Hearing Commissioners

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HEARING COMMISSIONERS

RALPH F. FUCHS

I

SUBSTANCE OF THE RECOMMENDATIONS

THE CONCLUSIONS of the Commission on Organization of the Executive Branch of the Government and those of its Task Force on Legal Services and Procedure with respect to hearing officers fall into two categories: those relating to the employment, tenure, status, compensation, and removal of hearing officers; and those relating to the extent of the authority of these officers, or hearing commissioners as they would be called if the recommendations were adopted. Recommendations in the former category are substantially the same in the two reports.

Recommendation No. 52 of the Commission report and Recommendation No. 66 of the Task Force report both propose, among other things, that hearing commissioners be appointed by an authority other than the agencies whose proceedings they will hear, and that their tenure, status, compensation, and removal be fixed by law. This recommendation of the Commission has the unanimous approval of the members, except Congressman Holifield who dissented from the report as a whole without, however, objecting specifically to Recommendation No. 52 in his separate statement. The other pertinent recommendations of the Commission do not carry the same endorsement.

Commission Recommendation No. 52 provides further that the hearing commissioners should be under the control and direction of the Administrative Court of the United States which the Commission elsewhere proposes. The Task Force also recommends that such a court be established. The explanatory texts of both reports, although not the recommendations, propose that a chief hearing commissioner, appointed by the President with the advice and consent of the Senate, be attached to the court to perform personnel functions with relation

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1 Commission on Organization of the Executive Branch of the Government, Report to the Congress on Legal Services and Procedure 93 (1955) (hereinafter cited as Comm'n Rep.; formal recommendations hereinafter referred to by number only).


3 Comm'n Rep. 97-112.

4 Comm'n Recommendation No. 51; Task Force Recommendation No. 63.
to hearing commissioners. Both reports also propose that there be a presidentially appointed advisory committee of five members, representing the judiciary, the agencies, and the bar. The Administrative Code which the Task Force proposes as a means of implementing its recommendations provides, however, that the advisory committee should be appointed by the council of the administrative court, consisting of the chief judge and the presiding judge of each section of the court. The functions of this committee would be more than advisory, since it would promulgate rules regarding the qualifications of hearing commissioners and pass on appointments of commissioners proposed by the chief hearing commissioner.

Both reports conclude that there is sufficient variety in the proceedings to be conducted by hearing commissioners to justify the establishment of two grades of commissioner positions. The Task Force proposes that there be senior hearing commissioners who should be paid salaries of $14,000 a year and have tenure during good behavior, in addition to ordinary commissioners who would have salaries of $12,000 and serve for eight-year terms. The Commission report is not specific on these points. Removal of commissioners from their positions during their terms, for cause, would under both reports be by a proceeding initiated in the administrative court by the chief hearing commissioner.

The Commission and Task Force reports both propose that incumbents of hearing-examiner positions under the Administrative Procedure Act who have held these positions at least one year immediately preceding the effective date of the commissioner plan "should be appointed hearing commissioners." The Task Force's proposed Administrative Code provides that for two years from its effective date no other candidates than previous incumbents shall be appointed to commissioner positions unless all available incumbents who have served for at least a year have received opportunity for appointment according to the procedure prescribed for new appointments. The reports further propose that incumbents who have served less than one year should be retained in temporary status for two years in order to afford them opportunity to qualify for regular appointments.

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10 Task Force Rep. 265.
12 Comm'n Rep. 92; Task Force Rep. 266.
14 Task Force Rep. 266; Comm'n Rep. 92-93.
Commission and Task Force Recommendations Nos. 52 and 66, respectively, agree that the hearing commissioners should be "completely independent" of the agencies whose proceedings they conduct. In part, this independence would be achieved by the assignment of commissioners to their posts by the chief hearing commissioner, which both reports recommend. The Commission report recommends that hearing commissioners "should be allowed to develop continuity of service in one agency with the resulting familiarity and competence that the special experience should create." The proposed code would leave assignment and transfers to the discretion of the chief hearing commissioner "as he may determine to be necessary for the most efficient conduct of . . . hearings," and would prohibit agencies from utilizing hearing commissioners for any other purpose than those specified in the code. Assignment of commissioners to cases is not expressly covered in the reports or code; but the chief hearing commissioner would be required to maintain a master calendar of agency hearings, for which the agencies would be obliged to furnish needed information, and he could so manage his assignment of commissioners as to check practices of which he disapproved.

Hearing-commissioner independence would be further secured and authority connected with hearings be conferred upon the commissioners by additional recommendations of the Task Force and provisions of the code. These do not have the sponsorship of the Commission; but similar, although far from identical, recommendations have been made by three of the twelve members. The dissent of Congressman Holifield covers these recommendations and Commissioner Brown has reserved the right to disagree with any of them if they are presented in Congress, of which he is a member. Commissioner Farley voted to transmit this group of recommendations, along with additional procedural recommendations to which they are closely bound, subject to reservations which he did not specify. Six Commissioners, including the Chairman, "did not vote for" this group of recommendations, but agreed that the Commission should present them to Congress. They have the actual sponsorship, therefore, of Commissioners Ferguson, McClellan, and Storey.

The Task Force recommendations and the corresponding ones

16 Comm'n Rep. 92.
17 Code § 504, Task Force Rep. 383. The Task Force's explanation of this provision states that "it is anticipated that hearing commissioners will be assigned to agencies on a semi-permanent basis, and that they will not be reassigned except for unusual circumstances." Task Force Rep. 423.
19 See Comm'n Rep. 95-112 for the respective statements of the Commissioners.
transmitted by the Commission in the foregoing fashion recommend that "separation of functions" in agency proceedings, as presently provided in the Administrative Procedure Act for cases of adjudication with certain exceptions,20 be rendered more rigorous. Separation of functions as so intensified would apply in rule-making and all instances of adjudication in which agency action is based on the record of a hearing.21 The requirement that action be based on the record of a hearing would be extended to all proceedings in which opportunity for any type of hearing is secured by constitutional or statutory provisions, instead of merely those in which a statute or the Constitution requires opportunity for a record-type hearing, as the Administrative Procedure Act now provides.22 In short, all hearings obtained as of right would become record-type hearings, attended by an intensified separation of functions. The Task Force, but not the recommendations transmitted by the Commission, would also require that in all record-type proceedings the presiding officer, who almost always would be a hearing commissioner,23 must render an "initial decision" which would become the agency's decision unless set aside upon agency review,24 and that upon review of an initial decision the power of the agency be limited to that of a reviewing court, "except for questions of policy committed to the determination of the agency by Congress."25 Hence, hearing-commissioner determinations of fact would become final unless "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record," as specified in the judicial-review provision of the proposed code.26

Both the Task Force and the recommendations transmitted by the Commission recommend enlargement of the powers available to hearing commissioners at hearings as compared to those conferred on hearing examiners by the Administrative Procedure Act.27 The

21 Comm'n Recommendations Nos. 33(c), 37; Task Force Recommendations Nos. 35, 41; Code § 204(c), Task Force Rep. 368. Such proceedings will be referred to hereinafter as "formal."
23 Code § 205(a), Task Force Rep. 369, retains the provisions of the Administrative Procedure Act § 7(a), 60 Stat. 241 (1946), 5 U.S.C. § 1006(a) (1952), with respect to the officers who may preside at record-type hearings, except that authority for the conduct of hearings by single officials, other than hearing commissioners or agency members, pursuant to other legislation (e.g., immigration-service special-inquiry officers) would be withdrawn. See also Comm'n Recommendation No. 41; Task Force Recommendation No. 45.
26 Code § 207(f), Task Force Rep. 374. See also Task Force Recommendations Nos. 48, 49.
proposed extensions of authority confer: (1) the power to issue subpoenas in all cases; (2) discovery powers; (3) power to require conferences of parties; (4) power to rule on all motions, including motions to dismiss; (5) disciplinary powers at hearings; and (6) authority to take other actions in accord, to the extent practicable, with trial procedure in the United States district courts.\textsuperscript{28} Interlocutory appeals from hearing-commissioner actions and rulings would be restricted by the Task Force\textsuperscript{29} and under the proposed code to such as commissioners might find "necessary . . . to prevent substantial prejudice to any party or to expedite the conduct of the proceeding."\textsuperscript{30} To such possible appeals the Commission recommendation would add appeals that might be based on a showing to the agency that substantial prejudice would otherwise result.\textsuperscript{31}

II

RELATION TO OTHER RECOMMENDATIONS

The foregoing recommendations cannot be considered entirely apart from others to which they are closely related. Personnel functions relating to hearing commissioners could be attached to an administrative court, for example, only if such a court were established pursuant to other recommendations. The essential aspect of the proposal for linking the chief hearing commissioner and the advisory committee to the court is, however, that their functions should be carried on independently of the administrative agencies whose hearings are to be conducted, by an authority so composed and so located as to emphasize the judicial aspect of the functions of hearing commissioners.\textsuperscript{32} If an administrative court does not become available to harbor the chief hearing commissioner and the advisory committee, the same emphasis can be obtained otherwise—e.g., by attaching them to the Administrative Office of the United States Courts, with proceedings for the removal of commissioners perhaps lodged in the advisory committee. This judicial emphasis in the recommendations as to hearing-commissioner personnel administration as elaborated in specific provisions, rather than the link to the proposed court, will be discussed in this article.

