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## The Hearing Examiners and the Administrative Procedure Act, 1937-1960

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# The Hearing Examiners and the Administrative Procedure Act, 1937–1960<sup>1</sup>

By Joanna L. Grisinger\*

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## I. INTRODUCTION

Federal hearing examiners—that is, administrative law judges before they were called “administrative law judges”—were crucial figures in the movement to reform administrative law in the 1930s, 1940s, and 1950s. In the early years of the administrative process, Americans were increasingly apprehensive about the fact that bureaucrats—and particularly hearing examiners—were becoming the primary makers of federal law and policy. Complaints about examiners were easily conflated with complaints about the agencies (and vice versa). Given their role handling initial fact-finding hearings in highly political regulatory disputes, the examiners were believed by many critics to be potentially lawless figures who abused their decision-making powers to help their agencies deprive regulated parties of their property rights.<sup>2</sup> Without the neutrality or

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<sup>2</sup> For scholarship on the early development of the administrative state, see BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* (2009); MATTHEW A. CRENSON, *THE FEDERAL MACHINE: BEGINNINGS OF BUREAUCRACY IN JACKSONIAN AMERICA* (1975); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012); WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900* (1982); WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996); Michael Nelson, *A Short, Ironic History of American National Bureaucracy*, 44 *J. POL.* 747 (1982); Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 *LAW & HIST. REV.* 1 (2008).

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For scholarship on the New Deal and post-New Deal state, see BRIAN BALOGH, CHAIN REACTION: EXPERT DEBATE AND PUBLIC PARTICIPATION IN AMERICAN COMMERCIAL NUCLEAR POWER, 1945–1975 (1991); ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR (1995) [hereinafter BRINKLEY, THE END OF REFORM]; Alan Brinkley, *The Late New Deal and the Idea of the State*, in LIBERALISM AND ITS DISCONTENTS, 37, 37–62 (1998) [hereinafter Brinkley, *The Late New Deal*]; LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA (2003); KENNETH FINEGOLD & THEDA SKOCPOL, STATE AND PARTY IN AMERICA'S NEW DEAL (1995); ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE (1966); MEG JACOBS, POCKETBOOK POLITICS: ECONOMIC CITIZENSHIP IN TWENTIETH-CENTURY AMERICA (2005); MICHAEL E. PARRISH, SECURITIES REGULATION AND THE NEW DEAL (1970); DAVID H. ROSENBLOOM, BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION: CONGRESS AND THE ADMINISTRATIVE STATE, 1946–1999 (2000); JASON SCOTT SMITH, BUILDING NEW DEAL LIBERALISM: THE POLITICAL ECONOMY OF PUBLIC WORKS, 1933–1956 (2006); BARTHOLOMEW H. SPARROW, FROM THE OUTSIDE IN: WORLD WAR II AND THE AMERICAN STATE (1996); BRIAN WADDELL, THE WAR AGAINST THE NEW DEAL: WORLD WAR II AND AMERICAN DEMOCRACY (2001); Brian Balogh, *Reorganizing the Organizational Synthesis: Federal-Professional Relations in Modern America*, 5 STUD. AM. POL. DEV. 119 (1991); Michael K. Brown, *State Capacity and Political Choice: Interpreting the Failure of the Third New Deal*, 9 STUD. AM. POL. DEV. 187 (1995); John J. Coleman, *State Formation and the Decline of Political Parties: American Parties in the Fiscal State*, 8 STUD. AM. POL. DEV. 195 (1994); Marc Allen Eisner, *Discovering Patterns in Regulatory History: Continuity, Change, and Regulatory Regimes*, 6 J. POL'Y HIST. 157 (1994); John W. Jeffries, *The "New" New Deal: FDR and American Liberalism, 1937–1945*, 105 POL. SCI. Q. 397 (1990); Ira Katznelson, Kim Geiger, & Daniel Kryder, *Limiting Liberalism: The Southern Veto in Congress, 1933–1950*, 108 POL. SCI. Q. 283 (1993); Ira Katznelson & Bruce Pietrykowski, *Rebuilding the American State: Evidence from the 1940s*, 5 STUD. AM. POL. DEV. 301 (1991); Karen Orren & Stephen Skowronek, *Regimes and Regime Building in American Government: A Review of Literature on*

independence of judges, examiners were free (critics alleged) to be biased and unfair, thus tainting agency proceedings as a whole.

This focus on the examiners motivated subsequent reform. Although the Attorney General's Committee on Administrative Procedure, which released a comprehensive study of the

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*the 1940s*, 113 POL. SCI. Q. 689 (1998); David Plotke, *The Endurance of New Deal Liberalism*, 10 STUD. AM. POL. DEV. 415 (1996).

For studies of the development of administrative law and administrative organizations, see MATTHEW HOLDEN, JR., CONTINUITY AND DISRUPTION: ESSAYS IN PUBLIC ADMINISTRATION (1996); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (1992); PAUL C. LIGHT, THE TIDES OF REFORM: MAKING GOVERNMENT WORK, 1945–1995 (1997); THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (2d ed. 1979); JOHN A. ROHR, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE (1986); Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, in TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II (Daniel R. Ernst & Victor Jew eds., 2002) [hereinafter Schiller, *Reining in the Administrative State*]; HAROLD SEIDMAN, POLITICS, POSITION, AND POWER: THE DYNAMICS OF FEDERAL ORGANIZATION (5th ed. 1998); G. Edward White, *The Emergence of Agency Government and the Creation of Administrative Law*, in THE CONSTITUTION AND THE NEW DEAL 94 (2000); James E. Brazier, *An Anti-New Dealer Legacy: The Administrative Procedure Act*, 8 J. POL'Y HIST. 206 (1996); Ronald A. Cass, *Models of Administrative Action*, 72 VA. L. REV. 363 (1986); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); James G. March & Johan P. Olson, *Organizing Political Life: What Administrative Reorganization Tells Us About Government*, 77 AM. POL. SCI. REV. 281 (1983); Ann Marshall Young, *Judicial Independence in Administrative Adjudication: Past, Present, and Future*, 19 J. NAT'L ASS'N ADMIN. L. JUDICIARY 101 (1999); Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 267 (1990); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986); Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 VAND. L. REV. 1389 (2000) [hereinafter Schiller, *Enlarging the Administrative Polity*]; Reuel Schiller, "Saint George and the Dragon": *Courts and the Development of the Administrative State in Twentieth-Century America*, 17 J. POL'Y HIST. (SPECIAL ISSUE) 110 (2005); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); Jessica Wang, *Imagining the Administrative State: Legal Pragmatism, Securities Regulation, and New Deal Liberalism*, 17 J. POL'Y HIST. 257 (2005); Nicholas S. Zeppos, *The Legal Profession and the Development of Administrative Law*, 72 CHI.-KENT L. REV. 1119 (1997).

administrative process in 1941, found little evidence of actual unfairness, its members were concerned with the damage that the perception of unfairness did to administrative governance. Their recommendations, then, sought to give the examiners less opportunity to engage in potentially lawless behavior. The Attorney General's Committee also questioned the examiners' skills and expertise, and offered other recommendations aimed at making the examiners more capable and giving them a larger role in the decision-making process. The work of the Attorney General's Committee significantly influenced the Administrative Procedure Act of 1946 (APA), which moved to improve the examiners at the same time it constrained their discretion by formalizing the initial hearings and removing the agency's (presumably pernicious) influence on examiners. Such reforms, many hoped, would make it more difficult for examiners to simply impose their own (or the agency head's) preferences on the proceedings.

Debates about the capacity, fairness, and independence of examiners continued under the APA. In 1951, the Supreme Court held in *Universal Camera v. NLRB* that, while agencies and reviewing courts should take examiners' reports seriously, their reports did not bind agency heads.<sup>3</sup> However improved the examiners might be, the APA had not fundamentally transformed examiners' relationship to their agencies. Efforts to implement the hearing examiner provisions of the APA also raised questions about the fairness and capacity of those already serving as examiners. Although conservative lawyers were dubious about both, expertise trumped charges of bias when almost all of the examiners were ultimately (and controversially) reappointed to their positions.

By the 1950s, fairness—especially the fairness of the initial hearing—was no longer the most common concern about the agencies, as it became increasingly clear that the administrative process involved more than just the examiners and their fact-finding hearings. In light of new criticisms of agency capture, slowness, and corruption, reformers seeking fairness by making examiners more independent and adding more steps to the process were unconvincing. Agency processes and agency heads were the problem, not the examiners (who seemed the most professional of the lot). The developments in administrative law thus indicate the extent

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<sup>3</sup> *Universal Camera v. NLRB*, 340 U.S. 474 (1951).

to which, during the first few decades after the New Deal, both supporters and opponents of the administrative process projected their hopes and fears onto the examiners. As these changed, so too did proposals for administrative reform. For several decades, examiner independence was inextricable from fairness (the debate over professionalization was yet to come).

## II. CRITICISM OF THE AGENCIES IN THE POST-NEW DEAL ERA

During the 1930s, rumors of bureaucrats' bias and lawlessness flourished. Although the constitutionality of New Deal programs was no longer in question by 1937 and a rich case law defined the boundaries of administrative due process,<sup>4</sup> questions

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<sup>4</sup> See, e.g., H.R. DOC. NO. 78-678, BD. OF INVESTIGATION AND RESEARCH, 78TH CONG., REPORT ON PRACTICES AND PROCEDURES OF GOVERNMENTAL CONTROL (2d Sess. 1944); JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960), in U.S. Congress, Senate Judiciary Committee, Subcommittee on Administrative Practice and Procedure, Committee Print, 86th Cong., 2d Sess.), available at [http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1960/1960\\_1221\\_Landis\\_report.pdf](http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1960/1960_1221_Landis_report.pdf); A SELECTION OF CASES UNDER THE INTERSTATE COMMERCE ACT (Felix Frankfurter, ed., 2d ed. 1922); ERNST FREUND ET AL., THE GROWTH OF AMERICAN ADMINISTRATIVE LAW (1923); A. A. Berle, Jr., *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430 (1917); JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES (1927); GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE (1924); LOWI, *supra* note 2; ISAIAH LEO SHARFMAN, THE INTERSTATE COMMERCE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE (1931–1937); Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614 (1927); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011); Roscoe Pound, *The Growth of Administrative Justice*, 2 WIS. L. REV. 321 (1924); Robert L. Rabin, *supra* note 2, at 1320; Schiller, *Enlarging the Administrative Polity*, *supra* note 2; Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565 (2011). Daniel Ernst has coined the term “procedural Diceyism” to describe the phenomenon in which courts “accorded administrators a great deal of freedom from judicial oversight, as long as they handled disputes in ways that mimicked the courts.” Daniel Ernst, *Morgan and the New Dealers*, 20 J. POL’Y HIST. 447, 449 (2008) [hereinafter Ernst, *Morgan and the New Dealers*]. See also Daniel R. Ernst, *The Politics of Administrative Law: New York’s Anti-Bureaucracy Clause and the O’Brian–Wagner Campaign of 1938*, 27 LAW & HIST. REV. 331 (2009) [hereinafter Ernst, *The Politics of Administrative Law*].

remained about the agencies and commissions that administered federal programs. The departments, bureaus, agencies, and commissions that complicated the federal organizational chart remained an easy political target for lawyers and politicians motivated not just by anti-New Deal animus, but also concerns about federal spending and centralized power that indicated a very real discomfort with the changing nature of governance.<sup>5</sup> Concerns about subversion were also present; as one lawyer plaintively inquired in 1940: “Is the Administrative Process a Fifth Column?”<sup>6</sup>

One of the most common complaints concerned the fairness of the formal, quasi-judicial hearings that occurred in the small number of licensing, rate-making, or enforcement cases not resolved informally. These proceedings were targeted far out of proportion to their frequency, largely because they both resembled and sharply diverged from the courtroom model through which property rights were more commonly adjudicated.<sup>7</sup> In these initial fact-finding hearings, “hearing examiners” heard testimony, received evidence, and drafted nonbinding initial reports to be used by commissioners and agency heads issuing final orders.<sup>8</sup> Practices varied, but often the examiner was the agency staffer who had handled the case since

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<sup>5</sup> JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976); JONATHAN BELL, *THE LIBERAL STATE ON TRIAL: THE COLD WAR AND AMERICAN POLITICS IN THE TRUMAN YEARS* (2004); DAVID CIEPLEY, *LIBERALISM IN THE SHADOW OF TOTALITARIANISM* (2006); THOMAS I. EMERSON, *YOUNG LAWYER FOR THE NEW DEAL: AN INSIDER’S MEMOIR OF THE ROOSEVELT YEARS* (Joan P. Emerson ed., 1991); Joanna L. Grisinger, *Law and the Administrative State*, in *A COMPANION TO AMERICAN LEGAL HISTORY* (Sally E. Hadden & Alfred L. Brophy eds., 2012); Ellis W. Hawley, *The New Deal State and the Anti-Bureaucratic Tradition*, in *THE NEW DEAL AND ITS LEGACY: CRITIQUE AND REAPPRAISAL 77* (Robert Eden ed., 1989); PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982); BARRY D. KARL, *THE UNEASY STATE: THE UNITED STATES FROM 1915 TO 1945* (1983); ANNE MIRA KORNHAUSER, *SAVING LIBERALISM: POLITICAL IMAGINATION IN THE AMERICAN CENTURY* (2004); RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* (1995); White, *supra* note 2; Marver H. Bernstein, *The Politics of Adjudication*, 16 *J. POL.* 299 (1954); Ronald A. Cass, *supra* note 2, at 364; Ernst, *The Politics of Administrative Law*, *supra* note 4; Ralph F. Fuchs, *Symposium on Administrative Law*, 9 *AM. L. SCH. REV.* 139, 139 (1939); Barry D. Karl, *Constitution and Central Planning: The Third New Deal Revisited*, *SUP. CT. REV.*, 1988, at 163.

<sup>6</sup> Samuel Kaufman, *Is the Administrative Process a Fifth Column?*, 6 *J. MARSHALL L. Q.* 1 (1940).

<sup>7</sup> GRISINGER, *UNWIELDY*, *supra* note 1, at 20.

