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THE HOOVER COMMISSION AND TASK FORCE REPORTS ON LEGAL SERVICES AND PROCEDURE

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A. *General Nature of the Reports*‡

The report of the Commission on Organization of the Executive Branch of the Government, popularly known as the Hoover Commission, on Legal Services and Procedure, dated March, 1955,¹ and the report of the Commission's Task Force on the same subject,² on which the Commission's report was based, are major landmarks in the literature relating to the legal work of the Government and to administrative law. The report of the Task Force in particular, as has been pointed out, "contains the most comprehensive treatment of federal administrative law since the issuance of the celebrated Report of the Attorney General's Committee on Administrative Procedure in 1941" and, whatever one may think of its recommendations, "seems likely to serve as the catalyst in a new movement for administrative law reform."³ Intensive analysis and criticism of the reports, especially that of the Task Force, are prerequisite to their due consideration.

The general scope of the two reports is the same. They contain recommendations with regard to the selection and conduct of government lawyers and the representation of private parties before agencies. To conduct a new legal career service within the Government and to carry on certain coordinating functions with reference to agency procedure, the reports propose the establishment in the Department of Justice of an Office of Legal Services and Procedure. The Department's role in the representation of government agencies before courts would also be

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‡ The report of the Commission will be cited hereinafter as H.C. Rept. and that of the Task Force as T.F. Rept. The numbered recommendations in each report will be cited simply by number, *viz.*, H.C. Rept. No. 52. Two bills proposed in the Task Force report will be cited as L.S. Act (Legal Services Act) and Code (Administrative Code).

1. This report is in the form of a pamphlet of 115 pages.

2. The Task Force report is a pamphlet of 442 pages.

3. Bernard Schwartz, *Hoover Commission Report*, 7 AD. L. BULL. 126 (1955).

enlarged. The establishment of an Administrative Court is recommended, as is the creation of a corps of hearing commissioners to serve the various agencies in formal proceedings, which would be attached to the proposed Court. Both reports contain recommendations relating to the procedure of federal agencies and judicial review of agency determinations; but only three members of the Commission⁴ joined in these recommendations, which differ in important respects from those of the Task Force. Six of the twelve members of the Commission⁵ "did not vote" for this group of Commission recommendations, but agreed that they might be presented to Congress; one⁶ reserved judgment as a member of Congress if the recommendations should be actively considered by that body; one⁷ voted in favor of the recommendations only with reservations; and one⁸ dissented from the Commission's report as a whole. The conclusions of the Task Force were unanimous except as to the extent of the jurisdiction of the proposed Administrative Court. The Task Force report includes drafts of two bills to carry out the bulk of its recommendations calling for legislation, including an Administrative Code that would replace the federal Administrative Procedure Act.

All in all, the reports review those aspects of the work of the executive branch of the Government and of the courts in relation to that work, which are of particular professional concern to lawyers. The Task Force was composed entirely of lawyers⁹ and the three Commissioners who went farthest in supporting its recommendations are also lawyers. The recommendations, therefore, constitute to a large extent a professional judgment on the problems covered and will be looked upon as such by Congress and the country. The dissenting Commissioner, Congressman Holifield, states as his over-all criticism that "generally, I believe the report is too 'legalistic' in its approach to problems of Government organization and management."¹⁰ The governing philosophy of the Task Force report appears in the statement in its text that "*The more closely that administrative procedures can be made to conform to judicial procedures,*

4. Robert G. Storey and Senators Homer Ferguson and John L. McClellan.

5. Chairman Herbert Hoover, and Messrs. Herbert J. Brownell, Jr., Arthur S. Flemming, Solomon C. Hollister, Joseph P. Kennedy, and Sidney A. Mitchell.

6. Congressman Clarence J. Brown.

7. James A. Farley.

8. Congressman Chet Holifield.

9. The members of the Task Force were James Marsh Douglas, Chairman, Herbert Watson Clark, Cody Fowler, Albert J. Harno, James McCauley Landis, Carl McFarland, Ross L. Malone, Jr., David F. Maxwell, Harold R. Medina, David W. Peck, Reginald Heber Smith, E. Blythe Stason, Elbert Parr Tuttle, and Edward Ledwidge Wright. Mr. Justice Robert H. Jackson, George Roberts, and Chief Justice Arthur T. Vanderbilt served as special consultants.

10. H.C. Rept., pp. 97-98.

the greater the probability that justice will be attained in the administrative process."¹¹

Unfortunately the report of the Task Force is not accompanied by "a separate staff document containing detailed charts and appendices for the use of the task force and the Commission," which is cited at various points in the report but "has not been published and is not available."¹² The reports as issued suffer at numerous points from a lack of supporting information and at some points from an apparent superficiality that might diminish if the data used were available. It seems fair to say, however, that in the main the recommendations and proposed statutory provisions are logical applications of governing principles, rather than proposals based on empirical study, and must stand or fall on the asserted validity of those applications. In characteristic Hoover Commission style, the Commission report consists of short, dogmatic text passages which lead to brief black-letter recommendations, 52 in number. The order is reversed in the Task Force report, with fuller statements following 74 black-letter recommendations. In addition, an over-all General Report, by way of summary, occupies 51 pages of the first of five Parts into which the Task Force report is divided; some of the chapters within each Part have introductory passages; and the two comprehensive statutes proposed are followed by section-by-section analyses of their provisions. Considerations counter to those which moved the Task Force and the Commission are rarely mentioned.

In the treatment that follows, the recommendations and proposed statutory provisions will be dealt with in the following order: (1) government legal personnel and representation of private parties before agencies; (2) organization of government legal services; (3) the Administrative Court; (4) hearing commissioners; (5) administrative procedure and judicial review; and (6) proposed limitations of federal administrative authority. Over-all comments will be offered in conclusion. Proposals in the reports with respect to legal services within the Department of Defense, which involve matters largely unfamiliar to the writer,¹³ will not be discussed, nor will certain other recommendations of limited scope.¹⁴

B. Legal Personnel and Representation

The most important proposal in the reports with respect to legal personnel is that government attorneys be placed under a career service

11. T.F. Rept., p. 138. (Italics in original.)

12. *Id.* at p. viii.

13. These proposals embrace recommendations 7-10 and 18-20 of the Commission report and recommendations 7-12, 14, and 21-22 of the Task Force report.

14. Notably a recommendation that the Veterans' Administration Guardianship Service be curtailed. H.C. Rept. No. 5; T.F. Rept., pp. 68-71.

to be newly established and administered by the Department of Justice.¹⁵ The need for a career legal service has long been felt. Under the prevailing practice from the beginning of the Government, except for a four-year interlude under Executive Order No. 8743 of April 23, 1941 and succeeding Orders, federal attorneys have been outside of the civil-service merit system and subject to political appointment. Although consideration of merit in making appointments has been the rule rather than the exception and considerable security of tenure has existed on an informal basis, adequate security has not been created, and the Government's efforts to obtain qualified young lawyers in competition with private employment have been seriously handicapped by the absence of a suitable system of recruitment, selection, promotion, and tenure.¹⁶

The 1941 report of the President's Committee on Civil Service Improvement,¹⁷ which for some reason that is difficult to understand is not cited in the present reports, recommended the establishment of a legal service under a merit system and presented two alternative plans in detail. One of these plans was placed in effect by executive order and continued with modifications until 1945 when denial of funds by Congress compelled its abandonment.¹⁸ The new recommendations are similar in important respects to those of the earlier committee; but whereas that committee suggested placing the specialized career service under the over-all Civil Service laws with some modification, the present proposal would govern it by new legislation and place it in an Office of Legal Service and Procedure in the Department of Justice. It would be under a director and would function with the aid of a Legal Services Advisory Committee chosen by the chief law officers of the various agencies. The Committee, the chairman of which could not be from the Department of Justice, would have limited veto power over the regulations of the Office.¹⁹ An informal recruitment plan which has been maintained by the Department of Justice during the past three years suggested the proposed scheme.²⁰ In the Department of Defense the plan would operate

15. H.C. Rept. Nos. 11, 12; T.F. Rept. No. 13.

16. H.C. Rept., pp. 16-18; T.F. Rept., pp. 12-15, 85-88. It has been particularly difficult for federal agencies, having to carry on recruitment separately, to afford consideration for appointment to lawyers and graduating law students located at a distance from Washington, since selection almost necessarily involves personal interview.

17. H.R. Doc. No. 118, 77th Cong., 1st Sess. (1941).

18. See Fuchs, *The Hearing Officer Problem—Symptom and Symbol*, 40 CORN. L. Q. 281, 314 (1955); COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, Task Force Report on Personnel and Civil Service, pp. 130-31 (1955).

19. L.S. Act § 202(c).

20. H.C. Rept., p. 18; T.F. Rept., p. 87.

through a Civilian Legal Personnel Committee²¹ modeled after similar committees now existing in the several services, the earliest of which, in the Department of the Army, stems from the wartime attorney merit system.

The methods of examination and selection proposed in the reports and elaborated in the suggested statute are that the written applications and records of candidates should be screened and that those candidates found satisfactory on this basis should be personally interviewed and graded. The use of written tests would not be excluded by the proposed statute, although it is not contemplated in the reports. Those candidates rated highest would have their names placed on registers for the several grades of positions.²² Not more than five names would be certified from the top of the appropriate register for each vacancy in an employing agency,²³ perhaps subject to some selection of eligibles for certification according to their possession of specific qualifications for the positions to be filled.²⁴ Subject to regulations of the Office of Legal Services and Procedure, agencies would be permitted to go outside of the registers for temporary appointments in "emergency or unusual situations" and, "when especially desired by a department or agency," they might be allowed to appoint persons of their own selection to positions not in the lowest grade.²⁵ Tenure would be at the discretion of the employing agency during a three-year qualifying period and thereafter could be terminated only for cause,²⁶ but subject to possible reductions in force mitigated by government-wide preference for reemployment to similar positions.²⁷

Attorney positions subject to the proposed plan would be designated by the Office, subject to ultimate decision by an Office of Legal Counsel in the Department of Justice if disagreement with the Civil Service Commission should arise.²⁸ The positions would be divided into six salary grades with compensation ranging from \$4205 to \$17,500 a year.²⁹ Advancement would be by action of the agencies' chief legal officers, subject to the regulations of the Office of Legal Services and Procedure.³⁰ Recruitment of applicants among law schools would be carried on,³¹

21. H.C. Rept. No. 8; T.F. Rept. No. 14.

22. H.C. Rept., p. 19; T.F. Rept., p. 89.

23. L.S. Act § 201(c) (7).

24. L.S. Act § 201(c) (1).

25. L.S. Act § 201(c) (5). See also T.F. Rept., p. 90.

26. H.C. Rept., pp. 23-24; T.F. Rept., pp. 91-92; L.S. Act § 205(b).

27. T.F. Rept., p. 90; L.S. Act § 201(c) (6).

28. L.S. Act § 203(b).

29. H.C. Rept., p. 22; T.F. Rept., p. 96; L.S. Act § 204(a).

30. T.F. Rept., p. 91; L.S. Act § 204(c).

31. H.C. Rept., p. 18; T.F. Rept., p. 89; L.S. Act § 201(c) (2).

in-service training to provided,³² and the requirement, otherwise applicable, of bar membership as a condition of eligibility be waived for a 12-month period after initial appointment.³³

The substance of the plan thus articulated is well thought-out and provides for all of the elements of a career service embodying merit principles, except that the number of applicants for the beginning grade probably would call for an initial written test to eliminate some and reduce the volume of subsequent oral interviews, as well as to aid in coordinating the ratings of geographically-scattered interviewing boards. If it should be properly administered, the plan ought to work well and produce great improvement in the recruitment, operation, and morale of the Government's legal staffs. It is encouraging to have the endorsement of the Commission and of the Task Force for a scheme of this type. Several questions of detail and one fundamental issue arise with regard to the plan as proposed, however.³⁴

No reason is given in the reports for rejection of proposals for rating candidates on registers of eligibles by categories of excellence instead of by numerical grades and giving agencies a wider choice among eligibles than the certification of five for each vacancy would provide. Such proposals have won considerable favor of late.³⁵ The escape provisions of the proposed statute³⁶ seem loosely drafted and might well operate to encourage evasion of the proposed merit system in connection with new appointments. Allowing an official of the Department of Justice to decide which positions are attorney positions when dispute with the Civil Service Commission arose would hardly be acceptable outside of legal circles. Much more important is the objection that arises to having the career service administered by the Department of Justice. The Attorney General, who would be in charge, is a political officer. The Department is and will remain one of the chief patronage-dispensing agencies of the Government in connection with judicial and other appointments, and there would be constant grave danger of subversion of the merit system by political influences operating in the Department. The reports are not explicit on the question whether staff positions in the offices of the United States Attorneys would be subject to the plan proposed, as they

32. L.S. Act § 201(c)(16).

33. L.S. Act § 206(f).

34. Minor features of the proposed plan, such as those dealing with veterans' preference and performance rating (H.C. Rept., pp. 24-25; T.F. Rept., pp. 97-100), will not be discussed here.

