

Administrative Procedure in
Government Agencies
monograph of the
Attorney General's Committee
on Administrative Procedure.
Dept. of Commerce
Bureau of Marine Inspection
and Navigation.

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ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES

MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE

EMBODYING THE
RESULTS OF THE INVESTIGATIONS MADE BY THE
STAFF OF SAID COMMITTEE RELATIVE TO THE
ADMINISTRATIVE PRACTICES AND PRO-
CEDURES OF SEVERAL AGENCIES
OF THE GOVERNMENT

IN 13 PARTS

PART 10

DEPARTMENT OF COMMERCE
BUREAU OF MARINE INSPECTION
AND NAVIGATION



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SENATE RESOLUTION NO. 248

[Reported by Mr. HAYDEN]

IN THE SENATE OF THE UNITED STATES,

April 22, 1940.

Resolved, That the monographs published by the Attorney General's Committee on Administrative Procedure embodying the results of the investigations made by the staff of said Committee relative to the practices and procedures of the Division of Public Contracts, Department of Labor; the Veterans' Administration; the Federal Communications Commission; the United States Maritime Commission; the Federal Alcohol Administration; the Federal Trade Commission; the Administration of the Grain Standards Act, Department of Agriculture; the Railroad Retirement Board; the Federal Reserve System; the Bureau of Marine Inspection and Navigation, Department of Commerce; the Administration of the Packers and Stockyards Act, Department of Agriculture; the Post Office Department; the Bureau of the Comptroller of the Currency, Treasury Department; and the Federal Deposit Insurance Corporation, be printed as a Senate document; and that one thousand three hundred additional copies be printed for the use of the Joint Committee on Printing.

Attest:

EDWIN A. HALSEY, *Secretary.*

PREFACE

ATTORNEY GENERAL'S COMMITTEE
ON ADMINISTRATIVE PROCEDURE,
DEPARTMENT OF JUSTICE,
Washington, D. C.

This monograph is one of a series of studies submitted to this Committee by the investigating staff working under the Director. The members of the staff are Walter Gellhorn, Director; and Ralph S. Boyd, Kenneth C. Davis, Robert W. Ginnane, William W. Golub, Martin Norr, and Richard S. Salant.

These staff reports represent information and recommendations submitted to the Committee. They are not an expression of committee findings or opinion. The Committee invites professional and lay criticism and discussion of the matter contained in these studies, both by written communications addressed to it at the Department of Justice, Washington, D. C., and by oral presentation at hearings which the Committee will hold in Washington on June 26, 27, and 28 and July 10, 11, and 12, 1940.

The Committee will make its report, setting forth its findings, conclusions, and recommendations after consideration of all the material submitted to it, including these reports of its staff; the record of oral examination of administrative officers; and the briefs, statements, and testimony which may be furnished by members of the bar and the public. These reports are made available in furtherance of this Committee's desire, first, that the information submitted to it by its investigators shall be public, and, second, that all persons desiring to do so shall have full opportunity to criticize and supplement these reports.

The members of the Committee are Dean Acheson, Chairman, of the District of Columbia Bar, formerly Under Secretary of the Treasury; Francis Biddle, Solicitor General of the United States; Ralph F. Fuchs, professor of law, Washington University; Lloyd K. Garrison, dean of the University of Wisconsin School of Law; D. Lawrence Groner, chief justice of the Court of Appeals for the District of Columbia; Henry M. Hart, Jr., professor of law, Harvard University; Carl McFarland, of the District of Columbia Bar, formerly Assistant Attorney General; James W. Morris, associate justice of the United States District Court for the District of Columbia; Harry Shulman, Sterling professor of law, Yale University; E. Blythe Stason, dean of the University of Michigan School of Law; and Arthur T. Vanderbilt, of the New Jersey Bar, formerly president of the American Bar Association.