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



the initial complaint was filed.<sup>9</sup> In some agencies, due to agency preference, the complexity of the case, or budget constraints, a single examiner might both conduct the hearing and represent the agency's views.<sup>10</sup> Before and after a hearing, examiners might consult with other agency employees about the case in question, and, during the hearing, examiners often questioned parties and witnesses themselves in an effort to improve the record.<sup>11</sup>

Although these practices were designed to maximize the agency's institutional expertise, they also gave rise to criticism that these agency officials were abusing their power, tilting the proceedings toward their agency and against the private parties before them.<sup>12</sup> Among the loudest critics was the American Bar Association (ABA), the traditionally conservative lawyers' organization whose members balked at the combination of investigation, prosecution, and adjudication functions in administrative hearings.<sup>13</sup> ABA Special Committee on Administrative Law chairman Roscoe Pound famously denounced the lawlessness of the administrative process in the committee's 1938 report, characterizing agency governance as "administrative absolutism," inconsistent with due process and the rule of law.<sup>14</sup> Taking for granted that the administrative process was deficient and not nearly enough like that of courts, the ABA sought to restrain examiners' discretion and reform the initial hearing.<sup>15</sup>

Revelations about the United States Department of Agriculture's (USDA) practices provided ammunition for critics skeptical of agency decision-making. In the Supreme Court's 1938 decision in *Morgan v. United States*, the Court concluded that the USDA, in issuing a 1933 order fixing maximum rates for the sale of

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 21.

<sup>11</sup> *Id.*

<sup>12</sup> Chester T. Lane, Book Review, 54 COLUM. L. REV. 1008, 1011 (1954) (reviewing LLOYD D. MUSOLF, *FEDERAL EXAMINERS AND THE CONFLICT OF LAW AND ADMINISTRATION* (1953)).

<sup>13</sup> For more on the ABA's proposals, see Brazier, *supra* note 2; Shepherd, *supra* note 2.

<sup>14</sup> *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 343 (1938).

<sup>15</sup> *See supra* note 13.

livestock in the Kansas City Stock Yards, had not played fair.<sup>16</sup> USDA staffers had enjoyed easy access to the Secretary of Agriculture, but, without an examiner's report processing some 10,000 pages of testimony and 1000 pages of exhibits produced during the initial hearing, and without an opportunity for a useful oral argument before the secretary, the stockmen's agents had been essentially shut out of the decision-making process.<sup>17</sup> The Court rejected the idea that the Secretary could adopt "the findings which have been prepared by the active prosecutors for the Government, after an ex parte discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them."<sup>18</sup> Such an obvious preference for one side over the other failed to provide adequate due process to the regulated parties.<sup>19</sup>

Additional criticisms were lobbed by members of Congress concerned about the uncontrolled authority of administrative officials.<sup>20</sup> Many of the charges of administrative unfairness focused on the National Labor Relations Board (NLRB), where, if critics were to be believed, the vast majority of examiners were unfairly

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<sup>16</sup> *Morgan v. United States*, 304 U.S. 1 (1938). See JAMES HART, AN INTRODUCTION TO ADMINISTRATIVE LAW, WITH SELECTED CASES (2d ed. 1950); A. H. Feller, *Prospectus for the Further Study of Federal Administrative Law*, 47 YALE L.J. 647 (1938); Kenneth C. Sears, *The Morgan Case and Administrative Procedure*, 7 GEO. WASH. L. REV. 726 (1939); Frank J. Dugan, Note, *A New Administrative Landmark*, 27 GEO. L.J. 351 (1939); Irving Allan Lore, *Recent Case*, 12 WIS. L. REV. 245 (1937); Joseph Wise, Editorial Note, *Morgan v. United States: Administrative Hearing*, 12 U. CIN. L. REV. 598 (1938); Note, *Aftermath of the Morgan Decisions*, 25 IOWA L. REV. 622, 622-38 (1940); Note, *Judicial Control of Administrative Procedure: The Morgan Cases*, 52 HARV. L. REV. 509 (1939); Note, *Implications of the Second Morgan Decision*, 33 ILL. L. REV. 227 (1938); *Recent Decisions*, 36 COLUM. L. REV. 1156 (1936); *Recent Case*, 7 GEO. WASH. L. REV. 110 (1938); *Recent Case*, 5 GEO. WASH. L. REV. 119 (1936); *Recent Case Note*, 14 IND. L.J. 164 (1938); *Recent Decision*, 13 ST. JOHN'S L. REV. 138 (1938); see also Daniel J. Gifford, *The Morgan Cases: A Retrospective View*, 30 ADMIN. L. REV. 237 (1978).

<sup>17</sup> *Morgan*, 304 U.S. at 16-18.

<sup>18</sup> *Id.* at 22; see also Ernst, *Morgan and the New Dealers*, *supra* note 4; Tushnet, *supra* note 4. The Court excoriated a state public utilities commission for taking the idea of judicial notice too far a year earlier in *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937).

<sup>19</sup> GRISINGER, UNWIELDY, *supra* note 1, at 22.

<sup>20</sup> *Id.* at 24.

biased.<sup>21</sup> Some of the loudest attacks on the NLRB came from conservative Virginia Democrat Howard W. Smith, who launched a special investigation into whether the board was abusing its authority.<sup>22</sup> During hearings in 1939 and 1940, the Smith Committee called out NLRB officials for incompetence, unethical behavior, and radical political beliefs.<sup>23</sup> Among other criticisms, the Smith Committee lambasted the NLRB's initial hearing procedures and examiners' practice of conferring with other board employees before, during, and after formal hearings.<sup>24</sup> In addition, members criticized the NLRB's review attorneys, who essentially served as middlemen at the board.<sup>25</sup> These "juvenile jurists" (so described by one hostile observer) handled the cases after the examiners had completed their work; review attorneys reviewed the hearing transcripts and the examiners' reports and presented cases to the board.<sup>26</sup> This meant,

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<sup>21</sup> For discussions of this critique of the NLRB, see Harold W. Davey, *Separation of Functions and the National Labor Relations Board*, 7 U. CHI. L. REV. 328 (1940); Charles Fahy, *The Preparation and Trial of Cases Before the National Labor Relations Board*, 25 A.B.A. J. 695 (1939); Walter Gellhorn & Seymour L. Linfield, *Politics and Labor Relations: An Appraisal of Criticisms of NLRB Procedure*, 39 COLUM. L. REV. 339 (1939); J. Warren Madden, *Administrative Procedure: National Labor Relations Board*, 45 W. VA. L. Q. 93 (1939) [hereinafter Madden, *Administrative Procedure*]; J. Warren Madden, *The National Labor Relations Act and Its Administration*, 18 TENN. L. REV. 127 (1943) [hereinafter Madden, *The National Labor Relations Act*]. See also Seymour Scher, *The Politics of Agency Organization*, 15 W. POL. Q. 328 (1962). For scholarly studies of the NLRB in this period, see JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW, 1933–1937* (1974) [hereinafter GROSS, *THE MAKING*]; JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION, 1937–1947* (1981) [hereinafter GROSS, *THE RESHAPING*]; IRONS, *supra* note 5; CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960* (1985).

<sup>22</sup> BRUCE J. DIERENFIELD, *KEEPER OF THE RULES: CONGRESSMAN HOWARD W. SMITH OF VIRGINIA* (1987); GROSS, *THE RESHAPING*, *supra* note 21.

<sup>23</sup> See H.R. 1902, H. SPECIAL COMM. TO INVESTIGATE THE NAT'L LABOR RELATIONS BD., 76TH CONG., REPORT ON THE INVESTIGATION OF THE NATIONAL LABOR RELATIONS BOARD, INTERMEDIATE REPORT 36 (3d Sess. 1940) [hereinafter INVESTIGATION OF THE NATIONAL LABOR RELATIONS BOARD].

<sup>24</sup> *Id.* at 45; see GRISINGER, *UNWIELDY*, *supra* note 1, at 24–25.

<sup>25</sup> INVESTIGATION OF THE NATIONAL LABOR RELATIONS BOARD, *supra* note 23, at 45.

<sup>26</sup> Willard Edwards, *Juvenile Jurists*, SATURDAY EVENING POST, Aug. 24, 1940, at 29.

the Smith Committee alleged, that the review attorneys, reputed to be among the most radical at the NLRB, could and did slant cases according to their own questionable political sympathies.<sup>27</sup>

Defenders of the administrative process argued that this conflation of roles at the NLRB and elsewhere was less problematic than it might appear.<sup>28</sup> Whereas judges played an active role in hearing testimony and determining the credibility of witnesses, examiners were more typically presented with masses of depositions, statistics, and other documentary evidence about which there was little controversy.<sup>29</sup> Thus, unlike adversarial trials, administrative hearings were an opportunity for parties to discuss the legal and policy implications of uncontested facts with an examiner familiar with the agency's policies.<sup>30</sup> Even at the NLRB, where the facts were often in dispute, supporters argued that the examples complained about were mostly routine and unproblematic examples of the administrative process at work.<sup>31</sup> A 1940 study of the Attorney General's Committee on Administrative Procedure reported that the NLRB had in fact gone to some trouble to keep their examiners as independent as possible, appointing separate trial attorneys to represent the NLRB during its hearings and keeping the two groups of attorneys apart.<sup>32</sup> The blame, some carefully suggested, lay instead with employers hostile to regulation.<sup>33</sup> The 1938 *Weirton Steel* case illustrated the challenges for NLRB

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<sup>27</sup> INVESTIGATION OF THE NATIONAL LABOR RELATIONS BOARD, *supra* note 23, at 141–47; GROSS, THE RESHAPING, *supra* note 21.

<sup>28</sup> GRISINGER, UNWIELDY, *supra* note 1, at 21.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 20.

<sup>32</sup> ATTORNEY GENERAL'S COMM. ON ADMIN. PROCEDURE, MONOGRAPH NO. 18, NATIONAL LABOR RELATIONS BOARD 35 (1940). As of 1939, according to Gellhorn and Linfield, "In only one instance has the Board ordered a new hearing because of what it found to be improper and prejudicial rulings by the presiding Trial Examiner." Gellhorn & Linfield, *supra* note 21, at 360 n.57. See also GROSS, THE MAKING, *supra* note 21; HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT–HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS (1950); Joanna Grisinger, *Law in Action: The Attorney General's Committee on Administrative Procedure*, 20 J. POL'Y HIST. 379 (2008).

<sup>33</sup> Gellhorn & Linfield, *supra* note 21; Madden, *The National Labor Relations Act*, *supra* note 21.

examiners facing hostile employers.<sup>34</sup> The examiner called out the steel company's counsel for his "defiant, contemptuous and contumacious conduct" at the hearing, during which, according to the NLRB, counsel pursued "a calculated attempt to wrest control of the hearing" from the NLRB examiner.<sup>35</sup> When, based on these antics, the examiner expelled the attorney from the hearing, a local crowd in Steubenville, Ohio, organized a demonstration and hung the examiner in effigy.<sup>36</sup>

Defenders also pointed to a wealth of judicial decisions in which such administrative practices had been deemed fair, or at least held to provide minimum constitutional standards of due process.<sup>37</sup> After all, many administrative procedures had developed defensively, as agencies and commissions adopted quasi-judicial procedures to demonstrate to reviewing courts that they were not as alien as they might seem.<sup>38</sup> Whereas the Smith Committee charged that the NLRB was "most deplorably biased" toward employees,<sup>39</sup> and parties appealing NLRB orders routinely blamed examiners for deviating from judicial norms, federal judges reviewing administrative hearings generally dismissed claims of unfairness.<sup>40</sup> Weak performances by examiners were embarrassing for the agency but not necessarily ultimately unfair to the parties, and only in a few cases were board members or examiners found so unfair as to convince the reviewing court that the NLRB's decision lacked due process.<sup>41</sup> And given that examiners did not control the final decision, judges typically endorsed agencies' proceedings even when the initial hearing involved practices unlikely to pass muster in the courts.<sup>42</sup> Although

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<sup>34</sup> *In re Weirton Steel Co.*, 8 N.L.R.B. 581 (1938).

<sup>35</sup> *Id.* at 582, 588.

<sup>36</sup> *Id.* at 588-89; *NLRB Will Hear Weirton Lawyer*, N.Y. TIMES, July 14, 1938, at 1; *NLRB v. Weirton Steel Co.*, 135 F.2d 494 (3d Cir. 1943).

<sup>37</sup> *See infra* note 42.

<sup>38</sup> GRISINGER, UNWIELDY, *supra* note 1, at 28.

<sup>39</sup> INVESTIGATION OF THE NATIONAL LABOR RELATIONS BOARD, *supra* note 23, at pt.1, 149.

<sup>40</sup> GRISINGER, UNWIELDY, *supra* note 1, at 28.

<sup>41</sup> *See* *Donnelly Garment Co. v. NLRB*, 151 F.2d 854 (8th Cir. 1945); *NLRB v. Phelps*, 136 F.2d 562 (5th Cir. 1943); *Berkshire Emps. Ass'n v. NLRB*, 121 F.2d 235 (3d Cir. 1941); *NLRB v. Wash. Dehydrated Food Co.*, 118 F.2d 980 (9th Cir. 1941); *Inland Steel Co. v. NLRB*, 109 F.2d 9 (7th Cir. 1940); *Montgomery Ward & Co. v. NLRB*, 103 F.2d 147 (8th Cir. 1939).

<sup>42</sup> For cases finding that the NLRB had provided a fair hearing, see *NLRB v. Bradford Dyeing Ass'n*, 310 U.S. 318 (1940); *Consol. Edison Co. v. NLRB*, 305

most judges were already convinced that “different” did not necessarily mean “unfair” when it came to administrative procedure, they were not the only ones who needed convincing.<sup>43</sup> Defenders

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U.S. 197 (1938); *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 45 (3d Cir. 1942); *NLRB v. Air Assocs., Inc.*, 121 F.2d 586 (2d Cir. 1941); *Press Co. v. NLRB*, 118 F.2d 937 (D.C. Cir. 1940); *NLRB v. Ford Motor Co.*, 114 F.2d 905 (6th Cir. 1940); *Consumers Power Co. v. NLRB*, 113 F.2d 38 (6th Cir. 1940); *Cont'l Box Co. v. NLRB*, 113 F.2d 93 (5th Cir. 1940); *Subin v. NLRB*, 112 F.2d 326 (3d Cir. 1940); *Cupples Co. Mfrs. v. NLRB*, 106 F.2d 100, 113 (8th Cir. 1939); *NLRB v. Stackpole Carbon Co.*, 105 F.2d 167, 177 (3rd Cir. 1939); *Jefferson Electric Co. v. NLRB*, 102 F.2d 949 (7th Cir. 1939); *NLRB v. Remington Rand, Inc.*, 94 F.2d 862 (2d Cir. 1938). *See also* Gellhorn & Linfield, *supra* note 21.

