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THE HEARING EXAMINER FIASCO UNDER THE ADMINISTRATIVE PROCEDURE ACT

*Ralph F. Fuchs **

THE vehicle of centralized administration, employed under the Federal Administrative Procedure Act¹ (APA) to carry forward the civil service system which the Act establishes for hearing examiner positions, has recently collapsed with a resounding thud. The casualties include the morale of the examiners in the federal administrative service, which it was the purpose of the Act to enhance. The wreckage continues seriously to obstruct the path to a sound merit system for examiners. A tolerable solution to the resulting problem can be achieved only if the best thought and effort of both lawyers and personnel administrators are enlisted in the attempt. Among those who must participate are at least some — red-faced, one hopes — who share responsibility for the disaster that has occurred.

I. PRELUDE TO DISASTER

At least since the report of the Attorney General's Committee on Administrative Procedure,² enhancement of the stature and status of hearing officers has been a central element in proposed administrative procedure reform. The Committee was united in recommending that improvement in this respect be sought in part through supervision of the personnel arrangements for hearing officers by an Office of Federal Administrative Procedure, which

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¹ 60 STAT. 237, 5 U.S.C. § 1001 *et seq.* (1946).

² REP. ATT'Y GEN. COMM. AD. PROC. 45-51, 208-09 (1941).

should be established to work for the betterment of agency processes.³ Hearing examiners, who function in formal adjudicative proceedings, were to be "nominated" by the agencies for which they would work and "appointed," if approved, by the Office.⁴ They were to hold office for fixed terms, subject to removal only for cause, accompanied by the right to a hearing.⁵

In the APA itself,⁶ the provision for such an office was dropped:

It is objected that such an office — in addition to involving the creation of another administrative agency — will be political, will interfere with the independent operation of boards and commissions, will constitute a superadministrative agency, will serve to unduly emphasize and channel complaints respecting the administrative process, or will be without real authority.⁷

Centralized supervision of the selection of examiners, however, together with safeguards to their security of tenure, was retained in Section 11 of the Act;⁸ and the administration of these features was entrusted to the Civil Service Commission.

³ *Id.* at 123, 221-23.

⁴ *Id.* at 196, 237.

⁵ *Id.* at 196-97, 238.

⁶ The above proposals, together with certain others, were considered in Congress before Pearl Harbor, but led to no action at that time. See *Hearings before Subcommittee of Committee on the Judiciary on S. 674, S. 675, and S. 918*, 77th Cong., 1st Sess. (1941). Consideration of later bills, based largely upon the proposals of the "minority" of the Attorney General's Committee, was undertaken after V-E Day and led to the adoption of the present Act in 1946. The resulting legislative history has been assembled in SEN. DOC. No. 248, 79th Cong., 2d Sess. (1946).

⁷ *Id.* at 42. These vague objections seem largely without foundation.

⁸ 60 STAT. 244, 5 U.S.C. § 1010 (1946), which provides:

Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission . . . after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended [which provide for minimum efficiency ratings and certification by department heads as prerequisites to salary increases], and the provisions of section 9 of said Act, as amended [which provides for the method of efficiency rating], shall not be applicable. . . . For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpoena witnesses or records, and pay witness fees as established for the United States courts.

Section 12 provides that "the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after" the date of the Act's approval, June 11, 1946. 60 STAT. 244, 5 U.S.C. § 1011 (1946).

Under the APA, the examiners selected in accordance with Section 11 are the only government officers, aside from agency heads or officials specially provided under other specific statutes, who may conduct hearings in rule-making or adjudicative proceedings in which the resulting agency action is required by statute to be based upon the record after opportunity for hearing.⁹ In conducting formal hearings, examiners are armed with statutory power¹⁰ to perform the usual functions of a judge in ruling upon points of evidence and procedure, regulating the course of the hearing, conducting conferences, and the like. To a large extent, therefore, the Act embodies the conception of a corps of highly responsible hearing officers, originally put forward by the Attorney General's Committee. Manifestly the selection and tenure provisions of Section 11 require administration in a manner appropriate to this type of personnel.

In setting up its administration of Section 11, the Civil Service Commission could not begin altogether *de novo*. There were incumbent examiners performing the functions enumerated in the APA. Their relationship to the new system, with which the Act did not expressly deal, needed to be defined. Legally the Commission had a free hand as to them, for the APA rather clearly contemplated new appointments to examiner positions and impliedly superseded existing tenure rights in order that such appointments might be made. According to the APA, appointments were to be made "[s]ubject to the civil-service . . . laws."¹¹ These laws do not preclude special treatment at the

⁹ 60 STAT. 241, 5 U.S.C. § 1006 (1946). Only the examiner who presided at the hearing or the agency head may, in important classes of proceedings, make the initial decision; and in many cases the examiner must recommend a decision before even the agency head may act. 60 STAT. 242, 5 U.S.C. § 1007 (1946).

¹⁰ 60 STAT. 241, 5 U.S.C. § 1006(b) (1946).

¹¹ Strictly speaking, the civil service laws do not require that any particular methods be followed as to any particular class of positions. The general examination requirement in § 7 of the Civil Service Act, 22 STAT. 403, 406 (1883), 5 U.S.C. § 638 (1946), applies to the "classes of employees" who come under the Act; but that requirement operates through the Civil Service Rules, which the statute requires the President to formulate with the aid of the Commission, 22 STAT. 403 (1883), 5 U.S.C. § 633 (1946), and which need provide for "open, competitive examinations" only "as nearly as the conditions of good administration will warrant." In addition the President retains a previous statutory power "to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof." REV. STAT. § 1753 (1875), 5 U.S.C. § 631 (1946). Because of these provisions, the Civil Service Rules provide for positions that may be filled without examination and for other positions that may be filled by means of noncompetitive examinations. 5 CODE FED. REGS. § 6.1

Commission's discretion for some classes of persons possessing a previous relationship to positions in the civil service. Under general regulations of the Commission persons having "competitive status," that is, status acquired by appointment after competitive examination or by certain other means,¹² may be transferred without examination to other positions for which they meet prescribed qualifications.¹³ Even without previous competitive status, the incumbents of positions which are newly brought under a competitive examination requirement may acquire such status and retain their positions, subject to any requirements imposed by the Commission.¹⁴

On the effective date of Section 11, there were 197 incumbents of examiner positions.¹⁵ Consistently with the general regulations just summarized, the Commission could have provided that the status incumbents or, subject to veterans' preference, the non-status incumbents or both should either (a) be eligible for new appointment to the examiner positions they occupied, upon ascertainment that they met certain prescribed standards; or (b) be so eligible, subject to the same requirement *and* to the successful completion of a noncompetitive examination; or (c) be subject to the same requirements as outside applicants, including perhaps a competitive examination.

It would have been desirable for the Commission to clarify the situation of the incumbents promptly. The positions involving the performance of hearing examiner functions as defined in the

(1949). It is at best doubtful, however, whether examiner positions could be altogether exempted from examination by the Commission, consistently with § 11 of the APA; for although the section does not in terms require examinations or mention the Civil Service Commission in connection with the appointing process, the Attorney General doubtless stated the general understanding when he said: "Appointments are to be made by the respective employing agencies of personnel determined by the Civil Service Commission to be qualified and competent examiners." SEN. DOC. NO. 248, *supra* note 6 at 231. The Senate and House committees stated that the Act "requires the Civil Service Commission to fix appropriate qualifications and the agencies to seek fit persons." *Id.* at 215, 280. This language, if taken literally, would permit the examination requirement to be dispensed with; but the committees may not have so intended. The Veterans Preference Act, 58 STAT. 387 (1944), 5 U.S.C. § 851 *et seq.* (1946), requires that the agencies, if not the Commission, examine and grade the candidates for all positions for which veterans make application. For excepted positions, see 5 CODE FED. REGS. pt. 281 (1949).

¹² 5 CODE FED. REGS. §§ 1.1, 3.1 (1949).

¹³ *Id.* §§ 8.101-8.104.

¹⁴ *Id.* §§ 3.1, 3.101.

¹⁵ 64 CIVIL SERV. COMM'N ANN. REP. 30 (1947). See also page 753 *infra*. 148 of the 197 incumbents possessed competitive status.