The recommendations of the Task Force and those transmitted by the Commission, relating to the authority of hearing officers and the manner in which they should function, are similarly linked to a

\textsuperscript{28} Comm'n Recommendation No. 41(b); Task Force Recommendation No. 46; Code § 205(b), Task Force Rep. 370.
\textsuperscript{29} Task Force Rep. 199.
\textsuperscript{31} Comm'n Recommendation No. 41(c).
"policy consideration" stated by the Task Force that "the more closely . . . administrative procedures can be made to conform to judicial procedures, the greater the probability that justice will be attained in the administrative process."33 They are also linked to procedural recommendations, not directly affecting hearing commissioners, which are designed to carry out this view. The recommendations relating specifically to the work of hearing commissioners will be considered here as an integrated group of proposals implementing the conception of the Task Force and of the concurring Commissioners as to administrative proceedings and the proper role of hearing officers in them.

III

AGENCY IN CHARGE OF HEARING-COMMISSIONER PERSONNEL

ADMINISTRATION

The creation of an office of chief hearing commissioner and an "advisory" committee has much to commend it, apart from the more doubtful questions of where the office should be located in the governmental structure and of what its precise functions should be. Previous studies and reports by members of the legal profession or in which lawyers have played a leading role have agreed that personnel functions as to hearing officers should be performed by an agency in which lawyers play a larger part than they do in the Civil Service Commission's administration of section 11 of the Administrative Procedure Act.34 The Attorney General's Committee on Administrative Procedure in 1941 suggested an agency not unlike the one now proposed to ascertain the qualifications of examiners and play a determining role in their selection.35 The President's Conference on Administrative Procedure, in which there was strong sentiment for a similar proposal, has recently recommended that the Civil Service Commission place its hearing-examiner program in charge of a committee of five, at least two of whom should be lawyers.36 The creation of an independent chief judge or chief hearing examiner to administer the work of a corps of administrative "judges" or examiners has been

36 Report 9, 58-59 (1955). H.R. 4558, 84th Cong., 1st Sess. (1955), would establish a three-member board of lawyers within the Civil Service Commission to administer the hearing-examiner system. For fuller discussions of the problem see two reports to the President's Conference entitled "Appointment and Status of Federal Hearing Officers" (Sept. 3 and Sept. 8, 1954). See also Musolf, Federal Examiners and the Conflict of Law and Administration (1952); Fuchs, The Hearing Officer Problem—Symptom and Symbol, 40 Cornell L.Q. 281 (1955); Fuchs, The Hearing Officer Fiasco Under the Administrative Procedure Act, 63 Harv. L. Rev. 737 (1950); Thomas, Selection of Federal Hearing Examiners, 49 Yale L.J. 431 (1950).
proposed of late in several bills. The Commission and Task Force reports follow these suggestions, but combine them with the proposal for an administrative court.

There has been substantial agreement that, regardless of where the administration of a hearing-officer corps is located, the day-to-day functions should be performed by a single administrator, with whom a professional committee should be associated. The Commission and Task Force recommendations are on sound ground in entrusting operating functions to a chief hearing commissioner and giving basic policy-making functions to the "advisory" committee. The continuous attention of a full-time official and the judgment of a professional group are both required by the nature of the work to be done. The administrator should not be dependent on the committee for action in current matters; but the judgment of the committee should govern as to basic policy, both because it would reflect valuable experience and viewpoints, and because advisory functions would hardly be sufficient to induce the members of such a committee to devote adequate time to their occasional duties in competition with other demands upon them.

The advisory committee proposed in the recommendations would have five members. Its chairman would be a judge of the administrative court, two members would represent federal administrative agencies, and two would be members of the bar experienced in representing parties before administrative agencies—a balanced distribution, representative of the interests affected. It is suggested below that an official of the Civil Service Commission should be included on the committee and the committee membership correspondingly enlarged, even if the committee is attached to the court. With this addition the composition of the committee seems sound within the court framework. The objection sometimes stated, that bar members who practice before agencies might be improperly motivated, is believed to be insubstantial. They would function not in relation to particular proceedings but in an over-all professional capacity and in a framework that would support objectivity. The composition

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40 Fuchs, The Hearing Officer Problem—Symptom and Symbol, 40 Cornell L.Q. 281, 316-21 (1955). Committee members probably should be disqualified from participating in the reappointment of hearing commissioners who have presided at hearings in which the members have served as counsel for either the agency or a private party. The members of the committee of consultants which the Civil Service Commission used at one stage of its administration of § 11 of the Administrative Procedure Act disqualified themselves when they felt they might be prejudiced or partial. See the commit-
of the committee would still be sound, with a different chairman sub-stituted for an administrative-court judge, if no such court were established, provided hearing commissioners were to function largely in the judicial manner proposed in the reports.

Whether hearing commissioners should function in the proposed highly judicial manner, or whether administrative agencies should retain substantially their present powers in proceedings before them is the key question raised by the Commission and Task Force reports. Its merits are discussed later. If agency powers are not to be cur-tailed to such a degree, the committee which participates in adminis-tering the hearing-commissioner or hearing-examiner system should be so composed as to give predominance to members who understand the agencies' operating problems; for otherwise conflict of authority and failure to meet legitimate agency requirements might result. A com-mittee composed of a Department of Justice or Executive Office official as chairman, two members from administrative agencies, two prac-ticing lawyers, a judge of the United States Court of Appeals for the District of Columbia, and a member from the Civil Service Com-mission, would be preferable if the link to an administrative court is not forged, and if enhancement of hearing-officer independence in agency proceedings is not carried to the length proposed in the reports.

The desirability of having a member from the Civil Service Commission on the advisory committee results partly from considerations relating to retirement, annual and sick leave, and possibly other aspects of personnel administration with which the Commission has had experience. Some, at least, of these incidents to government em-ployment would be applicable to hearing commissioners, and would require determinations to be made by the officials in charge of hearing-commissioner personnel. Time would be saved and mistakes avoided if experience under the statutes administered by the Civil Service Com-mission were drawn upon by including a member from that agency. Additional reasons for including such a member are discussed below.

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1. Infra pp. 1355-72, 1373-74.
4. 41 Infra L. Rev. 737, 747-49 (1950); Thomas, supra note 36, at 459-60.
5. Fuchs, The Hearing Officer Fiasco under the Administrative Pro-cedure Act, 63 Harv. L. Rev. 737, 747-49 (1950); Thomas, supra note 36, at 459-60.
6. Fuchs, The Hearing Officer Fiasco under the Administrative Pro-cedure Act, 63 Harv. L. Rev. 737, 747-49 (1950); Thomas, supra note 36, at 459-60.
IV
CHARACTER OF HEARING-COMMISSIONER PERSONNEL ADMINISTRATION

It is doubtful, to say the least, whether an informal personnel system, operating according to the discretion of a few officers, such as the Commission and Task Force reports propose, would function as well, in relation to hearing commissioners, as a scheme that made greater use of established merit-system methods of selection and appointment. There will inevitably be political, agency, and group pressures upon such an administration, to be resisted or constructively channeled. Opportunity to be considered for appointment should be accorded throughout the country, and appropriate techniques of grading applicants developed. Despite the attempt to render the hearing-commissioner positions judicial, they would be within a supervised corps, and at least those commissioners serving for eight-year terms would be considerably less independent than federal judges. For these and other reasons the positions would not be likely on the whole to attract persons of the experience and attainments common among appointees to the federal bench, and an effort to recruit qualified applicants might need to be made.

