CHAPTER IV

FORMAL ADJUDICATION: PROBLEMS OF ORGANIZATION

A. THE METHOD OF FORMAL ADMINISTRATIVE DECISION

GENERAL STATEMENT OF THE PROBLEM

Most of the controversy over administrative procedure has centered around formal adjudication, though it is the smaller part of administrative adjudication as a whole. It is employed in two principal types of situations. One is when the investigation and the possible resulting action are of such far-reaching importance to so many interests that sound and wise government is thought to require that proceedings be conducted publicly and formally so that the information on which action is to be based may be tested, answered if necessary, and recorded. The other type is where the differences between private interests or between private interests and public officials have not been capable of solution by informal methods but have proved sufficiently irreconcilable to require settlement through formal public proceedings in which the parties have an opportunity to present their own and attack the others' evidence and arguments before an official body with authority to decide the controversy.

Since positions are strongly held, interests clash, and issues are often difficult and technical, the cases have an importance far greater than their number indicates. More than in any other administrative activity, the element of controversy plays a major part, and there must be, therefore, an even greater insistence on impartiality in decision.

Procedure at this stage must be framed to require that the special methods of the administrative process operate in such a way as to give convincing assurance, not that the deciding body is indifferent to the result, because it is usually charged with responsibility for continuous protection and advancement of a particular public interest or policy, but that its decision is not motivated by any desire to deal with the parties or their interest otherwise than in the manner which an objective appraisal of the facts and the furtherance of the public duty imposed upon the agency require.

To accomplish this, it is necessary that the evidence be heard and the facts be reported to the agency head by an official who shall command public confidence both by his capacity to grasp the matter at issue and by his impartiality in dealing with it. The heads of the agency cannot, through press of duties, sit to hear all the cases which must be decided. Their function is to supervise and direct and to hear protests of alleged error. If the initial decision—which may dispose of the case or be the statement of it from which appeal may be taken to the heads—can carry a hallmark of fairness and

capacity, a great part of the criticisms of administrative agencies will have been met.

The methods of hearing and initial decision and the internal procedural structure vary from agency to agency. In general, it has been customary to designate hearing officers before whom evidence may be adduced—whether they be a board of three or more individuals, or, as is more common, a single hearing officer, variously known as a trial examiner, a referee, a presiding officer, a district engineer, a deputy commissioner, or a register. These hearing officers have been selected in various ways. Cases coming before the Board of Tax Appeals—which has no other duties than to hear and decide cases—and the National Mediation Board are heard by single members of the agency itself; cases coming before the National Railroad Adjustment Board are heard by the full bi-partisan membership of one of the four divisions into which the Board is divided by statute. Many other agencies maintain special and separate divisions of trial examiners devoting their time exclusively to the conduct of hearings; still others utilize members of their staffs selected specially for each occasion. In one situation—certain proceedings conducted by the General Land Office of the Department of the Interior—the hearing may be before a clerk or notary public not otherwise connected with the agency.

No less varied is the weight attached by the several agencies to the judgments of those who conduct the hearings. In most of the agencies the person who presides is an adviser with no real power to decide. In a few agencies the hearing officer's or board's decision is conclusive unless appealed by the parties to the head of the agency or unless the agency head itself takes the case up for consideration after initial decision.[1] In one instance initial decision by the hearing officer is final without provision for administrative appeal.[2] In another case there is no appeal to the agency as of right, and the decision of the hearing officer is final unless discretion is exercised to grant a request for review.[3]

Even in the common situation where a hearing officer is without real power to decide, his duties and powers vary considerably. He may simply be a monitor at the hearing with power to keep order and supervise the recording of testimony but little or none to make rulings or to play a real part in the final decision of the case. Such is the role of the hearing officer in homestead entry contests and in some Federal Communications Commission proceedings. Or he may have substantial power to rule at the hearing, and he may issue his decision in the form of an intermediate report upon which the agency will heavily rely. Such is his role in some (though by no means all) of the proceedings at the Interstate Commerce Commission. Or he may have limited powers to rule at the hearings; interlocutory appeals may be taken from his rulings to the agency itself; and his inter-

[1] This is the formula adopted by the Railroad Retirement Board, the Veterans' Administration, the administration of the grazing statutes by the Department of the Interior, the Social Security Board, the Board of Tax Appeals, and cases handled by the Bureau of Motor Carriers of the Interstate Commerce Commission.

[2] Longshoremen's and Harbor Workers' Compensation Act, under which the deputy commissioners of the United States Employees' Compensation Commission hold hearings.

[3] Initial decisions upon applications for individual exemptions under the Fair Labor Standards Act are final unless the Administrator of the Wage-Hour Division in his discretion considers the petition for review.

mediate report may be purely advisory, weighing little in the minds of those who finally decide. Such is his role at the Securities and Exchange Commission and the Federal Trade Commission.

Just as there is variation in the part played by the hearing officer in the process of deciding, so the agencies differ in their choice of methods of reaching the ultimate decision. Because the agencies have required the person who heard the evidence to play a more or less subordinate role in deciding, they have had to use other instrumentalities for shaping a decision. Intermediate reports, exceptions thereto, and oral arguments on the exceptions are the mechanical devices which are usually employed; staffs of review attorneys or review examiners and the like have been created as aids. Some agencies, such as the National Labor Relations Board, have established large sections of attorneys isolated from other staff members to analyze the record and prepare decisions in accordance with the Board's directions. Others, such as the Federal Communications Commission, have relied for analysis and assistance upon members of their legal staffs, who collate the recommendations and suggestions of other staff members in the technical divisions. Whatever form of organization may be employed, almost invariably the agency heads rely heavily upon subordinates other than the hearing officer to digest the record and to draft findings and opinions in accordance with the directions of the agency.

