statement of Dan L. Webb
re: Vote Fraud September 19, 1983

ROUTE TO:

ACTION

DISPOSITION

Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>CULLA11</u>		ORIGINATOR	<u>830915</u>			<u>1 / 1</u>
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DRAFT

STATEMENT OF DAN K. WEBB
UNITED STATES ATTORNEY FOR THE
NORTHERN DISTRICT OF ILLINOIS AT
A HEARING BY THE UNITED STATES
SENATE JUDICIARY SUBCOMMITTEE
ON THE CONSTITUTION, SEPTEMBER 19, 1983

Office's History Regarding Vote Fraud

The Office of the United States Attorney for the Northern District of Illinois has had a long history of active investigation of vote fraud. Since the early 1970's, our office has been one of the few, if not the only, United States Attorney's Office in the country to actively monitor voting practices on election days. On election days, our office, in conjunction with the United States Marshal's Service, the Immigration and Naturalization Service (INS), and the Federal Bureau of Investigation (FBI), implement a field effort which entails sending Assistant United States Attorneys and Deputy United States Marshals to various polling places throughout the City of Chicago in order to detect and prevent vote fraud. Numerous teams of Assistant United States Attorneys, accompanied by Deputy United States Marshals and equipped with radios, tour Chicago and other areas in this district and respond to and investigate allegations of vote fraud. They target key wards and precincts based on evidence of fraud in past elections and on other information. FBI agents and INS investigators are available to respond to specific problems related to their area of expertise. Federal agents also are available to act upon serious complaints made prior to election day. Additionally, Assistant United States Attorneys and federal personnel in the United States Attorney's Office answer complaints made by telephone.

Our election day efforts include cooperation with local law enforcement officials such as the Cook County State's Attorney's Office, the Illinois Attorney General's Office, the Chicago Police Department, the Chicago Board of Election Commissioners, as well as local watchdog groups.

Our ability to actively monitor elections is facilitated by Illinois law, which permits law enforcement personnel, including my Assistants, to enter polling places and closely observe voting activities. The primary purpose of our monitoring efforts on election days has been to deter vote fraud, but an additional purpose has been to uncover and preserve any evidence that could be used in a vote fraud prosecution.

Federal Statutes

There are several federal statutes which condemn vote fraud and which we rely on in our prosecutions. When a federal candidate is on the ballot, specific federal statutes become applicable. These statutes prohibit voting more than once, supplying false information to vote, voting in the name of another person, and paying people to vote. 42 U.S.C. §§ 1973i(c),(e). Further, the civil rights statutes (18 U.S.C. §§ 241,242) prohibit conspiracies and substantive conduct directed at depriving the public-at-large of their constitutional right to the fair and impartial administration of federal elections. Also, voter intimidation directed at influencing the results of a federal contest is outlawed by statute. 18 U.S.C. § 594. When a federal candidate is not on the ballot, the federal civil rights statutes prohibit the deprivation of voters' federal constitutional right to vote in a local election in accordance with the one-person-one-vote principle. Serious vote fraud committed with the assistance of election judges violates these civil rights statutes. Finally, the mail fraud statute (18 U.S.C. § 1341) has been used to prosecute vote fraud that is perpetrated through the use of the mails. This statute has been applied most often to fraudulent schemes involving absentee ballots.

Investigation of November 1982 Election

Our office, together with the Federal Bureau of Investigation and the Immigration and Naturalization Service, have undertaken an intense and wide-ranging investigation of alleged vote fraud in the November 1982 general election. Offices at

stake in this election in Illinois included representatives in Congress and Governor. Because this investigation is quite active right now and is subject to grand jury scrutiny, I am unable to discuss the investigation in detail. I will, however, describe it in broad outline. This investigation started the way many investigations start: citizens with knowledge of crimes came forward and told us about them. Additionally, the media and certain candidates' organizations made us aware of allegations of vote fraud. Our investigation this year, however, has included a unique and very important new facet—namely, the use of a computer. In order to provide the data base for the computer analysis, Federal Bureau of Investigation agents had to review virtually all of the 1,000,000 ballot applications submitted in the city of Chicago in the November election. One of the most important results of this investigation is that the FBI has developed an effective computerized method of investigation that has proved very helpful in detecting vote fraud and that can be used in all future elections. This technique includes cross-matching the names of persons who voted with the names of persons who have died and compiling a list of names where more than one vote was cast in the same name.

