

---

## Administrative Law: Federal Trial Examiners and the Ramspeck Case

Charles H. Kinnane

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### Recommended Citation

Charles H. Kinnane, *Administrative Law: Federal Trial Examiners and the Ramspeck Case*, 4 DePaul L. Rev. 1 (1954)

Available at: <https://via.library.depaul.edu/law-review/vol4/iss1/1>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# DE PAUL LAW REVIEW

---

Volume IV

AUTUMN-WINTER 1954

Number 1

---

## ADMINISTRATIVE LAW: FEDERAL TRIAL EXAMINERS AND THE RAMSPECK CASE

CHARLES H. KINNANE

**I**N *Ramspeck v. Federal Trial Examiners Conference*,<sup>1</sup> decided March 9, 1953, the Supreme Court made notable contributions to an important area of federal administrative law. That area relates to the important "administrative judiciary" or "independent trial examiner" system provided by the Federal Administrative Pro-

<sup>1</sup> 345 U.S. 128 (1953).

---

DR. CHARLES HERMAN KINNANE, Professor of Law in De Paul University, died after a brief illness on April 28, 1954. This article was completed shortly before Professor Kinnane's death and reflects his provocative thinking on a controversial portion of the Federal Administrative Procedure Act. Proposals for amendment of the sections dealing with trial examiners were introduced in the 83d Congress, but no action was taken and the problem is still under discussion and consideration.

Born in Linwood, Michigan, on September 4, 1898, Professor Kinnane interrupted his student days at the University of Illinois to serve in France with the University of Illinois Ambulance Unit. He returned to the University of Illinois after the war, and was awarded the degrees of B.S. and LL.B. in 1924. In 1926, he was awarded the degree of J.S.D. by Yale University. The fifteen years after his graduation from law school were spent in acquiring a wide experience in different fields of legal endeavor. He had several years of practice in Illinois and a year with the Home Owners Loan Corporation. He taught in the University of Wyoming College of Law from 1924 to 1932, being the Dean after 1926; he then taught as a part-time teacher in Loyola University School of Law (Chicago) from 1932 to 1936, and he served as the Dean of the University of San Francisco School of Law from 1936 to 1939. In 1939, he came to De Paul University College of Law, where he spent the remainder of his career, except for a leave of absence from 1943 to 1948, as an attorney in the Public Utilities Division of the Securities and Exchange Commission.

Professor Kinnane's early interests in the law had centered in legal history and resulted in the publication of "A First Book on Anglo-American Law" in 1932. The subject continued to engross him, and although new interests were forming, he wrote a second edition which was published in 1952. The new interests just mentioned were in the field of Administrative Law and came into being after his service in the Securities and Exchange Commission. He was greatly affected and influenced by what he saw there of the administrative process and came to regard this process as increasingly important and necessary in national and local government activity. A year or so before his death he had begun the collection of materials for a casebook on Administrative Law.

cedure Act of 1946.<sup>2</sup> In settling a number of basic problems, the Court sustained the Civil Service Commission in its controversy with individual and associated members of the federal trial examiner system; but the settling involved extensive differences of opinion besides that between the Commission and the examiners. The Court itself divided; it reversed the two courts below;<sup>3</sup> and there was also a division in the Court of Appeals.<sup>4</sup>

A litigation so fertile of controversy at all levels, from the administrative to the highest judicial, would seem almost inevitably to involve grave issues of law, or of policy, or both; and furthermore, the final decision in such a case, while it terminates the particular litigation, may well fail to end the controversy about the issues themselves, especially when, as in the *Ramspeck* case, such issues involve interpretation of a highly ambiguous statute. In such a case the decision might serve very effectively to precipitate a new controversy, in a legislative as distinguished from a judicial environment, as to whether the statute should be amended to implement the view which failed to prevail in the Court. At any rate, it is proposed herein to evaluate the decision with the objects primarily of (1) ascertaining what the position of the federal trial examiner is, in the light of the *Ramspeck* case decision, and (2) forming a judgment as to whether the statute should be amended to change that position.

