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THE HEARING OFFICER PROBLEM — SYMPTOM AND SYMBOL

Ralph F. Fuchs*

I. THE DEMAND FOR REFORM AS TO FEDERAL HEARING OFFICERS

What has come to be known as the federal hearing officer problem has been much bruited about since the failure of Section 11 of the Administrative Procedure Act, as administered, to produce a generally satisfactory state of affairs. The question presented is in reality one phase of a larger complex of issues surrounding administrative proceedings. The likelihood that an attempted answer to the specific problem through amendment of Section 11 or through administrative changes will be formulated in the near future renders it timely to undertake to deal in this

* See Contributors' Section, Masthead, p. 326, for biographical data.

1 60 Stat. 244 (1946), 5 U.S.C. § 1010 (1952). This section (infra, note 39) provides for the method of selecting, compensating, and dismissing hearing officers who, under section 7, preside at hearings in formal agency proceedings (see infra, note 14).

2 The history of the administration of Section 11 and of the controversies surrounding that administration is told in Morgan Thomas, "The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process," 59 Yale L.J. 431 (1950); Fuchs, "The Hearing Officer Fiasco under the Administrative Procedure Act," 63 Harv. L. Rev. 737 (1950); and pp. 17-41 of the Draft Report, Committee on Hearing Officers of the President's Conference on Administrative Procedure, transmitted to the Conference by four members of the Committee on August 10, 1954, and submitted as a final report, with changes of detail, by these members on September 8, 1954. The comments of the other four members of the same committee on the issues raised by this history appear at pp. 10-36 of their report which was transmitted to the Conference on September 3, 1954. Both reports are entitled "Appointment and Status of Federal Hearing Officers." Litigation surrounding certain features of the administration of Section 11 culminated in the Supreme Court's decision in Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953).

3 Two bills providing for the appointment of hearing officers by the President with the advice and consent of the Senate, S. 1708 and H.R. 9035, were introduced in the 83d Congress. The Senate Committee on the Judiciary in the closing days of the second session recommended that the former bill pass. Sen. Rep. 2199, 83d Cong., 2d sess. (1954). In March, 1954 the American Bar Association committed itself to elimination of the authority of the Civil Service Commission in the administration of Section 11 of the Administrative Procedure Act and advocated "the independent appointment of Federal hearing officers, whether by an independent Office of Federal Administrative Procedure if such an office is created, by Presidential appointment, or by other appropriate means." 40 A.B.A.J. 446 (1954). The President's Conference on Administrative Procedure at its meeting October 14-15, 1954, endorsed the continuance of Civil Service Commission administration of Section 11 of the present Act, but recommended certain administrative changes not requiring legislation. Minutes, Thursday, October 14, 1954—Friday, October 15, 1954, 3-4. In the meantime the Commission on Organization of the Executive Branch of the Government (Hoover Commission), through its Task Force on Legal Services and Procedure, has also taken up the hearing officer problem. See statement of James M. Douglas, Task Force Chairman, printed at 6 Admin. L. Bull., 122-123 (1954); Robert G. Storey, "The Second Hoover Commission: Its Legal Task Force," 40 A.B.A.J. 483, 537-538 (1954). As a result of existing dissatisfaction and the attention thus being centered on the problem, it seems probable that new measures will be formulated and adopted.
paper with certain factors that are believed to underlie a sound solution.

There are two ends to be attained in dealing with the hearing officer problem, not only through revision of Section 11 but otherwise as well. These are (1) the creation of methods of selecting, compensating, and judging the performance of hearing officers which will maintain the best-qualified corps of examiners\(^4\) possible and (2) the establishment of principles and methods applicable to the work of these officers that will be most conducive to the proper performance of their duties. These two ends are interrelated, since obviously the quality of personnel obtainable will be determined in part by the conditions of work\(^5\) which are offered and these, in turn, must be adapted to the type of officials provided.

Two significant recent reports\(^5\) illuminate the hearing officer problem by relating it to the entire organized movement to enhance the fairness of federal administrative procedure, which began with the creation in 1933 of the American Bar Association's Special Committee on Administrative Law and culminated in the enactment of the Administrative Procedure Act in 1946.\(^6\) That movement's avowed goal has been to secure objectivity of judgment and good-faith application of statutory provisions to private interests on the part of administrative agencies.\(^7\)

\(^4\) The designation of the officials who are under discussion as "hearing officers," "examiners," or persons given other titles has varied. Section 11 of the Administrative Procedure Act designates them as examiners. The Final Report of the Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) refers to them variously as hearing officers and hearing commissioners. The Draft Report, supra note 2, refers ordinarily to hearing officers but occasionally to hearing examiners. A still greater variety of titles prevails among the several agencies which employ Section 11 examiners. Id. at C-1-C-34.

\(^5\) Draft Report, supra note 2, 6-17; Lloyd D. Musolf, Federal Examiners and the Conflict of Law and Administration 35-46 (1952).


\(^7\) Good faith pursuit of this goal involves acceptance, for the purpose in hand, of the legislative ends which the agencies are established to serve. See C. A. Miller, speaking in behalf of the bill which became the Federal Administrative Procedure Act at a Public Forum of the Federal Bar Association, March 30, 1945, 12 J.D.C. Bar Ass'n 361, 367 (1945): "There is a very distinct difference between urging needed reforms of administrative procedure and urging procedures which will hamstring the government." Indications that those who have taken strong positions on problems of administrative procedure have sometimes been motivated by ulterior considerations do not detract from the need for as objective an
For this purpose procedural safeguards and organizational changes have been advocated and adopted. The reconciliation of these measures with the requirements of administrative effectiveness is the fundamental requirement in solving many specific problems. It underlies the solution to the hearing officer problem.

The movement for further reform has centered upon greater "independence" of hearing officers as an immediate goal. The thought behind this proposal derives mainly from the conclusion of the Attorney General's Committee on Administrative Procedure in 1941 that greater authority and independence of status for hearing officers should be sought. This Conclusion became the basis of several of the provisions of the Administrative Procedure Act. Failure to attain, in certain respects, the objective of "independence" as it was formulated, albeit not too clearly, by sponsors of the Act, accompanied by other deficiencies in the operation of Section 11, has produced the current demands for remedial action. These demands are sometimes supported by reference to the approach as possible. Cf. Final Report, Att'y Gen. Comm. Ad. Proc., Sen. Doc. No. 8, 77th Cong., 1st Sess. 1 (1941).


9 The Senate and House committee reports recommending passage of the McCarran-Sumners bill which became the Administrative Procedure Act characterize the tenure and compensation provisions of Section 11 as "designed to make examiners largely independent." Legislative History of the Administrative Procedure Act, supra note 6, at 215, 280. The Senate report further states that "The purpose of this section is to render examiners secure in their tenure and compensation." Id. at 215. Elsewhere in the same report the bill is said to provide for "a special class of semi-independent subordinate hearing officers." Id. at 192. In a later article and letter to the Chairman of the Civil Service Commission the chief Senatorial sponsor of the Act attributed to it the design "to make examiners a separate and independent corps of hearing officers worthy of judicial traditions" and to make them, "[o]n paper at least . . . very nearly the equivalent of judges, albeit operating within the federal system of administrative justice." Hon. Pat McCarran, “Three Years of the Federal Administrative Procedure Act—A Study in Legislation,” 38 Geo. L.J. 575, 582-583 (1950); Sen. Doc. No. 82, 82d Cong., 1st Sess. (1951). In Senator McCarran's opinion the design of the Act in this regard had not been realized and additional legislation might become necessary. Ibid. Later be introduced S. 1708, 83d Cong., supra note 3, the "basic objective" of which, according to the committee which recommended its passage by the Senate, was "to achieve a completely independent corps of hearing examiners." Sen. Rep. No. 2199, 83d Cong., supra note 3. In the Supreme Court's interpretation of the present Act, it is designed to give effect to the conclusion of the Attorney General's Committee on Administrative Procedure that "Creation of independent hearing commissioners insulated from all phases of a case other than hearing and deciding will . . . go far toward solving this problem [of commingled functions of investigation, advocacy, and deciding] at the level of the initial hearing provided the proper safeguards are established to assure the insulation." Wong Yang Sung v. McGrath, 339 U.S. 33, 44 (1950).

10 Reports, "Appointment and Status of Federal Hearing Officers," supra note 2, passim.

11 Supra note 3.
analogy of the judiciary,\textsuperscript{12} giving evidence of a belief that hearing officer independence should approximate that of judges.\textsuperscript{13}

As a basis for dealing with the present hearing officer problem, it is important to consider realistically the position occupied by these officers, including the extent to which it resembles that of the judge, and its relation to the proper functioning of the agencies the hearing officers serve.

II. THE POSITION OF THE HEARING OFFICER

Like trial judges, hearing officers in formal administrative proceedings\textsuperscript{14} preside at hearings where evidence is introduced and arguments are made and on the basis of which conclusions of fact and of law will be reached. There are, however, important aspects of the judge's position

\textsuperscript{12} Both S. 1708 and H.R. 9035, supra note 3, specifically provide that hearing officers shall be “administrative judges.” The Federal Trial Examiners' Conference from the beginning took the view that hearing officers should be regarded as “an administrative judiciary made up of men of the highest obtainable judicial caliber, with full independence of decisional action, and the maximum of security in tenure and compensation.” J. Earl Cox, “Resume of Hearing Examiner Conference Activities,” 19 I.C.C. Practitioners’ J. 974 (1952). The Conference, however, did not endorse Presidential appointment of hearing officers. Transcript of Hearings, Comm. on Hearing Officers, Pres. Conf. Ad. Proc. 989-1001 (1954) (testimony of Everett F. Haycraft, chairman of the Examiners' Conference). Of the 104 lawyers and law teachers who expressed their views to the Committee and whose recommendations are summarized in Appendices H and I of the Draft Report of four members of the Committee, supra note 2, 15 definitely invoked the analogy of the judiciary which, according to four members of the Committee, was “constantly made” by those who expressed their views. Id. at 3. The Attorney General's Committee on Administrative Procedure may have initiated comparisons of hearing officers to judges by its statement that “In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court.” Final Report, supra note 7, at 51.

\textsuperscript{13} “We believe that the hearing officer should be as independent and inaccessible in the matter being heard as an upright judge would be in hearing a controversy in a court of law.” Statement of Sylvester C. Smith, Jr., chairman of the Spec. Comm., on Ad. Law, to the House of Delegates of the American Bar Association, 69 A.B.A. Rep. 439 (1944).

\textsuperscript{14} Formal administrative proceedings, as the expression is here used, means proceedings leading to action which some governing law requires to be based on the record of a hearing. The proceedings may be either rule-making or adjudication as defined in Section 2 of the Fed. Ad. Proc. Act, 60 Stat. 237 (1946), 5 U.S.C. § 1001. Sections 4 and 5 of that Act require that the provisions of Sections 7 and 8, with certain additions which Section 5 attaches to adjudication, shall be observed in proceedings of this kind. These requirements are of principal importance in determining the role which hearing officers play. Some differentiation is made between rule-making and adjudication in this regard, and proceedings on applications for initial licenses, although denominated adjudication, are assimilated to rule-making in certain particulars for this purpose. These provisions of the Act are discussed infra at p. 291-292. They have been supplemented and to some extent replaced by stricter provisions, applicable to two leading agencies, by the Labor-Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. § 151 et seq. (1952), especially 29 U.S.C. § 154 as amended, and the Communications Act amendments of 1952, 66 Stat. 711, 47 U.S.C. § 153 et seq., especially 47 U.S.C. § 409 as amended.
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which are not applicable to that of the hearing officer. The judge is master of the tribunal in which he sits, subject to understood principles and governing statutes and, increasingly, to rules laid down by a superior court. When the decision is by a jury, the responsibility for instructing the jury and for controlling the processes by which evidence reaches it is the judge's. When the judge makes the decision, it is his personal product, based on the record and the applicable law and aided, as regards relevant general information, by what the judge brings to his task or is able to acquire by permissive inquiry of his own. If the judge remains within his proper province, there will be only such determinations of policy involved in his action as are "interstitial" to determinations of law, except where, as in disposing of an offender or instructing a guardian or receiver, he is required to exercise discretion. When he exercises such an avowed discretion, the judge may take account of data which have not been adduced at the trial.

The administrative hearing officer, by constrast, is traditionally not master of the tribunal in which he sits, but acts in place of an agency that controls it. The agency, rather than he, has authority to direct the proceedings before him within limits imposed by applicable statutes. The Federal Administrative Procedure Act confers certain powers in the hearing upon him and assures in cases of adjudication as defined in the Act, except initial licensing, that he shall render either an initial decision or a recommended decision; but the agency remains the repository of resid-

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16 Judicial notice is well understood to embrace general knowledge which the judge acquires by resort to recognized sources of information, as well as similar knowledge which he already possesses. Model Code of Evidence, Rule 802 (1942). He may, upon occasion and within proper limits, consult individuals who possess knowledge he needs and can properly use. Davis, Administrative Law 487-497 (1951), citing Frank, J., dissenting, in Triangle Publications v. Rohrlich, 167 F.2d 969, 976 (2d Cir. 1948), and the practice of Lord Mansfield. See 12 Holdsworth, A History of English Law 526 (1938).

17 See generally Edward H. Levi, An Introduction to Legal Reasoning (1949). Few legal rules are mathematically precise. The process of determining whether situations not previously covered do or do not come within particular rules possesses both logical and policy aspects.

18 The practice of using such data in sentencing offenders is reviewed and discussed in the opinion of the Court in Williams v. New York, 337 U.S. 241 (1949).

19 Section 7(b) of the Act provides that, subject to the published rules of the agency and within its powers, the hearing officer shall have authority to:

(1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommended decisions in conformity with Section 8(a), and (9) take any other action authorized by agency rule consistent with this Act.