Kind of Vote Fraud Found

Based on indictments and convictions that we have obtained concerning the November 1982 general election, we have uncovered certain species of vote fraud. All of these crimes occurred in Chicago in areas that were dominated by one political party. In each instance of fraud there was one prerequisite, and that was that the leader of the dominant political party at the precinct level (the precinct captain) controlled the actions of the officials administering the election at the polling place (the election judges).

With the election judges in his control, the precinct captain perpetrated the most common type of vote fraud, which consisted of forging on ballot applications the names of persons who did not come in to vote and then voting ballots in their names. Either the precinct captain himself, one of his workers, or an election judge would do the forging. For example, in an extreme case a large number of ballot applications were forged and then an equal number of ballots were taken to a back room, voted, and then placed in the ballot box.

Another type of fraud consisted of a precinct worker getting into line and posing as a legitimate voter and then voting in the name of this person.

Another type of vote fraud consisted of false registration. Here, a precinct captain caused another person who did not live in his precinct to register to vote in his precinct in order to increase the number of votes that the precinct captain controlled.

Another instance of fraud that we uncovered concerned elderly and disabled voters. Such voters will need assistance to vote. We found examples of election judges who voted ballots on behalf of these people without the authorization or understanding of the elderly voters.

We also uncovered instances of precinct captains and precinct workers paying people to vote.

Another instance of fraud that we found involved absentee ballots. Under this scheme, false information was submitted in order to obtain blank absentee ballots, which were then voted by the precinct captain.

Perhaps the most flagrant example of vote fraud that we have prosecuted occurred in the 30th Precinct of the 27th Ward. In this precinct, in November, a precinct captain and his son in effect ran their own election at the end of the day. Instead of properly tabulating the vote, the election judges stood aside and watched

the precinct captain's son take one straight Democratic ballot and run it through the tabulating machine 203 times.

Election Canvasses

The principal vote fraud problem that we have uncovered is the forging of ballot applications and the fraudulent voting of ballots in the forged names by precinct captains and persons working for the precinct captains. To accomplish this illicit process, the precinct captain needs a pool of registered voters whose names he can forge. Persons who have died or who have moved are prime candidates for this pool. It is therefore imperative to assure an honest election that these names be removed from the voting rolls prior to each election.

In Chicago, these names are supposed to be removed in periodic canvasses. We have found that all too often these canvasses have not been performed. Again, the canvasses are supposed to be conducted by the election judges. The judges, however, are often controlled by the local precinct captains, who do not want good canvasses and who prevent the canvasses from being properly performed. These faulty canvasses contribute significantly to vote fraud.

Alien Problem

Another serious problem that we uncovered involves illegal aliens and other non-citizens who illegally register to vote and vote in various elections.

We have found that many illegal aliens register to vote for the purpose of acquiring voter registration cards, which they then use to commit additional crimes. We have found instances of illegal aliens using an illegally obtained voter registration card to fraudulently obtain passports, public aid, and food stamps. We also found that on one occasion a non-citizen used an illegally obtained voter registration card in order to get security clearance to work for a contractor selling weapons parts to the United States Department of Defense.

Furthermore, our investigation shows that some of these aliens actually cast illegal votes in various elections. We have found instances in which some persons have actively sought the registration of illegal aliens for the very purpose of influencing the outcome of an election. If these people do not vote, their illegal registrations can still lead to a dishonest election because they constitute additional names added to the pool that can be fraudulently voted.

We have obtained the convictions of seven aliens charged with offenses related to their illegal registration and voting, including passport fraud and fraud against the government. Also, our office and INS have referred to the State's Attorney's Office twenty-nine cases resulting in indictments.

We would note, however, that where an alien, who is lawfully in the United States, has been convicted of casting an illegal vote in an election, his deportation is not necessarily required under 8 U.S.C. § 1251(a)(4), since that provision only requires deportation for crimes of "moral turpitude" resulting in a prison sentence.