<sup>43</sup> Many administrative procedures had developed defensively, as agencies and commissions adopted quasi-judicial procedures to demonstrate to reviewing courts that they were not as alien as they might seem. *See* BD. OF INVESTIGATION & RESEARCH, REPORT ON PRACTICES AND PROCEDURES OF GOVERNMENTAL CONTROL, 78th Cong., H.R. DOC. NO. 78-678 (2d Sess. 1944); Bernstein, *supra* note 5, at 317–18; LANDIS, *supra* note 4. Courts generally upheld agency orders when the sufficiency of the facts was in question. The central question of administrative law in earlier decades was whether courts or agencies should have the final say over administrative decision-making. Although courts proved initially unwilling to defer to administrators, by the early 1930s courts had developed doctrines allowing them to review agencies' application of law but defer to their fact-finding. Federal courts held most agencies to this standard (for example, interpreting language that facts would be conclusive if “supported by evidence” to mean that “substantial evidence” was indeed required). *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206 (1940); *Consol. Edison Co. v. NLRB*, 305 U.S. 197 (1938); *Wash., Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937); *FTC v. Curtis Publ'g Co.*, 260 U.S. 568 (1923). For studies of the development of the “substantial evidence” standard, see WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* (1982); ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* (1941); J. ROLAND PENNOCK, *ADMINISTRATION AND THE RULE OF LAW* (1941); ARI ARTHUR HOOGENBOOM & OLIVE HOOGENBOOM, *A HISTORY OF THE ICC: FROM PANACEA TO PALLIATIVE* (1976); CARL MCFARLAND, *JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION, 1920–1930* (1933); SALYER, *supra* note 2; RICHARD D. STONE, *THE INTERSTATE COMMERCE COMMISSION AND THE RAILROAD INDUSTRY: A HISTORY OF REGULATORY POLICY* (1991); White, *supra* note 2; Rabin, *supra* note 2; E. Blythe Stason, “*Substantial Evidence*” in *Administrative Law*, 89 U. PA. L. REV. 1026 (1941); Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70 (1944); Stewart, *supra* note 2 (1975); Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258 (1978); Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197 (1991).

touted their agencies' legal legitimacy,<sup>44</sup> but political legitimacy had not necessarily followed.

Indeed, critics continued to complain about administrative misconduct during the 1930s and 1940s, and, led by the ABA, pushed for reform that would bring the administrative state to heel.<sup>45</sup> Their proposed code, introduced into Congress in 1939 by Representative Francis Walter (D-Pennsylvania) and Senator Marvel Mills Logan (D-Kentucky), found the administrative process was not nearly enough like the judicial one, and the examiners not nearly enough like judges. In response to these concerns, the ABA proposed additional opportunities for both administrators and courts to review administrative decisions. Parties could seek review by: (1) new review boards to be created within each agency, ensuring an appeal from unfair examiners before the agency's decision became final; *and* (2) by federal courts with expanded powers of review, ensuring an appeal from the agency itself.<sup>46</sup> Committees in each house of Congress reported favorably on the Walter–Logan Bill,

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<sup>44</sup> Clyde B. Aitchison, *Reforming the Administrative Process*, 7 GEO. WASH. L. REV. 703 (1939); Fahy, *supra* note 18; Robert E. Freer, *Federal Trade Commission Procedure*, 26 A.B.A. J. 342 (1940); R. E. Freer, *Practice Before the Federal Trade Commission*, 7 GEO. WASH. L. REV. 283 (1939); Gellhorn & Linfield, *supra* note 21; Grisinger, *supra* note 32; Chester T. Lane & Robert M. Blair-Smith, *The SEC and the "Expeditious Settlement of Disputes,"* 34 ILL. L. REV. 699 (1940); Madden, *Administrative Procedure*, *supra* note 21; Madden, *The National Labor Relations Act*, *supra* note 21; Calvert Magruder, *Administrative Procedures Under the Fair Labor Standards Act*, 25 A.B.A. J. 688 (1939); Ashley Sellers, *Administrative Procedure—A Suggested Classification of Procedures of Regulatory Agencies in the United States Department of Agriculture*, 25 WASH. U. L. Q. 352 (1940); Benedict Wolf, *Administrative Procedure Before the National Labor Relations Board*, 5 U. CHI. L. REV. 358 (1938).

<sup>45</sup> GRISINGER, UNWIELDY, *supra* note 1, at 62.

<sup>46</sup> On the Walter–Logan Bill, see Louis L. Jaffe, *Invective and Investigation in Administrative Law*, 52 HARV. L. REV. 1201 (1939); Breck P. McAllister, *Administrative Adjudication and Judicial Review*, 34 ILL. L. REV. 680, 691 (1940). See also HORWITZ, *supra* note 2; SHAMIR, *supra* note 5; Brazier, *supra* note 2; Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986); Walter Gellhorn & Kenneth Culp Davis, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511 (1986); Kaufman, *supra* note 6; James M. Landis, *Crucial Issues in Administrative Law: The Walter-Logan Bill*, 53 HARV. L. REV. 1077 (1940); Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999); David H. Rosenbloom, *1946: Framing a Lasting Congressional Response to the Administrative State*, 50 ADMIN. L. REV. 173 (1998); Shepherd, *supra* note 2; Verkuil, *supra* note 43; Zeppos, *supra* note 2.

suggesting the bill would rein in overzealous bureaucrats whom, the House Judiciary Committee warned, “become contemptuous of both the Congress and the courts; disregardful of the rights of the governed; and for lack of sufficient legal control over them a few develop Messiah complexes.”<sup>47</sup>

Not surprisingly, agencies and their defenders fiercely resisted, arguing that turning all adjudications into formal adjudications and adding additional steps to the decision-making process would slow down the administrative process significantly.<sup>48</sup> Indeed, opponents argued that the bill was *intended* to hinder the administration of substantive New Deal policies, and a *New York Post* editorial, entitled *A Dull but Dangerous Bill*, called the Walter–Logan Bill “the most subtle attack yet planned on all the social reforms of the past seven years.”<sup>49</sup>

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<sup>47</sup> H. JUDICIARY COMM., PROVIDING FOR THE MORE EXPEDITIOUS SETTLEMENT OF DISPUTES WITH THE UNITED STATES AND FOR OTHER PURPOSES, 76th Cong., H.R. REP. NO. 76-1149, at 2 (1st Sess. 1939).

<sup>48</sup> Mortimer Reimer, Letter to the editor, N.Y. TIMES, June 14, 1939, at 22; *see also* REPORT OF THE COMMITTEE ON ADMINISTRATIVE LAW OF THE NATIONAL LAWYERS’ GUILD (1939), Folder “National Lawyers Guild,” Box 9, A.G. Committee Correspondence, Entry 376, Records of the Attorney General’s Committee on Administrative Procedure (AGCAP), General Records of the Department of Justice, Record Group (RG) 60, National Archives & Records Administration, College Park, MD (NACP); Landis, *supra* note 46; John Foster Dulles, Administrative Law, Address at Langdell Hall, Cambridge 5 (Jan. 14, 1939).

<sup>49</sup> Samuel Grafton, *A Dull but Dangerous Bill*, ST. LOUIS POST DISPATCH, Feb. 7, 1940, *reprinted from [originally in]* N.Y. POST, Folder “Legislation—Administrative Procedure Bills Statements & Articles,” Box 8, A.G. Committee Correspondence, Entry 376, AGCAP, RG 60, NACP.



III. THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE  
PROCEDURE

Even as Congress considered the Walter–Logan Bill (which ultimately was vetoed by President Roosevelt in December 1940), President Roosevelt asked Attorney General Frank Murphy to lead a new study of federal administrative procedure.<sup>50</sup> The Attorney General's Committee on Administrative Procedure was staffed with prominent attorneys, several of whom—including Solicitor General Robert H. Jackson, former Assistant Attorney General Carl McFarland, former Undersecretary of the Treasury Dean Acheson, and former NLRB chairman Lloyd Garrison—had significant administrative experience.<sup>51</sup> The committee and its staff worked closely with agencies and practitioners as they compiled twenty-seven monographs, each describing the operations and procedures of individual agencies, bureaus, and departments, and published a lengthy final report, issued in January 1941.<sup>52</sup> (Carl McFarland, E. Blythe Stason, dean of the University of Michigan School of Law, and Arthur T. Vanderbilt, a legal reformer and a past president of the ABA, issued a separate joint statement disagreeing with several of the majority's points. D. Lawrence Groner, chief judge of the U.S. Court of Appeals for the District of Columbia, offered another.)

The Attorney General's Committee found scant evidence of malfeasance by examiners and rebuked claims of lawlessness by demonstrating the wealth of multistep procedures for hearings and appeals throughout the administrative process.<sup>53</sup> Their reports did demonstrate that most “formal” hearings were in fact relatively informal when compared to courts; parties confronted administrative officials not in formal courtrooms but in the agencies' own offices, in

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<sup>50</sup> Letter from President Roosevelt to Attorney General Frank Murphy (Feb. 16, 1939), *reprinted in* ATTORNEY GENERAL'S COMM. ON ADMIN. PROCEDURE, FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 252 (1st Sess. 1941).

<sup>51</sup> GRISINGER, UNWIELDY, *supra* note 1, at 66.

<sup>52</sup> *See also* COMM. ON ADMIN. PROCEDURE, MONOGRAPHS OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 76-186 (3d Sess. 1940); S. DOC. NO. 77-8.

<sup>53</sup> S. DOC. NO. 77-8. For more on the Attorney General's Committee, see ROHR, *supra* note 2; Brazier, *supra* note 2; Grisinger, *supra* note 32; Shepherd, *supra* note 2.

space borrowed from other agencies, or in the field.<sup>54</sup> At the Federal Alcohol Administration, for example, agency representatives maintained friendly relationships with parties; they “often address each other by their given names when off the record, and frequently indulge in bits of facetious asides.”<sup>55</sup> Practices were so informal that the parties and the examiners often smoked during the hearings, and agency officials even “occasionally remove[d] their coats”—weather permitting.<sup>56</sup> Surveying these varying models, the committee suggested that such informality was not ideal, but became a problem only when parties lost respect for the examiners and for the hearing process.<sup>57</sup> As the members argued, “fairness does not require a particular form of hearing procedure. It does require an open and fair atmosphere and a receptive presiding officer.”<sup>58</sup>

The controversial figure of the hearing examiner thus received considerable attention. In response to critics worried that communication between examiners and other agency staffers influenced examiners’ decisions, the committee reported that many of the more controversial and more powerful agencies, including the Securities and Exchange Commission and the NLRB, already went to some lengths to insulate their personnel.<sup>59</sup> The Labor Department’s Division of Public Contracts, for example, separated its examiners and trial attorneys during travel, even “in places boasting only one reasonably comfortable hostelry.”<sup>60</sup> In other agencies, the Attorney General’s Committee found that having the examiners fully involved in agency business was unproblematic; at the Federal Communications Commission (FCC), it had led to “increasingly intelligent records.”<sup>61</sup> And the USDA’s Grain Division had ended its

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<sup>54</sup> See S. DOC. NO. 77-8.

<sup>55</sup> ATTORNEY GENERAL’S COMM. ON ADMIN. PROCEDURE, MONOGRAPH NO. 5, FEDERAL ALCOHOL ADMINISTRATION 40 (1940).

<sup>56</sup> *Id.*

<sup>57</sup> See S. DOC. NO. 77-8, at 69.

<sup>58</sup> *Id.* at 68.

<sup>59</sup> GRISINGER, UNWIELDY, *supra* note 1, at 69.

<sup>60</sup> ATTORNEY GENERAL’S COMM. ON ADMIN. PROCEDURE, MONOGRAPH NO. 1, DIVISION OF PUBLIC CONTRACTS, DEPARTMENT OF LABOR, THE WALSH-HEALEY ACT 31 (1939).

<sup>61</sup> ATTORNEY GENERAL’S COMM. ON ADMIN. PROCEDURE, MONOGRAPH NO. 3, FEDERAL COMMUNICATIONS COMMISSION 23 (1940). The Federal Communications Bar Association, however, questioned this and other staff observations. See SPEC. COMM. OF THE FED. COMM’NS BAR ASS’N, REPORT TO THE EXECUTIVE COMMITTEE 8-9 (May 9, 1940), Folder “Attorney General’s

practice of using one examiner to conduct the hearing and another to represent the division in proceedings regarding grain quality misrepresentation “because of gibes at the Department for using two men where one would suffice.”<sup>62</sup> As the Attorney General’s Committee staff reported, “The ‘judge-prosecutor’ complex, beloved of lawyers, apparently impresses the grain trade very little if at all.”<sup>63</sup>

Members recognized, however, that even unfounded charges of bias were harmful to an agency’s reputation.<sup>64</sup> They concluded that formal hearings must be designed with an eye toward reassuring the parties before them that the agency’s decision was unbiased.<sup>65</sup> Thus, the committee suggested that all agencies fully segregate prosecution and adjudication functions.<sup>66</sup> The examiners in each agency would be hired by an external process, isolated from cases before and after the hearing process, and barred from performing other administrative tasks.<sup>67</sup> Four members of the committee—Carl McFarland, Blythe Stason, Arthur Vanderbilt, and Judge D. Lawrence Groner—recommended in a separate statement that the process of adjudication (and the examiners themselves) be moved entirely outside the agencies, to an independent board.<sup>68</sup>

The Attorney General’s Committee was also concerned with examiners’ capacity, having found that the ideal of expert examiners contrasted sharply with the reality of passive and ineffective ones.<sup>69</sup> Ideally, an examiner’s report would contain the examiner’s factual findings and tentative recommendations to the agency heads.<sup>70</sup> However, as Acheson observed, “in almost every agency that we have dealt with that had examiners we have run into the decay of the

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Committee on Administrative Procedure, 1939–1941: General [2 of 4],” Box 2, Dean G. Acheson Papers, Harry S. Truman Presidential Library, Independence, MO (HSTL).

