

## Memorandum 90-127

Subject: Study N-104 - Administrative Adjudication: Control of ALJ  
Career Path

Background

The Commission decided it will investigate the possibility of external control of administrative law judge pay raises and promotions. The concept is that having the career path of the administrative law judge controlled by a state civil service or personnel agency, rather than the employing agency, could help ensure administrative law judge independence and help achieve fairness in administrative hearings. The judge would not be involved in a personal conflict if called upon to make a decision that could adversely affect the judge's employer.

Would such a scheme in fact be practical and beneficial? The Commission asked the staff to report back suggesting the scope of this investigation, the proposed allocation of staff resources to it, and any alternative staff suggestions to deal with this matter.

Federal System

There is at least one model in existence for such a scheme, and that is the federal system for control of the administrative law judge's career path. Under the federal system, administrative law judges are employed by specific agencies, but their pay raises and promotions are controlled by the Office of Personnel Management (formerly Civil Service Commission) "independently of agency recommendations or ratings". 5 U.S.C. § 5362. This has been the case since adoption of the federal Administrative Procedure Act in 1946.

The federal administrative law judge is thus unique among federal employees. The federal Administrative Procedure Act creates a semi-independent group of administrative law judges and enforces their status by precluding employing agencies from evaluating administrative law judge performance.

The federal administrative law judge has been described as an agency employee with practically assured tenure until retirement. We understand from the Administrative Conference of the United States that pay raises for federal administrative law judges are a matter of course and that denial of a pay raise is unheard of.

The success of the federal system is not free of debate. The matter of external control has been criticized since its inception. Many committees, studies, and advisory groups have concluded that:

(1) Agencies are reluctant to attempt to manage administrative law judges for fear it will be interpreted as an infringement on administrative law judge independence.

(2) The Office of Personnel Management is reluctant to take an active management role because it is not in a position to properly evaluate the administrative law judges and their performance.

(3) The net result has been a condensation of all administrative law judges into one or two civil service classifications with a narrow advancement range and a lack of accountability for movement within and between classes.

In a provocative article reviewing the history and present status of external control of the administrative law judge career path under the federal system, Professor (now Justice of the Supreme Court and formerly Chairman of the Administrative Conference) Scalia sees a number of serious consequences of this situation, including the fact that to ensure competence in its administrative law judges, agencies tend to hire new judges from among their own attorneys who they know to be good. "Surely it is ironic that the zeal to preserve the impartiality of hearing officers--manifested in the utterly impracticable commitment of promotional responsibility to the OPM--has produced a system in which, quite reasonably, almost all of the most important regulatory agencies strive to hire judges from their own prosecutory staffs." Scalia, *The ALJ Fiasco--A Reprise*, 47 U. Chi. L. Rev. 57, 75 (1979).

Scalia believes that the demise of the multi-grade system is primarily attributable to the sheer inability of the Office of Personnel Management to handle the recurrent promotion decisions it entails. Scalia believes the fears of agency favors to judges who

distort their factfinding to support the agency position are exaggerated. He believes it is possible to achieve a system that is fair and equitable, and that still allows the agency to promote its judges on the basis of its own intimate and unique knowledge of their performance. He suggests that the current federal system of merit selection of administrative law judges, their increased salary and prestige, and their required functional separation from prosecutory staff, ensure independence; any further benefits achieved by external control of the administrative law judges's career path are outweighed by the detrimental effects on quality and efficiency. A copy of the Scalia article is attached as Exhibit 1.

There is also an interesting interrelation between external control of the administrative law judge career path and efforts to create a central panel of federal administrative law judges. In testimony before the Senate Judiciary Committee on the central panel proposal, central panel opponents have stated that existing federal safeguards are adequate, whereas central panel proponents have denigrated the impact of external control, e.g.:

*Statement of Chief Judge Victor W. Palmer for the Federal Administrative Law Judges Conference (March 17, 1988):*

The Administrative Procedure Act contemplated that the Civil Service Commission, now the Office of Personnel Management, would protect the independence of administrative law judges. The Supreme Court reiterated this responsibility in Ramspeck v. Trial Examiners Conf., 345 U.S. 128, 139 and 142 (1953).

The selection process as currently administered by OPM has become a praiseworthy model for making judicial appointments that should be retained. But, OPM has otherwise failed to distinguish itself in fulfilling its responsibility to the ALJ program.

#### Other Jurisdictions

The staff has not yet come across information indicating whether other states or countries follow the federal model and, if so, whether their experience is similar to the federal experience.

## California

The California civil service law is a bewildering hodge podge of constitutional provisions, statutes, regulations, and memoranda of understanding between the state and various bargaining units, overseen by a number of overlapping state agencies including the State Personnel Board, the Department of Personnel Administration, and the Public Employment Relations Board. It would take the staff a substantial amount of time to map out the routes of various types of decisions and appeals, so we have summarized a few of our gleanings here.

In California there is a variety of classes of administrative law judges and hearing officers, depending on the employing agency. However, in the typical agency there are two classes of administrative law judges--Class I and Class II--each of which contains five steps, or annual merit salary adjustments. The salary range is narrow, running from approximately \$62,000 per year at the lowest step of Class I to about \$79,000 per year at the highest step of Class II.

Advancement through the various steps in each class tends to be routine, and merit salary adjustments are made as a matter of course. Denial of a merit salary increase by an agency is rare. When it does occur, the administrative law judge may file a grievance with a designated manager or supervisor within the agency. If the resolution of the grievance is unsatisfactory, the administrative law judge may appeal at higher levels within the agency and, if unsatisfied, to the Director of the Department of Personnel Administration. (The Director is a gubernatorial appointee, with the consent of the Senate, who serves at the pleasure of the Governor. "The director shall be appointed wholly on the basis of training, demonstrated ability, experience, and leadership in personnel administration and labor relations." Gov't Code § 19815.) If the grievance is not resolved at this level, the administrative law judge's bargaining unit may submit the matter to arbitration; the award of the arbitrator is final and binding on the parties.

Promotion between classes is not automatic, and in most agencies Class II positions are limited--available to chief or presiding administrative law judges. (The major exception to this generalization is the Public Utilities Commission, which has more Class II ALJs than

Class I.) The State Personnel Board establishes the standards and qualifications for the class, and administers an examination for determining eligibility for the position. In filling the position, the agency must select from among the top three candidates on the eligibility list compiled by the State Personnel Board. Appeals by employees unhappy with the agency's promotional decision are made to the State Personnel Board. (The Personnel Board is a constitutional body composed of 5 members appointed by the Governor with the approval of the Senate, for 10-year terms.)

Disciplinary actions, demotions, and removals by the agency are a "federal case", and can be achieved only with great difficulty.

### Conclusion

External control of the administrative law judge's career path may be a solution in search of a problem in California.

While there could be a danger of an agency attempting to influence administrative law judge decisions by the threat of denied merit increases or promotions, this threat appears more theoretical than real. If an agency were to attempt to exert improper influence on an administrative law judge, there are a number of structural devices built into the system for external review of agency personnel actions. In any case, as a practical matter, merit increases are almost beyond the discretion of the agency, and promotion opportunities occur rarely. The whole issue of grievance procedures is largely removed from the statutory realm and is negotiated as part of the collective bargaining agreement between the state employer and the administrative law judge employees.

The federal system of excluding the employing agency from pay raise and promotion decisions has not been unanimously applauded. The Scalia article makes a number of telling points, and there have been continuing efforts for a central panel at the federal level despite the federal system of external control.

The staff's conclusion is that the Commission should not devote resources to developing an external control system for California at this time. This conclusion could change if we receive evidence that there are problems in California that the external control system would

address. But existing structures appear adequate and the staff time necessary to develop such a system would be substantial. This is a matter for the State Personnel Board, the Department of Personnel Administration, the Public Employment Relations Board, the various agencies, and the Association of California State Attorneys and Administrative Law Judges (the bargaining unit for the administrative law judges), with their overlapping jurisdictions, to work out among themselves. It is not a problem of a type either the Law Revision Commission or its staff is particularly well-suited to deal with.

