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Roger C. Cramton

*Cornell Law School*, [rcc10@cornell.edu](mailto:rcc10@cornell.edu)

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# A Title Change for Federal Hearing Examiners? "A Rose By Any Other Name..."

ROGER C. CRAMTON\*

## *Some Prior History*

The appropriateness of the title "hearing examiner" was first challenged seventeen years ago, and the controversy continues today. In 1955, the Hoover Commission's Task Force on Legal Services and Procedures, noting that hearing examiners preside in adjudicatory and rulemaking proceedings "with the degree of independence of judgment which is expected of judges," recommended a new title "with the status of administrative trial judge."<sup>1</sup> Congress, however, did not act on the Commission's recommendation of the new title of "hearing commissioner."

In 1963 the Civil Service Commission considered adoption of the title "hearing commissioner" but the title was thought to be productive of confusion with the heads of agencies who are denominated

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\* Chairman, Administrative Conference of the United States. Formerly, Professor of Law, University of Michigan.

This paper is an elaboration of remarks prepared for delivery at the Ninth Annual Seminar of the Federal Trial Examiners Conference on Tuesday, March 21, 1972, in Washington, D.C. Except as indicated to the contrary, the views expressed are those of the author and not necessarily those of the Administrative Conference of the United States. The author acknowledges the able assistance of Lynda S. Zengerle in the preparation of this paper. Needless to say, she is not responsible for my views or errors.

1. TASK FORCE ON LEGAL SERVICES AND PROCEDURE, REPORT ON LEGAL SERVICES AND PROCEDURE TO THE EXECUTIVE BRANCH OF THE GOVERNMENT 197-98 (March 1955).

"commissioners." The Commission decided against the suggested change.<sup>2</sup> Three years later a bill was introduced in Congress to change the title of hearing examiners to "administrative judge."<sup>3</sup> The Judicial Conference of the United States opposed the legislation, stating that "the designation 'hearing examiner' is well understood and that the proposed change would be inappropriate and confusing."<sup>4</sup> Congress did not act on the legislation.

The Administrative Conference of the United States undertook consideration of the title question in 1969 as part of a broader examination of matters relating to the selection and continuing education of hearing examiners. The Committee on Personnel held public hearings for five days in April 1969, surveyed agency views, and considered responses to tentative proposals.<sup>5</sup> The Committee concluded that a new title "more clearly reflecting the unique status and responsibility of these quasi-judicial officers" should be adopted and recommended the title of "administrative chancellor."<sup>6</sup> The Committee's recommendation, however, was not supported by the Council of the Administrative Conference, which forwarded the question for consideration by the Assembly with a statement opposing the proposed title of "administrative chancellor," as well as the title of "administrative trial judge." After a spirited debate in the Assembly, the Council position was upheld and the Administrative Conference did not recommend a change in title.

In 1970, the Judicial Conference of the United States reiterated its opposition to a title change for hearing examiners that involved the word "judge." The Conference, after repeating its earlier view, relied on the action of the Administrative Conference in disapproving legislation to redesignate hearing examiners as "administrative trial judges."<sup>7</sup> In July 1971, however, the tide of events shifted in the direction of a change in title. The section on Judicial Administration of the American Bar Association, with the approval of the House of Delegates, created the Conference of Administrative Law Judges,

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2. See Report of Advisory Committee for Hearing Examiners to United States Civil Service Commission (undated) (presented to the Commissioners in July 1963).

3. H.R. REP. No. 16550, 89th Cong., 2d Sess. (1966).

4. Proceedings of the Judicial Conference of the United States 40 (Sept. 1966) (The Committee report in support of this action is not available to the public).

5. The transcript of the public hearing held by the Committee on Personnel was published in an abridged form by the Federal Trial Examiners Conference. CCOMM. ON TITLE CHANGE, FEDERAL TRIAL EXAMINERS CONFERENCE, THE CASE FOR ADMINISTRATIVE TRIAL JUDGE (1969) [hereafter cited as THE CASE FOR ADMINISTRATIVE TRIAL JUDGE].