35. See Fuchs, *supra* note 18; COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, Commission Report on Personnel and Civil Service, pp. 61-62; Task Force Report on Personnel and Civil Service, pp. 88-89 (1955).

36. See note 25, *supra*.

should and apparently would be. The political tradition in connection with these posts would die hard and might be somehow maintained within the Department, if the administration of the plan were placed there. Any operating agency employing lawyers and headed by a politically-chosen officer would be under a continuing temptation to subvert the merit system it administered, particularly when it had as large a staff as does the Department of Justice.

In view of the foregoing considerations, it would be far better to establish an independent administration under the control of a professional board, preferably with representation on it of the legal profession outside of the Government as well as within it.³⁷ The Commission's Task Force on Personnel and Civil Service,³⁸ which reported before the reports on Legal Services and Procedure were issued, has recommended³⁹ that a legal examining system similar to the one established by Executive Order No. 8743 be established under either the Civil Service Commission or a Board of Legal Examiners. In the respects in which it differs from the recommendations in the present reports, this recommendation of the Task Force on Personnel and Civil Service affords a better base from which to work.⁴⁰ It does not, however, go into many of the other aspects of a career merit system for lawyers, with which the present reports deal.

The Task Force⁴¹ and proposed Code would make provision for up to one-half of the attorney positions in the top two grades in each agency to be removed from the career merit system by action of the President on recommendation of the Office of Legal Services and Procedure, if these positions were determined to be "administrative positions" or positions "which involve to a substantial extent the policy making function."⁴² In this recommendation the Task Force follows the reports on Personnel and Civil Service with respect to non-legal administrative positions.⁴³ The general problem of identifying positions that are policy making in a sense which links them to political administration and justifies omitting them from the career service is recognized as difficult of

37. The Commission and the Task Force both recommend such a board in connection with the personnel system which they propose for hearing commissioners. See H.C. Rept., p. 90; T.F. Rept., p. 264.

38. See note 35 *supra*.

39. At p. 132.

40. The present author served as Assistant Secretary and Secretary to the former Board of Legal Examiners, which this recommendation would in effect restore.

41. T.F. Rept., pp. 90-91.

42. L.S. Act § 203 (f).

43. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT, Commission Report on Personnel and Civil Service, pp. 25-29, No. 1; Task Force Report on Personnel and Civil Service, pp. 1-7 (1955).

solution.⁴⁴ Certainly legal positions present difficulties; for the performance of many legal functions, from the preparation of memoranda by junior attorneys to ruling on the legality of vital programs and deciding what issues to litigate, often involves an interweaving of policy with established law. Whether in the legal hierarchy the line should be drawn elsewhere than just below the top positions is highly doubtful. The top positions in cabinet departments and some independent agencies involve participation in the political strategy of the national administration in addition to strictly professional duties. Everywhere else, including the general counselship of the independent regulatory agencies, the basic policy is largely given by statute or by decision higher up and the lawyer's duties consist of professional service, including the resourceful implementing of policy. If positions that involve only this latter type of work are to be lumped with positions that are policymaking in the partisan political sense and withdrawn from the career-service merit system, it is clear that no formula will separate them from those, differing only in degree of involvement in policy, that remain subject to the merit system. The Task Force recommendation provides a mechanism for dealing with the problem, but it furnishes no guide for operating that mechanism. No such guide could be furnished, since the separation which is recommended presents a distinction in degree and not in kind. It would be preferable not to attempt the distinction and to professionalize the entire legal service under the merit system, excepting only those positions that require involvement in party politics.

Recommendations of the Commission and the Task Force that full-time government attorneys should be prohibited from engaging in outside legal practice except, upon express permission, to handle family legal matters⁴⁵ seem sound, provided adequate pay scales are established and maintained as recommended. The Commission's added recommendation that government lawyers should be prohibited from engaging in business activities "which interfere with the performance of their official duties"⁴⁶ is obviously sound as stated; but its administration would present difficulties. By contrast to these sound recommendations, the Task Force's "conclusion" that the government attorney "should not participate in groups of employees which seek advantages with respect to conditions of employment" seems difficult to sustain. It is based on the "unique obligations" of the lawyer to his client "which cannot be fulfilled

44. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT, Commission Report on Personnel and Civil Service, pp. 30-31, No. 2; Task Force Report on Personnel and Civil Service, pp. 7-8 (1955).

45. H.C. Rept. No. 17; T.F. Rept. No. 20; Code § 601(b).

46. H.C. Rept. No. 17.

to the fullest extent if he participates in groups which are formed to seek advantages from his client by group action."⁴⁷ There is little relation, if any, between the duties of an attorney in the Government and the public interests with which an employee organization might conflict. The economic aspects and other conditions of the employment of government lawyers do not differ from those of other government officers. If employee organization in government service is useful, as it appears to be, attorneys should not be deterred from participating in it.

The Commission and Task Force reports contain a well-considered set of recommendations with regard to the representation of private parties before federal administrative agencies, which in the Task Force report is supported by a theory that is highly questionable in one respect. In addition to a reaffirmation of the right of every person compelled to appear before an agency to be accompanied by an attorney or other qualified representative,⁴⁸ which is extended by the recommendations to voluntary appearances as well,⁴⁹ the recommendations are as follows: (1) that attorneys authorized to practice law in any state or territory be permitted to practice before any federal agency by enrolling there;⁵⁰ (2) that non-lawyer specialists be permitted to represent parties before an agency in its discretion upon meeting the qualifications established by it, but that no non-lawyer be permitted to engage in the practice of law before any agency;⁵¹ (3) that statutory standards of conduct be established and enforced with respect to both lawyers and non-lawyers who are permitted to practice before agencies;⁵² and (4) that a discipline committee having authority to investigate complaints against lawyer practitioners before federal agencies be appointed by the Chief Judge of the United States Court of Appeals for the District of Columbia. This committee would have authority to reprimand offenders and the duty to refer instances deemed to require judicial action to the United States District Courts in the districts where the attorneys involved practiced. These courts would take disciplinary action as to administrative practice and notify the courts having further disciplinary authority over the various bars. Enforcement as to non-lawyers and full disciplinary authority in their own proceedings would be lodged in the agencies themselves.⁵³

The most important aspects of the system of administrative practice

47. T.F. Rept., p. 103.

48. A.P.A. § 6(a), 60 STAT. 240 (1946), 5 U.S.C. § 1005(a) (1952).

49. H.C. Rept. No. 21; T.F. Rept. No. 67; Code § 600.

50. H.C. Rept. No. 25; T.F. Rept. No. 71; Code § 602(a).

51. H.C. Rept. No. 27; T.F. Rept. No. 73; Code § 604(a).

52. H.C. Rept. No. 23; T.F. Rept. No. 69; Code § 601(a).

53. H.C. Rept. Nos. 26, 28; T.F. Rept. Nos. 72, 74; Code §§ 603, 604(b).

before federal agencies that would be changed by the foregoing recommendations are (a) the maintenance of special requirements by certain agencies, which lawyers as well as non-lawyers must meet; (b) the absence of any presently-effective disciplinary machinery with respect to members of state bars who engage in administrative practice in Washington without being admitted to the courts there; and (c) the absence of defined standards of conduct applicable to non-lawyers, except in a few agencies which have enunciated them. The proposed discipline committee would represent a particularly desirable advance. Any proposal to abolish special requirements for lawyers in certain agencies occasions a considerable outcry on the ground that these requirements are needed;⁵⁴ yet lawyers master many difficult, specialized problems in the course of a practice, as well as invoke the aid of specialists when their own knowledge or skill needs supplementing; and it is arguable that agency practice does not call for safeguards in addition to general professional responsibility. Nevertheless, it probably would be wiser to provide that agencies which can demonstrate to an Office of Legal Services and Procedure or other over-all authority that their operations are benefited by requiring that lawyers as well as non-lawyers display specific competence in advance, may impose special qualifying requirements.⁵⁵

The Commission introduces into its recommendation as to the right of persons to be represented in agency proceedings the qualification that this right shall not apply in selective service proceedings before local boards or in proceedings over "the granting of voluntary benefits by the Government."⁵⁶ The first exception recognizes the informality of proceedings before boards composed of volunteers, who are expected to apply their own knowledge as well as evidence brought before them. The second exception is difficult to support. It is true that legal representation may obstruct an administration of benefits which earnestly seeks to confer these benefits where authorized by law; but the effort to employ lawyers is rarely made in such proceedings, and other representatives, such as agents of veterans' organizations who aid claimants before the Veterans

54. The recommendations would do away with even the examination traditionally required for lawyers to practice in the Patent Office.

55. Much bungling doubtless continues to be perpetrated by lawyers who do not realize what is involved in particular matters they are asked to handle. Where an agency reasonably believes that its operation would be impeded by such bungling or that its operations would benefit by specific assurance of knowledge relating to the matters with which it deals, there seems to be inadequate reason to deny it the authority to maintain a specialized bar. Only three agencies maintain such bars now. T.F. Rept., p. 292. The Task Force's argument (T.F. Rept., pp. 305-06) that "it is a distinct hardship . . . for lawyers to have to comply with the technical requirements of all agencies" considerably overstates the actual situation.

56. H.C. Rept. No. 21.

Administration, are in fact welcomed.⁵⁷ The line between "voluntary benefits" and matters of right, moreover, is impossible to draw with precision. The Task Force is more realistic in its recognition that matters of importance to the individual, whether denominated matters of right or not, should be administered with adequate procedural safeguards.⁵⁸

Both the Commission and the Task Force recognize that what constitutes the practice of law, from which non-lawyers are barred, is a matter for judicial determination.⁵⁹ The Commission, which asserts that "the executive branch of the Government is under obligation to itself and to the public to take reasonable measures to assure that representation before its departments and agencies is properly conducted,"⁶⁰ apparently regards it as a matter of convenience that the judicial definition of the practice of law should be followed by the agencies, although the importance of restricting that practice to lawyers is recognized.⁶¹ The Task Force, by contrast, enunciates the view that if the Federal Government were to proceed otherwise than by deferring to state courts in respect to what constitutes the practice of law before federal agencies it would "interfere with the traditional control by the States of the practice of law" and that "Federal control of professions would be a serious step toward the destruction of State sovereignty."⁶² This view seems exaggerated and unsound, even when qualified by the concession that federal control might justifiably be asserted where "the consequence of State action is to completely defeat the effective functioning of Federal agencies."⁶³ Practice before federal agencies is a federal matter and there should be no question about federal authority to govern it. The exercise of that authority would in no wise "interfere" with any matter properly subject to state control or restrict the large areas of practice which unquestionably are of exclusively state concern. For federal agencies to be compelled to follow state authority as to activities in which non-lawyers are forbidden to engage would, moreover, either require the most expansive state views as to the practice of law, to be applied or necessitate the use of different

57. H.C. Rept., p. 42. See T.F. Rept., pp. 313-14.

58. T.F. Rept., pp. 170-71. Cf. pp. 287-88. The Task Force's assertion (T.F. Rept., p. 287) that Congress intended to provide in the Administrative Procedure Act for a right of persons to be represented before agencies even when not "compelled" to appear is unsupported and seems at variance with the apparently careful draftsmanship of this provision of the act. A.P.A. § 6(a), 60 STAT. 240 (1946), 5 U.S.C. § 1005(a) (1952). Denial of the right of counsel to persons compelled to appear, referred to in the Task Force report, seems a violation of the act, however.