<sup>62</sup> ATTORNEY GENERAL’S COMM. ON ADMIN. PROCEDURE, MONOGRAPH NO. 7, THE ADMINISTRATION OF THE GRAIN STANDARDS ACT, DEPARTMENT OF AGRICULTURE 35 (1940).

<sup>63</sup> *Id.*

<sup>64</sup> GRISINGER, UNWIELDY, *supra* note 1, at 68.

<sup>65</sup> ATTORNEY GENERAL’S COMM. ON ADMIN. PROCEDURE, FINAL REPORT OF ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 68 (1st Sess. 1941).

<sup>66</sup> GRISINGER, UNWIELDY, *supra* note 1, at 70.

<sup>67</sup> *Id.*

<sup>68</sup> *See* S. DOC. NO. 77-8, at 209.

<sup>69</sup> GRISINGER, UNWIELDY, *supra* note 1, at 68.

<sup>70</sup> *Id.*

examiners”; as a result, the initial report “isn’t a report at all, it is just a sort of summary of some of the evidence.”<sup>71</sup> Even when examiners did reach conclusions, there was no guarantee of their accuracy.<sup>72</sup> Although the Interstate Commerce Commission (ICC) accepted examiners’ recommendations in approximately eight-five percent of the cases, the FCC had decided to abolish examiners’ reports entirely once it found that commissioners disagreed with examiners in over half the cases.<sup>73</sup>

The Attorney General’s Committee thus recommended improving the examiner corps by offering lawyers higher wages, fixed terms with removal only for cause, and the more impressive title of “hearing commissioners.”<sup>74</sup> As the committee concluded, once examiners’ work could “carry a hallmark of fairness and capacity,” then “a great part of the criticisms of administrative agencies will have been met.”<sup>75</sup> These new hearing commissioners would, Attorney General’s Committee members assumed, be able to draft more useful reports; thus, the committee recommended that agency heads defer to hearing commissioners’ fact finding unless they found clear error.<sup>76</sup> In this sense, hearing commissioners *were* to become more like trial judges; as the committee stated, “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.”<sup>77</sup> However, the committee was quick to emphasize that the ultimate decision in any case always remained with the agency heads, and “[c]onclusions, interpretations, law, and policy should, of course, be open to full review” by the agency.<sup>78</sup>

#### IV. THE ADMINISTRATIVE PROCEDURE ACT OF 1946

Political pressure on Congress to do *something* about the agencies only increased in following years, especially as the wartime

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<sup>71</sup> Dean G. Acheson, Transcript of the Conference of the Attorney General’s Committee, 43 (Feb. 24, 1940), Folder “Committee Meeting Feb. 24th & 25th,” Box 4, A.G. Committee Correspondence, Entry 376, AGCAP, RG 60, NACP.

<sup>72</sup> GRISINGER, UNWIELDY, *supra* note 1, at 69.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> S. DOC. NO. 77-8, at 43–44.

<sup>76</sup> GRISINGER, UNWIELDY, *supra* note 1, at 69.

<sup>77</sup> S. DOC. NO. 77-8, at 51.

<sup>78</sup> *Id.*

experience with bureaucracy failed to comfort Americans already suspicious of administration.<sup>79</sup> Bureaucrats at the Office of Price Administration (OPA), in particular, were charged with usurping and abusing power as they exercised their price control and rationing authority.<sup>80</sup> Critics slammed the OPA's "pseudo judiciary" of

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<sup>79</sup> *Report of the Special Committee on Administrative Law*, 68 ANN. REP. A.B.A. 249, 250 (1943). For studies of the OPA and other wartime agencies, see AMY BENTLEY, *EATING FOR VICTORY: FOOD RATIONING AND THE POLITICS OF DOMESTICITY* (1998); JOHN MORTON BLUM, *V WAS FOR VICTORY: POLITICS AND AMERICAN CULTURE DURING WORLD WAR II* (1976); BRINKLEY, *THE END OF REFORM*, *supra* note 2; COHEN, *supra* note 2; Schiller, *Reining in the Administrative State*, *supra* note 2; JACOBS, *supra* note 2; RICHARD POLENBERG, *WAR AND SOCIETY: THE UNITED STATES, 1941-1945* (1972); Andrew H. Bartels, *The Office of Price Administration and the Legacy of the New Deal, 1939-1946*, PUB. HISTORIAN, Summer 1983, at 5.

<sup>80</sup> On the operations of the OPA, see BAR ASS'N OF S.F., COMMITTEE REPORT ON OFFICE OF ADMINISTRATIVE HEARINGS OF THE OFFICE OF PRICE ADMINISTRATION (1943); Harold Leventhal, *Part II: The Role of the Price Lawyers*, in NATHANIEL L. NATHANSON & HAROLD LEVENTHAL, OFFICE OF TEMPORARY CONTROLS, OFFICE OF PRICE ADMIN., PROBLEMS IN PRICE CONTROL: LEGAL PHASES, 49 (1947); HARVEY C. MANSFIELD, A SHORT HISTORY OF OPA (1948); VICTOR A. THOMPSON, THE REGULATORY PROCESS IN OPA RATIONING (1950); OFFICE OF PRICE ADMIN., RATIONING, WHY AND HOW (1942); Joseph W. Aidlin, *The Constitutionality of the 1942 Price Control Act*, 30 CALIF. L. REV. 648 (1942); Chester Bowles, *OPA Volunteers: Big Democracy in Action*, 5 PUB. ADMIN. R. 350 (1945); Arthur L. Brown, *The Office of Administrative Hearings*, 29 CORNELL L.Q. 461 (1944); Samuel D. Estep et al., Comment, 41 MICH. L. REV. 109 (1942); Richard H. Field Jr., *Rationing Suspension Orders: A Reply to Dean Pound*, 30 A.B.A. J. 385 (1944); David Ginsburg, *Legal Aspects of Price Control in the Defense Program*, 27 A.B.A. J. 527 (1941); David Ginsburg, *The Emergency Price Control Act of 1942: Basic Authority and Sanctions*, 9 LAW & CONTEMP. PROBS. 22 (1942); Joseph E. Goodbar, *Administrative Agency in Action*, 25 B.U. L. REV. 185 (1945); Leon Henderson, *A Preface to Price Control*, 9 LAW & CONTEMP. PROBS. 3 (1942); Donald D. Holdoegel, *The War Powers and the Emergency Price Control Act of 1942*, 29 IOWA L. REV. 454 (1944); Elmo B. Hunter, *The Emergency Price Control Act of 1942*, 10 U. KAN. CITY L. REV. 129 (1942); John F. McCarthy, *Aspects of Federal Rent Control*, 31 CORNELL L.Q. 68 (1945); Carl Henry Monsees, *Industry Advisory Committees in the War Agencies*, 3 PUB. ADMIN. R. 254 (1943); Henry S. Reuss, *The Lawyer in the OPA*, 10 AM. L. SCH. REV. 23 (1942); Sylvester C. Smith Jr., *Comment on Mr. Field's Reply for the OPA*, 30 A.B.A. J. 390 (1944); Robert A. Sprecher, *Price Control in the Courts*, 44 COLUM. L. REV. 34 (1944); Charles W. Stewart Jr., *The Emergency Court of Appeals: Interpretation of Procedure and Judicial Review Under the Price Control Act*, 32 GA. L. REV. 42 (1943); William R. Bandy, Comment, *Notice and Opportunity to Be Heard in Price Control Proceedings*, 20 TEX. L. REV. 577 (1942).

hearing commissioners, and attacked the combination of prosecution and judicial powers in their hearings.<sup>81</sup> Here, too, cries of unfairness linked fairness to legality, and framed anti-bureaucratic politics around the need for procedural reform.

The combination of New Deal debates and wartime concerns about the dangers of administrative power were reflected in the Administrative Procedure Act of 1946, the first broad procedural statute for the administrative state.<sup>82</sup> The APA—passed without a recorded vote and signed into law on June 11, 1946—was touted by Senator Pat McCarran as “a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government.”<sup>83</sup> As Kenneth Culp Davis, an active participant in these debates, concluded forty years later, the APA’s “considerable

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For examples of criticism, see *Brand Names and Newsprint, Part 1: Hearings Before the United States House Committee on Interstate and Foreign Commerce, 78th Cong.* (1943); H. COMM. ON INTERSTATE & FOREIGN COMMERCE, 78TH CONG., BRAND NAMES AND NEWSPRINT: INTERIM REPORT OF THE SPECIAL SUBCOMMITTEE ON INVESTIGATION OF RESTRICTIONS ON BRAND NAMES AND NEWSPRINT OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, PT. 1, H.R. REP. NO. 78-808 (1st Sess. 1943); H. SPECIAL COMM. TO INVESTIGATE EXEC. AGENCIES, 78TH CONG., HEARINGS BEFORE THE SPECIAL COMMITTEE TO INVESTIGATE EXECUTIVE AGENCIES, PT. 1 (1st Sess. 1943); H. SELECT COMM. TO INVESTIGATE EXEC. AGENCIES BEYOND THE SCOPE OF THEIR AUTHORITY, 78TH CONG., INVESTIGATING EXECUTIVE AGENCIES, H. REP. 69 (1st Sess. 1943); H. SELECT COMM. TO INVESTIGATE EXEC. AGENCIES, REPORT OF THE SELECT COMMITTEE TO INVESTIGATE EXECUTIVE AGENCIES: SECOND INTERMEDIATE REPORT OF THE SELECT COMMITTEE TO INVESTIGATE EXECUTIVE AGENCIES, H.R. REP. NO. 78-862 (1st Sess. 1943). See also Ralph K. Huitt, *The Congressional Committee: A Case Study*, 48 AM. POL. SCI. REV. 340 (1954).

<sup>81</sup> H.R. REP. NO. 78-862, at 14, 3.

<sup>82</sup> Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 500–596 (2012)). For studies of the APA, see VERKUIL, *supra* note 43; Gellhorn, *supra* note 46; SHAMIR, *supra* note 5; Gellhorn & Davis, *supra* note 46; Shepherd, *supra* note 2; Brazier, *supra* note 2; Zeppos, *supra* note 2; Rosenbloom, *supra* note 46; McCubbins, Noll, & Weingast *supra* note 46.

<sup>83</sup> See *Administrative Procedure Act: Proceedings in the H.R. May 24 and 25, 1956 and Proceedings in the S. of the U.S. March 12 and May 27, 1956 on S.7, S. Judiciary Comm.*, 79th Cong. (1946) [hereinafter *Admin. Procedure Act: Proceedings*] (statement of Sen. Pat McCarran, Mar. 12, 1946), reprinted in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, at 298 (1946), available at [http://www.justice.gov/jmd/ls/legislative\\_histories/pl79-404/proceedings-05-1946.pdf](http://www.justice.gov/jmd/ls/legislative_histories/pl79-404/proceedings-05-1946.pdf).

accomplishment” was in fact “much more political than legal.”<sup>84</sup> Although the ABA and Congress used the act to trumpet the fact that due process had been brought to the administrative state, administrative law professor Bernard Schwartz suggested that the APA “is not revolutionary” but instead “adopts, in large measure, the best existing administrative practice.”<sup>85</sup> In reality, much of the APA was an explicit statement of best practices that effectively indicated Congress’s approval of the administrative state.<sup>86</sup> The ABA had pulled back from the restrictive approach it espoused in the Walter–Logan Bill;<sup>87</sup> indeed, the APA was intentionally broad and flexible, and was designed to encompass the vast variation in administrative tasks and methods.<sup>88</sup> Carl McFarland described it to Congress as a “skeleton, upon which administrative agencies may adopt their own rules of procedure”;<sup>89</sup> the Senate Judiciary Committee similarly described it as “an outline of minimum basic essentials” rather than a prescriptive code.<sup>90</sup> As one observer noted, some critics were disappointed that the APA was “a gentle slap on the bureaucratic wrist when they would prefer a kick in the bureaucratic buttock.”<sup>91</sup>

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<sup>84</sup> Gellhorn & Davis, *supra* note 46, at 518. Marver Bernstein agreed, remarking in 1954 that the APA was “more important for its political implications than for its specific procedural requirements and definitions.” Bernstein, *supra* note 5, at 304. See also HOLDEN JR., *supra* note 2; MILLIS & BROWN, *supra* note 32, at 63–64; MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION (1988); White, *supra* note 2, at 94–127; Verkuil, *supra* note 43; Rabin, *supra* note 2; Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447 (1986).

<sup>85</sup> Bernard Schwartz, *Administrative Procedure and the A.P.A.*, 24 N.Y.U. L. Q. REV. 514, 514 (1949).

<sup>86</sup> See Ashley Sellers, *Carl McFarland—The Architect of the Federal Administrative Procedure Act*, VA. J. INT’L L. 12, 16–17 (1975).

<sup>87</sup> GRISINGER, UNWIELDY, *supra* note 1, at 74.

<sup>88</sup> *Id.* at 77.

<sup>89</sup> *Administrative Procedure: Hearing on H.R. 184, H.R. 339, H.R. 1117, H.R. 1203, H.R. 1206, and H.R. 2602 Before the H. Comm. on the Judiciary*, 79th Cong. (1945) (statement of Carl McFarland), reprinted in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, at 72 (1946), available at [http://www.justice.gov/jmd/lis/legislative\\_histories/pl79-404/hear-19-1945.pdf](http://www.justice.gov/jmd/lis/legislative_histories/pl79-404/hear-19-1945.pdf).

<sup>90</sup> S. JUDICIARY COMM., ADMINISTRATIVE PROCEDURE ACT, 79TH CONG., S. REP. NO. 752, at 7 (1st Sess. 1945); see also *Admin. Procedure Act: Proceedings*, *supra* note 83, at 304.

<sup>91</sup> Alfred Long Scanlan, *Judicial Review Under the Administrative Procedure Act—In Which Judicial Offspring Receive a Congressional Confirmation*, 23 NOTRE DAME L. 501, 503 (1948).

