

TESTIMONY OF
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BEFORE THE
CONSUMER SUBCOMMITTEE
SENATE COMMITTEE ON COMMERCE,
SCIENCE AND TRANSPORTATION
ON
THE ADMINISTRATIVE LAW JUDGE SYSTEM
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Mr. Chairman and members of the Subcommittee, I am pleased to appear today to discuss the corps of Administrative Law Judges and its relationship to the administrative agencies. Because law judges play so central a role in effective agency decisionmaking, I think that the Subcommittee's initiative in taking a hard look at their relationship to their parent agencies is commendable.

I want to say at the outset that, in my view, the current system not only works, but works well. At the FTC today we have a corps of Administrative Law Judges who are competent, impartial, and independent. They perform their responsibilities wholly without agency interference. That is my experience, and I am certain that my predecessors at the FTC will confirm that conclusion. So, too, will my colleagues here today, with respect to their agencies.

The success of the present Administrative Law Judge system is, of course, no accident. When Congress enacted the Administrative Procedure Act in 1946, it carefully designed an adjudicatory process that has, as integral components, ALJ independence and impartiality. This is so from the very outset, the method of ALJ selection.

The Office of Personnel Management, not the individual agencies, undertakes ALJ recruitment and examination. OPM sets the standards, OPM does the screening, and OPM prepares the list of qualified applicants from which an agency seeking to hire an ALJ must choose.

Once hired, a law judge does not answer to the agency for his performance, as other employees do. While the Chief Administrative Law Judge monitors workload to assure acceptable productivity, no effort is ever made to direct one or another outcome to an ALJ's decision.

During the course of an adjudication, a law judge is insulated from any ex parte communication on the merits. He compiles the record at trial and makes rulings as he sees fit. At the FTC, the Commission does not involve itself at all in ALJ decisionmaking, except in the rare event when it grants interlocutory review of an ALJ order. The law judge's initial decision is likewise free of any interference from anyone. He calls the facts and the law exactly as he sees them.

At that point, if his decision is appealed, the Commission quite properly applies its own perspective to the evidence. That, after all, is a principal purpose for which a bipartisan body of experts was created by Congress. But though the Commission sometimes disagrees with the legal conclusions of a law judge, an analysis of Commission decisions will demonstrate the Commission's confidence in, and reliance upon, the evidence adduced under the ALJ's supervision. There is, in short, exactly the synergy of independent decisionmakers - the law judge who compiles the record and draws his conclusions from it, and the Commission that draws from its experience and collegiality its final view of the statutory enforcement entrusted to it - that Congress envisioned when it created the regulatory agencies. In my view this process produces far more effective decisionmaking than either an ALJ acting alone, or an ALJ acting in conjunction

with some external body devoid of experience with the complexities of FTC law enforcement.

Yet I recognize that some observers are troubled about the current structure and procedures. They perceive that law judges are dependent upon their parent agencies and appear to be biased in favor of agency prosecutions. That view is not borne out by experience, but as is often the case, appearances must be dealt with, for they create a sort of reality all their own. I therefore would like to raise a couple of ideas that may merit further consideration.

First, on ALJ recruitment, I think it might be valuable if OPM were given the resources to widen its recruitment effort. Our concern at the FTC, as I'm sure is true at the other agencies, is to enjoy the services of well qualified law judges, able to handle the often complex cases that arise under our statutes. So long as that criterion is satisfied, we have no particular preference as to the background of law judges. If a greater proportion of our ALJs were recruited from private practice, rather than from the agency itself, that would be entirely acceptable, assuming that proficiency standards were maintained. The major difficulty, I believe, is the substantial gap in salary between private practitioners of the requisite experience and skill and ALJs. Nevertheless, OPM can perhaps seek ways to broaden its recruitment efforts.

Second, the idea of assigning administrative responsibility for ALJs to a single entity, such as OPM or the Administrative Conference, instead of to the individual agencies as is now the

case, merits further consideration. It may be that even the minimal agency involvement in approving ALJ budget requests and the like contributes needlessly to the appearance of ALJ dependency. While I understand that this concept of centralization has been proposed in the past, and was subjected to intense criticism from some agencies, I think it would be fruitful if a fresh look were given to its pros and cons.

Finally, efforts at increasing ALJ independence ought to be accompanied by correlative efforts to assure high levels of ALJ performance. The Commission has in the past supported the concept of periodic evaluations of ALJs, as contained in regulatory reform legislation proposed by the Carter Administration and by Senator Ribicoff and others. So long as the agency itself is divorced from the evaluation process, I believe that periodic certification of high performance by the vast majority of law judges, together with a weeding out of the few who do not perform satisfactorily, can only enhance the respect for an independent corps of Administrative Law Judges.

That concludes my prepared remarks, Mr. Chairman. I will be glad to respond to questions.