

law. Thus, the degree of latitude to be granted the prosecutor becomes pertinent. The traditional restriction on the prosecutor's discretion, not to exercise it with a corrupt intent, protects the public from the dishonest official but not from the negligent or ignorant one.

If the prosecutor's discretion is further limited by the requirement that it be exercised in a manner consistent with the standards of the reasonable man test, the public is protected not only against the dishonest prosecutor but also against the ignorant or negligent one. Unfortunately, the price of the additional protection is too high, for all the advantages presently accruing from the prosecutor's freedom of action are thereby forfeited, especially the personal judgment most desired in an office which demands selective use of time and talents. Since the ballot is considered to be the most appropriate method for selecting capable government officials, it should offer adequate protection in this instance.⁶³ If the prosecutor elects to omit prosecution when his judgment tells him that the community would profit by it, the sanctions of disbarment and removal from office, plus the loss of public approval and good will, should induce him to act in the best interests of society.

HEARING EXAMINER STATUS: A RECURRENT PROBLEM IN ADMINISTRATIVE LAW

The current controversy concerning the Civil Service Commission's role in administering the hearing examiner program under Section 11 of the Administrative Procedure Act¹ points up what may be an inherent weakness of this Act. This weakness is the concept of a semi-independent hearing examiner which grew out of the recommendations of the Attorney General's Committee on Administrative Procedure in 1941 and which was substantially embodied by Congress in the APA in 1946.

Prior to the formation of the Attorney General's Committee formidable efforts were directed toward curbing the powers of administrative

63. "Neither lack of intellect, learning, nor even moral courage, in a prosecuting attorney, judge or other elective officer, constitutes a disqualification to act officially, and a judge would no more be justified in supplanting a prosecuting attorney for such deficiency than would the latter be warranted in demanding a more learned, conscientious and capable judge to hear the causes he must prosecute. The responsibility for lack of capacity in officers must rest on the people who elected them." *State ex rel. Williams v. Ellis*, 184 Ind. 307, 321, 112 N.E. 98, 103 (1915).

1. 60 STAT. 244 (1946), 5 U.S.C. § 1010 (1952).

agencies.² The protagonists of this goal came close to success in 1940.³ Confronted with this it is not surprising that the Attorney General's Committee advocated compromise even though it recognized both the tenuousness of the complaints directed at administration⁴ and the nature of the fears⁵ which prompted the unrealistic demands for a return to ". . . government of law rather than of men."⁶ The very least the Committee could propose in order to effect this compromise was that administrative hearings be invested with attributes giving the appearance of fair judicial process.⁷ It considered that this could best be achieved, without doing violence to administrative effectiveness, through the provision for internal separation of prosecutory and adjudicatory functions and through a strengthening of the independence of the persons who

2. Prior to the report of the President's Committee on Administrative Management in 1937, legislative efforts were largely directed toward the establishment of an administrative court before which agency decisions would be subjected to close scrutiny. APA—LEGISLATIVE HISTORY, SEN. DOC. NO. 248, 79th Cong., 2d Sess. 62-66 (1946). In an effort to control the administrative process at its source, later bills were aimed at providing uniform procedures and, as an additional safeguard, judicial review at the behest of any citizen. These proposals, as amended, succeeded in passage in 1940; but President Roosevelt's veto was sustained by the House on the ground that the problem was being studied by the Attorney General's Committee. *Ibid.* This latter series of bills was endorsed by the ABA. 25 A.B.A.J. 93-102 (1939). The effects of the bill upon administrative flexibility were denounced in a study made by the Brookings Institution. 86 CONG. REC. 4738-40 (1940).

3. See note 2 *supra*.

4. In its study of various administrative agencies the Committee's staff found no evidence and little indication of unfairness resulting from agency procedures. In fact, the staff found separation of functions practiced to such a degree in some agencies that they expressed wonder at the value on appeal of the decisions made by such persons. Att'y Gen. Comm. Ad. Proc., ICC, Monograph 24 at 63; SEC, Monograph 26 at 231-32 (1941).

5. The fears of many of these critics have not been rational, but this does not detract from the force of the resistance born of that fear. Many of the objections originate from profound economic, social and political beliefs; others spring from less respectable motives. "There is . . . a certain group of men who want to see administrative agencies struck down or hampered because they are the heart of modern reform legislation. . . . I think it would be unfortunate if the [ABA] should align itself with that viewpoint. I think it is already somewhat in danger of being identified with that viewpoint. . . ." 25 A.B.A.J. 95 (1939). Passage of the APA was due ". . . in part at least . . . to the deep yearning of the traditional lawyer 'for the comparatively simple life of yesteryear' and his desire to put brakes on any new development in the law that disturbed his accustomed way of doing business." Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE L. REV. 581, 583 (1951).

6. APA—LEGISLATIVE HISTORY, SEN. DOC. NO. 248, 79th Cong., 2d Sess. iii (1946).

7. See note 4 *supra*. "We should bear in mind that the report issues out of . . . a controversy which is concerned with the basic directions and purposes of government. . . . A certain amount of political expediency no doubt entered into its formulation. . . . This process of compromise, if not too responsive to every pressure of the moment, is a legitimate mechanism, consonant with the genius of democracy." Jaffe, *The Report of the Attorney General's Committee on Administrative Procedure*, 8 U. OF CHI. L. REV. 401, 440 (1941).

initially hear agency cases.⁸ These recommendations became the basis for the safeguards imposed by the APA.⁹

While the requirement of separation of functions has a noticeable effect upon agency efficiency, the problems thus presented are amenable to solution at a higher agency level.¹⁰ Much more subtle are the effects upon proper application of agency policy and performance of examiner duties resulting from frustrated desires for greater status. The independence granted examiners under the APA eliminates agency control over the performance of duties in which the agencies and the public have a vital interest. This has left an area in which the examiners are free to agitate for increased status.¹¹ It was with this particular problem that the case of *Ramspeck v. Federal Trial Examiners Conference*¹² dealt. The decision in the *Ramspeck* case upholding the validity of Civil Service Commission regulations which examiners claimed were destructive of

8. REP. ATT'Y GEN. COMM. AD. PROC. 46-53, 57-60 (1941). The Committee carefully restricted its recommendations to formal hearings involving adjudication as opposed to rule making. *Id.* at 53-55.

9. Subject to specified excepted proceedings no person who presides over cases involving adjudication required by statute to be made on the record after opportunity for hearing shall ". . . consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate. . . ." or be responsible or subject to the supervision of any person charged with investigative or prosecuting functions. Further, no person charged with investigative or prosecuting functions shall take part or advise in making decisions. 60 STAT. 239 (1946), 5 U.S.C. § 1004 (1952). The examiner, though to remain within the agency and to apply agency policies, was declared free of agency control in such matters as compensation and tenure. Control in these matters was transferred to the Civil Service Commission. 60 STAT. 244 (1946), 5 U.S.C. § 1010 (1952).

10. The APA does not require that examiners make initial decisions but provides that when the agency does not preside at the reception of evidence, either the examiner or the agency must make the initial decision. 60 STAT. 242 (1946), 5 U.S.C. § 1007 (1952).

11. The Federal Trial Examiners' Conference was formed in February, 1947. Civil Service Commission, Report to the Committee on Hearing Officers, Exhibit 2 (1954). It appears that the organization had its inception as a result of fear among incumbents of examiner positions that they would be displaced by new appointees under Section 11. *Id.* at 1-2. The period following adoption of the APA provided ample evidence that critics of the administrative process not only wanted the APA adopted but also wanted the privilege of staffing the hearing examiner corps. The weakness of the Civil Service Commission in the face of pressures exerted by bar groups and Congressmen is one of the reasons for the present lack of faith in the Commission's ability to administer the examiner program. Fuchs, *The Hearing Examiner Fiasco under the Administrative Procedure Act*, 63 HARV. L. REV. 737 (1950); Thomas, *The Selection of Federal Hearing Examiners*, 59 YALE L. REV. 431 (1950); Schwartz, *The Administrative Procedure Act in Operation*, 29 N.Y.U.L.Q. REV. 1173 (1954).