Respectfully submitted,

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## The ALJ Fiasco—A Reprise

*Antonin Scalia*†

The subject of administrative hearing officers is once again on the agenda of federal regulatory reform. Several of the leading reform proposals in the Congress seek to improve the quality of administrative law judges (ALJs) by changing their virtual life tenure to a term appointment for seven or ten years, with reappointment conditional upon some minimal performance standard.<sup>1</sup>

It is surely a sign of great progress that the debate should now center about so demanding a requirement as quality. The last time the subject of hearing officers attracted serious congressional attention, the issue was basic impartiality. When, in 1947, the Civil Service Commission was developing its rule regarding the qualifications of incumbent hearing officers to serve in the new "hearing examiner"<sup>2</sup> positions established by the 1946 Administrative Procedure Act (APA),<sup>3</sup> the Chairman of the Senate Judiciary Committee, supported by the American Bar Association, urged a vigorous campaign against ready acceptance of these individuals. He believed many of them to be "men of bias, of ideological preconceptions, of partisan fealty, of subservience to pressure groups, of habits of unfairness, of disregard of the true values and weight of evidence."<sup>4</sup> What ensued, veteran administrative lawyers will recall, was what one commentator appropriately dubbed "The Hearing Examiner Fiasco Under the Administrative Procedure Act."<sup>5</sup> To pass upon the qualifications of

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<sup>1</sup> S. 755, 96th Cong., 1st Sess. § 211 (1979); S. 262, 96th Cong., 1st Sess. § 208 (1979).

<sup>2</sup> The original statutory title was "examiner," 60 Stat. 237, 244 (1946). This was changed to "hearing examiner" in the 1966 codification, 80 Stat. 386, 415. In 1972, pursuant to its authority to establish official class titles "for personnel, budget, and fiscal purposes," 5 U.S.C. § 5105(c) (1976), the Civil Service Commission adopted use of the title "Administrative Law Judge," 37 Fed. Reg. 16,787 (1972)—an appellation which the hearing examiners themselves much preferred, and which had been happily accorded by the lawyers appearing before them for some years. In 1978, the United States Code was amended by replacing "hearing examiner" with "administrative law judge" wherever it appeared. Act of Mar. 27, 1978, Pub. L. No. 95-251, 92 Stat. 183.

<sup>3</sup> Pub. L. No. 404, ch. 324, 60 Stat. 237 (1946) (current version at 5 U.S.C. §§ 551-552, 553-559, 701-706, 1305, 3105, 3344, 5362, 7521 (1976), as amended in part by Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111).

<sup>4</sup> Letter from Sen. Alexander Wiley to Arthur S. Flemming, Chairman of the U.S. Civil Service Comm'n (Apr. 5, 1947) (quoting *More About Selecting 350 Hearing Examiners*, 33 A.B.A.J. 213, 213 (1947)), reprinted in *The 350 Hearing Examiners: Chairman Wiley Asks Open Choices for Fitness*, 33 A.B.A.J. 421, 422 (1947).

<sup>5</sup> Fuchs, *The Hearing Examiner Fiasco Under the Administrative Procedure Act*, 63

the 197 incumbent hearing officers, the Commission established a seven-man Board of Examiners chaired by the eminent administrative lawyer (and Chairman of the ABA Special Committee on Administrative Law) Carl McFarland.<sup>6</sup> The Board found a quarter of the incumbents unqualified and rated many others eligible only for grades lower than those they occupied. The National Labor Relations Board was particularly hard hit, with 27 of its 41 incumbents in effect disqualified. The incumbents "organized themselves," displaying for the first time a talent that has come to characterize administrative law judges over the years; a political storm ensued;<sup>7</sup> and when the dust settled the Commission had repudiated its Board of Examiners, all members of the Board except one who was a Commission employee had resigned, and almost all incumbent examiners were confirmed in their positions.

It is, as I say, a triumph that thirty years later we should be concerned not about bias but about bona fide incompetence. Still, that subject is worth some attention, even if it cannot quite engage the old emotions. The aim of this essay is to discuss what seems to me two allied deficiencies which, in combination, prevent our administrative judges from being as capable and as efficient as they might be: the manner of their appointment and the manner of their promotion.

### I. APPOINTMENT

One of the more controversial issues raised in the years of study and debate that preceded enactment of the APA concerned the manner in which hearing officers were to be appointed. One approach was described (and rejected) by the 1941 Report of the Attorney General's Committee on Administrative Procedure: "Suggestion has been made that [hearing commissioners] be a separate corps, not attached to specific agencies, and that they be appointed, perhaps for life, perhaps for a specified term, by the President, by and with the advice and consent of the Senate."<sup>8</sup> This idea of appointment by some authority other than the agency has

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HARV. L. REV. 737 (1950).

<sup>6</sup> For a more detailed treatment of events discussed in this paragraph, see *id.*; Macy, *The APA and the Hearing Examiner: Products of a Viable Political Society*, 27 *FED. B.J.* 351, 364-69 (1967); Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 *YALE L.J.* 431 (1950).

<sup>7</sup> Macy, *supra* note 6, at 368.

<sup>8</sup> *Id.*

<sup>9</sup> ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, *ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES*, S. DOC. NO. 8, 77th Cong., 1st Sess. 47 (1941).



had continuing vitality, favored, for example, by a substantial minority of the Conference on Administrative Procedure called by President Eisenhower in 1953,<sup>10</sup> by the 1955 Hoover Commission Report,<sup>11</sup> and currently by the Federal Administrative Law Judges Conference.<sup>12</sup> The APA, however, decisively rejected that approach. While providing that hearing examiners would be removable, and their compensation determined, only by the Civil Service Commission, as to appointment it specified that "there shall be appointed *by and for each agency* as many qualified and competent examiners as may be necessary."<sup>13</sup> As stated in the House and Senate Committee Reports:

That examiners be "qualified and competent" requires the Civil Service Commission to fix appropriate qualifications and the agencies to seek fit persons. In view of the tenure and compensation requirements of the section, designed to make examiners largely independent in matters of tenure and compensation, self-interest and due concern for the proper performance of public functions will inevitably move agencies to secure the highest type of examiners.<sup>14</sup>

In other words, it was evidently contemplated that the Civil Service Commission would establish qualifying requirements by general rule, and that the agencies would then select from among all individuals who met those requirements.<sup>15</sup>

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<sup>10</sup> PRESIDENT'S CONFERENCE ON ADMINISTRATIVE PROCEDURE, REPORT 58-59 (1955) [hereinafter cited as PRESIDENT'S CONFERENCE].

<sup>11</sup> COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOV'T, LEGAL SERVICES AND PROCEDURE 93 (1955).

<sup>12</sup> FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE, STATEMENT AND RECOMMENDATIONS TO THE UNITED STATES CIVIL SERVICE COMMISSION 12-13 (1973).

<sup>13</sup> Administrative Procedure Act, Pub. L. No. 404, ch. 324, § 11, 60 Stat. 237, 244 (1946) (emphasis added). The current version is 5 U.S.C. § 3105 (1976), as amended by Act of Mar. 27, 1978, Pub. L. No. 95-251, § 2(a)(1), (b)(2), (d)(1), 92 Stat. 183, which provides that "each agency shall appoint as many administrative law judges as are necessary."

<sup>14</sup> H.R. REP. NO. 1980, 79th Cong., 2d Sess. 46 (1946), reprinted in SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 235, 280 (1946) [hereinafter cited without cross-reference as APA LEGISLATIVE HISTORY]. The Senate Committee Report is identical, except for omission of the phrase "in matters of tenure and compensation," which limitation is treated in the next paragraph of the report. S. REP. NO. 752, 79th Cong., 1st Sess. 29 (1945), reprinted in APA LEGISLATIVE HISTORY at 215.

<sup>15</sup> See Thomas, *supra* note 6, at 432. The APA's specification that the appointment process should be "subject to the civil service . . . laws to the extent not inconsistent with this Act," Administrative Procedure Act, Pub. L. No. 404, ch. 324, § 11, 60 Stat. 244 (1946) (current version at 5 U.S.C. § 3105 (1976), as amended by Act of Mar. 27, 1978, Pub. L. No. 95-251, § 2(a)(1), (b)(2), (d)(1), 92 Stat. 183), was no obstacle to this arrangement, since the

This is not, however, what occurred. The regulations issued by the Commission in September of 1947<sup>16</sup> adopt the principle that has been uniformly followed since:<sup>17</sup> not merely the establishment of qualifying requirements, but also the ranking of individual applicants, would be the responsibility of the Commission, and the agency role would be limited to selecting among the three applicants certified by the Commission as best qualified.<sup>18</sup> Under present procedures,<sup>19</sup> the Office of Personnel Management (OPM) assigns each applicant up to sixty points for his experience, and up to forty points on the basis of evaluations (usually written) from persons under whom or with whom the applicant has worked.