Precise evaluation of the comparative merits of the varying methods of the agencies is not now necessary, though some are unquestionably better than others. In general, the Committee has been impressed by the conscientiousness with which some agencies have conducted the necessary experimentation with procedures for formal adjudication. The Committee's detailed study of the several agencies, and the criticisms of procedure which it has received from persons dealing with the agencies, from the bar, and from the agencies themselves, however, have convinced it that there should be general improvement in administrative procedure at this stage. To be sure, it is essential that any prescribed changes be adaptable to the special problems of each agency, but the Committee believes that the adoption of certain general propositions will improve formal procedure, increase public confidence in it, and retain the basic requirement of flexibility.

THE COMMITTEE'S RECOMMENDATIONS

The Committee's recommendations are based upon a recognition and embodiment in law of the administrative practices which in its opinion have been most successful in achieving public confidence and in disposing of the work of the agency. The Committee has not attempted to improvise procedure but to adapt the most successful in actual experience. It has been impressed with the fact that as the conduct of the hearing becomes divorced from responsibility for decision two undesirable consequences ensue. The hearing itself degenerates, and the decision becomes anonymous.

In those agencies where the hearing officer plays, and is known to play, an important part in the disposition of the case, he exercises real authority in keeping the testimony to the relevant and important issues, reducing its volume and sharpening the issues. Where this is not the case, the testimony wanders and the proceeding loses direc-

tion. Evidence is admitted "for what it is worth" or "for the information of" the agency, time is lost and expense increased.

Also, if the hearing officer is not to play an important part in the decision of the case, other persons must. The agency heads cannot read the voluminous records and winnow out the essence of them. Consequently, this task must be delegated to subordinates. Competent as these anonymous reviewers or memorandum writers may be, their entrance makes for loss of confidence. Parties have a sound desire to make their arguments and present their evidence, not to a monitor, but to the officer who must in the first instance decide or recommend the decision. In many agencies attorneys rarely exercise the privilege of arguing to the hearing officer. They have no opportunity to argue to the record analysts and reviewers who have not heard the evidence but whose summaries may strongly affect the final result.

The Committee is impressed also with the fact that where agencies have recognized the importance of hearing officers in the salaries paid, in the independence of view encouraged and accorded, and in the importance given to their decisions, the positions have attracted and held men whose ability and fairness have been recognized by the bar and the public. Where the opposite has happened, progresssive decline has occurred. The agency heads have not had confidence in the ability of the officials, and with that the compensation and lack of responsibility have precluded men of sufficient ability to reverse the trend from accepting the positions.

This is the heart of formal administrative adjudication. It cannot succeed without competent and well-paid men exercising functions of responsibility and interest. This is necessary to protect both the public interest and the private interests which are concerned in the proceedings.

Accordingly, the Committee recommends the following general method, with such exceptions as are later specified, for formal administrative adjudication. These recommendations are contained in a bill drafted by the Committee and printed as Exhibit 1 of this report.

1. HEARING OFFICERS

To each agency (other than those to be noted subsequently) there should be added officials to be known as hearing commissioners to hear cases. These officials should be men of ability and prestige, and should have a tenure and salary which will give assurance of independence of judgment. They should be appointed for stated terms of 7 years, and be removable only upon formal charges of fraud, neglect of duty, incompetence, or other impropriety. Salaries should be substantial—$7,500 for hearing commissioners and $8,500 for chief hearing commissioners. In agencies which deal with many small cases,[4] a salary of $5,000 a year might be authorized. No agency should be permitted, however, to adopt this lower salary except upon application to the Director of Federal Administrative Procedure (a post the creation of which is urged in a later portion of this report) and upon his certification that the applicant agency's cases are of a type to warrant it.

[4] The cases coming before the Bureau of Marine Inspection and Navigation (disciplinary), the Civil Aeronautics Board (revocation of airmen's certificates), the Division of Public Contracts (violation cases), and the Immigration and Naturalization Service may be examples.

In any event, a hearing commissioner's salary should be fixed for his entire 7-year term, subject neither to reduction nor to increase during that period.

(*a*) *Method of appointment.*—The method by which the hearing commissioners and their chiefs should be selected presents a perplexing problem. Suggestion has been made that they 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. The Committee has given careful and searching consideration to this and similar suggestions and has concluded that they are not desirable.

Several hundreds of hearing commissioners would have to be appointed initially; thereafter each year a substantial number would be appointed or reappointed.

Efficient conduct of the work demands that hearing officers specialize in the work of specific agencies. Some exchange, as we point out, is desirable and will occur. But in the main the work of a hearing commissioner will be with a particular agency. Specialization is one of the fundamentals of the administrative process.

Furthermore, the hearing commissioner is in a very real sense acting for the head of the agency. He is hearing cases because the heads cannot as a practical matter themselves sit. He plays an essential part in the process of hearing and deciding. Those responsible for the work of the agency have a vital interest that this process shall be effectively and fairly performed. The entire usefulness of the agency may be destroyed if the hearing officers are incompetent or if the public loses confidence in their fairness.