Most agencies and commissions already adhered to judicially defined standards of due process and employed quasi-judicial procedures in their work, a result of years of agencies scrambling to satisfy reviewing courts and prove their fairness to the public.<sup>92</sup> To the extent that the APA was, in fact, a “judicialized” conception of the administrative state, such standards came largely from the doctrines of administrative law created and articulated by the courts over the past six decades, rather than the new law itself.<sup>93</sup> By 1948, the outgoing president of the ICC Practitioners’ Association observed that “everyone interested is still searching in vain for some profound effect it has had upon practice before the Commission.”<sup>94</sup>

The APA’s most significant reforms were those related to the examiners and to the formal hearings they conducted.<sup>95</sup> If the problem of the administrative state was administrative officials who acted recklessly in resolving private parties’ property interests, the APA’s solution was fairer hearings for parties challenging agency action. Examiners were not renamed hearing commissioners, but their separate role within the agency was clarified and codified.<sup>96</sup> Examiners could no longer be supervised by any administrative official “engaged in the performance of investigative or prosecuting functions,” and they themselves could “perform no duties inconsistent with their duties and responsibilities as examiners,” thus putting an end to examiners wearing many hats in an agency.<sup>97</sup> Examiners were also barred from consulting “any person or party on any fact in issue” in a particular case without offering *all* parties an opportunity to participate, and were to draft their initial decisions without consultation with others in the agency.<sup>98</sup> Examiners were to be more isolated from outside influences and from the rest of the agency (as was already the practice at many of the most powerful agencies), shielding them from pressure to decide in a particular

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

<sup>93</sup> *Id.* at 545–46.

<sup>94</sup> Harry C. Ames, *I.C.C. View of Procedure Act*, 16 I.C.C. PRACTITIONERS’ J. 218–19 (1948), as reprinted in 1 ADMIN. L. BULL. 2, 2 (1949).

<sup>95</sup> GRISINGER, UNWIELDY, *supra* note 1, at 79.

<sup>96</sup> See Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946).

<sup>97</sup> See *id.* §§ 5(c), 11.

<sup>98</sup> *Id.* § 5(c).



manner and reassuring parties that the person hearing their side of the story was more like a neutral arbiter than a regular agency staffer.<sup>99</sup>

By deeming examiners' conversations with fellow agency staffers improper, the APA appeared to impose a quite strict segregation of functions that would make agencies' operations more like those of courts, and significantly change administrative practice for those agencies that did not already draw clear lines in this area.<sup>100</sup> These strict requirements were soon watered down, however, as the Justice Department's 1947 Attorney General's Manual on the Administrative Procedure Act—an interpretive guide for agencies wondering how to comply with the APA—suggested that the statute could not logically have meant to keep an examiner away from his agency's collective expertise.<sup>101</sup> According to Attorney General Tom Clark, the examiner was barred from communications with the prosecutors, but he was free to request help from staffers “not engaged in investigative or prosecuting functions in that or a factually related case.”<sup>102</sup> This interpretation brought the APA in line with much existing agency practice.<sup>103</sup>

To be sure, examiners became a little more like judges under the Act.<sup>104</sup> Examiners were given new authority to command the hearing and to respond to objections—making certain, as the Senate Judiciary Committee put it, “that the presiding officer will perform a real function rather than serve merely as a notary or policeman.”<sup>105</sup> The examiners' ability to dictate the agency's final decision remained limited, however.<sup>106</sup> The Act adopted the recommendation of the Attorney General's Committee that the examiner's proposed decision should stand unless the regulated parties or the agency appealed;

<sup>99</sup> GRISINGER, UNWIELDY, *supra* note 1, at 79.

<sup>100</sup> *Id.*

<sup>101</sup> See TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 55 (1947).

<sup>102</sup> *Id.*; see also NLRB v. Botany Worsted Mills, 133 F.2d 876 (3d Cir. 1943).

<sup>103</sup> GRISINGER, UNWIELDY, *supra* note 1, at 80.

<sup>104</sup> *Id.*

<sup>105</sup> S. JUDICIARY COMM., ADMINSTRATIVE PROCEDURE ACT, S. REP. NO. 79-752, at 207 (1945), available at [http://www.justice.gov/jmd/lis/legislative\\_histories/pl79-404/senaterept-752-1945.pdf](http://www.justice.gov/jmd/lis/legislative_histories/pl79-404/senaterept-752-1945.pdf).

<sup>106</sup> GRISINGER, UNWIELDY, *supra* note 1, at 80.

however, on appeal, the agency appeared free to take over the case and go through the whole file themselves.<sup>107</sup>

The precise role of the examiner's report was at issue in *Universal Camera v. NLRB*,<sup>108</sup> an early Supreme Court case examining the changes the APA had wrought. In this case, involving an NLRB reinstatement order, the Board had rejected its examiner's conclusions in crafting its order.<sup>109</sup> In the 1947 Labor-Management Relations Act (Taft-Hartley Act), passed by a newly conservative Congress to limit the NLRB's authority, Congress followed the APA and changed the standard of review from a de facto "substantial evidence" standard to one of "substantial evidence on the record considered as a whole."<sup>110</sup> At issue was whether this was a significant change; the Court decided that it was.<sup>111</sup> As Justice Felix Frankfurter explained, in changing the statutory standards, "Congress expressed a mood."<sup>112</sup> This "mood" reflected "pressures for stricter and more uniform practice, not a reflection of approval of all existing practices."<sup>113</sup>

Also at issue was the role of the examiner's report.<sup>114</sup> The Second Circuit struggled to decide how much weight to give the

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<sup>107</sup> Administrative Procedure Act of 1946 § 8(a).

<sup>108</sup> 340 U.S. 474 (1951).

<sup>109</sup> See *id.* at 491.

<sup>110</sup> Labor Management Relations Act of 1947, Pub. L. No. 101, 29 U.S.C. §§ 141–144, 61 Stat. 136 (2012). In the Taft-Hartley Act, Congress created a powerful general counsel, independent of the NLRB, to take charge of the board's investigation and prosecution functions, and replaced the three-man board with five members focused entirely on quasi-judicial duties (and thus essentially acting as hearing examiners). See MILLIS & BROWN, *supra* note 32; JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994* (1995); GROSS, *THE RESHAPING*, *supra* note 21; CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960* (1985); Robert N. Denham, *The Taft-Hartley Act*, 20 TENN. L. REV. 168 (1948).

<sup>111</sup> *Universal Camera*, 340 U.S. at 491.

<sup>112</sup> *Id.* at 487; KENNETH CULP DAVIS, *ADMINISTRATIVE LAW* 925–28 (1951).

<sup>113</sup> *Universal Camera*, 340 U.S. at 489. See Raymond L. Britton, *Changes in Organization and Procedures of the NLRB*, 5 SW. L.J. 226 (1951); Seymour Scher, *The Politics of Agency Organization*, 15 W. POL. Q. 328 (1962); Louis R. Gilbert, Comment, *Administrative Law—“Review of Whole Record” in Determining Substantiality of Evidence to Sustain Administrative Board's Finding*, 35 MARQ. L. REV. 361 (1952).

<sup>114</sup> See *Universal Camera*, 340 U.S. at 491–97; *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 752–53 (2d Cir. 1950), *vacated*, 340 U.S. 474 (1951).

examiner's findings rejected by the Board.<sup>115</sup> Judge Learned Hand pointed out that the examiner's proximity to oral and written evidence gave him a distinct advantage, "and it is principally on that account that upon an appeal from the judgment of a district court, a court of appeals will hesitate to reverse."<sup>116</sup> Looking at the Wagner Act, the Taft-Hartley Act, and the APA, however, Judge Hand rejected the analogy of the examiner as a district court judge, and declined to find that the NLRB was bound by the examiner's conclusions.<sup>117</sup> Judge Hand stated that "although the Board would be wrong in totally disregarding his findings, it is practically impossible for a court, upon review of those findings which the Board itself substitutes, to consider the Board's reversal as a factor in the court's own decision."<sup>118</sup>

In determining whether courts should accord more weight to examiners' views than they had previously, the Supreme Court looked hard at the history of procedural reform, particularly the work of the Attorney General's Committee on Administrative Procedure.<sup>119</sup> Unlike the court below, the Court suggested that the examiners' findings were relevant as part of the "whole record" on review, given "the indications in the legislative history that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform."<sup>120</sup> Although the APA had not codified the Attorney General's Committee recommendation that the agencies take the examiners' findings more seriously,

[T]his refusal to make mandatory the recommendations of the Attorney General's Committee should not be construed as a repudiation of them. Nothing in the statutes suggests that the Labor Board should not be influenced by the examiner's opportunity to observe the witnesses he hears and sees and the Board does not. Nothing suggests that reviewing courts should not give to the examiner's

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<sup>115</sup> *Universal Camera*, 179 F.2d at 752-53.

<sup>116</sup> *Id.* at 752.

<sup>117</sup> *Id.* at 752-54.

<sup>118</sup> *Id.* at 753.

<sup>119</sup> *Universal Camera*, 340 U.S. at 477-97.

<sup>120</sup> *Id.* at 488, 493-94.

report such probative force as it intrinsically commands.<sup>121</sup>

Plenty of discretion remained for the agency, however. To require the agency to be bound by the examiner's findings "would make so drastic a departure from prior administrative practice that explicitness would be required."<sup>122</sup> And even under review on the "whole record," the examiner's report was only one part of the record.<sup>123</sup> The examiners—awkwardly described by the Senate Judiciary Committee as "semi-independent subordinate hearing officers"—thus remained within the agency's control.<sup>124</sup>

## V. IMPLEMENTING THE APA'S HEARING EXAMINER PROVISIONS

The APA also attempted to improve the quality of hearing examiners, addressing the findings of the Attorney General's Committee that the sitting hearing examiners were not as competent as one might hope. The APA moved to attract such men and women by giving them a more important role and raising their salaries.<sup>125</sup> In addition, responsibility for examiners' hiring, firing, and promotion was moved to the Civil Service Commission (CSC), in the hope that examiners might render more "objective" decisions once freed from the possibility of retaliation.<sup>126</sup> And although examiners were still

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<sup>121</sup> *Id.* at 495. Thus, agencies were to consider examiners' reports on a case-by-case basis as they evaluated the substantiality of the evidence, and consider that

[E]vidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony.

*Id.* at 496.

<sup>122</sup> *Id.* at 492.

<sup>123</sup> *Id.* at 496.

<sup>124</sup> See *Ramspeck v. Fed. Trial Exam'rs Conference*, 345 U.S. 128, 132 (1953); see S. JUDICIARY COMM., ADMINSTRATIVE PROCEDURE ACT, S. REP. NO. 79-752, at 192 (1945).

<sup>125</sup> Administrative Procedure Act of 1946 § 11; see also Lloyd Musolf, *Administrative Law Judges: A 1948 Snapshot*, 46 ADMIN. L. REV. 257 (1994).

<sup>126</sup> Administrative Procedure Act of 1946 § 11.

administrative officers, lacking the life tenure of federal judges, the APA made them more independent than their fellow staffers by barring their firing for any reason other than “good cause” as found by the CSC.<sup>127</sup>

However, the government’s efforts to comply with these seemingly straightforward provisions quickly erupted into controversy.<sup>128</sup> When the CSC began its efforts to hire new hearing examiners, it had to confront an obvious question: What should they do with the 350 men and women already holding these positions?<sup>129</sup> Simply reappointing the existing examiners to newly enhanced roles seemed to confound the goal of improving staffing; on the other hand, starting fresh with untrained examiners would have thrown the agencies into chaos.<sup>130</sup> The CSC split the difference.<sup>131</sup> Soon after the APA took effect in July 1947, the CSC issued regulations setting forth the qualifications for both new hearing examiners and those already in place.<sup>132</sup> It assembled a group of lawyers from outside the CSC to serve on a Board of Examiners in charge of evaluating the hearing examiners; the CSC suggested it would reappoint only those who their consultants found, per the APA, to be “qualified and competent” to perform their duties.<sup>133</sup>

Early in the board’s work, Chairman Carl McFarland wrote to select members of Congress wondering “how far we may go—as a

<sup>127</sup> See *id.*; Bernstein, *supra* note 5, at 313.

<sup>128</sup> On the “hearing examiner controversy,” see Bernstein, *supra* note 5, at 306–08; Ralph F. Fuchs, *The Hearing Examiner Fiasco Under the Administrative Procedure Act*, 63 HARV. L. REV. 737 (1950); Ralph F. Fuchs, *The Hearing Officer Problem—Symptom and Symbol*, 40 CORNELL L. Q. 281 (1955); Daniel J. Gifford, *Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions*, 49 ADMIN. L. REV. 1 (1997); Chester T. Lane, Book Review, 54 COLUM. L. REV. 1008 (1954) (reviewing LLOYD D. MUSOLF, *FEDERAL EXAMINERS AND THE CONFLICT OF LAW AND ADMINISTRATION* (1953)); Note, *Hearing Examiner Status: A Recurrent Problem in Administrative Law*, 30 IND. L.J. 86 (1954) [hereinafter *Hearing Examiner Status*]; John W. Macy, Jr., *The APA and the Hearing Examiner: Products of a Viable Political Society*, 27 FED. B.J. 351 (1967); Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57 (1979); Morgan Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 YALE L.J. 431 (1949).

<sup>129</sup> GRISINGER, UNWIELDY, *supra* note 1, at 92.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Administrative Procedure Act of 1946 § 11.

practical matter—in weeding out the incompetent and unfit.”<sup>134</sup> Given the vagueness of the APA’s “qualified and competent” standard, the board had a great deal of discretion in deciding who to retain and what to consider in making that determination.<sup>135</sup> On the basis of agency records and oral interviews, members looked for professional legal experience and specialized administrative experience of those before them.<sup>136</sup> As McFarland put it, the board’s duty was to “make sure that every examiner who is to be retained is mentally and temperamentally equipped to be what federal judges ought to be.”<sup>137</sup> This preference for legal over administrative expertise was not surprising—with the exception of McFarland, few of the board members were experts in administration, but several (McFarland included) had strong connections to the conservative ABA.<sup>138</sup> The board’s desire to judge administrative officials by the standards of judicial officers was problematic from the agencies’ perspective, however.<sup>139</sup> By discounting the benefits of specialization and ignoring the APA’s clear endorsement of non-courtroom methods, the board adopted a different view of “apt” and “able” for the agencies than the agencies had adopted for themselves.<sup>140</sup>

Board members were also troubled about the political preferences of the current examiners.<sup>141</sup> They evaluated examiners on their “general ability to act independently, objectively, efficiently, and fairly,”<sup>142</sup> and the CSC noted that the decision to review and set

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<sup>134</sup> Letter from Carl McFarland, Chairman, Civil Serv. Comm’n Hearing Exam’r Bd., to Sen. Pat McCarran (Feb. 2, 1948), Folder “CSC: Congress,” Box 5, Carl McFarland Papers, Mss 85–3 (McFarland Papers), Special Collections, University of Virginia Law Library (UVA). Similar letters were also sent to Representative Walter, Representative John W. Gwynne, and Senator Alexander Wiley.