12. 345 U.S. 128 (1953), reversing 202 F.2d 312 (D.C. Cir. 1952). The Court sustained the validity of Civil Service Commission regulations which the examiners asserted were contrary to Section 11 of the Administrative Procedure Act and destructive of the examiners' independence. The regulations provided for: Classification of hearing examiner positions according to the level of difficulty and importance of the work performed, § 34.10, 16 FED. REG. 9626 (1951); assignment of examiners in rotation to cases of the level of difficulty and importance that are normally assigned to positions of the salary grade the examiner holds, § 34.12; intra-agency promotion of examiners, § 34.4; reductions in force affecting examiners, § 34.15.

their independence prompted demands contained in Senate Bill 1708 that examiners be given complete independence.¹³

Faced with this proposal, the Committee on Hearing Officers of the President's Conference on Administrative Procedure¹⁴ recently completed an evaluation of the Civil Service Commission's administration of the hearing examiner program. At the conclusion of the study, the Committee split into two groups and made alternative recommendations to the Conference.¹⁵ The Kintner Report proposed complete revision of the program under an independent Office of Administrative Procedure, while the Lester Report advocated a modification and continuation of the present arrangement.¹⁶ The Conference adopted the latter recommenda-

13. S. 1708, 83d Cong., 1st Sess. (1953). The bill would amend Section 11 of the Administrative Procedure Act to end Civil Service Commission responsibility for examiner selection and compensation. Examiners would be appointed by the President by and with the advice and consent of the Senate and would be designated "administrative judges." Compensation would be set at \$14,000 per annum, and removal could be accomplished only upon an order of a federal district court. *Ibid.* The bill contains no provision for incumbent examiners. A bill similar in most provisions but which would remove examiners and assignment of cases from administrative agencies was also introduced. H.R. 9035, 83d Cong., 2d Sess. (1954).

14. The Conference was first proposed in 1951, by the Prettyman Committee of the Judicial Conference of the United States and was to be concerned with eliminating ". . . unnecessary delay, expense, and volume of record in administrative proceedings." *Hearing before a Sub-Committee of the Committee of the Judiciary on S. 17, 83d Cong., 1st Sess. 43 (1953).*

The recommendation was not acted upon until early in 1953, after the ABA, through its Section of Administrative Law, urged President Eisenhower that the subject should receive high priority by the new administration. *Id.* at 49. One of the alleged causes of the difficulty with which the Conference was to be concerned was ". . . the current belief among hearing officers that it is the practice of the Civil Service Commission to place value upon the length of the record in determining the classification of the hearing officer. . . ." *Id.* at 47. President Eisenhower called the Conference on April 29, 1953. The decision in the *Ramspeck* case was handed down on March 9, 1953; and Senator McCarran introduced S. 1708 on April 21, 1953. The seemingly unanticipated problem of examiners' status raised by the bill has overshadowed the stated purposes of the Conference, which reconvened on October 14, 1954, to consider recommendations made by the Committee on Hearing Officers.

15. The Committee Chairman, E. W. Kintner, General Counsel, FTC, and three members, R. S. Doyle, practicing attorney; E. L. Reynolds, Solicitor, Patent Office; L. P. Winings, General Counsel, Immigration and Naturalization Service, joined in submitting a report highly critical of the Civil Service Commission. This report will hereinafter be referred to as the KINTNER REPORT (1954). Four members of the Committee, W. R. Lester, professor of Law at the University of Cincinnati; J. E. McElvain, Chairman, Appeals Council, Social Security Administration; L. V. Meloy, Chief Law Officer, Civil Service Commission; W. F. Scharnikow, Hearing Examiner, NLRB, joined in a report highly critical of the KINTNER REPORT. Hereinafter, this report will be referred to as the LESTER REPORT (1954).

16. "Basic, revisionary measures are required." KINTNER REPORT 57 (1954). The Kintner group recommended transfer of hearing examiner administration to an independent Office of Administrative Procedure. *Id.* at 59. "We prefer to stand by the agency that has made mistakes and has profited by them than with the agency that is an innovation." LESTER REPORT 55 (1954). The group concluded that the Civil Service Commission should continue to administer the program. *Id.* at 59.

tion, but there is much which indicates that this is not the final word on the present controversy.¹⁷ The lack of unanimity within the Committee, the almost unanimous opposition of lawyers to continued Commission administration,¹⁸ and the increasing interest which Congress has displayed in the status of hearing examiners all point up the likelihood that greater changes will be forthcoming.¹⁹ Because of this it is important that the Committee's proposals be considered in the light of the findings which support them.

The Commission's administration of examiner compensation is a major source of dissatisfaction. In 1951, the Attorney General declared that under Section 11 of the APA the Civil Service Commission had the duty of selecting examiners for promotion.²⁰ Pursuant to this opinion the Commission made determinations of qualifications as the opportunity for promotions arose.²¹ All examiners in the next lower grade within the area of competition²² were first investigated; and on the basis of these investigations and a sampling of the records compiled in proceedings presided over by those examiners being considered for promotion, the Commission assigned a numerical rating to each examiner. Promotions could not be effected, however, until appeals from ratings were reviewed by the Commission; and it became standard practice for those examiners who were not promoted to appeal.²³ None was successful, but promotions for other examiners were thereby delayed in many cases for months.²⁴ The inevitable result of this cumbersome procedure was examiner discontent with the Commission and enmity among examiners.²⁵ Further,

17. 23 U.S.L. WEEK 2183 (1954).

18. "One familiar with the history of the operation in practice of the examiner system provided for under . . . the APA would, indeed, have to shut his eyes to reality for him to conclude that the APA provisions have been implemented in accordance with the intent of their draftsmen." Schwartz, *supra* note 11 at 1221.

19. See note 13 *supra*.

20. Under a recent change in regulations, § 34.4, 19 FED. REG. 3317 (1954), the Commission will establish promotion registers for those agencies having more than one grade of hearing examiner position. A system of vouchering will be used to conduct the qualifications investigation instead of the full field investigation. Examiners will be notified of ratings assigned but will not be aware of their relative position on the register. Appeals from ratings assigned will be limited to a period of ten days. The registers will be rerated at least biennially. Civil Service Commission, Departmental Circular No. 592, Revised June 2, 1954.

21. § 34.4, 16 FED. REG. 9626 (1951).

22. 5 CODE FED. REGS. § 34.4 (Cum. Supp. 1954). An area may include a functional or subject matter area within an agency, *e.g.*, the Bureau of Motor Carriers, Bureau of Formal Cases, and Bureau of Finance are areas of competition within the ICC. *Hearings before Committee on Hearing Officers of the President's Conference on Administrative Procedure*, 1216 (1954).

23. *Id.* at 77.

24. *Id.* at 145, 787, 791.

25. *Id.* at 268, 787, 1003.

there is reason to believe that the efficient conduct of agency business was impaired by preoccupation with promotion worries.²⁶

Inseparable from the promotion issue is the requirement of the APA that examiners be assigned to cases in rotation.²⁷ In view of the multiple-grade structure, rotation of cases has been interpreted to mean within position grade. Consequently, it is the task of the agency to determine the approximate difficulty of a case and assign it to a hearing examiner of the corresponding grade.²⁸ Since the Commission may later find that

26. *Id.* at 290-92, 629-30

27. ". . . [Examiners] shall be assigned to cases in rotation so far as practicable. . . ." 60 STAT. 244 (1946), 5 U.S.C. § 1010 (1952).