So the Committee concludes that the agencies themselves should have an important share of the responsibility of selecting the persons who shall be hearing commissioners. But it concludes also that before anyone should undertake these highly responsible duties of a hearing commissioner his judicial qualifications and capacity should be investigated and approved by a body independent of the agency, and whose special concern is the improvement of administrative procedure. Public confidence would be deservedly inspired if full power to approve and appoint or disapprove and refuse to appoint persons nominated by an agency to be hearing commissioners were lodged in the Office of Federal Administrative Procedure, the creation of which is recommended elsewhere in this report [5]—an office composed of a director to be appointed by the President and confirmed by the Senate; an associate justice of the United States Court of Appeals for the District of Columbia designated by the chief justice of that court; and the Director of the Administrative Office of the United States Courts, who is appointed by the Supreme Court of the United States.

Independence of judgment on the part of hearing officers, the Committee believes, will be achieved both by this method of selecting them and by the adoption of the Committee's recommendation that hearing commissioners be given definite tenure of office at a fixed salary. Appointment for a term of 7 years is deemed by the Committee to assure an adequate measure of security for the hearing commissioners without making impossible the displacement of those who fail to measure

[5] See chapter VIII of this report, *infra*, pp. 123–124.

up to the standards required of them; the period of 7 years here suggested is comparable to that provided in a number of state constitutions as the term of office of judges of the highest courts.

(*b*) *Provisional and temporary appointments.*—The Committee believes it necessary in order to meet practical needs to provide for (1) provisional appointments; and (2) temporary appointments.

Provisional appointments are suggested in order that an opportunity may be given to test the abilities of possible permanent appointees where desirable. Either the agency or the Office of Federal Administrative Procedure, or both, may believe that although upon a candidate's record he appears qualified, it is desirable to observe him in the actual work as hearing commissioner before concluding that he can successfully discharge his duties. The Committee's recommendation, therefore, provides for provisional appointments, subject to the same requirement of approval by the Office. These appointments should not, in any event, exceed 1 year, and might be less in the discretion of the agency. No provisional appointment should be extended after the expiration of this period; the provisional appointee should either receive a regular appointment or be dropped altogether as a hearing commissioner.

The appointment of temporary hearing commissioners may be necessitated by different considerations. Sudden increases in the number of cases which must be heard at a given time may be of only a temporary character, not justifying the appointment of another hearing commissioner for a 7-year term. Similarly, one or two unusually protracted proceedings may so reduce available hearing personnel that dockets become congested with other cases. To prevent the accumulation of backlogs, and to dispose of them as rapidly as possible when they do occur, the Committee finds it desirable to permit agencies, in such a situation, to appoint temporary hearing commissioners, either by the temporary assignment of hearing commissioners from other agencies or by the temporary appointment of persons who meet with the approval of the Office of Federal Administrative Procedure. These appointments should be for designated cases or for 30 days, subject to extension if the chief hearing commissioner (provided for below) certifies to the continuation of the need.

Furthermore, in some agencies, the volume of cases may be so small that the appointment of a regular hearing commissioner may not be justified. The Federal Reserve System has held less than a dozen formal adjudicatory hearings since 1914; the Federal Deposit Insurance Corporation has held only 22 hearings in three years; the War Department has set rates for a total of only 50 toll bridges, and often not a single rate hearing is held in the course of a year. In agencies whose work load is as light as these, there are insufficient cases to occupy a permanent hearing commissioner devoting his entire time to hearing and deciding. The Committee, accordingly, does not recommend the addition of regular hearing commissioners in such agencies. Instead, it is contemplated that the agencies in which formal adjudication is a more or less inconspicuous and inconsequential adjunct of other activities, will select temporary hearing officers, as outlined above, to conduct and decide cases as they arise.

In any event, all hearing commissioners—be they permanent, provisional, or temporary—should be approved and appointed, after

nomination by the agency concerned, by the Office of Federal Administrative Procedure, and should enjoy the powers and perform the functions which have been outlined in the Committee's recommendations, to the end that the procedures of hearing and decision may be direct, simple, and fair.

(*c*) *Removal.*—Removal of a hearing commissioner during his term should be for cause only and by a trial board independent of the agency. The removal trial board should be composed of the three members of the Office of Federal Administrative Procedure, but these members may, in their discretion, delegate the conduct of the hearing to the Director of the Office sitting with two other persons designated by the members of the Office. Charges might be presented either by the agency concerned or by the Attorney General of the United States acting upon complaint made by private persons and believed by him to be well founded.[6]

(*d*) *Exchange of hearing commissioners.*—While, as stated, each hearing commissioner should be attached to a particular agency whose cases he is to hear and decide, it should not be necessary that under all circumstances he devote his entire energies to that agency. Rather, insofar as the several agencies desire and request it, there should be permitted an interchange of hearing commissioners among the agencies. Thus, for example, cases arising under the Commodity Exchange Act probably will not justify the Department of Agriculture's appointment of a full-time hearing commissioner, yet hearing commissioners at the Securities and Exchange Commission should be well qualified to hear Commodity Exchange Act cases. Similarly, the same hearing commissioner might well be able to hear cases arising both under the National Labor Relations Act and violation cases under the Walsh-Healey Act; or the same commissioner may be qualified to hear misconduct cases coming both before the Bureau of Marine Inspection and Navigation and the Civil Aeronautics Board. Interchange of this nature is desirable because it would reduce the use of temporary hearing officers; it would save expense; it would provide some variety for the hearing commissioner; and it would impart fresh points of view to the agencies. The Office of Federal Administrative Procedure, through its Director, should serve as a clearing-house for these exchanges; requests should be made to the Director, and he should, in turn, effect the necessary arrangements. The agencies involved should furnish, pro rata, the hearing commissioner's salary.