6. Administrative Conference of the United States, full text of debate on the recommendations of the Committee on Personnel on Proposed Change of Title of Hearing Examiners 217, 219 (Oct. 21-22, 1969).

7. Proceedings of the Judicial Conference of the United States 11 (Sept. 1970).

which is composed primarily of federal hearing examiners.<sup>8</sup> The ABA thus officially conferred the title "judge" upon hearing examiners.

Balancing the judicial designation explicit in this ABA action is the recent report of the Job Evaluation and Pay Review Task Force of the Civil Service Commission.<sup>9</sup> This report, the so-called "Oliver Report," recommended "administrative law examiner" as a more appropriate title than "hearing examiner," but opposed as too controversial, any title involving the word "judge."

In late 1971, several of the independent regulatory agencies gave consideration to the adoption of rules changing the title of their hearing examiners, at least for certain purposes. An advisory committee on procedures of the Federal Trade Commission recommended in mid-1971 that the FTC, in connection with FTC adjudicative proceedings, refer to its hearing examiners as "Federal Trade Commission Trial Judges." The FTC tentatively adopted a rule to that effect on October 7, 1971. The Federal Power Commission took a somewhat similar action in December 1971.

When word of the tentative actions of the FTC and FPC spread to other independent agencies and to the United States Civil Service Commission, the Commission took steps to maintain the status quo pending a full consideration of the question. On January 19, 1972, Chairman Hampton of the Civil Service Commission wrote to the FTC and FPC urging the two agencies not to publish their proposed changes, but to maintain the status quo until the Commission had an opportunity to: (1) assert whatever jurisdiction we have in this area because of a conviction that a uniform response to this multi-agency problem is far preferable to its piecemeal treatment on an agency-by-agency basis"; and (2) "decide the matter for all agencies after obtaining the current view of the Administrative Conference of the United States, the Judicial Conference, the agency heads who employ most examiners, suitable representatives of the hearing examiner corps such as the Federal Trial Examiners Conference, and the Job Evaluation and Pay Review Task Force within this Commission which conducted a recent survey on the subject."<sup>10</sup> The FTC and FPC acceded to Chairman Hampton's request on the understanding that the Civil Service Commission's review of the issue would be conducted as expeditiously as possible.

On March 1, 1972, the Civil Service Commission issued a regulation which pre-empted the field in the sense that it prevents any agency from making a title change on its own.<sup>11</sup> Simultaneously, the Commission announced the initiation of a broad study of the question "whether a more appropriate title than that of 'hearing exam-

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8. 16 AM. B. NEWS No. 12, at 4 (Dec. 1971).

9. U.S. CIVIL SERVICE COMMISSION JOB EVALUATION AND PAY REVIEW TASK FORCE, MODEL OF ATTORNEY EVALUATION SYSTEM AND PAY STRUCTURE (1971).

10. Letter from Robert Hampton to Roger Cramton, Feb. 29, 1972 [hereinafter cited as Letter from Hampton].

11. 47 Fed. Reg. 4375 (March 2, 1972).

iner' should be adopted." Chairman Hampton of the Commission has made a formal request to the Administrative Conference for its "advice on the feasibility and adequacy of [the Commission's] approach [and] your views on the merits of the change."<sup>12</sup> Before considering subsequent developments, including the Conference's reaction to Chairman Hampton's request for advice, it may be useful to summarize the opposing views on the merits of a title change for Federal hearing examiners.

### *The Opposing Arguments*

The dispute over what to call hearing examiners appointed under section 11 of the Administrative Procedure Act<sup>13</sup> encompasses two distinct issues: (1) the desirability of a new title, and, if one is desirable, the selection of the appropriate title or titles; and (2) the question whether uniformity in title for all hearing examiners is desirable despite variations in examiners' tasks in different agencies and the explosive growth in the number of hearing examiners required by the Department of Health, Education, and Welfare.