59. H.C. Rept., p. 34; T.F. Rept., p. 292.

60. H.C. Rept., p. 31.

61. *Id.* at p. 34.

62. T.F. Rept. p. 290.

63. *Ibid.*

criteria for persons from different states. The use of state criteria should extend just so far as is helpful and no farther, as the proposed Code would permit.⁶⁴

An additional recommendation of both the Commission and the Task Force is that no attorney should be permitted to represent private parties before an agency or a court in any matter as to which he "personally and in his official capacity dealt with, passed upon, or gained material information" while previously employed by the Government.⁶⁵ As the Task Force report explains, existing conflict-of-interest statutes are unsatisfactory. The recommendations would place the matter in the domain of professional ethics, with disciplinary sanctions available for enforcement, where it clearly belongs. The standard of what should bar an attorney because of previous representation of an opposing party includes the established judicial criterion with regard to knowledge of facts.⁶⁶ Although this standard is sometimes difficult to apply, its purpose is clear and it can be administered sensibly on a case-by-case basis. The Task Force report, however, seems to omit an important consideration by suggesting that a former supervising official should not be barred from accepting employment in relation to a matter for which he was officially responsible, where he did not gain actual knowledge concerning it or personally pass upon it while holding his government position.⁶⁷ "Influence peddling" by former supervisory officers would virtually be invited by so restrictive an interpretation. A new statute should, rather, apply wherever there had been official responsibility for a matter coming before an agency, whether or not there had been personal involvement in it. The word "personally" should, therefore, be stricken from the proposed Code provision.

C. Organization of Government Legal Services

The Commission and the Task Force agree in recommending that the Department of Justice become the chief law office of the entire Government to an extent not now true⁶⁸ and in proposing important changes to enable the Department to function effectively in its enlarged capacity. The specific measures suggested fall under three headings: (1) changes in the organization of the Department; (2) rendition of legal services by the Department directly to agencies employing relatively few lawyers;

64. Code § 604(a).

65. H.C. Rept. No. 24. See also T.F. Rept. No. 70; Code § 601(b).

66. *Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp.*, 216 F.2d 920 (2d Cir. 1954); *Laskey Bros. v. Warner Bros. Pictures, Inc.*, 130 F.Supp. 514 (S.D.N.Y. 1955).

67. T.F. Rept., p. 303.

68. H.C. Rept. No. 2; T.F. Rept. No. 1.

and (3) government-wide coordination by the Department of agency procedures and conduct of litigation. In addition, integration of the legal staff of each department and agency under a chief legal officer is recommended, except that in regulatory agencies separate advisory legal staffs to serve the agency heads would be maintained, so as to separate this advisory function from the active conduct of agency proceedings.

The reports contain a brief account of the history of the Department of Justice in relation to the legal work of the Government and of past efforts to integrate all legal functions, or at least the conduct of all litigation, under the Department.⁶⁹ These efforts have lapsed because of the sheer multiplicity and magnitude of the tasks to be performed. The principal question now raised is whether the new recommendations promise to lead to organizational structures and procedures adequate to cope with the difficulties standing in the way of integration and whether, if so, the character of the reorganized Department of Justice would be likely to be such as to justify entrusting to it such vast powers as are recommended in the reports.

Within the Department of Justice, to enable the Attorney General better to keep in touch with the activities for which he is responsible, the recommendation is that, in addition to a Deputy Attorney General, who would aid the Attorney General in all matters, there be created an Assistant Deputy Attorney General for litigation and an Assistant Deputy Attorney General for Legal Administration.⁷⁰ All the units of the Department except the Office of the Solicitor General, the Federal Bureau of Investigation, the Board of Immigration Appeals, and an Office of Legal Counsel would be placed under the direction of one or the other of these Assistant Deputy Attorneys General. In addition, the reports⁷¹ and the proposed legislation⁷² contemplate an Office of Legal Counsel, the head of which would report directly to the Attorney General with reference to certain matters of inter-agency conflict. In the contemplation of the Task Force, the proposed Office of Legal Services and Procedure would be placed under the Assistant Deputy Attorney General for Legal Administration.⁷³

The idea of dividing the supervision of the several divisions of the Department of Justice into two parts may be a good one, since it may facilitate the exercise of responsibility by the Attorney General, assisted by his Deputy. The attempt to distinguish units of the Department deemed

69. H.C. Rept., pp. 4-5; T.F. Rept., p. 8.

70. H.C. Rept. No. 6; T.F. Rept. No. 2; L.S. Act §§ 100, 101.

71. H.C. Rept. No. 3; T.F. Rept. No. 3.

72. L.S. Act § 103.

73. T.F. Rept., p. 61.

to engage in litigation from those having to do with administration seems futile, however. The Task Force's own separation⁷⁴ is purely arbitrary, except as to certain units, such as the Bureau of Prisons, which rarely engage in litigation. The Immigration and Naturalization Service and the Office of Alien Property, which the Task Force assigns to the Assistant Deputy Attorney General for Administration, engage in a large volume of litigation. The Lands Division and the Internal Security Division, which are assigned by the Task Force to litigation, have important administrative functions, out of which their litigation grows. The assignment of United States Marshals to the Deputy Attorney General for Litigation has only a nominal justification. The validity of the proposed structure of the Department of Justice is, therefore, that of a convenient mechanical device rather than the embodiment of a valid theory. It would seem, also, that the Office of Legal Services and Procedure, if created and given the functions proposed,⁷⁵ should report directly to the Attorney General.

The position taken by the Task Force and the Commission with respect to the independence of agency legal staffs from the Department of Justice is that such independence should exist only when specifically authorized by Congress; that Congress should examine all instances where it exists without such authorization; and that separate legal staffs having only a few lawyers should be avoided except where unusual reason for them is found to exist.⁷⁶ The Commission recommends that all litigation on behalf of federal agencies be conducted by the Department of Justice except when Congress authorizes otherwise.⁷⁷

It seems highly doubtful, as Congressman Holifield points out in his dissent,⁷⁸ that the abolition of small independent legal staffs and the rendition of service to certain agencies by the Department of Justice through attorneys on its staff, would produce any more responsible or effective work than at present. It is true that more highly-paid supervision of attorneys might be available in the Department than in most smaller agencies; but responsibility to the Department of Justice might entail delays and want of understanding by supervisory personnel that

74. *Ibid.*

75. H.C. Rept. Nos. 12, 49; T.F. Rept. Nos. 4, 61. These functions, relating to the proposed attorney merit system and the procedures of agencies throughout the Government, would not be primarily intra-Departmental and should receive attention at the top. In the opinion of the present writer they should not be in the Department at all, but rather in an independent agency that would be able to deal directly with other agencies on their own level.

76. T.F. Rept., pp. 67-71. See also H.C. Rept. No. 1.

77. H.C. Rept. No. 2.

78. H.C. Rept., p. 100.

would interfere seriously with the performance of functions reposed by statute in the agencies. The Task Force and the Commission adduce in support of their recommendations the theory that legal advice should be rendered free of client control by sufficient stature and independence on the part of the lawyer to assure professional responsibility. This theory is undoubtedly sound; but it seems doubtful that it can be given application by the method suggested. Integration of the legal staff of each department under a single professional head, as also recommended by both the Commission and the Task Force,⁷⁹ is a sound device which, as to small agencies as well as large, probably should remain the chief reliance for securing adequate professional responsibility and competence.

Conflicts of legal interpretation among various agencies have led, as the Task Force points out,⁸⁰ to litigation in which agencies have opposed each other and in which the courts have had to determine the issues. The Commission's recommendation⁸¹ would provide an ostensibly voluntary means within the Department of Justice to which the agencies might resort for resolving any such conflicts. The Task Force and the proposed statute⁸² would make the use of this means compulsory in many situations by forbidding any agency to litigate a conflict with another agency involving the "application, construction, or interpretation of any statute" unless authorized by the Office of Legal Counsel after a request to that Office to determine the matter. Questions of "general law" would not be subject to this provision.⁸³ To the extent that the Commission would place all litigation under the control of the Department,⁸⁴ its recommendations would operate similarly.

There is, of course, every reason for not burdening the courts with unnecessary litigation between government departments and for eliminating the apparent unseemliness of the Government's litigating with itself. Nevertheless it is hardly accurate to say, as the Task Force does, that "controversies of this kind between agencies can scarcely be more justified than such controversies between two or more divisions of a large corporation."⁸⁵ The Federal Government is an immensely more complicated affair than any corporation, and it is a fact of life that various departments take different points of view, responsive to conflicts of view among interests in the community with which they are in touch. Were these to be litigated between private proponents, no questions would be raised.

79. H.C. Rept. No. 4; T.F. Rept. No. 6.

80. T.F. Rept., pp. 62-64.

81. H.C. Rept. No. 3.

82. T.F. Rept. No. 3; L.S. Act § 103.

83. T.F. Rept., p. 65.

84. Note 77 *supra*.

85. T.F. Rept., p. 62.

There is already a control over agency resort to appellate courts, in the form of a requirement that the Solicitor General approve all government appeals.⁸⁶ The proposals in the reports would apply a similar check as to trial litigation, at least when a question of statutory interpretation was at issue among federal agencies. The substituted means of resolving such conflicts would be the Office of Legal Counsel in the Department of Justice. One must regretfully conclude that such an Office, staffed by lawyers not chosen in the manner of judges, would hardly be a suitable tribunal to determine with finality for all practical purposes some of the most important justiciable controversies that arise. With whatever hardship and occasional embarrassment, it would be better to leave such matters to the courts to the extent that agreement among agencies cannot be secured. The suggestion in the reports⁸⁷ that the Attorney General summon conferences of agency counsel to effect coordination among them proposes a much better method of resolving conflicts than compulsion through the Office of Legal Counsel, provided the Attorney General does not attempt to use these conferences as a means of impairing the independence of agencies that are supposed to determine their policies with relative freedom from control by the chief executive.⁸⁸

D. *The Administrative Court*

The proposal for an Administrative Court in the Commission and Task Force reports would establish a trial and not an appellate tribunal.⁸⁹ A final sentence in the Commission's recommendation on this subject that "Congress study and determine" whether certain elements of the court's jurisdiction should be "original or appellate," is inexplicable in terms of anything contained elsewhere in either report. Except for this sentence, the proposal is clearly that the new court assume the jurisdiction of the present Tax Court together with the original adjudicatory functions of certain other existing agencies.

Just which agency functions should be transferred to the new court is a subject of differences of opinion expressed in the reports. The Commission, which made a unanimous recommendation on this subject except for the dissent of Congressman Holifield, would transfer the jurisdiction of the Federal Trade Commission to issue cease-and-desist orders under the Clayton and Federal Trade Commission Acts, together with that of

86. The authority exercised is that of the Attorney General, conferred by REV. STAT. § 359 (1875), as amended, 5 U.S.C. § 309 (1952). See *United States v. Winston*, 170 U.S. 522 (1898).