(*e*) *Chief hearing commissioner.*—In agencies employing five or more hearing commissioners, the agency heads should designate one hearing commissioner to serve as chief hearing commissioner, at a somewhat higher salary than that received by his colleagues. The chief hearing commissioner should play an important part in the supervision of the hearing and decision process. He should, of course, assign the hearing commissioners to sit in particular proceedings. Because he will be in a position to gauge the agency's needs

[6] In addition, of course, termination of a hearing commissioner's service with the agency should be permissible where there is such a diminution in the number of cases to be heard before the agency that his retention is no longer warranted. To assure that removal on this ground is bona fide, the Director of the Office of Federal Administrative Procedure should certify to the necessity of the removal and the hearing commissioner should, during his unexpired term, be placed on an eligible list for reappointment. During such unexpired term, the appointments should be made to the agency only from the eligible list.

with respect to hearing officers, he should be empowered to ask for an exchange or temporary hearing commissioner.

2. FUNCTIONS OF HEARING COMMISSIONERS

Hearing commissioners should be fully empowered by statute to preside at hearings, issue subpoenas, administer oaths, rule upon motions, carry out other duties incident to the proper conduct of hearings, and make findings of fact, conclusions of law, and orders for the disposition of matters coming before them. In order to reduce the burdensome length of many records and the needless waste of time and money resulting therefrom, hearing commissioners should be particularly empowered to exclude evidence which is immaterial, irrelevant, unduly repetitious, or not of the "kind on which responsible persons are accustomed to rely in serious affairs";[7] and they should have power to rule upon the form of any question asked.

Hearing commissioners should also be empowered to preside at prehearing conferences.[8] Cases in which no evidence is adduced, because the submission is upon an agreed statement of facts, could, in the discretion of the agency, be heard and decided by a hearing commissioner in the first instance.

The hearing commissioners should be a separate unit in each agency's organization. They should have no functions other than those of presiding at hearings or prehearing negotiations and of initially deciding the cases which fall within the agency's jurisdiction.[9]

3. ASSIGNMENT OF DECISIONS TO OTHER HEARING COMMISSIONERS

Situations will arise in which the hearing commissioner who presided at the hearing cannot prepare the findings and decision or cannot do so within a reasonable period. This may arise from death, illness or unforeseen exigencies of business. A hearing commissioner on circuit may find himself involved in a case of unexpected length, or he may have to take over hearings of a colleague who is ill, thus delaying the decision of a case already heard. In such circumstances the chief hearing commissioner should have authority to assign the preparation of findings and decision upon the transcript to another hearing commissioner if, in his opinion, this can be properly done. The hearing commissioner to whom the case is reassigned should be able to order reargument, or even retrial, if that appears necessary. But in any other event than that of prolonged illness, death, or unforeseen exigency, cases should not be reassigned without the consent of the parties.

4. EFFECT OF HEARING COMMISSIONERS' DETERMINATIONS

In the absence of appeal by one of the parties to the proceedings (including the representatives of the agency), the determination of

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[7] *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2nd, 1938), cert. den., 304 U. S. 576, 585 (1938).

[8] See sec. 2 of ch. V, *infra*, pp. 64–68.

[9] The adoption of this recommendation will entail an abandonment of procedural methods now in vogue in certain (but not all) types of proceedings before the Federal Communications Commission, the Department of Agriculture, and the Civil Aeronautics Administration.

a hearing commissioner should be final and binding unless, within a reasonable period, to be stated in applicable regulations, the case is called up for review by the head or heads of the agency on his or their own motion. The findings, conclusions, and recommendations of the hearing commissioner should be included in the record upon which any court review is sought.

A major purpose of the Committee's recommendations is to increase, in most agencies, the effect of the hearing officer's work in the decision of the case. The Committee contemplates that his decision will serve as the initial adjudication of most cases, and the final adjudication in many, just as does the decision of a trial court. Accordingly, an integral part of the Committee's recommendations is that, in the absence of appeal, the decision of the hearing commissioner be final and effective without further action or consideration by the agency. But to preserve uniformity of decision and effective supervision of an agency's work, the Committee recommends not only that the parties, including the agency's trial attorney, be permitted to appeal, but also that the agency heads may, within the period for appeal, take up any decision for review upon their own motion.[10]

In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown. And in the event that the agency does find facts contrary to those found by the hearing commissioner, the agency's opinion should articulate with care and particularity the reasons for its departures, not only to disclose the rationale to the courts in case of subsequent review but to assure that the agency will not carelessly disregard the decision of the hearing commissioner.