28. Assignment practices vary between agencies. Those having a great number of examiners provide that a chief hearing examiner shall assign cases, *e.g.*, the National Labor Relations Board, 29 CODE FED. REGS. § 102.34 (Cum. Supp. 1954). In the FTC, cases are assigned by the Commission on the recommendation of the chief hearing examiner. 16 CODE FED. REGS. § 7.4(b) (Cum. Supp. 1954). The Secretary of the FPC assigns cases in that agency. 18 CODE FED. REGS. § 1.14 (1949). In several agencies there is only one examiner. KINTNER REPORT, Appendix D, 4-6 (1954). The standards by which the Commission classifies hearing examiner positions and by which agencies having multiple grades estimate the difficulty of a case are contained in the following table:

<i>Grade and Classification</i>	<i>Controlled facts</i>	<i>Protestations</i>	<i>Complexity of Questions</i>	<i>Difficulty of Contentions or issues</i>	<i>Size of Record</i>	<i>Effect of Decision</i>
GS-11 Moderately difficult and important	None or Simple	None	Moderately complex	Simple	Small	Narrow
GS-12 Difficult and important	Few	None or few	Fairly complex	Normal	Relatively small	Narrow
*GS-13 Unusually difficult and important	Many	Strong	Complex	Normal	Large	Fairly wide
*GS-14 Exceedingly difficult and important	Numerous	Vigorous	Extremely complex	Novel	Extremely Large	Wide
*GS-15 Exceptionally difficult and important	Many highly	Many Vigorous	Exceptionally complex	Many Novel	Voluminous	Very broad

Federal Trial Examiners Conference v. Ramspeck, 104 F. Supp. 734, 739-40 (D.D.C. 1952). In position classification the Commission also utilizes illustrative records at each

the work assigned to an examiner justifies a reclassification of the position,²⁹ examiners and other critics assert that agencies can control the promotion of any hearing examiner by manipulating assignment of cases.³⁰

The promotion problem³¹ and the claim of agency domination of examiners' pay through position reclassification underlie the Committee's recommendation that a single salary grade be established within each agency.³² The implementation of this proposal would eliminate most of the problems with which the Commission has been beset, but the recommendation does not consider the Commission's responsibility under the APA. Section 11 requires the Commission to prescribe compensation for hearing examiner positions according to the difficulty and responsibility of the work performed.³³ The Commission has set standards by which these factors are measured,³⁴ and their application continues to result in multiple grades within agencies.³⁵ The Committee did not take issue with the standards.³⁶ Rather, both Reports justified the recommendation of a single salary level within agencies upon the desirability

grade level. *Hearings, supra* note 22, at 1259.

* All six factors are used at the GS-11 and 12 levels. Three or more of the factors must be present for the higher three grades. *Id.* at 1253.

29. Positions must be audited upon the request of an occupant or may be audited at the discretion of the Commission. 63 STAT. 958 (1949), 5 U.S.C. § 1101 (1952).

30. KINTNER REPORT 51, 76 (1954).

31. *Id.* at 74-78. LESTER REPORT 19-20 (1954).

32. LESTER REPORT 41 (1954); KINTNER REPORT 76 (1954). The Kintner group further recommends that the Office of Administrative Procedure carefully consider the advisability of establishing one grade level throughout government. *Id.* at 77.

33. "Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1949. . . ." 60 STAT. 244 (1946), as amended, 63 STAT. 972 (1949), 5 U.S.C. § 1010 (1952). The policy provisions of the Classification Act are: ". . . [T]he principle of equal pay for substantially equal work shall be followed, and . . . variations in rates of basic compensation . . . shall be in proportion to substantial differences in the difficulty, responsibility, and qualification requirements of the work performed. . . ." 63 STAT. 954 (1949), 5 U.S.C. § 1071 (1952). Positions shall be classified and described in published standards. *Ibid.*

34. See note 28 *supra*.

35. A survey recently completed in the three bureaus of the ICC resulted in the elimination of the two lowest examiner grades and classification of positions in each bureau from GS-13 through GS-15. *Hearings, supra* note 22, at 1218. These audits have resulted in a narrowing of the grade span within agencies and the establishment of a higher median grade for all examiners. LESTER REPORT 28-29 (1954).

36. The only recommendation made with respect to classification standards is that reference to size of the record be deleted, see note 28 *supra*, because it is a source of false impressions. LESTER REPORT 37 (1954). This factor is but one of six indicia of the difficulty of a proceeding; and, alone, has no effect upon a position classification. The Commission has defended the standard as one having value in determining position grades, and it was adopted upon the recommendation of hearing examiners. Further, examiners have been made aware of the insignificance of the factor. *Hearings, supra* note 22, at 1254-58.

of eliminating promotion difficulties.³⁷ The Kintner Report cites agency control over examiners' compensation as an additional reason for its proposal, but this criticism results from overlooking the distinction between a position and its occupant.³⁸ A change in the grade of the position does not result in the promotion of the examiner assigned to that position.³⁹ There would instead be a vacancy which could be filled only by a person approved by the Commission. Also, the assignment of more difficult work does not affect an examiner's promotion rating since ratings are based on the examiner's performance of the work to which he has been

37. LESTER REPORT 40 (1954) ; KINTNER REPORT 76 (1954). Examiners responsible for assignment of cases maintain that although it is difficult, cases can be classified according to difficulty. *Hearings, supra* note 22, at 198-201, 245, 622, 637, 784, 1022. Further, those examiners who insist that cases can not be pre-classified do so on the somewhat unrelated ground that there are no degrees of justice and all examiners should be paid the same amount. *Id.* at 264, 366, 424, 480, 784-85, 1025. Practicing lawyers also take this approach. *Id.* at 872, 961, 965, 1090. The Kintner group reflects this attitude: "In the larger and philosophical aspects of the hearing officer program it is quite unimportant that the nature and difficulty of work performed by hearing officers vary among agencies. In this broader and bigger light, primary importance automatically attaches to the quality of the hearing officer, not to the difficulty of the work he performs." KINTNER REPORT 77-78 (1954).

This begs the question of whether hearing examiners should be compensated as employees under the Classification Act or as judges under some new arrangement. Indeed, the transcripts raise the question of whether the whole Committee realized that this was one of the questions it was hoped would be answered. The following excerpt indicates this: "CHAIRMAN KINTNER: You are in effect, you and other Examiners throughout the Government, administrative judges." "MR. MULLEN: I don't call them administrative judges, no. I don't think they are judges. They have no final decision." "CHAIRMAN KINTNER: I realize that is a contradiction in terms, but speaking broadly, you are the little judges of the Federal administrative process, are you not?" "MR. MULLEN: I don't consider them judges at all." "CHAIRMAN KINTNER: You do not?" *Hearings, supra* note 22, at 198. Chairman Kintner's further references to hearing examiners as judges indicates that his decision in favor of the judge analogy might have been a foregone conclusion. *Id.* at 399, 405, 406, 490, 1014. See notes 93, 94 *infra*.

38. "The agencies themselves are in almost full control of compensation and promotion. They determine the number of grades which shall exist and they are able, *by the assignment of cases according to difficulty*, to control the promotion of any hearing officer." KINTNER REPORT 51 (1954). (Emphasis added). This assertion can not be reconciled with another of the group's criticisms: "Cases cannot be assigned degrees of difficulty in advance of their trial." *Id.* at 76. One of these complaints must fall if either is to stand. The question of estimating difficulty of cases remains unanswered. See note 37 *supra*. "In actual practice, an agency could demote an *examiner* if it so chose by consistently assigning him less difficult cases." KINTNER REPORT 51 (1954). (Emphasis added). To support this statement, the Report cites discussion which relates to *position* classification. *Id.* at 51 n.24.