Applicants are also given a rudimentary test of their decision-writing ability, and are interviewed for about one-half hour by a panel composed of an OPM representative, an administrative law judge and a member of the practicing bar; these steps can result in an upward or downward adjustment of the applicant's score, though rarely by more than five points. And finally, of course, a representative of the agency (usually the Chief Administrative Law Judge) reviews the records of, interviews, and may make further inquiries regarding the three candidates whose names are forwarded by the OPM.

Obviously, this system has serious weaknesses. Consider, for example, how the sixty points allocated to "experience" must be computed: so many points are awarded for having conducted one sort of litigation practice, so many for another, so many for having served as judge of one or another court or administrative tribunal, in one or another state. And the forty points based on written third-party evaluation raise the problem not only of undetectable bias for or against the applicant, but also that of utter incomparability of standards. What unknown lawyer X in Idaho considers "outstanding" is not likely to be the same as what unknown lawyer Y in Pennsylvania considers so.

Still, it is not an irrational system for all purposes and may indeed be the best that can be devised for any nationwide competition that must select candidates without opportunity for lengthy

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civil service laws essentially conferred discretion as to such matters upon the President and the Commission. See Fuchs, *supra* note 5, at 739 n.11.

<sup>16</sup> 12 Fed. Reg. 6321 (1947).

<sup>17</sup> See 5 C.F.R. § 930.203(b) (1979).

<sup>18</sup> This is the so-called "rule of three." See 5 C.F.R. §§ 332.402, .404 (1979).

<sup>19</sup> The following account of procedures is based on the description provided by Charles Dullea (then Director of the Office of Administrative Law Judges) to the Meeting of the Civil Service Commission's Advisory Committee on Administrative Law Judges (Nov. 28, 1977).

personal observation.<sup>20</sup> It is no worse—except, perhaps, for the greater incomparability of the personal evaluations—than the essentially paper-record, second-hand evaluation system that is used by law firms or law school faculties to hire associates or assistant professors out of law school. But the point is that the winners in this case do not become associates or assistant professors; they become effectively life-tenured<sup>21</sup> occupants of positions that are within the highest levels of the federal career service. The appropriate question is, therefore, whether any law firm would regularly fill its *partnership* vacancies in such a fashion—by conducting a nationwide competition among lawyers who have practiced a specialty other than that for which the vacancy exists, ranking those lawyers in a strict numerical order on the basis (primarily) of a paper record of experience and third-party evaluations, and selecting one of the top three. None would, of course. Nor would any law faculty select its tenured members in such a fashion. The assessment necessary for making appointments to high-level legal positions is thought to require, except in extraordinary cases, substantial first-hand evaluation of performance—and of performance in the particular branch of the profession at issue.

It seems proper to ask—indeed, it seems unintelligent not to ask—why we should not think the same rule desirable for administrative law judges. The ready answer, of course, is that we do not think it desirable for other federal judges, and that they, rather than lawyers or law professors, are the proper analogue. But our system for selecting article III judges makes no pretense (or at least no convincing pretense) of being based primarily upon merit or performance. It is justifiable as a political system for selecting individuals who wield a considerable degree of political power—authority to overrule the actions of the two elected branches. No such power inheres in the presiding officers at administrative hearings, even if

<sup>20</sup> This analysis disregards one irrational element that is not inherent in the system: the automatic adding of five points to the final score for a veteran, and ten points for a disabled veteran. See 5 U.S.C. § 2108(3) (1976), as amended by Civil Service Reform Act of 1978, Pub. L. No. 95-454, §§ 307(a), 401(d), 92 Stat. 1147, 1154; 5 C.F.R. § 337.101(b) (1979).

<sup>21</sup> An APA hearing examiner may be removed "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing." 5 U.S.C. § 7521 (1976), as amended by Act of Mar. 27, 1978, Pub. L. No. 95-251, § 2(a)(1), 92 Stat. 183, and Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 204(a), 92 Stat. 1137. In the 33 years since the enactment of the APA, there have been only a few such removals. Examiners may be dismissed when there is a reduction in force, but under current regulations this power cannot be used selectively; dismissals must follow an order of priority based upon tenure and veterans' preference. Moreover, any examiner so dismissed is accorded priority in subsequent hirings. See 5 C.F.R. § 930.215 (1979).

Congress chooses to call them judges. They are entirely subject to the agency on matters of law;<sup>22</sup> they can be reversed by the agency on matters of fact, even where demeanor evidence is an important factor;<sup>23</sup> and they can always be displaced, if the agency wishes, by providing for hearing before the agency itself or one of its members.<sup>24</sup> We have, therefore, chosen to use a merit, rather than a political, system for the selection of administrative law judges; my point is that, viewed as a merit system, the present regime makes little sense.

What I am suggesting is that unless (as there is no reason to believe) the activity of being an administrative law judge is different from any other field of legal endeavor—or, indeed, any other field of human endeavor—the best way to achieve excellence is to promote from within, on the basis of observed performance. A blind-man's buff, paper-record system is acceptable for the selection of neophyte judges, at lower levels of salary and responsibility; but the high-level judges, who are to conduct and decide the most difficult proceedings, should be chosen principally (if not exclusively) from among existing judges on a progressive promotion basis. Not only is this not a revolutionary thought; it is, I believe, the system envisioned by the APA.

## II. PROMOTION

This leads to the second, closely allied subject I wish to discuss: the promotion of administrative law judges. At present this is virtually a nonissue, since the OPM and the agencies have systematically achieved almost total elimination of the prerequisite for promotion—a variation in grades. As late as 1953, the 294 APA hearing examiners were distributed broadly among five grade levels from GS-11 to GS-15;<sup>25</sup> in two agencies, the examiners spanned all five levels.<sup>26</sup> Today, by contrast, all of the 1,134 administrative law

<sup>22</sup> See, e.g., *Frost v. Weinberger*, 375 F. Supp. 1312, 1320 (E.D.N.Y. 1974) ("an Administrative Law Judge is precluded from passing upon the constitutionality of the very procedures he is called upon to administer"), *rev'd on other grounds*, 515 F.2d 57 (2d Cir. 1975), *cert. denied*, 424 U.S. 958 (1976). See also *Herd v. Folsom*, 231 F.2d 276 (7th Cir. 1956) (sustaining reversal of ALJ by HEW Appeals Council on issue of law).

<sup>23</sup> See, e.g., *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364-65 (1955); *International Woodworkers v. NLRB*, 262 F.2d 233 (D.C. Cir. 1958); *NLRB v. Pyne Molding Corp.*, 226 F.2d 818 (2d Cir. 1955).

<sup>24</sup> See 5 U.S.C. § 556(b) (1976), as amended by Act of Mar. 27, 1978, Pub. L. No. 95-251, § 2(a)(1), 92 Stat. 183.

<sup>25</sup> See COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOV'T, PART VI OF THE REPORT OF THE TASK FORCE ON LEGAL SERVICES AND PROCEDURE Chart III-A-2 (1955).

<sup>26</sup> See *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 135 (1953).

judges (excluding chief ALJs) occupy only two grade levels, GS-15 and GS-16; in all of the major regulatory agencies ALJs all occupy the same grade level; in only two agencies do two separate grade levels coexist.<sup>27</sup>

It is interesting to trace the process by which this progressive evaporation of lower grade levels has occurred. To understand it, one must understand the entirely inappropriate provisions of the civil service laws applicable to the classification of ALJ positions, and to the promotion of individual judges. To simplify the matter somewhat, the protected civil service consists initially not of thou-

<sup>27</sup> According to information provided by the Office of Administrative Law Judges, Letter from John E. Flannery, Acting Director, Office of Administrative Law Judges, Office of Personnel Management, to Antonin Scalia (Feb. 1, 1980) (on file with *The University of Chicago Law Review*), the current breakdown by agency is as follows:

All GS-16

Department of Agriculture <sup>a</sup>	5
Civil Aeronautics Board <sup>a</sup>	14
Commodity Futures Trading Commission	4
Consumer Product Safety Commission	1
Drug Enforcement Administration	1
Environmental Protection Agency	7
Federal Communications Commission <sup>a</sup>	13
Federal Energy Regulatory Commission <sup>a</sup>	21
Federal Labor Relations Authority	10
Federal Maritime Commission	7
Federal Mine Safety and Health Review Administration	18
Federal Trade Commission	13
Food and Drug Administration	2
International Trade Commission	2
Interstate Commerce Commission <sup>a</sup>	59
Maritime Administration	3
Merit Systems Protection Board	1
National Labor Relations Board <sup>a</sup>	115
National Transportation Safety Board	6
Nuclear Regulatory Commission	1
Occupational Safety and Health Review Commission	48
Securities and Exchange Commission <sup>a</sup>	8
U.S. Postal Service	2

All GS-15

Coast Guard <sup>a</sup>	16
Department of Housing and Urban Development	1
Internal Revenue Service <sup>a</sup>	1
Social Security Administration	670

GS-16 and GS-15

Department of the Interior	8 GS-16, 5 GS-15
Department of Labor <sup>a</sup>	13 GS-16, 59 GS-15 <sup>b</sup>

NOTE: Figures do not show one-grade supplement for chief ALJs in agencies with ten or more judges.