As a preliminary, it might be pointed out that the Administrative Procedure Act provides for a limited, rather than universal, use of the "independent" trial examiners provided for by that Act. In general such trial examiners serve as presiding officers at hearings, and make decisions, in cases where agency action is of such an important kind that Congress has thought fit, in specific instances covered by other statutes, to safeguard the interests of persons affected by such action by requirements of opportunity for hearing and of decision on the

<sup>2</sup> 5 U.S.C.A. § 1001-1011 (1953).

<sup>3</sup> *Federal Trial Examiners Conference v. Ramspeck*, 104 F. Supp. 734 (D.C.D.C., 1952). Judgment affirmed July 16, 202 F. 2d 312 (App. D.C., 1952). The opinion of the majority of the Supreme Court states that "The Court of Appeals affirmed in a short per curiam opinion, one judge dissenting," and that the Supreme Court granted certiorari, 344 U.S. 853 (1952).

<sup>4</sup> By implication the Supreme Court also sustained so much of an opinion of the Attorney General as involved the point that the Civil Service Commission is to determine which federal trial examiners within a particular agency may be promoted. See the citation in 5 U.S.C.A. § 1010, to 1951, 41 Op. Atty. Gen., February 23.

basis of record of such hearing.<sup>5</sup> But even in such cases, the agency, or one or more of its members, may preside and decide, to the complete exclusion of the trial examiner from both the hearing and decisional processes; and in rule-making and some licensing cases the trial examiner, even though he presided at the hearing, may be excluded from participating in the decision.

Nevertheless, there remain numerous important situations where, if the agency or one or more of its members do not preside, the "independent" trial examiner must do so; and where he must in the first instance decide the case, whether by initial or recommended decision. Furthermore, practice reinforces law in this connection, for, as a matter of fact, the agency heads in many agencies seldom wish to preside in person at such hearings. As Mr. Justice Minton pointed out, in his opinion for the majority in the *Ramspeck* case, "These agencies have such a volume of business, including cases in which a hearing is required, that the agency heads, the members of boards and commissions, can rarely preside over hearings in which evidence is required."<sup>6</sup> Accordingly, while the agencies can exclude the trial examiners from participation in the important kinds of cases mentioned, in practice they often do not. The consequence is that in great numbers of cases the trial examiner is an important participant, with important functions to perform, in the more important kinds of cases coming before many important federal agencies.

A principal reason for the establishment of the "independent" trial examiner system for such important cases, by the Administrative Procedure Act, is also mentioned in Mr. Justice Minton's opinion. He

<sup>5</sup> Section 4 of the Administrative Procedure Act provides that "Where rules are required *by statute* to be made on the record after opportunity for any agency hearing, the requirements of sections 7 and 8 shall apply. . . ." Section 5 uses the same formula as is shown by the following: "In every case of adjudication required *by statute* to be determined on the record after opportunity for an agency hearing . . . (c) The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision. . . ." (Emphasis supplied.) Section 7 requirements as to use of trial examiners to preside at hearings are applicable "In hearings which section 4 or 5 requires to be conducted pursuant to this section. . . ." Section 8 requirements in regard to decisions, by trial examiners among others, are applicable, "In cases in which a hearing is required to be conducted in conformity with section 7." Rule-making and adjudication (defined by the Act to include licensing) *not* required by statute to be on the record after opportunity for agency hearing, is *not* safeguarded by the foregoing provisions.

<sup>6</sup> During the writer's period of service of about five years with the Securities and Exchange Commission, to mention a specific agency, the cases when the Commission presided at such hearings were very few. This experience is believed to be typical of what goes on in many agencies.

wrote, "Many complaints were voiced against the actions of the hearing examiners, it being charged that they were mere tools of the agencies concerned and subservient to the agency heads in making their proposed findings of fact and recommendations."

The core of the problem in regard to subservience or independence of trial examiners is to be found in the Section 7 provisions of the Administrative Procedure Act about presiding at hearings for the making of records,<sup>7</sup> and in the Section 8 provisions in regard to decisions. The Congressional objective is indicated in the portion of Section 7 (a) which reads: "The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner." If "impartial manner" means anything, it seems to mean that the presiding and deciding officer is not to be either the prosecuting agent of the agency at hearings, or the mere mouthpiece of the agency as one of the parties to the case, at decision time.