The illegal alien registration problem stems in part from the ease with which persons may register to vote in Illinois. Persons who want to register to vote should be required to furnish identification. I understand that legislation has been passed by the General Assembly and is awaiting approval by Governor that would alleviate this problem by requiring identification when a person registers to vote.

Circumstances Conducive to Vote Fraud

In analyzing the results of our investigation, we can point to certain circumstances that are conducive to vote fraud. The first prerequisite is that one party dominate the precinct, and that there not be any hotly-contested races in that precinct. If there is a hotly-contested local race, or if both major political parties are viable in that particular precinct, there will be enough persons watching the activity in the polling place to prevent most kinds of vote fraud. If the people in the

polling place—judges and watchers—observe each other and have an adversary relationship, an honest election is the likely result.

Vote fraud cannot occur if election judges do their job. Therefore, a precondition to a dishonest election is that the judges, either because of their economic situation or personality, must be of a type to be dominated by a precinct captain.

We have also found that a significant amount of fraud occurs in those areas where it is hard for a precinct captain to make his quota by legitimate means. For example, if the voter pool consists of a substantial number of transients or otherwise unreliable people, a precinct captain will have a hard time getting out the vote legitimately, and he may have to resort to illegal methods.

Results and Reasons for Our Investigation

Our investigation of the November 1982 election has resulted so far in the indictment, conviction, and penitentiary sentence for a precinct captain, the indictment of three other precinct captains, and the indictment and conviction of other precinct workers and election judges. In addition to the seven convictions of aliens, we have obtained vote fraud convictions of five persons, and vote fraud indictments against fourteen others. Our investigation is continuing, and we expect additional results in the near future.

Numerous FBI agents, INS agents, and attorneys in my office are assigned to the investigation of vote fraud. I have assigned these resources to this investigation for several reasons. I believe that the right to vote is one of the most precious that we Americans possess. It must be protected. Because of the level of fraud we detected in the November election, I believe the problem is a serious one. The February and April mayoral elections, according to our indicators, were not tainted with the kind of fraudulent conduct we detected in the November election. We hope that this

improvement was due not only to the hotly contested nature of the mayoral elections, but also in part to our intensive investigation begun in January of this year.

I believe that if the U.S. Attorney's Office can do its part to achieve fair elections, we will be performing an important service to this district and to this country. I therefore reaffirm my commitment to continue our efforts on behalf of honest elections.

THE WHITE HOUSE

WASHINGTON

September 19, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Statement of Jonathan Rose Regarding
S. 1080 - The Regulatory Reform Act
on September 21, 1983

OMB has asked for our views on the attached testimony, which Assistant Attorney General Rose proposes to deliver before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee. The testimony reviews Department of Justice opposition to section 5 of S. 1080, the so-called "Bumpers Amendment." This proposal, which has significant conservative support, seeks to restrain agency action by authorizing more searching judicial review. In particular, section 5 would (1) require courts to determine if an agency were acting within its jurisdiction by reference to the enabling act, (2) generally eliminate the presumption that agency action is lawful, and (3) require agency factual determinations to have substantial support rather than simply satisfy the "arbitrary and capricious" test.

The testimony correctly points out that the well-intentioned bill would simply shift power from the agencies to the judiciary. The testimony also notes that giving the courts added review power could jeopardize deregulatory efforts as well as more traditional regulation. I have no objection.

Attachment

THE WHITE HOUSE

WASHINGTON

September 19, 1983

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Statement of Jonathan Rose Regarding
S. 1080 - The Regulatory Reform Act
on September 21, 1983

Counsel's Office has reviewed the above-referenced proposed testimony, and finds no objection to it from a legal perspective.