#### *A Title Change for Hearing Examiners?*

*Accuracy in description of function.* Those who favor a change in title to "administrative trial judge" believe that the present title of "hearing examiner" is not descriptive of the function performed by APA hearing examiners. They assert that "administrative trial judge" more accurately describes the initial decision-maker in the Federal administrative process and is sufficiently unique to avoid confusion with Federal and State judges.<sup>14</sup> *The Wall Street Journal* has commented:

An examiner's job is similar in many ways to that of a trial judge. . . . He presides over court-like hearings, complete with harried steno typists, bickering lawyers and nervous witnesses. He makes rulings—called initial or recommended decisions—that are subject to review by the agency's governing body.<sup>15</sup>

While the examiner's job varies with the agency that employs him, the examiner's basic function is the same in almost all agencies: to build a factual report and make a decision supported by legal rea-

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12. Letter from Hampton 10.

13. 5 U.S.C. § 3105 (1970).

14. If it is thought that the term "administrative trial judge" is susceptible to confusion with the "administrative judges" that have managerial functions in some court systems, the use of the name of the administrative agency, as in the FTC's proposed title of "Federal Trade Commission Trial Judge," would eliminate that problem.

15. Wall St. J., Sept. 16, 1969, at 1, col. 1.

soning. In performing this function, hearing examiners are armed with broad powers to control the conduct of proceedings, to rule on evidence and to issue subpoenas for the production of testimony or documents.

Opponents of a title change, especially one involving the word "judge," stress the limitations on the examiners' exercise of these powers. Hearing examiners perform the functions delegated to them by the agencies by which they are employed in accordance with agency rules and subject to the agency's ultimate power of decision. They also preside at rulemaking and other proceedings of a "legislative" character and in many proceedings which lack the adversary quality that tends to be characteristic of courtroom litigation.

*Confusion with other jobs.* The title "examiner" has long been used by federal administrative agencies, even before the present role of the APA examiner was established. Proponents of a change in title maintain that the public is unable to distinguish between an APA hearing examiner and the many other "examiners" employed by Federal, state and local governments, who have administrative, investigative, or clerical functions markedly different from the decisional function of the hearing examiner. There are at least eight types of "examiners" employed by the federal government alone, ranging in GS grade from GS-5 to GS-11, and the job qualifications and duties of these examiners have little in common with the APA hearing examiner. It is argued that lay misunderstanding about who the hearing examiner is and what he does is widespread and that it impairs the performance of adjudicatory functions. Participants and witnesses may not fully understand the seriousness of the proceeding, or they may view the examiner as a representative of the prosecutorial wing of the agency rather than as an independent deciding officer. Misinterpretation of the hearing examiner's function is said to adversely affect the public's respect for administrative proceedings and to limit the availability of idle state and federal courtrooms in many parts of the country.

The problem of confusion with other jobs, of course, is most likely with respect to hearing examiners who participate in proceedings involving members of the general public, such as social security disability proceedings, and less likely with hearing examiners who deal with a specialized bar or a few industry groups. Opponents of a title change, however, find any title involving the word "judge" inappropriate for both kinds of hearing examiners. Social security proceedings are viewed as lacking an essential adversarial quality because the claimant is represented in only a portion of the cases and staff lawyers do not ordinarily participate. And the large economic and regulatory proceedings of other agencies have traditionally been viewed as involving "legislative" functions that could not be delegated to constitutional courts.

Some purists also argue that the title of "judge" should be reserved, at least insofar as the federal government is involved, to the judges

of constitutional courts created pursuant to Article III.<sup>16</sup> Although the long historical experience with "legislative courts" created under Article I provides support for the use of "judge" in connection with legislative functions, legislative courts have tended to become constitutional courts over the course of time, a transition only recently completed with the Court of Claims and the Court of Customs and Patent Appeals.<sup>17</sup> In the view of some opponents of a title change, if hearing examiners are to be called "judges," they should be appointed by the President with the consent of the Senate and should be subject to removal only by impeachment.