This requirement of impartiality by presiding officers, including trial examiners, was not put into the Act merely as the expression of a pious hope.<sup>8</sup> A partial and subservient examiner has a most dangerous power to shape the making of the record of the hearing to desired ends,<sup>9</sup> and also, in any case involving a substantial conflict in the evidence, he has a similar power to make findings of fact in a way believed by him to be "politic," and thereby lay the foundations for decisions by him having the same inestimable character. On the other hand, the independent and impartial examiner may let the chips lie where they ought, and in case the agency on review disagrees with his findings or decision, put the burden on the agency, which is more or less suspect of partiality in some cases, of justifying its disagreement with the examiner who, because of his independence, is indulged more or less with the contrary presumption of impartiality.<sup>10</sup>

<sup>7</sup> One of the more "horrible" examples of perversion by a trial examiner of the process of record making at hearing is found in *Inland Steel Co. v. National Labor Relations Board*, 109 F. 2d 9 (C.A. 7th, 1940). Not even removal of the overzealous trial examiner by the Board could correct the harm he had done.

<sup>8</sup> See also Lavery, *Federal Administrative Law* § 136 (1952) for the point that the matter of provisions in regard to presiding officers was very fully considered by the two judiciary committees, and for citations to references.

<sup>9</sup> See for example, the *Inland* case, cited in note 7.

<sup>10</sup> Logically, of course, if independence of judgment at the levels of either initial or final decision were the sole advantage to be desired, a complete separation of the prosecutive from the determinative function should have been provided. Suffice it to say that Congress felt that other important advantages would be needlessly sacri-

The reasons for impartiality, and for the independence that makes impartiality possible, are, therefore, both substantial and pervasive. To ensure the desired impartiality on the part of trial examiners in particular, Congress provided that, in the important kinds of situations already mentioned, if authority to preside be delegated to a subordinate, the hearings should be presided over by "one or more examiners *appointed as provided in this Act*."<sup>11</sup> No other kind of subordinate could be designated for such service. And it was in general only the kind of examiner "appointed as provided in this Act" who was eligible to make the initial or recommended decision—a decision which could not be dispensed with by the agency.

With these matters of background in regard to trial examiner impartiality and independence in mind, we may now proceed to consider the presently crucial section of the Administrative Procedure Act, namely section 11. This is the section of the Act which purports to provide independence for the federal trial examiner. It is the section which was involved in the *Ramspeck* case. What, in fact, does this section provide in the way of trial examiner independence?

In pertinent part, it provides:

Subject to the civil service and other laws to the extent not inconsistent with this act, *there shall be appointed by and for each agency* as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8 who shall be *assigned to cases in rotation* so far as practicable. . . . Examiners shall be *removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission* (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall *receive compensation prescribed by the Commission independently of agency recommendations and ratings* and in accordance with the Classification Act of 1923 as amended. . . .<sup>12</sup>

To be noted: While the agencies may appoint their examiners, the examiners are (1) made independent of the agency served in that (a) their compensation is determined by a separate body, the Civil Service Commission, and (b) the examiners are removable only for

---

ficed by such a complete separation, and accordingly it made the initial or recommended decisions of trial examiners subject to plenary review by the agency. See Section 8 (a). As to decisions at the top level of the agency, without requiring separation of functions, see Section 5 (c); and on the advantages of preserving at that level the "unitary process" see Carrow, *The Background of Administrative Law* (1948), pages 35-36, 95, 96, 100, 108.

<sup>11</sup> Administrative Procedure Act, § 7(a) (3); 5 U.S.C.A. § 1006(a) (3) (1946). Emphasis added.

<sup>12</sup> Emphasis added.

cause, not as determined by the agency served, but only as determined by the Civil Service Commission; and (2) the examiners are protected against agency reprisals in the way of assignments to routine or unimportant cases only, or in the way of withholding from them any work assignments whatever, by a requirement of assignment of cases in rotation.

