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**ADMINISTRATIVE LAW JUDGE CORPS ACT**

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**HEARINGS**

BEFORE THE

SUBCOMMITTEE ON

ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

**S. 1275**

A BILL TO ESTABLISH A SPECIALIZED CORPS OF JUDGES NECESSARY  
FOR CERTAIN FEDERAL PROCEEDINGS REQUIRED TO BE CONDUCTED,  
AND FOR OTHER PURPOSES

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JUNE 23 AND SEPTEMBER 20, 1983

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Most administrative law judges come up through the ranks of the agency where they sit. They are housed, sustained, and are ranked as employees of that agency. As a practical matter, not only are they seen as having, but they do in fact have, however unconsciously, a bias toward the agency which is often a party to the proceeding, and a partiality toward the view of agency staff.

I agree with Bill Ross, practitioner William Warfield Ross, who has said:

We all know that the staff, collectively and individually accumulate many axes to grind, and the concern is that the judge will be subliminally influenced by the agency atmosphere and thus will fail to perform what is the primary reason for his or her existence—an impartial and unprejudiced examination of factual assertion and argument on the record.

I can say that I have seen these proclivities in action, and I applaud the independence which will be enhanced by S. 1275.

I think this is consonant with the basic functions of an administrative law judge sitting as a judge, performing the role described by the Supreme Court as functionally comparable to that of traditional judges with guarantees of decisional independence, and prohibitions against performing duties inconsistent with their obligations as fact finders and adjudicators.

Other witnesses and statements have pointed out other advantages in promoting more efficient utilization and in effecting cost savings.

The second reason, however, which I find particularly persuasive to support S. 1275, is that it will contribute to the competency and breadth of the administrative law judges by exposure to the proceedings of other related or similar, but not like agencies.

For more than 2 years after I left law school, I was a law clerk for one of the great trial judges of the Federal bench, Chief Judge Bolitha J. Laws of the U.S. District Court for the District of Columbia.

I've always believed that it made him a better judge, and indeed, that it makes all trial and appellate judges the greater for their experience that they do not sit with the narrow tunnel vision of specialization, but are exposed, not only to new ideas, and new situations, but also to differing views and perception of old issues, for example, how different agencies look at rate making to derive a more comprehensive, balanced and creative decision. It may not be something that can be demonstrated empirically, but I believe it's there.

For these reasons, I believe the bill should go forward. There should be further hearings. The specific provisions should be closely scrutinized, and perhaps the corps when it is created should go forward slowly and somewhat experimentally. But it is a sound concept, and I believe it should be supported.

Senator HEFLIN. Professor Dash?

→ Mr. DASH. Thank you, Mr. Chairman.

My name is Abraham Alan Dash, and I'm a professor of law at the University of Maryland School of Law.

My apologies to the committee that I did not have a prepared statement. I was caught in a time exigency, but I shall submit one for the record within such time as the committee tells me.

To start with, I would correct the record to one extent, that I'm not completely an academic. I do have a background with the Government. I was a trial attorney with the criminal division. I was an appellate attorney with the National Labor Relations Board. I was director of litigation and deputy chief counsel at the Comptroller of the Currency's Office, and I've taught administrative law now for at least 11 years.

I am very much for this bill, but I come here with some bewilderment. Bewilderment that the Federal Government in 1983 is still discussing this issue. I know that the files of the committee must have the past record of this issue, but I would like to remind you of that history. Back in 1936, more than 20 years before the APA became law, we had the Norris and the Logan bill, which talked of an administrative court by consolidating our present article I courts with the hearing examiners. This concept failed. Then you have the second Hoover commission of 1955, which recommended a centralized administrative hearing system. I might note that the present bill, under consideration has some of the same principles in it as the Logan bill and Hoover commission report.

The Hoover commission, as I said, in 1955 recommended much the same thing. The Ash Council, in 1971, after another thorough study, talked in terms of an administrative court of appeals, and addressed this issue.

In 1974, the Civil Service Commission report, I think it was known as the LaMacchia Committee, came out for a uniform corps of administrative law judges, after extensive study.

In 1977, the Bork Committee of the Department of Justice came out for the same thing. In other words, I think the record is so replete with these recommendations after extensive studies, that it's amazing we haven't done anything about it at this time.

The States, and you've had, of course, the testimony from the chief judge, or chief hearing examiner from Minnesota, are way ahead of the Federal Government.

But it's interesting that the States started the concept of an ALJ corps in 1945 in California. The eighth State, Washington, in 1982, has adopted the central panel, which is a unified ALJ corps.

It's now part of the model State APA which was adopted in 1981, and it is only a matter of time before most States will have this system.