FFF:JGR:aea 9/19/83

cc: FFFielding
JGRoberts
Subj.
Chron

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DRAFT

STATEMENT

OF

JONATHAN C. ROSE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE
UNITED STATES SENATE

CONCERNING
S. 1080, THE REGULATORY REFORM ACT

ON

SEPTEMBER 21, 1983

Mr. Chairman, thank you for the opportunity to submit this statement of the views of the Department of Justice on S. 1080, the Regulatory Reform Act. We will confine our comments to section 5 of the bill, which would amend the judicial review provisions (5 U.S.C. § 706) of the Administrative Procedure Act (APA). 1/ We defer to other federal agencies on all of the other parts of S. 1080.

For the reasons set forth below, the Department recommends against enactment of section 5. Section 5 would modify the APA's rules on judicial review of agency actions in three significant ways. First, new subsection (c) of section 706 would require reviewing courts to determine whether an agency acted within the scope of its statutory "jurisdiction or authority" on the basis of the language of the statute or, "in the event of ambiguity, other evidence of ascertainable legislative intent." Second, with respect to "other questions of law," subsection (c) would forbid courts from according any presumption "in favor of or against agency action," but require them to give agency interpretations "such weight as [they] warrant." Finally, the bill would further define the existing "arbitrary and capricious" standard upon which a reviewing court may set aside agency action

1/ We note that section 13 of S. 1080 contains a legislative veto provision which is of doubtful constitutionality in light of the Supreme Court's June 23, 1983 decision in INS v. Chadha (No. 80-1832). We assume that this section of the bill is being reevaluated in light of Chadha.

by establishing a new section 706(d), which would require a court to "determine whether the factual basis of a rule adopted in a proceeding subject to section 553...is without substantial support in the rule making file." For the purpose of convenience, I will refer to these provisions (which also are found in other regulatory reform bills currently pending) as the "Bumpers Amendment". 2/

General Observations

As a general matter, the Department of Justice believes that the Bumpers Amendment is unnecessary and undesirable. Our principal objection is that these changes, taken as a whole, purport to transfer to the federal courts significantly more power than they now possess to oversee implementation of congressional regulatory objectives by the executive branch. This shift of power would, in the Department's judgment, further distort the balance of power between the executive and judicial branches of government -- a balance which has already been tipped heavily in favor of the courts, principally through the activism of federal judges. The Department believes that the Bumpers Amendment would

2/ The bill would also require reviewing courts to "independently" decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. However, we do not consider the addition of "independently" to be a significant change because it simply reaffirms the authority the courts clearly have under the Constitution.

further encourage this activism by inviting the federal courts to assume responsibilities for which they are institutionally ill-suited and would disrupt the efforts of administrative agencies to implement broad congressional mandates expeditiously and effectively.

We disagree with assumptions that seem to have been made by supporters of the Bumpers Amendment. The amendment assumes that the federal courts have neglected their duty to exercise independent judgment in deciding "questions of law" that arise in connection with review of agency action. We believe that this supposition is wrong as a factual matter. Moreover, to the extent that certain courts have been remiss in their duties, the proper response is not to expand generally their powers to review agency action. A better means of assuring independent judicial scrutiny of agency action is to clarify and tighten the statutory standards which agencies and courts must interpret.

The Bumpers Amendment also assumes that many agency excesses have gone unchecked by the courts. While we agree that some agencies have acted beyond the limits of their authority, we believe that the roots of agency activism more often lie in the vaguely-defined objectives and standards found in many regulatory statutes. Of course, general delegations of power to administrative agencies are inevitable, given the sophistication and complexity of the technical areas covered by many regulatory statutes and the institutional constraints upon the time and

resources of Congress. However, as the full Senate Judiciary Committee acknowledged in its report last Congress on S. 1080 (which contained similar judicial review amendments), 3/ Congress has frequently asked the agencies to make the basic, vitally important policy choices that, at least in theory, are more properly for the legislature to make. To the extent that agencies have misread the direction that Congress intended them to take, we believe that Congress -- and not the courts -- should be responsible for articulating regulatory policies.

Specific Comments

A. Questions of "Statutory Jurisdiction or Authority"

The first sentence of proposed section 706(c) states that in considering questions of statutory jurisdiction or authority

the court shall require that the action by the agency is within the scope of the agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of ascertainable legislative intent.