At first glance, these provisions might appear to be ample to destroy agency power to coerce, or to entice, examiners into subservient action. On the other hand they may go less far than they appear to go. In any event they seem to leave unanswered more questions than they clearly provide answers for. A few examples: What in fact is the general status of the federal trial examiner? Is he a judge, or not? Does he, or does he not, have life tenure? Are the examiners all of one rank, as for example federal district court judges? If not, who determines ranks, and who controls promotions, and increases in compensation? Are the examiners entirely beyond the reach of agency reprisals? Are they entirely relieved of temptation to curry the favor of the agency they serve? Obviously, the answers to all these questions will have a bearing on the matter of independence and on the matter of the impartiality that trial examiner independence is designed to make possible. The *Ramspeck* case answers some of these questions and suggests possible answers to others.

The action in that case was for a declaratory judgment that certain rules of the Civil Service Commission in regard to examiners were invalid, and for an injunction to restrain enforcement of such rules. The relief asked was granted in the District Court, which interpreted Section 11 as requiring:

(1) that hearing examiners employed by a particular federal administrative agency must be placed in the same salary grade; (2) that a hearing examiner may not be promoted from one salary grade to another within the same agency; (3) that hearing examiners must be assigned to cases in mechanical rotation without regard to the difficulty or importance of particular cases, or the competence or experience of particular examiners; and (4) that the employment of hearing examiners may not be terminated by reduction in force procedures where there is lack of work or funds with which to pay them.<sup>13</sup>

In disagreeing on these matters, the Supreme Court made a number of important observations about the general status of trial examiners. It said:

<sup>13</sup> This statement is from the majority opinion. 345 U.S. 128, 129 (1953).

Congress intended to make hearing examiners "a special class of semi-independent subordinate hearing officers" by vesting control of their compensation, promotion, and tenure in the Civil Service Commission to a much greater degree than in the case of other federal employees. . . . An examination of Section 11 shows that Congress retained the examiners as classified Civil Service employees . . . "freed from the theretofore existing dependence on agency ratings for their classification, but as so freed" the examiners were specifically declared to be otherwise under the other provisions of the Classification Act of 1923, as amended (now the Classification Act of 1949 . . .). . . . The position of hearing examiner is not a constitutionally protected position. It is a creature of congressional enactment. . . . Their positions may be regulated completely by Congress. . . . We find no evidence that Congress intended to make hearing examiners a class with lifetime employment, whether there was work for them to do or not, as contended by the respondents. A reduction in force . . . and removal of an examiner in accordance therewith is a "good cause" within the meaning of § 11.<sup>13A</sup>

It seems clear that the federal trial examiners are in no sense members of the federal judiciary, or even judges at all. They are simply classified civil service employees with, however, an unusual freedom from control by employer agencies. They do not have the security of tenure that is given by Article III of the Constitution to some federal judges; nor do they have even the security of tenure attributable, in federal and state fields, to appointment or election for fixed terms. They are subject to removal as Congress may direct. More to the point, it also appears that to the extent that reductions in force are subject to agency control or manipulation, to that extent trial examiners are subject to agency dismissal. They lack, therefore, in important particulars, the full independence of judges.

On the other hand, they are not mere agency employees. Their powers when presiding at hearings come directly from the Administrative Procedure Act (Section 7),<sup>14</sup> as do their powers in connection with the decisional process (Section 8). They appear, therefore, to be in a different, and more independent position than, for example, masters in chancery or equivalent officers, whether under the name of court commissioners, referees, or otherwise. The examiners are

<sup>13A</sup> *Ibid.*, at 132 and 133.

<sup>14</sup> The Section 7 powers seem clearly to be adequate to put the trial examiner in full control of the hearing. In addition to the grant of general power to "regulate the course of the hearing," Section 7 gives the following specific authorities: to administer oaths and affirmations; issue subpoenas; rule on offers of proof and receive evidence; take or cause depositions to be taken; hold conferences with the consent of the parties for the settlement or simplification of issues; and dispose of procedural requests or similar matters. These things he can do on his own authority and without any need for prior clearance or subsequent approval by the agency.

not mere assistants or delegates of the agencies which they serve. After presiding, the examiner is to make the initial or recommended decision in the circumstances provided by Section 8, also on his own authority.<sup>15</sup>

The position of a federal trial examiner appears, therefore, to be largely *sui generis*. He is more than a master or other assistant to a judge, but, as was made clear in the *Ramspeck* case, he is less than a judge.