19 Section 8(a) provides that the hearing officer "shall initially decide the case or the
employment of the hearing officer to receive the evidence and to determine the facts.

The decision authority for both hearing and decision. That decision is one of the means by which the agency discharges its responsibilities, and the hearing officer must therefore be its "alter ego" in fulfilling his role. Thus, his position is in some ways more analogous to that of a special master or commissioner of a court, who ordinarily possesses no independent authority, than to that of a judge. If he is to have greater independence than a special master, the reasons for it must lie in specific considerations applicable to the hearing officer's particular function. Those reasons and the considerations that suggest limits to this independence lie, as would be expected, in the nature of administrative agencies and of the work they are called upon to do. Here, rather than in any analogies to non-administrative functionaries, must be found the answer to the hearing officer problem.

The report of the Attorney General's Committee on Administrative Procedure has set forth the characteristics of federal administrative agencies and the reasons which have led to their establishment. Briefly stated, the matter comes down to this: The satisfactory attainment of legislatively-prescribed results under numerous statutes, especially in modern times, has required the establishment of large, specialized organizations to administer these statutes. These organizations are capable of exercising initiative in enforcement; of giving continuous, coordinated attention to the matters with which they are concerned; and of exercising an informed discretion when necessary. Many types of matters are handled by these organizations or agencies. Some of them, such as the dis-

agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision;" but:

[w]henever the agency makes the initial decision without having presided at the reception of the evidence, such officer shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.


20 Musolf, op. cit. supra note 5, 52-56. Such was the conception which the ICC had of its corps of examiners, the first in the Federal Government. See Hearings before Committee on the Judiciary on S. 674, 675 and 918, 77th Cong., 1st Sess. 445-446 (1941) (testimony of Commissioner Clyde B. Aitchison). See also Final Report, supra, note 7, at 24.

21 Rule 53 of the Fed. R. Civ. Proc., which embodies a modern conception of the duties of a special master, authorizes the court's order of reference to specify or limit his powers in the full discretion of the judge. When the judge does not limit his powers, the master's authority at the hearing is similar to that of a hearing officer under the Fed. Ad. Proc. Act; and if he is authorized to make findings of fact without limitation of their effect by the order of reference, they are to be accepted by the court "unless clearly erroneous." That the order may deprive his findings of weight, see Kycoga Land Co. v. Kentucky River Coal Corp., 110 F.2d 894 (6th Cir. 1940).

22 Final Report, supra note 7, c. I.
position of numerous small claims for monetary benefits, require primarily
speed, accuracy, and uniformity of handling.\textsuperscript{23} Others, such as fixation
of utility rates and licensing of enterprises on the basis of public con-
venience and necessity, call for careful weighing of economic and social
considerations, including difficult considerations of policy.\textsuperscript{24} Still others,
such as the preservation of safety at sea, turn largely on technological
factors.\textsuperscript{25}

When the hearing officer conducts a proceeding within an agency, he is
operating in the context of the agency's entire task. His conduct of the
proceeding and the action to which it leads form part of the flow of
agency business and will enhance or diminish the efficiency and wisdom
with which the agency discharges its functions. His actions, like those of
agency personnel who gather needed information, who determine what
matters to take up and what to postpone or ignore, or who dispose infor-
mally of a host of issues that never proceed to a hearing, must somehow
be guided by the agency's store of knowledge and its formulated policy.
The hearing officer must, at the same time, be in a position to contribute
personally as much as possible to the disposition of the case before him
and of others that may turn upon it.

Because the organization he serves is large, and because the dignity
and prestige of the presiding officer are essential to the satisfactory con-
duct of a hearing, the hearing officer must have adequate authority, sub-
ject to interlocutory appeals in some situations, to dispose of procedural
issues that arise, such as the admissibility of evidence, postponement of
sessions, and requests for intervention by additional parties. Conceivably
the special master or commissioner of a court might refer such matters to
the judge without too much loss of time or failure of understanding of the
situation presented.\textsuperscript{26} At most, the judge would be preoccupied with a
trial or with a small number of other cases which he had under considera-
tion. In an administrative agency, by contrast, the matter may have to

\textsuperscript{23} The Administrator of Social Security in the Department of Health, Education, and
Welfare, the Railroad Retirement Board, and the Veterans Administration handle matters of
this type.

\textsuperscript{24} The ICC, FPC, FCC, CAB and Packers and Stockyards Div. of the Dep't of Agr. deal
with issues of this sort.

\textsuperscript{25} The U.S. Coast Guard deals with marine safety. Similar functions with respect to safety
are performed by the agencies that regulate transportation.

\textsuperscript{26} In reality, the judicial framework is such that a special master would be unlikely to seek
aid from the judge except with the knowledge of the parties and opportunity for them to
participate in proceedings before the judge. "That courts may appoint auditors, investigators,
and examiners has never been known to and does not necessarily affect in the slightest degree
the rights of the parties to judicial hearings." In re Utilities Power & Light Corp., 90 F.2d
798, 801 (7th Cir. 1937).
be referred to supervisors in another city if the hearing is in the "field," and the officials to whom it goes may be absorbed in numerous other matters and may have no ready means of comprehending the problem presented. Delay and unwise action may result. This is one of the reasons why the powers contained in Section 7 (b) of the Administrative Procedure Act have been bestowed.

The fact that at least some of the other personnel of an agency have an interest—even though only an official one—in the outcome of proceedings is another reason why it is necessary that the hearing officer have sufficient independence to secure objectivity in his rulings and conclusions. In this connection account must be taken of what is commonly called the combination of prosecuting and judging in the same agency. An agency, however, "prosecutes" in the criminal-law sense only if it files charges and pursues them for the purpose of securing punishment. In many proceedings it does neither; and in relatively few where it files charges is punishment involved, even if license revocation and deportation of aliens are deemed to fall in this category. More commonly, license issuance, the level of rates to be charged by a utility, the content of a regulation, or the propriety and terms of a cease-and-desist order are at stake. Nevertheless agency personnel who institute a proceeding, oppose an application, or present the agency's position at a hearing may be psychologically committed to the point of view they have adopted. In any event, the agency heads ordinarily are officially responsible for the position taken by the agency in a proceeding before a hearing officer; and other agency personnel may be committed, or may appear to be committed, to the same position. To "separate" the hearing officer from possible agency pressure so as to secure objective consideration of the positions taken by other parties appearing before him seems essential to a "fair hearing."

At the same time, to require an agency to submit its cause to a hearing officer unarmed with the knowledge it possesses through its expert personnel and not charged by statute, as are the agency heads, with responsibility for effectuating legislatively-prescribed ends, may weaken agency effectiveness unless means are provided for integrating the hearing officer's performance into that of the agency. The agency's concern for efficient discharge of its business, its expert knowledge pertinent to the proceeding, and its established criteria for judging the issues must be

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27 Supra note 18.
29 Frequently the agency is not the moving party and occupies the position of a tribunal which is set in motion by others.
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communicated to him. The situation requires that this need be reconciled with the need for hearing-officer "independence."

The traditional methods of both courts and administrative agencies are relevant to the situation. The question arises whether the methods traditional to the judicial process, of offering information in the form of testimony and presenting legal and policy considerations to the hearing by means of enacted rules and open argument, do not suffice. If they do, truly judicial independence of the hearing officer from the agency is appropriate; for the agency has all of these means of communication available to it. Its agents may offer testimony and may argue orally and file briefs in the proceeding. The hearing officer will be bound by any regulations the agency may issue under its statutory authority. 30 His decision, also, will be subject to correction by the agency heads upon review. What more is needed, it may be asked?

The answer lies, in the eyes of some, in the "institutional method" of arriving at decisions, which is stated to be characteristic of administrative agencies and into which the hearing officer can be fitted. The "institutional method," it has been said, involves "the cooperative effort of a number of officers with the agency head," bringing to bear the "cumulative efforts of specialized officers" and producing "a series of automatic internal checks" by each officer upon the data and ideas the others contribute. 31 In this way a staff of engineers, lawyers, economists, accountants, and other specialists can work together in reaching conclusions. The safeguards to persons who have interests at stake or who are otherwise affected by the decisions an agency reaches in this manner lie in the professional training and responsibility of the officers involved, in cross-checking among them, and in the responsibility of the agency heads who coordinate the entire operation, decide finally upon the result, and must answer for all that transpires.

30 Even if the agency lacks power to issue regulations which have statutory force, it can certainly promulgate binding instructions to its personnel, including hearing officers. The governing statutes usually authorize the issuance of regulations necessary for their administration, and the power to do so is in any event conferred by the over-all statute which provides that "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." Rev. Stat. § 161 (1875), 5 U.S.C. § 22 (1952). Statements of law or policy in agency opinions operate with almost equal authority thereafter, according to general testimony. See Davis, Administrative Law 545-547 (1951); Transcript of Hearings, supra note 12, at 231 (testimony of Examiner Charles E. Morgan), 881 (testimony of Rufus G. Poole). Such adherence to agency precedent is not inconsistent with an occasional considered recommendation by a hearing officer that an applicable precedent not be followed. See, e.g., id. at 1178 (testimony of Odell Kominers).

Outside of government, the preponderance of human affairs calling for more than individual action is conducted by a consultative method, with or without professional participation. Business decisions are reached, human ailments are diagnosed, and club and church problems are settled in this manner. To only a slight extent are the methods of adjudication applied, as they may be, for example, in the expulsion of an individual from an organization or the dismissal of an employee from his job. In government too, foreign policy, military affairs, and the management of public enterprises and property go forward in the same way. Often vital interests of people are at stake in what transpires, as they are, for instance, in a decision whether to discontinue or move a business or where to locate a park or highway or how much to charge for a service; yet it is rarely suggested that the "hearing" of interested persons be attempted in connection with such matters, or, if it is, that more than an interview be accorded. Arguably, the same considerations as account for the acceptance of "institutional" methods in these contexts should point to their possible use in licensing, rate fixing, and kindred operations\(^3\)---for which, indeed, they were thought to suffice until relatively recently.\(^3\)

The use of formal hearings before hearing officers in agencies equipped to employ institutional methods need not result in displacing those methods altogether. Traditionally it has not done so, for the participation of agency staff members in the decisional process has continued alongside of the hearing, through advice to the hearing officer or to other officials who have rendered decisions. Since the end-product of such a proceeding must be based upon the record of the hearing, however, it is necessary that sufficient data to sustain that product be introduced as

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\(^{32}\) See Gellhorn, Federal Administrative Proceedings 71-74 (1941).

\(^{33}\) Hearings akin to judicial trials were a rarity in the administration of statutes by executive agencies until comparatively recently and are still the exception in numerous traditional areas of government, such as state and local licensing and property-tax collection. Extension of more formal procedures has taken place through a combination of administrative, legislative, and judicial action. By this means, for example, the careful processes incident to the regulation of public utilities have been evolved; yet as recently as 1933 three dissenting Justices of the Supreme Court of the United States thought that elimination of a grade crossing at great expense to a railroad could constitutionally be ordered without opportunity for a full hearing on the merits. Southern Railway Co. v. Virginia, 290 U.S. 190 (1933). Starting with no express statutory provision for a hearing to be accorded an alien and with a provision that the administrative determination should be final, the courts in habeas corpus actions succeeded in imposing procedural requirements which have now borne fruit in the hearings provisions contained in Sections 101(b)(4) and 242 of the Immigration and Nationality Act of 1952, 66 Stat. 171, 208, 8 U.S.C. §§ 1101(b)(4), 1252. Hecht v. Monaghan, 307 N.Y. 461, 121 N.E.2d 421 (1954), affords a recent example of extension of formal methods into an area of administration where they were previously unknown. As the Attorney General's Committee on Administrative Procedure remarked regarding one aspect of the subject, "the administrative process, far from being an encroachment upon the rule of law, is an extension of it." Final Report, supra note 7, at 12.
evidence; and it is clearly improper to withhold from the hearing any of
the evidence that is to be used, since the checks which the testimonial
process affords are intended to be applied. Agency staff members must
appear as witnesses and let their testimony be weighed against that of
others. To this extent the process of informal interchange among experts
gives way. Insofar, moreover, as the viewpoints of agency personnel are
brought to bear in written or oral argument at the hearing, the judicial
process substitutes for the institutional. The "record" of a hearing or
trial, however, does not conventionally include the argument and it is not
clear merely on the basis of the requirement that the decision be grounded
in the record that additional discussion may not take place *in camera*. In
any event, even a court may take judicial notice of pertinent general
knowledge and ought to take cognizance of applicable law, whether or
not it has been brought out at the hearings. So may a hearing officer; and
in the setting of an administrative agency he might be expected to seek
advice in these matters from qualified staff members.

The Administrative Procedure Act, in addition to conferring certain
authority upon the hearing officer during the proceeding before him,\(^\text{34}\) detracts from the institutional method of reaching decisions to the extent
of forbidding the hearing officer in any adjudication, except initial licens-
ing, to consult any person or party on any fact in issue except upon notice
and opportunity for all parties to participate\(^\text{35}\) and by providing that
agency personnel engaged in the performance of investigative or prosecut-
ing functions in any such case shall not render advice in that or a factu-
ally related case.\(^\text{36}\) The further requirement as to adjudication, except
initial licensing, that the hearing officer prepare either an initial decision,
subject to review, or a recommended decision\(^\text{37}\) tends to personalize his
role. The act provides further that hearing officers shall not be responsi-
ble to or subject to the supervision or direction of agency personnel en-
gaged in the performance of investigative or prosecuting functions;\(^\text{38}\) it
provides for the appointment of hearing officers "by and for each agency,
subject to the civil-service and other laws to the extent not inconsistent
with this Act;" it requires that hearing officers shall be assigned to cases
in rotation so far as practicable and shall perform no duties inconsistent
with their duties and responsibilities as examiners; it renders hearing
officers "removable by the agency in which they are employed only for
good cause established and determined by the Civil Service Commission

\(^{34}\) Supra note 18.