5. NATURE OF APPEAL

The specific grounds of appeal should be required to be stated, so that the review of a hearing commissioner's decision may be limited accordingly. Because of differences in the subject matters involved in cases before the several agencies, the scope of review should be left for later definition by the agencies; but it should be made plain by statute that where an appeal is based upon allegedly erroneous determinations of fact by the hearing commissioner, the agency may permissibly, but is not required to, confine its examination of the record to the portions cited and may reject that ground of appeal unless those portions disclose that the finding is clearly wrong. In other words, mere allegations of error without convincing support should not impose on the agency heads the duty of reading an entire record.

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[10] It must be noted in this context that the term "agency heads" connotes the highest adjudicatory body within one of the administrative establishments, even though the members of that body may not be the agency heads themselves. For example, the Social Security Board, under statutory authorization, has completely divested itself of jurisdiction to consider individual claims for benefits. This jurisdiction it has delegated to an Appeals Council, which has power finally to determine cases arising under the Social Security Act. For purposes of the present discussion it is the Appeals Council rather than the Social Security Board which is the "agency head."

The Committee strongly urges that the agencies abandon the notion that no matter how unspecified or unconvincing the grounds set out for appeal, there is yet a duty to reexamine the record minutely and reach fresh conclusions without reference to the hearing commissioner's decision. Agencies should insist upon meaningful content and exactness in the appeal from the hearing commissioner's decision and in the subsequent oral argument before the agency. Too often, at present, exceptions are blanket in character, without reference to pages in the record and without in any way narrowing the issues. They simply seek to impose upon the agency the burden of complete reexamination. Review of the hearing commissioner's decision should in general and in the absence of clear error be limited to grounds specified in the appeal.

6. ELIMINATION OF REVIEW STAFFS AND APPELLATE DUTIES OF AGENCY HEADS

If limited as the Committee recommends, the process of review should rarely involve the heavy burden now assumed by many agencies. If the appeal, the briefs, and the oral argument are prepared with the care and precision upon which the agencies should insist, even factual issues may be determined by means of reference to the papers filed by the parties and to such portions of the record as may have been specifically indicated by them. A successful system of review upon appeal depends upon adequate presentation of all relevant arguments and considerations. The Committee, accordingly, recommends that the agency's trial attorney be required to file a brief, and, where possible, to argue orally in cases where the agency's staff has asserted a position during the trial hearing.

As a consequence, many of the perplexing problems of assistance by subordinate reviewers to the heads of the agency in deciding cases will disappear. Under the methods which the Committee now proposes, there should be little greater need by administrators for review attorneys than would exist among appellate judges. Like judges, however, each agency head may find it useful to have attached to his office one or more law clerks, or even more important officers such as the "examiners" utilized by the Interstate Commerce Commissioners.

But these assistants should be aides and not substitutes. The heads of the agency should do personally what the heads purport to do. We have already recommended that the work of personnel selection and management, the work of investigation, informal adjustment or decision, and the issuance of complaints in the generality of cases be vested in responsible officers. We here recommend similar relief so far as the hearing and initial decision of cases is concerned and have outlined the restricted nature of the review which should be given those decisions. But that review should be given by the officials charged with the responsibility for it, and the review so given should include a personal mastery of at least the portions of the records embraced within the exceptions.

In agencies headed by a board, commission, or authority, further division of labor may be necessary to provide the time for individual attention by the agency heads. The members may find it necessary to sit in divisions, as do the Interstate Commerce Commission and

the Board of Tax Appeals, with the full board reviewing decisions only in cases of exceptional importance or upon petition. It may be necessary to increase boards of three members to five, in order to make this possible.

In single headed departments and agencies, like the Post Office and the Departments of Commerce and Agriculture, the Committee recommends that all pretense of consideration of each case by the agency head be abandoned and that there be created either boards of review, as in immigration procedure, or chief deciding officers who shall exercise the final power of decision. But if the agency head in these departments does review a case, he must assume the burden of personal decision. It is obviously impossible for the Postmaster General to give personal consideration to every case of use of the mails to defraud, for the Secretary of Commerce to pass on the suspension or revocation of seamen's licenses, or for the Secretary of Agriculture to adjudicate all the cases arising under the many statutes administered by his Department. In such instances the cases should be heard and initially decided by the hearing commissioners and be reviewed if necessary by designated officials who are charged with that responsibility and who will perform it personally.

7. POWERS OF AGENCY HEADS TO REVIEW AND DECIDE

Agency heads should have the authority, when reviewing hearing commissioners' determinations, to affirm, reverse, modify (including the power to make the finding which they deem required by the record), or remand for further hearing. It should be open to them to adopt, wholly or partially, the findings, conclusions, decision, or order from which appeal has been taken. They should also have authority upon the certification of the hearing commissioner that novel or complex questions of law exist in the case which call for the immediate decision of the agency,[11] or upon petition of the private parties that good cause exists for so doing, to receive the record of a case upon the conclusion of the hearings and proceed directly to its decision, upon requests for findings and arguments by the parties, without findings or decision in the first instance by the hearing commissioner. In such cases they should issue either a proposed decision subject to exceptions or a final administrative decision as may be deemed warranted by the circumstances and fair to the parties.

APPLICABILITY OF RECOMMENDATIONS

The recommendations just summarized and explained are intended by the Committee to be broadly applicable to all agencies which utilize the formal hearing process in adjudication. Some exceptions must, however, be noted.

