

POST WAR PROBLEMS OF THE LEGAL PROFESSION
FROM THE STANDPOINT OF CIVIL SERVICE
EXAMINING AGENCIES

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From the limited standpoint of examining agencies engaged in selecting personnel for Government legal positions, the principal post-war problems demanding attention relate to (1) methods of selection for original appointment and (2) methods of passing upon promotions and transfers from one position to another in the government service. In respect to both sets of problems the methods employed should be such as will secure the best available lawyers for vacancies as they arise and will at the same time promote esprit de corps and opportunity for advancement within the service. Under the federal system of government, the public service of each State, of many localities, and of the United States will continue to be separate entities; but recognition by other examining agencies of the qualifications established within a particular unit is nevertheless possible, and inter-governmental transfer of personnel may be encouraged.

Although professional opinion, as reflected by bar associations and other groups of lawyers, has for a good many years advocated the establishment of the merit system for legal positions, the application of civil service principles to such positions has lagged behind the development of the merit system generally, especially in the Federal Government. The reasons have probably lain in a continued attachment to the patronage system in relation to legal jobs because of the close connection between law and politics and in the well-founded belief that the measurement of qualifications for appointment to legal positions is more difficult than in the case of most other professions. As the President's Committee on Civil Service Improvement pointed out in its report early in 1941, "The lawyer, in contrast with the ordinary professional employee of the Government, is inevitably thrown into the heart of the policy making process and of necessity has an important, and often a controlling voice in the major issues of his department or agency.¹ As the Committee further pointed out, Government legal staffs have a great variety

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1. 77th Cong., 1st Sess., H. Doc. No. 118, p. 31.

of functions to perform, ranging from trial work to drafting and research; and the traditions of the profession run counter to narrow specialization on the part of individual lawyers, even when their duties at particular times may be quite specialized. The qualifications which need to be measured in examinations for legal positions consequently run a wider gamut than is the case, for example, with engineering and scientific positions, which ordinarily require more definitely defined techniques. The selection of economists and managerial personnel has also been rather largely resolved into judging individuals for somewhat limited categories of work, such as labor economics, finance, transportation, accounting, personnel administration, budget administration, and the like.

Notwithstanding the difficulties which the President's Committee recognized in connection with the establishment of a merit system for lawyers in the Federal Government, that Committee recommended the extension of the competitive civil service under the Civil Service Act to embrace substantially all legal positions in the Executive Branch. Acting pursuant to this recommendation, the President on April 23, 1941 issued Executive Order 8743 whereby legal positions in the Government departments, with certain exceptions, were brought into the competitive civil service and a Board of Legal Examiners was established in the Civil Service Commission to conduct the merit system as applied to legal positions. A relatively small number of legal positions had previously come under the jurisdiction of the Civil Service Commission by arrangement between the Commission and the employing agencies. These also were brought within the new system by the Executive Order. The Board of Legal Examiners commenced operations on July 1, 1941.

State and local merit systems, embracing legal positions as well as others, have also expanded during recent years. As a result, it is probable that the normal channel whereby lawyers may secure public employment after the war will be that of civil service examination and appointment. So far, it is true, positions in the offices of the United States Attorneys throughout the country, as well as legal positions in the state and local governments which have not adopted merit systems, remain subject to appointments and dismissals by non-civil service methods. Even in these areas, however, selection of appointees on the basis of professional qualifications infor-

mally ascertained, rather than of political connections, is the rule rather than the exception; and considerable security of tenure in fact prevails. This was notably true in the Federal Government prior to the extension of the competitive civil service to legal positions.

At the present writing a controversy which has surrounded the Federal civil service system for legal position has not yet been resolved, and it is possible that the system will again be abolished by legislative action. Even if such an outcome should occur, it is probable that civil service for legal positions would again be established within relatively few years, since the demand for opportunity to enter Federal employment is strong and no other means exist for affording such opportunity to lawyers throughout the country. The various government law offices, moreover, have found it increasingly difficult to select their own personnel, especially with due regard to geographical and law school distribution, and are likely to demand the service which a soundly conducted merit system can render in this regard.

A question is sometimes raised with respect to the necessity for any formal method of ascertaining the qualifications of lawyers for appointment to government legal positions, when they have already qualified as members of the bar. While it is true that bar membership is now acquired in every State by methods which establish that the individual possesses minimum professional qualifications, the standards of bar admission in the various States are not uniformly high enough to assure government agencies that particular lawyers will possess the competence required for their staffs. Therefore, even without regard to special qualifications which are sometimes required, a further scrutiny of available lawyers with reference to their general professional qualifications is necessary in order to secure a public service of sufficient quality. In addition the presence of special qualifications must sometimes be determined by examinations of one kind or another. Even apart from these considerations, it is a fact in normal times that many more applicants apply for appointment to government positions than can be accommodated in the filling of vacancies, and this competition for jobs necessitates a selection on the basis of relative fitness. The competitive examination affords the best available means of choosing from among many applicants and is the essence of the merit

system. For all of these reasons, the continuance and extension of civil service methods in filling government legal positions may be anticipated.