<sup>135</sup> GRISINGER, UNWIELDY, *supra* note 1, at 93.

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

<sup>137</sup> Letter from Carl McFarland, *supra* note 134.

<sup>138</sup> GRISINGER, UNWIELDY, *supra* note 1, at 93.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 93–94.

<sup>142</sup> ADMIN. LAW SECTION, AM. BAR ASS’N, FIRST REPORT OF THE CONSULTANTS TO THE UNITED STATES CIVIL SERVICE COMMISSION, HEARING EXAMINER PERSONNEL UNDER THE ADMINISTRATIVE PROCEDURE ACT, METHOD OF RATING APPLICANTS 9 (Jan. 31, 1949) [hereinafter FIRST REPORT OF THE

standards for all hearing examiners was intended to avoid charges “that hearing examiners are ‘hand picked’ by the agency and may be biased in favor of the agency.”<sup>143</sup> This echoed the ABA’s concerns that simply reappointing the examiners would entrench the agencies’ own positions.<sup>144</sup> Pushing for hearing examiners “free from preconceptions and political motivations or ideologies,” the ABA insisted that such objectivity was “the core of the distinction between the American system and the Soviet concept of judicial bodies.”<sup>145</sup> Indeed, existing skepticism about the hearing examiners was easily combined with developing concerns about allegedly subversive officials.<sup>146</sup> One former ABA president complained that many of the sitting hearing examiners “were ‘hatchet men’ for Left Wing ideologies or New Deal philosophies against business,”<sup>147</sup> and Senate Judiciary Committee chairman Alexander Wiley (R-Wisconsin) asked the CSC to ensure that the new examiners “not be men of leftist thinking, men who don’t have complete loyalty to our constitutional system of checks and balances, men who are not

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CONSULTANTS], Folder “Administrative Procedure Act, Proposed Legislation—Senatorial,” Box 21, J. Howard McGrath Papers, HSTL.

<sup>143</sup> U.S. CIVIL SERV. COMM’N, 65TH ANNUAL REPORT, H.R. DOC. NO. 81-13 (1948); *see also* Ralph N. Kleps, Book Review, 37 CAL. L. REV. 534 (1949) (reviewing FIRST REPORT OF THE CONSULTANTS, *supra* note 142).

<sup>144</sup> GRISINGER, UNWIELDY, *supra* note 1, at 94.

<sup>145</sup> Editorial, *Impartiality Is Essential*, 33 A.B.A. J. 148 (1947).

<sup>146</sup> In an ironic turn, provisions protecting examiners from retribution by their agencies made them harder to remove on grounds of disloyalty. The APA required that the CSC fire examiners only on the basis of “good cause,” after a hearing and full disclosure of evidence; to the CSC’s consternation, this conflicted with the loyalty-security program’s less rigorous standards and, given the evidentiary requirements, it would be much more difficult to remove subversive examiners than to remove other bureaucrats with less authority and discretion. Bernstein, *supra* note 5, at 313–14, 317. *See also* John D. Morris, *U.S. Examiner Held Immune to Ouster*, N.Y. TIMES, Dec. 21, 1951, at 14. The CSC worked out separate procedures early on. *See* Memorandum No. 15 from Seth Richardson, Chairman, Loyalty Review Bd. to All Departments and Agencies (July 23, 1948), Folder “Memoranda to All Executive Departments and Agencies, No. 1–No. 57,” Box 10, Records Relating to Loyalty Review Boards, 1947–1952, A1, Entry 1011, Records of the Loyalty Review Board, Records of the Civil Service Commission, Record Group 146, NACP.

<sup>147</sup> Memorandum from William L. Ransom, Former President, Am. Bar Ass’n, to Hoover Comm’n 5 (Mar. 18, 1948), Folder “Regulatory Agencies, Correspondence Relating to Task Forces, 1947–1949,” NC 115, Entry 11, Box 15, Records of the Office of the Executive Director, Records of the Commission on Organization of the Executive Branch of Government, Record Group 264, NACP.

devoted to our system of private enterprise; but rather men of outstanding judicial temperament, who are unalterably dedicated to the preservation of the American Way.”<sup>148</sup> The same reformers who wanted the hearing examiners to be more independent were nonetheless adamant that *these* hearing examiners not be made more independent.

When the board concluded its review in early 1949, the results were striking. Of the 148 incumbent hearing examiners with civil service protection, only 106 were found “qualified for permanent and unconditional appointment.”<sup>149</sup> Although the CSC trumpeted the fact that seventy percent of sitting hearing examiners were found qualified,<sup>150</sup> this meant, of course, that a substantial number of those who had long been serving as examiners were deemed unqualified to continue doing so. Anticipating criticism, the board emphasized that “only a handful” of these low ratings resulted from examiners’ “bias, prejudice, or lack of objectively judicial temperament.”<sup>151</sup> Most disqualifications, they claimed, were instead attributable to examiners’ lack of experience or “abilities indubitably very mediocre at best.”<sup>152</sup> Other groups of examiners fared similarly poorly; twelve of the sixty-nine sitting examiners without civil service status were found wholly unqualified, and many of the rest met with only grudging approval.<sup>153</sup>

Examiners, agencies, and the press were skeptical of this argument, pointing out that many of those deemed unqualified had already amassed years of expertise.<sup>154</sup> The Association of Interstate Commerce Commission Practitioners protested that the order was “extremely unfair because certain men have been disqualified whom we all know to be eminently qualified for this position.”<sup>155</sup> The NLRB similarly complained that the firings had “eviscerated the

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<sup>148</sup> Letter from Sen. Alexander Wiley, Chairman, S. Judiciary Comm., to Arthur S. Flemming, Comm’r, U.S. Civil Serv. Comm’n (Apr. 5, 1947), *reprinted in* 33 A.B.A. J. 421, 422 (1947).

<sup>149</sup> FIRST REPORT OF THE CONSULTANTS, *supra* note 142, at 18, Table I.

<sup>150</sup> CSC Press Release (Mar. 9, 1949) (for release Mar. 11), Folder “CSC: Regulations, Releases, General Statements,” Box 5, McFarland Papers, UVA.

<sup>151</sup> FIRST REPORT OF THE CONSULTANTS, *supra* note 142, at 17.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 18, Table II.

<sup>154</sup> *See infra* notes 155–157 and accompanying text.

<sup>155</sup> *Public Hearing Asked on Ousted Examiners*, N.Y. TIMES, Mar. 22, 1949, at 4 (quoting Association of Interstate Commerce Commission Practitioners).



hearing examiner staff.”<sup>156</sup> The agencies and the press jumped on the figures, and demonstrated that certain agencies were particularly affected; twelve of the ICC’s forty-eight examiners were deemed unqualified, and the Civil Aeronautics Board (CAB) had ten of their thirty examiners so designated.<sup>157</sup> The greatest damage occurred at the NLRB, where almost half of the examiners, many of whom were long-time employees, were marked unqualified.<sup>158</sup>

The disqualified examiners and their agencies quickly challenged the board’s findings, questioning both the substantive tests the board had used to evaluate them and the procedures by which the board had done so.<sup>159</sup> The Federal Trial Examiners’ Conference rejected allegations of examiner inefficiency, arguing that the board should consider the “the importance, complexity and magnitude of each case handled” as part of an examiner’s assessment.<sup>160</sup> Examiners also pointed out that the board’s cavalier approach to rating the examiners and its use of confidential sources violated the very rules the CSC had created to ensure the APA’s stronger removal provisions—regulations that required notice of the charges against them, opportunity to cross-examine witnesses, and a decision made “on the basis of the record of the hearing.”<sup>161</sup> The Association of Interstate Commerce Commission Practitioners found the process “subversive of constitutional guarantees and democratic principles and ideals” and complained of the damage to examiners’ “professional standing (in the sunset of life devoted to public service), social and professional reputation, and the very livelihood” without procedural protections.<sup>162</sup>

The CSC quickly retreated from its board’s findings, announced that it would allow the hearing examiners rated ineligible

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<sup>156</sup> *NLRB Says It Needs Rejected Examiners*, N.Y. TIMES, Apr. 2, 1949, at 2.

<sup>157</sup> *Appeals Granted “Unfit” Examiners*, N.Y. TIMES, Mar. 30, 1949, at 2.

<sup>158</sup> Joseph A. Loftus, *15 NLRB Examiners Found Unqualified*, N.Y. TIMES, Mar. 13, 1949, at 1, 20.

<sup>159</sup> GRISINGER, UNWIELDY, *supra* note 1, at 96.

<sup>160</sup> J. FRED JOHNSON JR., RESOLUTION ADOPTED BY THE FEDERAL TRIAL EXAM’RS CONFERENCE 2 (Mar. 31, 1949), Folder “CSC: Rating Factors,” Box 5, McFarland Papers, UVA.

<sup>161</sup> Appointment, Compensation, and Removal of Hearing Examiners, 12 Fed. Reg. 6321, 6324 (Sept. 23, 1947).

<sup>162</sup> Jerry Kluttz, *The Federal Diary*, WASH. POST, May 23, 1949, at B1 (quoting statements of Ass’n of Interstate Commerce Comm’n Practitioners to Congress).

to appeal and to retain their positions while they did so, and rebuked the board for its overly strict approach.<sup>163</sup> CSC president Harry Mitchell suggested to McFarland that the board (which had used the standard of “eminently qualified” rather than the APA’s “qualified and competent”) “should adopt a more liberal view” when it reconsidered its ratings.<sup>164</sup> By late 1949, the CSC had capitulated entirely, permanently reappointing almost all of the sitting examiners and starting from scratch to promulgate regulations for hiring and firing the examiners in accordance with the APA.<sup>165</sup> Only one incumbent examiner with civil service status was ultimately let go.<sup>166</sup>

When the CSC finally did propose new regulations for hiring and firing examiners in the fall of 1951, it had to grapple once again with the APA’s vision of examiner independence. Along with regulations regarding hiring, promoting, and firing examiners, the CSC adopted the practice of sorting examiners into different grades, each with different responsibilities and salaries.<sup>167</sup> This practice, in which examiners were assigned cases based on their difficulty, had been common in the agencies, but came in for significant heat from those who feared an agency could rig the system to ensure certain cases went to certain examiners.<sup>168</sup> Senator McCarran criticized this provision, arguing that under the APA “all examiners should be superior,” and suggesting that the CSC had created “a nefarious promotion scheme” that “leaves to the agency the initiative and the control.”<sup>169</sup> Such regulations were contrary to McCarran’s vision of functionally independent examiners who were to “be very nearly the

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<sup>163</sup> GRISINGER, UNWIELDY, *supra* note 1, at 96.

<sup>164</sup> Letter from Harry B. Mitchell, President, U.S. Civil Serv. Comm’n to Carl McFarland, Chairman, Civil Serv. Comm’n Hearing Exam’r Bd. (May 4, 1949), Folder “CSC: Rating Factors,” Box 5, McFarland Papers, UVA.

<sup>165</sup> See Appointment, Compensation, and Removal of Hearing Examiners, 16 Fed. Reg. 9623 (Sept. 21, 1951).

<sup>166</sup> WILBER R. LESTER, COMM. ON HEARING OFFICERS, APPOINTMENT AND STATUS OF FEDERAL HEARING OFFICERS: REPORT TO THE PRESIDENT’S CONFERENCE ON ADMINISTRATIVE PROCEDURE 14 (1954).

<sup>167</sup> GRISINGER, UNWIELDY, *supra* note 1, at 97.

<sup>168</sup> *Id.*

<sup>169</sup> Sen. Pat McCarran to Robert C. Ramspeck (Sept. 6, 1951), *reprinted in* S. DOC. 82, SENATE JUDICIARY COMMITTEE, 82ND CONG., HEARING EXAMINER REGULATIONS PROMULGATED UNDER SECTION 11 OF THE ADMINISTRATIVE PROCEDURE ACT 10 (1st Sess. 1951); *see also* Bernstein, *supra* note 5, at 308–12.

equivalent of judges even though operating within the Federal system of administrative justice.”<sup>170</sup>

The Federal Trial Examiners Conference contested the regulations in court, on the grounds that the provisions would stymie examiners’ independence and thwart the APA.<sup>171</sup> The Supreme Court, however, found that courts should not overstate the importance of examiner independence in the APA, and resisted the urge to adopt a highly judicialized conception of the examiner’s role, recognizing that agencies should take examiners’ skill and expertise into account in assigning cases.<sup>172</sup> The majority of the Court found that the regulations did not conflict with the history of administrative reform generally, or the APA specifically—a history in which Congress intended to make hearing examiners at least “semi-” or “partially” independent of the agencies in which they heard cases.<sup>173</sup> Dissenting justices warned that the provisions assigning cases by rank “are so nebulous that the head of an agency is left practically free to select any examiner he chooses for any case he chooses,”<sup>174</sup> but the majority found that examiners were still decisively agency employees rather than judges on loan to the administrative process.<sup>175</sup> McCarran’s subsequent proposal to have the president appoint the examiners and to subject them “to the canons and standards of conduct applicable to members of the Federal Judiciary” failed to catch on, reflecting some limits of this path of reform.<sup>176</sup>

## VI. THE 1950S AND THE RISE OF THE “CAPTURE CRITIQUE”

During the 1950s, hostility to bureaucrats—and particularly to hearing examiners—did not fade away. During the 1952 campaign season, Republicans (echoing the Declaration of Independence) suggested that Democrats had “violated our liberties by turning loose upon the country a swarm of arrogant bureaucrats and their agents who meddle intolerably in the lives and occupations of our

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<sup>170</sup> S. DOC. 82, at 9.

<sup>171</sup> See *Ramspeck v. Fed. Trial Exam’rs Conference*, 345 U.S. 128 (1953).

<sup>172</sup> See *id.* at 135–43.

<sup>173</sup> *Id.* at 131, 132, 143.

<sup>174</sup> *Id.* at 145 (Black, J., dissenting); see also Bernard Schwartz, *Administrative Law*, 29 N.Y.U. L. REV. 101, 108–12 (1954); Bernstein, *supra* note 5, at 311–12.