APA needed to be determined, however, and the Commission chose not to deal publicly with the problem of incumbents until that task, together with the preparation of regulations governing the whole matter before it, had been completed. To aid with these problems, the Commission created a well-chosen advisory committee, composed of four high-ranking administrative and legal officers of the Government and Mr. Carl McFarland.¹⁶ The classification of examiner positions was completed by June 11, 1947; but, to gain more time for the preparation of regulations and examination methods, the Commission deferred action upon the status of the incumbents as well as other problems.¹⁷ In order to preserve the *status quo* pending further action, the agencies were authorized to confer "conditional reappointments" upon the incumbents of examiner positions.¹⁸

Whether or not the literal requirements of the APA were met by the Commission's actions at the time Section 11 became effective, the attainment of the Act's more fundamental purposes as to examiner personnel was certainly impaired seriously. Obviously the staffs of permanent examiners would be composed largely of previous incumbents for some years to come. It was important

¹⁶ The latter had been an Assistant Attorney General of the United States, a member of the Attorney General's Committee on Administrative Procedure, chairman of the American Bar Association's Special Committee on Administrative Law, and, in the latter capacity, the Bar Association's chief contributor to the drafting of the APA which the Association sponsored. See SEN. DOC. NO. 248, *supra* note 6, at 47-50, 72-86; 32 A.B.A.J. 325 (1946).

¹⁷ See note 15 *supra*.

¹⁸ *Ibid.*; 12 FED. REG. 3507, 5 CODE FED. REGS. 409 (Supp. 1947). A difficult legal question surrounds these "conditional reappointments." A primary purpose of § 11 is to enhance the independence of examiners in the performance of their duties by attaching a high degree of security to their tenure. SEN. DOC. NO. 248, *supra* note 6, at 215, 280. Arguably, this security was to go into effect June 11, 1947, the effective date of § 11, as to all examiners thereafter appointed in whatever way, without authority in anyone to defer it. The conditional reappointments were intended to be terminable by the Commission, in the interest of permanent appointments more fully meeting the requirements of the Act. See Civil Serv. Comm'n Press Release, May 29, 1947; Department Circular No. 592, June 3, 1947. The question is whether the Commission could terminate these "reappointments" in ways not set forth in the APA. Since any termination during the transitional period would probably be for reasons not contemplated by the Act, it is reasonable to urge that the Act does not preclude such removals, if they can be made consistently with the civil service laws. Cf., e.g., 5 CODE FED. REGS. §§ 2.112, 2.114, 10.102 (1949). To protect the objectives of the APA in centralizing personnel administration over trial examiners, the Commission promptly provided that no agency might remove an examiner without authorization from it. Departmental Circular No. 592, Supp. No. 1, June 18, 1947.

that the new system be launched on a firm basis in order to enhance the morale of examiners and encourage the most effective use of their enlarged authority; yet the opportunity to accomplish this result was frittered away. Instead, a temporary state of affairs was established which was destined to be prolonged and to produce increased, instead of diminished, uncertainties.

Improvement seemed to be in the offing when the Commission, on June 28, 1947, published its proposed regulations governing the appointment and tenure of hearing examiners and announced a hearing upon the regulations to be held July 9.¹⁹ Under this proposal, (1) incumbents with competitive status or holding office under excepted appointments conferred before December 11, 1946, were to be eligible for permanent appointment if the Commission found them qualified for their positions and suitable for federal employment; and (2) all others wishing to gain permanent appointments were required to submit themselves to competitive examination and to secure eligibility on the resulting registers. Examinations were to be given by a three-member board appointed by the Commission and functioning within its Examining and Placement Division. If the proposed board were well selected and given a relatively free hand, a reasonably good administration of the hearing examiner merit system might have been achieved under the proposed regulations. Such was not destined to be the outcome, however.

II. FORCES OF DESTRUCTION

During the period of gestation of the regulations the *American Bar Association Journal*, aided by Senator Wiley of Wisconsin, then chairman of the Senate Judiciary Committee, conducted a vigorous campaign to cause the Commission to adopt certain policies in administering the hearing examiner merit system, particularly as to retention of incumbents. The *Journal* represented Mr. McFarland as having urged "our Association's contentions" upon the Commission; he, Senator Wiley, and others were credited with having brought about a "substantial and highly gratifying victory" for the Association in the rules which the Commission adopted.²⁰ When the rules were under consideration, it was said that "insistence on impartiality" of the examiners was "a paramount issue," lest the quasi-judicial agencies become subject to

¹⁹ 12 FED. REG. 4233 (1947).

²⁰ 33 A.B.A.J. 861, 910 (1947).

the "Soviet concept of judicial bodies" which renders them "‘government organs of vengeance’" for carrying out "the predeterminations of the government policy makers, irrespective of the facts as to the individuals involved."²¹

The source of this threatened subversion of the "American ideal of justice under law,"²² according to letters from Senator Wiley to the Commission which the *Journal* featured and identified with the Association's position, was "an entrenched 'palace guard' of former [*i.e.*, incumbent] Examiners and/or . . . individuals having an approach inimical to the welfare of private enterprise."²³ The Senator was "determined" that examiners should not "be appointed on a narrow partisan and ideological basis, with the selection largely limited to present examiners and agency staffs," who might "‘be men of bias, of ideological preconceptions, of partisan fealty, of subservience to pressure groups, of habits of unfairness, of disregard of the true values and weight of evidence’" — "men of leftist thinking, men who don't have complete loyalty to our constitutional system of checks and balances." In an apparent attempt to coerce the responsible administrative officials, he called upon the Commission "to refute by action" reports that it might proceed contrary to the course which Congress desired and to state the Commission's intentions in order "to prove that the allegations are unmerited." The Senator suggested that otherwise "many members of the Congress may feel that it will be necessary to take definitive legislative steps to insure the fulfillment of the mandate" of the APA.²⁴

The Commission's regulations, published September 23, 1947,²⁵ differed somewhat from the tentative ones previously announced, although the principal features were the same. On the whole, the changes were not for the better. The regulations omitted provision for a board of examiners, but an accompanying mimeographed statement and a later departmental circular²⁶ announced that the qualifications of incumbents with competitive status would be appraised by a board of examiners composed of one

²¹ *Id.* at 148.

²² *Ibid.*

²³ *Id.* at 688, 689; see also *id.* at 421-22.

²⁴ *Id.* at 688, 689.

²⁵ 5 CODE FED. REGS. § 34.1 *et seq.* (1949).

²⁶ Departmental Circular No. 592, Supp. No. 2, § II, 2(a), Nov. 5, 1947; mimeographed statement accompanying Civil Serv. Comm'n Press Release, Sept. 22, 1947.

member "now on the Commission's staff" and "at least two persons from outside the Government who have an outstanding reputation in the field of administrative law"; and, in a specification for the competitive examination for other applicants, it was stated that "competitors will be requested to appear before a board for oral interview . . ." ²⁷ The regulations provided that incumbents with competitive status might be appointed without competitive examination, if found by the Commission to be "qualified and competent to perform the duties of hearing examiners"; but only those "who, in the judgment of the Board [of Examiners] are eminently qualified" would receive regular appointments; and these incumbents would be judged according to "standards to be developed by the Board." ²⁸ Hence the responsibility for judging "status" incumbents, the standards to be applied to them, and the extent of the participation of examining boards in the competitive

²⁷ Examination Specification No. 851, at 5, Nov. 5, 1947; see also the Commission's Examining Circular EC-17, at 3, Oct. 21, 1947.

²⁸ Some question has been raised whether the Civil Service Commission had power to delegate the development of such standards to a board. Under Civil Service Rule II, 5 CODE FED. REGS. § 2.1 (1949), the Commission is authorized to establish standards of education, training, etc., for admission to examinations. But the standards to be developed by the Board were of a different sort. These were standards to be applied in examinations. The Commission itself did define who were the "status" incumbents; and later, in Examination Specification No. 851 and Examining Circular EC-17, *supra* note 27, it prescribed the standards of experience, etc., to be met by participants in the competitive examination. The Commission is authorized by § 3 of the Civil Service Act, 22 STAT. 404 (1883), as amended, 42 STAT. 637 (1922), 5 U.S.C. § 635 (1946), to appoint boards of examiners composed of persons within the federal service; and § 01.4 of Exec. Order No. 9830, 12 FED. REG. 1259, 1262, 3 CODE FED. REGS. 109-10 (Supp. 1947), authorizes it to include persons from outside the federal service where qualified examiners "are not readily available" within it. The authority of the Board of Examiners for hearing examiner positions was made broader in the published announcements than that of other such boards as stated in the regulations, 12 FED. REG. 8801, 5 CODE FED. REGS. § 01.9 (Supp. 1947); and the scope of the delegation of authority was not published in the Federal Register pursuant to § 3 of the APA, 60 STAT. 238, 5 U.S.C. § 1002 (1946). That section provides that "No person shall in any manner be required to resort to organization or procedure not . . . published" in the Register; but it can hardly be said that one who has been duly apprised that he may or will be expected to appear before a board of examiners is required to resort to a different organization or procedure because the authority of the board is somewhat enlarged. Hence it seems that the Commission did have authority to entrust the development of standards to be applied in examinations to the Board. Even if it should have published the delegation in the Federal Register, its failure to do so did not invalidate the delegation as to participants in the examination. Whether the Commission had authority to select persons outside the federal service to compose a majority on the hearing examiner board is a separate question which will be discussed below.

examination were left quite vague. The ominous publicity must have been extremely disturbing to status incumbents.