The interest of the legal profession in civil service for government legal positions has been evidenced in several ways in connection with the establishment and administration of the Federal plan. The President's Committee on Civil Service Improvement, which rendered a report on professional and higher grade administrative positions generally, had four lawyers among its eight members and was aided by an advisory committee on lawyers which rendered a preliminary report to the principal Committee. The chief law officers of the Government, including the solicitors of the regular departments, the general counsels of the independent agencies, and the principal officials of the Department of Justice, took a continuing interest in the establishment of a merit system for legal positions. The Board of Legal Examiners consisted at the outset of 11 lawyers, of whom 7 originally came from within the Government and 4 from the profession at large. Later the number of Government lawyers was reduced to 6, with 3 practicing lawyers and 2 law teachers serving in addition. The system also came to embrace a large number of professional examining committees and boards, upon which over 500 representative members of the profession throughout the country rendered uncompensated service.² In the controversy surrounding the continuance of the system, the American Bar Association, the National Lawyers' Guild, and the National Bar Association have rendered continuous support to the maintenance of the plan. It seems clearly justifiable to say, therefore, that the profession as a whole has definitely adopted the establishment and maintenance of the merit system for public legal positions as a plank in its professional platform.

In conducting examinations for appointments to beginning positions, which will naturally constitute the great bulk of the positions to be filled otherwise than by promotion, a distinction between such examinations and bar examinations should be observed. The purpose of a bar examination is to determine whether the individual who seeks membership in the bar has received the training and possesses the general

2. An account of the legal examining system during its first two years has been published in 11 *Journal of the Bar Association of the District of Columbia*, at p. 51 (Feb., 1944). A similar account, amplified in some respects, will appear in the *Public Personnel Review* for July, 1944.

professional qualifications which should be demanded of him. Ordinarily he presents himself soon after completing his course of study, and the extent of his professional competence can be ascertained by determining what he has learned as well as how he handles himself professionally. The applicant for a Government position, on the other hand, may come forward a number of years after his formal study has ended, at a time when much learning will have passed from memory and his knowledge of law will have been conditioned by experience. The point to be determined is how he ranks in relation to his fellows in terms of professional competence, or capacity, as distinguished from knowledge; and the testing methods which should be applied to him must be designed with this end in view.

The experience gained in administering the Federal legal examining system demonstrates that general competence tests, as distinguished from knowledge tests, can be developed for lawyers. A written test of the so-called objective variety, in which the applicant is supplied with case summaries, statutory texts, and the like, and is asked to apply them in the solution of given problems, is a workable device to this end. Such a test was given in September, 1942, to over 13,000 applicants for Federal legal positions and proved to be an effective means of selection.³ Oral examining methods may be directed to the same end.⁴ If, for example, a lawyer is questioned by an examining committee for a period of approximately 45 minutes with reference to legal problems lying in his experience, the ability with which he discusses these problems is a good index to his professional competence. If he can analyze the issues in a satisfactory manner and can maintain his views in the face of questioning, he demonstrates his professional capacity. If, on the other hand, he can not satisfactorily discuss even these problems, which are those most familiar to him, he is almost certainly lacking in basic qualifications.

In examining for appointment to higher grade positions, when these are not to be filled from within the service, similar techniques may be employed. The use of written tests will be less, since analytical ability is less prominent

3. A full account of this test is given in Weihofen, *The Written Federal Attorney Examination*, 11 U. of Chi. L. Rev. 154 (Feb., 1944).

4. An account of the oral examinations given in connection with the Federal civil service system for legal positions is included in the articles cited supra, note 1.

among the qualifications required; but the unassembled examination, in which the individual's record and the impression which he makes in an oral examination are brought together, provides a suitable means of selection. Here again emphasis should be placed upon ascertaining the individual's capacity or competence as distinguished, in this connection, from the kind and amount of experience which he may have had. The possession of given amounts of specified types of experience may properly be made a prerequisite to consideration for appointment; but in judging the qualifications of applicants, the evaluation of experience should not take the place of judgments upon the capacity of the applicants themselves; experience is simply relevant evidence.