The foregoing aspects of personnel administration for hearing commissioners pose problems of a civil-service, as well as of a professional-legal, nature. It is true that relatively few positions are involved, and that the problems are of a specialized nature; but these are scarcely adequate reasons for casting loose altogether from previous experience. Yet the reports leave these matters at large, to be handled in the discretion of the chief hearing commissioner and the advisory committee. Their resourcefulness, objectivity, and fortitude, coupled with whatever use they might choose to make of previous experience so far as it was available to them, would constitute the sole assurance that sound methods would be followed. Not more than three members of the advisory committee would be members of the same political party; but the real safeguard against abuse would lie in a sense of professional responsibility. The scheme could be easily

44 Such reasons, applicable to hearing examiners under the Administrative Procedure Act, include the specialized nature of most hearing-officer work, its relative remoteness from public attention, and the subordinate role of hearing officers in relation to the agencies they serve. Fuchs, The Hearing Officer Problem—Symptom and Symbol, 40 Cornell L.Q. 281, 306-07 (1955). The proposals of the Hoover Commission and Task Force would mitigate the first two of these elements and largely eliminate the third, as respects hearing commissioners. It is believed that the differences between these officers and judges would remain substantial, however.

45 Approximately 300 at the present time, involving only a small number of new appointments for replacement each year. The use of eight-year terms would increase this number.

perverted and should be strengthened by, at a minimum, statutory provision for suitable merit-system methods as well as for a member of the advisory committee from the Civil Service Commission. If these provisions were added, the recommendations would be on sound ground in providing for administration outside of the Civil Service Commission; without them more might be lost than gained by the adoption of the proposals now made. The risk that the merit system might be scuttled, without these safeguards, in favor of either partisan or ideological politics is too great to run.

V

Hearing-Commissioner Status

By entrusting hearing-commissioner personnel functions entirely to the proposed chief hearing commissioner and advisory committee, the Commission and Task Force reports would eliminate the possibility that these functions might be a means of agency dominance over hearing officers. Agency determination of whether to fill a vacancy in a hearing-officer position by new appointment, promotion, or transfer from another agency; opportunity for an agency to favor a nonhearing-officer employee for appointment from among candidates who have qualified; the promotion problem which was litigated in the Ramspeck case, and possible agency manipulation of reductions-in-force: all these would disappear. Instead, hearing commissioners appointed as specified in the proposed code would be assigned by the chief hearing commissioner to the agencies, and would be reassigned by him or have their service terminated as prescribed. Agency wishes would not necessarily be eliminated from consideration in the assignment of hearing commissioners, since there would be nothing to prevent the chief hearing commissioner from taking these wishes into account.

If the Commission's and Task Force's theory of making the hearing commissioners more fully judicial is not accepted, the proposal to have hearing officers appointed and assigned by an authority other than the agencies becomes more questionable than it is in the context of the reports. Although there is much to be said for this aspect of the plan even under the present allocation of authority to hearing officers and agencies, a safeguarded scheme of agency selection from limited registers of eligibles would on the whole be preferable if the agencies retained ultimate responsibility for their hearings and for the resulting

47 The reasons for a merit-system administration outside of the Commission are stated in Fuchs, The Hearing Officer Problem—Symptom and Symbol, 40 Cornell L.Q. 281, 316-17 (1955).
49 For a discussion of these problems see Fuchs, The Hearing Officer Problem—Symptom and Symbol, 40 Cornell L.Q. 281, 299-303, 304-12 (1955).
fact determinations. The hearing commissioners, or examiners as they would still be called, would then remain officers of the several agencies, subject to a method of selection, protection from possible agency pressures, and promotion of *esprit de corps* among them, that might contribute much to the quality of agency proceedings.50

The proposals of the reports with regard to the salaries and tenure of hearing commissioners are good. The salaries suggested would place the compensation of hearing commissioners somewhat below that of agency heads and district court judges and on a par with that of major bureau chiefs. Subsequent legislative adjustments presumably would preserve these relationships. The eight-year term for ordinary commissioners would confer sufficient tenure to be attractive, would ordinarily leave time in the life span of a commissioner who was not reappointed to move into other fields, and would withhold permanent tenure from commissioners until their work had been thoroughly tested. A commissioner who accepted a senior appointment at the expiration of an eight-year term would have decided on the basis of adequate experience that he wished to devote the remainder of his professional life to a type of work which he presumably would regard as challenging and rewarding even though the economic status that accompanied it would be static. There is some question whether hearing officers of the contemplated stature really are needed for some administrative hearings; but it probably is desirable to be generous in this regard so as to avoid the difficulty connected with promotions among more numerous ranks, which has proved to be a baffling one.

VI

ASSIGNMENT OF COMMISSIONERS TO PROCEEDINGS

In addition to entrusting assignment of hearing commissioners among agencies to the chief hearing commissioner, the Commission and Task Force reports and the proposed code provide that the latter official should maintain a master calendar of agency hearings, open for public inspection.51 It may be doubted that much use would be made of it by parties or counsel, who would continue to receive notice of hearings from the agencies; but information furnished by the agencies for use in maintaining the calendar would be administratively useful to the chief hearing commissioner, and might aid him in detecting possible improper agency influence through the assignment of hearing officers to cases. Evidence of actual abuse by agencies in this regard is lacking;52 but it would be a boon to have this ghost laid.

50 Id. at 314–16.
52 Fuchs, The Hearing Officer Problem—Symptom and Symbol, 40 Cornell L.Q. 281, 303 (1955).
VII
RETENTION OF INCUMBENT HEARING EXAMINERS

The provisions of the proposed Administrative Code, with regard to appointment of incumbents of hearing-examiner positions to hearing-commissioner posts if the code should be enacted, are in need of clarification. The proposed code would not secure unqualified "grandfather" rights to incumbents since it provides merely that "initial appointments of hearing commissioners shall be made exclusively," until two years from the effective date of the code, "from persons who have served as examiners ... for a period of at least one year immediately preceding" that date, unless within that time "all such examiners have been given the opportunity of appointment as hearing commissioners."53 Temporary appointment of examiners as commissioners until the commissionerships have been filled would be authorized.54

"Opportunity of appointment" may mean opportunity to accept an offer of appointment, or it may mean merely opportunity to be considered. The words of the Commission and Task Force reports, that examiners who have held their positions for at least one year "should be appointed hearing commissioners," are likewise inconclusive.55 The Task Force report, after noting that "undoubtedly, there are some" present examiners "who are not fully qualified to be appointed hearing commissioners or senior hearing commissioners,"56 goes on to state that present incumbents have been retained by their agencies without challenge for fitness, and that "it would not be in the best interest of the executive branch to produce a large turnover in hearing-examiner personnel. Those who prove incompetent could be removed by complaint to the Chief Hearing Commissioner, and a proceeding for removal predicated thereon."57 Reliance on the removal power to eliminate unqualified commissioners seems to indicate unconditional grandfather rights in the first instance; but mention of a "large" turnover as undesirable may indicate that a lesser turnover might be acceptable. Limitation of "opportunity of appointment" to a two-year period, moreover, would create the possibility that some examiners might be left out by expiration of the time allowed. Drastic reduction in the number of positions available would result from the...

53 Code § 503(a), Task Force Rep. 382. The Task Force's explanation (p.422) of this provision states that it secures "opportunity of appointment" to "all present examiners"; but the intention to exclude those who would not have served at least one year on the effective date of the code seems clear from the code provision and other pertinent portions of the reports.
54 Code § 503(b), Task Force Rep. 382.
55 Task Force Rep. 266; Comm'n Rep. 92.
56 Task Force Rep. 266.
57 Ibid.
transfer of National Labor Relations Board adjudicatory functions to the proposed administrative court, as recommended by all but two of the members of the Task Force.\(^5\) A lesser reduction would follow from the establishment of a trade section of the court, as the Task Force recommends unanimously.\(^6\)

Logically and from the standpoint of the public interest in well-conducted proceedings, there should be no claim by incumbent hearing officers to an unqualified right of appointment to new positions carrying duties and compensation which place them in a higher range than previous positions involving similar functions;\(^6\) nor could legislation which adopted a genuinely altered scheme calling for different qualifications of personnel rightly be regarded as "ripper" legislation designed to oust incumbents. Psychologically, nevertheless, a claim on the part of incumbents to perform work functionally similar to what they did before would be strong, and it is doubtful whether even the best possible administration of a change-over that involved a screening of incumbents could avoid repercussions that would be extremely harmful.\(^6\) Under the circumstances, the Task Force's suggested reliance on the removal power as a means of eliminating wholly unsatisfactory commissioners after they had received an opportunity to qualify on the job probably constitutes the best available means of early strengthening of the hearing-commissioner corps as compared to the present staffs of examiners. Hence, the proposed code should provide clearly for unqualified grandfather rights for incumbents who have served at least a year.

VIII

AUTHORITY OF HEARING COMMISSIONERS IN CONDUCTING HEARINGS

The enlarged authority of hearing commissioners in the conduct of hearings, as proposed in the reports, compared to the authority conferred by the Administrative Procedure Act, seems desirable in

\(^{58}\) Id. at 439-40.

\(^{59}\) Ibid.; Task Force Recommendation No. 63.

