

Ronald Reagan Presidential Library Digital Library Collections

This is a PDF of a folder from our textual collections.

Collection: Roberts, John G.: Files
Folder Title: JGR/Bumpers Amendment
Box: 6

To see more digitized collections visit:
<https://reaganlibrary.gov/archives/digital-library>

To see all Ronald Reagan Presidential Library inventories visit:
<https://reaganlibrary.gov/document-collection>

Contact a reference archivist at: reagan.library@nara.gov

Citation Guidelines: <https://reaganlibrary.gov/citing>

National Archives Catalogue: <https://catalog.archives.gov/>

COPY

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

ID # 172236 CUFG☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1/1Name of Correspondent: Branden Blum / James Murr☐ MI Mail Report

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

Subject: Statement of Jonathan Rose re: S. 1080
The Regulatory Reform Act on September 21, 1983

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Date YY/MM/DD
<u>CULB011</u>	ORIGINATOR	<u>83.09.16</u>	<u>C</u>	<u>C 83.09.20</u>
<u>CWAT/8</u>	Referral Note: <u>D</u>	<u>83.09.16</u>	<u>C</u>	<u>C 83.09.20</u>
<u>CWFIEL</u>	Referral Note: <u>S</u>	<u>83.09.20</u>	<u>C</u>	<u>C 83.09.20</u>
	Referral Note: <u>Sep 20 83 FFF memo to Branden Blum</u>	<u>1/1</u>		<u>1/1</u>
	Referral Note:	<u>1/1</u>		<u>1/1</u>
	Referral Note:	<u>1/1</u>		<u>1/1</u>

ACTION CODES:

A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet
to be used as EnclosureI - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:

A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of OutgoingComments: Sep 20 83 FFF memo also to C. Boyden Gray

Keep this worksheet attached to the original incoming letter.

Send all routing updates to Central Reference (Room 75, OEOb).

Always return completed correspondence record to Central Files.

Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1 / 1Name of Correspondent: James C. MURR☐ MI Mail Report

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

Subject: Proposed Statement of Jonathan C. Rose
concerning S. 1080, the Regulatory
Reform Act.

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>CVH011</u>	ORIGINATOR	<u>83109119</u>		<u>1 / 1</u>
<u>CVAT14</u>	<u>D</u>	<u>83109119</u>		<u>S 83109120</u> <u>10:00 am</u>
		<u>1 / 1</u>		<u>1 / 1</u>
		<u>1 / 1</u>		<u>1 / 1</u>
		<u>1 / 1</u>		<u>1 / 1</u>
		<u>1 / 1</u>		<u>1 / 1</u>

ACTION CODES:

A - Appropriate Action
 C - Comment/Recommendation
 D - Draft Response
 F - Furnish Fact Sheet
 to be used as Enclosure

I - Info Copy Only/No Action Necessary
 R - Direct Reply w/Copy
 S - For Signature
 X - Interim Reply

DISPOSITION CODES:

A - Answered
 B - Non-Special Referral
 C - Completed
 S - Suspended

FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer
 Code = "A"
 Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
 Send all routing updates to Central Reference (Room 75, OEOB).
 Always return completed correspondence record to Central Files.
 Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

THE WHITE HOUSE

WASHINGTON

September 20, 1983

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING Orig. signed by FFF
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. In order to ensure that the testimony is consistent with previous Administration positions, however, it should be reviewed by C. Boyden Gray, who was active in negotiations with the Hill in this area.

FFF:JGR:aea 9/20/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE

WASHINGTON

September 20, 1983

MEMORANDUM FOR C. BOYDEN GRAY
COUNSEL TO THE VICE PRESIDENT

FROM: FRED F. FIELDING *FFF/k3*
COUNSEL TO THE PRESIDENT

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

We have reviewed and have no objection to this proposed testimony, but would appreciate it if you would review it to determine if it is consistent with previous Administration positions. In light of the short deadline, you should raise any objection directly with Jon Rose.

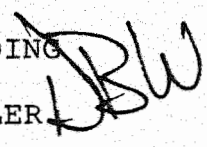
FFF:JGR:aea 9/20/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE

WASHINGTON

September 20, 1983

FOR: FRED F. FIELDING 
FROM: DAVID B. WALLER
SUBJECT: Proposed Statement of Jonathan C. Rose
Concerning S. 1080, The Regulatory Reform Act

For your information, the attached Legislative Referral Memorandum regarding the referenced matter was sent by OMB to the various agencies and departments on the distribution list with a request for their views prior to OMB's advising on the draft bill's relationship to the program of the President. You and several others were provided carbon copies.

Assistant Attorney General Rose's Statement is limited to § 5 of the bill which would amend the judicial review provisions (5 U.S.C. § 706) of the Administrative Procedure Act. Briefly, in the Statement the Department recommends against enactment of § 5 as being unnecessary and undesirable. The Department's principal objection is that the proposed changes would transfer to the federal courts significantly more power than they now possess to oversee implementation of congressional regulatory objectives by the Executive branch. The Department fears that this shift of power would further distort the balance of power between the Executive and Judicial branches.