87. H.C. Rept., p. 6; T.F. Rept., p. 60.

88. See Fuchs, *supra* note 18, at pp. 294-97.

89. H.C. Rept. No. 51; T.F. Rept. Nos. 63-65.

nine other business regulatory agencies under the latter act,⁹⁰ and also the jurisdiction of the National Labor Relations Board to issue orders forbidding unfair labor practices. On the Task Force, twelve of the fourteen members joined in recommending that the National Labor Relations Board's⁹¹ unfair practice jurisdiction be transferred, and all but five recommended that the court be given jurisdiction over cases involving exclusion, deportation, and incidental powers over aliens.⁹²

Under the recommendations the Administrative Court would be organized into Sections, each dealing with one of the areas of jurisdiction transferred to the court. One of these Sections would consist of the members of the present Tax Court.⁹³ All of the judges of the new court would be transferable among Sections as business might require, and within Sections might sit in divisions of one or more.⁹⁴ Commissioners might also be appointed to conduct hearings and make findings and recommendations.⁹⁵

The judges of the Administrative Court, other than the transferred judges of the Tax Court, would be appointed by the President with the advice and consent of the Senate, to serve during good behavior. A chief judge would be designated by the President,⁹⁶ and each Section would have a presiding judge chosen annually by the members of the Section.⁹⁷ The Chief Judge and the presiding judges of the several Sections would constitute an administrative Council to watch over the business of the court, review and pass on the rules of the Sections, and exercise specified authority with respect to hearing commissioners who would serve the administrative agencies but be attached to the court.⁹⁸ The court might hold hearings throughout the country.⁹⁹

90. The Commission's report (H.C. Rept., p. 86) refers only, in language borrowed from the Federal Trade Commission Act, to jurisdiction relating to "unfair methods of competition and unfair or deceptive trade practices"; but the enumeration of the agencies whose jurisdiction would be affected and the apparent adoption of the Task Force's conclusions, which are clear on the point [T.F. Rept., p. 251; Code § 410(a)], indicate that jurisdiction under the Clayton Act is conferred. The Commission's black-letter recommendation speaks of "limited jurisdiction in the trade regulation field," as does that of the Task Force.

91. T.F. Rept., p. 280. One member opposed this recommendation and one neither favored nor opposed it.

92. T.F. Rept., p. 269. Of the five, three opposed and two neither favored nor opposed this recommendation.

93. Code § 400. The Tax Court is not a court at present in the same sense as other federal tribunals that are called courts. It is in the Treasury Department and its judges hold office for 12-year terms instead of during good behavior.

94. *Id.* § 404.

95. *Id.* § 407.

96. *Id.* §§ 400, 401.

97. *Id.* § 404.

98. *Id.* § 406. See pp. 22-23 *infra*.

99. *Id.* § 405(a).

The recommendation for an administrative trial court is the latest in a considerable line of such proposals which has reflected the desire to infuse judicial methods and standards into administrative processes to the greatest extent practicable.¹⁰⁰ The expectation of both the Commission and the Task Force is that, if the proposed court were established, additional jurisdiction would be transferred to it from time to time.¹⁰¹ The Task Force also anticipates that "after case law had been accumulated and experience gained" by the court, "some matters of adjudication handled by" the court "might be transferred to the courts of general jurisdiction."¹⁰²

If an administrative court of first instance is to be established as part of the federal system, the structure and method of administration proposed in the reports provide an excellent model to follow; for they supply the ingredients of an efficient tribunal, well geared to the federal system. The court would be a legislative court, administratively attached to the judicial branch, like the Court of Claims, the Customs Court, and the Court of Customs and Patent Appeals.¹⁰³ Its decisions would be reviewed by the United States Courts of Appeals.¹⁰⁴

Only a single minor criticism comes to mind concerning the proposed organization of the court, and that is that the Tax Section with its sixteen judges would be overwhelmingly large. The reasons for the size of the Tax Section obviously are that this is the size of the Tax Court and that it would be unwise to diminish the number of judges and introduce the use of commissioners, unless and until such altered methods commended themselves to the judges.¹⁰⁵

The central question concerning the proposed court is whether there is a need for it; and the answer to this question depends, in turn, on whether a sufficient volume and variety of administrative adjudications to justify a tribunal of several sections can wisely be transferred to it. The Tax Court could obviously be joined to the Customs Court in a new tribunal; but the Commission and the Task Force pre-

100. S. Doc. No. 248, 79th Cong., 2d Sess. 62-64 (1946).

101. H.C. Rept., p. 87; T.F. Rept., p. 249.

102. T.F. Rept., pp. 249-50.

103. The Task Force report contemplates that the Administrative Court would be served by the Administrative Office of the United States Courts. T.F. Rept., p. 249.

104. Code § 411.

105. The Tax Court sits and renders decisions in divisions consisting of a single judge, with occasional revision of decisions by the court en banc when the Chief Judge so determines. The operation of the court has given general satisfaction, but some difficulty has been experienced in achieving coordination of the decisions of the several judges. Whether a smaller, more unified tribunal, proceeding on the basis of commissioners' reports, could accomplish improvement, presents a question that only experience could resolve.

sumably omitted the latter out of deference to it as an established judicial body. The Court of Claims could be included too; but the volume and specialized nature of its business probably justify its continued independence. An administrative court formed from among these existing tribunals would, however, not contain the seeds of the kind of growth which is envisaged in the reports. Although other areas of non-regulatory adjudication might be added to its jurisdiction consistently with its character, such as the determination of employees' compensation claims and the decision of appeals in old age and survivors insurance and railroad retirement cases, no argument is made in the reports for including these in the province of the Administrative Court. The transfer of immigration and deportation jurisdiction, which is of the same general character because it involves largely fact determination, drew less support in the Task Force than the other items included and, so far as appears, drew no support in the Commission. Non-regulatory adjudication does not appear to be what the Commission and the Task Force are gunning for. The latter speaks, rather, of "the stage of development of the regulatory process"¹⁰⁶ that justifies court adjudication and "the adjudication of matters in special areas of regulation"¹⁰⁷ which may be given to the Administrative Court. The cease-and-desist jurisdiction recommended for the proposed court appears to be a much more significant indicator of the probable directions of future enlargement of the court's province than the Tax Court's adjudicatory function or that of the Customs Court.

The cease-and-desist jurisdiction of the Federal Trade Commission and the National Labor Relations Board is like other functions of the regulatory agencies in that it involves the exercise of discretion and the development of policy. What shall be deemed to constitute unfair methods of competition and unfair labor practices depends to a substantial extent on what the administering agencies deem it wise to prohibit in pursuance of the governing statutory purposes, as does the meaning of "public convenience and necessity" and "reasonableness" of rates under other statutes. The agencies are established largely to make such determinations expertly and wisely through the use of the information and competence with which it is sought to equip them. To a large extent these determinations are made through adjudicatory decisions. The issue surrounding the proposed transfer of adjudicatory functions of this variety to an administrative court is whether a loss of capacity to make the necessary determinations ably is likely to be involved and, if so, whether that loss

106. T.F. Rept., p. 240.

107. *Id.* at p. 250.

is counter-balanced by the increased objectivity which the court is likely to display.

The issue just stated has been debated back and fourth in the literature of administrative law.¹⁰⁸ There probably would be no loss and there might be considerable gain if certain non-regulatory adjudicative functions, affecting vitally the lives and personal fortunes of individuals and not too closely bound up with a continuous governmental process like administration of the old age and survivors insurance system, were entrusted to an administrative court. Important among these would be decisions as to the deportation of aliens. Adjudications growing out of regulatory processes are, however, another matter; for in them the importance of agency expertness and discretion is high. Not merely fact determination and application of law to fact are involved, but the evolution of social, political, and economic policy as well. The policies applied in such adjudication should grow out of over-all administrative experience, such as a regulatory agency continuously acquires. A purely adjudicative agency such as an administrative court, even though its judges specialize in particular subjects, can gain experience only through testimony and argument before it. There are strong grounds for concluding that this is not enough. The impact of continuous grappling at first-hand with the problems the legislature desires to have solved, and has conferred discretionary authority as an aid in solving, is often necessary.¹⁰⁹ Where this is true, the transfer of adjudicatory functions to a court not subject to this impact would sacrifice vital public interests.

The Task Force report, which supplies the more detailed justification for the recommended jurisdiction of the proposed administrative court, does not consider adequately the objection thus raised. It argues, rather, from an asserted trend toward judicialization of all administrative adjudication after it has been in effect for some time, and selects the cease-and-desist type of function for early transfer to the Administrative Court because of its supposedly drastic character.¹¹⁰ A cease-and-desist order is injunctive in nature and enforceable by contempt process in the courts of general jurisdiction. The courts are largely bound in such proceedings by administrative determinations of fact, which thus are similarly conclusive upon the respondents. It is hard to see, however, why a sentence for contempt is more drastic than imprisonment as punishment for viola-

108. See especially Caldwell, *A Federal Administrative Court*, 84 U. PA. L. REV. 966 (1936); Cooper, *The Proposed United States Administrative Court*, 35 MICH. L. REV. 193, 565 (1936-37).

109. Attorney General's Committee on Administrative Procedure, Final Report 58 (1941).

110. T.F. Rept., p. 245.

tion of an order after a trial in which the only issue is whether the order has been violated. On the contrary, it was generally regarded as a strengthening of the Federal Trade Commission Act when criminal enforcement was added to civil enforcement proceedings as a means of effectuating cease-and-desist orders under that act.¹¹¹ Practically speaking, moreover, the application of sanctions to compel observance of administrative orders is rare and the significant question concerning the effect of such orders on respondents relates to the adverse consequences of obedience to them. On this basis public utility rate orders and the denial or revocation of licenses far outrank most cease-and-desist orders in the scale of seriousness. If administrative actions involving adverse consequences to private interests are candidates on this account for transfer to an administrative court, the whole gamut of agency functions requires consideration. This is, in fact, the result to which the Task Force's argument inescapably leads.

As to the Clayton Act and prevention of unfair methods of competition, the Task Force also argues that diffusion of enforcement authority among a number of agencies and present inefficiency in the conduct of proceedings¹¹² should be corrected by consolidating the jurisdiction over such matters in the Administrative Court. It is suggested, further, that the common law origin of the concept of unfair competition and continuing jurisdiction of the ordinary courts in antitrust cases justify the belief that an administrative court would be better qualified than the agencies to determine Clayton Act and unfair-method-of-competition cases. This reasoning aside from overlooking the distinction between common law tribunals and an administrative court, ignores the rudimentary character of common law unfair competition as compared to the ramifications of modern competitive methods and does not rest upon any examination into the actual operations of the ordinary courts in antitrust matters. There are problems aplenty in the antitrust field, including problems as to the suitability of alternative enforcement tribunals; but perplexity as to the best means of enforcement will scarcely be resolved by the sketchy type of consideration given by the Task Force to the choice of a tribunal.

The Administrative Court, then, will be a sound development if such a tribunal can be established with non-regulatory jurisdiction sufficient in volume and diversity to justify the existence of the court in preference to a small number of separate legislative courts; but regulatory adjudication should not be entrusted to it unless the Task Force's basic

111. 52 STAT. 111 (1938), 15 U.S.C. § 45 (1952).

112. T.F. Rept., pp. 250-53.

belief, that all such adjudication belongs potentially to the courts, is to be accepted. The validity of that belief will be examined in the final section of this article.

E. The Hearing Commissioners

With respect to the administrative processes of government agencies, the crux of the reports, particularly the report of the Task Force, is reached in the recommendations as to hearing commissioners and the relative roles of these commissioners and agency heads in formulating decisions. These recommendations would substitute hearing commissioners for the hearing examiners now employed under Section 11 of the Administrative Procedure Act.¹¹³ The recommendations can be classified into two categories: (1) employment, tenure, status, compensation, and removal of hearing commissioners; and (2) the extent of the authority of these officers.¹¹⁴

The Commission and the Task Force both recommend that a separate corps of hearing commissioners, outside of the various agencies, be established and be attached to the Administrative Court.¹¹⁵ The underlying thought is that the hearing commissioners should be appointed by an authority other than the agencies whose proceedings they will hear and that their tenure, status, compensation, and removal also be determined independently of the latter agencies. All personnel matters relating to the hearing commissioners would be in charge of a Chief Hearing Commissioner appointed by the President with the advice and consent of the Senate,¹¹⁶ who would hold office for twelve years and who would be removable only by the Council of the Administrative Court for cause, after opportunity for hearing.¹¹⁷ The Chief Hearing Commissioner would be aided by a so-called Advisory Committee which would have the more-than-advisory functions of promulgating rules to prescribe the qualifications of hearing commissioners and passing on the appointment of commissioners proposed by the Chief Hearing Commissioner.¹¹⁸ Contrary to the presidential appointment recommended in both reports, the proposed Code would have the Advisory Committee named by the Council of the Administrative Court. The Committee would have five members

113. 60 STAT. 244 (1946), 5 U.S.C. § 1010 (1952).