(a) *Cases heard by Agency heads.*—The purpose of the recommendations is, insofar as possible, to fix the responsibility for initial determinations in able, highly placed officials who have themselves heard the evidence, and to make their determinations a significant

[11] Typical of the cases in which there are presented novel questions of law in which the hearing officer does not have the guidance of principles established by the agency in prior cases and in which the judgment of the agency heads is crucial are those now pending before the Securities and Exchange Commission involving simplification and integration of holding company systems.

part of the process of administrative decision. Obviously, then, the recommendations do not apply in agencies where the heads themselves hear and decide cases. Agencies like the United States Tariff Commission and the National Railroad Adjustment Board are therefore altogether excluded, while other agencies which occasionally sit *en banc* are in no wise intended to be precluded from continuing to do so. Nor is anything in the Committee's recommendations intended to affect the hearing of cases by one or more, but less than a majority, of the members of an agency. The procedure of the Board of Tax Appeals, for example, need not be altered. The occasional practice of the Securities and Exchange Commission, Interstate Commerce Commission, and others in this respect is not intended to be changed; except that when a case is heard by one of the agency's heads instead of by one of its hearing commissioners, the same effect should be given to the initial findings and decision as would attach to them if they had been made by a hearing commissioner. Also excluded from application are the deputy commissioners of the United States Employees' Compensation Commission, who, under the Longshoremen's and Harbor Workers' Compensation Act, not only hear industrial accident cases, but finally decide them, subject only to a direct appeal to the courts.

(b) *Cases involving future governance of persons not parties to proceeding.*—The Committee's recommendations are directed to improving the processes by which agencies decide cases. They do not extend to the making of rules and regulations, even where action is required by statute to be preceded by hearings cast into a judicial mold. In many proceedings of this sort as in price-fixing, wage-fixing, and the setting of standards, where controversies can be narrowed to a series of specific issues, the agencies can usefully employ the method of hearing and initial decision here recommended. But the method is not uniformly applicable and to impose it in some instances would probably produce confusion and delay rather than improvement. This may be true because other methods of intermediate report may be regarded as preferable; for instance, the reports of industry committees provided for in the Fair Labor Standards Act. In other instances, many of the important "facts" on which an essentially legislative judgment must rest are conclusions regarding probabilities and consequences, as to which the interests concerned would normally prefer to have the tentative views of the officials who must make the decision rather than of a hearing commissioner who in the nature of things cannot make it. Even in such situations, however, there often are subsidiary questions of fact upon which sharp issue may be joined by conflicting interests. The Committee recommends that the agencies attempt by prehearing conferences to ascertain these issues, formulate them for the hearing, and direct the hearing officer to make his findings upon them to the agency heads. Further discussion of rule-making procedure is contained in chapter VII of this report.

(c) *Cases not marked by hearings.*—The Committee's recommendations pertain only to adjudications based upon formal hearings, and obviously do not apply to the informal proceedings which have been appraised and approved in chapter III of this report. "Spot decisions" such as those involved in grain grading and hull and boiler

inspection therefore remain unaffected. So, too, for example, would the determinations of the War Department respecting harbor works and obstructions, of the United States Maritime Commission respecting subsidies, and of the Veterans' Administration respecting claims for benefits or pensions. While hearings occur in these three situations, they are merely incidental to an ex parte investigatory process; decisions rest upon the whole investigation, rather than merely upon that portion of it embraced by the hearing. Initial determinations which rest on written applications and preexisting records, such as those made by the State Department in acting upon passport applications and by the Social Security Board and the Railroad Retirement Board, are similarly untouched by the present recommendations.

B. SEPARATION OF THE ADJUDICATING FUNCTION FROM OTHER ADMINISTRATIVE ACTIVITIES

The recommendations made in the preceding sections of this report looking toward the creation of the office of hearing commissioners to hear and initially to decide cases which go to formal proceedings, together with the recommendations looking toward a greater delegation of administrative functions within the agencies, would insure internal but nevertheless real and actual separation of the adjudicating and the prosecuting or investigating functions. The person who heard and weighed the evidence, who made the initial findings of fact and the initial order in each case, would be entirely different from those persons who had investigated the case and presented it in formal proceedings. He would have had no connection with the initiation or prosecution of the case. His decision would stand unless either the attorney for the agency or the attorney for the private party were able to demonstrate through exceptions, appeal, and argument before the agency heads that his findings or conclusions were in error.

But current discussions of the administrative process raise the question whether separation of function ought not to go further than this. Specifically, it has been urged that possession of the deciding functions of a "judge" is inconsistent with possession of the "prosecutor's" functions of investigation, initiation of action, and advocacy. The proposal is accordingly made that the deciding powers of Federal administrative agencies should be vested in separate tribunals which are independent of the bodies charged with the functions of prosecution and perhaps other functions of administration.

Two points are important to put the problem in a just perspective. The first is that, as the Committee has repeatedly noted, an administrative agency is not one man or a few men but many. It is important, the Committee believes, not to make the mistake of conceiving of an agency as a collective person and concluding that, because the agency initiates action and renders decision thereafter, the same person is doing both. In an agency's organization there are varied possibilities of internal separation of function to the end that the same individuals who do the judging do not do the "prosecuting." Such internal separation by no means eliminates the problem of combination of functions; but it alters, or if wisely done may alter, its entire set and cast. The second major point is that the functions

of so-called prosecution belonging to administrative agencies are actually of varying types. It is important to distinguish among these types not only because agencies differ in the functions which they possess but because different questions, in relation to the function of judging, arise with respect to different types of functions.