In other words, the concept of a united ALJ corps, or an administrative court, if you will, is something which for almost 30 years or 40 years we have talked about, discussed, and studied in detail. I won't go into the list of Journal articles—I'm pretty sure you've seen them—which have also discussed and recommended this concept as a united ALJ system. So, to me the issue is no longer a question of whether we should have one, it's when are we going to do it, and whether this bill is the way or a good step on the way.

I support the bill. I think without any question it is a good step I have some questions on some minor points. I'm only going to note one because I hesitate to say anything adverse because I'm so much in favor of this principle of the separate corps of administrative law judges.

But in a moment I will note one thing I think the committee should consider in this bill.

The concept of having a separate ALJ corps in the Federal Government of fairness is so paramount, so necessary, it goes beyond just the perceptions of the public. I believe the perceptions of the public that deal with administrative law judges and hearings under the APA, are generally unfavorable as to the fairness to them. Certainly the unfortunate news that was coming out of social security in the past couple of years, of covert pressure on their ALJ's, whether true or not has affected the public perception, and their perception of the fairness of the hearing system is vital to our administrative process.

I know from personal experience the reservations the public have when dealing with administrative law judges as to whether or not they are under the influence of the agencies, and consequently unfair, make this generally an unfair perception.

My experience with the ALJ's make this generally an unfair perception. At least with those ALJ's whom I know. But the problem is there. And in some circumstances it is more than just a perception.

There is another factor I would like to note here. You hit it with some of your questions, Senator, but for example, when we talk about adjudicatory hearings, we really are referring to ALJ's and hearings that are required under the APA, which always require a formal hearing with an administrative law judge.

But we also have within our Government quite a lot of hearings, adjudications which grew out of the due process cases of the 1960's, of the Supreme Court, which do not require an ALJ, and heard by the staff of the agency's general counsel office.

One of the previous witnesses testified that generally such hearings are referred to ALJ's. That may be true generally but there are some agencies that do not refer these hearings to ALJ's.

They hold their own hearings and I know this because frankly with some embarrassment I set up some of those agency hearings for one agency I was with. And I just used members of the general counsel's office to sit as the hearing examiners.

And the reason we held those hearings were, frankly, to please the courts, so that they would have a record they could look at under an arbitrary and capricious standard, which, as you noted, you very rarely lose under that standard if you're the Government.

So I think there's an important area that is rarely addressed which should go to the ALJ corps. Hearings which are required because of due process considerations, not because of any statute, that triggers the APA formal hearing. The ALJ corps would be important in providing a remedy to this type of hearing, which now is a neglected area of due process.

But I'll have more of that in my prepared statement.

I would like to bring your attention to section 566 and the judicial nomination commission of the proposed bill. I'm a little concerned, one, about bringing the judiciary into the appointment system. I recognize that you do attempt to get out of the constitutional problem by having the judicial members of the Commission distant from the actual appointment power by the President given the right to reject the panel of three candidates if he wishes.

But I don't think it's a good idea to bring the judiciary into this assuming it meets the constitutional problem, which I doubt. This



is not an article III court you're setting up. It's an executive branch type of court. However, if you do wish to use the judiciary I believe it is a mistake to use the chief judge of the U.S. Court of Appeals for the District of Columbia, and the chief judge of the U.S. District Court for the District of Columbia, as the only judicial members of the Commission.

I think it's a mistake because I think you're implying that administrative law in the United States is a Washington-based system, perhaps before the broader venue statutes of 1962, most administrative law judicial cases were in the District of Columbia. But today that is not true.

And in a way, I think it's an unintended slap at circuits like the fifth circuit and the second circuit, which have done so much in administrative law, as well as the other Federal courts of appeals.

It seems to make it, I think, a rather Washington dominated type thing, which I am certain is unintentional. I believe the committee would want to take another look at the composition, if you think it's necessary to have a nomination commission. I don't believe an elaborate nominative commission is necessary, but I won't pursue that at this time.

Senator HEFLIN. Well, the problem is probably the author of the bill. He has got too much of an advance stage of Potomac fever.

Mr. DASH. Well, I was joking with a mutual friend of mine who is an administrative law judge, and I was saying that if Judge Learned Hand was still around, I think you'd get a very nasty letter from him for ignoring his circuit and focussing only on the District of Columbia circuit.

But in any case, I will include a few more things I would like to add in my prepared statement, now I would prefer to save the time of the committee and other witnesses and respond to any questions you would like to ask.

Senator HEFLIN. Thank you, sir, and we particularly appreciate you coming here today and making a real effort in view of the family problems that you have.

We deeply appreciate it.

Senator Grassley has a couple of questions to Mr. Forrest. As a practicing attorney, Mr. Forrest, do you think that the more diverse experience available under a unified corps of administrative law judges would help us retain and recruit more good people to the service.