\(^{60}\) The name "hearing commissioner," which would replace "examiner" under the proposed code, is deemed by the Commission (Comm'n Rep. 89) and the Task Force (Task Force Rep. 267) to reflect, "more accurately than others, the quasi-judicial status which these officers should have" and which the code would bestow more fully than at present.

\(^{61}\) Mishandling of the previous attempt after the Administrative Procedure Act became effective, rather than inherent factors, produced failure at that time; but the feelings then aroused are a continuing fact that would make another attempt more difficult. An influential group of examiners, in particular, is effectively organized. See Thomas, supra note 36, and Fuchs, The Hearing Officer Fiasco Under the Administrative Procedure Act, 63 Harv. L. Rev. 737 (1950), for over-all accounts of the previous attempt.
the main. No good reason appears why subpoena powers should not be available uniformly at hearings, instead of being limited by the agencies' previous powers as under the Administrative Procedure Act at present.\textsuperscript{62} It could be argued that, as proposed in an illustrative rule laid before the President's Conference on Administrative Procedure and published by it,\textsuperscript{63} subpoenas should be freely available to all parties, subject to later objection by parties to whom subpoenas are directed; but it seems preferable to enable agencies to control the length of proceedings by requiring parties who seek subpoenas to furnish "a statement or showing of general relevance and reasonable scope of evidence sought," as the proposed code would do.\textsuperscript{64} Discovery powers constitute a more controversial subject;\textsuperscript{65} but here again it is difficult to understand why, if competently exercised by qualified hearing officers who have discretion as to subpoenas, interrogatories, and other compulsory process, they would not contribute to effective proceedings. The power to require prehearing and other conferences instead of merely the authority to conduct them where the parties consent seems similarly desirable and, if bestowed by statute, should not give rise to serious dissatisfaction or resistance.

The view of the Commission with respect to interlocutory appeals, which would enable the agencies to permit them if substantial prejudice would otherwise result, seems preferable to that of the Task Force and to the provision of the proposed code, which would place them wholly under the control of the hearing commissioners. Although such appeals should clearly be restricted so far as feasible, it would surely serve the interests of all parties to permit an agency to determine immediately some question, vitally affecting a proceeding, which would be subject to its determination in the end. This would be especially true if hearing commissioners were authorized, as proposed, to act on all motions. A motion to intervene, for example, may vitally affect a proceeding, and its denial forecloses, at least for a time, full participation as parties by persons wishing to have their day in court. The benefit of the hearing commissioner's judgment should be had without determining the matter irretrievably until a final decision has been reached, if the agency sees fit to take it up for specific reasons.

\begin{itemize}
\item \textsuperscript{62} § 7(b), 60 Stat. 241 (1946), 5 U.S.C. § 1006(b) (1952).
\item \textsuperscript{63} Report 16-18 (1955).
\item \textsuperscript{64} Code § 204(b), Task Force Rep. 368.
\item \textsuperscript{65} The Committee on Pleadings of the President's Conference on Administrative Procedure considered the matter of discovery but did not report upon it. Three members of the committee made a statement, dated Sept. 30, 1954, advocating that agencies be urged to establish discovery procedures to the greatest extent their statutory powers permit. The principal controversy over such a policy turns on whether discovery available to all parties would harmfully enhance the litigation aspect of administrative proceedings.
\end{itemize}
A motion to dismiss which had been granted under a hearing commissioner's enlarged authority might be a subject of appeal to the agency in any event; but if such a motion is overruled the question presented may also be a legitimately important one which the agency need not be denied all authority to take up immediately. It should be sufficient if there is a clear statutory direction to hold interlocutory appeals to a minimum, especially as respects procedural matters. The device of having the hearing commissioner find whether an interlocutory appeal is needed to avoid prejudice to a party or to expedite a proceeding, as proposed in the code, should be primarily, but not exclusively, employed. A motions commissioner to advise the agency whether interlocutory appeals would be warranted, such as the President's Conference on Administrative Procedure has mentioned on the basis of Federal Trade Commission practice, might be a desirable supplement.

IX

RELATION OF HEARING COMMISSIONERS TO THE DECISIONAL PROCESS

The Proposed Distribution of Authority.—With relation to the future of federal administrative methods, the most crucial questions presented by, in particular, the Task Force proposals and, to a lesser degree, those transmitted by the Hoover Commission are raised by three recommendations: that the separation of functions as between hearing commissioners and agency personnel be made more complete than that which prevails under the Administrative Procedure Act, and be extended to all formal rule-making and adjudication; that, except where the parties expressly waive this procedural step, hearing commissioners render initial decisions in all such proceedings in which they have presided; and that agency review of these decisions be limited to the same scope as judicial review of agency decisions, "except for questions of policy delegated to the agency by Congress."

67 Of these recommendations, only the extension of separation of functions to additional proceedings has been presented by the Commission, in Recommendations Nos. 33(c) and 37. This entire group of recommendations, which the Task Force includes in its Recommendations Nos. 35, 41, 48, and 49 and proposed code §§ 204(c), 206(b), and 206(c), respond to much of the essence of that group's theory, already quoted, that "the more closely . . . administrative procedures can be made to conform to judicial procedures, the greater the probability that justice will be attained in the administrative process." Task Force Rep. 138. Their importance is correspondingly great. As to agency review of hearing-commissioner initial decisions in rule-making, the Task Force report states at one point that "agencies should . . . have all the powers which they would have in making the initial decisions themselves," because "the making of [rules] . . . involves policy considerations which justify independent appraisal of pertinent facts and circumstances by the agency." Task Force Rep. 204. Task Force Recommendation No. 49 and § 206(c) of the proposed code, however, both provide that "in rule making required under the Constitution or by statute to be made
All the other recommendations which would enhance the status and independence of hearing commissioners as compared to the present hearing examiners and alter the manner in which proceedings would be conducted still leave unimpaired the agencies' present authority and means of advice to hearing officers in regard to matters of substance. These recommendations, on the other hand, would drastically curtail agency power in the respects mentioned. They would make the hearing commissioner truly a trial judge no more subject to agency advice or authority than the courts in enforcing a regulatory statute or agency regulations in penal actions or injunction suits at the instance of an agency, except that the rules of practice applicable to a proceeding before a commissioner would stem from the agency, and that interpretative regulations of the agency, adopted after opportunity for public participation as provided in another recommendation, would be binding upon him.

To carry "judicialization" of formal administrative proceedings to the length proposed, while at the same time retaining the over-all responsibility of agencies under the statutes establishing them, seems entirely unsound. It would be far better to transfer to an administrative court or to other trial tribunals the full jurisdiction and respon-

after hearing," as well as in all formal adjudications, the scope of review by the agency shall be the same as that of a court upon judicial review of agency decisions, "except for questions of policy" committed to the agency by Congress. Doubtless the qualification with respect to questions of policy is intended to take care of the point which is made in the text of the report. The report states elsewhere that "to assert that formal rule making is, unlike adjudication, not an adversary proceeding is to have regard only to the form of the proceeding and to ignore realities" (p. 164), and that "the person best qualified, apart from special circumstances, to arrive at a correct decision in an adversary matter is the person who actually hears and receives the evidence" (p. 202). Hence, the Task Force's intention to limit agency review of hearing-commissioner fact determinations in formal rule-making as well as adjudication seems clear.

68 Comm'n Recommendation No. 33(a), (b); Task Force Recommendation No. 32. See Task Force Rep. 159. The Commission's recommendation excepts "matters . . . relating solely to internal agency instructions." Since hearing commissioners would not be within the agencies, this exception would not apply to instructions to them. For the same reason and because private parties must observe them, rules of practice applicable to hearings before commissioners would also have to be preceded by opportunity for public participation. Even the obligation to follow agency precedents would be drastically curtailed by the provision of § 208(b) of the proposed code that no sanction, as broadly defined, "shall be imposed against a person for pursuing a normal, customary, or previously acceptable course of conduct, unless such conduct shall have been proscribed or restricted by a generally applicable rule of the agency." Task Force Rep. 417.

69 Comm'n Recommendation No. 50 and Task Force Recommendation No. 62 propose the transfer of certain deciding functions of administrative agencies to the United States courts, and Comm'n Recommendation No. 51, together with Task Force Recommendations Nos. 63-64, propose the transfer of other functions to the proposed administrative court. The merits of these recommendations do not fall within the province of this article.

70 The often-suggested separation of regulatory agencies into initiating and ad-
sibility to decide contested administrative matters than to create the hybrid proceeding which the Task Force proposes, involving power without sufficient responsibility on the part of hearing commissioners and responsibility without adequate power on the part of the agencies. In addition, the means of deliberation and of obtaining information, which are important and normal to agencies, would be curtailed as respects hearing commissioners to a point where they would be even less than those available to courts.