In other respects the regulations, which are still in effect with amendments, embody provisions that carry out the mandate of the APA in general conformity to the over-all civil service system. Generally the regulations governing the competitive service as a whole are made applicable to hearing examiner positions.²⁹ Vacancies are to be filled from registers of eligibles according to the usual method of consideration of the three highest-ranking eligibles,³⁰ subject to final approval of each appointment by the Commission. To conform to the APA's protection of the tenure of examiners, all appointments are to be final, subject to the safeguarded removal procedures prescribed by the Act.³¹ Promotions, reassignments, and transfers of examiners are to be strictly controlled by the Civil Service Commission. Promotion registers within each agency are to be established.³² Efficiency ratings and their use in determining salary increases are eliminated for examiners as required by the APA.³³

The hearing examiner positions had been allocated by the Commission to grades with a salary range from \$5232 to \$10,330.³⁴ The regulations require applicants to have a minimum of six

²⁹ 5 CODE FED. REGS. § 34.1 (1949).

³⁰ *Id.* § 34.4; see *id.* § 2.109. The "rule of three" is now mandatory in filling all civilian positions in the Government, whether or not in the competitive service, for which veterans entitled to preference have applied. Veterans Preference Act, 58 STAT. 389 (1944), 5 U.S.C. §§ 857, 858 (1946). See 5 CODE FED. REGS. §§ 21.1, 21.7 (1949). Operation of this method of selection need not be as rigid as is sometimes supposed. Appointment from registers may follow "selective certification" if the Commission determines after study that regular certification "would not provide persons properly qualified to fill the vacancy." Selective certification may be accomplished either by picking, in order of rank, those eligibles who possess qualifications appropriate to the position to be filled or after the eligibles have been re-rated on the basis of "a special rating schedule which emphasizes the importance of the qualifications required." 12 FED. REG. 7166, 5 CODE FED. REGS. § 02.2(f) (Supp. 1947).

³¹ 5 CODE FED. REGS. § 34.11 (1949). Detailed rules of procedure, such as were included in the proposed regulations, are omitted, however. The one-year probationary period which applies to other competitive appointments, during which the employing agency may terminate an appointment at will if the appointee does not measure up to the job, is not to apply in the appointment of examiners. *Cf.* 5 CODE FED. REGS. §§ 2.1, 2.113, 34.4 (1949).

³² *Id.* § 34.5. An amendment just made (Dec., 1949) abandons the promotion register device. See p. 758 *infra*.

³³ *Id.* §§ 34.7, 34.8.

³⁴ See 64 CIVIL SERV. COMM'N ANN. REP. 29 (1947); Amendment of July 5, 1949 to Examining Circular No. EC-17, *supra* note 27.

years of "progressively responsible experience," partly "general," but mostly — particularly for higher grades — "specialized," including the decision or preparation or presentation of cases before governmental regulatory bodies or before courts. All told, applicants must have had experience which "has demonstrated conclusively their ability to conduct hearings in a dignified, orderly and impartial manner; determine credibility of witnesses; sift and analyze evidence; apply agency and court decisions; prepare clear and concise statements of fact, law and order [*sic*]; and exercise sound judgment"; and they "must also show conclusively that they are persons of judicial temperament and poise."³⁵

Aside from the ebullience of some of the language just quoted, such as the statement that the applicant must "conclusively demonstrate" the possession of qualities which even the best judges must strive hard to acquire and maintain, the circular and the regulations could have afforded the basis for successful administration of Section 11 of the APA. The salary scale, considered in the framework of government salaries generally, seems adequate. The tenure protections and the regulations governing salary increases, promotions, transfers, and the like, are consistent with the Act. The quantitative experience requirements are appropriate, and the qualitative requirements are at least susceptible to sensible administration. The competitive examining procedures provided — *i.e.*, evaluation of experience, oral interview, and investigation, without a written test — can be made to produce realistic results. The requirement that all applicants except incumbents of examiner positions possessing competitive status submit to competitive examination is sound. The requirement that status incumbents submit to noncompetitive examination is also sound,³⁶

³⁵ Examining Circular EC-17, *supra* note 27, at 1-2.

³⁶ The bulk of these incumbents acquired their status through appointment after some type of examination, or through approval of their qualifications for their positions when these were for a time brought into the competitive service, along with most other legal positions, by Exec. Order No. 8743, 3 CODE FED. REGS. 927 (Cum. Supp. 1943). Exec. Order No. 9830, 12 FED. REG. 1259, 3 CODE FED. REGS. 108 (Supp. 1947), again removed these positions from the competitive service. The process of "covering in" pursuant to Executive Order No. 8743, despite efforts to make it more substantial, came to consist simply of determinations that the basic requirements of experience, etc., for the grades of positions held, were met. In few instances, if any, had the qualifications of incumbents of examiner positions been determined by any central agency with specific reference to the duties of those positions.

although the standard expressed in the announcements is ominously worded. The creation of a special board to judge status incumbents might seem to indicate particular suspicion of them; on the other hand, such a board is a useful means of conducting noncompetitive examinations.

Serious reason for apprehension concerning the future of the hearing examiner system arose when the Commission, on January 23, 1948, announced the personnel of the Board of Examiners which was to pass upon the qualifications of the status incumbents. Several months later, apparently without public announcement, the same board was given the responsibility of conducting the competitive examination of non-status incumbents and outside applicants for examiner positions.³⁷ The membership of this Board did not bear out the Commission's promise³⁸ that it would be composed of "at least two persons from outside the government who have an outstanding reputation in the field of administrative law," in addition to a member from the Commission's staff. There was a member from the Commission,³⁹ and the chairman, Mr. Carl McFarland, clearly met the quoted description,⁴⁰ but the other members hardly did. Two were state supreme court judges;⁴¹ two were practicing lawyers and former presidents of the American Bar Association.⁴² These four members undoubtedly had some familiarity with administrative law and procedure; none of them, however, had become known as outstandingly expert in the field.

One member, Mr. Henderson, as president of the American Bar Association, had denounced federal administrative agencies and hearing officers with extreme vigor. In an article during his incumbency he asserted that, "There is a tendency in all administrative agencies to go beyond or outside of the statute creating them

³⁷ The time of this action is given as April, 1948, in 65 CIVIL SERV. COMM'N ANN. REP. 32 (1948), and as May, 1948, in FIRST REP. CONSULTANTS TO CIVIL SERV. COMM'N, HEARING EXAMINER PERSONNEL UNDER THE ADMINISTRATIVE PROCEDURE ACT [hereinafter CONSULTANTS' REPORT] 6 (Jan. 31, 1949).

³⁸ See pp. 743-44 *supra*.

³⁹ Mr. Wilson M. Matthews, a lawyer serving as examiner in the Examining and Placement Division.

⁴⁰ See note 16 *supra*.

⁴¹ Douglas L. Edmonds of the California Supreme Court and Laurance M. Hyde of the Missouri Supreme Court.

⁴² Joseph W. Henderson of Philadelphia, president of the ABA in 1943-44, and Willis Smith of Raleigh, North Carolina, president in 1945-46.

and defining their power; to set up and give effect to policies beyond or even at variance with the statutes or the general law governing their action," and "to make determinations contrary to the fair weight of the evidence and even without a basis in evidence of logical probative force."⁴³ In an address in 1944, he spoke of the "growth of bureaucracy and administrative absolutism in the guise of wartime controls" and inveighed against

the ousting of our courts and lawyers from jurisdiction and authority to protect the rights of persons and property against discretion based on radical theories and against arbitrary powers exercised by officials who recognize no responsibility to our Congress, our courts, or our electorate.⁴⁴

In his presidential address before the Association, he averred that the agencies "have more and more extended their asserted powers beyond those granted by Congress in the statutes creating them" and asserted that

zeal of officials, lust of power by subordinates, want of any traditional or developed ethics of hearing and decision, and above all want of effective checks upon administrative decisions, result in a fixing of policies by the agencies rather than by Congress⁴⁵

Since the *Journal* had represented the Association as essentially a pressure group with respect to the administration of the hearing examiner system, had identified Mr. McFarland with these pressures, had linked the views of Senator Wiley with the Association's, and had itself uttered sentiments similar to those expressed earlier by Mr. Henderson, it was a disastrous impropriety for the Civil Service Commission to create a Board of Examiners so strongly colored by the asserted ideology of the Association.⁴⁶

⁴³ *Lawyers Urge Judicial Curbs on Administrative Abuses*, 29 A.B.A.J. 681, 683, 684 (1943).