<sup>a</sup> Agencies using selective certification.

<sup>b</sup> Currently under review for upgrading to GS-16.

sands of different individuals paid according to their ability and performance, but rather of thousands of different "positions" for which applicants compete. Each position is assigned a basic pay level (a General Schedule or "GS" level), which by statute is based upon "(A) level of difficulty and responsibility; and (B) level of qualification requirements of the work."<sup>28</sup> The civil service laws contain a (necessarily vague) description of the eighteen separate levels of (A) difficulty and responsibility, and (B) qualification requirements, into which all work in the protected service is divided.<sup>29</sup> It is the initial responsibility of each agency to classify its positions,<sup>30</sup> pursuant to standards established by the OPM,<sup>31</sup> but such classification is subject to review by the OPM,<sup>32</sup> and review can be requested by any affected employee.<sup>33</sup>

This system is obviously difficult to apply to professional positions whose duties are essentially intellectual rather than managerial or supervisory. And as applied to ALJ positions it implicitly involves the distasteful determination that some litigants are entitled to "better" judges than others. These difficulties are compounded by two statutory provisions peculiar to administrative law judges designed to assure their independence from agency influence. First is the requirement that administrative law judges "shall be assigned to cases in rotation so far as practicable."<sup>34</sup> Not long after passage of the APA, the Federal Trial Examiners Conference asserted that this provision, combined with the position-classification requirements of the civil service laws and regulations described above, led to the conclusion that all examiners in any single agency must occupy the same grade level—since they must all do the same work. This assertion was flatly contradicted by the legislative history of the APA,<sup>35</sup> and was rejected by the Supreme Court in

<sup>28</sup> 5 U.S.C. § 5102(a)(5) (1976). See also *id.* § 5106(a)-(b).

<sup>29</sup> *Id.* § 5104. The vagueness of these descriptions can be discerned from the fact that the only difference between GS-15 and GS-16 is the latitude for exercise of independent judgment; the former requires "very wide" latitude, the latter "unusual" latitude. *Id.* § 5104(15)(A), (16)(A).

<sup>30</sup> *Id.* § 5107, as amended by Civil Service Reform Act of 1978, Pub. L. No. 95-454, §§ 801(a)(3)(E), 906(a)(2), (3), 92 Stat. 1222, 1224.

<sup>31</sup> *Id.*; 5 U.S.C. § 5105 (1976), as amended by Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 906(a)(2), (3), 92 Stat. 1224.

<sup>32</sup> 5 U.S.C. § 5110 (1976), as amended by Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 906(a)(2), (3), 92 Stat. 1224.

<sup>33</sup> 5 U.S.C. § 5112(b) (1976), as amended by Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 906(a)(2), (3), (17), 92 Stat. 1224.

<sup>34</sup> 5 U.S.C. § 3105 (1976), as amended by Act of Mar. 27, 1978, Pub. L. No. 95-251, § 2(a)(1), (b)(2), (d)(1), 92 Stat. 183.

<sup>35</sup> S. REP. No. 752, 79th Cong., 1st Sess. 29 (1945), reprinted in APA LEGISLATIVE HISTORY

*Ramspeck v. Federal Trial Examiners Conference*.<sup>34</sup> "The Act clearly provides," said the Court, "for the allocation of positions within an agency to be made in various salary grades, which reflect the competence and experience of the person in the grade."<sup>35</sup> The Court's opinion nicely summarizes, by reference to the Government's brief, the function that such allocation was intended to serve:

Petitioners [the Government] argue that cases in a given agency are of varying levels of difficulty and importance and that the examiners hearing them must possess varying degrees of competency and types of qualifications. Petitioners point to the experience of the Civil Aeronautics Board where there are safety cases heard by one group of examiners and economic cases heard by another. The examiners assigned to the safety cases have pilots' certificates, while those assigned to the economic cases have completely different types of qualifications. Again, certain cases before the Interstate Commerce Commission involve relatively simple applications for extensions of motor carrier certificates, while others involve complicated and difficult railroad rate proceedings. Petitioners' argument indicates the need for specialization among examiners in the same agency to meet the diverse types of cases presented.<sup>36</sup>

But the Government's victory in *Ramspeck* has, over the years, been deprived of virtually all its significance by the corrosive effect upon multiple grade levels of the second civil service protection peculiar to administrative law judges: they "are entitled to pay prescribed by the Civil Service Commission [now the Office of Personnel Management] independently of agency recommendations or ratings."<sup>37</sup> The Commission acknowledged from the outset that this provision required the *grade levels* for positions to be established by the Commission itself, rather than by the agencies subject to Commission review.<sup>38</sup> Initially, however, it maintained that the *promotion* of examiners from one position to another could be effected by the employing agency itself, by selecting from among the

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at 215; H.R. REP. NO. 1980, 79th Cong., 2d Sess. 46 (1946), reprinted in APA LEGISLATIVE HISTORY at 280.

<sup>34</sup> 345 U.S. 128 (1953).

<sup>35</sup> *Id.* at 136.

<sup>36</sup> *Id.* at 134.

<sup>37</sup> 5 U.S.C. § 5362 (1976), as amended by Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 801(a)(1), 92 Stat. 1219.

<sup>38</sup> 12 Fed. Reg. 6324 (1947).

three top eligibles certified by the Commission;<sup>41</sup> in 1949 it went even further, revising its regulations to permit the agency to fill a vacant higher-grade position with any of its incumbent examiners, subject only to Commission approval.<sup>42</sup> This procedure was struck down in 1951 by an Attorney General's opinion which held that "the responsibility for determining which hearing examiner should be promoted to a higher classification [is] to be vested in the Commission itself instead of in the agencies."<sup>43</sup>

The subsequent history of the ALJ program represents an unremitting retreat from the multi-grade system defended so ardently in *Ramspeck*. One of the factors producing that result was, unquestionably, the relentless pressure exerted by the examiners themselves—collectively, through the Federal Trial Examiners Conference,<sup>44</sup> and individually, through exercise of their statutory right to request classification review by the Commission on the ground that the cases they were being assigned were of the same difficulty as those assigned to higher-grade examiners.<sup>45</sup> Pressure to collapse the multi-grade system also came continuously from the organized bar,<sup>46</sup> and occasionally from prestigious organizations in which practitioners had substantial participation.<sup>47</sup>

It is likely that these pressures could have been resisted if the Commission had had the will to do so. Ultimately, the determinative factor that sealed the doom of the multi-grade system was the

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<sup>41</sup> *Id.* at 6323.

<sup>42</sup> 14 Fed. Reg. 7501 (1949).

<sup>43</sup> 41 Op. Att'y Gen. 74, 76-79 (1951).

<sup>44</sup> The examiners as a group could only benefit from a single-grade system, since if all cases were (theoretically, at least) rotated among all examiners in an agency, the highest level of difficulty would govern.

<sup>45</sup> See text at note 32 *supra*.

<sup>46</sup> For example, in 1956 and 1957 the House of Delegates of the American Bar Association adopted a resolution supporting legislation that would establish all APA hearing examiners at grade level GS-18. 81 ABA ANNUAL REPORT 402-03 (1956); 82 ABA ANNUAL REPORT 416 (1957).