*Need for increased status, dignity and respect.* ...Although we live in a democratic society, titles continue to impart dignity, authority and honor. A title containing the word "judge" arguably would promote public understanding of the examiner's role in conducting an impartial hearing in a judicial atmosphere. While the public recognizes what a court is and what a judge stands for, the public generally does not recognize the status of an examiner, particularly if he presides in the chapel of the local YMCA or in a hotel room. Moreover, calling an examiner "judge" will further public acceptance of the impartiality and objectivity of the administrative process.

Those who favor a change in title buttress their argument by citing the rigors that must be survived in order to become a hearing examiner.<sup>18</sup> Qualification for an appointment requires membership in the bar and seven years of legal experience, including two years in administrative law. An applicant must also undergo a five-hour test of his ability to write an examiner's decision. Only one-tenth of those who apply are placed on the register and even fewer are actually appointed. Further, many individuals in the federal hearing examiner corps have demonstrated a degree of professional skill and attainment that rivals that of their brethren in the federal judiciary.

The opposing view is that the title of "hearing examiner," which has been in use for many years, is a familiar designation that imparts dignity and status to the office with which it is associated. No more honorific title is necessary. While it is recognized that "judge" is a more prestigious title than "hearing examiner," it is argued that many hearing examiners have yet to "earn their wings" through outstanding performance. Other opponents of a title change, con-

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16. See, e.g., CURRIE, FEDERAL COURTS 105-31 (1968); WRIGHT, LAW OF FEDERAL COURTS 24-36 (2d ed. 1970).

17. See *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). In *Glidden* the Supreme Court held that the Court of Claims and the Court of Customs and Patent Appeals are "constitutional" courts and that the assignment of judges of these courts to sit with courts which are "constitutional" is valid. *Id.* at 584.

18. See generally United States Civil Service Commission Announcement No. 318 (Hearing Examiner) (July 1970).

ceding the high quality of many hearing examiners, assert that a single title such as "administrative trial judge" would confer inappropriate formality upon proceedings, such as social security hearings, that benefit from their very informality. This argument has led some observers to call for a distinction in title between GS-15 and GS-16 hearing examiners, with the title of "administrative trial judge" reserved for the latter group.

*Effect on performance of hearing examiners.* Proponents of a title change argue that it will result in improved performance by hearing examiners. Justice Tom Clark stated "[A]s you put the robe around a judge, or give him the title of 'judge,' he seems to take on a different perspective from the standpoint of the responsibility he has in discharging the duties of his office."<sup>19</sup> Human behavior is influenced greatly by self-image, professional expectations and the indicia of title and office. If a change in title adds to the decorum of the hearing, to the significance of the oath, to the ability of the hearing examiner to obtain truthful testimony, and to the respect shown by participating lawyers, those changes would contribute to improved performance by the examiner. While financial rewards are important, the morale and pride provided by professional status and recognition are vital incentives to improved performance.

Opponents of a title change rely on the commonly held belief that status and respect do not flow from titles or labels but rather from first-rate performance. The only way the hearing examiner will increase his status and the respect for his position, in this view, is by putting out a better work product, conducting more dignified hearings and comporting himself in a manner befitting his office. A change of name will not produce these desired effects; only a concerted effort by the hearing examiners themselves will earn them the status and dignity they believe they deserve. In this view, the best public relations is to do a good job. "A rose by any other name would smell as sweet."<sup>20</sup>

*Effect on recruitment.* One of the central factors emphasized by those favoring a change of title is the difficulty in recruiting qualified persons for the position of hearing examiner.<sup>21</sup> It is difficult to keep the current hearing examiner registers adequately filled with highly qualified applicants to meet current demands. The likelihood that many new positions for hearing examiners will be created in the near future will accentuate the problem. New agencies and functions, such as the Occupational Health and Safety Review Commission, need to be staffed with hearing examiners. The Social Security Administration now has 347 examiners but anticipates an in-

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19. See generally *THE CASE FOR ADMINISTRATIVE TRIAL JUDGE*.

20. Shakespeare, *Romeo and Juliet*, Act II, Sc. 2, Line 33:

"What's in a name? That which we call a rose

By any other name would smell as sweet."