Under the recommendations the power to find facts would be placed largely in the hands of the hearing commissioners, with judicial review available to any party who might claim that an agency had exercised more than the limited check permitted to it under the proposals; yet the agencies would continue to be charged with the duty of effectuating the statutes they administer. Whenever a hearing commissioner presided at a hearing, he alone would be empowered to formulate the decision that must become the agency's if not susceptible to change on the grounds specified in the proposed code.71 These do not include error in conclusions of fact unless the conclusions are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." In formulating his decision the hearing commissioner would be insulated from all processes of consultation with agency staff members as well as others. These changes from the present distribution of authority will now be discussed.

Authority to Determine Facts.—The conception with regard to fact determination, which causes the Task Force to recommend that this function be vested in hearing commissioners subject to the same scope of review by agencies as courts would exercise with respect to agency findings except as questions of policy committed to agencies may be involved, is nowhere stated explicitly. Apparently, however, it is a conception which looks upon "facts" as all of the same variety, subject to ascertainment with maximum accuracy in a contested proceeding by "the person who actually hears and receives the evidence" and can, therefore, judge the weight to be given to the testimony of witnesses "on the basis of their demeanor."72 Ignored at this point

judicating agencies would establish a reasonably clear distribution of responsibility between the former, which would be expected to effectuate the governing statutes by seeking adjudications, and the latter, which would have the responsibility for rendering decisions to the same ends. The Labor Management Relations Act establishes such a division of functions and of responsibility in somewhat less clear-cut form. The present proposals would continue to combine in the agencies the initiation of proceedings with some aspects of reaching decisions, but would assign final responsibility for other aspects of decisions to hearing commissioners, without answerability of the hearing commissioners to any authority concerned with the effectuation of statutory policies.

72 Task Force Rep. 202-03.
are the distinctions among different varieties of facts which cause some of them to turn largely on oral testimony and others to reflect recorded data entirely or in considerable part. It is not explained why the hearing officer's conclusions should be preferred to the agency's as to the latter type of facts. Also overlooked is the related situation in which conclusions turn not on the demeanor or credibility of the witnesses, but on the significance of the undisputed information they offer. Here too the officer may be in no better position than the agency to weigh the evidence.

Insofar as policies committed to an agency by Congress may be involved in fact determination, the Task Force recommendations permit an agency to substitute its conclusions for those of a hearing officer. It is impossible to say, however, whether recognition would be given to agency authority as to the questions of judgment or discretion, falling short of policy issues that are clearly identifiable as such, which are bound up with numerous fact determinations that agencies make. According to the Supreme Court in a leading case, for example, the question whether the term "sausage" would be "false and deceptive" when applied to a product containing more than a specified percentage of cereal is "a question of fact, the determination of which is committed to . . . the Secretary of Agriculture" by the Meat Inspection Act, "and the law is that the conclusion of the head of an executive department on such a question will not be reviewed by the courts, where it is fairly arrived at with substantial evidence to support it." The same thought was expressed in a more recent case of a similar nature where the determination was made on the record of a hearing, and would come under the Task Force's proposal as to agency review. In the second case especially, however, the question at issue was recognized by the Court as also one of judgment or discretion rather than merely of fact; but it made little difference, since the Court would defer to the agency in the absence of abuse however the question might be characterized. Under the Task Force's formula for agency review of the findings of hearing commissioners, the distinction between fact and policy would be crucial, since upon it would turn the question whether the agency might freely substitute

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73 Elsewhere the Task Force recommends that agencies and presiding officers should have authority to provide "for the submission of all or part of the evidence in written form, provided that no party is substantially prejudiced thereby." Code § 205(d), Task Force Rep. 190-91. Possibly the initial decision might be waived most readily by the parties in a proceeding where the evidence was so submitted, thus enabling the agency to make fact determinations for itself; but the agency would have only the opportunity of one party among several to bring about such a result.

74 See Allentown Broadcasting Corp. v. FCC, 222 F.2d 781 (D.C. Cir. 1954).


its judgment for that of the commissioner or would be bound by his determination unless it were "clearly erroneous."

At the very least, endless litigation would spring up around the issue in case after case, with no prospect that the results would give satisfaction to anyone. The Task Force is itself proposing that the results of previous litigation on an analogous issue surrounding the scope of judicial review of agency determinations be changed. That issue relates to whether certain questions of statutory interpretation—e.g., in a leading case, who is an "employee" subject to the statute—involve questions of fact, as to which a reviewing court is concluded by agency determinations supported by substantial evidence, or whether they are questions of law, as to which a court is free to substitute its judgment. The effect of this troublesome issue is confined to the relatively small number of cases in which judicial review of agency determinations is sought. The issue raised by the Task Force, by contrast, would affect every formal proceeding in which a fact-policy question was involved, and would plague the agencies each time they were required to review hearing-commissioner determinations in such cases. No one would know whether commissioner or agency had the last word on, for example, questions of safety of transportation equipment, deceptiveness of competitive practices, relative need of communities for broadcast services, relative fitness of competing license applicants, or a host of other questions on which decisions in both rule-making and adjudication turn and which heretofore have been at the core of agency responsibility.

Recent judicial utterances have called attention to the policy element in some fact determinations and its implications for procedure, administrative judgment, and judicial review. The United States Court of Appeals for the District of Columbia in an opinion by Judge Prettyman, for example, has recognized the "forward-looking function" of an agency in licensing carrier operations, which "in that respect . . . differs markedly from a purely judicial or quasi-judicial determination of present or past rights." Although the necessary determinations "cannot be fashioned from pure fantasy" and must be based on "a hard core of factual possibility, which can be ascertained

77 Code § 207(g), Task Force Rep. 374; Task Force Rep. 216-17.
80 American Airlines, Inc. v. CAB, 192 F.2d 417 (D.C. Cir. 1951).
and evaluated only upon the basis of present and past events and conditions," the questions at issue involve "matters of foresight, not products of unblended hindsight." Consequently, the agency has broad authority in accepting, discarding, and evaluating evidence as to traffic needs and in coming to conclusions concerning these needs and the amount of transportation to be supplied. To what extent, one asks, would this authority remain with the agency, and to what extent would it be transferred to the hearing commissioner and insulated from agency review under the Task Force recommendations?

It is, of course, the intimate association of fact with policy crystallized into law and with discretion, or policy, entrusted to agency determination that accounts for the traditional impossibility of sharply distinguishing facts from other elements for purposes of judicial review. Yet the Task Force seeks to require a clear separation of questions of fact so as to insulate them in part from agency review, thereby breeding litigation and endangering the essence of the functions the agencies were established to perform.

The Task Force, it is fair to say, fails to recognize in its report as a whole the central importance of agency competence to determine facts. For example, the report states at one point that "the substantial evidence rule was developed by the courts for the review of administrative orders because such orders commonly were based upon proceedings which did not conform to the evidentiary rules applicable in the judicial process" and which, consequently, resulted in voluminous records that "could not always be examined by the reviewing court with the same degree of care and thoroughness that the reviewing court would normally apply to the record of the trial court." Hence, it is said, the need for restrictive judicial review largely disappears when... the administrative process is brought into reasonable relation to the judicial process, and records are compiled by competent presiding officers... ."

Aside from the doubtful assumption that voluminous administrative records result mainly from loose practices...

81 Id. at 420, 421.
82 Consider also such questions as whether one corporation is subject to the "controlling influence, directly or indirectly" of another which owns a minority block of its stock, Pacific Gas & Elec. Co. v. SEC, 127 F.2d 378 (9th Cir. 1942), and whether market value is the proper measure of the recognition to be accorded in a "fair and equitable" reorganization plan to a remote and speculative interest in a corporation, Niagara Hudson Power Corp. v. Leventritt, 340 U.S. 336 (1951).
in the admission of evidence and incompetence of presiding officers, the statement wholly ignores "the respect that courts have for the judgments of specialized tribunals which have carefully considered the problems and the evidence," which accounts much more largely for the recognized limits to the scope of judicial review of agency action than any other factor. The Task Force, it is true, states that "the agency has technical knowledge in the field of its special competence," and "is concerned primarily with the wise exercise of administrative discretion, in accordance with statute." It also asserts that formulation of the decision "in an adversary matter" by the "person who actually hears and receives the evidence," subject to limited agency review, "does not, of course, affect the determination of policy questions delegated by Congress to an agency"; but competence to determine facts is not mentioned as important. The assertion is made, indeed, that "the responsibility for decision . . . properly belongs in the first instance" to "the officer whose special function it is to conduct the administrative hearing."