<sup>47</sup> For example, the temporary Administrative Conference of the United States established by President Kennedy in 1961 endorsed the principle (by then a *fait accompli*) of a single grade per agency, and recommended no more than two grades throughout the federal service. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FINAL REPORT, Recommendation 28-2(a), (b) at App. IV (1962). The 1953 Conference on Administrative Procedure called by President Eisenhower had not endorsed the principle of one grade per agency, although some of its members had ardently urged that it do so. See PRESIDENT'S CONFERENCE, *supra* note 10, at 10, 63. For a description of some of the controversy in the 1953 Conference, and exposition of the administrators' viewpoint by two commissioners of the Interstate Commerce Commission, see Cross, *Statement to the President's Conference on Administrative Procedure Concerning Appointment and Status of Federal Hearing Officers*, 22 ICC PRAC. J. 120 (1954); Tuggle, *The Status of Federal Hearing Examiners*, 22 ICC PRAC. J. 129 (1954).



sheer impracticability of the arrangements established by the statutory provisions discussed above for determining grades and for awarding promotions among them. Consider: Roving officials from the Civil Service Commission—generally of a grade level much lower than that of the examiners themselves—with no first-hand knowledge of the substantive or procedural aspects of the matters with which the examiners had to deal, were to recommend to the Commission, “independently of agency recommendations or ratings,”<sup>48</sup> not only the grade levels appropriate for various examiner assignments, but also the ranking of individual examiners for purposes of promotion to higher grades. Quite obviously, the job either could not be done well, or could not be done without almost conclusive reliance upon the evaluation of the agency itself or its officers.<sup>49</sup>

Thus, amidst the battering of repeated requests for classification review and promotion determinations, the Civil Service Commission’s annual reports tell the following story:

In 1953-1954:

The Commission . . . conducted a classification survey in four agencies employing approximately one-half of the Federal Government’s hearing examiners. The survey revealed that there are fewer “levels of difficulty” now existing among hearing examiner positions since agencies were “rotating” cases among their examiners to a greater extent than they had in the past. Under this plan of rotating assignments, more hearing examiners were handling cases of greater importance and difficulty. As a result, a total of 142 hearing examiners were upgraded from one to two grades in these agencies.<sup>50</sup>

In 1954-1955:

As a result of position classification studies made during this fiscal year, the trend toward reducing the number of grades of hearing examiners in each of the agencies continued.<sup>51</sup>

<sup>48</sup> 5 U.S.C. § 5362 (1976), as amended by Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 801(a)(1), 92 Stat. 1219.

<sup>49</sup> Both the House and Senate reports make it clear that the requirement that the Commission act “independently” does not prevent receipt and consideration of agency views and recommendations. S. REP. NO. 752, 79th Cong., 1st Sess. 29 (1945), reprinted in *APA LEGISLATIVE HISTORY* at 215; H.R. REP. NO. 1960, 79th Cong., 2d Sess. 47 (1946), reprinted in *APA LEGISLATIVE HISTORY* at 281. See also 41 Op. Att’y Gen. 74, 79 (1951). The inevitability of substantial agency influence over promotion decisions through such means is, of course, one of the reasons for the bar’s opposition to a multi-grade system.

<sup>50</sup> 71 CIVIL SERV. COMM’N ANN. REP. 57 (1954).

<sup>51</sup> 72 CIVIL SERV. COMM’N ANN. REP. 119 (1955).

In 1960-1961:

67 hearing examiner positions were changed from GS-14 to GS-15 and the incumbents promoted.<sup>82</sup>

In 1962-1963:

On February 20, 1963, the Civil Service Commission found the 295 Hearing Examiner positions then classified in grade GS-15 to be allocable to grade GS-16 . . . .

Hearing Examiner positions in the following agencies were also reclassified during fiscal year 1963:

Office of the Solicitor, Interior Department:

from GS-12 to GS-13;

Bureau of Land Management, Interior Department:

from GS-13 to GS-14;

Internal Revenue Service, Treasury Department:

from GS-13 to GS-14;

Social Security Administration, Department of Health, Education, and Welfare: from GS-13 to GS-14; and

U.S. Coast Guard, Treasury Department:

from GS-14 to GS-15.<sup>83</sup>

In 1967-1968:

Positions subject to classification review:

Reclassified upward . . . . . 223

No change . . . . . 4<sup>84</sup>

"Finally, in 1961," wrote the Chairman of the Civil Service Commission, "with the classification of all Interstate Commerce Commission hearing examiner positions at GS-15, the goal of a single grade per agency was achieved and the problem of intra-agency promotions disappeared."<sup>85</sup>

"The problem of intra-agency promotions." It was, to be sure, regarded as a problem,<sup>86</sup> as was classification review. And with good reason, given a statutory structure of administration that separated knowledge from power in the management of hearing officers. We have thus been led, quite foreseeably, to the current state, in which

<sup>82</sup> 78 CIVIL SERV. COMM'N ANN. REP. 31 (1961).

<sup>83</sup> 80 CIVIL SERV. COMM'N ANN. REP. 35 (1963).

<sup>84</sup> 85 CIVIL SERV. COMM'N ANN. REP. 79 (1968).

<sup>85</sup> Macy, *supra* note 6, at 377.

<sup>86</sup> See also PRESIDENT'S CONFERENCE, *supra* note 10, at 62 ("one of the strongest points of [the advocates of a single-grade system] was that the stresses and strains of promotions had been the largest single problem in the past administration of the hearing officer program").

all Social Security judges are GS-15 and, with few exceptions, all administrative law judges in the rest of the government are GS-16.

### III. EFFECTS OF THE CURRENT SYSTEM

With all due sympathy for the factors that have operated to produce the present system, the results are nonetheless inefficient. The sheer diversity of formal administrative proceedings requiring use of an administrative law judge has not diminished since 1946. Even within a single agency, variation in the level of difficulty is enormous—not only with respect to diverse cases arising under the same statutory provision (for example, a simple or a complex Federal Energy Regulatory Commission electric rate case<sup>57</sup>) but also with respect to cases arising under totally different provisions of law (for example, a Federal Communications Commission common-carrier ratemaking proceeding,<sup>58</sup> as compared with a Federal Communications Commission proceeding to cancel a safety-radio-telephony certificate for a cargo ship<sup>59</sup>). It is almost as unreasonable to establish a single category of administrative law judges to hear all such cases as it would be to establish one level of state judges to hear all civil cases. And it is difficult to believe that chief administrative law judges do not in fact consider level of difficulty when they assign widely divergent cases among the members of their staffs; differences in work performed, however, are not reflected in grade levels assigned.

With a total ALJ corps of over 1,100, the compression of grades that used to range from GS-11 to GS-15 (which in 1953 produced a salary range from \$5,940 to \$11,800<sup>60</sup>) into grades GS-15 and GS-16 (which currently produces an actual range from \$38,160 to \$47,500<sup>61</sup>) must represent a considerable waste of money.

For example, if all the current GS-16 ALJs were divided evenly

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<sup>57</sup> See 16 U.S.C. § 824d(e) (1976). With respect to such cases covered by the Administrative Conference's 1975 Statistical Report, total brief pages per case ranged from 0 to 22,123, and ALJ opinions varied from 4 to 192 pages. ADMINISTRATIVE CONFERENCE OF THE U.S., FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS 153 (1975). It is true, no doubt, that the simplicity or difficulty of a particular proceeding cannot always be predicted in advance; but surely it often can be.

<sup>58</sup> See 47 U.S.C. §§ 203-205 (1976).

<sup>59</sup> See *id.* § 359.

<sup>60</sup> Act of Oct. 24, 1951, ch. 554, § 1(a), 65 Stat. 612 (current version at 5 U.S.C.A. § 5332 (West Supp. 1979)).

<sup>61</sup> The actual salary range is different from that set out in 5 U.S.C.A. § 5332 (West Supp. 1979) of \$38,160 to \$56,692, since 5 U.S.C. § 5308 (1976) places a ceiling on the General Schedule salaries equal to the lowest rate for Level V of the Executive Schedule. At the present time, the beginning salary rate for that level is \$47,500. 5 U.S.C.A. § 5332 (West Supp. 1979).

among grades GS-14 to GS-16, and if all the current GS-15 ALJs were divided evenly among grades GS-13 to GS-15, the savings would be about seven and a half million dollars per year.<sup>62</sup> By federal government standards that is not a lot, but to paraphrase what the late Senator Dirksen used to say, "Seven and a half million dollars here, seven and a half million dollars there—pretty soon it adds up to real money."