39. A rise in the grade of a position resulting from the assignment of work of a higher level of difficulty requires that the Commission select the examiner to be promoted. § 34.4, 19 FED. REG. 3317 (1954). Prior to this change in regulations, agencies had the option of filling these vacancies by promotion of examiners within the agency or by bringing in examiners from outside the agency. 5 CODE FED. REGS. §§ 34.4, 34.5, 34.6, 34.7 (Cum. Supp. 1954). This discretion in filling vacancies seems to be the real object of the complaints that agencies control the promotion of examiners. See note 38 *supra*.

assigned without regard to the level of that work.⁴⁰ The only justification for the recommendation is, thus, the unhappy experiences resulting from Commission administration of promotions. In the Committee's view, elimination of the promotion problem transcends the importance of equal pay for equal work and promotion incentives.⁴¹

The entire Committee recommended that salaries of hearing examiners be increased.⁴² The Kintner Report found fault with the Civil Service Commission for failing to "satisfy" in salary matters.⁴³ This criticism, again, overlooks the relation which the Commission has had to maintain between examiners' salaries and the Classification Act.⁴⁴ The

40. *Hearings, supra* note 22, at 131-32.

41. Both Reports *commended* the Commission for narrowing the grade span within agencies. KINTNER REPORT 57 (1954), LESTER REPORT 39 (1954); see note 35 *supra*. Neither Report notes the Commission's explanation that higher grades result from agency assignment of cases rather than upon the will of the Commission. *Hearings, supra* note 22, at 1278-82. Thus, believing that the Commission has simply failed to eliminate grades, the Kintner group criticizes the Commission for inertia. KINTNER REPORT 54 (1954). See note 44 *infra*. Because the Lester group would leave examiner compensation within the framework of the Classification Act, its recommendation is more difficult to rationalize. No fault is found with the classification standards or their application. LESTER REPORT 28, 37 (1954). Rather, the recommendation is based upon a belief that it is best to eliminate the need for pre-determining case difficulty and a judgment that difficulty of cases *within* agencies is not as great as *between* agencies. Supporting these conclusions is a reference to the importance of all cases to the public. *Id.* at 39-40. The recommendation appears to be an attempt to compromise problems of low salaries and promotion by partially recognizing the "no grades of justice" concept as a standard under the Classification Act. See notes 28, 37 *supra*. The Kintner group concluded that incentives are not necessary for hearing examiners. "They of course require a good salary, but their primary incentive is excellence in the law and in the judicial function they perform." KINTNER REPORT 76 (1954). The Lester group also considered incentives as secondary to elimination of the promotion problem. LESTER REPORT 40-41 (1954). This is, perhaps, a mistaken judgment. The compensating features of the Kintner group's proposals will not be available under the Commission's administration. See notes 42, 61, 94 *infra*. In addition, the agencies' desire to attract and hold young men for eventual placement in the corps is not satisfied. *Hearings, supra* note 22, at 644, 650-652, 760-761, 783, 1114, 1135.

42. LESTER REPORT 43 (1954). Salaries should range between \$12,000 and \$14,000 to be fixed for each agency by the Office of Administrative Procedure. KINTNER REPORT 79 (1954). Present beginning salaries range from \$5,940 for a grade 11 examiner to \$10,800 for grade 15. 63 STAT. 965 (1949), as amended, 65 STAT. 612 (1951), 5 U.S.C. § 1113 (1952).

43. "To the extent that [the Civil Service Commission] has assumed responsibility in salary matters it has failed to satisfy, performing hesitantly and inconsistently." KINTNER REPORT 54 (1954). This criticism is not directed toward specific instances of Commission failure. Other criticisms indicate that the Commission could have satisfied the Kintner group only by acceding to the examiners' demand for one level of compensation within each agency, *Ibid.*, and by insisting that agencies assign cases in mechanical rotation. *Id.* at 51. Thus, the criticism is based upon an interpretation of Section 11 different from that which the Commission has followed. See note 12 *supra*. In effect, this complaint becomes an after-the-fact observation on how promotion difficulties could have been avoided and laid the groundwork for the group's ultimate recommendation. See note 16 *supra*.

44. "That the salaries of most hearing examiners have been far too low is another indication that the Civil Service Commission has failed to comprehend and master the

Lester Report would effect higher salaries by eliminating the two lowest levels of compensation.⁴⁵ Somewhat perplexing, however, is the failure of the Report to justify its recommendation. It makes no substantial criticism of the Commission's position classification standards.⁴⁶ If the proposal were accepted, the basis for the correlation between salaries of hearing examiners and other employees in the classified service would be destroyed. The problem of fitting a multitude of government positions into a defensible salary structure is difficult, and departure from the classification schedule for the benefit of hearing examiner positions should depend upon a conclusive showing that the positions have been erroneously classified. Resistance to pressure for reclassification without such a showing is, in large measure, a test of the worthiness of the Civil Service Commission. Until the Commission is shown or is willing to admit that its classification standards are unreliable, or until Section 11 is amended to remove the reference to the Classification Act,⁴⁷ the recommendation should be disregarded.⁴⁸

Regulations which allow the appointment of status employees to hearing examiner positions⁴⁹ are a source of further dissatisfaction with

importance and complexities of the hearing officer function. Inadequate salaries are an insult and an injustice to incumbent hearing officers." KINTNER REPORT 50 (1954).

This criticism is made without first comparing the compensation of hearing examiners with other government employees whose salary is also prescribed by the Commission under the Classification Act. The salary range proposed by the Kintner group, if it can be taken as an indication of the measure of the Commission's failure, falls within the "super grades" which have been reserved by Congress for those bureau heads whose work is of the highest order and for positions entailing planning responsibilities of national significance. 63 STAT. 959 (1949), 5 U.S.C. § 1112 (1952). Even though the Kintner group believes that hearing officers deserve greatly increased salaries, it is unrealistic to criticize the Commission for failing to achieve what would be outside the scope of its power under the Classification Act. See note 43 *supra*.

45. ". . . [W]e recommend that . . . the range, until increases are made possible, be from the maximum figure provided for GS-15 to a minimum figure as provided by GS-13." LESTER REPORT 43 (1954).

46. ". . . [W]e regard the Commission's development of the present classification [standards] as a creditable achievement, which with minor modifications . . . should be preserved as part of the basis of the hearing examiner program." *Id.* at 30.

47. See note 33 *supra*.

48. The recommendation is based upon the group's opinion that variations in the difficulty of the work performed by all examiners does not justify a difference of over \$2,000 in their compensation. LESTER REPORT 43 (1954). See note 46 *supra*. However true this judgment may be as regards a vertical consideration of hearing examiners' compensation, the Committee has not considered the horizontal grade structure upon which present compensation is based. 63 STAT. 957 (1949), 5 U.S.C. § 1091 (1952). Without this, no reliable judgment as to the adequacy of salaries can be made. It seems obvious that hearing examiner salaries are inadequate, but this may also be said of government salaries generally. The recommendation does not take into consideration the fact that examiner capabilities differ or the effect which a pay increase for examiners would have upon other employees whose duties and responsibilities are comparable. *Hearings, supra* note 22, at 642-643, 795-797, 809-812, 824.

49. 5 CODE FED. REGS. §§ 34.5(b), 34.6(b), 34.7(b) (Cum. Supp. 1954). These regulations allow the appointment of a person with civil service status if, after examination

the Civil Service Commission.⁵⁰ Among the complainants are persons on the Commission's hearing examiner registers who point out that their ratings were made in 1949-1950,⁵¹ while status employees are rated as of the date of application.⁵² The fact that only a limited number of vacancies occur in the hearing examiner corps⁵³ indicates that few registrants would be appointed in any event. This and the desirability of keeping open the few incentives for career service in government detracts from the force of the contentions. Further, agencies have not abused the privilege of selecting status employees.⁵⁴

Other dissatisfied persons are those who are neither status employees nor registrants. Because of the closed registers, they cannot become eligible for appointment unless new registers are established. This situation raises a serious question as to the value of competitive selection. Under the "rule of three"⁵⁵ many certificates are returned non-selected by agencies.⁵⁶ Selective certification, which allows the agency to select from a group of persons having special qualifications, has been necessary to meet the needs of three agencies;⁵⁷ and other agencies are expected to

by the Commission, his rating would be within reach for certification if his name were on the open competitive register. *Id.* at § 34.4(b). See note 39 *supra*.