21. An Appendix to this article contains current data on the number of hearing examiners currently employed by Federal agencies and the number of prospective vacancies.

crease to 682 by June 1973. Pending welfare reform legislation would require about 1,000 additional hearing examiners in the Department of Health, Education and Welfare. A more esteemed title that was better understood by the general public would help attract a larger number of qualified applicants. While a successful lawyer may be willing to change employment and even relinquish some remuneration to become a state judge, he is unwilling to change his living circumstances for a job entitled "hearing examiner." Moreover, a period of heavy incidence of retirement is affecting a number of agencies that have not had recruitment difficulties in the past.<sup>22</sup> If these agencies are to avoid an inbred, agency-staffed corps of examiners, they must find qualified applicants from the private sector.

The opposing argument minimizes the effect a title change would have on recruitment or finds any such effect outweighed by other considerations. Officials of the Civil Service Commission state that both the GS-16 and GS-15 hearing examiner registers have an adequate number of names. In their view, the basic difficulty in recruiting hearing examiners is that of finding the requisite number who can meet the exacting requirements. Therefore, a change in title alone may have only a limited effect.

*"Overjudicialization."* Opponents of a title change believe that agency control of policy and agency supervision of hearing examiners will be adversely affected if examiners are called "judges." A "judge" may feel freer to act independently of established agency policy than a "hearing examiner." The essential characteristics of the administrative process may be lost as administrative behavior becomes more and more judicialized. Moreover, reviewing courts may give more effect than is warranted to initial determinations of administrative judges, to the detriment of agency authority and policy-making.

Proponents of a title change reply that the degree of judicialization of the administrative process is independent of the title given presiding officers in formal proceedings; a change in agency authority or judicial review is neither intended nor probable. While most hearing examiner decisions, even now, become the final decision of the agency,<sup>23</sup> agencies will still feel free to review, rewrite, amend or modify the examiner's decision.

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22. Conversations of the author with a number of agency officials, including Commissioner Dale W. Hardin of the Interstate Commerce Commission, support the statement that a large number of Federal hearing examiners are eligible for retirement.

23. Macy, *The APA and the Hearing Examiner: Products of a Viable Society*, 27 *FED. B.J.* 389 (table A) (1967). See 1 *RECOMMENDATIONS AND REPORTS OF THE ADMIN. CONF. OF THE UNITED STATES* 122 (1970) (recommendation No. 6—Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency).

## *The Issue of Uniformity*

In addition to whether there should be a title change, there is also the question of whether all hearing examiners should have the same title. Some government officials cite the variations in the examiner's job from agency to agency as support for allowing agencies to choose designations for their APA hearing examiners. Other officials see a logical cut-off point for title distinctions in the GS rating system: they advocate the title "administrative trial judge" for all those having a GS rating of 16 or above and retention of the "hearing examiner" designation for examiners with a GS rating of 15 or below.

The Social Security Administration examiners are the focal point of this particular controversy. It is asserted that the 345 social security examiners do not have as much responsibility or judicial character as the GS-16 examiners in the major regulatory agencies. Social security hearing examiners primarily preside over disability claims. Generally only one claimant appears at each hearing; only about one-third of the claimants engage the services of an attorney; and a staff lawyer does not ordinarily participate.<sup>24</sup> In addition to this alleged non-adversarial quality of the proceedings, it is feared that the massive present and prospective size of the social security hearing examiner corps, which may ultimately grow to 1,500-2,000 examiners, would unduly dilute any new titles.

Those who favor the use of the same title for all APA hearing examiners, regardless of GS rating or agency, believe that the examiner's function is basically alike for all agencies. The differences that do exist are generally in terms of the substantive issues involved and their complexity. The rendering of a written decision, which becomes a final decision unless appealed, and the holding of evidentiary hearings are common denominators for most agencies. While disability determinations involve individual citizens, so do petty criminal cases in the courts, in many of which the parties are unrepresented and the case turns on issues of fact relating to a single individual.