114. For a more detailed discussion of these recommendations see Fuchs, *The Recommendations as to Hearing Commissioners*, 30 N.Y.U.L. REV. 1342 (1955).

115. H.C. Rept. No. 52; T.F. Rept. No. 66. The Task Force's black-letter recommendation does not include attachment of the hearing commissioners to the Court; but the text of its report (T.F. Rept., p. 264) and the proposed Administrative Code (Code § 500) both provide for such an attachment.

116. H.C. Rept., p. 89; T.F. Rept., p. 264; Code § 500.

117. Code § 500.

118. H.C. Rept., p. 90; T.F. Rept., pp. 264-65; Code § 501.

representing the judiciary, the agencies, and the bar, with a judge of the Administrative Court as chairman.

Both reports state that "it should be the primary responsibility of the Chief Hearing Commissioner to recruit and to nominate outstanding men for hearing commissioner positions."¹¹⁹ Neither in the reports nor in the applicable Code provisions is any requirement stated that merit-system methods must be followed in the selection of hearing commissioners. Both reports provide for two grades of positions,¹²⁰ which the Task Force and the proposed Code¹²¹ would make, respectively, those of hearing commissioners paid \$12,000 a year for eight-year terms and senior hearing commissioners paid \$14,000 a year and enjoying tenure during good behavior. Commissioners would be assigned to the several agencies by the Chief Hearing Commissioner. No specific provision is made for the manner in which these assignments would be made, but the Commission report states that "hearing commissioners should be allowed to develop continuity of service in one agency with the resulting familiarity and competence that the special experience should create," and the Task Force states that "it is anticipated that hearing commissioners will be assigned to agencies on a semipermanent basis, and that they will not be reassigned except for unusual circumstances."¹²² The applicable Code provision reads that "the Chief Hearing Commissioner shall assign and transfer hearing commissioners to and from agencies as he may determine to be necessary for the most efficient conduct of the hearings required to be held by such agencies."¹²³ Hearing commissioners would be removable during their terms only for cause, after opportunity for hearing before a committee of judges of the Administrative Court upon charges filed by the Chief Hearing Commissioner.¹²⁴

The reports and the proposed Code, taken together, make somewhat ambiguous provision for "grandfather rights" in the present hearing examiners with relation to appointment to hearing commissionerships. This problem because of its temporary nature, will not be considered here, although it is highly important to a successful launching of the hearing-commissioner scheme.¹²⁵

The foregoing provisions for hearing-commissioner personnel administration have a number of good features. A personnel system out-

119. H.C. Rept., p. 90; T.F. Rept., p. 264.

120. H.C. Rept., p. 91; T.F. Rept., p. 265.

121. Code §§ 501, 505, 506.

122. H.C. Rept., p. 92; T.F. Rept., p. 423.

123. Code § 504.

124. Code § 507.

125. See Fuchs, *The Recommendations as to Hearing Commissioners*, 30 N.Y.U.L. Rev. 1342, 1343, 1353-54 (1955).

side of the Civil Service Commission would be justified if it could be surrounded with adequate assurance that merit-system principles would be observed.¹²⁶ The device of a Chief Hearing Commissioner, assisted by a professional committee with policy-making powers, is a good one. The terms of appointment and compensation of the hearing commissioners, specified in the reports, also seem appropriate. Two weaknesses appear in the proposed scheme. One is that no statutory assurance is given that merit-system principles will be followed; the other is that, unless federal administrative agencies are to be deprived of authority over the process of decision to a greater extent than this writer believes to be justified, the authority to select hearing commissioners should not be removed from the agencies as completely as the recommendations provide.

As to the first weakness, it seems evident that hearing-commissioner positions would become desirable political plums that would be plucked unless barriers to the intrusion of politics in the filling of these posts were set up. What may be called ideological politics would present an equally grave threat, as interests favoring and opposing regulation struggled to gain control of the processes of hearing and decision.¹²⁷ Inexperience of the Chief Hearing Commissioner and the Advisory Committee in personnel administration might, moreover, be a handicap in devising effective methods of selecting hearing commissioners unless suitable guidance were available to them. The proposed Code¹²⁸ would provide that not more than three members of the Advisory Committee could be members of the same political party; but the real safeguard against abuse and assurance of sound methods would lie in the professional skill and sense of responsibility of the Committee and the Chief Hearing Commissioner. These should be a main reliance, but the pressures would be great, and, if resistance were not strong, the scheme could easily be perverted. Minimum safeguards should be the inclusion of provisions in the Code for suitable merit-system methods to be followed, and for a member of the Advisory Committee to be appointed by the Civil Service Commission. Without these safeguards more might be lost than gained by the adoption of the proposals now made, and it would be preferable to follow the recommendation of the President's Conference on Administra-

126. See Fuchs, *The Hearing Officer Problem—Symptom and Symbol*, 40 CORN. L.Q. 281 (1955).

127. See Fuchs, *The Hearing Examiner Fiasco Under the Administrative Procedure Act*, 63 HARV. L. REV. 737 (1950); Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 YALE L.J. 431 (1950).

128. Code § 501.

tive Procedure that administration by the Civil Service Commission be retained and strengthened.¹²⁹

As to the second weakness, the writer believes, as will presently appear, that the agencies should retain more complete authority over their decisions than the Task Force, in particular, proposes; and it seems fair to conclude that, if so, a safeguarded scheme of agency selection from limited registers of eligibles maintained by a merit-system type of personnel administration, preferably outside of the Civil Service Commission, would on the whole be preferable to the present proposals. The hearing commissioners would then remain officers of the several agencies, subject to a method of selection, protection from possible agency pressures, and promotion of esprit de corps among them that might contribute much to improving the quality of agency proceedings.¹³⁰

In addition to recommending a new type of personnel administration for hearing commissioners, the Commission and Task Force reports propose to increase the status and independence of these officials in the conduct and decision of proceedings, as compared to the authority of examiners under the Administrative Procedure Act.¹³¹ The recommendations to this effect in the Commission's report are among those which have the actual sponsorship of only three Commissioners. The corresponding recommendations of the Task Force are of central importance in the attainment of that group's objectives. The function of the hearing commissioners would be to conduct all statutory agency hearings except those in which the agency itself or a member of an agency or statutory board presided¹³² and to render initial decisions in such proceedings.

Both the Task Force and the Commission recommend enlarging the powers of hearing commissioners during hearings. The proposed extensions of authority confer (1) the power to issue subpoenas in all cases; (2) discovery powers; (3) power to require conferences of parties; (4) power to rule on all motions, including motions to dismiss; (5) disciplinary powers in hearings; and (6) authority to take other actions in accord, to the extent practicable, with trial procedure in the United States district courts.¹³³ Interlocutory appeals from hearing-

129. President's Conference on Administrative Procedure, Report 9-10, 57-63 (1955).

130. Fuchs, *The Hearing Officer Problem—Symptom and Symbol*, 40 CORN. L.Q. 281, 312-20 (1955).

131. A.P.A. § 7(b), 60 STAT. 239 (1946), 5 U.S.C. § 1006(b) (1952).

132. H.C. Rept. No. 41; T.F. Rept. No. 45; Code § 205(a). The authority to employ hearing officers other than hearing examiners under the Administrative Procedure Act, presently existing under the Immigration and Nationality Act [66 Stat. 166, 8 U.S.C. § 1101(b)(4) (1952)], would be revoked. One other instance of similar authority is reported by the Task Force report. (T.F. Rept., p. 193, see also p. 411).

133. H.C. Rept. No. 41(b); T.F. Rept. No. 46; Code § 205(b).

commissioner actions and rulings would be restricted by the Task Force to such as the presiding officer might find "necessary . . . to prevent substantial prejudice to any party or to expedite the conduct of the proceeding."¹³⁴ To such possible appeals the recommendation in the Commission's report would add appeals that might result from a showing to the agency that substantial prejudice would otherwise result.¹³⁵

The Task Force and Commission-transmitted recommendations would render the Administrative Procedure Act's provision for "separation of functions"¹³⁶ more rigorous and extend it to all instances of rule-making and adjudication in which agency action is based on the record of the hearing.¹³⁷ The requirement that proceedings be of the record type would be applied to all proceedings in which a hearing, whether otherwise required to be of record type or not, is mandatory under a constitutional or statutory provision.¹³⁸ In addition the Task Force, but not the recommendations in the Commission's report, would require that in all record-type proceedings the presiding officer, who almost always would be a hearing commissioner,¹³⁹ must render an "initial decision," unless such a decision was waived by the parties. That decision would become the agency's decision if not set aside upon agency review;¹⁴⁰ the agency's power in reviewing such a decision would be the same as that of a court in reviewing an agency decision, "except for questions of policy committed to the determination of the agency by the Congress."¹⁴¹ Pursuant to a proposal for expanded scope of judicial review, made by the Task Force and transmitted by the Commission,¹⁴² this would mean that hearing-commissioner determinations of fact would become final unless "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."

The enlarged authority of hearing commissioners in the hearings themselves seems desirable. The powers to be conferred should promote the dignity and efficiency of hearings, and it is difficult to see why any of them should prove objectionable. The proposal in the Commission's report with respect to interlocutory appeals seems preferable to that of the Task Force; for although such appeals should be restricted so far as

134. Code § 205(c). Cf. T.F. Rept., p. 199.

135. H.C. Rept. No. 41(c).

136. A.P.A. § 5(c), 60 STAT. 239 (1946), 5 U.S.C. § 1004 (1952).

137. H.C. Rept. Nos. 33(c), 37; T.F. Rept. Nos. 35, 41; Code § 204(c).

138. Code §§ 205, 206.

139. See note 132 *supra*.

140. Code § 206(b).

141. Code § 206(c).

142. H.C. Rept. No. 44; T.F. Rept. No. 52; Code § 207(f).

feasible,¹⁴³ it would surely serve the interests of all parties to permit an agency to determine immediately some questions, vitally affecting a proceeding, which would be subject to its determination in the end, even though the hearing commissioner might be unwilling to allow an intermediate appeal.

The Task Force's proposal for initial decisions by hearing commissioners, subject to limited agency review, would place the power to find facts largely in the hearing commissioners' hands. Upon judicial review, a dissatisfied party might not only contest the merits, but claim that the agency had exercised more than the limited check permitted to it. The agencies would be confronted in every instance of rule-making or adjudication based on a hearing with the question of what the scope of that check was. The check would embrace questions of law and policy entrusted by the statute to the agency, but not questions of fact.

In relation to an analogous problem, the Task Force complains of the doubt that continues to surround the distinction between questions of law which, when determined by an agency, remain subject to judicial redetermination, and questions of fact which, under existing law, an agency may determine with finality so long as there is substantial evidence in support.¹⁴⁴ The effects of this troublesome problem are confined to the relatively small number of cases in which judicial review of agency determinations is sought. The Task Force's proposed limitation of agency review of hearing-commissioner determinations, by contrast, would affect every hearing proceeding in which a fact-policy question was involved and would plague the agencies each time they were required to review hearing-commissioner determinations in such cases. No one would know whether the hearing commissioner or the agency should have the last word as to, for example, the safety of transportation equipment, the deceptiveness of competitive practices, the relative need of communities for broadcast services, and a host of other questions which heretofore have lain at the core of agency responsibility. Agency decisions would be handicapped by inescapable doubts, and litigation to resolve those doubts favorably to losing parties would be vastly encouraged. For this reason alone the recommendations should be rejected.