With respect to the relative claims of applicants from outside the government on the one hand and of incumbents who seek advancement to particular legal positions on the other hand, several important considerations should be mentioned. For beginning professional positions, there is little reason for conferring an advantage upon the incumbents of non-legal positions, merely because they are already in government service. Although such incumbents may have acquired useful knowledge of the affairs of a particular agency in which they have worked, they should nevertheless be required to qualify professionally upon the same basis as those who seek to enter from the outside. Previously acquired knowledge may later be taken into account in choosing from among those who have qualified professionally; but it should not dispense with the professional examination itself or lead to judgment according to more lenient standards. There is a strong tendency in government agencies to prefer the worthy, ambitious incumbents of clerical positions who have acquired professional educations by dint of part-time study, over unknown applicants from outside. This tendency is natural and understandable; but it ignores the likelihood that outside applicants may be equally worthy and may have struggled just as hard to acquire professional educations, and it tends to deprive the government of superior professional personnel. No more threatening cause of mediocrity and lack of vision and initiative in the government legal service exists or can be imagined than the practice of almost routinely advancing non-professional employees to professional positions without adequate testing of their professional qualifications. Civil service regulations should guard rigorously against this practice.

Once persons whose professional qualifications have been tested have entered government legal positions, a different set of considerations becomes relevant. It is necessary to stimulate the interest and effort of incumbents and to preserve professional initiative and imagination in the face of frequent unavoidable specialization in the work to be performed. This can be done only if opportunity for advancement in salary is afforded, if transfers to other types of work are encouraged, and if means of in-service training are provided so that the individual may remain in touch with professional developments, may come in contact with his fellows in other types of work, and may have access to means of self-improvement. These inter-related needs require that on the whole higher-grade positions be filled by promotion from within. The desirability of formal systems of competition for higher positions will vary with the size of the governmental units involved and with the caliber of supervisory personnel, whose discretion will govern if such systems are not used. On the whole it seems wise to avoid formal methods so far as possible and to rely rather upon close relationships between civil service authorities and supervisory personnel and upon advice and suggestion, as means of promoting opportunity and fair treatment in promotions. By similar means, coupled with a suitable training program, it should be possible to promote transfers from one kind of work to another and to develop a public service of high grade, attractive to able young lawyers. At the same time, occasional appointments of outside lawyers to high-grade positions should be contemplated; for incumbents of the requisite caliber will not always be available for promotion, and it is desirable in any event to secure the infusion from time to time of fresh ideas and methods. When government expands rapidly, this problem takes care of itself; but during more stable periods it requires conscious attention.

The recent history of the civil service for government legal positions and the nature of the problems involved in civil service administration demonstrate the stake of the legal profession in the operation of merit systems and the need of professional participation in conducting them. The interest of lawyers in entering the public service is great; the opportunity for them to do so is growing;⁵ the willingness

5. Opportunity to enter the public service is increasing not only because of the extension of merit systems but also because of the growth in the size and importance of government. On July 1, 1941, before the war-time expansion, the Federal Government

of members of the profession at large to contribute to the administration of merit systems has recently been widespread and genuine; and the professional contribution to administration is essential to its sound conduct.

Only the last factor just mentioned requires elaboration. Generally speaking, public personnel, or merit, systems are conducted by methods which are adapted to organizations of great size, employing largely clerical, mechanical, and custodial workers. The tendency is strong to apply to professional positions the same rather mechanical methods of recruitment, examination, appointment, promotion, transfer, separation and reinstatement that are worked out for the great mass of positions. The necessity of professional judgment and knowledge in handling professional personnel administration seems obvious and can scarcely be over-emphasized; but adequate provision to this end as respects the legal civil service will be made only if there is a strong demand for it and if the legal profession will accept the responsibility of continuously supplying the needed participation.⁶ Given these prerequisites, a new, valuable, and satisfying outlet for the public spirit of an ancient profession will be created. Its creation presents a definite post-war need.

alone employed approximately 5500 lawyers in legal positions in the competitive civil service, or approximately 3 percent of the country's lawyers. The number increased to approximately 8500 at the peak and is now probably around 7500. It is unlikely that there will be a return to pre-war numbers, and there may be a considerable increase after the war in order to staff tax-collecting agencies and administer social security and veterans' benefits, even if the permanent regulatory functions do not expand.

6. It is not intended to suggest that general personnel methods do not have a place in conducting the civil service for legal positions. On the contrary, they contain much that is valuable and should be used. An excellent working relationship between personnel office and law office has been established in a number of Federal agencies, with advantage to each and to the lawyers affected. The argument here is that in many personnel operations the determining judgment in dealing with lawyers should be that of lawyers who share in professional traditions and possess knowledge of professional affairs and of legal education; and this decisive role should extend to many matters of procedure as well as to determining the content of examinations. In much civil service administration the "examiners" who come from particular professions are confined to the latter role.