⁴⁴ *The American Lawyer's Place and Part in the Postwar World*, 30 A.B.A.J. 548, 550 (1944).

⁴⁵ *Making Secure "The Blessings of Liberty,"* 30 A.B.A.J. 597, 599 (1944).

⁴⁶ The Association is, of course, a large and complex organization, to which it is difficult to ascribe particular views in the absence of formal action by its policy-making agencies. No such action appears to have been taken with reference to the hearing examiner system. Acquiescence by these agencies in the *Journal's* campaign to influence the Commission may perhaps be assumed; but the membership was not put on notice as it would have been by formal action. Actually even formal action by the Association, when it takes place, results from representative processes which are imperfect because of inactivity of the mass of the membership. The viewpoint that finds dominant expression is intensely conserva-

Try as the members of such a board might to rise above the record that had been made, they could scarcely succeed fully; and if they did, they would hardly be credited with success by those whom their actions hit. Especially with the governing regulations and pronouncements no clearer than they were, the Board had opportunity for the exercise of wide discretion; the basis for suspicion of its performance was correspondingly broad. Mr. McFarland's eminence in the field of administrative law made his appointment appropriate; but it should have been accompanied by the appointment of others who had equivalent backgrounds.

Simultaneously with the enlargement of the functions of the Board of Examiners to include initial responsibility for conducting the competitive examination, the Civil Service Commission provided the Board with "associates" residing in various centers throughout the country, to aid it in the investigation and examination of applicants.⁴⁷ Like the Board, this group was heavily weighted with professional dignity and standing. While only two of its members appear to have had particular experience with federal administrative agencies,⁴⁸ the associate group, assuming proper control by the Board, seems to have been capable of satisfactory participation in the examining process.

III. THE DEBACLE

The Board of Examiners first developed the standards for the examinations.⁴⁹ It recommended,⁵⁰ and the Commission approved, that the open competitive standards applied in the competitive examination be used also in re-examining the status incumbents.⁵¹ A grade of "C" on a scale of "A" to "F" would, however, qualify a status incumbent for retention in his position.⁵²

tive in economic matters; and it is evidently this viewpoint which produced the *Journal's* stand in the examiner matter. It is this author's conclusion that what was wanted, consciously or unconsciously, were examiners who would be tender toward economic interests affected by regulation.

⁴⁷ CONSULTANTS' REPORT 7; 65 CIVIL SERV. COMM'N ANN. REP. 32 (1948).

⁴⁸ Chester T. Lane of New York City, former general counsel of the SEC, who had engaged in legal examining work as executive secretary to the War Department Civilian Legal Personnel Committee; and Clarence A. Miller of Washington, D. C., vice-president and general counsel of The American Short Line Railroad Association.

⁴⁹ CONSULTANTS' REPORT 8, 28-30. For explanation of the use of the term "consultants" with reference to the Board, see note 102 *infra*.

⁵⁰ CONSULTANTS' REPORT 6-8, 28.

⁵¹ 65 CIVIL SERV. COMM'N ANN. REP. 32 (1948).

⁵² CONSULTANTS' REPORT 17.

Except for certain specific points, the Board's printed standards add relatively little to those previously prescribed by the Commission. Law teaching was not to be counted as general experience, or the teaching of "administrative law, public utilities, etc." as specialized experience.⁵³ "Work as an interviewer, field investigator, or sleuth" [*sic*]; duties connected with courts martial or military justice; work as a "mediator, moderator, arbitrator, etc."; work as "a case or record reviewer of examiners' proposed reports or initial decisions" — none of these might count as specialized experience.⁵⁴

The Board also decided, for reasons which it was at pains to set forth at length,⁵⁵ that "the fairly numerous administrative officers who are called 'chief', or 'assistant' or 'associate chief', examiners" could not be regarded as incumbents of examiner positions, even if their duties included hearing cases "to a necessarily limited extent"; nor could these duties be counted as specialized experience, since they fell within another excluded category — "administrative or supervisory work connected with public administration or regulation."⁵⁶ If, perchance, a chief examiner should become responsible for results in the cases handled by his staff, he would assume the role of "a directing executive destructive of the initiative and independence of his flock who under the Administrative Procedure Act are supposed to be freed of such influence."⁵⁷ This reasoning violates the Commission's governing regulation when applied to persons whose duties include the occasional hearing of cases.⁵⁸ It also goes beyond the purpose of the APA. The Act calls for qualified examiners who shall perform

⁵³ The reader must estimate the author's prejudice toward the Board and its work, resulting from these provisions. To a member of the teaching profession, it seems arbitrary to exclude law teaching from professional experience, especially in connection with an examination which should take account of the qualitative factors produced by any experience presented.

⁵⁴ CONSULTANTS' REPORT 29.

⁵⁵ *Id.* at 11-13.

⁵⁶ *Id.* at 29. Mr. McFarland, arguing before the Commission as to the experience requirements to be stated in the regulations, had asserted that persons who have administrative charge "of cases conducted before a . . . governmental regulatory body" include "persons who are expeditors, coordinators, paper pushers, and the like who are hardly more than chief clerks or political supervisors" 33 A.B.A.J. 861, 863 (1947).

⁵⁷ CONSULTANTS' REPORT 12.

⁵⁸ The regulation defines "hearing examiner position" as "one in which any portion of the duties includes those prescribed" by the APA for examiners. 5 CODE FED. REGS. § 34.2 (1949).

responsible duties independently of favoritism or pressure from within their agencies; but it does not require that they be freed of supervision with respect to the efficiency or the manner of their performance. An administrative agency is still responsible for the efficient use of public funds and for adherence to the law and to agency policies by its personnel, including examiners. It is unsound to suggest that supervisory examiners have no proper function to perform, or that they need not be versed in the functions of the men under them.⁵⁹

The members and associates of the Board proceeded to perform their duties energetically, conducting 148 examinations of status incumbents and 694 examinations of non-status incumbents and other applicants.⁶⁰ The board member from the Commission's staff determined whether outside applicants possessed the necessary experience; the investigation of incumbents and of those outside applicants who possessed the requisite experience were conducted by Commission investigators under the direction of the examiners; and oral interviews were conducted by the examiners themselves, sitting singly in the case of outside applicants, and in panels of two or more when interviewing incumbents.⁶¹

It is not possible on the basis of available data to evaluate accurately the quality of the examinations that were given or to determine whether the experience of the applicants was correctly measured. To do so would require knowledge of the judgment that was exercised in appraising the experience recorded in the written applications, of the competence of the Commission's investigators, of the thoroughness with which the available sources of information concerning applicants were tapped, of the questions and answers in the oral interviews, and of the ratings finally assigned. None of this information is obtainable in the time at the command of the writer; some of it is not recorded at all, and much of it is properly held confidential by the Civil Service Commission. One can form certain judgments from the approach of

⁵⁹ The reasoning of the Board of Examiners would limit the effective execution of regulatory policies by administrative agencies. The APA, however, was consciously designed to avoid any such result. The Senate committee "attempted to make sure that no operation of the Government" would be "unduly restricted" by its provisions. SEN. DOC. NO. 248, *supra* note 6, at 191; see also *id.* at 250 (House committee report).

⁶⁰ CONSULTANTS' REPORT 18, 20. With limited exceptions, the members and associates served without compensation.

⁶¹ *Id.* at 13-16.

the Board and the general character of the results, however, and some specific comments on the conduct of the examinations are possible on the basis of information that has been disclosed.