50. "The regulations favor appointment of anybody who has Civil Service 'status,' even though it be status as a messenger or a clerk." KINTNER REPORT 47 (1954). "The robe of 'status' is a magic one to wear. Once a person acquires status . . . and works as a status employee for the required length of time, he acquires a lifetime of special privileges and protections." *Id.* at 31 n.160.

Some examiners demand that regulations be changed so that vacancies can be filled only by promoting incumbent examiners. *Hearings, supra* note 22, at 342-344. Included in the demand is that appointments from the register be limited to cases where no examiner can be promoted to fill the vacancy. *Id.* at 334.

51. The examination for hearing examiners was closed on July 5, 1949. Civil Service Commission, Report to the Committee on Hearing Officers, Exhibit 5 (1954). The examination was reopened on August 10, 1954, and closed September 7, 1954. Civil Service Commission, Examining Circular EC-17, October 21, 1947, as amended August 10, 1954. The Commission expects to have new registers prepared by early 1955. *Hearings, supra* note 22, at 1238. All eligibles on the old registers who failed to renew their eligibility will be disqualified for future appointment. *Id.* at 1238-39.

52. 5 CODE FED. REGS. § 34.4(b) (Cum. Supp. 1954).

53. Since the adoption of the APA there have been 120 appointments to the corps: 50 persons have been appointed from the registers; 15 non-hearing examiner status employees have been qualified and appointed; and 55 persons have been blanketed-in under the provisions of 5 CODE FED. REGS. § 34.3(c) (Cum. Supp. 1954). KINTNER REPORT 47 (1954).

54. See note 53 *supra*.

55. "The nominating or appointing officer shall make selection from not more than the highest three names available for appointment. . . ." 58 STAT. 389 (1944), as amended, 5 U.S.C. § 857 (Supp. 1953).

56. *Hearings, supra* note 22, at 149.

57. The Commission screens the register of eligibles for persons who possess the special qualifications which have justified the privilege of selective certification, *e.g.*, maritime law. An agency which is granted the privilege must use the method so long as the Commission can supply suitable persons. The United States Coast Guard, FCC, and

ask that the privilege be extended to them.⁵⁸ The registers, although nearly five years old, contain enough eligibles to fill all anticipated vacancies.⁵⁹ Despite these indications that competitive selection is too narrow and that broad recruitment is unnecessary, the Lester Report recommended that new registers be established biennially.⁶⁰ Free agency choice from among all eligibles was recommended in the Kintner Report.⁶¹ Both Reports recommended that new appointments be limited to the "registers."⁶²

The Civil Service Commission's regulations subjecting examiners to reduction in force procedures⁶³ are the object of particular examiner criticism.⁶⁴ The determination of who shall be affected in any cutting down of personnel is made solely on the basis of length of federal service.⁶⁵ After an agency has employed the procedure it is required to place names of persons affected on a reemployment priority list from which subsequent appointments must be made.⁶⁶ In the case of hearing examiners, Commission regulations provide for reinstatement at the top of the register for the grade in which the examiner formerly served.⁶⁷ The safeguards which surround the hearing examiner and the infrequent use of the procedure in the past emphasize the negligible effect which reductions in force have had.⁶⁸ No changes were recommended by the

FPC have been granted the use of this method of selection. *Hearings, supra* note 22, at 1275-76.

58. *Id.* at 1275.

59. *Id.* at 1248. Commission policy with respect to registers is to give one year of eligibility, and then to keep the register open for so long as it is sufficient to meet needs. The hearing examiner register is being reopened because of the five year lapse of time since its establishment. *Id.* at 1248-49. Competitive selection is both expensive and restrictive. *Id.* at 144-48.

60. LESTER REPORT 59 (1954). The injustice that results when an examination is closed for five years will thereby be reduced by three-fifths. *Id.* at 18, 36, 45.

61. KINTNER REPORT 72-73 (1954). The proposed Office of Administrative Procedure would recruit and qualify persons for appointment. Agencies would then select from the entire list of eligibles, and the act of appointment would be conferred upon the President. It is believed that presidential appointment will add to examiners' prestige. *Ibid.* Further, "The appointment of hearing officers should . . . be exposed to the salutary light of publicity." *Id.* at 61.

62. LESTER REPORT 19, 45 (1954); see note 61 *supra*.

63. 5 CODE FED. REGS. § 34.15 (Cum. Supp. 1954).

64. *Hearings, supra* note 22, at 336-38, 984-85.

65. 5 CODE FED. REGS. §§ 20.4, 34.15 (Cum. Supp. 1954).

66. 5 CODE FED. REGS. § 20.7 (Cum. Supp. 1954). A separated employee must be kept on the list for a period of one year and will be removed only at his request, or by accepting a permanent position, or by declining an offer of a position equivalent in salary to that from which separation was made. An agency may not make new appointments if there is a qualified person on the list. However, this limitation does not apply to the appointment of 10-point preference eligibles. *Ibid.*

67. 5 CODE FED. REGS. § 34.15(c) (Cum. Supp. 1954); *Hearings, supra* note 22, at 1300.

68. *Id.* at 1266-67. Twelve examiners have been affected directly or indirectly by reductions in force. Of the twelve, six secured immediate reemployment as hearing

Lester Report.⁶⁹ The Kintner Report recognized the agencies' need for curtailing staffs under some conditions but recommended that reduction in force procedures be inapplicable to the hearing examiner.⁷⁰

The qualification standards for appointment to an examiner position have not been changed since their establishment in 1947.⁷¹ The Civil Service Commission has taken the view that until agencies complain about the competence of hearing examiners, there is no reason to question the standards.⁷² Those who joined in the Kintner Report took issue with

examiners with other agencies. The six for whom positions were not immediately available were, when funds became available, offered their old positions with the NLRB. *Ibid.*

69. LESTER REPORT 48 (1954). The suggestion that agencies consider the effect of loss of examiners and attempt to "loan" examiners under 5 CODE FED. REGS. § 34.13 (Cum. Supp. 1954) before employing reduction in force procedures seems already to be the practice. *Ibid.* See note 66 *supra*.

70. KINTNER REPORT 82 (1954). The Kintner group, after reviewing the safeguards of present reduction in force regulations, concluded: "So that the door is open to some extent at least for an agency's use of reductions in force to bring about the separation of an unwanted examiner." *Id.* at 38. The group later suggests that agencies continue to be allowed to employ the procedure except that the examiners affected will be given preference for later vacancies. *Id.* at 82. This procedure is closely comparable to present practices, see note 66 *supra*, especially when it is considered that the Kintner group made no provision for the examiner's pay. It appears that the total effect of the group's recommendation would be to continue, under an Office of Administrative Procedure, the danger which the group notes under Commission administration. There is no reason apparent why an agency could not yet remove an examiner from within the agency.

71. Civil Service Commission, Departmental Circular No. 592, Revised June 2, 1954. In the recent examination (See note 51 *supra*) no changes were made in the experience and training requirements. Civil Service Commission, Examining Circular EC-17, Oct. 21, 1947, as amended, Aug. 10, 1954. The standards were established by the Commission with the advice of an Advisory Board. Members of the Board were Commissioner J. R. Alldredge, ICC; F. C. Baggarly, Chief Trial Examiner, FTC; H. A. Bergson, Legal Consultant, Dept. of Justice; W. C. Hunter, Solicitor, Dept. of Agriculture; and Carl McFarland, a past president of the ABA and a member of the Attorney General's Committee on Administrative Procedure. After a public hearing and revision of the standards the examination for hearing examiner applicants was announced. Civil Service Commission, Report to the Committee on Hearing Officers, Attachments 4-16 (1954).