The only justification advanced for limiting the authority of agencies in fact determinations when hearing commissioners preside at hearings, which goes beyond analogy to judicial proceedings and the alleged desirability of having such determinations made by persons who have heard and received the evidence, relates to the need for overcoming the effects of a "combination of prosecutor and judge" in an agency, from which a detached hearing commissioner will be

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85 The President's Conference on Administrative Procedure has concurred with a report to the Judicial Conference, adopted by that body, which finds that the tendency toward undue liberality by administrative hearing officers in the admission of evidence "has been due principally to the attitude of the regulatory agencies themselves and of the Federal courts, which have criticized hearing officers for excluding evidence of doubtful relevancy in unwarrantedly sweeping terms." President's Conference on Administrative Procedure, Report 53-54 (1955). The bulkiest records undoubtedly result from the complexity of certain proceedings, which it requires special methods and skill to keep to minimum size, and which have plagued the courts as well as administrative agencies. See Committee on Practice and Procedure in the Trial of Antitrust Cases, ABA Section of Antitrust Law, Report (1954); Dession, The Trial of Economic and Technological Issues of Fact, 58 Yale L.J. 1019, 1242 (1949); McAllister, The Big Case: Procedural Problems in Antitrust Litigation, 64 Harv. L. Rev. 27 (1950).


87 Task Force Rep. 205.

88 Id. at 202.

89 Id. at 203.

90 The Task Force report, at 176-77, emphasizes this factor in dealing with the separation of functions, and includes the presiding officer's "independent judgment on the evidence" as one of the objectives to be secured. The same reasoning lies behind the proposed policy of preferring that judgment, when obtained, to the agency's in relation to fact determinations.
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free. There is indeed a problem here; but its importance varies in different kinds of proceedings, and there are many in which it does not arise.\textsuperscript{91} Its solution, therefore, requires identification of the situations where it is present and the formulation of appropriate remedies in those situations.\textsuperscript{92} Whether any such remedy can wisely separate principal responsibility for fact determination from ultimate responsibility for decisions,\textsuperscript{93} as the Task Force proposes, involves additional considerations that require discussion.

The idea that fact determination is a mechanical process which, if correctly employed by a neutral authority, leads always to a "right" answer as distinguished from a "wrong" one is erroneous. Procedural policy based upon this idea would be self-deceiving and might work great harm. On the contrary, even where "facts" are pure facts—free of the "forward-looking," policy aspect just discussed—they may turn on complex data, like facts concerning the national income or other economic phenomena, or on obscure evidence, like the circumstances of an unwitnessed accidental death or the presence of a threat of an epidemic of disease. In any such situation the "facts" established in official proceedings must be inferences which the trier of fact draws from the evidence. Conflicting inferences will be possible to the extent that each is rationally supportable on the basis of evidence favorable to it when cast against the opposing evidence.\textsuperscript{94} After the trier of fact

\begin{footnotes}
\textsuperscript{91} The Task Force report selects a passage from the report of the "minority" of the Attorney General's Committee on Administrative Procedure which, standing alone, seems to indicate that the problem arises whenever the "stages of making and applying law have been telescoped into a single agency." Task Force Rep. 176. There is a combination of some kind in the functions exercised in such situations; but it is not a combination of "prosecuting" and judging unless the agency has initiated the proceeding with a view to securing a result adverse to a private party. When a private party seeks an advantage, such as a license or a rate increase, which there may be governmental reasons for withholding, the tables are turned, and the danger of agency "bias" is of a different sort. If the agency acts as an umpire between private parties, as it may where one of two or more license applicants for mutually exclusive privileges will have his application granted, the situation is still different. See Chamberlain, Dowling, and Hays, The Judicial Function in Federal Administrative Agencies 209-10 (1942); Fuchs, The Hearing Officer Problem—Symptom and Symbol, 40 Cornell L.Q. 281, 288 (1955).

\textsuperscript{92} As pointed out above, the establishment of a deciding agency separate from the one that initiates proceedings is such a remedy. Conduct of the hearing by a hearing officer separated to a large extent from the personnel that investigates problems coming before the agency and initiates proceedings is another, which the Federal Administrative Procedure Act instituted for the bulk of federal agencies, but with some differentiation among types of proceedings. Id. at 291-92, 321-23.

\textsuperscript{93} This is what happens, of course, under a system of special verdicts by juries, adopted to correct evils under the system of general verdicts. The judge, who may be hampered in reaching just results by jury verdicts with which he disagrees, is without other responsibility than to apply the law to the facts as found in the particular case.

\textsuperscript{94} Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), having established this test as the one to be employed under the substantial-evidence language of § 10(e) of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1952), it is
\end{footnotes}
has mustered all the objectivity and conscientiousness of which he is capable, his inferences may still be the product of conscious or unconscious choice within rational limits. Enforcement of these limits may be had through an external check, such as suitably restricted review of an agency's determinations by a court; but broader review gives opportunity, not for measurably more correct answers than the original ones, but for the substitution of different rationally sustainable inferences for those originally drawn. It may become of the highest importance who shall be the trier of fact whose inferences, if rationally sustainable, will stand; for in many cases any inferences drawn will reflect in some degree the choices inevitably involved in reaching them, and these will in turn reflect, equally inevitably, the predilections of the trier of fact. Heretofore in administrative proceedings, even when the officer who has presided at a hearing has drawn inferences in an initial decision or report, the agency has been empowered to substitute its own conclusions. The Task Force now proposes to withdraw this authority and to substitute the presiding officer, usually a hearing commissioner, as the decisive fact determiner.

It is believed that the foregoing recommendation cannot be justified. The agency charged with effectuating the purposes of a statute should have authority to find the facts within the limits imposed by judicial review. Whether or not a combination of functions on the

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96 Every reason exists, of course, why a reviewing agency with full power to substitute its findings for those of a presiding officer should defer to his conclusions insofar as they reflect his judgment of the demeanor and credibility of witnesses whom he observed. The Universal Camera decision imposes a duty to defer, although its extent is difficult to measure. See the case on remand, 190 F.2d 429 (2d Cir. 1951). The agency may wish to rely on its hearing officers' conclusions to an additional extent, because they reflect knowledge built up during the hearings, or because it is satisfied with initial determinations not shown to exceed rational limits. Of course it should be free to do so; but the choice as to such reliance should rest with it.

97 This conclusion is not inconsistent with complete separation of "prosecuting" from deciding where it is determined that the separation should be made. The deciding agency then becomes the responsible one in formal proceedings unless it is supposed to proceed mechanically and with indifference to results. If it employs hearing officers, the problem as between it and those officers is the same as with an agency exercising "combined" functions. Cf. Benjamin, Administrative Adjudication in the State of New York 338 (1942): Unless an administrative agency, operating where adjudication is only one part of a larger process, "is permitted to act on the basis of its own adjudication, when that adjudication is rationally supportable, the whole process of administration will be unduly impeded."
part of the agency heads exists, the predilections which operate in
fact determinations should be those to which the agency's interpreta-
tion of the statutory purposes leads and for which the agency will be
answerable to Congress, to higher executive authority, if any, and to
the public.\textsuperscript{98} Any attempt to substitute a supposedly neutral officer
within the framework of continued agency responsibility can only
introduce other, more fortuitous and variant predilections for the
agency's, rendering the agency's position largely intolerable and un-
attractive to competent personnel. It is difficult to see who could
benefit from such a situation except, from time to time, a party to an
agency proceeding whose interest coincided with a particular hearing
commissioner's predilections.

\textbf{Authority to Formulate Decisions.---}The same factors as argue
for continued agency authority over fact determinations suggest, al-
though with less force, that there should be continued authority to
substitute a recommended decision by the hearing officer for an initial
decision by him,\textsuperscript{99} or to substitute a tentative agency decision or a
recommended decision by any of its responsible officers in rule-making
or initial-license proceedings.\textsuperscript{100} If the issues do not turn primarily
on oral testimony, agency competence for formulating conclusions, or
that of particular staff members who have not been investigators, ad-
vocates, or prosecutors in the same or a related proceeding, may ex-
ceed that of a hearing commissioner. However, the reasons for having
the presiding officer render an initial decision in most cases are
strong.\textsuperscript{101} These include not only the presiding officer's familiarity
with the case through having presided at the oral hearing, but also
the added dignity and efficiency which may attach to the hearing be-
cause of knowledge that the presiding officer will be in command of
the case until an initial decision has been rendered.

\textsuperscript{98} For example, the inference that a death during employment arose "out of and
in the course of" the employment, where rationally sustainable, may legitimately be
preferred to the contrary inference, or be chosen instinctively, so as not to defeat the
purpose of a workmen's compensation act to afford relief from the economic effects of
industrial accidents. The adverse consequences in such a case fall upon an insurance fund.
Where an inference relates to conduct having an ethical aspect or leads to serious dis-
advantage to specific persons, such as the inference that an employer has discharged
certain workers for union affiliation rather than for unsatisfactory performance on the
job and must therefore reinstate them with back pay, the reasons for seeking determina-
tions uninfluenced by "prosecution" become strong; but they should still be those of
officials who bear the over-all responsibility for sound decisions.