Perhaps, however, a more realistic assessment is not that this money would be *saved*, but that it could be *better spent* for the improvement of the administrative process. My interest in this subject was first generated by a comment made to me when I was Chairman of the Administrative Conference by a newly appointed Commissioner of the Federal Communications Commission, complaining about the inordinate proportion of so-called "supergrade" positions (GS-16 and above) occupied by administrative law judges. Supergrades, and the Senior Executive Service (SES) positions into which most supergrades have been converted by the Civil Service Reform Act of 1978,<sup>63</sup> occupy a special status within the federal service. The law places a limitation upon their total number,<sup>64</sup> and permits them to be established only by the OPM rather than by the employing agencies.<sup>65</sup> They are of course much sought after by all the agencies, and their allocation is substantially controlled by the Office of Management and Budget.<sup>66</sup> As of July 13, 1979, ALJs comprised the following percentages of total career supergrade and SES employees in the indicated agencies:<sup>67</sup>

Civil Aeronautics Board	42%
Commodity Futures Trading Commission	31%
Federal Communications Commission	32%
Federal Energy Regulatory Commission	46%

<sup>62</sup> These figures are based on current salaries, assuming both that all positions are in step one of the grade levels and that fringe benefits equal 15% of salary. As to the latter, see S. REP. NO. 697, 95th Cong., 2d Sess. 6-7 (reproducing Congressional Budget Office Cost Estimate of Jan. 6, 1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 496, 501.

<sup>63</sup> Pub. L. No. 95-454, § 402(a), 92 Stat. 1156 (to be codified at 5 U.S.C. § 3132(a)(2)).

<sup>64</sup> The current ceiling is 10,777. *Id.* § 414(a)(1)(C), 92 Stat. 1177 (amending 5 U.S.C. § 5108(a) (1976)).

<sup>65</sup> *Id.*

<sup>66</sup> With respect to SES positions, the participation of the Office of Management and Budget in the allocation process is formalized by statute. The Civil Service Reform Act of 1978 requires the OPM to act upon agency requests for SES positions "in consultation with" that Office. *Id.* § 402(a), 92 Stat. 1158 (to be codified at 5 U.S.C. § 3133(c) (1976)).

<sup>67</sup> Derived from figures contained in letter from Anne A. Andrews, Personnel Management Specialist, Office of Personnel Management, to Antonin Scalia (Mar. 11, 1980) (on file with *The University of Chicago Law Review*).

Federal Labor Relations Authority	73%
Federal Maritime Commission	41%
Federal Trade Commission	24%
Interstate Commerce Commission	61%
National Labor Relations Board	63%

This situation represents the triumph of the courtroom mystique over reason.

The only function committed by law to the dispositive determination of the administrative law judge is the finding of disputed issues of fact where demeanor evidence is entirely conclusive<sup>68</sup>—if such a situation can ever occur. In article III courts, the entire fact-finding function is often committed to a lay jury. Of course, administrative law judges perform many other important functions: they make findings of fact of an often extraordinarily difficult nature, not primarily dependent upon the credibility of demeanor evidence; they make important decisions regarding statutory law and agency policy; they write opinions that marshal the facts and frame the issues in a comprehensible fashion; and they conduct proceedings so as to assure a full and informative record. These functions are absolutely vital to the administrative process. But they represent merely the first step, and not necessarily the final stage, of agency action. The ALJ's decision may be reviewed—and frequently is reviewed—*de novo*, by the agency head<sup>69</sup> (usually advised and assisted by agency employees) or even, in some agencies, by a review board composed entirely of agency employees.<sup>70</sup> Even if the agency does nothing but formal adjudication, surely a substantial proportion of its most talented career officers (presumably its supergrades) should be devoted to this review function. And of course, virtually no agency limits its activities to formal adjudication.<sup>71</sup> All of the major

<sup>68</sup> See, e.g., *NLRB v. Thompson & Co.*, 208 F.2d 743 (2d Cir. 1953); *NLRB v. Universal Camera Corp.*, 190 F.2d 429 (2d Cir. 1951).

<sup>69</sup> See 5 U.S.C. § 557(b) (1976).

<sup>70</sup> The availability of this procedure depends upon statutory authority for the agency's delegation of its decisionmaking power. Such authority is possessed by the agency that employs more than half of all administrative law judges, the Social Security Administration, whose Appeals Council has the power of discretionary review over all ALJ decisions, and in fact reviews thousands each year. See Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 *Duke L.J.* 681, 698-99. The Federal Communications Commission and the Interstate Commerce Commission also use review boards extensively. See generally Freedman, *Review Boards in the Administrative Process*, 117 *U. Pa. L. Rev.* 546 (1969).

<sup>71</sup> To my knowledge, the only exception is the Occupational Safety and Health Review Commission, whose only function (apart from internal administration) is the adjudication of challenges to violation citations and penalty notifications issued by the Secretary of Labor

regulatory agencies have, in addition, responsibilities of investigation, advice giving, enforcement (including prosecution in administrative proceedings) and the development of legislative initiatives—together with the training, budgetary, and supervisory responsibilities that all of this activity entails. One would expect a considerable number of career supergrade and SES employees to be devoted to those tasks.

Most important of all, moreover, there is rulemaking, which has in the past decade replaced adjudication as the central mechanism of agency law giving. As one scholar has observed: "The increased use of rulemaking has changed the whole structure of administrative law, for as recently as the early 1960's it was generally assumed that any significant regulatory scheme would rely to a considerable extent on trial-type hearings."<sup>72</sup> I have elsewhere described the recent development of administrative law as a "constant and accelerating flight away from individualized, adjudicatory proceedings to generalized disposition through rulemaking."<sup>73</sup> Is it not perverse that, even as the governmental and societal importance of adjudication has dramatically decreased, we have devoted an increasingly higher proportion of our best-paid civil servants to positions designed primarily for that function? At the FCC, for example—to take an agency whose statistics are far from the worst—almost a third of all career supergrade and SES positions are allocated to administrative law judges.<sup>74</sup> The remainder are distributed among all the lawyers, economists, statisticians, scientists, and managers necessary not only to prosecute and review matters conducted by ALJs but also to enforce and administer the regulation of all broadcast and common-carrier communications; to develop policies for confronting the constant stream of new technology from cable to satellites to computers, and of new societal demands from consumerism to minority rights; and to advise and assist the Congress in the pending "rewrite" of a Communications Act that is almost fifty years old. The scarcity of high-level career positions at the FCC is demonstrated by Professor Freedman's poignant observation—in discussing the Commission's initial establishment of a five-member Review Board to review ALJ decisions—that "[t]he . . . decision to name

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under the Occupational Safety and Health Act of 1970. 29 U.S.C. §§ 659(c), 661, as amended by Act of Mar. 27, 1978, Pub. L. No. 95-251, § 2(a)(7), 92 Stat. 183.

<sup>72</sup> Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 38-39 (1975).

<sup>73</sup> Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 376.

<sup>74</sup> See text at note 67 *supra*.

senior staff employees to the Review Board undoubtedly thinned the ranks at a very important level."<sup>75</sup>

The harmful effect of the disproportionate allocation of high-level positions to administrative law judges is difficult to perceive with respect to nonlawyer professionals, since it is indirect; but with lawyers the "brain drain" is apparent. Senior careerists in the general counsel's office or the prosecutory division of an agency often find advancement blocked for sheer lack of available SES positions, and thus seek appointment as administrative law judges.<sup>76</sup> This drain will undoubtedly be accelerated by the 1978 amendments to the civil service laws, which subject all SES positions—which do not include administrative law judges—to a one-year probationary period, and to permissive and mandatory removal for failure to achieve specified ratings in annual evaluations.<sup>77</sup> The adjudication of individual cases simply does not warrant such a disproportionate commitment of the government's best-paid and best-secured positions.

Moreover, to return to the point I began with, this system does not even have the merit of producing the best possible ALJ corps. There is no substitute for determining advancement on the basis of actual on-the-job performance. And there is no substitute for determining *nonadvancement* on that basis as well, causing the less competent to depart for fields where their particular skills can be better applied. Blind-man's buff does not really work.