While there are different GS ratings for examiners, there are also different kinds of judges; yet all claim the same title. A wide variety of state and local officials who man tribunals of limited jurisdiction and significance are given the title of "judge." It is asserted, therefore, that all those who qualify under the APA can be called by the same title even if their functions do vary slightly. To differentiate in title would only make it more difficult to find able people to fill the GS-15 examiner positions. Furthermore, in many respects social security cases are more adjudicatory in character than the policy-oriented proceedings in the major regulatory agencies.

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24. See Dixon, *The Social Security Disability Program: An Heretical Report III-15* (Report prepared for the Committee on Grant and Benefit Programs of the Administrative Conference of the United States, Second Draft, March 8, 1972).

*Personal Observations and the Views of the Administrative Conference*

My personal view, as distinct from that of the Administrative Conference, is that it is desirable to change the title of all or most federal hearing examiners to "administrative trial judge." The change would put an end to a vexing controversy and would have a number of beneficial effects without, in my view, any substantial negative consequences. Higher standards and improved performance on the part of hearing examiners would likely follow. Titles, self-image, and expectations of performance *are* important influences on the behavior of professional groups and do tend to be self-fulfilling. People joke about other people's concern with titles, but invariably they regard their own titles or status as terribly important. A title change would also have a beneficial effect on recruitment of hearing examiners in a period of substantial growth of the hearing examiner corps.

I do not give great weight to the opposition of the federal judiciary or to the somewhat metaphysical arguments based on Article III of the Constitution. A number of conversations with individual federal judges have indicated that the principal bases of the Judicial Conference position are: (1) a fear that the status of federal judges will be diluted if administrative hearing officers are included within the term "judge," even though qualifying language ("administrative trial judge") clearly differentiates the task and the institutional context; and (2) the assertion that the present title of "hearing examiner" is sufficiently honorific and well understood, and that a case for a change has not been made. I think that the first argument will not withstand public statement and scrutiny, while the second is outweighed by the opposing arguments.

Whether a single title should be applied to all hearing examiners raises a different set of issues. I do not believe that discrimination against social security examiners on grounds of the non-judicial character or relative unimportance of their function is easily justified. The function is clearly adjudicatory in character and at least as important to the individuals affected as the repetitive personal injury and petty criminal cases on which federal and state judges spend much of their time. Why should lower status or dignity be accorded to proceedings in which citizens press their individually important claims of entitlement to governmental benefits? Moreover, it is in this area that public confusion is a problem and that the beneficial effect of title change on recruitment and performance is likely to have the greatest effect.

There is room, however, for a compromise position on this question. The potentially explosive need for hearing officers in the De-

partment of Health, Education and Welfare, when combined with the administrative difficulties of supervising such a large number of "independent" hearing officers, suggests the possibility of utilizing "administrative trial judge" for a substantial number of senior HEW hearing officers, while retaining the present title or a new one such as "referee" for the remainder of the HEW hearing examiner corps. An approach of this kind might provide HEW with greater control over the selection, promotion and conduct of "referees," while retaining APA independence for the "administrative trial judges" who would supervise their work.

A final issue is whether individual federal agencies should be permitted to change the title of their own hearing examiners for purposes of dealing with the public in cases of an adjudicatory character. The present General Counsel of the United States Civil Service Commission concluded in 1969 that, although such an arrangement might be undesirable as a matter of policy, individual agencies had authority to use a title other than the official civil service class title for purposes of internal administration, public convenience, law enforcement and the like. When the FTC and FPC, however, sought a few months ago to exercise this authority, the Civil Service Commission moved to block such independent action and stressed the desirability of a uniform government-wide position.

I believe that one's attitude on this question of individual agency action is very much influenced by one's position on the merits of the title-change question. Those who favor a title change are apt to emphasize the diversity and freedom that the controlling statute appears to contemplate.<sup>25</sup> After all, the NLRB for sometime has referred in its rules to its "Trial Examiners" as individuals who act as "administrative trial judges" and it has asked members of its staff to address them as "Judge." Although an individual agency cannot affect the title established by the Civil Service Commission for personnel, budget, and fiscal purposes, why should it not be free to take steps which it thinks desirable for other purposes?