The panel system of conducting interviews, adopted with respect to incumbents, is desirable, for the reactions of an examiner to the personality and specific disclosures of an applicant need to be checked by others. Interview and judgment by a single examiner, relied upon for most nonincumbent applicants,⁶² thus seem hardly adequate as a basis for conclusions. Given the types of investigation and examination that were employed, the method adopted for co-ordinating the results and assigning final ratings seems reasonably adequate;⁶³ but it might have been desirable to designate more precisely certain qualities for which the applicants were to be rated, and then to co-ordinate the results with reference to these. Such qualities as knowledge of administrative procedure, ability to handle technical questions during hearings, personal bearing, and objectivity might have been selected for this purpose and have aided somewhat in the difficult task of arriving at comparative judgments summarizing a host of intangible factors. Stenographic notes, or a recording, of each oral interview with at least the status incumbents should have been made, so as to be available in case of an appeal.⁶⁴

The problem of securing a satisfactory number of applicants for the competitive examination from outside the Government was met in part by enlisting the efforts of the board members and associates, who were apparently quite successful in this capacity.⁶⁵

⁶² *Id.* at 15-16. "A post-audit of the results indicates that panels of two or three members tended to more uniform, and slightly more conservative, ratings." *Id.* at 14.

⁶³ In the panels, grades were first assigned by each examiner separately and then co-ordinated. After all the grades were in, the results were reconsidered and co-ordinated by the Board and final grades—numerical as well as letter grades for participants in the competitive examination—were assigned.

⁶⁴ As regards the numerous applicants in a competitive examination, even for examiner positions, the expense of records of oral interviews would perhaps not be justified. But where an incumbent has his career at stake, the protection of a complete record seems little enough to accord. The cost would be insignificant. In this connection it is worthy of note that, while removing legal positions, including most examiner positions, from the competitive service, Executive Order No. 9830 preserves the ordinary civil service tenure protections to incumbents who possess competitive status. Exec. Order No. 9830, § 6.1(f), 12 FED. REG. 1263, 3 CODE FED. REGS. 113 (Supp. 1947).

⁶⁵ "The ratio of high quality privately occupied applicants definitely increases in those areas where an active representative of the group of consultants is

Undoubtedly special pains must be taken to enlist interest in an examination in a profession not accustomed to seeking rank-and-file government office or to competitive tests as a channel to employment, and this function of recruitment can best be performed by professional personnel. Some division of labor would be desirable, however. To permit the same individuals to serve as recruitment agents and as initial or final examiners of competitors, often without collaboration by others at the initial examining stage, may lead to favoritism, either subconscious or to avoid embarrassment; and it certainly opens the door to charges of abuse such as later arose.

The storm broke when the results of the examinations were disclosed. In a press release of March 9, 1949, the Commission announced that "70 per cent of the hearing examiners with competitive status . . . have been found qualified to continue in their positions," and that of the 69 non-status incumbents 52 "passed" the examination, 12 failed, and 5 were still under investigation. The printed report of the Board of Examiners revealed that 42 of the 148 status incumbents were disqualified — 14 for lack of the requisite experience and 28 on other grounds. Of the 12 non-status incumbents who failed, 8 lacked experience and 4 were disqualified on other grounds.⁶⁶ Of the 625 other applicants who passed the preliminary screening and were competitively examined and rated, 212 were found qualified, 165 with grades of "B" or higher.⁶⁷ Of the status incumbents disqualified, 64.3 per cent were in three agencies which employed 52 per cent of the status incumbents examined. Two of these agencies employed 75 per cent of the non-status examiners who failed, but only 53.6 per cent of such incumbents examined.

The two agencies to suffer most spectacularly were the Interstate Commerce Commission and the National Labor Relations Board. The former had one fourth of its hearing examiner staff disqualified; the latter had 14 examiners disqualified from among 41.⁶⁸ Moreover, among those passing the examination were a number of incumbents who qualified only for positions of lower

available to publicize the opportunities or to consult with those interested — a situation which suggests that consultants may have recruiting ability of appreciable value." CONSULTANTS' REPORT 11.

⁶⁶ *Id.* at 18.

⁶⁷ *Id.* at 20.

⁶⁸ *Id.* at 22. The agencies are not identified in the published report.

grade than they occupied — in some instances lower grades than existed in the employing agency — together with some non-status incumbents who received lower ratings than many outside applicants and would be displaced by some of the latter standing higher on the register. It is reported that, in all, 27 of the 41 NLRB examiners who were examined were in effect disqualified. In addition, the Board of Examiners declined to consider the NLRB's chief trial examiners as incumbents of examiner positions and, in rating them in the competitive examination, disqualified one and assigned doubtful grades to the other two.

The Commission immediately issued to the employing agencies a "displacement notice,"⁶⁹ requiring that incumbents who failed to qualify for retention must be dismissed not later than June 25, 1949. And individual notices of the examination results were sent to the persons involved. Ten working days were allowed for appeals to be filed, if it was desired to have them heard before the effective date of the notice.⁷⁰

The affected administrative agencies and examiners reacted quickly to the situation. Through collaboration and inquiry among examiners and some outside applicants, the results of the examinations were rather fully compiled and the consequences estimated. Experiences in the oral interviews were compared. The backgrounds of examiners, associates, and applicants who succeeded well in the examination were explored for indications of favoritism. As a result, not only individual appeals from ratings in the examinations were filed, but also protests from a number of the affected agencies, including the ICC and the NLRB. The NLRB later argued, among other things, that the Board of Examiners' standards as to what constituted specialized experience were too narrow, particularly with reference to review

⁶⁹ General Displacement Notice No. 27, March 11, 1949.

⁷⁰ Under the Commission's general regulations, appeals from ratings in examinations are determined originally by the section of the Examining and Placement Division or the committee of expert examiners that took the original action. 5 CODE FED. REGS. §§ 01.9(b)(2)(iii), 01.9(c)(3) (Supp. 1947). Further consideration by the Commission's over-all Board of Appeals and Review, a nonstatutory body, may be had. The decisions of this board are intended to be final in most matters, including appeals arising from examinations, *id.* § 01.8; but the Commission necessarily retains discretionary power to deal further with matters decided by the board, at least upon the petition of dissatisfied parties. The Board of Examiners asked that it be permitted to reconsider the grounds of its decisions in the event of appeal, in addition to the consideration which the Commission would give. CONSULTANTS' REPORT 21-24.

attorneys and legal assistants to agency heads. Both agencies asserted that the disqualification of so many of their examiners deemed highly competent would have serious adverse effects upon administration.⁷¹

In order to prosecute their appeals effectively, many of the incumbent examiners secured counsel, some of whom represented groups of examiners within one or more agencies and agreed to serve with minimal if any compensation. Their advocacy immediately became vigorous, including attacks upon the work of the Board and the procedures of the Commission as well as arguments addressed to the qualifications of individual clients. The Association of Interstate Commerce Commission Practitioners petitioned Congress for an investigation and additional steps "to prevent the individual injustice and public disservice" that were threatened.⁷² Washington newspaper columnists gave much attention to the situation. Rarely has a personnel operation aroused such public controversy.

As a result of the impact of these efforts, the Board of Examiners and the Commission began a retreat which, by the year's end, produced a complete abandonment of the previous outcome of the examinations. The Board, reconsidering the cases on appeal, found eligible 26 status and at least 7 non-status incumbents who had originally been completely disqualified. These changed results were produced in part by lapse of time, which added to the quantum of experience of those who had previously been found to lack the requisite amount. Another factor is said

⁷¹ So far as limited time on brief visits to Washington during the fall of 1949 permitted, the writer has gathered unpublished information concerning the results of the examinations and subsequent occurrences through personal interviews and through search of files to which he was given access. He wishes to make particular acknowledgment in this connection of the courtesy of Mr. W. A. McCoy, chief of the Civil Service Commission's Examining and Placement Division, of Mr. Carl McFarland, chairman of the Board of Examiners for hearing examiner positions, and of Mr. Charles Horsky and Mr. R. Granville Curry of the District of Columbia Bar, counsel for groups of appellant examiners. It is not feasible to cite specific sources for most of the statements made. If inaccuracy resides in any of them, the reason lies in the writer's understanding and not in the information supplied. Throughout this article the judgments expressed are, of course, entirely the writer's own.