Mr. FORREST. Yes, indeed. I would presume from your own experience on the bench, I would hope you would agree with me that it really does make a better judge if you handle not one narrow specialization, but, in effect, your thoughts are leavened by the experiences in a vast range of duties. I think it would attract a finer class of administrative law judges, because they would find it more interesting and stimulating not to be sidetracked into one narrow area.

Mr. DASH. If I could ride piggyback on that for a second, Senator, this concept of specialization for administrative law judges I've always felt was nonsense. When we think in our judicial proceedings that we have juries deciding issues involving malpractice in complex medical cases; we have district court judges who are picked from a variety of backgrounds who sit 1 day on a complex antitrust case, another a criminal case, and so forth. It seems a

little, I think, demeaning and insulting to think that an administrative law judge could not have, within reason, a certain variety, and of course, I agree that that would certainly attract even better people to have that kind of flexibility.

Senator HEFLIN. Professor Dash, Senator Grassley's question to you is this bill would allow Federal courts to refer certain types of proceedings to the administrative law judge corps. It is my understanding that this represents a major departure from the present system.

Is that correct, and if so, what is the impact of such a major change?

Mr. DASH. Well, I don't know if this is such a change. I believe what the Senator must have in mind is that there are many cases in which a Federal district court will remand after a hearing back to an agency for further hearings for further findings of fact.

What would happen here, which I think is very good, is that it would simply go back to the administrative law judge corps for these further findings.

It isn't dramatic in the sense that you're having something new, because this is done, I think, not infrequently, where a court will find that the decision on the record, or in looking for substantial evidence, that there is something that they want to have further findings on, and they will refer it—they normally today, of course, refer it back to the agency, and if it is an APA type hearing, the agency, of course, will refer it back for further hearings.

This would just send it to the corps, which is good. But I don't think it's going to make a dramatic change.

Mr. FORREST. If I may piggyback on that answer, there is a doctrine of primary jurisdiction when a district court, for example, has an antitrust case, and there are some matters which are within the expertise of a particular agency, it may refer that question back to the agency for a hearing, and then not surrender jurisdiction, but let the expert agency first decide the particular issue which is then referred back to the district court. The antitrust case, or whatever it is, then goes forward.

Senator HEFLIN. One final question. Are there any agencies, Professor Dash, that are so specialized that specialized administrative law judges should be retained?

Mr. DASH. Well, as I indicated to you, I don't believe in specialization. But I have been half convinced that in some of your power type cases, under the Federal Power Commission, also under the Nuclear Regulatory Agency, there may be arguably a case to have separate ALJ's, better trained in that area.

I don't believe, however, that it's necessary to keep it with the agency. There is no reason why an administrative law judge corps can't through its counsel recognize, as they will, these kinds of distinctions and cannot have their own group of judges who would handle, more often than not, cases coming from these agencies.

They don't have to be separated, is what I'm really getting at. It can still go to the corps, and still retain where necessary this limited specialization.

Senator HEFLIN. Thank you.

[The prepared statements of Messrs. Forrest and Dash follow:]

## PREPARED STATEMENT OF ABRAHAM A. DASH

Mr. Chairman and Members of the Committee:

I appreciate the opportunity accorded me by this committee on requesting my comments on the proposed legislation, S. 1275, a bill to establish an Administrative Law Judge Corps. The views I shall express are my own and reflect the interest of an academic, but it also reflects the interest of one who has been a government lawyer and has had a continuing interest in administrative law and its procedures. I have my own point of view as to what direction we should be going to improve the effectiveness and fairness of the administrative process, federally and in the several states, which is why I am in favor of the intent and impact of the proposed legislation.

I support the proposed bill. My reason for this support is that I believe its effect will be to move forward a philosophical and substantive movement in administrative law that has developed over the past forty years.

While there have been historically many threads and movements in administrative law, one particularly vital progression has been the growth of the hearing officer. From a simple subordinate in an agency whose opinion was more often ignored;<sup>1</sup> to the quasi-judicial figure of today who we call the Administrative Law Judge. The attempt to create hearing officers of quality and independence has been one of the fundamental aspects of progress in administrative law. The turning point for this movement was in 1941,<sup>2</sup> with the national debate on the direction of the administrative process and ultimately in the passage of the Federal Administrative Procedure Act of 1946.<sup>3</sup> The culmination of this movement has been the change of title from Hearing Examiner to Administrative Law Judge in 1972 by regulation; and subsequently by statute in 1978 which also added provision for higher pay and rank.<sup>4</sup>

1. See FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEEDINGS, Appendix H, Sen. Doc. No. 8, 77th Cong., 1st Session 1941 (375-397).

