

Mr. HANES. Well, I might point out, and I believe this is correct, that when Mr. Benjamin testified earlier, and when we met with the committee staff, we suggested that the judicial remedy be of a general nature that would have application beyond the public information provisions of section 3 of the Administrative Procedure Act and that section 3 not contain a separate, special judicial remedy.

Now I realize this bill is being considered separately and apart from the rest of the changes in the Administrative Procedure Act, and you would have to include a judicial remedy here if you intend to make clear that it is available.

I am not quite certain I understand, Mr. Kass, whether you are asking whether there should be standards spelled out in here which would be employed by the courts, or whether you are asking whether or not I think the judicial remedy would create a substantial volume of litigation.

Mr. KASS. This is the thrust of the question.

Mr. HANES. Yes.

Mr. KASS. The last part. The agencies have come up and stated that they felt the bill, if enacted, would in effect clutter up the dockets of the court.

Do you think that this would be a problem?

Mr. HANES. It would be my guess that it would not increase the volume of litigation in the courts substantially. I think in most cases, once the bill were enacted, information that was desired would be made available.

In the beginning there would probably be some test cases which would test the specific exemptions in the act. But I would not think it would create any major volume of litigation.

Mr. BENJAMIN. I think that is correct.

I think our experience in New York might be relevant. In New York almost any administrative agency proceeding, whether or not there is a formal hearing requirement, is reviewable by the courts; if there is no hearing requirement, by a proceeding in the nature of mandamus to review. And theoretically there are hundreds of thousands of agency determinations that are subject to review if there is merit to them.

But we have not found at all that that has overburdened the courts. The same argument was made where we recommended in S. 2335 that there be a proceeding to enjoin, a court proceeding to enjoin an agency proceeding clearly in excess of jurisdiction, which is very much like the old proceeding growing out of the writ of prohibition that we have in New York.

Again, while the agencies in opposing our proposal here say that the courts would be swamped, it certainly has not been found to be true in New York under the available proceeding in the nature of prohibition. I do not think it would be here. I think once the thing is spelled out, people generally acquiesce.

For one thing, it takes so much more effort to constantly litigate that I think the tendency ultimately is to stop it where you are not getting anywhere, and I think gradually at least, if not to begin with, the lines of action would be so clear here that there would not be anything to go to court about.