Since he is not a judge, although he has decisional powers and duties, and since he does not have the full independence of a judge, it is quite important to examine carefully his civil service status; for it is this status, rather than judicial status, that bears on the matter of trial examiner independence. The examiner may be dependent, or independent, to the precise degree that—and regardless of merely general impressions on the matter—Section 11 and the civil service laws and regulations permit him to be subject to agency pressures, or protect him from them. In the light of the *Ramspeck* case, how well was the objective of trial examiner independence actually attained?

As already noted, the employing agencies do not have the power to remove examiners, except as an incident to reduction in force procedures. But subservience might be coerced or induced in ways other than by a threat of outright discharge. The matter of control over promotion, or demotion, with attending salary adjustments, comes immediately to mind as a powerful instrument of control over examiners.

On this matter, the trial examiners in the *Ramspeck* case took what might be called the next to extreme position in favor of their independence. The extreme position would be that all trial examiners were of one rank, like federal district judges for example, and that no power existed anywhere to classify or grade the examiners. From this it would follow that they would have maximum independence because they would be immune from fear of demotion, and relieved also from the temptation to be subservient in the hope of reward by promotion.

The examiners did not take that extreme position, evidently being mindful that they were subject, as provided in Section 11, to the Clas-

<sup>15</sup> That the agency has plenary power of review over a trial examiner's decision, as provided in Section 8 (a), does not in any way require qualification of the statement that the trial examiner can and should make his own decision on his own responsibility.

sification Act; but they contended for the most limited application of that Act. As stated by the Court, the examiners "did not contend that all examiners should be classified in the same grade; they contend only that all hearing examiners *in any one agency* should be classified in the same grade." If the contention actually made by the examiners were sustained two important results would follow: first, the Civil Service Commission could classify or grade the examiners in view of the differences in the work of the various agencies, so that less experienced and less able examiners might be assigned to agencies with comparatively simple problems, while the higher grades of examiners could be assigned to agencies whose work required greater experience and ability. But, second, the examiners assigned to an agency would all be of the same grade (regardless of the variation in difficulty of agency problems), thereby immunizing all examiners serving a particular agency from the fear of being down-graded, or the hope of promotion.

On the face of it, this contention seemed to be well within the range of reason, having in mind the general objective of the Administrative Procedure Act to provide independent examiners; besides winning in the two courts below, the examiners also convinced a minority of three on the Supreme Court, namely Justices Black, Frankfurter and Douglas. Mr. Justice Black wrote:

The Administrative Procedure Act was designed to give trial examiners in the various administrative agencies a new status of freedom from agency control. Henceforth they were to be "very nearly the equivalent of judges even though operating within the Federal system of administrative justice." . . . In fact, the Administrative Procedure Act appears to contemplate that all examiners employed by a particular agency stand on equal footing in regard to service and pay.

The majority, however, took the contrary view. The reasoning of the majority on this point seems to be something less than clearly convincing. Without reviewing the reasoning in detail, it should be pointed out that the majority made what seemed to be their strongest point at the level of practicality, rather than as a strict matter of statutory interpretation. They pointed out that problems, even within a single agency, vary in difficulty and in nature, and they appeared in this matter to accept completely the contention by the Civil Service Commission that:

Cases in a given agency are of varying levels of difficulty and importance and that the examiners hearing them must possess varying degrees of competence

and types of qualifications. Petitioners point to the experience of the Civil Aeronautics Board where there are safety cases heard by one group of examiners and economic cases heard by another. The examiners assigned to the safety cases have pilots' certificates, while those assigned to the economic cases have completely different types of qualifications. Again, certain cases before the Interstate Commerce Commission involve relatively simple applications for extension of motor carrier certificates, while others involve complicated and difficult rate proceedings.

From this point on, the majority seemed to conclude, rather than demonstrate, that intra-agency stratification of examiners was not only practically desirable but also that it was intended by Congress. However practical it might be in the interest of economical and efficient utilization of examiner manpower to have a system of intra-agency stratification, it does not necessarily follow that Congress intended to have the most efficient system. However, the majority found another bit of standing ground on the somewhat dubious basis that "Congress must have recognized the right of the Commission to so classify when it amended the Classification Act in 1949" without disturbing the then prevailing situation whereby the "Commission was classifying examiners under regulations similar to the present ones."