A still more fundamental objection to the Task Force's proposal rests upon the importance of fact determination in relation to the discharge of agency responsibility. That responsibility would continue to include the duty to effectuate the legislation the agencies are established

143. The President's Conference on Administrative Procedure has taken the same view. Report 41, 81-82 (1955).

144. T.F. Rept., pp. 216-17.

to administer. The compulsion to proceed under the handicap of fact determination by hearing commissioners who were removed from agency control and whose conclusions of fact were to a considerable extent beyond revision, would render agency membership and other positions of top responsibility for rule-making and adjudication stultifying and unattractive. It is a mistake to suppose that fact determination is a mechanical process which, if correctly employed by a neutral authority, leads always to a "right" answer as distinguished from a "wrong" one. Facts, even simple facts, established by means of a hearing, must be inferences drawn from the evidence; conflicting inferences will be possible to the extent that each is rationally supportable on the basis of evidence favorable to it when cast against the opposing evidence.¹⁴⁵ After the trier of fact has mustered all the objectivity and conscientiousness of which he is capable, his inferences are still likely to be the product of conscious or unconscious choice within rational limits. In the absence of some countervailing reason for attempting strict neutrality, such as applies in criminal cases or in civil litigation where public policy favors neither side, the trier of fact should be charged with responsibility for the public purpose of the proceeding in which he is a participant; yet the Task Force's proposal, by attempting to introduce a supposedly neutral officer as the fact-determiner in an agency proceeding, would substitute other, more fortuitous and variant predilections for the agency's. Such a change—except in proceedings such as deportation, where non-discretionary determinations vitally affect personal freedom—would benefit no one except, from time to time, a party whose interest happened to coincide with a particular hearing commissioner's predilections. The change would be especially harmful in rule-making¹⁴⁶ and in relation to facts of a so-called "forward-looking" nature,¹⁴⁷ such as the future requirements of public convenience and necessity, the degree of control one corporation may be able to exercise over another by reason of a minority stock inter-

145. See DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* 318-19 (1927); BENJAMIN, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* 329, 336-38 (1942).

146. The Task Force report states at one point that in agency review of initial decisions in rule-making "agencies should . . . have all the powers which they would have in making the initial decision themselves," "because the making of the [rules] involves policy considerations which justify independent appraisal of pertinent facts and circumstances by the agency." T.F. Rept., p. 204. The contrary recommendations previously cited are explicit, however, and it is believed the Task Force intended its general preservation of agency review of questions of policy to take care of the point which is made in the passage just quoted.

147. *American Airlines, Inc. v. Civil Aeronautics Bd.*, 192 F.2d 417 (D.C. Cir. 1951).

est,¹⁴⁸ and the "reasonableness" of a public utility rate in terms of the financial results it may be expected to produce.

The proposed intensification and extension of the "separation of functions," which both the Task Force and the Commission-transmitted recommendations propose, would provide that hearing commissioners shall not "be advised by any other agency or employee except as a witness or counsel in public proceedings of which all parties have notice and in which they have full opportunity to participate, or . . . permit any other agency officer or employee to participate in any way in the formulation of findings or decisions"¹⁴⁹ and hence would render absolute in all cases of formal rule-making and adjudication the limited separation of functions which the Administrative Procedure Act at present imposes only in certain instances of adjudication.¹⁵⁰ As respects agency personnel, hearing commissioners would be more completely insulated from resorting to available sources of information than are the judges of trial courts. In respect to facts of which judicial notice may be taken and in questions of law, trial judges may freely consult sources of information available to them, including persons, other than parties, who may possess the desired information. The theory of the proposed absolute separation of functions is that the entire agency is a party which, accordingly, should be consulted by the hearing commissioner only in open proceedings. This theory ignores, however, the historical and practical fact that administrative agencies were established for the very purpose of making the knowledge and experience of their staffs available in deciding matters before them and that the process of consultation is the natural method by which this may be done.

The Administrative Procedure Act wisely restricts its prohibition of hearing-officer consultation to consultation with agency personnel who have engaged in investigating or prosecuting in the same or a related proceeding and to consultation with any person or party, including agency personnel, regarding "any fact in issue,"¹⁵¹ and even this prohibition applies only to adjudication other than initial licensing and certain proceedings in the regulation of utilities. The Task Force, by contrast, acts in the belief that "to assert that formal rule making is, unlike

148. *Pacific Gas & Electric Co. v. Securities & Exchange Comm'n.*, 127 F.2d 378 (9th Cir. 1952).

149. Code § 204(c).

150. A.P.A. § 5(c), 60 STAT. 239 (1946), 5 U.S.C. § 1004(c) (1952).

151. It can be argued tenably that the act does not prohibit consultation with agency personnel, other than investigating and prosecuting officers. See DAVIS, *ADMINISTRATIVE LAW* 415-16 (1951). This view, however, is believed to be less tenable than a more literal interpretation which conforms to the words used and provides a safeguard against off-the-record consultation with anyone as to litigated facts.

adjudication, not an adversary proceeding is to have regard only to the form of the proceeding and to ignore realities."¹⁵² Many administrative proceedings, especially of a rule-making nature, however, are likely to be proceedings in which a wide range of facts and broad issues of policy are to be determined. To deny the hearing commissioner authority to use agency channels to ascertain facts which are susceptible to official notice, and to require him to determine questions of law and policy in isolation from the normal sources of aid which an agency can provide, is to cut the heart out of administrative processes.

The recommendation of the Task Force that the presiding officers prepare initial decisions in all proceedings unless such decisions are waived is, on the other hand, supported by strong considerations. When such a practice is followed, the presiding officer's familiarity with the case, through having presided at the oral hearing, is brought into play, and the hearing itself is given added dignity and efficiency by the knowledge that the presiding officer will be in command of the case until an initial decision has been rendered. Nevertheless, where the evidence submitted at the hearing is largely in writing and of a technical character, it may well be, as some agencies have long maintained, that other staff members may be in a better position than the presiding officer to formulate a proposed decision that will be useful to the agency and afford the parties an adequate forecast of what the agency may decide. If so, an initial decision prepared by the presiding officer will not make the maximum contribution to the decisional process at this stage. The Task Force does not adduce sufficient data in support of its conclusion to warrant incorporating its recommendation into legislation now. The report does disclose that the "initial decision is presently used in 11 statutory proceedings" and that "in nine others, the hearing examiner may prepare a recommended decision."¹⁵³ There is, however, no information as to whether these proceedings are, on the whole, better conducted than others. It would be desirable to allow this matter to rest pending further study.

F. Administrative Procedure and Judicial Review

Within the area commonly embraced by lawyers' administrative law the Task Force recommendations and those transmitted by the Commission deal with a wide range of matters in addition to the points affecting hearing commissioners which have just been discussed. These include: (1) information as to agency operations and action; (2) procedure in

152. T.F. Rept., p. 164.

153. T.F. Rept., p. 202.

rule-making; (3) procedure in informal adjudication; (4) formal adjudicative procedure; and (5) judicial review of agency action. In addition, the proposed Office of Legal Service and Procedure would be given important functions in relation to agency procedures.

1. Information as to Agency Operations and Action

The Task Force recommendations and those in the Commission's report (endorsed by three Commissioners) advocate more complete publication in the Federal Register and Code of Federal Regulations of descriptions of agency organization, procedures, and policies than now obtains, and fuller availability of unpublished documents than presently prevails.¹⁵⁴ No agency rule, order, or opinion would be effective unless published or, in the case of orders or opinions, made available to public inspection as provided by law, except where a person has actual knowledge pursuant to statute.¹⁵⁵ Although the Task Force's discussion is extremely informative and helpful,¹⁵⁶ it is not possible in this review to discuss the details of the situation disclosed in the report with respect to present practice.¹⁵⁷

The principal question that arises concerning the proposed requirements for publication is whether the Federal Register and Code of Federal Regulations would become unmanageably bulky if the recommendations were carried out; but probably the requirements of big government in a complex world should be faced and means be devised to keep the consequences within the capacity of ordinary human beings, as the physical aspects of mechanization have been. The recommendations, however, contain no provision dispensing with the publication requirement for possible emergency regulations which may need dissemination by radio or other means of rapid communication, although the possibility that other statutes may make such provision is recognized. It would seem that such provision should be made.¹⁵⁸

A related recommendation transmitted by the Commission is to the effect that "no sanction should be imposed for any act done or omitted

154. H.C. Rept. No. 32; T.F. Rept. Nos. 27-30.

155. H.C. Rept. No. 32(e); T.F. Rept. No. 31.

156. See also Newman, *Government and Ignorance—A Progress Report on Publication of Federal Regulations*, 63 HARV. L. REV. 929 (1950).

157. T.F. Rept., pp. 144-56.

158. The recommendations and proposed Code make provision for dispensing with procedures anterior to the issuance of emergency regulations and for short form methods of publication. H.C. Rept. No. 33(b); T.F. Rept. No. 34; Code §§ 200(a), 202(d). The former, however, are dependent upon publication of notice in the Federal Register. *Hotch v. United States*, 208 F.2d 244 (9th Cir. 1953), which the Task Force cites in its discussion (T.F. Rept., pp. 162-63), involved fishing regulations for Alaskan waters which should be subject to amendment to meet day-to-day conditions and be made effective upon radio transmission.

in good faith reliance upon an advisory written statement issued to any person by an officer of the agency specially authorized to do so."¹⁵⁹ The Task Force's corresponding recommendation covers also good-faith reliance upon a duly published rule.¹⁶⁰ These recommendations involve a genuine problem that has been dealt with in previous specific legislation¹⁶¹ and has called forth other proposals for a general statutory provision.¹⁶² Whatever precise solution may be arrived at, the reports do well to call attention to the need for over-all legislative treatment.

2. Procedure in Rule-Making

The recommendations in the reports with respect to rule-making would (a) extend and add to the requirements which section 4 of the Administrative Procedure Act now imposes with respect to informal rule-making procedures and (b) greatly extend present requirements that rule-making be based on the record of a hearing, as well as attach the mandatory separation of functions to such proceedings.¹⁶³

Military and foreign affairs functions, matters relating to agency management or public property, functions involving loans, benefits, grants, or contracts, interpretative rules, rules of practice, and mere statements of policy are exempted from procedural requirements of the present act.¹⁶⁴ All of these exemptions would be withdrawn under the recommendations. Thirty days' notice of opportunity to submit data, views, or arguments would be given; the agency would be required to accompany the resulting regulations with a statement of the considerations for and against; and reasons would have to be given for an agency's failure to initiate rule-making proceedings upon petition to it to do so.¹⁶⁵ Emergency regulations, effective for not more than 120 days, would be permitted where necessary, without observance of the otherwise requisite procedures.¹⁶⁶

The removal of the military and foreign-affairs, public-property, and loans-benefits-contract exemptions from the rule-making procedural requirements seems sound. As the Task Force points out,¹⁶⁷ the distinc-

159. H.C. Rept. No. 46.

160. T.F. Rept. No. 56; Code § 208(c).

161. See T.F. Rept., p. 225.

162. Cf. 7 AD. LAW BULL. 224-25 (1955).

163. See note 137 *supra*.

164. A.P.A. § 4, 60 STAT. 338 (1946), 5 U.S.C. § 1003 (1952).

165. H.C. Rept. No. 33; T.F. Rept. Nos. 32, 33; Code § 201.

166. H.C. Rept. No. 33(b); T.F. Rept. No. 34; Code § 201(d). The Commissioners' recommendation would have the emergency provision apply "when necessary for the protection of public health, safety, or welfare," whereas the Task Force would substitute "morals" for "welfare." The term "morals" seems unduly restrictive.

167. T.F. Rept., pp. 158-59.

tions they establish are artificial and to a large extent lacking in practical justification. To require all agencies, including the armed forces, to go through substantial procedures in order to make regulations to govern their own affairs seems excessive however, and a way should be found to maintain an exemption for such regulations without creating an escape for some regulations, such as postal regulations, that affect the public. Interpretative regulations affect the public and are given weight by the courts; but their merits are fully litigable, and it seems undesirable to impose procedural requirements upon a rule-making function, such as that of the Treasury in expounding its view of a new tax statute, which is of particular benefit when fully and expeditiously performed. Even the escape of emergency regulations seems inadequate as to such matters when elaborate procedures would have to follow. The requirements of added agency explanations to those whose petitions or contentions were not accepted also seem excessive. There is, after all, a limit to the procedures that should be demandable as of right when limited agency resources are to be apportioned in serving the public good.