⁷² The petition was submitted to the membership of the Association and adopted with near unanimity by the 2211 members who voted, constituting nearly 70 per cent of the membership. It was then sent to all of the members of both houses. 16 ICC PRACT. J. 706-16 (1949). See *id.* at 717 for the brief filed by Mr. Curry before the Civil Service Commission on behalf of the disqualified ICC examiners.

to have been the Commission's determination that the original "eminently qualified" standard for status incumbents should be replaced by a standard of "qualified and competent."⁷³ In addition, the Board was constrained by Commission action to treat as incumbents those chief and associate chief trial examiners whose duties included the hearing of any cases, and it consequently approved several in this category. Still pending, however, were the appeals of 16 status and some 10 non-status incumbents who had been totally disqualified, of non-status incumbents who were dissatisfied with the ratings given them or the grades of positions for which they were found eligible, and of nonincumbent participants in the competitive examination.⁷⁴

Early in its consideration of the appeals the Commission was confronted by a motion, filed by a majority of the incumbent appellants, that all of the determinations of the Board of Examiners be vacated and the Board be disestablished; or, if this action were refused, that trial-type procedures be followed in handling the appeals, including disclosure to the appellants of the information upon which their previous ratings were based, the rights of subpoena and cross-examination, and preparation and availability to all parties of complete transcripts of proceedings. In oral argument and supporting memoranda, counsel challenged the Commission's authority to remove "conditionally reappointed" examiners without following the removal provisions of the APA;⁷⁵ charged bias, prejudice, and excess of authority on the part of members of the Board; and attacked the Commission's power to create a board composed largely of members from outside the Government.⁷⁶

The Commission did not rule explicitly on the motion to disqualify the Board of Examiners.⁷⁷ In a letter to counsel, dated May 20, 1949, however, it declined to set aside the previous examinations; and it permitted the Board to proceed with the reconsideration of incumbents. It also refused to provide trial-type

⁷³ It is difficult to see, however, what difference this could make, since the Board has reported that originally it had "not found it possible to apply literally" the more stringent standard and that a grade of "C" was sufficient to qualify a status incumbent. CONSULTANTS' REPORT 17.

⁷⁴ The appeals of the last group were considered in the first instance by the Commission's regular staff rather than by the Board of Examiners.

⁷⁵ See the discussion of this problem at note 18 *supra*.

⁷⁶ See pp. 759-62 *infra*.

⁷⁷ This failure left the Board in an equivocal position and withheld from the appellants any answer or assurance with respect to their objections.

procedures, suggesting that "you continue to utilize the appeals procedures of the Commission." These required the appellants to go forward on the basis of extremely vague statements as to the reasons for the actions previously taken, contained in the individual notifications and in amplifications later furnished.⁷⁸ The period of notice of hearings by the Board of Appeals and Review was sometimes extremely short. No stenographic notes of hearings were permitted to be taken. In the Board of Examiners, the reconsideration was without additional oral hearings or interviews; but additional information respecting appellants was received.

Notwithstanding these handicaps, the appellants and their counsel proceeded resourcefully on the basis of clues and inferences. Motions, requests, objections, and appeals were filed with rapidity and telling effect. Meanwhile, the subject was discussed in the Senate, where critics of what had been done seized the ascendancy.⁷⁹ The Commission's defenses disintegrated. By a series of developments, the Board of Examiners disestablished itself; its remaining disqualifications of incumbents were reversed almost in their entirety; and the registers of eligibles which had been placed in effect for the several grades of examiner positions⁸⁰ were set aside. The incumbent appellants, in short, after extended proceedings, got virtually all that they had sought by means of their initial motion before the Commission.

In resigning by letter dated July 25, 1949, the members of the Board, with the exception of the member from the Commission staff, complained that in some instances of appeal the Commission had disregarded and even acted without awaiting the Board's action upon reconsideration; that the standing of incumbents who had not appealed, relative to the competitive ranking, would suffer from the increases given to some who had appealed; and

⁷⁸ The original notifications of disqualification uniformly stated either that the incumbent possessed "insufficient specialized experience" or that his rating resulted from "over-all characteristics," or both. The amplifications stated that the appellant was found to lack one or more of the following: "ability," "personality," "discretion," "dignity," "poise," "judicial temperament," "ability to be objective or to render an unbiased decision"—sometimes with the addition that the adverse judgment was based upon a "review of records of actual cases" heard by him.

⁷⁹ See p. 761 *infra*.

⁸⁰ General Displacement Notice No. 27, March 11, 1949, announced that from its date registers of eligibles, resulting from the examination, had been established for examiner positions.

that the Commission had failed to deal publicly with the attacks that had been openly made upon the Board. The members asserted that under these circumstances no useful purpose would be served by their continuing to function, and that the administration given to the examiner system by the Commission bade fair to "disrupt ruinously" the examiner corps.

In addition to reversing the disqualifications of incumbent appellants, the Commission took certain general steps to set aside or modify its previous actions. On May 23, 1949, it suspended the General Displacement Notice, thus giving unlimited time for the consideration of appeals and putting off indefinitely the threatened dismissals.⁸¹ On July 20, it announced that applications for the competitive examination had been closed on July 5 and that the registers resulting from the examination were currently in effect and should be used, but the actual displacement of incumbents remained suspended pending further notification.⁸² On November 9, the Commission announced that, in view of past and prospective appeals from applicants in the competitive examination, it would seek additional information concerning all applicants meeting the experience requirements and re-rate them all, including the non-status incumbents, through its examiners.⁸³

On December 13, the Commission disestablished the registers previously in effect, saving the validity of any appointments previously made.⁸⁴ The Commission also abandoned the original provision for competition in the promotion of examiners,⁸⁵ and provided for promotions by the employing agencies, subject to approval by the Commission upon noncompetitive examination.

At the end of 1949, therefore, the administration of the merit system for hearing examiners had become virtually indistinguishable from that which the Commission's general regulations provide for the competitive service as a whole. Protection for the tenure of examiners with permanent appointments, as required

⁸¹ *Id.* Supp. No. 1.

⁸² *Id.* Supp. No. 2.

⁸³ All together, 1710 applicants, other than incumbents of examiner positions, filed in the examination.

⁸⁴ Departmental Circular No. 592, Supp. No. 3.

⁸⁵ 14 FED. REG. 7501 (1949). Promotion registers pursuant to this provision had not been established, and much dissatisfaction had been caused among examiners by the absence of any means whereby even an examiner approved for retention might receive a permanent promotion. Provision for conditional promotions, however, was made shortly after the regulations were originally announced. Departmental Circular No. 592, Supp. No. 2, at 4, Nov. 5, 1947.

by Section 11 of the APA, was provided, however, and transfers from nonexaminer to examiner positions remained subject to competitive examination. In the meanwhile almost all status incumbents of examiner positions had succeeded in gaining permanent appointments. Moreover, most non-status incumbents had avoided disqualification; but the permanence of their tenure awaited the outcome of a competitive examination which the Commission was commencing to regrade. Permanent appointments to vacancies, which had been possible for approximately nine months, had again been suspended, pending the outcome of this examination.⁸⁶

IV. RETROSPECT AND RECOMMENDATIONS

Some of the factors responsible for the breakdown have already been discussed: delay on the part of the Commission; the unfortunate composition of the Board of Examiners; lack of clarity in some of the Commission's instructions and standards; questionable views adopted by the Board in certain of the standards which it developed and lack of sufficient precision and safeguards in some of its examining methods; and indecision by the Commission in the face of the protests that confronted it. Other factors remain to be reviewed.

The Board was dogged throughout its existence by doubt and challenges as to the legality of its existence. The authority in the civil service laws and executive orders for the creation of boards of examiners⁸⁷ seems not to include boards composed of non-government members, in the absence of special necessity, and the APA provides only for advisory committees. Under Public Law 600, 1946,⁸⁸ however, "the head of any department, when authorized in an appropriation . . . Act,"⁸⁹ may "procure the temporary (not in excess of one year) or intermittent services of experts or consultants" without regard to the civil service laws. This legislation creates a permanent statutory foundation for a

⁸⁶ Temporary appointments under 5 CODE FED. REGS. § 2.114(a) (1949) were authorized by Departmental Circular No. 592, Supp. No. 3, Dec. 13, 1949, with the provision that any such appointee must have filed in the competitive examination, must possess the requisite experience, and must be approved by the Commission.

⁸⁷ See note 28 *supra*.

⁸⁸ Section 15, 60 STAT. 810, 5 U.S.C. § 55a (1946).