But it is not our purpose to consider in detail the reasons for the decision in the *Ramspeck* case, so much as it is to evaluate the results of the decision. As a result of the decision the following situation apparently exists: examiners of different grades may be assigned to a single agency. The agencies lack not only power directly to dismiss "unsatisfactory" examiners, but also lack power to control demotion or promotion of examiners; furthermore cases are to be assigned to examiners in rotation. Accordingly, in spite of lack of absolutely secure tenure, and in spite of intra-agency grading of examiners, considerable examiner independence still seems to be provided for.

It is sometimes said that law is one thing and practice another. The examiners contended in effect in the *Ramspeck* case that in practice two loopholes existed to militate against maximum examiner objectivity and independence. First, as to the assignment of cases, not by mere mechanical rotation among all the examiners, but by rotation confined to examiners of equal qualifications or examiners of the same grade, it would be possible for the agencies served by more than one grade of examiners to exercise a very considerable discretion in the assignment of cases to favored, or "favorable" examiners. As the majority of the Court pointed out, the Civil Service Commission had

adopted a classification which "ranged from just one grade in several agencies to five grades in two agencies." Agency heads, and not the Civil Service Commission, or other disinterested body, have the authority to assign cases to fit examiners, when more than one grade of examiners serves the agency. The difficulty is due to the fact that there is no clearly objective basis for judgment in the matching of case difficulties to examiner qualifications. The bases for examiner classification or grading are, as to job content, as follows: "moderately difficult and important;" "difficult and important;" "unusually difficult and important;" "exceedingly difficult and important;" and "exceptionally difficult and important." Indeed, the majority of the Court admitted that these "specifications of necessity must be subjective." The minority asserted quite emphatically that "the distinctions depended upon to support the different classifications are so nebulous that the head of an agency is left practically free to select any examiner he chooses for any case he chooses."

We may test this quickly and practically. Just where does an ICC rate proceeding fit into the five abovementioned categories? And are all ICC rate cases of the same difficulty and importance? Without explicit answers to such questions, it is clear that the following is possible: Examiner A is eligible for work of the "unusually difficult and important" kind, and disposed to be "reasonable;" while Examiner B is eligible to preside at cases of the "exceedingly difficult and important" kind, and quite capable of being "difficult" if he thinks he ought to be. What can keep the agency from assigning the case to A? This question is highly practical. In addition to agency success in getting a favorable examiner on the case, there is also the point that if A gets all or many of the "important" cases, and B gets none or few of them, their records when considered by the Civil Service Commission are going to look very different. On the basis of extended experience in important cases, A would appear to be a candidate for promotion. Examiner B would not.

A weakness of the majority opinion is that it seems to give no satisfactory assurance that such things could not and would not happen. It does not indicate any way in which Examiner A can be relieved of the temptation to continue in a course of "reasonable" conduct, or in which Examiner B can be encouraged to continue to be independent.<sup>16</sup> Consequently, the result of the *Ramspeck* deci-

<sup>16</sup> The majority of the Court relied to some extent upon a kind of escape clause in Section 11, namely the one in regard to assignment of cases to examiners in rotation

sion on this point is that an agency can often so control the assignment of cases, when more than one class of examiners serves the agency, as to tend to destroy much of the desired examiner independence.<sup>17</sup>

Are there any other loopholes? Unfortunately, yes. Section 11 provides, as has been noticed, for appointment "by and for each agency as many qualified and competent examiners as may be necessary." There is always the possibility of an increase in examiner force, and the possibility of promotion within the existing force. Who will be found "qualified and competent" to do the work in the higher grades, if a vacancy exists, due to increase in the number of examinerships in those grades or to deaths, resignations, etc.? As the majority of the Court pointed out, it is the Civil Service Commission, and not the agency, which chooses the particular examiner who shall receive the promotion. But this is not the whole truth.