This is why, of course, a number of the most important agencies have clung tenaciously to the system of "selective certification" despite consistent opposition from the organized bar.<sup>78</sup> That is the system whereby the OPM establishes separate candidate registers, apart from the general register, for those agencies that assert that their administrative law judges require "specialized experience." To qualify for the specialized register of the SEC, for example, a candidate must have

[t]wo years of experience in the preparation, presentation, or hearing of formal cases, or in making decisions on the basis of

<sup>75</sup> Freedman, *supra* note 70, at 565.

<sup>76</sup> This is facilitated by the system of selective certification described below, see text at notes 78-81 *infra*.

<sup>77</sup> See 5 U.S.C.A. §§ 3393(d), 4314(b)(3) (West Supp. 1979).

<sup>78</sup> As noted by a former chairman of the American Bar Association's Section on Administrative Law, "[t]he ABA has persistently, unsuccessfully opposed the practice for many years." Miller, *The Vice of Selective Certification in the Appointment of Hearing Examiners*, 20 Ad. L. Rev. 477, 480 (1968).

the record of such hearings, originating before governmental regulatory bodies at the Federal, State, or local level, in the field of securities financing and involving the public issuance of securities or the trading of securities.<sup>79</sup>

Obviously, the three top candidates certified to an agency from such a specialized register<sup>80</sup> are much more likely than those certified from the general register to include present or past members of the agency's own legal staff—and there is some evidence that that is the whole object of the exercise.<sup>81</sup> Opponents of the system charge that it is prompted by "cronyism." Perhaps there is some element of truth in that. When supergrades are so scarce for the agency's own lawyer-careerists, it must rankle (and must render the in-house career pattern much less attractive) to distribute them to marginally better qualified outsiders. But to the extent that the practice of selective certification is not founded upon any genuine need for specialized experience, surely there is a more valid basis for the subterfuge than mere "cronyism." It is a means of avoiding exclusive reliance on a paper record, and on recommendations from unknown sources—by increasing the percentage of certified candidates whose work (whether as agency staffer or practitioner appearing before the agency) has actually been observed by officials in the agency itself. It is difficult to condemn such a motive.

Even selective certification, however, does not help to reduce the other irrational element in the current system—the necessity of

<sup>79</sup> OFFICE OF PERSONNEL MANAGEMENT, ADMINISTRATIVE LAW JUDGE ANNOUNCEMENT NO. 318, 20-21 (1979).

<sup>80</sup> Currently, 10 agencies, accounting for 248 of the 382 existing ALJ supergrade positions, employ selective certification, *see* note 27 *supra*; 83 of the 98 ALJ supergrade position appointments made in the last five years came from the specialized registers, Letter from John E. Flannery, Acting Director, Office of Administrative Law Judges, Office of Personnel Management, to Antonin Scalia (Feb. 1, 1980) (on file with *The University of Chicago Law Review*).

<sup>81</sup> In several instances, the agency request for the establishment of a specialized register clearly displayed such an objective. For example, "the FPC's justification letter of August 17, 1950 referred to particular individuals and stated that it proposed to 'promote from within where we have qualified and available employees eligible for promotion.'" U.S. CIVIL SERVICE COMM'N SUBCOMM. ON RECRUITMENT, QUALIFICATIONS, AND APPOINTMENT, REPORT FOR THE STUDY OF THE UTILIZATION OF ADMINISTRATIVE LAW JUDGES 40 (1974), *reprinted in* U.S. CIVIL SERVICE COMM'N, REPORT OF THE COMMITTEE ON THE STUDY OF THE UTILIZATION OF ADMINISTRATIVE LAW JUDGES, appendix (1974) [hereinafter cited as U.S. CIVIL SERVICE COMM'N, UTILIZATION STUDY]. A 1969 study conducted by Professor Robert Park for the Administrative Conference noted that since 1964, fifty-two of the sixty-six appointments to ALJ positions in agencies employing selective certification were individuals who had previously served on the appointing agency's staff. 1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, REPORTS 381, 396 (1969). As a recent Conference publication observes, "there is no reason to think that the effect is less prevalent today." ADMINISTRATIVE CONFERENCE OF THE U.S., *supra* note 57, at 11.



selecting the agency's highest-level judges on the basis of performance in some other job, most frequently a job that does not consist of presiding, factfinding and decision writing. But the agencies have found at least one means of somewhat alleviating this difficulty: hiring their judges from lower-graded ALJ staffs at other agencies. Such a move constitutes a noncompetitive "transfer," subject under current regulations to OPM approval and to the candidate's qualifying on the higher-grade register, but not subject to the requirement that he be among the top three on that register.<sup>82</sup>

#### IV. A RETURN TO A MULTI-GRADE STRUCTURE

Surely it is ironic that the zeal to preserve the impartiality of hearing officers—manifested in the utterly impracticable commitment of promotional responsibility to the OPM—has produced a system in which, quite reasonably, almost all of the most important regulatory agencies strive to hire judges from their own prosecutory staffs. A sensible system would institutionalize selection of senior judges on the basis of first-hand observation, rather than merely tolerate such selection through use (or abuse) of the selective certification and transfer devices. And it would permit such observation during the candidate's performance of the actual work of judging in the agency. It would establish, in short, a practicable system of promotion from within the ALJ staff—a multi-grade structure.

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<sup>82</sup> 5 C.F.R. § 930.206 (1978). This highly sensible practice of, in effect, using the lower-graded agencies as apprenticeships for the higher-graded agencies helps to explain the remarkable grade uniformity that has developed among agencies. Almost all major agencies except the Social Security Administration now rank their judges at GS-16. This is in part a necessary defense against inter-agency raiding. As described in the Civil Service Commission's 1974 Administrative Law Judge Study: "The CALJ [chief administrative law judge] of the U.S. Coast Guard states that the GS-15 grade makes it extremely difficult to recruit competent ALJs and that if they are successfully recruited they are soon lost to other agencies who offer them GS-16 grades." U.S. CIVIL SERVICE COMM'N, UTILIZATION STUDY, *supra* note 81, at 28.

The largest pool of apprentices, of course, consists of the 670 ALJs within the Social Security Administration. Over the past five fiscal years, 49 judges have been transferred from GS-15 positions to GS-16 positions in other agencies. Letter from John E. Flannery, Acting Director, Office of Administrative Law Judges, Office of Personnel Management, to Antonin Scalia (Feb. 1, 1980) (on file with *The University of Chicago Law Review*). The transfer device is also a means whereby an agency can hire one of its own employees who does not stand high enough to be certified from the general (or even a specialized) GS-16 register. Such an employee qualifies at the top of the GS-15 register, is hired by some other agency at that level, and then is promptly transferred back home at GS-16. Evidently to avoid, or at least to render somewhat less blatant, this additional manifestation of the principle of promotion from within, the Civil Service Commission in 1976 amended its regulations to prohibit ALJ transfers before the decent period of one year of service. 41 Fed. Reg. 2074 (1976) (codified at 5 C.F.R. § 930.206(c) (1979)).

The obverse of the problem of achieving excellence is the problem of eliminating inadequacy. As noted earlier, current legislative proposals for reform suggest the establishment of seven-year<sup>83</sup> or ten-year<sup>84</sup> terms for administrative law judges, with reappointment contingent upon favorable evaluation under a system administered by the Administrative Conference of the United States. Such a system might help, but it would reach only the most egregious cases. No one likes to dismiss a person, particularly an older person, from a long-term job. It is primarily this aversion, rather than any deficiency in standards or procedures, which renders dismissal from the civil service a rare occurrence—as is demonstrated by the fact that career lawyers are rarely dismissed, even though lawyers are not within the competitive service.<sup>85</sup> The remedy of dismissal is simply too draconian, and that underlying fact will not be changed simply by casting the decision with respect to administrative law judges in terms of failing to find adequate qualifications for continuation rather than finding grounds for dismissal.

The only effective way to winnow out incompetence—at least at professional levels—is the tried and true method long practiced by the government and by more humane (if less efficient) private employers: declining to promote, until the individual decides to go where his talents will be better appreciated. If relatively young lawyers were brought into the ALJ program at lower levels—for example, at GS-13 or GS-14—it is unlikely that they would remain indefinitely if no promotion were forthcoming. The best would become senior judges, the worst would leave, and (a crass but forceful consideration not yet mentioned) all would have substantial economic incentive to put forth their best efforts. Perhaps some of the savings derived from committing much of the current ALJ work to lower grade levels could be devoted to creating a small number of GS-17 and GS-18 positions, further expanding the incentive system. Such levels are not unreasonable for some of the most difficult cases handled by administrative law judges.