\(^{35}\) Section 5(c) of the Act, 60 Stat. 239 (1946), 5 U.S.C. § 1004(c) (1952).

\(^{36}\) Ibid.

\(^{37}\) Supra note 19.

\(^{38}\) Section 5(c), supra note 35.
... after opportunity for hearing and upon the record thereof;" and it provides that hearing officers "shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act," except that agency efficiency ratings shall not be given.\(^{39}\)

Such is the extent of the present statutory separation of hearing officers from the institutional context of their agencies; such is the statutory "Independence" conferred upon them. The problem to be solved is whether changes should be made in these provisions or their administration in order to secure greater objectivity and fairness of agency action.

### III. THE QUEST FOR OBJECTIVITY AND PROFICIENCY

The proponents of administrative procedure reform have tended to justify their proposals by reference to theoretical considerations. The separation of governmental powers,\(^ {40}\) the traditional rule of law,\(^ {41}\) and more recently the methods of the judiciary have served as norms against which to measure the performance of administrative agencies and by which to fashion measures of improvement. Yet men seldom are moved by theories of government except in response to needs which these theories serve;\(^ {42}\) and the effort to improve administrative procedure does not provide an exception. Underlying it has been a deep-felt sense of need to check possible injustice to private interests on the part of government agencies charged with carrying out statutory policies.\(^ {43}\)

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\(^{39}\) Sec. 11, 60 Stat. 244 (1946), 5 U.S.C. § 1010 (1952). Section 11 reads in pertinent part: Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission ... after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act. ... Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpoena witnesses or records, and pay witness fees as established for the United States courts.


\(^{42}\) Illustrative is the shifting adherence all during United States history of political parties, geographical areas, and economic groups to the doctrines of, on the one hand, states' rights and, on the other hand, strong national government.

\(^{43}\) The combination of "prosecuting" and "judging" functions is often attributed to such agencies. More accurately (see supra p. 288), Chief Justice Groner referred at one point to the need of separating the function of "enforcing a regulatory subject" from that of "passing judgment upon the alleged violation thereof." Transcript of Hearings, supra note 12, at 1363.
such agencies may become careless of private rights or disregardful of them is widespread and persistent. The theory of separation of powers is not without application to administrative action today; but it is of little aid in devising means to secure fair determinations by administrative agencies. Retention by the legislature of its essential function of prescribing the basic law, which the separation of powers requires, still allows such broad discretion to be conferred upon administrators in specific matters as to leave open the possibility of arbitrary action. Judicial review of administrative action, on the other hand, seldom extends to the merits of what has been done. Something more is needed if objectivity and fairness in administrative determinations are to be formally secured.

The institutional method which administrative agencies can employ and the expertness of much of their personnel provide certain protections of their own against abuse, as has been pointed out above. Yet experts, like the rest of us, all too often have feet of clay; and institutional methods, operating in camera, are or appear to be susceptible to manipulation. The philosophy of decency in government insists that effective means should be provided in some manner for bringing administrative operations into the open and for securing objectivity of decisions when vital private interests are at stake. This practical need for a check,

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44 The Supreme Court's rejection of the claim of inherent Presidential power to seize control of an industry, at least when the nation is not formally at war, affords a recent illustration. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). See also Wong Wing v. United States, 163 U.S. 228 (1896), holding that the infliction of infamous punishment for an offense must be effected through the judiciary.

45 Mr. Justice Roberts' demonstration of the pliability of a typical statutory "standard" governing an economic regulatory power—in the particular case, the power to set maximum prices—is logically convincing, even if it does not settle the constitutional issue presented. Dissenting opinion, Yakus v. United States, 321 U.S. 414, 448 (1944). The fiction that a verbal standard is necessary was virtually dropped in Lichter v. United States, 334 U.S. 742 (1948). That there are nevertheless standards and norms, derived from our entire culture, which control the administrator exercising broad powers, see Wyzanski, "The Trend of the Law and Its Impact on Legal Education," 57 Harv. L. Rev. 558, 560-561 (1944), reprinted in Gellhorn and Byse, Administrative Law, Cases and Comments 55 (1954), Cf. Sharfman, The Interstate Commerce Commission, Part I at 7 (1931).

46 The practical and constitutional limitations upon the feasible scope of judicial review of administrative action were effectively summarized in 1941 by Arthur T. Vanderbilt, 27 A.B.A.J. 209-210 (1941). Cf. the same authority's objections to the resulting state of affairs, recently expressed in Vanderbilt, The Doctrine of the Separation of Powers and Its Present-Day Significance 129-133 (1953).

47 The classical statement of the nature of an administrative agency, which frequently causes it not to satisfy this demand, is that of Dean G. Acheson, Chairman, Att'y Gen. Comm. Ad. Proc.: [T]he agency is one great obscure organization with which the citizen has to deal. It is absolutely amorphous. He pokes it in one place and it comes out another. No one seems to have specific authority. There is someone called the commission, the authority; a
rather than objections to the combination of theoretically separate functions, is the chief basis today of demands for reform. Opportunity for hearing provides the obvious safeguard; but it succeeds only to the extent that the ensuing decisions actually rest upon the hearing and register objective judgments.

The independent regulatory agency employing the hearing device and responsible directly to Congress is itself a device for securing object-

—metaphysical omniscient brooding thing which sort of floats around in the air and is not a human being. That is what is baffling.

Hearings on S. 674, 675, and 918 (1941), supra note 20, at p. 807.

48 Some indication that this is so is present in the procedural provisions of the Labor-Management Relations Act. Under that Act the "prosecuting" functions with respect to unfair labor practices have been taken from the National Labor Relations Board and vested in the General Counsel. The Board retains only the adjudicating function; yet the Act's restrictions upon consultation by hearing officers and by the Board itself in reaching decisions are more stringent than those of the Administrative Procedure Act. See infra, p. 323. However, the separation-of-functions provisions of the Labor-Management Act were an awkward compromise, as is indicated by the failure to separate the General Counsel from the Board in name as well as in fact and by inadequate provisions for the General Counsel to obtain his own subordinate personnel or for the Board to secure independent legal advice. Informal arrangements were made, with some difficulty, to overcome these deficiencies. See Davis, op. cit., supra note 30, at 411; H. Rep. No. 1852, 81st Cong., 2d Sess., at 14 (1950). In any case, distrust of the new adjudicative Board may be a carry-over from controversies under the predecessor National Labor Relations Act. There is much evidence that these controversies gave strong impetus to the entire movement for administrative procedure reform. See the agreement to this effect on the part of Senator O'Mahoney and Acting Attorney General Francis Biddle at the Hearings on S. 674, 675, and 918, supra note 20, at 1433. It is further true that the present Board and its trial examiners do not have the same need of advice from technical experts as does, for example, the Federal Communications Commission.

49 The responsibility of the independent agencies directly to Congress does not exclude a measure of responsibility to the President also. See generally Redford, Administration of National Economic Control 275-283, 286 (1952); Cole, Presidential Influence on Independent Agencies, 221 Annals 72-77 (1942); Cushman, The Independent Regulatory Commissions 225-226, 679-688 (1941); Commission on Organization of the Executive Branch of the Government (Hoover Commission), Task Force Report on Regulatory Commissions (Appendix N to the principal Report), 12-17 (1949). The annual budgets of these agencies, as of others, must clear through the Bureau of the Budget in the Executive Office of the President. Budget and Accounting Act, §§ 201, 207, 213, 42 Stat. 20, 22, 23 (1921) as amended, 31 U.S.C. §§ 11, 16, 21 (1952). The agency members are uniformly appointed by the President with the advice and consent of the Senate, for terms ranging from 5 to 14 years and overlapping in a manner which normally delays a President's appointment of a majority of the members of an agency until late in his four-year term. See Task Force Report, supra at 13. The members are removable by the President for cause or in his discretion, depending on the terms of the governing statute. See Humphrey's Executor v. United States, 295 U.S. 602 (1935). More recently, through the exercise of his power under the Reorganization Act of 1949, the President has obtained authority to designate the chairmen of all the "independent" agencies as to which he had not received this authority by statute, except the Interstate Commerce Commission. Reorganization Plans No. 8, 9, and 10 of 1950, 5 U.S.C. pp. 161-163 (1952). This change was recommended in the Task Force Report, supra at 31-33, in the interest of greater efficiency and improved coordination with the Chief Executive. Cf. Cus-
ity in administrative determinations, along with vigor and proficiency. Such an agency is designed to exclude political or economic influences such as might otherwise determine its decisions. In place of these bases of decision the agency is expected to substitute its resources of knowledge and expert judgment, plus the data and arguments supplied in negotiations or adduced at hearings by persons with whom it deals. Such a body’s operations, however, are less subject to surveillance from outside than those of a departmental agency which can be called to account by the chief executive. Hence if abuses creep in, they may go uncorrected. All specialized agencies, moreover, whether independent or departmental, develop stores of information and methods of operation which because of their detailed and technical character are difficult for outsiders to comprehend or comment upon. Therefore, insofar as safeguards upon the use of such an agency’s methods are required they must be specially devised.

50 Expertness and vigor were more stressed when the Interstate Commerce Commission was established than the objectivity to which its independence might be expected to contribute. Sharfman, The Interstate Commerce Commission, Part I, 286-287 (1931). Quasi-judicial detachment was sought as an accompanying virtue in the Federal Trade Commission and later agencies. Henderson, The Federal Trade Commission 19 (1924); Cushman, op. cit. supra note 49, at 177-181, 188-190, 305, 341. Objectivity has been especially stressed in later discussions of the quality of an independent agency’s work and of the conditions necessary to satisfactory performance. Board of Investigation and Research, Report on Practices and Procedures of Governmental Control, H. R. Doc. No. 678, 78th Cong. 2d Sess. 21 (1944); Sharfman, op. cit. supra, Part IV, 257-274 (1937); Robinson, “The Hoch-Smith Resolution and the Interstate Commerce Commission,” 42 Harv. L. Rev. 610 (1929); Hoover Commission Task Force Report, supra note 49, at 28. This objectivity may be impaired by undesirable Congressional influence as an accompaniment to proper legislative oversight, provision of funds, and Senatorial scrutiny of nominees for agency membership, taking the form of either unofficial pressure from legislators, restriction of appropriations, or (although rarely) formal directives which invade agency discretion without affording a genuine guide to action. See Comm. on Ad. Law, Ass’n of the Bar of the City of N.Y., “Report on Congressional Oversight of Administrative Agencies,” 5 The Record 11 (1950); Robinson op. cit. supra; Mansfield, “The Hoch-Smith Resolution and the Consideration of Commercial Conditions in Rate Fixing,” 16 Cornell L.Q. 339 (1931); Task Force Report, supra, at 37-38.

The independent regulatory agencies are sometimes charged with deficiencies, alleged to be characteristic, which impair the advantages these agencies are supposed to confer and call for remedy. To some extent, these agencies are criticized for failing to hold the balance among the interests they affect, and for yielding to considerations which are not fully disclosed and are only remotely amenable to evidence or argument. The independent agencies have also been criticized for inadequacy to their tasks and lack of that very vigor and specialized proficiency which were among the reasons for their creation. Administrative delays have also drawn criticism. According to some observers, the judicial process does not suffer by comparison with the methods of the independent agencies when judged by end-results.

An oft-repeated charge against the NLRB in its early years was that it was unduly favorable to unions. Sen. Rep. No. 105, 80th Cong., 1st Sess. 2 (1946); H. Rep. No. 3109, 76th Cong., 3d Sess. 149 (1941). At present the Board is sometimes accused of the opposite tendency. See N.Y. Times, Nov. 28, 1954, § 1, p. 74. The CAB, in the midst of a bitter struggle between certificated air transport carriers and non-scheduled operators, has been regarded as tender toward the former. See Jaffe, "The Effective Limits of the Regulatory Process: A Reevaluation," 67 Harv. L. Rev. 1105, 1110-1113, 1121-1123 (1954); Durham, "How Not to Regulate Air Transportation," 15 Law & Contemp. Prob. 105 (1950). The FCC is similarly looked upon by some as favoring large as against small interests in radio and television. Weaver and Cooley, "Competition in the Broadcasting of Ideas and Entertainment: Shall Radio Take Over Television," 101 U. Pa. L. Rev. 721 (1953). Even the long-revered ICC has not escaped condemnation as "railroad minded." Jaffe, op. cit. supra, at 1108-1109, and works cited. To an uncertain extent, obviously, allegations hostile to the agencies stem from the natural bitterness of disappointed interests. Inevitably there will be such interests in relation to any contested matter. The belief that there is tenderness toward established interests, however, need not rest on charges of sinister influence or corruption by persons involved. It may be enough, for example, that naturally, in the long run and by and large, agency members "will be responsive to plans for making business life more orderly and secure through integration and price regulation. Unplanned and ruthless commercial rivalry will be distasteful to them." Schwartz, "Legal Restriction of Competition in the Regulated Industries, An Abdication of Judicial Responsibility," 67 Harv. L. Rev. 436, 474 (1954). Jaffe, op. cit. supra, at 1107-1129, 1134, identifies a variety of reasons for so-called "industry mindedness" on the part of agency members, including the tendency identified by Schwartz and a sense of hesitancy to curb enterprise drastically where the financial risks continue to rest upon regulated interests. See generally Paul H. Douglas, Ethics in Government 33-35 (1952).