As the respondent examiners contended in the *Ramspeck* case, the agency, in effect, has the power to punish any or all of its examiners, if it wishes; it has a veto power over all promotions, for it is the agency which is to decide if a vacancy is to be filled, and if it is to be filled by promotion. On the other hand, if the agency desires to reward one or more, instead of punish, it has considerable room for maneuver. It can defer decision that vacancies shall be created or filled, and if so whether they are to be filled by promotion, until embarrassing eligibles for promotion are gotten out of the way for one reason or another, whether by death, resignation, transfer or reduction in force. Then, a decision at an opportune time to create or fill a vacancy, and to fill it by promotion, may as a practical mat-

---

"so far as practicable." In analyzing this highly ambiguous qualifying phrase the majority quite properly, as a matter merely of analysis, pointed out that it was "practicable" to assign cases not only by mechanical rotation among all the examiners serving an agency, but also by rotation within groups of examiners of the same grade. This does not, of course, meet the issue of encouragement or discouragement of examiners disposed to be independent.

<sup>17</sup> The system of intra-agency grading of examiners is, of course, a more efficient one. But if efficiency alone were desired, the system which existed before the Administrative Procedure Act could well have been continued. Under that system the agency could assign cases to whatever examiners it wished, and the agency would probably be in the best position to know the qualifications and abilities of its examiners—in fact in a better position than the Civil Service Commission is likely to be under the present arrangement, removed as that Commission is from close, intimate, contact with the day to day hearing and decisional problems within the particular agencies. It is not without significance on the matter of maximum efficiency that Congress abrogated, rather than perpetuated, the old trial examiner system.

ter almost ensure that the desired examiner will be selected for the position by the Civil Service Commission.

As to these matters, the fears of the respondent examiners were disposed of by the majority of the Court as the imagining of "all sorts of devious schemes by which the agencies shrewdly analyse their staffs to pick out which examiners would probably be chosen by the Commission for promotion, and then create vacancies for them as a reward for favorable decisions." It is submitted that such fears can well be founded on more than mere imagination. It would be at the least a most naive idea that the agencies lack the shrewdness to operate in the ways suggested. As to the point, made by the majority, that the "Respondents have not shown any actual examples of this," it need only be observed that such a point seems entirely irrelevant. If it is possible for such things to happen, that possibility should be taken into account. The majority did add that the respondent examiners did not show that "in such circumstances the Commission would not correct the situation." On the other hand, neither the Commission, nor the majority of the Court, showed that the Commission could and would. At the moment, it does not in fact appear that the Commission could correct such a situation. The law does not prohibit the agencies from engaging in shrewd analysis, nor does it seem to justify the Commission in rescinding any action taken by it to promote an examiner merely because it belatedly came to realize that it had been outmaneuvered by an agency.

But the main point is that it does not appear to be entirely fanciful that such maneuvering might occur with sufficient frequency and success to make many examiners keenly aware of the possibilities of reward if they are sufficiently responsive to "practical" considerations which might affect their futures.

Against the above mentioned evils in the form of threats to complete examiner independence, there are two countervailing considerations which, at least, go far to support the majority decision. One of these, the more economical and efficient use of examiner man power, through a system of intra-agency grading of examiners, has already been mentioned. It is obviously a consideration of the highest practical importance.

But there is another. Its importance appears to deserve pointed mention, although neither the majority nor minority opinions referred to it. That importance can be indicated as follows: The work

of many of the agencies is often highly specialized and complicated, and it is desirable that examiners serving the agencies should have specialized experience in the work of the particular agency served. Congress, in fact, seemed clearly to recognize this. Nothing in Section 11 appears to provide for a general pool of trial examiners, members of which can be shifted from one agency to another on a day to day or case to case basis. On the contrary, Section 11 provides that trial examiners shall be appointed "for" each agency. Accordingly, once an examiner is appointed for a particular agency he can usually expect to stay with it.