<sup>175</sup> See *Ramspeck*, 345 U.S. at 578 n.9.

<sup>176</sup> PATRICK ANTHONY MCCARRAN, PRESIDENTIAL APPOINTMENT OF TRIAL EXAMINERS, S. REP. NO. 83-2199, at 4 (2d Sess. 1954); Fuchs, *supra* note 128.

citizens.”<sup>177</sup> However, it was obvious that the character of this hostility was changing. Having trumpeted the APA’s achievements, critics found it difficult to argue that the agencies and examiners continued to run roughshod over individual rights. As observers increasingly pointed out, the last thing the administrative process needed was more formality or slower administration (the likely result, they claimed, of proposals to further separate the examiners). Instead, many complained, the agencies and commissions were not regulating *enough*.

Workloads kept rising but congressional appropriations did not, and agencies’ reliance on policymaking through case-by-case adjudication proved increasingly inefficient.<sup>178</sup> The Administrative Conference of 1953, called by President Eisenhower, focused on the delay and inefficiency of formal hearings rather than the alleged lawless discretion of hearing examiners.<sup>179</sup> The Administrative Conference declined to make significant changes to the existing hearing examiner system, finding the hearing examiners “generally competent” and the administration of the current system “essentially sound.”<sup>180</sup> Members reaffirmed their commitment to the examiner removal procedures provided by the APA, noting that even though complaints against the examiners were legion, no hearing examiners had actually been removed under the statute.<sup>181</sup> And in several different critiques of administrative governance written in the 1950s and early 1960s, observers painted a picture of tortoise-like regulatory agencies hamstrung by procedural requirements, moving

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<sup>177</sup> REPUBLICAN PARTY PLATFORM OF 1952, N.Y. TIMES, July 11, 1952, at 8.

<sup>178</sup> For more on case-by-case adjudication, *see supra* note 121; *infra* notes 183–187 and accompanying text.

<sup>179</sup> *See* ADMIN. CONFERENCE OF THE U.S., REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE CALLED BY THE PRESIDENT OF THE UNITED STATES (1953) [hereinafter REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE], *available at* [http://www.acus.gov/sites/default/files/documents/1953\\_0429\\_Report%20of%20the%20Conference%20on%20Administrative%20Procedure.pdf](http://www.acus.gov/sites/default/files/documents/1953_0429_Report%20of%20the%20Conference%20on%20Administrative%20Procedure.pdf).

<sup>180</sup> *Id.* at 59. *See also* EARL W. KINTNER, COMM. ON HEARING OFFICERS, RECOMMENDATIONS ON THE APPOINTMENT AND STATUS OF FEDERAL HEARING OFFICERS: REPORT TO THE PRESIDENT’S CONFERENCE ON ADMINISTRATIVE PROCEDURE (1954); LESTER, *supra* note 166; Fuchs, *supra* note 128; *Hearing Examiner Status*, *supra* note 128.

<sup>181</sup> REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE, *supra* note 181, at 66–67.

very slowly in their own work and quick to retract into their shells to avoid conflict.<sup>182</sup>

To protect themselves from attack, political scientist Marver Bernstein argued in a famous 1955 book that administrators chose the safest procedures for policymaking—namely, case-by-case adjudication.<sup>183</sup> With little political support and facing likely legal challenges to any action, commissions adopted what they saw as the safest path.<sup>184</sup> They declined to act unless necessary, and then accumulated mountains of evidence and proceeded through judicialized methods that would stand up in court.<sup>185</sup> Case-by-case policymaking was conservative, incremental, easily reversible, and unlikely to offend the entire industry at once.<sup>186</sup> This was not the courts' fault; judges had repeatedly endorsed flexible procedural due process standards.<sup>187</sup> Nor did Bernstein blame the APA, which had preserved administrative discretion and adopted existing procedures as a model. Instead, he laid the blame on the commissions themselves, where commissioners attempted “to acquire the respectability and social acceptability achieved by the courts” by adopting procedures mimicking judicial ones.<sup>188</sup> Administrative formality, unfortunately, slowed down the administrative process, established enormous backlogs, and left important policy areas untouched. Louis J. Hector's pessimistic 1959 memorandum about the CAB pointed out that formality was enormously inefficient as a

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<sup>182</sup> MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955); Warren E. Baker, *Policy by Rule or Ad Hoc Approach—Which Should It Be?*, 22 *LAW & CONTEMP. PROBS.* 658 (1957); Henry J. Friendly, *A Look at the Federal Administrative Agencies*, 60 *COLUM. L. REV.* 429 (1960); Louis J. Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 *YALE L.J.* 931 (1960); Nathaniel L. Nathanson, *Law and the Future: Administrative Law*, 51 *NW. U. L. REV.* 174 (1956); William H. Timbers & Barry H. Garfinkel, *Examination of the Commission's Adjudicatory Process: Some Suggestions*, 45 *VA. L. REV.* 817 (1959); Ernest Williams to the President's Advisory Comm. on Gov't Org. 8 (Sept. 14, 1956), Folder “No. 167 Regulatory Agencies—General,” Box 20, PACGO Papers, Dwight D. Eisenhower Presidential Library, Abilene, KS (DDEL).

<sup>183</sup> BERNSTEIN, *supra* note 182.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 99; *see also* John B. Gage, *Chairman's Page*, 11 *ADMIN. L. BULL.* 203 (1959).

form of policy making, as it forced investigations into quasi-judicial clothing, bound by all of the APA's procedural rules.<sup>189</sup> Another scholar, observing the NLRB, concluded that the natural result of case-by-case policy making was that "the caldron of litigation becomes a nightmare version of that magic soup-producing pot of nursery tales which flooded the streets of the town."<sup>190</sup>

Nor was it clear that due process was preserved by these procedures. As Hector charged, agencies "arc long on judicial form and short on judicial substance."<sup>191</sup> As he argued, although judicial trappings were provided in the initial hearing, examiners' reports often mattered little in practice.<sup>192</sup> Contrary to skeptics' earlier claims of vast examiner power, Hector and others now argued that administrative decisions were made later, based on "fact, policy, and legal questions" and by commissioners who had "little personal familiarity with the record."<sup>193</sup>

Bernstein similarly suggested that decades of procedural reforms aimed at improving the examiners and the initial hearing were all for show, as the ultimate decision lay with commissioners themselves, whose decision-making processes were "rather casual and frequently unsystematic."<sup>194</sup> The disconnect between examiners, who observed procedural niceties but had little idea what the commissioners would do, and commissioners, who played fast and loose with procedure but had the ultimate authority to decide, called into question the amount of expertise involved in the decision-making.<sup>195</sup> As Hector argued, "any resemblance between an examiner's recommended decision and the final decision of the Board in a significant case is almost coincidental."<sup>196</sup> Thus, it was hardly surprising that, abandoned by Congress and the Executive branch, and with no incentives to work with other agencies and commissions, a commission naturally turned to the regulated parties

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<sup>189</sup> Hector, *supra* note 182.

<sup>190</sup> Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 *YALE L.J.* 729, 753 (1961).

<sup>191</sup> Hector, *supra* note 182, at 931.

<sup>192</sup> *See id.* at 945.

<sup>193</sup> *Id.* at 944.

<sup>194</sup> *See* Bernstein, *supra* note 5, at 319; *see also* BERNARD SCHWARTZ, *THE PROFESSOR AND THE COMMISSIONS* (1st ed. 1959).

<sup>195</sup> GRISINGER, UNWIELDY, *supra* note 1, at 235.

<sup>196</sup> Hector, *supra* note 182, at 945.

themselves when it did make policy.<sup>197</sup> The propriety of contacts between those inside and outside the agency became a newly contested question in the late 1950s as highly publicized evidence of preferential treatment called the idea of public interest regulation into question.<sup>198</sup> Lawyers and reformers who had long been concerned with preventing examiners and agency staffers from talking to each other outside the presence of the regulated parties had generally seen the problem as the presence of an environment in which regulated parties could not participate.<sup>199</sup> This focus on the harm of internal communications prevented lower-level employees from imposing their own views on examiners and agency heads, but ignored the possibility that external communications could do the same thing.

The question of commissioners' unethical behavior flared into public controversy in 1957, as the House Interstate and Foreign Commerce Committee's Special Subcommittee on Legislative

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<sup>197</sup> GRISINGER, UNWIELDY, *supra* note 1, at 236.

<sup>198</sup> For contemporary scholarship on the "capture critique," see Hugh Hecló, *A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON* (1997); Hugh Hecló, *Issue Networks and the Executive Establishment*, in *THE NEW AMERICAN POLITICAL SYSTEM* 87 (Anthony King, ed., 1st ed. 1978); Paul J. Quirk, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* (1981); Ellis W. Hawley, *The Discovery and Study of a "Corporate Liberalism,"* 52 *BUS. HIST. REV.* 309 (1978); Thomas K. McCraw, *Regulation in America: A Review Article*, 49 *BUS. HIST. REV.* 159 (1975); Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 *CHI.-KENT L. REV.* 1039 (1997); Rabin, *supra* note 2; Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 *ADMIN. L. REV.* 1139 (2001); Stewart *supra* note 2; Paul R. Verkuil, *supra* note 43.

For studies examining close relationships between regulators and regulated parties, see BRINKLEY, *THE END OF REFORM*, *supra* note 2; SUSAN L. BRINSON, *THE RED SCARE, POLITICS, AND THE FEDERAL COMMUNICATIONS COMMISSION, 1941–1960* (2004); COHEN, *supra* note 2; FINEGOLD & SKOCPOL, *supra* note 2; HAWLEY, *supra* note 2; PARRISH, *supra* note 2; WADDELL, *supra* note 2; Robert M. Collins, *Positive Business Responses to the New Deal: The Roots of the Committee for Economic Development, 1933–1942*, 52 *BUS. HIST. REV.* 369 (1978); Robert Griffith, *Dwight D. Eisenhower and the Corporate Commonwealth*, 87 *AM. HIST. REV.* 87 (1982); Robert W. McChesney, *Free Speech and Democracy! Louis G. Caldwell, the American Bar Association and the Debate over the Free Speech Implications of Broadcast Regulation, 1928–1938*, 35 *AM. J. LEGAL HIST.* 351 (1991); David A. Moss & Michael R. Fein, *Radio Regulation Revisited: Coase, the FCC, and the Public Interest*, 15 *J. POL'Y. HIS.* 389 (2003); Rabin, *supra* note 2.

<sup>199</sup> See *supra* note 198, on studies examining close relationships between regulators and regulated parties.

Oversight, established to look into the affairs of the major independent commissions, publicized the close relationships industries cultivated with commissioners, the favors they exchanged, and the rampant conflicts of interest that resulted.<sup>200</sup> In the subcommittee's final report on these matters (released in January 1959), members focused on the broader damage the revelations had done to "the widespread confidence of the public in the fairness and integrity of the operations of governmental institutions."<sup>201</sup> A proposed 1960 bill attempted to ban "ex parte" communications for both internal and external matters—the first time that external influence on the commissioners was deemed as important as internal influence on the examiners.<sup>202</sup>

#### VII. THE SECOND HOOVER COMMISSION'S TASK FORCE ON LEGAL SERVICES AND PROCEDURE (1953–1955)

As lawyers inside and outside the administrative process looked askance at its slow and plodding nature, there was considerably less enthusiasm for new plans to remake the administrative process in the image of the federal courts. The major effort to do so in the 1950s was conducted by the second Hoover Commission's Task Force on Legal Services and Procedure, which suggested that the administrative process still failed to provide regulated parties with fair hearings. It recommended shifting as much administrative work as possible out of the hands of bureaucrats and hearing examiners and into the hands of judges. The first and second Hoover Commissions were established by Republicans in Congress interested in reducing the size and cost of government.<sup>203</sup>

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<sup>200</sup> See DAVID A. FRIER, CONFLICT OF INTEREST IN THE EISENHOWER ADMINISTRATION (1969); SCHWARTZ, *supra* note 194; R. W. Lishman, "Independence" in *the Independent Regulatory Agencies*, 13 ADMIN. L. REV. 133 (1961); Frank C. Newman, *The Supreme Court, Congressional Investigations, and Influence Peddling*, 33 N.Y.U. L. REV. 796 (1958); Louis L. Jaffe, *The Scandal in TV Licensing*, HARPER'S MONTHLY, Sept. 1957, at 77.

<sup>201</sup> H. SPEC. SUBCOMM. ON LEGIS. OVERSIGHT, INDEPENDENT REGULATORY COMMISSIONS, H.R. REP. 104-2711, at 60 (1959).

<sup>202</sup> H. COMM. ON INTERSTATE & FOREIGN COMMERCE, INDEPENDENT REGULATORY AGENCIES ACT OF 1960, H.R. REP. 86-2070, at 15 (2d Sess. 1960).

<sup>203</sup> For more on the two Hoover Commissions, see PERI E. ARNOLD, MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING, 1905–1996 (2d ed. 1998); HERBERT EMMERICH, FEDERAL ORGANIZATION AND ADMINISTRATIVE MANAGEMENT (1971); RONALD C. MOE, CONG. RESEARCH



The second Hoover Commission's task force on legal services and procedure, however, focused instead on questions of fairness and due process in the administrative state.<sup>204</sup>

The task force comprised several practicing lawyers, many with administrative experience, including Ross L. Malone Jr. of New Mexico (a former deputy attorney general of the United States) and San Francisco lawyer (and former special assistant to the attorney general) Herbert Watson Clark.<sup>205</sup> Several judges also served on the task force, including Judge Elbert Parr Tuttle of the Fifth Circuit Court of Appeals (a former general counsel for the Treasury Department) and Judge Harold R. Medina of the Second Circuit Court of Appeals.<sup>206</sup> They were joined by Montana State University president Carl McFarland, University of Michigan Law School dean E. Blythe Stason, and former Harvard law dean and experienced administrator James M. Landis.<sup>207</sup> Arthur Vanderbilt, chief justice of the New Jersey Supreme Court and Justice Robert H. Jackson were included as consultants to the task force.<sup>208</sup> Few of the members were strangers to one another; McFarland, Stason, and Vanderbilt had joined together in dissent twelve years earlier on the Attorney General's Committee on Administrative Procedure in calling for greater independence for hearing examiners and more judicial review,<sup>209</sup> and several other members had worked with one another through the ABA. The task force's recommendations were significantly informed by the legal training and political preferences of its members, who continued to fear administrative discretion and sought to judicialize administrative procedure far beyond the flexible measures established in the APA.<sup>210</sup> Articulating one of the task

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SERV., EXECUTIVE BRANCH REORGANIZATION: AN OVERVIEW (1977); RONALD C. MOE, THE HOOVER COMMISSIONS REVISITED (1982); Harvey C. Mansfield, *Reorganizing the Federal Executive Branch: The Limits of Institutionalization*, 35 LAW & CONTEMP. PROBS. 461 (1970).