2. See footnote 1, *supra*.

3. Administrative Law Cases & Comments, 7th edition, Gellhorn, Byse, Strauss (pp. 752-753).

4. P. L. 95-201, 92 Stat. 183 (1978).



Coupled with the perceived need to create an independent hearing officer has been the allied concept of how to separate the regulatory functions of an agency (policy and rulemaking plus enforcement) from its adjudicatory functions (fact finding in adversary proceeding of a quasi-judicial character). Constitutional concepts of procedural due process initially,<sup>5</sup> and the simple concept of fairness as the importance of administrative agencies grew, demanded some method of separating these functions. Of course, the growth of a quasi-independent Hearing Office or A.L.J., was a must if the adjudicatory functions of an agency were not to be a sham or suspect to the reviewing Court and the public at large.

Today we have a hybrid system. Administrative Law Judges are independent fact finders and adjudicators; however, they are still subject to an agency review of their decisions and arguably some agency pressures. Still we have come a long way from the primitive hearing in most agencies of the pre-World War II era. Today the debate is appropriately whether the next step, in this progression, should be a complete separation of adjudicatory function from the agencies. Many, including myself, believe that the time has come for a separate Administrative Law Judge Corps. Whether it should be an Article III, U.S. administrative court, or a tribunal established under Article I and placed under the executive as proposed here raises interesting questions not relevant here. The concept, however, of a separate adjudicatory body, answerable only to a reviewing federal court, and not to the administrative agency is and should be the goal. Indeed, (perhaps as an experiment) Congress did this very thing when it passed the Occupational Safety and Health Act of 1970. Under this Act the Agency, operating within the Department of Labor, makes rules, policy, and initiates enforcement proceedings. It has no adjudicatory function. Instead a separate entity called the OSHA review commission handles the adjudications. Its ALJ's decide the case as a mini-administrative court; the commission, as a mini-administrative appeals court, reviews the decision. Further review is not at the Agency, but in federal courts. The jury is still out on the success of this experiment; but it is the latest move in the

5. See *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

direction of further independence of the Administrative Law Judges.<sup>6</sup>

The proposed legislation, S. 1275, is a giant step in bringing the adjudicatory functions of the Federal Administrative process into the modern era, also providing a rationality much needed in the federal system. While it does not and, I recognize, cannot go as far as I would like at this time, it is a needed reform.

It is interesting that the Federal Government is still debating this issue which has a long history of study and recommendation. As I noted in my oral testimony the record is replete back to 1936 of studies and reporting noting the need for an independent adjudicatory system for the federal administrative law process. There is now the reports of the eight states that have used the separate A.L.J. system with success. It is interesting that those who have for years feared what they call the over judicialization of the administrative process with resulting cost and delay are confronted with reports, such as from Minnesota where the use of a separate hearing agency has reduced cost and expedited proceedings.<sup>7</sup>

In time I envision that the federal system will evolve where all adjudications will be handled by an independent trial court of Administrative Law Judges whether required by statute, due process requirements, or simply for fact finding assistance to agencies or Article III courts. Their decisions or fact finding will be final, subject to judicial review or appeal to the federal courts of appeal by the agency or any party to the hearing. All quasi-legislative and executive functions will remain with agencies, who will handle their own rule making proceedings separate from the A.L.J. Corps.

While S. 1275 is more limited in scope, I support it because it is again a step in the right direction -- a step forward.

I do have one concern with the Bill as proposed, which I believe the Committee should consider. Section 566 establishes an involved, complicated process called the judicial nomination commission to pick the Chief Judge of the Corps. While I question the need for such a complicated procedure whose choices are limited, in any case, to a

6. See N. Sullivan, INDEPENDENT ADJUDICATION & OCCUPATIONAL SAFETY & HEALTH POLICY: A Test for Administrative Court Theory, 31 Admin. L. Review, 177 (1979).

7. Testimony of Duane R. Harves, Chief Hearing Examiner, Minnesota Office of Administrative Hearings, June 23, 1983.

sitting Administrative Law Judge, I am concerned with the composition of the commission. I seriously question the constitutionality of bringing the judiciary in to the appointment process of an executive branch court, even though the bill permits the President to reject the panel of three candidates if he wishes. He still is ultimately restricted to the commission choices. Even more questionable is the use of judicial officers only from the District of Columbia. It is a mistake to use the Chief Judge of the United States Court of Appeals for the District of Columbia, and the Chief Judge of the United States District Court for the District of Columbia. A mistake for the implication is that Federal Administrative Law is a Washington, D.C. system, which judicially, at least, is not true. It also is, I believe, an unintended lowering of the status of the several Federal Courts of Appeals in the Administrative Law judicial process, when these courts play an equal if not more important judicial role nationwide.