The standards require a combination of six years general and specialized experience. General experience consists of legal practice or technical work in a field corresponding to one in which hearings are held in federal agencies. Specialized experience must have been obtained as a judicial officer of a court of record or of a government regulatory body, or obtained in the preparation or presentation of cases in a court of record or government regulatory body. Administrative responsibility for the preparation or presentation of such cases is also credited as specialized experience. The requirement of specialized experience is progressively increased for each examiner grade, and the cases from which the applicant gained specialized experience must have been in a field comparable to one in which federal agencies hear cases. Applicants are rated in relation to specific positions to be filled and, thus, may qualify for different grades of positions. They are required to submit detailed descriptions of cases with which they have worked, covering such points as are included in the position classification standards, see note 28 *supra*, and names of references who can verify the information submitted. After a field investigation, an oral interview, and analysis of the case descriptions each person is given a numerical rating. Civil Service Commission, Examining Circular EC-17, Oct. 21, 1947.

72. *Hearings, supra* note 22, at 98, 1235.

this attitude⁷³ and recommended that qualification requirements be "substantially raised."⁷⁴ The Lester Report concluded that the "present high standards" should be retained.⁷⁵ There seems to be no basis for the contention that the standards are too low.⁷⁶

Doubt as to the competency of the Civil Service Commission to rate legal qualifications pervades the criticisms which examiners⁷⁷ and practicing lawyers⁷⁸ direct at the administration of the hearing examiner program. Even the Committee on Hearing Officers reflects this doubt.⁷⁹ However, none defines "legal qualifications." The term would seem to include a combination of legal skills,⁸⁰ specialized

73. "We do not intend to be unduly critical of the standards of qualifications drawn up by the Civil Service Commission in 1949. The basis of our criticism is the fact that in the past 5 years the Commission has made no attempt to revise its standards upward. The failure to review and amend its qualifications stems from . . . [a] lack of any interest in determining whether or not appointees under existing standards have performed satisfactorily." KINTNER REPORT 50 (1954).

74. *Id.* at 85, Revised Summary of Recommendations. The recommended changes consist of requirements that applicants have a law degree, be members of a bar and have met the presently required six years experience requirement *immediately preceding* qualification. *Ibid.* The split between the Committee members developed partially because the Kintner group did not acknowledge that their "substantially raised" standards are not materially different from those presently used by the Commission. LESTER REPORT 25, 33 (1954). See notes 71, 73 *supra*. The Kintner group would, however, materially alter the application of the standards. Candidates would be deemed qualified in the broad discretion of the Office of Administrative Procedure. KINTNER REPORT 64 (1954). Other than the three recommended "minimums," all other standards would be left to the judgment of the Office of Administrative Procedure. *Id.* at 64-71.

75. LESTER REPORT 32 (1954).

76. The Kintner group does not provide the bases upon which the finding is made but criticizes the Commission for establishing standards which do not credit legal-administrative experience. KINTNER REPORT 50 (1954). This criticism is made with particular reference to the ICC. *Hearings, supra* note 22, at 1114, 1118. The Kintner group purports to end the condition by allowing legal-administrative experience to be credited. KINTNER REPORT 67 (1954). In fact, they have left this source of examiners closed by imposing a requirement of ". . . adequate experience as a participant in adversary proceedings before courts of record or in administrative agencies." *Id.* at 85, Revised Summary of Recommendations. The gist of the agency complaint is that this is a requirement. Commission standards come nearer to meeting the criticism voiced at the hearings because they do credit legal administrative experience without requiring participation in adversary proceedings. See note 71 *supra*.

77. *Hearings, supra* note 22, at 278, 287, 408, 488, 497, 521, 1007.

78. *Id.* at 843, 861-64, 888, 899, 1080, 1083.

79. "The Commission is simply not equipped for the task—not equipped to classify or to rate judicial functions or the performance thereof; not equipped to rate legal personnel." KINTNER REPORT 58 (1954). ". . . [W]e think that the essence of the adverse comment was that lawyers were being selected by nonlawyers. We believe that the criticism, while over emphasized, has some foundation." LESTER REPORT 49 (1954). The Commission, however, maintains that rating lawyers' qualifications is no more difficult than rating those of other professional persons. *Hearings, supra* note 22, at 131.

80. The legal skills which the Commission finds important are: ability to analyse and evaluate evidence, ability to interpret and apply laws, rules, regulations, and legal precedent, and ability to write clearly and concisely statements of fact and law, recommendations and orders. Civil Service Commission, Examining Circular EC-17, Oct. 21, 1947.

knowledge,⁸¹ and personal characteristics.⁸²

Evaluating specialized qualifications⁸³ requires a thorough knowledge of agency operations and a legal background. In performing this function the Civil Service Commission has utilized its staff of personnel examiners, some of whom are lawyers, and has sought advice from persons familiar with the examiners' work.⁸⁴ The personal characteristics⁸⁵ which hearing examiners should possess are those which are collectively described by the Committee as "judicial temperament." This connotes such traits as patience, objectivity, and decisiveness. Each of these traits is also desirable in administrators or teachers; yet, the Commission's competence in selecting these persons is not questioned. Whether any particular person, *e.g.*, a judge or a lawyer, is more capable of ascertaining the possession of these characteristics than is a trained personnel examiner would seem doubtful. There is nothing upon which to base a judgment that Commission selection has been defective,⁸⁶ but both factions of the Committee recommended that the viewpoint of the lawyer be given greater emphasis in selection.⁸⁷ Certainly, a resolution of the

81. Specialized knowledge consists of a diversity of experience in legal proceedings of the type heard by federal agencies and knowledge and experience in the technical subject-matter field involved in the position under consideration. *Ibid.* The importance of specialized knowledge suffered a decline at the hands of the Kintner group. Although such a standard could be imposed in some instances, the group cautions: "We stress . . . that the Office of Administrative Procedure . . . should attach first importance to the larger attributes, the subjective or intangible qualities. . . . They should be the qualifications primarily sought, not an amount of specialized knowledge, the search for which will necessarily result in a diminished importance being assigned the larger attributes." KINTNER REPORT 69 (1954). This shunning of specialized knowledge results from fears voiced by representatives of the bar and bench who believe that it ". . . betokens preconceived ideas injurious to the impartiality essential in the hearing officer." *Ibid.* See also *Hearings, supra* note 22, at 899, 909, 1069, 1087-88.

82. These include: Ability to make independent decisions, ability to secure facts from individuals through observation and interviews without friction and under difficult conditions, ability to be objective and free from influences which might affect impartial judgment, ability to handle difficult situations and to make and effectuate practical solutions to problems, and ability to preside at and control meetings, conferences, or hearings with dignity and poise. Civil Service Commission, Examining Circular EC-17, Oct. 21, 1947.

83. See notes 80, 81 *supra*.

84. *Hearings, supra* note 22, at 1272-74.

85. See note 82 *supra*.

86. The validity of the criticism would seem to be indicated by the changes recommended in qualification standards. See notes 75, 76, 81 *supra*.

87. The Lester group recommended ". . . that the Commission hire additional persons who shall have been engaged, immediately preceding their appointment, in the preparation and presentation of cases before administrative agencies." LESTER REPORT 49 (1954). The Kintner group recommended that the proposed Office of Administrative Procedure be headed by a board composed of: "[A] government expert in the field of Federal administrative law; a member of an independent Federal regulatory agency; a law professor; and two non-government practicing lawyers." KINTNER REPORT, Revised Summary of Recommendations 84 (1954). This latter recommendation substitutes two

question submitted by lawyers in favor of lawyers may lack complete objectivity.

The Lester Report recommended that the Civil Service Commission establish a Bureau of Hearing Examiner Administration⁸⁸ and adopt “[a] more lawyer like approach in selecting hearing examiners.”⁸⁹ Each of these proposals is characteristic of others made by this group—some concession is made to all those critical of the Commission.⁹⁰ The Lester Report, being a compromise measure, can only serve to postpone another attack upon the Commission and delay the approach to an adequate solution of the hearing examiner problem.