Most agencies would prefer a multi-grade system.<sup>86</sup> Its demise

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<sup>83</sup> S. 755, 96th Cong., 1st Sess. § 211 (1979).

<sup>84</sup> S. 262, 96th Cong., 1st Sess. § 208 (1979).

<sup>85</sup> See 5 C.F.R. § 213.3102(d) (1978).

<sup>86</sup> According to the U.S. Civil Service Commission Committee on the Study of the Utilization of Administrative Law Judges,

[a]ll but three of the agencies (Department of Agriculture, Civil Aeronautics Board, and U.S. Coast Guard) felt that multiple grades for ALJs, even within a single agency, were desirable. They are of the opinion that cases can be readily classified in terms of inherent difficulty and that ALJ grades should be assigned based upon such classifica-

is primarily attributable, I believe, to the sheer inability of the Office of Personnel Management to handle the recurrent promotion decisions that it entails. As suggested above, the allocation of promotion responsibility to the OPM violates a fundamental tenet of sound administration: he who decides should know. It also violates another tenet: he who decides should reap the grief or benefit of his decision. Unless promotion responsibility is shifted from the OPM, there is little hope—or, for that matter, little desirability—of a return to a multi-grade system.

The problem, of course, is that promotion responsibility cannot be lodged with the employing agency without raising fears that special favor will be granted to those judges who consistently distort their factfinding to support the agency position. It seems to me such fears are exaggerated. Control of the promotion decision by trial staff is surely unacceptable, but the decision could be lodged within the agency at such a level that staff control would not occur. Surely it is peculiar that agency heads are trusted to reverse a judge's decision—even on the facts—and yet are not trusted to manage the promotion of judges on a basis that will not reward biased fact-finding.

Perhaps we are far enough removed from the ideological ferment, particularly at the Labor Board, which underlay the promotion provisions of the Administrative Procedure Act, to acknowledge the possibility—in most if not all agencies—of a system that is fair and equitable, and that still allows the agency to promote its judges on the basis of its own intimate and unique knowledge of their performance. There are, after all, impartial and respected judges in other areas of executive activity whose promotion (and indeed, whose selection and firing) have been subject to no special protections beyond those which the agency itself has chosen to observe—for example, judges on the Armed Services Board of Contract Appeals,<sup>87</sup> immigration

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tion. The grades which they would assign range from GS-13 to GS-18.

U.S. CIVIL SERVICE COMM'N, UTILIZATION STUDY, *supra* note 81, at 29.

<sup>87</sup> For the Charter of the Armed Services Board of Contract Appeals, adopted jointly by the Secretary of Defense and the Secretaries of the Army, Navy, and Air Force, see 32 C.F.R. pts. 1-39 vol. III app. A, at 219 (1976). The judges of this Board, numbering about thirty, have long occupied the same grade level, but have regularly been promoted within grade by the award of "quality step-increases" pursuant to section 5336 of Title 5, and the implementing OPM regulations, 5 C.F.R. § 531.410-.413 (1978). Of course, employing agencies have no authority to award quality increases to administrative law judges. 5 C.F.R. § 930.210(c) (1978).

Regrettably, all boards of contract appeals, including the Armed Services Board, have recently undergone the same process of wholesale grade inflation and leveling previously

judges,<sup>88</sup> and members of Atomic Safety and Licensing Boards.<sup>89</sup> Indeed, even with respect to article III judges, the essential independence has been thought to demand security of tenure, but not insulation from executive and congressional control over promotion to higher courts through the appointment and confirmation powers.

In 1946, there might have been good reason to fear that examiners would be, in Senator Wiley's words, "men of bias, of ideological preconceptions, of partisan fealty, of subservience to pressure groups, of habits of unfairness, of disregard of the true values and weight of evidence."<sup>90</sup> In the more than thirty years since then, the system of merit selection, the increased salary and prestige, and—most important of all—the required functional separation from prosecutory staff,<sup>91</sup> have created a solid tradition of independence. It would be foolhardy to suggest that that tradition will alone suffice as an ironclad guarantee against all improper influence. But that, of course, is not the issue. The issue is whether, on balance, the beneficial effects of the present system upon proper independence outweigh its detrimental effects upon quality and efficiency. The answer seems to me to be no.

In a system that leaves promotional decisions to the agency, there are various steps that can be taken to reduce to an absolute minimum the possibility of improper influence. The greatest risk comes from the ability of the prosecutory staff to harm the career prospects of those judges who are not, in their view, sufficiently sympathetic to the staff position. This risk can be substantially reduced, if not entirely eliminated, by expanding the separation-of-functions provision of the APA<sup>92</sup> to exclude the prosecutory staff

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accomplished with respect to administrative law judges. Recent legislation has established all members of such contract appeal boards in all agencies at level GS-16 (GS-17 and GS-18 for vice-chairmen and chairmen, respectively). Contract Disputes Act of 1978, Pub. L. No. 95-563, § 8, 92 Stat. 2385 (to be codified at 41 U.S.C. § 607). Moreover, it provides that all members "shall be selected and appointed to serve in the same manner as [administrative law judges]." *Id.* The meaning of the last-quoted language is unclear; it may well subject boards of contract appeals to the full panoply of OPM-administered protections, not only with respect to hiring, but with respect to tenure and promotion as well. See S. REP. NO. 118, 95th Cong., 2d Sess. 24 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5235, 5258.

<sup>88</sup> The technical title is "special inquiry officer." See 8 U.S.C. §§ 1101(b)(4), 1226, 1252 (1976). Deportation proceedings that these officers conduct have been held by the Supreme Court to carry a constitutional requirement of hearing before an impartial tribunal, and were in fact subjected by the Court to the ALJ requirement of the Administrative Procedure Act until Congress provided otherwise. See *Wong Yang Sung v. McGrath*, 339 U.S. 33, modified, 339 U.S. 908 (1950); *Marcello v. Bonds*, 349 U.S. 302 (1955).

<sup>89</sup> See 42 U.S.C. § 2241 (1976); 10 C.F.R. § 1.11 (1979).

<sup>90</sup> See note 4 *supra*.

<sup>91</sup> See 5 U.S.C. § 554(d) (1976).

<sup>92</sup> *Id.*

from any decisional or recommendatory authority with respect to promotion of administrative law judges. The Administrative Conference might be charged with establishing or approving the procedures to be used in evaluation of judges. And the chief administrative law judge—who, though appointed and removable (as chief) by the agency, is disposed by position and training to be jealous of incursions upon proper independence—might be assured a major role in the evaluation process. (I would not, however, commit the decision entirely to his control, since, particularly in the agencies with small judicial staffs, he may be too much of a *primus inter pares*, and the spirit of collegiality may deter the sort of hard-headedness that efficient promotional decisions require.)

The problem of improper influence would also be solved by implementing proposals for establishment of a unified ALJ corps, headed by an independent administrator.<sup>33</sup> There would be no obstacle to giving such an administrator authority over promotion. Moreover, the unified-corps concept has some independent managerial advantages—notably, the efficiency of scale which would eliminate the phenomenon of highly paid judges who occasionally have no work within their own agency,<sup>34</sup> and which would make possible a range of grade levels not feasible within many single agencies. On the other hand, it seems unlikely that the administrator of a unified corps would have the same degree of knowledge concerning the judges' performance, or the same degree of incentive to maximize the quality of that performance, as the agencies whose substantive programs are affected. In any case, the unified corps would make a fundamental change in the perceived role of the administrative law judge as the "front line" of the agency itself rather than an impartial outsider; and it is that issue which should probably control the fate of the proposal. But the efficiency advantages, *if the corps is combined with a multi-level grade system*, should not be ignored—as they seem to be in most discussions of the proposal.

Whatever solution is adopted, surely the current system—hiring "by the numbers" into an effectively life-tenured job, with no advancement potential, and with no allocation of simpler work to less experienced (and hence lower-paid) individuals—is a horror story of personnel management which should come to an end. It does not even have the dubious merit of providing gold-plated judicial services at an exorbitant cost, but rather prevents intelli-

<sup>33</sup> See text and notes at notes 9-12 *supra*.

<sup>34</sup> See generally Scalia, *The Hearing Examiner Loan Program*, 1971 DUKE L.J. 319.

gent selection and adequate compensation of the finest judges, deters voluntary departure of the worst, and erodes incentive all along the way.