\textsuperscript{99} As these terms are used, an initial decision is one that takes effect as an agency
decision unless reviewed, whereas a recommended decision requires agency approval
before becoming effective.

\textsuperscript{100} Administrative Procedure Act § 8(a), 60 Stat. 242 (1946), 5 U.S.C. § 1007(a)
(1952).

The latitude which the Administrative Procedure Act\textsuperscript{102} permits resulted from the strongly expressed views of agency representatives while the act was pending that there was a need in relation to rule-making and certain other "forward-looking" agency functions for bringing the resources of agency staffs to bear in the formulation of tentative or recommended decisions.\textsuperscript{103} In practice under the act regulatory agencies which conduct these types of proceedings have tended to make use of the latitude permitted by not authorizing their hearing examiners to render initial decisions.\textsuperscript{104}

The Task Force's recommendation that if the agency has not presided at the reception of the evidence, the presiding officer prepare and file an initial decision in all cases of formal rule-making or adjudication\textsuperscript{105} is based on three considerations: "the established pattern of court actions"; delays that occur after the hearing while a tentative or recommended decision is formulated by someone other than the presiding officer; and the superior qualifications of the presiding officer, as the Task Force views the matter, for carrying out the responsibility for decision.\textsuperscript{106} The first reason involves broad considerations rather than factors embraced specifically by this problem. The second reason is significant, although its precise importance cannot be gauged. Delays have occurred in the process of staff preparation of tentative or recommended decisions, and may well have exceeded those that would have attended the preparation of reports by presiding officers who already knew the records. Additional delays may, moreover, be avoided if hearing-officer reports are given effect as initial decisions, subject to objections, because agency scrutiny is avoided except when the need arises through a request for review. If, on the other hand, the presiding officer's report is likely to be less satisfactory than a report prepared by someone else, the review process may be more protracted than it would be if a more suitable document were prepared.

The Task Force reports from the data it has gathered that the "initial decision is presently used in 11 statutory proceedings," and that in nine others "the hearing examiner may prepare a recom-

\textsuperscript{104} Davis, Administrative Law 314-15 (1951). The Labor Management Relations Act, 61 Stat. 146 (1947), 29 U.S.C. § 160(c) (1952), and the 1952 amendments to the Federal Communications Act, 66 Stat. 711, 47 U.S.C. § 409(b) (1952) (with a minor qualification), require that there be an initial decision by the hearing examiner in all cases in which such an officer has presided at the hearing.
\textsuperscript{105} Task Force Recommendation No. 48; Code § 206(b), Task Force Rep. 372.
\textsuperscript{106} Task Force Rep. 202-03.
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mended decision.\textsuperscript{107} No information is given as to whether these proceedings are distinguishable in their characteristics from those in which tentative or recommended decisions prepared by others are employed, or whether delays or other undesirable consequences are measurably greater in the latter than in the former. With so little addition to previous bases for judgment, the Task Force recommendation remains of doubtful merit. Its sweeping nature gives rise to persuasive objections to its adoption, and the matter should be allowed to rest pending further study.

**Insulation of Hearing Commissioners from Consultation with Agency Personnel.**—The recommendations of the Commission and Task Force with reference to separation of functions within agencies would insulate hearing commissioners more completely from advice concerning the matters before them, except through on-the-record testimony and consultation, than is the case even with trial judges. This separation would prevent consultation with agency staff members on any matters, and would extend to all formal rule-making and adjudication. Especially in conjunction with the proposals to require initial decisions by hearing commissioners whenever they preside at hearings and to give finality to their conclusions of fact unless clearly erroneous, which have just been discussed, these recommendations involve fundamental change.

In addition to providing that hearing commissioners shall not be subject to the supervision of agency personnel engaged in the performance of investigatory or prosecuting functions, the proposed code provision for the separation of functions, as it applies to hearing commissioners, prescribes that they shall not consult any party on any issue of fact except upon notice and opportunity for all parties to participate, save to the extent required for the disposition of ex parte matters as authorized by law, ... be advised by any other agency officer or employee except as a witness or counsel in public proceedings of which all parties have notice and in which they have full opportunity to participate, or ... permit any other agency officer or employee to participate in any way in the formulation of findings or decisions ....\textsuperscript{108}

This provision would replace provisions of the Administrative Procedure Act, applicable to formal adjudication with certain exceptions but not to rule-making, which read:

\begin{quote}
Save to the extent required for the disposition of ex parte matters as authorized by law, [no presiding officer] ... shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to par-
\end{quote}

\textsuperscript{107} Id. at 202.

\textsuperscript{108} Code § 204(c), Task Force Rep. 409.
ticipate . . . . No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers . . . .

By omitting the words "person or" from the prohibition against consultation as to facts, the proposed code provision appears to be narrower in one respect than the Administrative Procedure Act; but the omission seems to have been inadvertent, since the Task Force's comment on this provision reproduces its language as "any person or party." It will be assumed in the subsequent discussion that these words should be included.

The other changes of substance which the proposed code provision would work are as follows: (1) the prohibition of consultation as to facts would cover "any issue of fact" instead of "any fact in issue"; (2) the prohibition against rendering advice except as a witness or counsel would extend to all agency personnel instead of being limited to those who have engaged in investigative or prosecuting functions in the same or a related case; and (3) the prohibitions would be applied to all formal agency adjudicative and rule-making proceedings instead of being limited to adjudications not embraced by the exceptions stated in the present act.

The meaning of the second and third of these changes is clear; that of the first depends on the meaning of "issue of fact" in the new language as compared to "fact in issue" in the Administrative Procedure Act, when account is taken of the context of each phrase. The legislative history of the act contains the statement that a single purpose accounts for the entire separation-of-functions provision. This purpose is that

no investigating or prosecuting officer shall directly or indirectly in any manner influence or control the operations of hearing and deciding officers, except as a participant in public proceedings, and even then in no different fashion than the private parties or their representatives.

If, however, the purpose of both branches of the act's provision were only as stated, the sentence prohibiting unannounced consultation as to any fact in issue would be superfluous, since the second branch of the provision covers this purpose. It would also be broader than necessary because of its inclusion of "any person or party." The

sentence seems from its words to be designed to guard against improper off-the-record influences, from whatever source, relating to facts in issue. The suggestion has been made that it does not restrict consultation with agency personnel, because otherwise it would prevent desirable consultation with noninvestigating and nonprosecuting officers, and would be inconsistent with the meaning given elsewhere in the act to the word "person," where it does not include agency personnel. Although this suggestion is tenable, it involves a departure from the natural meaning of the words used, and overlooks the fact that at two points in the same section the word "parties" is used to include the agency. It seems probable that the act uses words such as these in different senses in different contexts. Nor is it necessary to omit agency personnel from the prohibition in order to preserve desirable intra-agency consultation; for consultation regarding "any fact in issue" is not desirable in a proceeding where the decision is to rest upon the record of a hearing. Consultation as to other matters is not forbidden by this provision. Agency personnel, equally with outsiders, might supply evidence that should come in via the record if the sentence in question did not apply to them.

Construed as a whole, then, the Administrative Procedure Act's limiting provisions forbid the hearing officer in adjudications to which these provisions apply to consult investigating or prosecuting personnel of the agency for any purpose or to consult anyone else on any "fact in issue." They leave the hearing officer free to consult other persons, including noninvestigating and nonprosecuting agency personnel, on matters that are not facts in issue, to the extent that such consultation is consistent with the requirement that the final determination be based on the record of the hearing.

According to a comment by the Attorney General, made before the Administrative Procedure Act was reported upon by either judiciary committee or passed by either house of Congress, "the term 'fact in issue' is used in its technical, litigious sense." It appears to mean, therefore, a fact which is in dispute at a trial and becomes a subject of evidence; and the term apparently does not embrace a fact which is proposed for official notice. The phrase "any issue of fact," proposed by the Task Force, is more likely to include facts which may be officially noticed, since such facts, although not "in issue" in a technical sense, are subject to dispute. Therefore, the proposed code

112 Davis, Administrative Law 415-16 (1951).
113 "[O]ther parties" in § 2(a); "the parties" in § 2(b).
provision, in addition to broadening the prohibition against advice to presiding officers by agency personnel and extending its prohibitions to all formal proceedings, appears to eliminate such consultation as would otherwise be proper as part of the notice process. Whether this is true or not, the aid of agency personnel in connection with that process, as well as otherwise, would be withheld. They could not even be consulted in advance of announcement by the hearing commissioner of proposed official notice in order to determine what might be the information to be gained from them and subjected to refutation.