The intent, as stated unequivocally in the Committee Report (at 169-70), is to shift the burden of proof to the government to show by "affirmative evidence" drawn from the statute or

3/ S. Rep. No. 97-284, 97th Cong., 1st Sess. 164 (1981) (hereafter the "Committee Report").

legislative history that its action is within its statutory jurisdiction or authority. The Report states, at page 169, that "[r]easonableness and consistency with the statutory purpose are not the equivalent of evidence of ascertainable legislative intent."

We find this provision troubling for several reasons. First, its application might extend to virtually all questions of statutory construction: it is difficult to imagine a statutory issue that could not be framed in terms of statutory "jurisdiction or authority." 4/ Litigants would have a strong incentive to frame their challenges to agency action as questions of statutory jurisdiction or authority, which would eliminate any presumption of validity with respect to such issues and, indeed, establish a presumption of invalidity by shifting the burden of proof to the government. 5/

4/ Thus, for instance, the Committee Report cites FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978), which upheld FCC cross-ownership regulations promulgated under a "public convenience, interest and necessity" statute, as a case which presented the question of the Commission's statutory "authority" to consider cross-ownership as a licensing factor. Neither the legislative history nor the case law construing "jurisdiction or authority" under the current section 706(a)(2)(C) supplies an effective, principled basis for narrowing the meaning of "authority."

5/ The Committee Report, at 170, also makes clear that the statement in the second sentence that the court should accord no presumption "against" agency action applies only to "other questions of law."

We believe that the effect of this provision would be to significantly narrow the legitimate regulatory powers of government agencies. In many cases, it would be difficult or impossible to meet the burden of affirmatively proving congressional authorization. The reason for this is that Congress often does not expressly or implicitly spell out the full range of measures agencies may properly devise to implement regulatory goods. Given the difficulty of drafting statutory language or preparing legislative history that anticipates the full range of problems that may confront an administrative agency in the future, many legitimate questions about an agency's jurisdiction or authority can only be resolved by determining whether the agency interpretation is reasonable and consistent with the congressional purpose. However, the Bumpers Amendment would foreclose such inquiry, remitting many agencies to antiquated statutory grants in formulating their regulatory agendas.

We would note that these problems with the Bumpers Amendment would affect both regulatory and deregulatory initiatives. The recent case of American Trucking Association v. Interstate Commerce Commission, 659 F.2d 452 (5th Cir. 1981), illustrates the potential problem in a deregulatory context. The statute in question, the Motor Carrier Act of 1980, required the ICC to "reasonably broaden" certificates of authority and to increase competition by promulgating regulations expanding carriers' authorization. The court struck down the new regulations, however, finding that the ICC had exceeded its statutory

authority because the new regulations went beyond the "reasonable" broadening allowed by the statute. Relying primarily on the general language of the statute (because the legislative history was conflicting, id. at 459), the court substituted its judgment of what was "reasonable" for that of the agency, even though it recognized that the agency's views were entitled to some deference. We believe that the practical effect of proposed subsection (c) would be to invite more cases like American Trucking, by authorizing the courts to substitute their own policy judgments for those of an agency under the guise of statutory interpretation.

B. Deference to Agency Interpretation of
"Other" Questions of Law

Traditionally, courts have deferred to agency interpretations of law only on a case-by-case basis. The practice of deferring in appropriate cases has developed in recognition of the fact that agencies "tend to be familiar with, and sophisticated about, statutes that they are charged with administering." 6/ This familiarity and sophistication give the agency insights which Congress and the courts have long understood warrant considerable weight. But the degree to which a court will give weight to a particular agency interpretation depends upon a

6/ Wilderness Soc'y v. Morton, 479 F.2d 842, 866 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 197 (1973).

variety of factors, which include the technical nature of the subject matter, the consistency with which the agency has adhered to the interpretation, and the extent to which Congress has vested the agency with broad legislative-type powers.