Based on a very brief review of Mr. Rose's proposed Statement, I concur with it. Your comments were not requested by the Legislative Referral Memorandum, and no further action is required at the present time. In the event you wish to forward a comment, I have attached a proposed memorandum expressing our non-objection to the proposed Statement.

THE WHITE HOUSE
WASHINGTON

September 20, 1983

MEMORANDUM FOR JAMES C. MURR
ASSISTANT DIRECTOR FOR
LEGISLATIVE REFERENCE, OMB

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Statement of Jonathan C. Rose Concerning
S. 1080, The Regulatory Reform Act

As requested in your Legislative Referral Memorandum of September 19, 1983, this office has reviewed the referenced proposed Statement and has no objection to it from a legal standpoint.

THE WHITE HOUSE

WASHINGTON

September 20, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Rose Testimony on Bumpers Amendment

You asked whether Jon Rose's proposed testimony represented a change in Administration position on Bumpers. Rose told me that he did not think so, but suggested we run the testimony by Boyden Gray to make certain it is consistent with positions taken during more general negotiations on regulatory reform. I have revised the memorandum to OMB accordingly, and prepared a transmittal to Gray.

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

*Before we go forward with
this - I think we may
want to reconsider to the
extent that this will
be a slight "change"
in position. - I personally
agree that we should oppose
this, but I think we
personally suggested!*

> 9/19



IF YOU HAVE ANY COMMENTS PLEASE
CONTACT BRANDEN BLUM, OMB,
395-3802.

SEP 16 1983



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

September 19, 1983

SPECIAL

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

SEE DISTRIBUTION

1722366

SUBJECT: Proposed Statement of Jonathan C. Rose concerning S. 1080,
the Regulatory Reform Act.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than 10:00 A.M. TUESDAY 9/20/83

NOTE: Only substantive comments will be accepted.

Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.


James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: J. Hill M. Horowitz F. Fielding K. Wilson B. Bedell M. Uhlmann
J. MacRae M. Allen W. Leiss

DISTRIBUTION:

Environmental Protection Agency
National Credit Union Administration
Veterans Administration
Department of Health and Human Services
Department of Commerce
General Services Administration
Nuclear Regulatory Commission
Department of Energy
United States Postal Service
Administrative Office of United States Courts
Department of State
Department of Labor
Department of Agriculture
Department of Transportation
Department of Education

DRAFT

STATEMENT

OF

JONATHAN C. ROSE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE

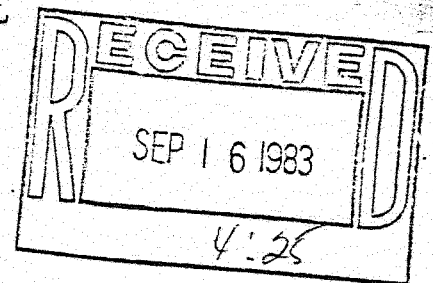
THE

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 . 1080.

For the reasons set forth below, the Department recommends against enactment of section 5. Section 5 would modify the 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

" 2/

Observations

As a general matter, the Department of Justice believes the Bumpers Amendment is unnecessary and undesirable. Our principal objection is that these changes, taken as a whole, tend 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.

THE WHITE HOUSE

WASHINGTON

September 20, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Rose Testimony on Bumpers Amendment

You asked whether Jon Rose's proposed testimony represented a change in Administration position on Bumpers. Rose told me that he did not think so, but suggested we run the testimony by Boyden Gray to make certain it is consistent with positions taken during more general negotiations on regulatory reform. I have revised the memorandum to OMB accordingly, and prepared a transmittal to Gray.

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

Before we go forward with this - I think we may want to reconsider to the extent that this will be a slight "change" in power - I personally agree that we should oppose this, but I think we previously suggested!
9/19

THE WHITE HOUSE

WASHINGTON

September 20, 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. In order to ensure that the testimony is consistent with previous Administration positions, however, it should be reviewed by C. Boyden Gray, who was active in negotiations with the Hill in this area.

FFF:JGR:aea 9/20/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE
WASHINGTON

September 20, 1983

MEMORANDUM FOR C. BOYDEN GRAY
COUNSEL TO THE VICE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

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

We have reviewed and have no objection to this proposed testimony, but would appreciate it if you would review it to determine if it is consistent with previous Administration positions. In light of the short deadline, you should raise any objection directly with Jon Rose.

FFF:JGR:aea 9/20/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE
WASHINGTON

September 20, 1983

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING *Orig. signed by FFF*
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. In order to ensure that the testimony is consistent with previous Administration positions, however, it should be reviewed by C. Boyden Gray, who was active in negotiations with the Hill in this area.

FFF:JGR:aea 9/20/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE

WASHINGTON

September 20, 1983

MEMORANDUM FOR C. BOYDEN GRAY
COUNSEL TO THE VICE PRESIDENT

FROM: FRED F. FIELDING *FFF/k3*
COUNSEL TO THE PRESIDENT

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

We have reviewed and have no objection to this proposed testimony, but would appreciate it if you would review it to determine if it is consistent with previous Administration positions. In light of the short deadline, you should raise any objection directly with Jon Rose.

FFF:JGR:aea 9/20/83

cc: FFFielding
JGRoberts
Subj.
Chron