Two characteristic tasks of a prosecutor are those of investigation and advocacy. It is clear that when a controversy reaches the stage of hearing and formal adjudication the persons who did the actual work of investigating and building up the case should play no part in the decision. This is because the investigators, if allowed to participate, would be likely to interpolate facts and information discovered by them ex parte and not adduced at the hearing, where the testimony is sworn and subject to cross-examination and rebuttal. In addition, an investigator's function may in part be that of a detective, whose purpose is to ferret out and establish a case. Of course, this may produce a state of mind incompatible with the objective impartiality which must be brought to bear in the process of deciding. For this same reason, the advocate—the agency's attorney who upheld a definite position adverse to the private parties at the hearing—cannot be permitted to participate after the hearing in the making of the decision. A man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions. Clearly the advocate's view ought to be presented publicly and not privately to those who decide.

These types of commingling of functions of investigation or advocacy with the function of deciding are thus plainly undesirable. But they are also avoidable and should be avoided by appropriate internal division of labor. For the disqualifications produced by investigation or advocacy are personal psychological ones which result from engaging in those types of activity; and the problem is simply one of isolating those who engage in the activity. Creation of independent hearing commissioners insulated from all phases of a case other than hearing and deciding will, the Committee believes, go far toward solving this problem at the level of the initial hearing provided the proper safeguards are established to assure the insulation. A similar result can be achieved at the level of final decision on review by the agency heads by permitting the views of the investigators and advocates to be presented only in open hearing where they can be known and met by those who may be adversely affected by them.

A distinctive function, which may be regarded as one of prosecution, is that of making preliminary decisions to issue a complaint or to proceed to formal hearing in cases which later the agency heads will decide. Before a complaint is issued—if an agency has power to initiate proceedings on its own motion or on charges filed by a private person—or before an application raising doubtful questions is set down for formal hearing, a determination must be made that the action is proper. The Committee has heretofore recommended, on grounds of administrative efficiency, that authority to make such preliminary determinations should be delegated as far as possible to appropriate officers. Where this is done, no question can arise that the ultimate deciding officers have been biased through having made, ex parte, a preliminary determination in a case which they have later to decide.

Yet such delegation, of course, cannot be complete; novel and difficult questions must from time to time be presented to the heads of the agency. The question must be faced, therefore, whether the making of such a preliminary determination in itself works unfairness in the final decision. Assuming that the agency heads simply pass on the sufficiency of material developed and presented to them by others, the Committee is satisfied that no such unfairness results. What is done is wholly comparable to what a court does in the first stage of a show cause proceeding, or in the issuance of a writ of certiorari. No decision on the merits is made; the court, or the agency, merely concludes that the situation warrants further examination in formal proceedings. The ultimate judgment of the agency heads need be no more influenced by the preliminary authorization to proceed than is the ultimate judgment of a court by the issuance of a temporary restraining order pending a formal hearing for a permanent injunction.

What remains to be discussed is the heart of the problem. Save at the level of the agency heads, an internal separation of function can afford substantially complete protection against the danger that impartiality of decision will be impaired by the personal precommitments of the investigator and the advocate. Even at the level of ultimate decision there can be similar protection, for the sheer volume of work does not permit the agency heads to participate actively in developing one side of any single side but requires that they reserve themselves for the task of deciding questions presented to them by others. Nevertheless, so far as the agency is empowered to initiate action at all, the agency heads do have the responsibility of determining the general policy according to which action is taken. They have at least residual powers to control, supervise, and direct all the activities of the agency, including the various preliminary and deciding phases of the process of disposing of particular cases. The question is whether there are dangers in the possession of these powers such as to make advisable a total separation.

An answer to this question requires first of all a counting of the costs which such a separation would entail. These costs include substantial dangers both to private and to public interests. Most obvious are the disadvantages of sheer multiplication of separate governmental organizations. If the proposal were rigorously carried out, two agencies would grow in each case where one grew before. The result would be, among others, a great variety of relationship in size and importance as between the two members of the various pairs. In some agencies functions of adjudication are of relatively minor significance in relation to the total task of the agency; in others they are a major part of the whole.

Particularly in cases where adjudicatory functions are not a principal part of the agency's work or are closely interrelated with other activities, whatever gains might result from separation would be plainly outweighed by the loss in consistency of action as a whole. Few persons, for example, would advocate that the Bureau of Marine Inspection and Navigation should examine applicants for officers' or seamen's certificates but that a separate board should decide in the first instance whether certificates should issue, or that a separate board, with equal responsibility for determining the questions of policy involved, should retry the questions after denial by the first

agency and issue the certificate if it thought the first agency wrong. Similar confusion would result if the function of issuing broadcasting licenses were divided between two commissions. In greater or less degree these same considerations are applicable wherever the adjudicatory and nonadjudicatory functions of an agency are required to be exercised in harmony with each other and where the knowledge secured in the exercise of the one group of functions is important in the wise exercise of the other. Thus the Interstate Commerce Commission not only decides cases but also prescribes rules and regulations governing carriers and supervises their accounts and the tariffs which they file. The Civil Aeronautics Board, the Securities and Exchange Commission, and other agencies also act through exercise of a number of interrelated powers. These powers must be exercised consistently and, therefore, by the same body, not only to realize the public purposes which the statutes are designed to further but also to avoid confusion of private interests.