But if all examiners of the agency were of the same grade, as advocated by the minority of the Court, there would be a certain deadening effect upon examiner ambition that in the long run would tend to be exceedingly expensive in the way of uninspired examiner service to the public. Each examiner would be "at the top," and so would have little incentive to improve himself and his capacity for service. Under the pattern approved by the majority of the Court the situation is vastly different. To an examiner appointed to the lowest grade, there are several higher grades to which he can aspire. The able and ambitious junior has a real incentive to work for promotion, and to do so under the theoretically superior condition, that promotion will be on a merit basis, rather than the result of appointment through political favor.<sup>18</sup> This, in itself, is a very wholesome condition. It is especially advantageous to the public interest for the reason that the normal route to promotion should be by way of superior service to the agency to which the examiner is assigned. Such service in order to be superior would seem necessarily to involve an increasing mastery of the technical and special matters within the jurisdiction of the agency served. There will tend to be, therefore, a continuing competition for advancement between examiners serving an agency, rather than the opposite situation which would tend to prevail if a deadening sameness of grade existed. It is believed to be impossible to overestimate the long-run benefits to the public interest in the feature of intra-agency competition.

Before arriving at any over-all conclusion about the decision in the *Ramspeck* case, those interested in it would do well to keep the point in mind that it would probably be a serious mistake (and per-

<sup>18</sup> Without "getting into politics" or dwelling on the matter of federal judicial appointments, it is well known that federal judges are overwhelmingly Democratic; and it is fondly hoped by many Republicans that this condition will be "corrected."

haps the majority of the Court accepted this view) to assume that agency heads in general will strive significantly to exploit the weaknesses revealed in Section 11. While the scrutiny herein has been in the nature of a somewhat suspicious search for evils possible under Section 11, temperance in judgment seems to require that possibilities should be evaluated only as such, and not as probabilities or as certainties. A safer assumption would seem to be one to the effect that the agency heads in general will be disposed to comply with the spirit of the section, that trial examiners by and large will be men of reasonable integrity, and that the Civil Service Commission will be reasonably alert to check or correct violations in particular cases. At most, the weaknesses revealed in Section 11 do not appear to be immediately and gravely alarming.

On the other hand, the results of the "practical" decision of the Court, in regard to the ambiguities in Section 11, seem to be such that the good might very reasonably be considered to far outweigh the evil. The features of economical and efficient use of examiner man power by a system of grading within agencies, and of active competition in public service between examiners serving an agency which employs examiners of different grades, are continuing and permanent advantages of the highest importance.<sup>19</sup> Not to be overlooked is the point that in spite of the weaknesses in the section, the trial examiners nonetheless enjoy a very considerable, if not the greatest possible, measure of independence.

Indeed, the solutions provided in the *Ramspeck* case appear, on the whole, to be so felicitous, that if prophecy may be hazarded, the prophecy is that it will probably be quite difficult to arouse any vigorous and widespread action to undo the decision by amending Section 11. There remains the matter of amending the section, not to undo the decision, but to eliminate the evils which persist in spite of it.

The matter involves a thorny, practical problem, in an important area of government, and in such thorny matters it is usually not possible to get solutions which are wholly beneficial, and completely unmixed with undesirable features. The good results provided by

<sup>19</sup> Whether it might even be desirable to extend features of the federal trial examiner system for use in court work is "another story," and so not to be gone into here; it will be only suggested that there might be large public benefits from a system of judicial arrangements permitting judges to specialize in particular fields, and requiring them to work under conditions where they would have the stimulus of competition for advancement.

the decision in the *Ramspeck* case should be preserved in any project for amendment. That point need not be dwelt upon. The question narrows, then, as to how Section 11 can be amended so as to eliminate the evil without eliminating the good.

The evil centers in the situations of agency power to effect reductions in force, to evade in some degree the assignment of cases in rotation, and to determine that vacancies in examinerships are to be filled by promotion. As to the first, would it be sensible to vest in some body, other than the agencies themselves, the power to decide when examiner forces should be reduced? Who, better than the agencies concerned, can know when and to what degree examiner force should be reduced? As to the second, it simply does not appear to be possible to devise a scheme for the perfect matching of cases, with their infinitely varying characters and complexities, to the different grades of trial examiners, so as to eliminate all agency discretion in the assignment of cases by a system of automatic rotation. As to the third, who better than the agencies concerned could be depended upon to determine properly when vacancies in their respective examiner forces should be filled by promotion?

A final thought on the matter is this: However reluctant one may be to give up on the matter of improving the situation, it is very hard to see how Congress could amend Section 11 to get any better results than those provided by the Supreme Court in its "practical" decision in the *Ramspeck* case.