Schwartz, op. cit. supra, note 52, at 458-463, 471-475; Transcript of Hearings, supra,
It is natural to consider whether improvement in the over-all performance of the agencies might ensue if somehow an able, fair-minded official, removed from pressures and capable of employing judicial methods to advantage, could be given a commanding role in the administrative process, thus serving as a check upon agency deficiencies. Attention naturally focuses on the hearing officer in this connection. Hence, to some extent, advocacy of increased effectiveness in the service of the public interest reinforces the demand from private interests for better treatment in directing attention to the hearing officer problem. That problem turns to a considerable extent on the provisions of Section 11 of the Administrative Procedure Act, to which so much attention has been given of late, and on the kind of administration these provisions receive.

IV. HEARING OFFICER PERSONNEL PROBLEMS

The interpretation of certain provisions of Section 11 of the Administrative Procedure Act which are summarized above has been settled by the decision of the Supreme Court in Ramspeck v. Federal Trial Examiners Conference, which sustained the applicable regulations of the Civil Service Commission in all of the respects in which they had been attacked. However, the questions of personnel policy which underlay note 12, 1066, 1097 (testimony of Honorable Douglas L. Edmonds); Hearings before the House Committee on Interstate and Foreign Commerce on S. 658, 82d Cong., 1st Sess. 84, 194-195 (1951) (testimony of F.C.C. Commissioner Robert F. Jones); Rosenblum v. F T C, 214 F.2d 338 (2d Cir. 1954) (dissenting opinion of Clark, J.). See also Adams v. Railroad Retirement Board, 214 F.2d 534 (9th Cir. 1954).

If... any case can be taken from the hearing officer at the will of the [Federal Communications] Commission, immediately upon the conclusion of the submission of evidence... [I]n difficult cases and those fraught with political implications temptation will exist to relieve the hearing officer of making determinations in such cases and the agency through an anonymous staff member can develop findings enforcing the agency's predilections... Under such circumstances the initial factual finding comes out, not as the independent finding of the hearing officer, but as a part of the proposed findings of the Commission.

Mr. Bingham did not explain why the Commission should be expected to have predilections of such a nature that they should be excluded from the proposed findings in a proceeding before it; but the agency's inability to demonstrate in its decisions that it was adhering to consistent policies may have stimulated suspicion. See Warner, "The Administrative Process of the Federal Communications Commission," 19 So. Calif. L. Rev. 191, 312 (1946). That the same inability continues see Rep. Comm. on Communications, Ad. Law Sec., American Bar Ass'n (mimeographed, 1954).

56 Hearings on S. 674, 675, and 918, supra note 20, 1125-1126 (testimony of Herbert M. Bingham):

57 Supra note 39.

58 345 U.S. 128 (1953).

59 The pervading issue was whether the purpose of the Administrative Procedure Act to free hearing officers more largely from agency influence should, in the disputed particulars, prevail over a more literal interpretation of Section 11's subjection of hearing officer personnel administration "to the civil service and other laws to the extent not inconsistent with this Act" and its provision for the compensation of hearing officers according to the Classification
the legal controversy, together with other questions that have been raised, remain for solution. These questions include: (1) the appropriate salary level for hearing officers; (2) the desirability of having more than one grade of position in an agency; (3) the scope to be allowed to agency discretion in determining the means by which vacant positions are to be filled; (4) the proper methods of assigning hearing officers to cases; and (5) the desirability of permitting reduction-in-force procedures to apply to hearing officers.

A. Hearing Officer Salaries

The President's Conference on Administrative Procedure recently declined to recommend the establishment of a single grade of hearing-officer position in each agency as advocated unanimously by its eight-member Committee on Hearing Officers. It adopted instead a recommendation that the Civil Service Commission continue to maintain in each agency "one or more salary grades, taking into account the diversity of the agency's functions, the desirability of minimizing the administration of promotions, and the possible utility of recruiting examiners at lower grades and increasing their compensation as, through increased experience and competence, they perform increasingly responsible work." Compensation of examiners as incumbents of positions in the higher grades of the Classification Act, with a range of annual salaries between $8300, the minimum for Grade GS-13, to $11,800, the maximum for GS-15, was recommended "until higher grades are available under the Classification Act." Four members of the Committee had recommended a range between $12,000 and $14,000 among agencies; the other four had recommended accepting the Classification Act range, subject to future increase. A suggestion to the Committee had been that hearing officers' salaries be slightly (i.e., approximately $1,000 a year) below those of agency heads; but it was also contended that from the standpoint of sound agency administration these salaries should not be above those of the principal staff officers, such as bureau heads, under the Classification Act. Three Justices dissented from the decision, which reversed the result in the District Court, 104 F. Supp. 734 (D.D.C. 1952), and the Court of Appeals, 202 F.2d 312 (D.C. Cir. 1952) (one judge dissenting). The Supreme Court's position avoids a strained construction of Section 11 except, perhaps, as to the application of reduction-in-force procedures to hearing officers. Critical comment has been divided. See 4 De Paul L. Rev. 1 (1954); 28 N.Y.U.L. Rev. 1311 (1953); [1953] U. Ill. L. Forum 467; 21 Geo. Wash. L. Rev. 38, 198 (1952); 101 U. Pa. L. Rev. 142 (1952).

60 Minutes, Thursday, October 14, 1954—Friday, October 15, 1954, p. 7 (mimeographed).


62 Recommendations on the Appointment and Status of Federal Hearing Officers (mimeographed, September 8, 1954), Recommendation No. 4.
Act. Bills introduced into the 83d Congress provided for a flat, Government-wide hearing-officer salary of $14,000 a year.

The argument that the level of hearing-officer compensation should not exceed that of the principal staff officers within a agency seems convincing, on the assumption that hearing officers will continue to function on behalf of the agencies they serve. Outstanding as the qualities they should possess are, these qualifications can hardly be said to exceed in significance or value those that should be present in certain other officials, such as those whose function it is to direct the engineering, economic, or legal aspects of an agency's work, to guide the negotiation of many determinations for each one that reaches an agency's hearing officers, or to direct the agency's presentation of all of the proceedings that reach this stage. There is honor enough and recognition enough of the hearing officers' independent contributions if their salary status rises to that on the highest staff level. More would produce an imbalance hard to defend. On this point the President's Conference seems on sound ground.

B. Grades of Hearing Officer Positions and Related Problems

The question whether there should be more than one grade of hearing officer within an agency involves several difficult considerations, such as whether formal proceedings in an agency may actually fall into several distinguishable ranges of difficulty; whether, if they do, the cases can be classified in advance so as to permit assignment to hearing officers in corresponding salary grades; whether, even so, each proceeding deserves the same grade of examiner as every other; whether a system of more than one grade can be so manipulated by an agency as to endanger the independence which the Administrative Procedure Act endeavors to secure to hearing officers; and whether the strains incident to a system of promotions from one grade to another are worth undergoing for the sake of whatever benefit may result.

The first point, whether proceedings within an agency may fall into

\[\text{Transcript of Hearings, supra note 12, 486, 520, 796.}\]
\[\text{S. 1708 and H.R. 9035, supra note 3. The salary of district court judges is now $15,000, 28 U.S.C. § 135 (1952); that of members of the regulatory commissions is the same, 63 Stat. 880-881 (1949).}\]
\[\text{The question here is independent of the question whether the hearing officers should be employed by these agencies or by a central administration, which is discussed infra at p. 319. In either event they would function on behalf of agency heads in the cases they heard. An administrative court, before which agencies were required to present their cases for initial decision, would establish a contrasting arrangement not here involved.}\]
\[\text{There seems to have been no dissent during the intervening years from the view expressed by the Attorney General's Committee that "These officials should be men of ability and prestige, and should have a tenure and salary which will give assurance of independence of judgment." Op. cit. supra note 7, at 46.}\]
different categories of difficulty, necessarily works out differently in the various agencies. Agencies which deal with several distinct kinds of subject matter may develop proceedings with correspondingly different grades of difficulty, such as the Civil Aeronautics Board’s safety and economic proceedings.\textsuperscript{67} Licensing, rate, and cease-and-desist proceedings involving the same enterprises, obviously differ according to the complexity of the issues presented, the number of parties involved, and the character of determinations to be made. It seems probable that on the whole, as an experienced commentator concluded, proceedings in these categories within a particular area of subject matter are likely to present only two separable degrees of difficulty—the relatively simple, involving one or a few issues with a small number of parties, and the relatively difficult, involving either many issues or many parties or both.\textsuperscript{68} Whether the cases possessing each degree of difficulty can be recognized in a preliminary stage, at the time hearing officers are assigned to them, is another question which varies from agency to agency. Certificate of convenience and necessity cases probably can be separated at that stage into simple local and complex regional proceedings. Rate cases may be similarly classifiable, and trade-practice cease-and-desist proceedings may be grouped according to the scope of the market operations involved. Interventions in even an apparently simple proceeding may be unexpectedly numerous, however, and a few clear issues in a case involving only a small number of parties may turn out to be forbiddingly technical.\textsuperscript{69} In practice an agency may prefer not to make the effort to distinguish among cases in advance. Partly as a result, there is a strong tendency toward uniformity in the work assigned to hearing officers within the various agencies. Consequently thirteen agencies now have only one grade of hearing officer and no agency has more than three grades.\textsuperscript{70}

The argument which has been made,\textsuperscript{71} that all proceedings deserve the

\textsuperscript{67} Transcript of Hearings, supra note 12, at 785 (testimony of CAB officials). The duties of hearing officers in three bureaus of the ICC, the largest employer of hearing officers in the Government, are also kept separate. Id. at 157 (testimony of Wilson Matthews, Examiner in charge of hearing officers for the Civil Service Commission.)

\textsuperscript{68} Woodall, “The Appointment and Compensation of Federal Hearing Officers,” 10 Fed. B.J. 391, 405 (1949). See also Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 134 (1953): Petitioners point out that “certain cases before the Interstate Commerce Commission involve relatively simple applications for extensions of motor carrier certificates, while others involve complicated and difficult railroad rate proceedings.” Mr. Matthews in his testimony, supra note 67, at 138, gave it as his personal view, based on long experience with the problem, that two grades of examiner positions in each agency, one of which would be of a "trainee type," would provide the best solution.

\textsuperscript{69} See, e.g., Radio Officers' Union v. N.L.R.B., 347 U.S. 17 (1954).

\textsuperscript{70} Report, September 3, 1954, supra note 2, 28-29, 38-39; Draft Report, supra note 2, 25-29 and Appendix D.

\textsuperscript{71} Draft Report, supra note 2, at 78, J-9.
same grade of hearing officer because the human interests involved should have the same quality of attention, wears the aura of democratic due process; but it overlooks an essential distinction. It is true that all proceedings, great and small, are entitled to the same conscientiousness and integrity on the part of the deciding officer; but it does not follow that all require this officer to possess the same proficiency. If it did, justices of the peace would have to possess the same qualifications as United States district judges and should receive the same compensation. All district judges, it is true, receive the same salaries, although the character of their case load may vary widely; but the reasons lie in administrative considerations and in a policy of preserving the independence and prestige of the office rather than in the rights of litigants to the same quality of treatment. Conscientiousness and integrity must be sought in all areas of life and of government; differences of compensation result from variations in the proficiency required and from other factors not relevant here.

The possibility of an employing agency's manipulating the grade classification of hearing officers where more than one grade exists, so as to endanger their independence, stems from the practicalities and not from the theory of classification. That theory is simple, although often misunderstood. The duties of a position are determined by the employing agency. By their nature, when matched against the classification standards established by the Civil Service Commission, these duties determine the statutory salary grade into which the position falls and the range of compensation, assigned by the statute, which an incumbent may receive. Within that range, authorized statutory salary increases may occur periodically. These, except in the case of hearing officers, depend upon length of service and the efficiency ratings accorded by the employing agencies; but hearing officers, because of the prohibition in Section 11 of the Administrative Procedure Act against the use of efficiency

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72 See Hearings on S. 674, 675, and 918, supra note 20, at 835 (statement of Dean G. Acheson).

73 The Classification Act provides that:

[The principle of equal pay for substantially equal work shall be followed and . . . variations in rates of basic compensation paid to different officers and employees shall be in proportion to substantial differences in the difficulty, responsibility, and qualification requirements of the work performed. . . .


ratings,\textsuperscript{78} receive their increases on the basis of length of service alone.\textsuperscript{79} The grade of a position, if it has been properly classified, cannot be changed so long as its duties remain the same. Promotion, therefore, is dependent upon the existence of a vacancy in a position of higher grade to which the incumbent can be shifted. If an error in classification has been made or the duties of a position change, the Civil Service Commission may assign the position to the proper grade;\textsuperscript{80} and if it does so, the compensation of the incumbent will change accordingly, provided he remains in the position.

There is room for a great deal of variation between this theory and real life, however. Positions may exist on paper but be unfilled over periods of time for budgetary or other reasons and then be filled again. The same type of work may in some situations be allocated to positions which are in different grades because other, accompanying duties are different. The verbal standards for measuring duties and assigning positions to grades are necessarily somewhat artificial.\textsuperscript{81} The entire scheme is obviously a conceptual one, imposed upon complex and shifting actu-

\textsuperscript{78} Supra note 39.