⁸⁹ The Commission's appropriation for the fiscal year 1948 carried an item pursuant to this provision, 61 STAT. 589 (1947), as did that for 1949, 62 STAT. 179 (1948).

practice long followed in the Government pursuant to specific or transitory authorizations, of contracting for special services.⁹⁰ The most persuasive argument that the arrangements between the Commission and the members and associates of the Board were not authorized by this statute⁹¹ is that the specific restrictions in the civil service laws upon the membership of boards of examiners remain in effect. Public Law 600 is more recent than the applicable civil service legislation, however, and if it confers additional statutory powers upon the Commission, the failure of a subsequent executive order⁹² to recognize them scarcely results in their withdrawal. It is significant that, although the Commission's appropriations for earlier years carried items for the "employment of expert examiners not in the Federal service on special subjects for which examiners within the service are not available,"⁹³ the corresponding items in years subsequent to 1946 have been couched in the terms of Public Law 600.⁹⁴

A related question concerns the possible effect of the statute⁹⁵ which forbids any "officer, clerk, or employee in any of the departments" to aid in the prosecution of "any claim against the United States," and two sections of the Criminal Code,⁹⁶ applicable to any "officer or employee of the United States or any department or agency thereof," which attach criminal penalties to the same conduct and to the receipt of compensation for services rendered "in relation to any proceeding . . . or other matter in which the United States is a party or directly or indirectly interested." The difficult interpretational problem is whether the terms "officer or employee" include part-time or uncompensated personnel.⁹⁷ The only direct authority appears to be opinions of

⁹⁰ Schedule A of the Civil Service Rules has for years carried a provision excepting positions of this nature from competitive requirements. 5 CODE FED. REGS. § 6.101(n) (1949). The preceding paragraph, (m), similarly excepts "positions without compensation provided such appointments meet the requirements of applicable laws relating to compensation."

⁹¹ Information has not been obtained as to whether there was annual renewal of the arrangements, so as to bring them within the statutory one-year limit.

⁹² Exec. Order No. 9830, *supra* note 28.

⁹³ *E.g.*, 55 STAT. 96 (1941); 58 STAT. 364 (1944); 60 STAT. 62 (1946).

⁹⁴ See note 89 *supra*; Pub. L. No. 266, 81st Cong., 1st Sess. 5 (Aug. 24, 1949).

⁹⁵ REV. STAT. § 190 (1875), 5 U.S.C. § 99 (1946).

⁹⁶ 18 U.S.C. §§ 281, 283 (Supp. 1949).

⁹⁷ Greater ambiguity, stemming from vestigial language, resided in the Criminal Code sections before their recent revision.

the Attorney General during World War II, holding the sections as then worded to be applicable to members of OPA War Price and Rationing Boards and to an uncompensated member of the Joint Army and Navy Committee on Recreation;⁹⁸ but the opinions themselves disclose grounds for doubt, especially since the Criminal Code sections have been changed. To clarify matters in particular situations, legislation has from time to time excepted the members of specific volunteer or part-time tribunals from these provisions.⁹⁹

It would have been desirable to provide similar assurance for the members of boards or committees concerned with the hearing examiner system. Instead, the current Congress, moved by the charges made against the Board of Examiners but acting after the Board had resigned, added a provision to the present appropriation for the Civil Service Commission, forbidding it to use funds for the "compensation or expenses of any member of a board of examiners," (1) who has "not made affidavit that he has not" within two years and will not while a board member appear in any proceeding in an agency employing an applicant who has been rated or will be rated by him; or (2) who, after making such an affidavit, has rated an applicant who was an employee of an agency in which the board member has appeared within two years.¹⁰⁰ Should such a provision become a permanent feature of the appropriation acts, it would seriously hamper future efforts to make satisfactory provision for merit systems affecting legal positions.¹⁰¹ The Government cannot have the assistance of lawyers engaged in private practice on such conditions; nor should such excessive safeguards be required. The

⁹⁸ 40 OPS. ATT'Y GEN. 289, 294 (1943).

⁹⁹ The more important recent exceptions are listed in a note to 18 U.S.C. § 283 (Supp. 1949). In addition, the current Independent Offices Appropriation Act excepts the members of the Loyalty Review Board and the regional loyalty boards. Pub. L. No. 266, 81st Cong., 1st Sess. 6 (Aug. 24, 1949). Three other recent acts contain similar provisions.

¹⁰⁰ *Ibid.* The provision was introduced in broader form by Senator Morse. He discussed his proposal at the time of its introduction, 95 Cong. Rec. 10,835 (Aug. 2, 1949), stating that he did not charge actual impropriety on the part of members of the Board of Examiners and that he had great admiration for some of the members. The substitute provision was inserted in the House without discussion. *Id.* at 11,738 (Aug. 15, 1949).

¹⁰¹ It is recommended at p. 765 *infra*, that an advisory committee for hearing examiner positions should again be established and conduct oral interviews of applicants.

ethics and sense of responsibility of members of the legal profession must be relied upon, both to preserve their objectivity and to cause them to disqualify themselves in situations where a real threat to impartiality or to the appearance of impartiality on their part arises. The presence of government counsel on an examining board, together with adequate administrative attention to what is going on, should prevent objectionable situations from arising.¹⁰²

The appeal procedure accorded the incumbent examiners contributed much to dissatisfaction with the conduct of the examiner system. In ordinary personnel matters, the Commission's procedures, consisting of only informal conferences,¹⁰³ are probably satisfactory. Trial-type hearings are hardly essential in hiring people, even competitively, or in taking certain later actions, such as promotions; nor should the Government be denied the opportunity to obtain confidential information about prospective employees and to keep faith with its informants.¹⁰⁴ The dismissal of career employees, however, may sometimes require the protections of a trial so far as possible; and Section 11 of the APA

¹⁰² The members of the Board of Examiners stated in their letter of resignation that they had "long recommended" to the Commission that government members be included on the Board. The letter also asserts that the Board did not undertake to disqualify incumbent examiners but merely recommended approval in individual cases or, if such a recommendation was not made, transmitted the matter to the Commission for further action. Such is the form in which the members' actions were couched upon the reconsideration of appealed cases. Consistently with this position, the members had previously designated themselves as "consultants" in entitling their printed report; and it is said that they were so designated in the letters of appointment sent to them by the Commission. This designation, however, is a formal one for record purposes, which accords with long-standing usage, and it is not inconsistent with any functions the "consultants" might lawfully be called upon to perform. The report, moreover, speaks at one point of future reconsideration by the consultants of an adverse "decision" on their part, CONSULTANTS' REPORT 24; and it affirms an understanding with the Commission that any "action" of the consultants involving matters of judgment in individual cases would be allowed to stand. *Id.* at 23-24. At least in the first instance, therefore, the consultants appear to have acted essentially as a board of examiners. It has seemed preferable in this article to use that term, in accordance with the Commission's prevailing usage. The term is without precise technical significance, however. Whatever name is used, the Board made certain judgments which the Commission had power ultimately to adopt or reject and for which it was responsible. Equally, the Commission naturally would accept the conclusions of experts whose aid it had invoked, except when unusual reasons to the contrary arose.

¹⁰³ FEDERAL PERSONNEL MANUAL A5-5.

¹⁰⁴ The Commission's published explanation for its reliance upon confidential information, *i.e.*, that it lacks the subpoena power, FEDERAL PERSONNEL MANUAL A5-2, hardly states the main reason.

affords the means of doing so in the case of hearing examiners. Even the Commission's ordinary procedures are described as usually involving stenographic reports of hearings before the Board of Appeals and Review; yet this was denied the appellant examiners by an action which can only be regarded as unfortunate. In the case of the status incumbents, moreover, little reason for resorting to confidential informants appears. Their work was largely a matter of record; and judgments upon it by witnesses, if any were needed, should have been expressed openly or not at all. As to these incumbents trial-type hearings before the Board of Appeals and Review should have been accorded. Time would probably have been gained, for definitive judgments could have been reached at once. As it was, decisions were rendered and then reconsidered in several instances.

A factor contributing to the Commission's retreat undoubtedly was the attention the matter received in Congress, especially in the Senate. In addition to the amendment previously referred to,¹⁰⁵ the Senate received a resolution introduced by Senator Johnston, chairman of the Committee on Post Office and Civil Service, authorizing that committee to make a complete investigation of the Commission's handling of the hearing examiner merit system. The resolution was referred to that Committee,¹⁰⁶ which last fall secured counsel; hearings were contemplated. Such hearings might cast considerable light on the provision that should be made for carrying out Section 11 of the APA. The principal drive behind the effort to secure an investigation, however, came from examiners who were threatened with dismissal. Now that they have been largely satisfied, the needs of the future may be lost sight of.

Senator Johnston's proposal produced an effect upon administration greater than that naturally incident to an expression of legislative interest. During the fall of 1949 persons acting for the subcommittee made direct requests of at least some of the agencies to refrain from using the Commission's registers for filling vacancies in examiner positions; and in some instances letters to this effect were written to agency heads. The wheel had turned full circle; in place of Senator Wiley's seeking to influence the Commission adversely to incumbent examiners, others were now exerting legislative influence upon administra-

¹⁰⁵ See p. 761 *supra*.

¹⁰⁶ SEN. RES. 143, 81st Cong., 1st Sess., 95 Cong. Rec. 10,571 (July 28, 1949).

tive agencies in behalf of the incumbents. Both efforts were inconsistent with sound administration.