Opponents to any title change for hearing examiners are likely to emphasize the "nose of the camel in the tent" or "divide-and-conquer" themes that may be the practical results of adoption by individual agencies of a changed title. There is no doubt that such steps would create pressures for similar efforts by other agencies. An agency's failure to respond to those pressures would be likely to create serious morale problems among its hearing examiners and difficulty, relative to agencies that had so responded, in recruiting new exam-

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25. See 5 U.S.C. § 5105(c) (1970): "The official class titles established under subsection (a) (2) of this section shall be used for personnel, budget, and fiscal purposes. However, this requirement does not prevent the use of organizational or other titles for internal administration, public convenience, law enforcement, or similar purposes." See also Letter from Anthony L. Mondello, General Counsel, U.S. Civil Service Comm'n, to Herzel H.E. Plaire, Chairman, Comm. on Title Change, Fed. Trial Examiners Conf., Feb. 5, 1969, in *THE CASE FOR ADMINISTRATIVE TRIAL JUDGE* 66-67.

iners. Thus opponents of a title change also tend to oppose any opportunity for different agencies to handle the problem in their own way.

If it is not possible to persuade the Civil Service Commission to change the title of all or most federal hearing examiners, I would at least attempt to preserve the authority of individual agencies to act independently. But I recognize that, if a person is opposed to title change, the same person is likely to be opposed to independent agency action.

My personal views, however, are less important than the institutional position of the Administrative Conference of the United States. As previously mentioned a majority of the Conference in 1969 was opposed to a title change involving the word "judge." As a quasi-legislative body, of course, the Conference is not bound by the past failure of a proposal to carry. On the other hand, it would not serve a useful purpose to reconsider a question after little more than two years unless new information is available or there is reason to believe that the result would be different. I am unable to give any assurance that that is the case.

As indicated earlier, the Civil Service Commission has initiated a broad review of the title question. As part of that study the Commission has asked the Administrative Conference for its views. The Council of the Conference considered this request at length at its meeting on March 10, 1972. On March 20, 1972, at the request of the Council, I communicated the following response to Chairman Hampton of the Civil Service Commission:

Dear Mr. Chairman:

On February 29, 1972, you wrote me to inquire concerning (1) the feasibility and adequacy of the Civil Service Commission's proposed course of action to study the question of the appropriate title or titles for Federal hearing examiners, and (2) the views of the Administrative Conference of the United States on the merits of this question.

The Council of the Administrative Conference discussed this matter at length at its regularly scheduled meeting on March 10, 1972. The Council was confident that the study described in your letter would provide a careful and balanced review of the relevant issues.

On the merits of a change of title for some or all hearing examiners employed under the provisions of section 11 of the Administrative Procedure Act, the Council is divided. Five members of the Council (Charles D. Ablard, Walter Gellhorn, Marion Edwyn Harrison, Edward L. Morgan, and Richard C. Van Dusen) adhere to the position taken by the Council and the Assembly of the Administrative Conference in October 1969

that a title change which includes the word "judge" is inappropriate and undesirable. Three members of the Council (Roger C. Cramton, Dale W. Hardin and Harold L. Russell) believe that "administrative trial judge" (or similar title) should be applied to Federal hearing examiners. Richard B. Smith would also favor such a title change if it were part of a larger shift of adjudicatory functions to an "Administrative Court." G. Harrold Carswell and Ralph E. Erickson did not participate and have expressed no opinion.

Under these circumstances, with a plurality of the Council opposed to a title change, the Council was unanimous that it would not serve a useful purpose for the question to be reconsidered by the Assembly of the Administrative Conference at this time.

A memorandum prepared in my office for the Council's use (1) discusses the arguments for and against a title change, (2) summarizes the discussion of the question on the floor of the Assembly in October 1969, and (3) summarizes the prevalent attitudes—informally and unofficially—of a number of Federal agencies on the question. Since this information may illuminate the 1969 action of the Administrative Conference and the present action of the Council, copies are enclosed for consideration by the Commission.

If I or my office can be of further assistance to you or this matter, please let me know.