The Kintner Report concluded that “. . . maintenance of the present system within the Civil Service Commission is intolerable.”⁹¹ and proposed the establishment of an independent Office of Administrative Procedure.⁹² The reasons underlying the conclusion are: First, the present administration allows room for interference with examiner independence;⁹³ and, second, the Commission has not been interested in help-

non-government practicing lawyers for a federal circuit judge and a practicing lawyer in the field of federal administrative law earlier suggested. KINTNER REPORT 63 (1954).

88. LESTER REPORT 50, 56-58 (1954). The Commission has already taken action to coordinate its activities in the hearing examiner program under a single administrative officer. Position classification and examining will continue to be carried out by the functional divisions within the Commission. Civil Service Commission, Departmental Circular No. 592, Revised June 2, 1954.

89. LESTER REPORT 49 (1954); see note 87 *supra*.

90. In the face of charges that agencies interfere with examiner independence and demands that the hearing examiner be raised to the status of a judge, the Lester group managed to sift fact from fiction and propose a series of compromise recommendations. Hearing examiners are to be given higher salaries, see notes 45, 48 *supra*, but they are to be denied relief from the symbol of their employee status—removal by reduction in force. See note 69 *supra*. The practicing bar is to be rewarded with: the abolishment of size of the record as a classification standard, see note 36 *supra*; a more nearly mechanical rotation of cases, see note 41 *supra*; and a minimum of representation in the selection of examiners. See notes 79, 87 *supra*.

In view of the possible alternatives, this compromise should be acceptable to hearing examiners for a time. See note 108 *infra*. However, the recommendations do not solve the problems which result from separation of responsibility for examiners, see note 9 *supra*, and they threaten the integrity of the Commission's administration of the Classification Act. See notes 33, 37, 41, 48 *supra*. Finally, the recommendations will be completely unacceptable to those who believe that hearing examiners must have greater status and nearly complete independence. See note 94 *infra*.

91. KINTNER REPORT 57 (1954).

92. *Id.* at 59.

93. The Kintner group appears to have been as much impressed by the possibility of interference with examiner independence as they would have been had evidence of such practices come before the Committee. An examiner, speaking before the Committee for himself and six other examiners whom the Commission had also failed to promote, stated that “*It has been reported to us that an attorney, after giving his views concerning an [ICC] examiner to a [Commission] investigator, visited the examiner before whom he had a case pending and told him of the wonderful recommendation he had made to the [Commission].*” *Hearings, supra* note 22, at 269. (Emphasis added).

ing the examiner to achieve the status intended for him under the APA.⁹⁴ The rationale of the recommendation is that such an office will enforce the "true spirit" of the APA.⁹⁵ Although the advocates of such an approach insist to the contrary, such an aggressive policy could only result in interference with the internal operations of agencies employing hearing examiners.⁹⁶ The results which the office would be expected to produce would require the conferment of powers commensurate with its responsibility.

The variance in the recommendations of the Committee on Hearing Officers is due to a difference in attitude toward the pressures which gave rise to the adoption of the APA and which continue to be exerted. The Lester Report recognizes the pressures and strives to compromise them in order to preserve the status quo;⁹⁷ the Kintner Report reflects them and seeks to impose additional new safeguards on administration.⁹⁸ The failure to find some common ground upon which to begin an evaluation of the problem foreclosed the possibility of reaching a common answer. The Committee centered its efforts upon meeting the demands of hearing

In the Report this becomes: "Such practice needs no further censure than that provided by the account in the transcript of an attorney who, although involved in a case pending before him, called upon a hearing officer in his quarters and pointedly informed him that he had just given him an excellent recommendation in response to a request by the [Commission]." KINTNER REPORT 52 (1954). See also *Id.* at 74-75; *Hearings, supra* note 22, at 219, 227, 871-872; notes 37, 38, 39 *supra*. The issue of interference with examiner independence seems to be no more than a lever which examiners have used to call attention to their problems of compensation. See note 12 *supra*.

94. Inasmuch as the status contemplated by the KINTNER REPORT is hardly distinguishable from that of a judge, the Commission could not have satisfied the demand under Section 11. See notes 33, 41, 43, 44 *supra*. The Kintner group considered that it had a mandate to enhance the status of the hearing officer and the integrity of the administrative process. KINTNER REPORT 58 (1954). This, they propose to accomplish by making the examiners' position more nearly equivalent to that of a judge, see notes 61, 70, 81 *supra*, and by setting a "watch-dog" on the arrangement. "Independence of salary and tenure assured, and other rights protected by the Office of Administrative Procedure, we believe that independence of judgment must follow." KINTNER REPORT 74 (1954).

In addition, there are ". . . the broader functions of overseeing the performance of hearing officers within the administrative process: . . . processing complaints and administering removal procedure, providing for rotation of cases in accordance with the Administrative Procedure Act, and constantly guarding against any encroachment upon the independence of hearing officers or upon the integrity of the administrative procedure." *Id.* at 62. Stripped of the force of a threat to examiner independence, all that remains is an independent examiner and his protector.

95. See note 94 *supra*.

96. The Office of Administrative Procedure recommended by the President's Conference bears no resemblance to the one proposed for administration of the hearing examiner program. ". . . [R]emember please, there is to be conferred upon the Office of Administrative Procedure, no power." PRESIDENT'S CONFERENCE ON ADMINISTRATIVE PROCEDURE, Transcript 33, November 23, 1953. The Office is to study and collect data, through cooperative means, to answer the problems of agencies and the bar. *Ibid.*

97. See note 90 *supra*.

98. See note 94 *supra*.

examiners and the organized bar without reference to the consequent effect upon the framework of the administrative process. The result is recommendations which offer the alternatives of continuing, through the proposals of the Lester Report, the present confusion; or accepting, through the recommendations of the Kintner Report, the goal of Senate Bill 1708.

Senate Bill 1708 was designed “. . . to achieve a completely independent corps of hearing examiners.”⁹⁹ The author of the bill reasoned that the decision in the *Ramspeck* case “. . . placed trial examiners at the mercy of the respective agencies in the executive branch of the Government with respect to such matters as promotion, tenure, compensation and removal.”¹⁰⁰ The study made by the Committee on Hearing Officers neither confirms this reasoning nor supports the inference that agencies seek to exert influence over examiners contrary to the provisions of Section 11 of the APA.¹⁰¹

Another asserted justification for independent examiners is the need for eliminating the opportunity for agency influence, but this overlooks the fact that eighty-one per cent of all federal hearing examiners are employed by independent boards and commissions.¹⁰² The organization of these agencies is designed to insure that a full representation of various views will enter into policy determinations, and it is highly improbable that a hearing examiner could be guided by anything but a synthesis of these views. The hearing examiner is a subordinate whose primary re-

99. SEN. REP. No. 2199, 83d Cong., 2d Sess. 1 (1954).

100. 99 CONG. REC. 3424 (1953).

101. See note 93 *supra*.

102. As of June 30, 1954, there were 278 federal hearing examiners. Two hundred and eighteen of these were employed by independent boards and commissions. KINTNER REPORT, Appendix D (1954). The examiners of the Bureau of Indian Affairs have been excepted from the provisions of the APA since the compilation of these figures. Pub. L. No. 663, 83d Cong., 2d Sess., Ch. VII (Aug. 26, 1954). Of the 51 examiners serving in the agencies outside the boards and commissions, 22 serve with agencies charged with administering public benefit programs: Social Security Administration and Veterans' Administration. These examiners should be excepted from the provisions of the APA as were those in the Bureau of Indian Affairs. The purpose of separation of examiners from agencies to any degree is essentially to cushion against the excessive zeal with which some administrators might push toward achievement of agency policy. There is no element of adversity in the administration of benefit programs, and the interests of all would be more efficiently served with less formalized procedures. Jaffe, *supra* note 7, at 427.