\textsuperscript{81} The Civil Service Commission has been much criticized for the allegedly unrealistic and unworkable nature of the classification standards which it has maintained for hearing-officer positions. Opinion of the District Court, Federal Trial Examiners Conference v. Ramspeck, 104 F. Supp. 734 (D.D.C. 1952); dissenting opinion in the Supreme Court, Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1952). The opinion in the District Court sets forth the standards in important part. See also, Draft Report, supra note 2, 20-24, where, in addition, the Commission's procedure in arriving at these standards is outlined. As the majority opinion in the Supreme Court brings out, the terminology which has been most criticized is based on criteria prescribed in the Classification Act itself. 63 Stat. 959 (1949), 5 U.S.C. § 1112 (1952). Any effort to imprison complex and variable factors within a formula is almost certain to yield a product that will seem arbitrary and unrealistic, and no one seems to have suggested a better set of standards than the Commission's, except for the suggestions of the President's Conference on Administrative Procedure that "less technical and simpler language" be used and that "language that erroneously suggests that length of record is of some importance" be deleted. Minutes, Thursday, October 14, 1954—Friday, October 15, 1954, at 7. The second of these suggestions relates to a feature of the standards that tends to exclude from consideration the need for skill by an examiner in limiting the size of records and in effecting settlements, which seems unwise. See Report, September 3, 1954, supra note 2, at 37; Transcript of Hearings, supra note 12, at 1002-1004 (testimony of Everett O. Haycraft, Trial Examiner with the Federal Trade Commission and chairman of the Federal Trial Examiners Conference). The Commission has given diminishing weight to the size-of-record factor in classifying positions. Id. at 1253-1257. The real question surrounding the standards is not their wording but whether the attempt should have been made to differentiate five different grades of positions involving the duties of hearing officers. Such was the grade pattern when the Administrative Procedure Act became effective, however. No one raised specific objection to it before the Commission at that time. Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1952); Brief for Petitioners, 4-5. Compare Brief for Respondents, at 65.
alities. A supervisory agency like the Civil Service Commission will have a difficult time at best in securing full adherence to the theoretical pattern.

It is charged that the incumbents of particular positions may be favored or discriminated against in the assignment of work, with salary effects to emerge in subsequent reclassification of the positions.\footnote{Draft Report, supra note 2, at 76; Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1952); Brief for Respondents, 55-56. This argument conflicts with the argument made by others, that the classification standards are impossible to follow.} In consequence, so runs the complaint, Section 11’s requirement that the Commission and not the agencies determine the compensation of examiners\footnote{Supra note 39.} has been violated. In any event, the existence of different grades of positions, calling for the exercise of a doubtful judgment as to the probable difficulty of cases in assigning work to examiners, is said to increase the possibility of manipulation to secure examiners favorable to the agency’s contentions in particular cases. Thus, the Administrative Procedure Act’s requirement of assignment of examiners to cases in rotation so far as practicable,\footnote{Transcript of Hearings, supra note 12, 510-514.} which would point to a single examiner if all were in one grade, may allow a choice among those available in two or three grades, so long as that number of grades exists.

No evidence has come to light that manipulation of case assignments for the purpose of influencing decisions has taken place. One witness before the Committee on Hearing Officers of the President’s Conference on Administrative Procedure mentioned that the legal staff of the Securities and Exchange Commission probably had its preferences among the hearing officers employed by that agency, but not that these preferences influenced the assignment of cases.\footnote{Ibid.} There have been statements that hearing officers, aware of their dependence upon the employing agencies for favorable assignment to cases and for promotion, tend consciously or unconsciously to decide in accordance with agency wishes;\footnote{Id. at 217; Draft Report, supra note 2, at 33, 76.} but this tendency is obviously hard to distinguish from proper deference to agency policy. What seems much more probable than improper manipulation by agencies where several grades of hearing-officer positions exist is the appearance of deviation from prescribed methods in assigning these officers to cases and in effecting promotions, which sometimes results from quite different reasons. This appearance gives rise to question and suspicion and may result in impairment of morale.

Differentiation among cases in advance for the purpose of assigning
hearing officers to them is an inexact operation at best. The Civil Service Commission's rule speaks only of assignment in rotation, so far as practicable, to cases that are "normally assigned" to particular grades of positions.\footnote{16 Fed. Reg. 9626 (1951), 5 Code Fed. Regs. § 34.12.} Departures from the norm are admittedly proper when cases are grouped geographically for hearing by a single examiner or occasionally when no examiner in the proper grade is available. Within a grade, "legitimate specialization" among examiners according to subject matter may be permitted.\footnote{Brief for Respondents, supra note 82, at 40; H.R. Rep. No. 1980, 79th Cong., 2d Sess., 46 (1946); S. Doc. No. 248, 79th Cong., 2d Sess. 280 (1946).} Continuous supervision of agency practice in this regard by the Civil Service Commission, such as Section 11 may permit,\footnote{That Section, supra note 39, authorizes the Commission to "require reports by agencies," as well as "promulgate rules," "for the purposes of this section." Whether this power extends beyond the functions vested in the Commission itself, so as to confer general authority to see to the agencies' performance of their duties toward hearing officers, is a disputed point. Except for the provision in its regulations, supra note 87, the Commission has acted in the belief that assignment of examiners to cases is not a matter with which it is empowered to deal. Draft Report, supra note 2, at G-18-19.} would obviously be difficult and might ensnarl the assignment process in cumbersome analyses and reports to the Commission. The Commission has refrained from intruding into this area of agency practice, except to determine from time to time whether the duties of particular positions have been so affected as to warrant a change of grade.\footnote{Transcript of Hearings, supra note 12, 1217-1228, 1241-1242.}

Deviation from prescribed methods in respect to promotions may seem to occur because of the departure of an agency's actual structure from that which appears on paper. There may, for example, be more high-grade positions authorized than are currently filled. The reasons may be budgetary; but an official who eyes an existing vacancy and is convinced that his work falls properly into the higher category will hardly be comforted by explanations or have his suspicions of favoritism toward those in the higher grade stilled. Agency administrators, like other people, moreover, ordinarily desire freedom of action in their work, including discretion to hire and promote personnel within the limits imposed by appropriations. In their eyes a good agency personnel officer is likely to be one who, together with other qualities, possesses ability to produce a paper vacancy when desired. Hence vacant positions may be maintained in an agency and be filled from time to time in seemingly unaccountable fashion. The reason, however, may lie in considerations that are free of actual impropriety.

Under Section 11 of the Administrative Procedure Act hearing officers are to receive compensation prescribed by the Civil Service Commis-
HEARING OFFICERS

The Commission's function in this regard extends to the selection of hearing officers for promotion; but except for a recent qualification, the determination of when a position shall be filled by promotion is left to the agencies. Although arguably the duty to prescribe compensation for hearing officers includes the determination of when to promote as well as whom to select for promotion, the assumption of this function by the Commission would raise problems. It might involve intrusion into the agencies' financial management and would substitute the Commission's choice for the agencies' in deciding when vacancies should be filled by promotion and when new blood should be brought in by new appointments or by other means. So substantial an invasion of previous agency responsibilities is not likely to be attempted without further legislation.

These administrative aspects of the classification and promotion problem supplement the possibility of improper agency influence over examiners as a basis for advocating that, so long as hearing officers remain agency employees rather than become members of a separate corps, all differences of grade and salary among them within each agency should

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91 Supra note 39.
92 The Commission, under its regulation as now amended, maintains promotion registers for those agencies having more than one grade of hearing officers, from which incumbents are selected for promotion according to their rank. Draft Report, supra note 2, at 35-36. Until April, 1951 the agencies were permitted to select hearing officers for promotion, subject to checks by the Civil Service Commission which were different during various periods. Draft Report, supra note 2, at 33-35. An opinion of the Attorney General, 41 Ops. Att'y Gen. No. 14 (1951), advising that the duty to determine the compensation of hearing officers, which Section 11 of the Administrative Procedure Act imposed upon the Commission, included the duty to determine which officer should receive a particular promotion, caused the Commission to assume this function. 16 Fed. Reg. 9626 (1951), 5 Code Fed. Regs. § 34.4(a).
93 Under the regulation supra note 92, as amended June 5, 1954, 19 Fed. Reg. 3317, when a position is reclassified upward by the Commission, the resulting higher-grade vacancy must be filled by promotion. If the increase is for just one grade, the former incumbent will compete with others of the same rank for the vacancy.
94 The other means of filling positions are outlined in the Draft Report, supra note 2, at 31-32. They consist of new appointments from the register of eligibles maintained by the Civil Service Commission and various types of choice of present or past Government employees other than hearing officers in the same agency. Except for hearing officers already in the same grade as the vacancy, who may be transferred or reinstated freely, and for certain former employees in the legislative or judicial branch who, by statute, may qualify non-competitively, only such employees not on the register as qualify in a special examination for top places on it may be named to a vacancy. Because they receive a special examination which takes account of their qualifications to date, such persons receive an advantage not available to others, except veterans with disability preference. The President's Conference on Administrative Procedure has recommended that this advantage be withdrawn and that future appointments be confined to the register of eligibles and to persons who are already hearing officers. Minutes, Thursday, October 14, 1954—Friday, October 15, 1954, at 6.
95 Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1952); Brief for Petitioners, 50-54.
disappear. Before this conclusion is accepted, however, at least two other aspects of the problem should be considered. One is the question of finances. If there is to be no differentiation of grades, all hearing officers within an agency must be capable of handling the most difficult cases and must be compensated accordingly. The annual bill would not be large; but an economy-minded Executive and Congress might eye the prospect with hostility. A more important question is whether an adequately-motivated staff of examiners can be maintained over the years within an agency if promotions are not available. This question was often asked during the hearings before the Committee on Hearing Officers and never answered except by occasional assertions which are accepted in the statement in the Draft Report of four members of the Committee that “A one grade system would not destroy incentive. No incentive system is needed for personnel of such high caliber as hearing officers. They of course require a good salary, but their primary incentive is excellence in the law and in the judicial function they perform. The future reward for which the superior hearing officer strives is the achievement of an enviable reputation, with its concomitant respect and prestige, and the possibility perhaps of appointment to a loftier judicial position above and divorced from that he presently occupies.”

It may be doubted whether this statement is justified; but if it is, it raises possibilities that should be examined. Calling the hearing officer’s function judicial, attaching a substantial salary to it, and conferring maximum security of tenure upon the officer will not change the nature of his work or contribute greatly to enhancing its public reputation beyond its actual character. Even with attributes of greater independence and more substantial contribution by hearing officers to agency decisions, the hearing officer’s role remains subordinate to the agency’s. When to this factor is added the somewhat remote or ambulatory aspect, in relation to the general public, of the tribunal in which the hearing officer sits, it seems unlikely that an aura similar to that which surrounds the federal judiciary will ever envelop it. If not, the hearing officer under a fixed-salary system, who approaches his task, say, in early middle age, must envisage for the years ahead the milder satisfactions of excellence in craftsmanship, public service, and honorable reputation among a relatively small circle of informed persons. As the years go on, such will be his compensations except as inter-agency transfers may introduce

\[96\text{ There are slightly under 300 Section 11 hearing officers employed at the present time. If all were raised to the highest grade, the increased expense might amount in time to approximately }\$150,000\text{ a year. It would be less insofar as lower grades were selected as appropriate single grades for particular agencies.}\]

\[97\text{ Draft Report, supra note 2, at 76.}\]
some variety and advancement. These are not inconsiderable rewards. Coupled with adequate remuneration and a good working environment, they are genuinely attractive; yet it is a real question whether in many instances they will not grow pale in time. If so, added incentive, supplied by the prospect of promotion as a reward for superior performance, may be a valuable supplement.

If hearing officers are linked to the federal judiciary in any fashion, so that examiners envisage the possibility of advancement to judgeships, some may attempt to qualify in ways closely related to those which are generally thought to cause lawyers to be considered. These ways are not limited to conspicuous professional achievement, but include also party service and the attainment of reputations upon public issues. Direct service to political parties will not be open to hearing officers under existing legislation; but controversial action pleasing to parties or powerful economic groups will be readily possible for hearing officers attached to some agencies. Some may be tempted to take advantage of these opportunities. It will in any event be difficult to avoid the suspicion at times that decisions are motivated by such considerations. Opposition to the influence of party politics in the appointment of hearing officers is expressed by everyone. It would be still worse to allow

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98 Inter-agency transfers are among the means available for filling vacancies, supra note 94, and are used from time to time. Especial effort is made to arrange them when a reduction-in-force threatens in a particular agency. Together with reinstatements, transfers have so far greatly reduced the impact of reductions. Draft Report, supra note 2, 38-39. So long as grade differences exist, they afford possible means of salary increases; but a hearing officer proposed for transfer to a higher grade must compete with examiners within the appointing agency for the preferment. 19 Fed. Reg. 34.6 (1954), 5 Code Fed. Regs. § 34.6. Transfers are different from inter-agency details, or loans, such as are contemplated by Section 11 of the Administrative Procedure Act, supra note 39, when agencies become temporarily understaffed. These too have been used. Report, September 3, 1954, supra note 2, at 48.

99 Some proponents of salary uniformity do not indicate specifically whether they would do away with present within-grade salary increases. These confer annual increments of $200 each 18 months in the grades occupied by hearing officers, up to the maximum for the grade. 63 Stat. 965, 967 (1949), 5 U.S.C. §§ 1113, 1121 (1952). With a salary spread of $1,000 in each grade, they may extend over a seven and one-half year period. Proponents of "a single salary grade per agency" in the present sense of "grade" would retain these increases; a "specific salary for a particular agency" would appear to eliminate them. Recommendations to both effects were made to the President's Conference on Administrative Procedure. The policy arguments used point both ways on this issue.


101 A hearing officer might think, for example, that prominence as a proponent of some controverted viewpoint in labor, electric power, or communications matters could result in preferment if political winds blew in the direction of his views.

102 Objection to possible political influence formed a principal basis of opposition to S. 1708, supra note 3, providing for Presidential appointment of hearing officers. Draft Report, supra note 2, at 72; C.A. Miller, address, summarized at 6 Ad. Law Bull. 11-12 (1953). The Senate Committee on the Judiciary, recommending passage of the same bill, which provided
that and other, equally harmful influences, or the suspicion of them, to enter into the actual work which hearing officers do.