Drastic extension of the requirement that regulations be based on the record of a hearing would be accomplished by provisions in the proposed Code that formal hearing requirements shall apply "in every case of . . . rule making required under the Constitution or by statute to be determined after opportunity for an agency hearing."¹⁶⁸ The proposal for extension seems almost to be an inadvertence, since the Task Force report states erroneously in two places that the Administrative Procedure Act already requires a record-type hearing wherever the Constitution or other legislation imposes a hearing requirement;¹⁶⁹ yet it is difficult to believe that the changed wording of the proposed Code provisions is actually unintentional.¹⁷⁰ These provisions, in any event, would at one stroke impose the full panoply of formal hearing requirements upon multi-party proceedings, oft-times involving complicated regulations based on a variety of technological and policy factors.¹⁷¹ In attempted justification of the extension of separation of functions to formal rule making, the Task Force states that to assert that formal rule-making, in comparison to adjudication, is not an adversary proceeding, is to ignore realities.¹⁷²

168. Code § 206. See also § 205.

169. T.F. Rept., pp. 164(410. Actually § 4(b) of the act, note 164 *supra*, provides that the formal requirements of §§ 7 and 8 shall apply "*where rules are required by statute to be made on the record after an opportunity for agency hearing.*" (Italics supplied.)

170. A similar change as to adjudication is deliberately proposed. T.F. Rept., p. 169.

171. Attorney General's Committee on Administrative Procedure, Final Report 109-11 (1941).

172. T.F. Rept., p. 164.

Granted that this may be so,¹⁷³ the question of what proceedings are subject to this reasoning still remains; the Task Force advances no justification for bringing in the whole range of rule-making which has been subject to statutory hearing procedures but not to the record requirement. The attempt to bring about so sweeping a formalization of rule-making processes should be rejected out of hand.

3. Procedure in Informal Adjudication

One of the most drastic proposals in the report of the Task Force, which finds only a weak counterpart in the Commission's report, is the recommendation that in adjudications not required to be accompanied by opportunity for agency hearing, including "the performance of all proprietary functions such as the use or disposition of public property or the execution of public contracts in which private rights, claims, or privileges are asserted or affected, a decision shall be proposed by a duly designated and responsible officer of the agency and served upon the parties by mail or delivered in person" and shall be reviewable "within the agency by a board or superior officer designated by the agency . . . after the receipt and full consideration of the evidence and the views and arguments of all interested parties."¹⁷⁴ Temporary adjudication in emergencies could be rendered in advance of the proposed procedures. The separation of functions would apply to intra-agency reviewing authorities.¹⁷⁵

One may assume that, contrary to the literal wording of the proposed Code provision, an initial rejection of a private claim might take place without the submission of a "proposed decision," *e.g.*, by the gatekeeper of a national park or a contracting officer in relation to bidders. Despite this assumption, the suggestion that all of the Federal Government's vast operations in relation to persons outside of the Government should be carried on subject to such an array of procedural rights seems completely fantastic. The Task Force rightly points to numerous instances in which intra-agency review procedures are voluntarily accorded at the present time, and it suggests validly that such procedures may usefully be extended,¹⁷⁶ but it is a far cry from this observation to the sweeping provision actually proposed. If extensions are to be made, the areas in which they are to be applied must be specified. There seems, moreover,

173. *Id.* at pp. 108-09; Fuchs, *Constitutional Implications of the Opp Cotton Mills Case with Respect to Procedure and Judicial Review in Administrative Rule-Making*, 27 WASH. U.L.Q. 1 (1941).

174. Code, § 202(b). See also H.C. Rept. No. 34; T.F. Rept. No. 38.

175. Code § 204(c); T.F. Rept., p. 409.

176. T.F. Rept., p. 171.

to be no good reason for applying the separation of functions to agency determinations in which the element of private right is secondary.

4. Formal Adjudicative Procedure

In respect to formal agency adjudication the recommendations of the Task Force and those transmitted by the Commission propose an extension of the record requirement to all instances in which a hearing of any kind is required under the Constitution or by statute, similar to that proposed for rule-making.¹⁷⁷ Since the courts have displayed a tendency to find that the record requirement as to adjudications exists by implication,¹⁷⁸ the effect of such an extension by a general statute might not be as great as in relation to rule-making. The Task Force report, moreover, enumerates the instances to which the extension might be expected to apply.¹⁷⁹ It does not, however, demonstrate that considerations relating to procedural efficiency or the public interest do not require an informal, expeditious type of hearing in some situations. The specific instances should be examined before a blanket provision is made applicable to them.

Aside from matters relating to the authority of hearing officers, which have already been noticed, the principal added procedural requirement which the recommendations would attach to formal adjudication is that the rules of evidence and requirements of proof in civil nonjury cases in the United States district courts should apply "so far as practicable."¹⁸⁰ Since court practice and the practice of agencies in this regard are drawing closer together,¹⁸¹ and since this provision is flexible, its effects would probably be less far-reaching than appears at first glance. An accompanying provision with respect to official notice¹⁸² would also work relatively slight change. Both provisions might improve agency practice by directing attention to the desirability of screening evidence reasonably and of affording opportunity for rebuttal with respect to noticed facts; but these provisions might also breed litigation over whether they had been properly applied. The need for them seems doubtful.

The reports also make the salutary recommendation that settlements and shortened procedures be employed to the maximum extent feasible.¹⁸³ When coupled with adequate authority in the presiding officer to require

177. H.C. Rept. No. 34(b); T.F. Rept. No. 37; Code § 202(b).

178. The Task Force report cites the decisions at p. 168.

179. *Id.* at p. 169-70.

180. H.C. Rept. No. 42. See also T.F. Rept. No. 47; Code § 205(d).

181. DAVIS, *ADMINISTRATIVE LAW* 447-57.

182. Code § 205(e).

183. H.C. Rept., p. 57, No. 40(b); T.F. Rept. Nos. 36, 44.

conferences of the parties, to simplify the issues, and to limit proof,¹⁸⁴ these measures can do much to improve the efficiency of formal administrative processes. It is significant that the President's Conference on Administrative Procedure concentrated its attention to a considerable extent upon these matters.¹⁸⁵

5. Judicial Review of Agency Action

Much might be written about the report of the Task Force with regard to judicial review of agency action, for the report contains many statements about present practice and desirable alterations in it that seem to call for comment. Space does not permit discussion of details, however, and this review will be confined to the principal recommendations of the Task Force and those contained in the Commission's report.

The Task Force proposes that judicial review of agency action giving rise to "legal wrong" be available,¹⁸⁶ and this recommendation is translated in the proposed Code into a right of review in "any person adversely affected or aggrieved by agency action."¹⁸⁷ The recommendation transmitted by the Commission and concurred in by three members, provides that "legal wrong" should be redressable unless Congress expressly provides otherwise,¹⁸⁸ but the Commission's report remarks, somewhat uncertainly, that, while Congress should want even persons to whom it accords bounties to have a day in court to vindicate their claims, "there undoubtedly are areas of administrative action which are not subject to judicial review, such as matters of internal administration."¹⁸⁹ The Task Force's intention seems to be more in accord with the broad language of the proposed Code provision than with limiting judicial review to redressing "legal wrong" in a traditional sense, for its report stresses claims for pensions and other benefits as among those which should not be subject to denial without possibility of judicial review.¹⁹⁰

The Task Force's logic is good. Capricious administrative action denying claims to bounty is as harmful in a practical sense as actions adversely affecting rights of a more traditional sort; judicial review is a useful check upon possible administrative arbitrariness, as reported cases occasionally attest. It does not follow, however, that the increased litigation that would result from, for example, opening denial of veterans'

184. Code § 205(b).

185. President's Conference on Administrative Procedure, Report 13, 33-34, 36-41, 66, 70-81 (1955).

186. T.F. Rept. No. 50.

187. Code § 207(a).

188. H.C. Rept. No. 43.

189. H.C. Rept., p. 74.

190. T.F. Rept., p. 208.

claims to judicial review, can wisely be imposed on the courts or that, taken as a whole, veterans would be treated more justly by an administrative process combined with a judicial check than they are now by an agency which accords generous procedures and is in a politically sensitive position. One would feel more confident in applying the Task Force's recommendation if agency-by-agency studies accompanied it. In their absence, one can at most recognize a presumption in favor of applying the recommendation in various situations. Non-reviewability is a fiction to some extent (since courts find ways to check administrative action when they are moved to do so) and gives rise to numerous unsatisfactory distinctions which it would be desirable to abolish so far as feasible.¹⁹¹

The Task Force also proposes to substitute simple statutory review procedures for the multiplicity of non-statutory remedies now prevailing.¹⁹² The question of the proper remedy gives trouble only occasionally,¹⁹³ but frustrations sometimes arise and no good reason exists for not affording easy access to the courts in all cases that may properly go there.¹⁹⁴ In providing that the court shall proceed on the basis of the administrative record when the administrative action is based on such a record and shall conduct a trial when it is not,¹⁹⁵ the Task Force conforms to a dichotomy of remedies that is fundamental but sometimes fails of recognition.¹⁹⁶

The Task Force would broaden the scope of judicial review in several important respects. Agency action would be subject to reversal in case of "clearly unwarranted exercise of discretion"¹⁹⁷ as well as for "abuse of discretion" as at present.¹⁹⁸ Conflict of agency action with statutory "purposes," as well as with statutory "jurisdiction, authority, or limitations," would also result in reversal. Findings, in case of administrative action based upon a record, would be set aside if they were "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record," rather than "unsupported by substantial evidence" on the

191. Davis, *Unreviewable Administrative Action*, 15 F.R.D. 411 (1954).

192. Code § 207(b).

193. Attorney General's Committee on Administrative Procedure, Final Report c. VI (1941).

194. The Task Force (T.F. Rept., p. 211) makes a salutary recommendation that proceedings for review should be maintainable against either an agency, the officials who compose it, or any person representing it. Inability of a plaintiff to sue outside of the District of Columbia, where the doctrine that agency heads are indispensable parties applies, would thus be eliminated.

195. Code § 207(e).

196. See Fuchs, *Judicial Control of Administrative Action in Indiana*, 28 IND. L.J. 1, 8-11 (1952).

197. T.F. Rept., p. 217.

198. A.P.A. § 10(c), 60 STAT. 243 (1946), 5 U.S.C. § 1009(e) (1952).

basis of the whole record, as at present.¹⁹⁹ The recommendation in the Commission's report concurs as to substitution of the "clearly erroneous" rule for the "substantial evidence" rule.²⁰⁰ In addition, in cases where the agency has not decided on the basis of the record of a hearing, the Task Force would have the court proceed on the basis of "the facts as established in and by the reviewing court," without giving prima facie weight to agency determinations.²⁰¹ Judicial deference to agency determination of "mixed questions of law and fact" involved in the interpretation of statutes would end.²⁰²

It is not made clear that actual evils lie back of these recommendations as to scope of review, except in relation to judicial deference regarding "mixed questions of law and fact"; and even here the Task Force seems impelled by objections to existing curtailment of "the protection which judicial review should" for some abstract reason provide,²⁰³ rather than by the impossibility which exists at present of forecasting the extent of judicial deference from case to case.²⁰⁴ An analogy is drawn between judicial review of agency action and appellate-court review of non-jury trial-court decisions which is deemed to establish a desirable norm; but the analogy ignores the special competence of administrative agencies acting within their province, a factor not present in the reviewing courts. This competence is the principal reason for limiting judicial review of agency fact determinations by the substantial evidence rule.²⁰⁵ The Task Force's contention that the rule was developed to economize judicial time and effort in going over voluminous administrative records, caused by loose agency practice in admitting evidence,²⁰⁶ seems manufactured out of whole cloth; and it overlooks the fact that courts have sometimes applied the substantial evidence rule even where their review of agency action has been based on records compiled in court by trial de novo.²⁰⁷

199. T.F. Rept., pp. 215-18; Code § 207(f).

200. H.C. Rept. No. 44.

201. Code § 207(f). See T.F. Rept. Nos. 51, 53.

202. T.F. Rept., p. 216. See Code § 207(g). The Task Force cites the most celebrated case involving this type of question, *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111 (1944), where the question was whether certain vendors of newspapers were, under certain facts, independent contractors or "employees" within the meaning of the National Labor Relations Act.