The twenty-nine examiners within the executive departments are considerably less insulated from the opportunity for interference that was meant to be guarded against than are those within independent agencies. The proximity to agency heads who are political appointees and subject to removal at the will of the President urges the desirability of greater safeguards against interference or arbitrary removal. Present Commission regulations seem adequate to protect against the possibility of such interference.

sponsibility is to serve as the organization's fact finding representative.¹⁰³ The further duty of making or recommending decisions requires that the examiner apply the policy formulated by the agency.¹⁰⁴ Some measure of control by the agency over the examiner in addition to removal for cause is necessary to insure that these subordinate duties are efficiently performed.¹⁰⁵ In the organizational scheme which Congress has devised for independent agencies,¹⁰⁶ the *independent* hearing examiner is a superfluity which threatens the accomplishment of effective regulation.¹⁰⁷ A Congressional demand for increased responsibility on the part of agency heads would be much more sensible.

The method of selection of examiners proposed by Senate Bill 1708 is political appointment.¹⁰⁸ The assumption is that responsible persons will be able to exert enough influence to secure the appointment of competent examiners. In the selection of federal judges, this influence has often been successfully exerted by bar associations; but lawyers do not stand in the same relation to federal regulatory agencies as they do to the courts.¹⁰⁹ Political appointment of those persons who perform a function closely comparable to that which agency heads are selected to perform is

103. *Hearings, supra* note 22, at 198, 230, 767, 878, 1116. See also ABA, Report *In Re* Hearing Officers of the Committee on Improvement of Administrative Procedures 2, May 10, 1954.

104. See note 10 *supra*.

105. See note 112, 114 *infra*.

106. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON REGULATORY COMMISSIONS 21 (1949). "The member of the Commission must expose his reasons and judgments to the critical scrutiny of his fellow members and must persuade them to his point of view." *Ibid*. There is no suggestion in the transcripts of the Committee's hearings that the APA ban against supervision of examiners by prosecutory or investigatory personnel had ever been raised as an issue. See note 9 *supra*.

107. ". . . [P]olitical expediency may sometimes force arguments to be pitched at a procedural level when attack on a program or agency with strong popular support is too risky." MUSOLF, FEDERAL EXAMINERS AND THE CONFLICT OF LAW AND ADMINISTRATION 21 (1952).

108. There is no provision in the bill securing incumbent examiners in their positions, but the Senate Committee on the Judiciary ". . . believes that the President should, and is confident that the President will, if this bill is enacted nominate for appointment under it all hearing examiners now serving . . . whose records indicate that they are fit and competent examiners." SEN. REP. NO. 2199, 83d Cong., 2d Sess. 2 (1954). Presumably, the President will rely upon the advice of Senators as to fitness and competency of present incumbents. ". . . [T]he Senate has so stretched its powers as practically to usurp, in all but a relatively few cases, the nomination as well as the confirmation of appointees. It has . . . gone further than this and . . . allotted the selection of appointees to the individual senators. . . ." WILLOUGHBY, PRINCIPLES OF PUBLIC ADMINISTRATION 273 (1927).

109. "It is beyond question that the courts could not function without the aid of the bar, and accordingly the members of the bar are deemed to be officers of the courts." VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS 103 (1953).

inconsistent with the painstaking effort which has been made to create independent agencies.¹¹⁰

Finding the proper balance between examiner independence and administrative responsibility and efficiency is the problem which the President's Conference was expected to resolve. A workable solution requires that the administrative process be recognized as no more and no less than an attempt to solve the problems of an increasingly complicated society. Agency interference with examiner independence remains only a theoretical possibility. Those who demand "reform" of the administrative process should carry the burden of producing the evidence to justify the need.

Civil Service Commission authority over the hearing examiner program should be retained to the extent that it promotes the selection of well qualified examiners. The division of authority over compensation and supervision of examiners has been a failure.¹¹¹ It has resulted in a complete lack of supervision which has contributed to the growth of the present dispute between hearing examiners and the Commission. Section 11 should be amended to eliminate Commission responsibility for determining examiner compensation.

The formal removal procedures presently applicable to Section 11 examiners¹¹² have never been invoked.¹¹³ The stringency of this provision may well have discouraged agencies from bringing charges even where such a course would have been desirable. Civil Service regulations relating to "separations in the interest of efficiency of the service" provide ample safeguards against arbitrary removal¹¹⁴ and, in the interest of efficient administration, should be substituted for the present Section 11 provision.

Competitive selection of examiners has proved to be uneconomical and impractical, and the limited number of vacancies in the hearing examiner corps militates against the continuance of a broad recruitment program.¹¹⁵ Further, it is doubtful whether the Commission, because of the narrowness of the "rule of three," can consistently meet agency needs for examiners with special qualifications.¹¹⁶ The ascertainment of specialized qualifications should be the responsibility of the agency for whom

110. See note 106 *supra*.

111. See note 9 *supra*.

112. "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." 60 STAT. 244 (1946), 5 U.S.C. § 1010 (1952).

113. *Hearings, supra* note 22, at 799.

114. 5 CODE FED. REGS. § 9 (1949), and 5 CODE FED. REGS. § 9 (Cum. Supp. 1954).

115. See notes 53, 57-59 *supra*.

116. See note 57 *supra*.

the examiner will serve.¹¹⁷ Hearing examiners should be appointed by the agencies subject to noncompetitive examination by the Commission,¹¹⁸ and the examination conducted by the Commission should be limited to insuring that the persons nominated by the agencies possess the minimum qualities necessary for conducting a fair hearing.¹¹⁹

The career aspects of the present hearing examiner program should be continued under agency administration. Variations in the difficulty of cases within agencies and between agencies under existing standards provide a basis for promotion incentives.¹²⁰ These incentives offer an excellent opportunity for an agency to train personnel for the hearing examiner function and provide the necessary distinction through which relatively young men can hope to achieve positions of greater responsibility.¹²¹ The subordination of the hearing examiner position to the effectiveness of administrative action does not diminish the importance of the examiner but, rather, returns the position to its proper perspective.

CRIMINAL LAW: STATUTORY REGULATION OF ALIBI DEFENSE THROUGH NOTICE REQUIREMENTS

Alibi legislation is an experiment of fairly recent origin in criminal procedure¹ seeking to regulate the use of alibi by discarding certain established rules of criminal pleading.² A number of states, including Indiana,

117. REP. ATT'Y GEN. COMM. AD. PROC. 47 (1941). ". . . [T]he agencies themselves should have an important share of the responsibility of selecting the persons who shall be hearing [examiners]." *Ibid.*; APA—LEGISLATIVE HISTORY, SEN. DOC. NO. 248, 79th Cong., 2d Sess. 215, 280, 371 (1946).

118. 5 CODE FED. REGS. § 6.2 (Cum. Supp. 1954).

119. See note 82 *supra*.

120. See note 28 *supra*. Multiple grades of examiner positions existed prior to the adoption of the APA. Civil Service Commission, Report to the Committee on Hearing Officers 10-11 (1954). The fact that this situation existed prior to the pressures which gave rise to the present controversy tends to confirm the fact that most, if not all, the present examiner complaints arise out of the lack of supervision and promotion delays rather than from the multiple grade structure.

121. The mean age of all federal examiners as of January 7, 1954, was 54 years. KINTNER REPORT, Appendix B (1954).

1. The first alibi act was adopted in Michigan in 1927. This law served as model for ensuing state enactments. The majority of the statutes were created in the period between 1934 and 1942.

2. Ordinarily the defendant in a criminal case cannot be compelled to reveal the nature of his defense through advance pleading. The duty rests upon the prosecutor to prove all the material allegations of the charge without the aid of prior notice of the defendant's case.