In the presence, therefore, of real doubt whether uniformity in the grade and salaries of hearing officers in an agency is consistent with adequate incentives to high-quality performance on their part; in the absence of more than a suspicion of abuse connected with a system of several grades;\textsuperscript{103} and in the light of dangers connected with the one-grade system suggested to the President's Conference on Administrative Procedure, it seems the better part of wisdom to retain the present statutory provision on this point. The number of grades has been greatly reduced by action of the Civil Service Commission, with the result that many agencies now have only one.\textsuperscript{104} It will be possible to compare the working of alternative patterns in different agencies and so to gain the advantage of additional experience, if a statutory change in this regard is not made now. The recommendation of the President's Conference therefore seems sound.\textsuperscript{105}

\textbf{C. The Question of Reductions in Force}

The question whether hearing officers should be subject to reduction-in-force procedures is separable from the other personnel problems pre-

\textsuperscript{103} Statements by present and former hearing officers that the agencies they served did not influence their examiners in any way were made frequently in the hearings before the Committee on Hearing Officers of the President's Conference. Draft Report, supra note 2, at G-27—G-28. No complaint against an agency on this score had ever been made to the Civil Service Commission. Transcript of Hearings, supra note 12, at 174 (testimony of Lawrence V. Meloy, Chief Law Officer, Civil Service Commission). The possibility of an agency's tailoring its structure of available vacancies to suit its purposes with respect to the promotion of employees is illustrated by an example recited to the Committee on Hearing Officers of the President's Conference. Transcript of Hearings, supra note 12, at 264-267. There is no indication that pressure or favoritism was involved in the instance recited.

\textsuperscript{104} Supra at p. 300. A separate argument in favor of eliminating the possibility of promotions has been the delays and frustrations that have attended them. These, however, have resulted in recent years partly from the Ramspeck case litigation. Delays will in any event be less under the Civil Service Commission's new promotion procedures than previously. Draft Report, supra note 2, at 35; Report, September 3, 1954, supra note 2, at 19-21.

\textsuperscript{105} The recommendation of the Attorney General's Committee on Administrative Procedure that there be only one grade of hearing officer in each agency at a fixed salary, with perhaps two grades in the Government as a whole, accompanied a recommendation that appointments he for definite seven-year terms, with new appointees required to serve probationary terms of not more than one year. Final Report, supra note 7, at 46-48. The minority of the Committee, which recommended twelve-year terms, suggested a much greater range of salaries but would have prohibited any increase or decrease in the salary of an individual hearing officer during his term. Id. at 238.
sented. It turns on issues similar to those involved in the question of promotions. From an operating standpoint, no reason exists why hearing officers should not be subject to the same consequences of fiscal policy or change in the volume of work to be done as other administrative officers, unless there is danger from this cause of undesirable effects upon their work. Again the governing theory is free from objection. The agency determines the classes of positions that can best be vacated in terms of their relation to work needing to be done. Within the areas so marked out, employees in comparable positions are selected for separation according to criteria specified in applicable regulations. Under the regulations for hearing officers, these criteria relate simply to veterans' preference and length of service, requiring the retention of those who possess seniority. The charge is made that agencies can and sometimes do make use of the opportunity allegedly afforded by reductions in force to get rid of unwanted hearing officers or at least that the possibility of such action may affect the independence and objectivity of hearing officers. The positions to be involved in a reduction in force may, for example, be so defined as to include a grade of hearing-officer positions in which it is known that the unwanted incumbent will be reached and quite arbitrarily to exclude other grades of such positions from the area affected. This danger would be reduced by elimination of grades of hearing-officer positions, but would not be altogether eliminated because the hearing officers as a whole could be included or excluded as the agency saw fit. If a force of the original size were actually needed and could be paid from available funds, the resulting vacancies could later be filled by other means than reinstatement of the former incumbent. The means usually available have, however, been severely restricted by the applicable regulation.

No evidence of actual abuse in reductions in force relating to hearing officers has been adduced. The problem has been of slight magnitude in terms of actual separations, because such means as inter-agency transfers have been available, and have been used, to minimize loss of employment among hearing officers through reductions in force. As a result of legislation to revise the hearing-officer personnel system in other respects, it may be possible to reduce still further such hazard of loss of employment through agency action as now exists. Until such legislation is enacted, the problem may be kept to a minimum by administrative measures

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107 Draft Report, supra note 2, at 38.
109 Supra note 98.
such as have already been employed, supplemented by others which
were suggested to the President's Conference on Administrative Proce-
dure but tabled by that body.110

V. THE RESOLUTION OF MAJOR ISSUES

The respects in which it is proposed to alter the hearing officer per-
sonnel system, aside from the matters already discussed, involve the
methods of initially selecting hearing officers and the agency that should
be placed in charge of administering the system. These questions are
obviously fundamental and affect all the others that have been brought
up.

A. Methods of Selecting Hearing Officers

In discharging its responsibilities under Section 11 as now written the
Civil Service Commission has applied the methods developed in con-
nection with federal personnel administration generally, modified to
meet the over-all purpose of the Administrative Procedure Act and cer-
tain specific requirements of Section 11.111 The departures the Commis-
sion has made from its usual practice, aside from the elimination of
efficiency ratings and the provision of opportunity for hearing by the
Commission before a hearing officer can be removed,112 add up to the
requirement that all persons within the federal service or seeking rein-
statement or reemployment in it, whom it is sought to name to hearing-
officer positions, except persons previously in such a position of equally
high grade, must qualify through a competitive test administered by the
Commission.113 Hearing officers considered for an increase of grade must
compete with others of their previous grade in the same agency or the
agency to which they are proposed for transfer;114 all others previously
in the Government must compete with those having the highest places
on the Commission's open register.115 By these means the Commission
endeavors to secure hearing officers with the best obtainable qualifications
and to hold the balance among hearing officers in relation to advancement.

110 Report, September 3, 1954, supra note 2, at 48; Minutes, Monday, November 8,
1954—Tuesday, November 9, 1954, at 5.
111 Supra note 39.
113 The only circumstance in which anyone can qualify for a hearing-officer position
without such a test involves former employees of the legislative and judicial branches of
the Government who may qualify noncompetitively (i.e., by meeting minimum require-
ments), by virtue of a statute conferring this right upon them. 19 Fed. Reg. 11,733 (1954),
5 Code Fed. Regs. § 34.3(d) (1).
114 Supra notes 92, 94.
Regs. § 34.3.
The Commission's regulations form a logically consistent whole and signify a considered effort to carry out the mandate of the Administrative Procedure Act. Especially noteworthy are the provisions which prevent agencies from preferring their non-hearing-officer personnel for advancement to hearing-officer positions except in competition with outsiders who are on the register; for otherwise the tendency to favor deserving applicants within an agency, whose qualifications and disposition are known, over better-qualified outsiders, would go largely unchecked. Criticism of the Commission's administration, which has again become vigorous, has exceeded its justification. Even during the earlier years of the Commission's administration the extreme shifts of policy and administration which this writer called the hearing-officer fiasco resulted as much from outside pressures upon the Commission as from internal factors. Since then the Commission has pursued a straight course, adhering to its regulations and methods except for amendments of detail. The amendments have introduced improvements. It is fair to say that they have come too slowly, occurring only after outside criticism has mounted; but they represent, nevertheless, a significant adaptation of Civil Service methods to the problems presented. An additional change recently made, which establishes coordination of all phases of the hearing-officer program of the Commission under the Director of the Bureau of Departmental Operations assisted by the Administrative Officer for the Hearing Examiner Program, should stimulate continuous, specialized attention to that program. It may well be followed, if the

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116 A general principle of the federal civil service is that persons possessing "competitive status," which ordinarily is acquired by appointment pursuant to competitive examination, have "basic eligibility to be noncompetitively selected to fill a vacancy in a [different] competitive position." Exec. Order No. 10,577, 19 Fed. Reg. 7521 (1954), § 1.3(c). Legal positions are particularly likely to attract non-professional Government personnel because of the possibility of meeting the professional requirements through part-time study.

117 The indications are that the Commission's effort has been fairly successful. An exceptional situation arose in the ICC when 55 positions in the Bureau of Motor Carriers were made Section 11 positions as a result of the decision in Riss & Co. v. United States, 341 U.S. 907 (1951), at which time the incumbents were accepted as Section 11 hearing officers pursuant to noncompetitive examinations. Fifty of the remaining 65 vacancies occurring in hearing-officer positions after the register requirement became effective were filled from the Commission's open register. Between 35 and 40 of these were previous federal employees. Report, September 3, 1954, supra note 2, at 22; Draft Report, supra note 2, at 32, 41, 47, D-7. It is doubtful, however, whether all of the other 15 appointees, who were found to rank with the top three on the register as a result of the special examinations given to them, would have been equally successful if they had been examined at the same time as those on the register. A requirement that such persons qualify for the register in the regular way seems needed. See supra note 94.


Commission retains jurisdiction, by acceptance of a recommendation of the President's Conference on Administrative Procedure that the program be placed under a separate bureau, headed by a committee of lawyers and Commission officials.  

The question remains whether the Civil Service Commission's system, even with present and prospective improvements in it, adequately effectuates the purpose of the Administrative Procedure Act and, insofar as it does not, what further measures are called for. Most of the discussion in the recent controversy over promotions, reductions in force, and related matters has not gone to the heart of the matter, which concerns chiefly the methods of competitive examination and of administering competitive registers, employed by the Commission. As applied to applicants for initial appointment, these methods involve the assignment of percentage grades to reflect the qualifications of candidates who have been found to meet specified minimum experience and other requirements for a particular grade of position. The names of those who receive passing marks are then listed in order of rank on the Commission's register of eligibles for that grade. As requests are received from agencies having vacancies to fill, the names of the three highest-ranking eligibles still available are certified in response to each request. The appointment is to be made from among these three with certain restrictions and limited exceptions. Examinations are held with such frequency as the needs of the service are deemed to require, taking account of the anticipated vacancies, the expense of an examination, the desirability of affording a reasonable period of opportunity to those who have qualified, and the desirability of admitting those who become interested or become eligible for examination by meeting the minimum experience requirements during the intervening periods.

The factors which are "rated" in determining the percentage grade of each applicant for the hearing-officer register embrace the value of his professional experience in relation to the work to be done and his ability in various respects of which the following are typical: ability to analyze and evaluate evidence, ability to interpret and apply law,
ability to make independent decisions in important matters, ability to write clearly and concisely, ability to be objective and free from influences which might affect impartial judgment, and ability to preside at and control meetings, conferences, and hearings with dignity and poise.\textsuperscript{124} No written test is given; but experience reflected in the applicants' records is evaluated and their relevant qualities are appraised on the basis of correspondence or interviews with references, former employers, associates, etc., and on the basis of an oral interview which concludes the examination.

It is obvious that mathematical exactness in the grading of intangible factors such as the foregoing is unattainable.\textsuperscript{125} The most that can be hoped for is that the grades assigned shall reflect as well as possible "sensed qualitative differences"\textsuperscript{126} in the factors measured. Because of inescapable error,\textsuperscript{127} the resulting rank-order of eligibles reflects only imperfectly the relative merits of those listed. The choice which agencies have among the highest-ranking three hardly counteracts the probable errors. The question arises, therefore, whether a method that leads to these errors can be justified.

The principal justification for applying an essentially artificial method of grading and certification to the selection of such officials as hearing officers\textsuperscript{128} is that thereby improper considerations are excluded from the process of selection to the maximum extent feasible. Granted that error enters into the rank-order, the balance is at least held steadily among competitors; and if the error is not too gross, the resulting advantage outweighs it. This argument is especially strong as applied to the exclusion of partisan political, racial, and other improper considerations from

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\item \textsuperscript{124} Pertinent portions of the Commission's examination circular prescribing the examination are set forth in the Draft Report, supra note 2, at 24-25. In grading incumbents for promotion, performance in office can be rated with possibly greater accuracy as to relative rank than can be achieved with new applicants.
\item \textsuperscript{125} Draft Report, supra note 2, at 70. In addition, weights must be assigned to the various factors graded, for the purpose of arriving at over-all totals. These weights are necessarily somewhat arbitrary.
\item \textsuperscript{126} Pockrass, "Rating Training and Experience in Merit System Selection," 2 Pub. Pers. Rev. 211, 215 (1941).
\item \textsuperscript{127} So-called selective certification may further counteract the errors inherent in the over-all rank-order. By this process, which may be made available to an agency when need is shown, only the names of those eligibles who possess particular qualifications desired by the agency are certified for consideration in filling a vacancy. In this way not only may consideration be limited to applicants who have had specialized experience, but a wider spread of percentage grades may also be obtained. See Draft Report, op. cit. supra note 2, at 31.
\item \textsuperscript{128} As applied to personnel whose principal qualifications are of a mechanical variety, such as speed and accuracy in the performance of continuous tasks, the method of percentage grades and ranked registers continues to be realistic.
\end{itemize}
appointments. It also applies to prevention of possible agency efforts to secure hearing officers who possess desired viewpoints.\textsuperscript{129}

Despite these considerations, the judgment of qualified commentators has become favorable to less mechanical methods in filling a wide range of government positions. Four of the eight members of the President's Committee on Civil Service Improvement, reporting in 1941, concluded that "any mechanical ranking and certification would operate in an undesirably arbitrary manner" as to legal positions. Therefore they recommended that a merit system employing unrated registers of suitable size containing the names of those applicants found to be most qualified on the basis of appropriate examinations, be placed in effect for legal positions.\textsuperscript{130} Such a system was operated in consultation with the Civil Service Commission for two years by the Board of Legal Examiners, created by Executive Order in 1941,\textsuperscript{131} and was continued for an additional year by the Commission with the Board as its advisors.\textsuperscript{132} Hearing-officer positions were covered by the system. Since then the Commission on Organization of the Executive Branch of the Government has recommended that a similar plan be employed for "a majority of the 15,000 basic occupations in the Federal service" and be administered largely by the employing agencies themselves with Civil Service Commission supervision and assistance.\textsuperscript{133} The Civil Service Commission has endorsed legislation to make this plan available to it for scientific and professional positions.\textsuperscript{134}