We recognize that the language of S. 1080 on this point is a marked improvement over provisions of earlier bills, which explicitly abolished the presumption of validity of agency actions and negated the deference traditionally accorded agency interpretations. Nevertheless, the compromise language of the second sentence of proposed section 706(c), while more subtle, remains problematic:

In making determinations on other questions of law, the court shall not accord any presumption in favor of or against agency action, but in reaching its independent judgment concerning an agency's interpretation of a statutory provision, the court shall give the agency interpretation such weight as it warrants, taking into account the discretionary authority provided to the agency by law.

As a threshold matter, we observe that the language allowing courts to give "weight" to agency statutory determinations applies only to questions of statutory construction "other" than those concerning "jurisdiction or authority." Since, as noted above (pp. 4-5), it is likely that litigants will attempt whenever possible to claim that all legal issues are no more than questions of jurisdiction or agency authority, there may well be little room left for application of the higher standard of review for "other" statutory questions. Thus, as a practical matter,

the class of statutory questions to which the language added by the compromise applies may be very narrow indeed.

Another "scope" concern is that the language allowing the courts to give weight to agency views applies by its terms only to "an agency's interpretation of a statutory provision" and does not apply to non-statutory questions of law, such as an agency's construction of its own regulations. This language, which applies to all "agency actions" and non-statutory "questions of law," would strip the agency of the deference that courts have accorded to such actions and questions today. ^{7/} This judicial deference to agencies' interpretations of their regulations has served to bring consistency to administrative programs and has encouraged the orderly development of regulatory law. The compromise language does nothing to save these principles.

We are also troubled by the meaning of the confusing mandate that, in interpreting statutory issues, courts should "accord no presumption but give warranted weight" to agency interpretation. The Committee Report (at 165) states that the "no presumption" language is intended to eliminate the existing "judicially created doctrine of deference" by which courts presume an agency's construction of law to be valid, and place the burden on the challenger of agency action to demonstrate

^{7/} See Udall v. Tallman, 380 U.S. 1, 16 (1965).

otherwise. We are concerned that the "presumptions" that the Bumpers Amendment would eliminate might encompass the wide variety of doctrines under which courts defer to agency determinations. Many of these doctrines serve useful purposes; often they recognize the agency's familiarity with, and responsibility to apply and interpret, particular statutes. We do not believe that the language allowing a court to give an agency construction "such weight as it warrants" would restore all of these rules, or equally further these policies.

The inadequacy of a rule which affords "weight" to agency constructions of statutes only to the extent they are "persuasive" may be illustrated by considering its application to tax regulations. Tax regulations currently enjoy a strong presumption of validity; they "must be sustained unless unreasonable and plainly inconsistent with the revenue statutes and should not be overruled except for weighty reasons." 8/ This heavy burden of proof is imposed on challengers of tax regulations not simply on the basis of agency expertise or the persuasiveness of its interpretation, but more broadly because of the responsibility of the Treasury Department to create and implement a coherent regulatory scheme, whose validity can be firmly relied on in planning tax transactions. This responsibility gives the

8/ Fulman v. United States, 434 U.S. 528, 533 (1978).

agency's views an authority based upon the Treasury Department's status as the responsible "agent" of Congress.

The proposed compromise language would appear to eliminate this strong presumption of the validity of tax regulations. Moreover, this provision would eliminate any deference or presumption in favor of the Treasury's interpretation of its own regulations. The loss or dilution of such presumptions would invite noncompliance with Treasury regulations or Treasury interpretations of tax regulations.

This language would be equally troublesome to many deregulatory efforts. Regulations or other agency initiatives to reduce the burdens of regulation are routinely challenged by special interest groups as improper constructions of statutory mandates or existing regulations. The successful defense of such initiatives often rests upon existing principles of deference to the agency's construction of its statute or of its own regulations.

In sum, although the compromise language is meant to give somewhat greater deference to agency interpretations than the Bumpers Amendment originally provided last Congress, it is unrealistic to believe that the dilution of principles of deference is wholly avoided by the compromise language in S. 1080. Moreover, the lack of clarity within the provision provides great opportunities for an activist court to substitute its policy

judgments for that of the agency under the guise of legal review. While current rules of deference provide some reasonably established limitations on judicial intervention, the compromise language of S. 1080 requires courts to give agency views only "such weight as it warrants." We simply cannot know whether or the extent to which this phrase would ultimately be construed as an effective limitation on unwarranted judicial intervention in the regulatory process.