Threatened disruption of the Government's examiner corps has been avoided through the acquisition of permanent tenure by virtually all of the status incumbents. It does not follow, however, that the result as to them is wholly good. Some of the incumbents probably lacked the qualifications envisioned in the APA and important to the conduct of formal administrative proceedings. Much attention has been given to the question whether proficiency in the subject matter with which an agency deals or broad legal competence should be the primary requisite for an examiner.¹⁰⁷ The Board of Examiners attached great importance to the latter, with emphasis upon the possession of "judicial" qualities;¹⁰⁸ and in this it was right. The strong tendency in government as in other large organizations to fill positions with personnel drawn from within creates the danger that narrow specialists who have not developed broader insights and skills may come to occupy positions for which they are inadequate. Their fault is less likely to lie in excessive zeal than in inability to comprehend the implications of their work and to become fully effective in advancing its purposes. One function of the Civil Service Commission under the APA should have been to eliminate from hearing examiner positions any incumbents who were too seriously deficient in this respect.¹⁰⁹ It would be strange if there were none; and loss of the opportunity to replace them with more competent personnel is regrettable. It does not follow that practicing lawyers or judges who may have gained high places on the hearing examiner registers should necessarily have been substituted for them. The process of selection from registers should, rather, be such as to secure persons who possess the requisite specialization in addition to the essential broader competence.

The solidification of incumbents in their positions must now be accepted, however. The questions that remain are (1) whether the Commission's present regulations afford a satisfactory

¹⁰⁷ The issue is drawn rather sharply in Mr. Curry's brief, *supra* note 72, at 721.

¹⁰⁸ CONSULTANTS' REPORT 9.

¹⁰⁹ A minimum standard should of course have been applied. Those who were eliminated by reason of it would not necessarily have been eliminated from their agencies, since they could, in all probability, have been transferred to other positions for which they were suited.

method of filling future vacancies and of strengthening the examiner corps by supervision of promotions and related means and (2) if not, what plan should be substituted.

The answer to the first question is emphatically, No. It is no discredit to the Commission that it does not possess and cannot possess on its regular examining staff lawyers of sufficient stature to pass judgment upon the experience and qualifications of applicants for a small number of positions near the top of the governmental legal hierarchy. Such lawyers can be obtained only by offering relatively high salaries and a sufficiently challenging body of work. Nor can personnel administrators of equally high grade be substituted, since their field of competence is totally different. Neither does the Hoover Commission's recent recommendation, that the departments and agencies should be given "primary responsibility for recruiting and examining Federal employees,"¹¹⁰ afford an adequate solution here. The APA casts inescapable responsibility upon the Civil Service Commission and embodies a valid belief that centralized supervision is necessary to assure an adequate quality of examiner personnel.¹¹¹

With regard to the second question above, it may not be possible to achieve a fully adequate substitute solution without additional legislation; but such legislation should await a renewed effort to solve the Government's over-all personnel prob-

¹¹⁰ COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, PERSONNEL MANAGEMENT 10, 17 (1949).

¹¹¹ The theory of the Act in this regard is valid mainly because of the dangers that result from excessive inbreeding, discussed above. The same danger, together with others, would attach to following the Hoover Commission's recommendation as to government legal positions in general. The Hoover Commission's report itself makes allowance for possible exceptional resort to centralized recruiting and examining for lower-grade positions. *Id.* at 17-18. If a centralized legal personnel system were set up in the Government, allowing scope to appointing officers in the agencies in accordance with other recommendations of the Hoover Commission (*e.g.*, liberalization of the "rule of three" in making appointments, *id.* at 11), the administration of the examiner system might be tied to it. Such a legal personnel system under a Board of Legal Examiners, with most examiner positions included, existed for several years pursuant to Exec. Orders No. 8743, *supra* note 36, and No. 9358, 3 CODE FED. REGS. 30 (Supp. 1943), which gave effect, in turn, to recommendations of the President's Committee on Civil Service Improvement, H.R. Doc. No. 118, 77th Cong., 1st Sess. (1941). The re-establishment of such a system without legislation is at present barred by a prohibition against the use of funds for such a system. Independent Offices Appropriation Act, Pub. L. No. 266, 81st Cong., 1st Sess. (Aug. 24, 1949).

lem in the light of the Hoover Commission's recommendations and other pertinent considerations. In the meantime, in order to discharge its responsibilities under the APA, the Civil Service Commission should establish the post of examiner for hearing examiner positions within its Examining and Placement Division at the highest salary feasible; should secure for the position an able young lawyer of broad training and as much experience as possible, without thought of permanence of tenure, and give scope to initiative on his part in carrying out the Act; should at the same time create a new part-time, uncompensated advisory committee of lawyers of high standard,¹¹² to be consulted in regard to all significant steps taken; and should further require that the committee or persons nominated by it conduct all oral interviews with candidates for appointment or promotion to hearing examiner positions. The examiner would supply the initiative and do the necessary "leg work," as well as make many primary decisions with the assistance and guidance of the Division's officers and staff. The advisory committee would supply the necessary professional weight and judgment.

The Commission should further, pursuant to authority which it now has,¹¹³ remove the hearing examiner positions from the competitive service and place them in Schedule B of the Civil Service Rules. This would subject them to noncompetitive examination by the Commission, after tentative selection by the appointing agencies. It is extremely difficult to grade a large number of applicants numerically with reference to many intangible qualifications and rank them fairly on a competitive basis for possible appointment to a small number of vacancies; nor is it necessary for the Commission to attempt to do so in order to discharge its responsibilities. With most of the incumbent examiners now secure in their positions, the number of prospective vacancies is small indeed. This fact alone largely eliminates the unfairness to applicants who took the competitive examination, which otherwise might reside in abandonment of the examination, since few of them can hope for appointment in any event. The Commission, moreover, can eliminate the un-

¹¹² The committee should be drawn largely from within the Government, including the federal judiciary; but if the amendment to the Independent Offices Act affecting private practitioners, p. 761 *supra*, can be overcome or caused to lapse with the Act next June 30, it would be desirable to appoint, say, two private practitioners of high standing.

¹¹³ 5 CODE. FED. REGS. § 6.1 (1949).

fairness altogether by rating all of these applicants in categories such as "outstanding," "well qualified," "qualified," and "unqualified," as recommended by the Hoover Commission,¹¹⁴ and by requiring each agency to regard as applicants those within the highest category available at the time a vacancy is to be filled. The Veterans Preference Act¹¹⁵ would require that those applicants possessing prescribed prerequisites for the position be rated competitively by the appointing agency and that selection be made from among the highest three; but the number to be examined would in each instance remain within practicable limits. The Commission would have the additional check of a noncompetitive examination of the applicant chosen by the agency, such as it now proposes to apply to promotions. The standard applied in these noncompetitive examinations should be high. The suggested solution would be consistent with the APA.¹¹⁶ The Act does not in terms require that initial examinations be given by the Civil Service Commission. To have the agencies give them would, indeed, produce the effect which the congressional committees envisioned, of causing "agencies to secure the highest type of examiners" through their own initiative.¹¹⁷

No system will work satisfactorily, however, if the Civil Service Commission continues to permit itself to be pushed first in one direction and then in another by outside pressures, whether these emanate from Congress or elsewhere. It is a reasonable inference from the facts recited above that exactly this has happened so far; and it is particularly depressing that an agency of government which traditionally embodies the highest rectitude should appear in such a role. As much as anything else, failure to understand the requirements for administering the APA successfully is probably responsible for the Commission's course. Without adequate knowledge to guide it in this area, the

¹¹⁴ COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, PERSONNEL MANAGEMENT 18 (1949). Such was the practice of the Board of Legal Examiners, *supra* note 111, in compiling its register for lower-grade legal positions, based upon a competitive examination. See Fuchs, *The Federal Civil Service for Lawyers*, 11 J.D.C. BAR ASS'N 51, 64 (1944), 5 PUB. PERS. REV. 168, 174 (1944). For an excellent discussion of the requirements of successful selection of hearing officers by civil service methods, see BENJAMIN, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* 268-92 (1942).

¹¹⁵ See note 30 *supra*.

¹¹⁶ Cf. particularly § 11. See p. 738 *supra*.

¹¹⁷ SEN. DOC. NO. 248, *supra* note 6, at 215, 280.

agency drifts and falls victim to the winds of the moment. It needs to select advisers wisely, seeking representation of legitimate viewpoints, and then to adhere steadily to the program which it works out with their aid.