203. T.F. Rept., p. 216.

204. DAVIS, ADMINISTRATIVE LAW 887-910; Benjamin, *Judicial Review of Administrative Adjudication: Some Recent Decisions of the New York Court of Appeals*, 48 COLUM. L. REV. 1, 12-19 (1948).

205. Attorney General's Committee on Administrative Procedure, Final Report 91 (1941); WARREN (ed.), THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 546, 592-96 (1947); DAVIS, ADMINISTRATIVE LAW 877-80.

206. T.F. Rept., p. 215.

207. *Houston v. St. Louis Independent Packing Co.*, 249 U.S. 479, 484-85 (1919).

How much change would actually be wrought by the proposed enactment of statutory provisions designed to broaden judicial review cannot be determined. The factors which have led courts to limit their review when no statutory provisions compelled them to do so would still be operative. Yet the legislative intention, if the recommendations were enacted, would be clear, and the courts might feel compelled to respond to it with resulting damage to the effectuation of the purposes the agencies were established to serve. At the very least, years of litigation would be required to determine what the new formulas really did mean. The reports do not set forth any convincing reason why the existing formulas, which by now have become reasonably clear in most respects, should be changed.

One additional provision recommended in the reports has extremely harmful potentialities and should be rejected decisively. The Task Force would have it that "courts of competent jurisdiction should be empowered to enjoin, at any stage of an agency proceeding, agency action in excess of constitutional or statutory authority."²⁰⁸ To this the Commission-transmitted recommendation would add the safeguard that a "frivolous or delaying action contesting the agency's authority" should cast "costs and attorneys' fees or an equivalent sum in lieu thereof"²⁰⁹ upon the plaintiff. The proposal seems to constitute a wide-open invitation to harassment of the agencies at every turn, which the requirement of a "showing of irreparable damage" would do little to check. Even suits that proved to be without merit would have their value as delaying actions. The doctrine that administrative remedies must be exhausted before resort may be had to a court, which the proposal would profoundly modify, has at times imposed inconvenience and even serious loss; but on the whole its operation has been salutary. It has, moreover, not prevented injunctive relief from being accorded where administrative usurpation or serious abuse could be shown.²¹⁰ The reports set forth little justification for weakening it drastically now.

6. Office of Legal Services and Procedure

From the standpoint of long-run improvement of federal administrative procedures, the most important recommendation in the reports, which has the support of the Commission as well as of the Task Force, is the proposal that the Office of Legal Services and Procedure, which already

208. T.F. Rept. No. 60. The proposed Code provision [Code § 208(g)] spells out that "authority" means "jurisdiction or authority," hence something more than jurisdiction.

209. H.C. Rept. No. 48.

210. DAVIS, ADMINISTRATIVE LAW 621-34. Cf. *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949).

has been discussed in relation to the proposed career merit system for government attorneys, should "assist agencies in simplifying, clarifying, and making uniform rules of substance and procedure . . . insure agency compliance with statutory public information requirements . . . and . . . receive and investigate complaints regarding legal procedures and report thereon to the authorities concerned."²¹¹ The purpose of this function of the Office might have been stated more broadly so as to include investigation and reports with regard to the improvement of agency procedures; but such is no doubt the intention. The Task Force report includes a review of the series of proposals, beginning with that of the Attorney General's Committee on Administrative Procedure, for the establishment of an office having this general function.²¹² Had these proposals been acted upon, especially in the Administrative Procedure Act, the difficulties still remaining with respect to federal administrative procedure might have been greatly lessened.

It cannot be too strongly urged that, whatever else may be done or not done as a result of the Commission and Task Force reports, the establishment of an office of administrative procedure should be no longer delayed. The substantial accomplishments of the President's Conference on Administrative Procedure working on a temporary basis, are indicative of what might be achieved by means of a permanent arrangement. Although in the writer's view an independent office would be greatly preferable to one in the Department of Justice, the objections to performance of procedural functions by a unit in the Department of Justice²¹³ are considerably less than those to the performance of government-wide personnel functions there.

G. *Limitations of Federal Administrative Authority*

Certain recommendations which the reports contain with respect to the bestowal and distribution of governmental authority are extremely important from a political, and to some extent from a legal, standpoint; but they can only be mentioned here. The Task Force in particular makes highly restrictive recommendations in this regard and supports them with reasoning which many will be unable to accept. "Duplicating and overlapping jurisdiction between Federal and State agencies should be

211. H.C. Rept. No. 49; T.F. Rept. No. 61.

212. T.F. Rept., pp. 232-33. The Report of the President's Conference on Administrative Procedure (1955) contains a recommendation similar to that in the present reports.

213. The reasons why an independent office would be preferable are stated in two successive annual reports of the Committee on Improvement of Administrative Procedures of the American Bar Association's Section of Administrative Law. See 7 *AD. LAW BULL.* 240, 243-44 (1955); 6 *id.* 203-04 (1954).

reduced to a minimum and entirely eliminated whenever possible by the relinquishment of jurisdiction by Federal agencies to State agencies which meet reasonable standards of regulation."²¹⁴ Broad standards to guide administrative action, in statutes conferring administrative authority, are also condemned, and the recommendation is made that such authority "should be clearly and precisely stated in enabling legislation."²¹⁵ When administrative authority has been conferred, "no sanction should be imposed or substantive rule or order issued except within the letter, purpose, and intent of applicable statutes and the limitations of agency jurisdiction."²¹⁶ Agency rules and orders, moreover, "should be enforced only within the literal, definite, and specific terms thereof, and should not exceed the scope permissible upon the facts or record on which such agency action is required to be made or sought to be justified."²¹⁷

In support of its view that federal authority should yield to state authority whenever possible, the Task Force argues that "the basic purpose of Federal action should be to supplement and not to displace State power."²¹⁸ This preference for state over federal authority has little relation to the administrative and procedural problems with which the Task Force primarily deals. The report of the Commission on this point, expressing the views of the three members who joined in all of the recommendations, is considerably more circumspect, contenting itself with emphasis upon the need for further study and elimination of conflicts.²¹⁹ Obviously the matter is not going to be settled, or even much affected, by what is said in a report on procedure.

The other restrictive recommendations relating to narrow confinement of federal administrative power when conferred, would, if conscientiously applied, seriously impede effective regulation by the national government. Heretofore remedial legislation has in general been construed broadly to effectuate its purposes, unless specific countervailing considerations dictated otherwise; and broad standards, permitting the exercise of considerable discretion, have been thought proper as a means of dealing with complex situations for which precise legislative prescriptions are impracticable. Yet, under the recommendations, even such perennial standards as "reasonable," "unreasonable," "public interest," "public convenience and necessity," and "practicable" would be expected to

214. T.F. Rept. No. 23. Under T.F. Rept. No. 24, duplication and overlapping among federal agencies would also be eliminated whenever possible. See also H.C. Rept. No. 29.

215. T.F. Rept. No. 25. See also H.C. Rept. No. 30.

216. T.F. Rept. No. 54. See also H.C. Rept. Nos. 30, 45.

217. T.F. Rept. No. 59.

218. T.F. Rept., p. 115.

219. H.C. Rept., p. 48.

disappear.²²⁰ There seems little likelihood that Congress will be able to dispense with such terms; it may, however, be able to avoid legislation entirely lacking in verbal standards, such as the Task Force also criticizes with justification. Narrow interpretation of regulatory statutes, such as the Task Force advocates, can be justified only if the public interest which leads to legislation is to be regarded as uniformly subordinate to meticulous procedural protection to private interests. Enforced literalness in regulations is also a counsel of perfection; for even government, with all its use of words, can hardly be expected to verbalize in advance all of its actions with precision, in the face of a complex and changing world.²²¹

H. Conclusion

It is apparent from the discussion in this review that the Commission and Task Force reports not only serve as stimulants to comprehensive consideration of the problems of administrative procedure and the legal aspects of administrative organization, but also contain valuable proposals for solving a considerable number of problems. The proposal for a career merit system for government attorneys, the recommendations as to regulation of the practice of law before government agencies, the proposal for an administrative court, the endorsement of an office of administrative procedure, and the recommendation that a special type of personnel system for hearing officers should be established, all these, together with certain specific suggestions as to agency procedures, contain the seeds of noteworthy progress.

Inability on the part of the writer and others to accept many of the recommendations, especially of the Task Force, results primarily from disagreement with the Task Force's underlying belief that judicial procedure, both during agency operations themselves and in subsequent judicial proceedings to challenge or review them, should be made available to the greatest possible extent to persons affected by agency actions. The Task Force's belief has given rise to an additional recommendation, to which the Commission, except for its dissenting member, lends qualified support: "Judicial functions, such as the imposition of money penalties, the remission or compromise of money penalties, the award of repar-

220. T.F. Rept., p. 134.

221. Case-by-case development of administrative policies would be largely prevented by adoption of the Task Force's recommendation [T.F. Rept. No. 55; Code § 208(b)] that "no sanction should be imposed or substantive rule or order issued against any person for pursuing a normal, customary, or previously acceptable course of conduct, unless such conduct shall have been proscribed or restricted by generally applicable rule of the agency." Aside from the litigation it would breed, this provision would have the harmful effect of reversing the sound reasoning of the majority of the Supreme Court in *Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194 (1947).

ations or damages, and the issuance of injunctive orders, should be transferred to the courts wherever possible.²²² The Commission would have Congress "look into the feasibility" of such a transfer of functions, "wherever it may be done without harm to the regulatory process."²²³ This recommendation of the Task Force stems from an over-all viewpoint, expressed in the report, that an evolutionary process throughout the Anglo-American legal history can be seen, whereby new governmental functions are started under executive auspices, there is subsequent judicialization by means of administrative tribunals, and then a final transfer of the adjudicative aspects to the courts of law.²²⁴ This viewpoint could be supported by reference to the origin of the English courts as administrative bodies and is exemplified by the development of tax tribunals in the federal system. Granted that such an evolution sometimes takes place, it by no means follows that the process is a universal one or that a counter-movement away from judicial tribunals through the establishment of administrative remedies does not also take place. Such, certainly, has been the modern history of railroad and public utility rate regulation and of governmental efforts to deal with trade practices, abuses in the marketing of securities, and protection to the consumers of food products. The Task Force's philosophy therefore breaks down as regards some of the most vital areas of administration with which the reports attempt to deal. If the specific recommendation that the reparations jurisdiction of the Interstate Commerce Commission be transferred to the courts means that the very duality of authority in rate-fixing which the primary jurisdiction doctrine²²⁵ was designed to avoid would be reestablished, it seems definitely unsound for this reason too. The authority to collect, remit, and compromise money penalties, on the other hand, has on the whole not been handled well by administrative agencies,²²⁶ and the substitution of judicial for administrative processes in performing these functions would probably constitute an improvement.

The nub of a sound approach to many of the problems dealt with in the reports is that, rather than attempt to follow a theory to its drily logical conclusions, it would be better to base reforms upon realistic study of particular problems, with general theory in the background rather than in the foreground. The danger is that, given the predisposition to favor judicial methods over administrative, which conventional opinion

222. T.F. Rept. No. 62.

223. H.C. Rept. No. 50.

224. T.F. Rept., pp. 239-42, 246-50.

225. DAVIS, ADMINISTRATIVE LAW 664-73.

226. See Nelson, *Administrative Blackmail: The Remission of Penalties*, 4 WEST. POL. Q. 610 (1951).

shares with the Task Force, mistakes may be made in carrying out the recommendations, which the nation will have cause to regret. The legal profession also would suffer if such should be the course of events, because lawyers would have been so largely responsible. The task of the profession now, as well as that of Congress, is to appraise the reports carefully, make use of the best that is in them, and avoid being stampeded into unwise action. The administrative process, far from being a passing phenomenon, continues to be a principal reliance in solving both old and new problems. It needs refinement rather than abolition.