C. "Substantial Support" Test

The Department has consistently opposed a "substantial support" test for judicial review of determinations of fact made in informal agency rulemaking. The version of that test found in S. 1080 has been transformed from the originally proposed independent standard of review to an element of the "arbitrary and capricious" standard:

(d) In making a finding under subsection (a) (2) (A) of this section, the court shall determine whether the factual basis of a rule adopted in a proceeding subject to section 553 of this title is without substantial support in the rule making file.

Although we believe that this new language is an improvement over the earlier versions of this provision, we continue to think that this test would in some instances prove extremely burdensome to the agencies. Just as troubling is the fact that it would also give rise to many lawsuits challenging the factual underpinnings of informal rules.

Perhaps our greatest concern is that the bill would require that the factual premises of all informal rulemaking be documented in a rulemaking file in every instance. We believe that this would unnecessarily burden and "formalize" the informal rulemaking process. Moreover, this requirement could prohibit the agency from relying on its factual expertise in formulating informal rules unless that expertise were fully documented in the rulemaking file. Even if an agency's factual expertise achieved over a period of years could be documented in the rulemaking file, the task of providing such documentation in every case would be costly, time-consuming, and wasteful.

In any event, to the extent that review of the factual basis for informal rulemaking is appropriate, it is adequately provided by current law. Under the existing "arbitrary and capricious" standard, courts must engage in "thorough, probing, in-depth review" that includes, where appropriate, a "searching and careful" inquiry into the facts. ^{9/} Thus, we believe that current law is adequate to enable courts to overturn agency action where factual deficiencies demonstrate the arbitrariness or capriciousness of the rule. Current law, however, has the additional advantage of permitting courts to retain some discretion in determining the extent to which careful inquiry into the

^{9/} Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-16 (1971); Montana Power Co. v. EPA, 608 F.2d 334, 345 (D.C. Cir. 1979); Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1049-50 (D.C. Cir. 1979).

factual support on the record is necessary. We believe that this kind of flexibility is appropriate and necessary in light of the number and types of regulations adopted through the informal rulemaking process.

It is by no means clear how courts would apply subsection (d) if it were enacted. While it is perhaps intended that the test be equivalent to the "hard look" doctrine developed by some courts, 10/ it is entirely possible that courts would construe subsection (d) as something more than a directive to continue to review agencies' factual findings as they have in the past. Indeed, if subsection (d) were only codifying the existing "hard look" rule, it is unclear why it would be needed. The more intensive scrutiny of facts required by the substantial support test would thus expose agency regulatory and deregulatory efforts to increased second-guessing by the courts. Such an invitation to the courts to expand their role in the regulatory decision-making process is particularly inappropriate in the case of agency factual determinations, inasmuch as courts have no institutional expertise or familiarity with the facts pertinent to informal rulemaking.

Finally, we are concerned that the substantial support test would not easily be applied across-the-board to informal

10/ See National Lime Association v. EPA, 627 F.2d 416, 451 n. 126 (D.C. Cir. 1980).

rules, many of which reflect "essentially legislative policy judgement[s]" that are "not susceptible to the same type of verification or refutation by reference to the record as are some factual questions." 11/ The "hard look" doctrine, which subsection (d) apparently is intended to codify, has traditionally been invoked in the context of review of rulemaking involving numerous and complex facts. 12/ Thus, application of the substantial support test to rules that are not based on an extensive factual record might inappropriately result in their invalidation, because the underlying factual justifications for what are primarily policy judgments frequently cannot be found in the rulemaking file.

* * *

In conclusion, the Department of Justice recommends against enactment of the Bumpers Amendment set forth in section 5 of S. 1080.

11/ Nat'l Small Shipments v. CAB, 618 F.2d 819, 830 n.23 (D.C. Cir. 1980), quoting Industrial Union Dept't, AFL-CIO v. Hodgson, 499 F.2d 467, 475 (D.C. Cir. 1974).

12/ See, e.g., National Lime Association v. EPA, supra.