The selection of hearing officers could be brought under a merit

\textsuperscript{129} See the argument of Wilbur R. Lester, Transcript of Proceedings, Pres. Conf. Ad. Proc., October 14, 1954, at 582.
\textsuperscript{132} See Report of the Board to the President 1-2 (mimeographed, 1945). The plan was discontinued because of a provision in the Independent Offices Appropriation Act of 1944, which has been carried into subsequent acts, forbidding the use of Civil Service Commission funds for this purpose. See, e.g., 67 Stat. 300 (1953). The writer served as assistant secretary and secretary to the Board. Its experience is summarized in Fuchs, "The Federal Civil Service for Lawyers," 11 J.D.C. Bar Ass'n 51 (1944) and 5 Pub. Pers. Rev. 168 (1944).
\textsuperscript{133} Task Force Report on Federal Personnel 20-25 (Appendix A to the Commission's Report, 1949); Report on Personnel Management 17-18 (1949). The recommendation is that eligibles be grouped in categories such as "outstanding," "well qualified," and "qualified," with those in the highest remaining category made available to appointing agencies at a particular time. The Board of Legal Examiners grouped its eligibles in this manner, without restricting the availability of the different categories for appointment.
\textsuperscript{134} See the testimony of Hon. Robert Ramspeck, Chairman of the Civil Service Commission, in Hearings before House Committee on Post Office and Civil Service on S. 1135, 82d Cong., 2d Sess. 18-20 (1952) and Hearings before Senate Committee on Civil Service on S. 1135, 1148, and 1160, 82d Cong., 1st Sess. 101, 106-107, 108 (1951). S. 1135 82d Cong., 1st Sess. (1951) which passed the Senate, would have authorized the use of the plan for "such scientific and professional positions as the Commission may designate."
system of the type thus suggested, which seems especially suited to such
a purpose. Such a plan should be centrally administered, since nation-
wide recruiting of suitable candidates would be difficult for many agencies
and the high caliber and objectivity of hearing officers would be best
secured by entrusting the initial selection of eligibles to a single
agency charged with maintaining the required standards. The conten-
tion that such a plan will open the door to political influence and favor-
itarism in agency selection of eligibles would be justified only if the
registers were to be vastly larger than the number of appointments to
be made. Such, however, need not be the case, since it would be possible
and desirable to limit the number of names on a register to 3 or 4
times the number of appointments expected to be made from it. If
this were done and the total number of hearing-officer eligibles on the
registers at a given time were, say, the best qualified 50 from among
1500 applicants, the opportunities for abuse would be extremely
limited and could be reduced to the vanishing point by alert administra-
tion.

Legislation would be required to establish the system proposed.

Language in the Congressional Committee reports recommending passage of the
Administrative Procedure Act indicates a contrary conception, since it speaks of the duty of
the Civil Service Commission "to fix appropriate qualifications" and of the agencies "to seek
fit persons," as well as of the probability that the agencies will endeavor "to secure the high-
History of the Administrative Procedure Act). The Civil Service Act, however, which Section
11 renders applicable, normally operates through initial selection by the Commission, although
the agencies may recruit candidates, especially for the higher grades of positions.

Such was the proposal in the Report of the President's Committee on Civil Service
Improvement, loc. cit. supra note 130. As to the feasibility of examining methods that will
produce such a selection of eligibles from among a large number of applicants see Benjamin,
Administrative Adjudication in the State of New York 279-285 (1942). Benjamin states also
that the qualifications necessary for some hearing-officer positions are so complex and subtle
as to preclude their comparative measurement and grading in competitive examinations. Id.
at 278.

There were more than 1700 applicants in the first examination for hearing-officer posi-
tions. The number of appointments that will probably be made to vacancies is difficult to
estimate in advance but is thought likely to be less than 10 a year in the near future, unless
additional agency functions are brought under the formal hearing requirement because of
legislation or judicial decisions. Draft Report, supra note 2, at 41. Allowance must be made
for attrition which a register suffers during its life because persons whose names are listed
become unavailable. On the other hand, additions of veterans with disability preference are
likely to be made, and a specialized administration should be able to reopen the register
frequently to all applicants.

The Executive Order establishing the Board of Legal Examiners was issued pursuant to
the President's authority "to prescribe such regulations for the admission of persons into the
civil service of the United States as may best promote the efficiency thereof," Rev. Stat. §
1753 (1875), 5 U.S.C. § 631 (1952), and to provide through the Civil Service Rules, with the
It would be vastly preferable to legislation establishing appointment by the President with the advice and consent of the Senate as provided in S. 1708 and H.R. 9035, 83d Congress. Because of factors already noted, hearing-officer positions are not of a nature that would attract persons of the same attainments as those who aspire to Federal judgeships or to agency headships which are comparable to judicial posts. Random selection by the President, unaccompanied by statutory means of attracting and appraising applicants, would not be likely to secure hearing officers of consistently high quality; and the appointing process, notwithstanding assurances to the contrary by the Senate Committee on the Judiciary, would almost certainly involve political influences damaging to the objectivity and specialized ability of the hearing-officer corps. It is significant that this method of choosing hearing officers found no support whatever in the President's Conference on Administrative Procedure. A merit system, attracting persons who, although mature, have not yet carved out careers, seems needed.

B. The Administering Agency

In the eyes of many, it is desirable to replace the Civil Service Commission's administration of the hearing-officer merit system with a fresh approach by an agency designed to bring professional legal judgment consistently to bear. It seems obvious that judgments regarding aid of the Commission, "as nearly as the conditions of good administration will warrant," for open competitive examinations and "selections according to grade from among those graded highest," 22 Stat. 403 (1883) as amended, 5 U.S.C. § 633 (1952). The Veterans Preference Act of 1944 now renders mandatory the use of percentage grades and choice from among the highest three whenever veterans applicants are among those considered for appointment, whether or not competitive examination requirements are otherwise applicable. 58 Stat. 387 (1944), 5 U.S.C. §§ 851-852, 857-858 (1952).

The question was not raised on the floor of the Conference. Four members of the Conference recommended that routine Presidential appointment of hearing officers previously chosen by merit-system methods be provided for the sake of prestige. Draft Report, supra note 2, at 72-73. Aside from the artificiality of such a device, it is doubtful at best whether appointment by the President, if invoked, can validly be limited to confirmation of the nominees of subordinates. The President might, however, provide by Executive Order for assistance to him in choosing persons whom he was empowered to appoint; and he might be specifically authorized by statute to issue such an order.

Four members of the Comm. on Hearing Officers of the Pres. Conf. Ad. Proc. who recommended that administration by the Civil Service Commission be retained conceded that probably a majority of persons consulted by the Committee were of the opposite view. Report, September 3, 1954, supra note 2, at 55. Agency opinion was, however, predominantly in favor of modified Civil Service Commission administration. Draft Report, supra note 2, at K-3—K-5. Such was the final recommendation of the Conference, supra note 3; Minutes, Thursday, October 14, 1954—Friday, October 15, 1954, 3-4.
professional experience and ability, which are required in competitive examinations for hearing-officer positions, can best be made by properly designated lawyers who possess insight into the procedures and problems with which hearing officers deal.\textsuperscript{144} The Civil Service Commission has lawyers on its staff and invokes the aid of outside lawyers for this purpose from time to time,\textsuperscript{145} but it is unlikely, because of absorption with larger tasks, to devise methods that would give adequate scope to professional judgment. A specialized agency that keeps in close, continuous touch with its problems and solves them in the light of available experience, would be preferable to one that thinks in terms of established methods and modifies them as difficulties arise.\textsuperscript{146} The "entire tradition" of Civil Service, which Congress sought in Section 11 of the Administrative Procedure Act to invoke in support of security of tenure for hearing officers,\textsuperscript{147} does not necessarily produce good administration in all respects. Its valuable elements need not be lost because innovations are made in its application to a professional field.\textsuperscript{148}

\textsuperscript{144} It is not intended to imply that all hearing officers must be lawyers, although necessarily very few non-lawyers can qualify. Everyone concedes that the conduct of hearings and the formulation of conclusions on the basis of the record of a hearing are primarily legal work. The non-lawyer who can learn such work must be an exceptionally able technician in a field with which a class of hearings deals. It appears that there are a few such people and there seems to be no sufficient reason to exclude them altogether from the opportunity to become hearing officers. See Benjamin, op. cit. supra note 137, at 287-288. A few federal hearing officers are not now members of the bar. Draft Report, supra note 2, at C-11, 19, 20, 28, 32.

\textsuperscript{145} The Commission's reported plan to use senior-grade hearing officers for rating applicants in its 1954-55 hearing-officer examination is a case in point, representing a commendable development. Draft Report, supra note 2 at 30.

\textsuperscript{146} The fact that the Commission encountered a severe failure when it departed drastically from its established over-all methods in inaugurating the hearing-officer program may render it overly wary of experimentation now. Too much importance should not be attached to a casual remark in the course of a hearing; but it may be significant that the Commission's chief operating official in administering examinations, who also is responsible for coordinating the hearing-officer program, is quoted as stating in answer to a question that the Commission does not find it more difficult to rate professional than non-professional people. Transcript of Hearings, supra note 12, at 107. Failure to make adequate provision for the special requirements of personnel administration for professional positions has been a leading cause of criticism of federal personnel management. Commission on Organization of the Executive Branch of the Government, Report on Personnel Management, supra note 133, at 6, 16. The Commission has, however, made strides since the start of World War II in decentralizing recruiting and examining for higher-grade positions and in recruiting prospective college graduates. Exec. Order No. 9830 (1947), Part I, 3 Code Fed. Regs. p. 108 (Supp. 1947); Task Force Report, supra note 133, at 10, 20-21; Rep. Civ. Ser. Comm'n 19 (1949); id. 15, 19 (1950).

\textsuperscript{147} Loc. cit. supra note 135.

\textsuperscript{148} The objection that placing a part of the Federal Government's career and merit system in a separate agency "is simply to diffuse" its administration, Report, September 3, 1954, supra note 2, at 55, does not state a disadvantage unless, as is not demonstrated, waste or error would result. That the new agency would be dependent for certain services upon the Civil
A new agency in charge of administering the hearing-officer merit system might be either an independent Office of Administrative Procedure, such as is widely advocated,¹⁴⁹ or an agency for administering a merit system for legal positions in the Government, if such a system should again be established.¹⁵⁰ In either event the direction of those of the agency’s policies and the formulation of those of its regulations affecting the hearing-officer system¹⁵¹ should be in the hands of a board composed of high-ranking hearing officers or Government lawyers, one or more representatives of the Civil Service Commission and of administrative agencies, and a minority of non-Government lawyers.¹⁶² Two essentials to its satisfactory operation are believed to be a majority of lawyers and a majority of members from within the Government on the board. The former would be needed to assure the desired professional judgment and approach, enriched by the ideas and experience of the administrative members; the latter would be designed to secure comprehension of the administrative setting in which hearing officers work and to emphasize over-all Executive responsibility for the successful operation of the agencies, aided and supplemented by the private practitioners’ under-

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¹⁴⁹ Draft Report, supra note 2, at 56, 59. The proposal for such an Office was supported not only by the four members of the Committee on Hearing Officers who signed this report but also by a majority of persons consulted by the Committee. It was originally made by the Att’y Gen. Comm. Ad. Proc. Final Report, supra note 7, 123-124, 192-194, 196-198, 221-223, 237-239. Provision for an Office of Administrative Procedure was omitted from the Administrative Procedure Act, perhaps because of objections which had been raised, that the Office as proposed would be political and would interfere, as a “superadministrative agency,” with other agencies. See Sen. Doc. No. 248, 79th Cong., 2d Sess. 42 (1946). These objections relate less to the functions with respect to hearing officers, proposed for the Office, than to those relating to the study and improvement of administrative procedure. The President’s Conference on Administrative Procedure has recommended the establishment of an Office of Administrative Procedure in the Department of Justice for the latter purpose on an experimental basis. First Report of the Conference 3-4, 15-17 (1953). An Office so located, responsible to a cabinet officer in close touch with political affairs, would not be an appropriate agency to administer a merit system for hearing officers. See Draft Report, supra note 2, at 59.

¹⁵⁰ The studies of the present Commission on Organization of the Executive Branch of the Government extend to the entire range of problems surrounding the Government’s legal services, as well as to the hearing-officer problem. Douglas, Storey, works cited, supra note 3.

¹⁵¹ An Office of Administrative Procedure would have functions related to the study and improvement of administrative procedure, in addition to its hearing-officer functions. The former would probably not be carried on under the same board as the latter. A legal personnel agency, on the other hand, would probably carry on its hearing-officer functions through the same organization as its other duties.

¹⁵² The service of lawyers in private practice would be difficult to obtain under the policy presently embodied in appropriation acts, which amounts to a prohibition of the performance of rating functions by lawyers who appear before agencies whose positions are involved. 67 Stat. 300 (1953).
standing of the hearing officers' functions in relation to the parties to proceedings. To secure consistency of the board's policies with Government-wide merit-system principles, the board's regulations might be made subject to approval by the Civil Service Commission. Under the Board there should be a director who would carry out its policies, perhaps in conjunction with other duties of the agency.