After an administrative hearing on the facts has ended, the decisional process includes, naturally and traditionally, use of the agency's resources of knowledge and experience in formulating conclusions. Agency knowledge embraces information stored in the minds of its personnel and material in its files; its experience covers that which the personnel of the agency, especially those with expert qualifications, possess as individuals, together with that which has been built up in the course of the agency's work. Together they form the basis of the agency's capacity to judge soundly the matters entrusted to it. Whether or not all agencies measure up to the standards of expertness and wisdom envisaged for them, the responsibility for judgment within their areas of competence rests primarily on them and, within those areas, is ordinarily more highly developed than the capacity of courts in the same fields. It is important that this capacity be applied in decisions at the same time procedural fairness to private parties is secured.

The method whereby a hearing officer, entrusted with the function of preparing an initial or recommended decision on the basis of the hearing before him, makes use of the agency's store of knowledge and experience not already reflected in the record is through reference to the agency's files and consultation with its personnel so far as proper. The Administrative Procedure Act leaves these means of

116 The Administrative Procedure Act now provides that "where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." § 7(d), 60 Stat. 241 (1946), 5 U.S.C. § 1006(d) (1952). The code would provide, § 205(e), Task Force Rep. 371: "Where the decision by any agency includes official notice of a material fact beyond the evidence appearing in the record, the decision shall be without force or effect unless (1) the fact so noticed is specified in the record or is brought to the attention of the parties before decision, and (2) every party adversely affected by the decision is afforded an opportunity to controvert the fact so noticed: Provided, that nothing in this subsection shall affect the application by an agency in appropriate circumstances of the doctrine of judicial notice." Judicial notice has been aptly characterized as a "process of informal proof and free investigation." McCormick, Evidence 700 (1954). That process and its counterpart in administrative proceedings, official notice, should include pre-eminently resort to sources of information within agencies.
drawing on the agency’s resources open so far as consistent with the record requirement, except for its prohibition, applicable to some instances of adjudication, of consultation with agency personnel who have engaged in investigating or prosecuting functions in the same or a related proceeding.\(^1\) The recommendations of the Commission and Task Force as expressed in the proposed code would, as has been seen, close the channels to other agency personnel by forbidding advice by any agency officer or employee except as a witness or counsel in public proceedings and by forbidding any such officer or employee to participate in any way in the formulation of findings or decisions. To the latter prohibition the code provision adds the qualification that agency members, but not hearing commissioners, “may have the assistance of persons who are members of an independent review staff.”\(^7\) The hearing commissioner in all instances of formal adjudication and rule-making, therefore, would be insulated from all nonpublic consultation with agency personnel during his formulation of conclusions regarding a case he had heard. He would be required to turn out a strictly personal product, unaided so far as agency personnel is concerned by the recourse which even a trial judge may have to sources of information appropriate for judicial notice and to advice on questions of law or policy.

These restrictions on intra-agency consultation by hearing commissioners would be imposed for the purpose of preventing the “prosecutor-judge” combination within agencies, as broadly conceived, from having any effect upon hearing-commissioner decisions,\(^1\)^\(^1\) although, as has been seen,\(^1\)^\(^2\) the combination referred to is of varying nature and significance in proceedings where it prevails. “Institutional decisions,” involving consultation and advice among agency personnel, which heretofore have been a principal source of strength in administrative proceedings,\(^1\)^\(^2\) would become a thing of the past in formal proceedings, and the decision in any such proceeding in which a hearing commissioner had presided would take shape in a document prepared by him in isolation, with his conclusions of fact given final effect unless clearly erroneous.

It is true that the hearing commissioner could reopen the hearing in order to receive testimony or advice concerning matters of which he wished to take official notice or upon which he desired to hear argument. Although this process is appropriate from time to time, its

\(^1\) See text at note 109 supra.
\(^7\) Code § 204(c), Task Force Rep. 368.
\(^1\)^\(^1\) Comm’n Rep. 61; Task Force Rep. 176-77.
\(^1\)^\(^2\) See note 91 supra.
\(^1\)^\(^2\) Fuchs, The Hearing Officer Problem—Symptom and Symbol, 40 Cornell L.Q. 281, 289-91 (1955).
cumbersome is apparent, and the Commission and Task Force reports do not supply a justification for requiring it each time a hearing commissioner needs to talk to someone within the agency he is serving, except by reference to danger residing in the combination of functions. The reopening of hearings would increase delays in administrative proceedings, to which the reports object,\(^1\) and the probability is that hearing commissioners would heroically perform their tasks in solitude rather than impose these delays. The public would be denied a large part of the benefits which Congress had endeavored to secure by creating agencies equipped to render informed decisions, especially in rule-making, licensing, and other proceedings in which facts relating to the future are involved.

If consultation by hearing commissioners with agency personnel is permitted at all, there is, it is true, a need for maintaining a distinction between, on the one hand, those communications that are improper because they relate to facts in issue or to matters of official notice which the parties to a proceeding should have an opportunity to controvert and, on the other hand, matters involving the agency's background knowledge or bases for judgment, as to which consultation is proper. Judges are trusted to maintain such distinctions even though, apart from a developed sense of ethics, they and members of the bar with whom they may have close personal relations could easily circumvent the restrictions. Agency personnel are, in general, similarly trusted. To carry statutory prohibitions in connection with administrative proceedings to the length now proposed would be an expression of distrust of officials which could hardly be conducive to good governmental performance.

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CONCLUSION

In sum, then, the Hoover Commission and Task Force recommendations on legal services and procedure as they affect hearing commissioners vary in desirability from certain ones which the present writer believes to be sound to others that appear seriously harmful. Between the two extremes are some that seem to call for further evidence of their desirability.

The salaries and tenure proposed for members of the hearing-commissioner corps would provide excellently for personnel of high grade and for an appropriate relationship of their status to that of other government officials. A corps of hearing commissioners outside

\(^1\) Comm'n Recommendation No. 38; Task Force Recommendation No. 42; Code § 204(d), Task Force Rep. 369.
of the agencies, administered by a chief hearing commissioner who would assign its members to the agencies on a continuing basis, has much to be said for it; but improvement in the present system of agency appointment would be preferable if agency authority in regard to hearing and decision were not curtailed to the extent proposed in the reports. A separately administered personnel system for the selection of hearing commissioners, such as is recommended, would be desirable; but the experience of the Civil Service Commission should be drawn upon in administering it, and there should be statutory provision to assure observance of merit-system principles.

In the functioning of hearing commissioners, enlarged powers of commissioners at hearings accompanied by severe restriction of interlocutory appeals, such as are recommended, would be highly desirable; but the Commission's recommendation to retain agency authority to allow such appeals upon a showing of substantial prejudice from their absence seems preferable to the Task Force's proposal to place the entire authority with respect to interlocutory appeals in the hearing commissioners. It would be extremely damaging to administrative processes and to the discharge of agency responsibilities, especially in rule-making and other "forward-looking" proceedings such as licensing, if the power to find facts, subject to only limited review by the agencies, were vested in hearing commissioners as proposed by the Task Force but not by the Commission. Equally damaging would be such complete insulation from agency personnel in the preparation of initial decisions by hearing commissioners as the proposed administrative code would establish. Although a requirement that hearing commissioners prepare such decisions in all cases where they have presided might not be harmful, the case for such a requirement has not been made out.

In general, it seems fair to say that the Task Force recommendations and, to a less extent, those transmitted by the Commission and endorsed by three of its members are an extreme application of the Task Force's expressed devotion to judicial methods—an application, in fact, which proposes to out-judicialize the courts. So to restrict administrative processes and risk defeat of the purposes for which administrative agencies are established would unjustifiably thwart legislative ends.

These are times in which government is distrusted as it has not been since the boom period of the 1920's. It is therefore easy for lawyers, whose judicial ideal is already woven into the culture, to make an impression with appeals for manifest justice according to the methods of their craft, at the expense of effective administration. Such appeals have validity and were never more needed than now. Despite
the disfavor into which government has fallen, it has acquired greater power than ever over essential human rights as security investigations, expulsion of aliens, and restrictions on international travel have been carried forward. It would be a dangerous fallacy for lawyers to conclude, however, that the answers to all procedural problems reside exclusively in their tradition, and that present and future governmental needs can be met without allowing scope for the methods which administrative officials have found to be adapted to their functions.\textsuperscript{123}

The more extreme recommendations of the Task Force and, to a less degree, those transmitted by the Commission seem chargeable with origination in just this fallacy.

\textsuperscript{123} Cf. Grundstein, Law and the Morality of Administration, 21 Geo. Wash. L. Rev. 265 (1953).