Sincerely yours,  
[s] Roger C. Cramton  
Chairman

This posture of events provides no assistance to those who seek a change in title for hearing examiners. But understanding the realities of a situation may be the beginning of wisdom. The first reality is that the Civil Service Commission's study of this question is likely to be determinative of the result for the time being. Information, views and argument should be made available to the Commission so that it may reach a thoughtful and informed decision.

Wholly apart from the question of title change, I would urge consideration of other issues which may improve hearing examiner status and performance in equal or greater degree than a title change. Improvement in the quality of hearing rooms available for the use of hearing examiners in many parts of the country has begun, but there is still an enormous distance to go.<sup>26</sup> Continuing effort and pressure are required if adequate—to say nothing of dignified—hearing rooms are to be available. In some agencies an improvement in the physical space and supporting services provided to hearing exam-

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26. Administrative hearings of the Federal government should be conducted in dignified, efficient hearing rooms, appropriate as to size, arrangement, and furnishings. . . . The General Services Administration could advantageously arrange for the service and the space needed by departments and agencies in which administrative hearings occur.

1 Recommendation and Reports of the Admin. Conf. of the United States 45 (1970) (recommendation No. 1—Adequate Hearing Facilities).

iners is also badly needed. Finally, the provision of law clerks is a step that a number of agencies should now consider. More productive use can be made of the talents of many hearing examiners if they are armed with qualified personal assistants.

Hearing examiners are a vital element in the federal administrative process. The quality of administrative justice, as perceived by the citizens who are affected by Government, is greatly influenced by their actions. Federal hearing examiners enjoy great respect in the agencies and from the bar due to their general high quality and excellent performance over the years. During the next quarter-century under the Administrative Procedure Act we can expect even larger accomplishments to flow from the men who hold this high office.

## Appendix

### NUMBER OF HEARING EXAMINERS EMPLOYED BY FEDERAL AGENCIES, GRADE OF POSITION, AND PROSPECTIVE VACANCIES (February 1972)

Agency	Grade of <sup>1</sup> Position	Number of Examiners	Prospective <sup>2</sup> Vacancies
Department of Agriculture	GS-16	6	0
Atomic Energy Commission	GS-17	1	0
Civil Aeronautics Board	GS-16	22	1
Federal Communications Commission	GS-16	17	1
Federal Maritime Commission	GS-16	6	0
Federal Power Commission	GS-16	19	0
Federal Trade Commission	GS-16	11	2
Food and Drug Administration, Department of Health, Education and Welfare	GS-15	1	— <sup>3</sup>
Office of the Secretary, Department of the Interior	GS-15	12	— <sup>3</sup>
Office of the Secretary, Department of the Interior (Indian Probate)	GS-13	12	— <sup>3</sup>
Internal Revenue Service, Department of the Treasury	GS-15	1	— <sup>3</sup>
Interstate Commerce Commission	GS-16	78	15 <sup>4</sup>
Department of Labor Maritime Administration,	GS-16	3 <sup>4</sup>	2
Department of Commerce	GS-16	3	— <sup>3</sup>
National Labor Relations Board	GS-16	100	10 <sup>4</sup>
National Transportation Safety Board, Department of Transportation	GS-16	6	— <sup>3</sup>
Occupational Safety and Health Review Commission	GS-16	10	13
Postal Rate Commission	GS-17	1	— <sup>3</sup>
Post Office Department	GS-16	2	— <sup>3</sup>
Securities and Exchange Commission	GS-16	6	— <sup>3</sup>
Social Security Administration, Department of Health, Education and Welfare	GS-15	345	340
U.S. Civil Service Commission	GS-16	1	— <sup>3</sup>
U.S. Coast Guard, Department of Transportation	GS-15	17	— <sup>3</sup>
		680	384

Source: Office of Hearing Examiners, U.S. Civil Service Commission.

1. With 10 or more hearing examiners, Chief is one grade higher. In addition the single hearing examiners of the Atomic Energy Commission and the Postal Rate Commission are GS-17's.
2. Includes imminent retirement and expansion of hearing examiner corps.
3. Unknown.
4. Estimated.