Much could be said in favor of an independent hearing-officer corps outside of the agencies, whose members would be assigned to the agencies for continuous periods by a central administration or to proceedings case-by-case. Suggestions to this effect, sometimes including housing of examiners' offices separately from the agencies, were made to the Committee on Hearing Officers of the President's Conference. One of the bills in the 83d Congress, H.R. 9035, would have provided for cases to be assigned to "administrative judges" through a director and assistant director under regulations prescribed by an administrative committee of judges. The freedom of hearing officers from agency influence would be secured by this type of arrangement and the advantages of specialization could be preserved if hearing officers were assigned consistently to the proceedings of particular agencies. Such proposals, however, have not commended themselves to official bodies which have considered the problem. The Attorney General's Committee rejected the idea of a separate corps, both because of the need of specialization by hearing officers and because of agency responsibility for the efficiency and fairness of hearings. Congress also rejected it. The recom-

153 An alternative form of organization, employing a director advised by a board, would obviously be possible. It is believed, however, that it would be difficult to enlist and maintain the interest and participation of board members serving part-time, unless responsibility were vested in them. Participation by a board of high caliber would be critically important in the plan proposed.

154 In an Office of Administrative Procedure the director might also be in charge of the functions relating to procedure and be aided by a varying number of advisory and cooperating groups.


156 The need for subject-matter specialization by hearing officers is generally recognized even by the numerous commentators who believe that professional competence related to the conduct of hearings is the quality primarily to be sought when hearing officers are selected. In this view, specialized expertise may be acquired after appointment, through study and experience. Draft Report, supra note 2, 56-57, 73-74, G-2—G-5, K-1—K-2.

157 Final Report, supra note 7, at 47.

mendations of the President's Conference on Administrative Procedure contemplate no change in this regard.

There is scarcely need for so radical a departure from previous forms of organization as would be involved in placing hearing officers in a separate corps. Although the effect of such a step would not be bad if the administration of the corps were fully aware of agency needs and adequately equipped to meet them, the same advantages of protection to the independence of hearing officers and maintenance of adequate incentives among them can be obtained through specialized, professional administration of a merit system applicable to hearing officers on the staffs of the agencies. Hence there is no need to override the strong belief among agencies that the final selection of hearing officers to perform their work should be lodged with them.\(^{159}\)

The independence and adequate motivation of hearing officers in the employ of agencies would be sought under adequate merit-system administration by taking the following steps in addition to the safeguards surrounding proposed dismissals: (1) confine new appointments to a narrowly-selected group of qualified eligibles; (2) prevent appointments of non-hearing-officer Government personnel, except such as qualify in regular examinations for the register of eligibles; (3) select hearing officers for promotion or transfer to a higher grade by the central administration; (4) continually study the performance of hearing officers by the scrutiny of records of hearings, decisions, and reports of hearing officers on a sampling basis, accompanied by cultivation of personal contact with hearing officers and receptiveness to complaints from them; (5) adjust difficulties through conferences with agencies where feasible; (6) arrange inter-agency transfers to relieve difficult situations, to promote interest of hearing officers in their work, and to absorb personnel released through reductions in force;\(^{160}\) and (7) provide for conferences of hearing officers and other interchange that would promote esprit de corps and effective performance of work. An administration that undertook these tasks, if reasonably well equipped to do so, would stand a good chance of success and would be in a position to recommend further legislation if more turned out to be needed.

An administration able to keep in touch with hearing-officer performance by the means suggested would be able to avoid relying upon agency

\(^{159}\) Draft Report, supra note 2, at K-5 - K-6.

\(^{160}\) Except in the face of drastic over-all governmental retrenchment, a specialized administration should at least equal the Civil Service Commission's considerable success in eliminating the effects of reductions in force. See supra, p. 309. If evidence of abuse arose, legislation to provide for tenure during good behavior might be sought.
judgment and the judgment of lawyers who have appeared before hearing officers in arriving at judgments upon promotions, as the Civil Service Commission has found it necessary to do. It is surely inconsistent with the dignity and effectiveness, if not the objectivity, of officers who preside at hearings to introduce the consciousness that the attorneys who appear before them may later be asked for judgments upon their performance. The reliance that has been placed in the ethics and responsibility of members of the bar as a safeguard against impropriety is largely justified; but there could be situations where it was misplaced. In any event the relationships which the practice establishes are inconsistent with the purpose of the Administrative Procedure Act. In the absence of a kind of administration that can avoid such a practice, the need for promotions should indeed be abolished.

C. Hearing Officer—Agency Working Relationships

With the independence of hearing officers safeguarded in the foregoing manner in relation to appointment and personal administration, there would be no need at the present time of additional general legislation regarding the manner in which hearing officers carry on their functions. Limits to the accuracy of the judicial analogy to the position of the hearing officer are apparent. Whether in a deciding agency like the National Labor Relations Board or in the more typical agency that may be a party to proceedings before itself, the hearing officer acts within the organization as the representative of agency heads. His status should be appropriate to that position; his methods should be such as will enable him in that situation to command the confidence of parties, including the agency, and to discharge objectively, yet with use of the agency's resources, his duty to formulate conclusions based on the record of the hearing before him.

If there are sufficient protections against agency pressure upon the hearing officer, the grounds for limiting his consultation with agency personnel after a hearing has ended, while formulating his conclusions, are reduced to three: (1) avoidance of prejudice through the influence of personnel imbued with a point of view in the case; (2) preservation to the parties of their right to rebut evidence and answer contentions

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161 Draft Report, supra note 2, at 29, 52, 74-75; Transcript of Hearings, supra note 12, at 39, 1230.
162 Id. at 1237 (testimony of Wilson Matthews, Examiner in charge of hearing officers for the Civil Service Commission).
163 The relation is quite different from the one that arises between a candidate for appointment or promotion and a selected member of an examining board who bases his judgment on an oral interview or on the record of the candidate's entire past performance.
adverse to their positions; and (3) exclusion of various undefined influences that have not emerged at the hearing but may be suspected. Militating against these considerations is the right of the parties and of the public to have the agency's knowledge and expertness brought to bear in reaching conclusions.

The first reason just stated operates more strongly where the agency has filed charges or a complaint of some kind than it does in other proceedings. The third reason, insofar as it refers (as often it does) to allegedly preconceived views of the agency or members of its staff, possesses an importance which depends on the subject matter of those views. If the suspected views relate to unsettled issues of law or of policy that is truly general, such as whether consumers are entitled to know what they are getting in a food product even though ignorance might not harm them physically or cheat them, there is relatively little reason to object to consultation concerning the issues. If, on the other hand, the views relate to issues upon which the conduct or qualifications of the parties have a bearing, such as whether local applicants for broadcasting frequencies should be preferred over non-local, the objection to consultation becomes stronger because enterprises have staked out their claims and feel entitled to litigate their contentions.

The Administrative Procedure Act differentiates among licensing proceedings, other instances of adjudication, and rule-making in its restrictions on consultation by hearing officers and its requirements for initial decisions and recommended decisions. The distinctions thus made are about as realistic as can be hoped for in general legislation. "Adjudication," to which all of the restrictions and requirements apply, includes proceedings in which the agency has charged a respondent with violation of law and such hearings as are necessary on claims for old age and survivors insurance. They are important in the former but probably are unnecessary in the latter because the agency does not occupy a position adverse to the claimant. They are, however, hardly a handicap in the claims cases, in which the result turns on evidence relating to specific events in the lives of individuals. The liberalization of procedure in initial licensing recognizes the "forward-looking function" being performed and the different treatment that may need to be given to "estimates, forecasts, and opinions" from that required for conclusions based on evidence of past fact; yet the parties are rendered uneasy by the liberalization. Insofar as the requirements of the Act

164 Supra at pp. 291-292.
fail to work satisfactorily, they can of course be changed by specific legislation, such as that affecting the National Labor Relations Board,\(^{167}\) the Federal Communications Commission,\(^{168}\) and the Immigration and Naturalization Service.\(^{169}\)

As they stand, the Act’s provisions, in cases of adjudication other than initial licensing, but only in such cases, eliminate post-hearing, off-the-record consultation by hearing officers on any fact in issue\(^{170}\) and forbid off-the-record participation in any manner by agency personnel engaged in investigating or prosecuting functions in the particular case or a factually related case.\(^{171}\) In this way proceedings which are likely to present important issues of policy are roughly differentiated from those where the issues relate more largely to issues of past fact.\(^{172}\) In the former consultation is not forbidden; in the latter it is. In the former, also, the hearing officer’s formulation of conclusions can be dispensed with under narrowly limited circumstances; in the latter it cannot be.\(^{173}\) In short, the independent hearing officer remains independent as to matters that should turn on the hearing alone; but agency personnel may take part to some extent when non-record factors can properly enter in.

It should not be expected that this legislatively-prescribed pattern, even when strengthened and improved by a superior status for the hearing officer and reinforced by stricter provisions as to particular agencies,

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\(^{166}\) See supra note 56.

\(^{167}\) 61 Stat. 139, 146 (1947), 29 U.S.C. §§ 154(a), 160(c) (1952). These provisions of the 1947 Act change the role of the trial examiner from that permitted under the Administrative Procedure Act by prohibiting him from consulting with the Board concerning exceptions taken to his findings, rulings, or recommendations and by requiring that his report and recommended order become the decision of the Board unless expected to. They are not to be reviewed except by Board members or their legal assistants.

\(^{168}\) 66 Stat. 721 (1952), 47 U.S.C. § 409(b), (c) (1952). An initial decision by the hearing officer who conducts a hearing is required. He is forbidden to consult any person, except another examiner assigned to the same case, on any question of fact or law in issue, unless upon notice to the parties and opportunity for them to participate, and is further forbidden to consult with the Commission or any of its employees concerning the initial decision or any exceptions taken to his findings, rulings, or recommendations.

\(^{169}\) 66 Stat. 208 (1952), 8 U.S.C. § 1252(b) (1952) (dispenses with the requirement of the Administrative Procedure Act that hearing officers perform no investigative or prosecuting function, except as to the case being heard).

\(^{170}\) Section 5(c) of the Act, 60 Stat. 239 (1949), 5 U.S.C. § 1004(c) (1952). It has been argued that this provision does not prohibit consultation with agency staff members not engaged in investigating or prosecuting the particular case or a factually-related one. Davis, Administrative Law 361, 415-416 (1951). If this interpretation is correct, an amendment to the section is needed.

\(^{171}\) Section 5(c), 60 Stat. 239 (1949), 5 U.S.C. § 1004(c) (1952).


\(^{173}\) Section 8(a) of the Act, supra note 19, 60 Stat. 242 (1946), 5 U.S.C. § 1007(a) (1952).
can do duty for adequate discharge of their functions by the agency heads\[^{174}\] and for sound inter-agency structure and relationships.\[^{175}\] If the agency environment is unhealthy in particular situations, healthy results of formal proceedings in the agency can arise only from other, more fundamental measures than the attempt to place a “judge” in the midst of the situation. Especially is this true when his decisions are issued—as they must be unless an administrative court is substituted for the agency—under the ultimate control of top officials.

An additional hazard would be created if the hearing officer were more largely removed from an institutional context. This hazard would stem from the methods of advocacy in litigation which, with all of the value that can rightly be credited to them, may serve to distort rather than reveal the truth when carried beyond their proper province. That province does not extend to dominance over the ascertainment of facts and the evolution of policy in economic and scientific matters, with which administrative agencies are so often concerned. Litigation has its place in administrative processes because of effects which these processes have on interests that need protection. The role of litigation is enlarged because the methods of rebuttal and cross-examination, incident to the presentation of evidence in litigation, can aid in arriving at scientific truth under some circumstances. Other aspects of litigation, however, especially advocacy in relation to the process of decision, may prove damaging. In the setting of formal administrative hearings it is natural for lawyers to seek full opportunity to use their methods and, having received it, to exploit it to the fullest extent. If the hearing officer, ordinarily a lawyer himself, is left with no recourse except his own knowledge when closeted with the record of a hearing, the product he turns out may be seriously deficient in relation to technical matters, especially if the material supplied to him via the hearing is artfully devised to lead to the advocate’s predetermined conclusion. He should not be allowed to seek evidence to supplement the record without notifying the parties; but proper official notice of facts\[^{176}\] and consultation as to law and policy should often be available.

An eminent administrative practitioner, speaking recently of administrative hearings in non-legislative proceedings, has admonished members of the bar that “The preparation of proposed findings of fact calls

\[^{174}\] Cf. supra note 52.

\[^{175}\] Cf. supra notes 49, 50.

\[^{176}\] Official notice which is at all disputable should be accompanied or followed by opportunity for rebuttal or challenge. See § 7(d), Ad. Proc. Act, 60 Stat. 241 (1946), 5 U.S.C. § 1006(d) (1952).
for the most skillful advocacy. Their object is to persuade the finder of
fact . . . . Ideal findings of fact . . . will both tempt and threaten the
examiner—tempt him with their clarity, completeness, and reasonableness and by virtue of these same qualities threaten him with reversal if they are ignored. 177 Accuracy of the proposed findings is undoubtedly implied by "completeness and reasonableness"; yet where the conclusions to be drawn involve debatable economic results or physical effects of desired or disputed actions, the advocate's cultivated art may unintentionally mislead as easily as furnish a reliable guide. Confronted with the temptations placed before him by advocacy, the hearing officer, in a technical field where the record of the hearing may not fully embody the considerations bearing on his problem, needs the aid of the consultation which the institutional method should in many cases supply. His "independence" ought not to be made a helpless one by denying this aid. To explore the proper boundaries of official knowledge, official notice, and advice as to relevant general considerations, within which assistance to the hearing officer must be confined, would carry this paper beyond its province. It is there, however, that further light on the hearing officer problem will be found. As it is found, the problems of fair, effective procedure, of which the hearing-officer problem is symptom and symbol, will move closer to solution.