<sup>204</sup> See *infra* note 211 and accompanying text.

<sup>205</sup> GRISINGER, UNWIELDY, *supra* note 1, at 213.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> COMM. ON ADMIN. PROCEDURE, FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 1, 203 (1st Sess. 1941).

<sup>210</sup> For discussion of the studies on legal services and procedure, see Anthony F. Arpaia, *The Independent Agency—A Necessary Instrument of Democratic Government*, 69 HARV. L. REV. 483 (1956); Clarence A. Davis, *Government Legal*

force's guiding assumptions, task force members emphasized that "[t]he more closely that administrative procedures can be made to conform to judicial procedures, the greater the probability that justice will be attained in the administrative process."<sup>211</sup>

Much of the task force's critique centered, as so many earlier ones had, on agencies' formal hearings.<sup>212</sup> Although the APA had separated investigation, prosecution, and adjudication functions within each agency, and kept the hearing examiners relatively insulated from other officials, the task force found that major revision of the APA was needed "to strengthen it as the charter of due process of law in administrative proceedings."<sup>213</sup> Abandoning the APA's guiding principles of flexibility and deference to agency decision-making, members proposed a new administrative code that would remake the administrative process in the image of the federal trial courts, adopting the pretrial procedures, discovery rules, and rules of evidence used in civil trials.<sup>214</sup> The separation of investigation, prosecution, and judicial functions provided in formal hearings was to be extended to licensing, rate making, rulemaking, informal hearings, and the final decisions of the agency—all areas in which

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*Services, Procedures, and Representations: A Discussion of the Hoover Report and the Administration of the Department of the Interior*, 50 NW. U. L. REV. 726 (1956); Kenneth Culp Davis, *Evidence*, 30 N.Y.U. L. REV. 1309 (1955); J. Forrester Davison, *An Administrative Court of the United States*, 24 GEO. WASH. L. REV. 613 (1955–1956); Guy Farmer, *An Administrative Labor Court: Some Observations on the Hoover Commission Report*, 24 GEO. L. WASH. REV. 656 (1955–1956); Robert E. Freer, *The Case Against the Trade Regulation Section of the Proposed Administrative Court*, 24 GEO. WASH. L. REV. 637 (1955–1956); Whitney R. Harris, *The Hoover Commission Report: Improvement of Legal Services and Procedure*, 41 A.B.A. J. 497 (1955), Whitney R. Harris, *The Hoover Commission Report: Improvement of Legal Services and Procedure*, 41 A.B.A. J. 713 (1955); Robert S. Pasley, *Legal Services in the Government: Some Thoughts on the Hoover Commission Report*, 6 J. PUB. L. 163 (1957); Robert G. Storey, *The Second Hoover Commission: Its Legal Task Force*, 40 A.B.A. J. 483 (1954).

<sup>211</sup> HOOVER COMMISSION II, TASK FORCE ON LEGAL SERVICES AND PROCEDURE, REPORT ON LEGAL SERVICES AND PROCEDURE 138 (1955) [hereinafter HOOVER COMMISSION II].

<sup>212</sup> GRISINGER, UNWILDY, *supra* note 1, at 215.

<sup>213</sup> HOOVER COMMISSION II, *supra* note 213, at 2. Congress had subsequently imposed even stricter separation at the NLRB in the 1947 Taft–Hartley Act and at the FCC in the 1952 Communications Act Amendments.

<sup>214</sup> GRISINGER, UNWILDY, *supra* note 1, at 215–16.

the interplay of expert administrative staffers had been designed to improve cooperation and lead to better regulation overall.<sup>215</sup>

At the same time, examiners—renamed “hearing commissioners” to make their quasi-judicial status clear—were to be of higher caliber and further isolated from the agencies in which they worked.<sup>216</sup> Finding that CSC’s experience in evaluating executive officers had translated poorly to evaluations of legal and quasi-judicial personnel, the task force recommended that responsibility for hiring and firing be transferred from the CSC to a Chief Hearing Commissioner, under the authority of a new administrative court.<sup>217</sup> As hearing commissioners mastered their newly judicialized role, the task force proposed that they become more powerful.<sup>218</sup> The decisions of hearing commissioners were to have as much authority as the decisions of trial courts when reviewed by federal appellate courts.<sup>219</sup> Hearing commissioners’ findings of fact would be final unless the agency on review determined that the findings were clearly erroneous.<sup>220</sup> This would have empowered the hearing commissioners while stripping authority from the commission. The task force recommended that agency heads and commissioners should still have a free hand regarding “policy” decisions, but their failure to clarify what this meant suggested that the limits of the examiners’ authority would be newly broad and undefined.<sup>221</sup>

These proposals legitimized agency decision-making only insofar as it looked like judicial decision-making was just the beginning. Judicial review of agency decisions was to be more rigorous, and, clearly uncomfortable with the quasi-judicial authority Congress had repeatedly vested in agencies to make policy, the task force further recommended moving such functions out of the agencies entirely, into a new and independent administrative court. The Legal Services and Procedure recommendations were thus, at their core, calling for a vast reconstruction of the administrative state. Whatever jurisdiction could not be transferred to the courts would be so hemmed in by procedure, so subject to judicial scrutiny, and so

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<sup>215</sup> *Id.* at 216.

<sup>216</sup> *Id.*

<sup>217</sup> HOOVER COMMISSION II, *supra* note 213, at 2.

<sup>218</sup> *Id.*

<sup>219</sup> GRISINGER, UNWIELDY, *supra* note 1, at 216.

<sup>220</sup> *Id.*

<sup>221</sup> HOOVER COMMISSION II, *supra* note 213, at 2.

isolated from that of other administrators as to be virtually unrecognizable.

This proposal to drastically make over the administrative process was viewed skeptically by several members of the Hoover Commission, by the agencies, and by the Eisenhower White House, all of whom feared putting so much authority in the hearing examiners. As one Hoover Commission staffer warned, putting almost final decision-making authority in hearing examiners “assumes vast powers of intelligence and comprehension in hearing examiners” and “could be the most irresponsible class of officials in the Government.”<sup>222</sup> As Hoover commissioner Joseph P. Kennedy remarked to John Hollister, another commissioner,

I assure you that, as Chairman of the Securities and Exchange Commission, I didn't conceive of my job to be to accept the decisions of any hearing examiner or to review his work for major errors. His responsibility was to dig out the facts; it was my responsibility to use those facts in the manner in which I believed Congress wanted them used.<sup>223</sup>

Others widely criticized the idea that the rule of law required so much change.<sup>224</sup> Louis Jaffe suggested that the report “so insists on the judicialization of the administrative process that it ends by refusing to recognize its existence.”<sup>225</sup> Law professor Ralph Fuchs sharply criticized the commission's proposals regarding internal separation of functions, arguing that to deprive hearing

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<sup>222</sup> Letter from Jarold A. Kieffer, Assistant to Arthur S. Flemming, to Arthur S. Flemming, Comm'r, U.S. Civil Serv. Comm'n 6, 9 (Mar. 9, 1955), Folder “COEBG, 53–55: Legal Services and Procedure (1),” Box 86, Arthur Flemming Papers, DDEL.

<sup>223</sup> Letter from Joseph P. Kennedy, member, First and Second Hoover Comm'ns, to Solomon C. Hollister, member, Second Hoover Comm'n 2 (Mar. 11, 1955), Folder “Task Force on Legal Services and Procedure Misc. Correspondence Folder #1 10/17/53–1/12/54,” Box 3, Hoover Commission II, Herbert Hoover Papers, Post-Presidential Papers, Herbert Hoover Presidential Library, West Branch, IA.

<sup>224</sup> See *infra* notes 225–226 and accompanying text.

<sup>225</sup> Louis L. Jaffe, *Basic Issues: An Analysis*, 30 N.Y.U. L. REV. 1273, 1296 (1955).

commissioners of accumulated agency expertise would “cut the heart out of administrative processes.”<sup>226</sup>

The ABA picked up the slack through its own Special Committee on Legal Services and Procedure.<sup>227</sup> The ABA had sought greater uniformity and increased judicialization since the APA, and soon drafted a Code of Administrative Procedure that closely resembled the Hoover Commission’s code.<sup>228</sup> Although the ABA spent the next several years drafting bills and pressing for reform, strong opposition from agencies and commissions, administrative practitioners, and the Attorney General meant little was accomplished. By the early 1960s, the Senate Subcommittee on Administrative Practice and Procedure concluded that the ABA’s proposed code appeared “inconsistent with any real attempt to reduce delay and expense.”<sup>229</sup> Further judicializing the administrative state to ensure fairness through independence had become a losing battle.

### VIII. CONCLUSION

Developments in administrative procedure during the Eisenhower and Kennedy administrations suggest how much the context for discussing administrative law had changed. Concerns that examiners were neither fair nor capable enough gave way to concerns about administrators’ lack of enthusiasm and examiners’ proceduralism. Reformers using fairness arguments to press for more examiner independence found these arguments less salient. James M. Landis’s critical report to president-elect John Kennedy in 1960 indicated just how much conversations about the administrative process had shifted and how many long-standing complaints earlier reform efforts had managed to ignore.<sup>230</sup> Failed attempts by the second Hoover Commission and the ABA to further limit

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<sup>226</sup> Ralph F. Fuchs, *The Hoover Commission and Task Force Reports on Legal Services and Procedure*, 31 IND. L.J. 1, 30 (1955).

<sup>227</sup> GRISINGER, UNWIELDY, *supra* note 1, at 226.

<sup>228</sup> *Proceedings of the House of Delegates*, 81 A.B.A. ANN. REP. 369, 383 (1956); *Report of the Special Committee on Legal Services and Procedure*, 81 A.B.A. ANN. REP. 491 (1956); *see also* Dante B. Fascell, *The Problem of Complexities and Delays in Administrative Proceedings and Practice*, 12 ADMIN. L. BULL. 6 (1959).

<sup>229</sup> S. JUDICIARY COMM., ADMINISTRATIVE PRACTICE AND PROCEDURE, S. REP. NO. 87-168, at 11 (1st Sess. 1961).

<sup>230</sup> Landis, *supra* note 4.

administrative discretion through onerous court-like procedures and expansive judicial review suggested that both interested observers and regulated parties were embracing new understandings of the problems of the administrative state.

This contrast suggests the gradual consolidation and acceptance of the administrative state in the post–New Deal era. The idea of “bureaucrats run amok” was no longer as terrifying as it had been even a decade earlier. By 1960, administrative agencies and independent regulatory commissions were familiar features of the federal landscape, and the ABA’s feverish visions of “administrative absolutism” had given way to new concerns about slow and plodding administrators elsewhere in the agency. Discussions about examiner independence would take place in terms of professionalization, not presumptive unfairness. In addition, administrative experiments in health, welfare, safety, and environmental regulation in the late 1960s and early 1970s indicated a new focus in administrative politics.<sup>231</sup> Responding to complaints about existing agencies’ failure to state broad principles of policy and their preference for adjudication, many of the new statutes explicitly instructed the new agencies to make policy through rulemaking instead of case-by-case adjudication—bypassing the examiners entirely. In addition, in response to “capture” critiques, agencies opened up the regulatory process; “public participation” would become the new touchstone of

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<sup>231</sup> Hugh Davis Graham, *Since 1964: The Paradox of American Civil Rights Regulation*, in *TAKING STOCK: AMERICAN GOVERNMENT IN THE TWENTIETH CENTURY 187* (Morton Keller & R. Shep Melnick, eds., 1999); RICHARD A. HARRIS & SIDNEY M. MILKIS, *THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES* (2d ed. 1996) [hereinafter Graham, *Since 1964*]; Robert A. Kagan, *Adversarial Legalism and American Government*, in *THE NEW POLITICS OF PUBLIC POLICY* (Marc K. Landy & Martin A. Levin eds., 1995); JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990); David Vogel, *The New Social Regulation in Historical and Comparative Perspective*, in *REGULATION IN PERSPECTIVE: HISTORICAL ESSAYS 155–85* (Thomas K. McCraw ed., 1981); Hugh Davis Graham, *Legacies of the 1960s: The American ‘Rights Revolution’ in an Era of Divided Governance*, 10 *J. POL’Y HIST.* 267 (1998) [hereinafter Graham, *Legacies of the 1960s*]; Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 *VA. L. REV.* 253 (1986); William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 *YALE L.J.* 38 (1975); Schiller, *supra* note 198.

reform.<sup>232</sup> The “problem” of the administrative state—once that of powerless citizens against a powerful state—was now the reverse.

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<sup>232</sup> BERNSTEIN, *supra* note 182; Graham, *Since 1964*, *supra* note 231; HARRIS & MILKIS, *supra* note 231; Hugh Hecl, *The Sixties' False Dawn: Awakenings, Movements, and Postmodern Policy-Making*, in INTEGRATING THE SIXTIES: THE ORIGINS, STRUCTURES, AND LEGITIMACY OF PUBLIC POLICY IN A TURBULENT DECADE 34 (Brian Balogh ed., 1996); Kagan, *supra* note 231; LOWI, *supra* note 2; MASHAW & HARFST, *supra* note 231; MCCRAW, *supra* note 2; SUNSTEIN, *supra* note 231; Vogel, *supra* note 231; Graham, *Legacies of the 1960s*, *supra* note 231; Merrill, *supra* note 198; Sidney M. Milkis, *Remaking Government Institutions in the 1970s: Participatory Democracy and the Triumph of Administrative Politics*, 10 J. POL'Y HIST. 51 (1998); Morrison, *supra* note 231; Pedersen, Jr., *supra* note 231; Rabin, *supra* note 2; Reuel E. Schiller, *Enlarging the Administrative Polity*, *supra* note 2; Schiller, *supra* note 198; Stewart, *supra* note 2; Verkuil, *supra* note 43.