There are, however, some agencies such as the Federal Trade Commission and the National Labor Relations Board whose principal duty is the enforcement, by decision of cases, of certain statutory prohibitions. In the case of such agencies, the practical objection which has just been noted to isolating the adjudicatory function and handing it over to some independent body would not exist to the same extent. It would be theoretically possible to assign to one agency the task of investigating charges and filing complaints of statutory violations, and to another agency the task of deciding the controversies thus arising. And it is undoubtedly true that agencies whose only substantial task is that of enforcing the prohibitions of a statute through adjudication, especially in such controversial fields as that of unfair methods of business competition and labor relations, are peculiarly in danger of being charged with bias by those against whom the prohibitions are sought to be enforced.

Further practical objections, however, have to be taken into account in relation to these as well as other agencies. Of prime importance among these objections is the danger of friction and of a break-down of responsibility as between the two complementary agencies. This is a danger to private interests no less than to public ones. To create a special body whose single function is to prosecute will almost inevitably increase litigation and with it harassment to respondents. At present the added responsibility of deciding exercises a restraining influence which limits the activities of the agency as a whole. If only to save itself time and expense an agency will not prosecute cases which it knows are defective on the facts or on the law—which it knows, in short, it will dismiss after hearing. The situation is likely to be different where the function of prosecuting is separated out. First, a body devoted solely to prosecuting often is intent upon "making a record." It has no responsibility for deciding and its express job is simply to prosecute as often and successfully as possible. Second, it must guess what the deciding branch will think. It can explore the periphery; it can try everything; and meanwhile the individual citizen must spend time and money before some curb can be exercised by the deciding branch. And, it should be noted, a separation of functions would seriously militate against what this Committee has already noted as being, numerically and otherwise, the

lifeblood of the administrative process—negotiations and informal settlements. Clearly, amicable disposition of cases is far less likely where negotiations are with officials devoted solely to prosecution and where the prosecuting officials cannot turn to the deciding branch to discover the law and the applicable policies.

These factors are thrown into clear relief if it is recalled that the statutory prohibitions which administrative agencies are commonly called upon to enforce are not and cannot be as clear and precise as a promissory note or bill of sale. They necessarily describe in general terms, and with emphasis upon tendency or effect, those practices which are forbidden. It is and must be left to the administrative agencies to apply these general prohibitions to a great variety of conduct. As this is done, it is expected that the general terms will take on concreteness and that subsidiary principles may be worked out by which certain types of conduct will be known as improper and others as permissible. To do this involves the investigation of many informal complaints and the settlement by agreement of many situations where the practices may have been innocently or inadvertently or not consistently engaged in. To divorce entirely the investigating and enforcing arm from the deciding arm, may well impart additional confusion to this process. Even in the field of taxes, where historically the aim has been at precision, some confusion results from the separation of the collecting officials from the deciding officials. In many claims one person may take one view and another person a different view of the meaning of a statute, with resultant uncertainty and hardship for some taxpayers until the matter has been straightened out in the courts. The danger is even greater with statutes whose content is more vague. It seems most desirable that within the administrative field itself, interpretations should not have to be evolved by a series of litigations in which the enforcing branch endeavors to ascertain the mind of the deciding branch. For this would result, not merely in added difficulty of enforcement, which might be warranted if it were necessary to assure fairness, but in added burdens upon many private interests, who would be unnecessarily harassed by complaints and trials.

Moreover, when one examines the specific criticisms of specific agencies, one is struck by the fact that a mere splitting up of functions would not itself cure the criticisms which appear most common. Insofar as predispositions may exist in the more highly charged fields in which administrative agencies operate, they are mainly the product of many factors of mind and experience, and have comparatively little relation to the administrative machinery. There is no simple way of eliminating them by mere change in the administrative structure. They can only be exorcised by wise and self-controlled men. The problem is inherently one of personnel and the traditions in which it is trained. We believe that the structure and procedure which we have recommended have been demonstrated to be entirely compatible with the development of deciding officers whose impartiality is universally respected.

For, while we thus conclude that complete separation by no means necessarily cures bias, which derives from deeper roots than mere organization, conversely, it is demonstrable that impartiality can be achieved without separation. For instance, throughout the hearings

held by our Committee, both the bar and representatives of the carriers warmly commended the procedures and the fairness of the Interstate Commerce Commission. While the greater part of the formal adjudicatory work of that Commission consists in weighing evidence and arguments presented to it by opposing private interests—carriers, shippers, committees, and the like—still the Commission both initiates proceedings to enforce requirements of law and renders the decision. Yet there is no charge that the Commission is biased or unfair; on the contrary the testimony appears to be unanimous that the Commission acts without favor to or prejudice against any litigant or interest.

The Committee concludes, then, that complete separation of functions would make enforcement more difficult and would not be of compensating benefit to private interests. On the contrary, both those private interests which the statutes are designed to protect and those which are regulated would be likely to suffer. And, finally, we conclude not only that separation will not necessarily cure bias and prejudice but that the requisite impartiality of action can be secured by the means set forth in this and the preceding sections of this report.