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THE DEPARTMENT OF COMMERCE ¹

INTRODUCTION

The principal activities of the Department of Commerce are devoted to making available service and promotion facilities to the business community. A primary function consists in the attempt to provide through research a more adequate understanding of numerous problems concerning the operation of our economic system. In undertakings such as the reciprocal trade agreements program, for example, the Department prepares studies of American exporters' problems in foreign markets and furnishes other needed information. The Bureau of Foreign and Domestic Commerce not only collects, analyzes, and disseminates statistics for the guidance of American businessmen, but it also conducts elaborate trade-promotion activities; its Foreign Commerce Service maintains 32 posts abroad for supplying practical help to American traders. Other service agencies in the Department include the Business Advisory Council, the Coast and Geodetic Survey, the Lighthouse Service, the National Bureau of Standards, and the Bureau of the Census.²

The adjudicative and rule-making functions of these service organizations, to the extent that they exercise any such functions at all, are so scattered and incidental to the principal activities that they do not lend themselves to profitable inquiry into administrative procedures.

The Bureau of Foreign and Domestic Commerce is almost entirely an information-gathering agency. It has issued a set of procedural regulations, published in the Federal Register, called Regulations for the Collection of Statistics of Foreign Commerce and Navigation of the United States. Under the China Trade Act the Bureau grants certificates of incorporation to do business in China, and the act requires a finding that the corporation "will aid in developing markets in China for goods produced in the United States," but no application for a certificate of incorporation has ever been denied.

The National Bureau of Standards performs many functions preparatory to issuance of regulations by other governmental agencies, but, with the exception of the issuance in 1917 of regulations covering permissible variations in standard barrels and another set of regulations covering fees to be charged for its own services, the Bureau does not issue regulations having the force of law. Even in the field of weights and measures the Bureau is only an advisory and correlating agency, as regulations regarding the application of weights and measures have in general been established by action of the States. The Bureau does frequently serve as arbitrator of controversies con-

¹ This monograph was submitted December 1936, finally revised January 1940.

² The Bureau of Air Commerce ceased to exist in 1938, when the Civil Aeronautics Authority was created. The Bureau of Fisheries was transferred to the Department of the Interior in 1939.

cerning technical questions, but only by consent of the parties, and ordinarily without anything resembling formal hearing.

The Bureau of the Census adjudicates no cases and issues no regulations. Statutory penalties for failure to furnish information and for unlawful activities affecting enumerations are imposed only by courts. The determination of subjects for enumerations often importantly affects private interests, but is always made wholly informally.

One agency whose functions are regulatory in character is the Foreign Trade Zones Board, which was created in 1934 to govern foreign trade zones. A zone, according to regulations issued by the Board, is—

an isolated, enclosed, and political area * * * operated as a public utility by a corporation, in or adjacent to a port of entry, without residential population, furnished with the necessary facilities for lading and unlading, for storing goods, and for reshipping them by land and water; an area into which goods may be brought, stored, and subjected to certain specific manipulation operations. If reshipped to foreign points the goods may leave the restricted trade zone without payment of duties, and without the intervention of customs officials * * *

The Board has power to grant, deny, and revoke licenses, to issue regulations and to adjudicate a certain class of cases involving complaints. But inasmuch as during its 5 years of existence the Board has as yet established only one zone (New York), most of these powers remain unexercised.

The only extensive adjudication or rule making in the Department of Commerce is found in the Patent Office and in the Bureau of Marine Inspection and Navigation. Study of the Patent Office's functions—granting patents for inventions and discoveries, including patents on plants and designs, and registering trade-marks—has been reserved until a later time. The remainder of this monograph, therefore, is devoted to the Bureau of Marine Inspection and Navigation.

BUREAU OF MARINE INSPECTION AND NAVIGATION

The Bureau of Marine Inspection and Navigation was formed in 1932 by a consolidation of the Steamboat Inspection Service, created in 1838, and the Bureau of Navigation, some of whose functions were exercised as early as 1789 although the Bureau itself was not created until 1884.³ From the very beginning the Steamboat Inspection Service inspected vessels and their equipment for the purpose of promoting safety at sea, and later began to license officers and crew members. The Bureau of Navigation had "general superintendence of the commercial marine and merchant seamen of the United States," its duties including the documentation of vessels, the admeasurement of vessels, the collection of tonnage taxes, the supervision of the shipment and discharge of seamen, and the recording of deeds, mortgages, bills of sale, and other instruments affecting ownership of vessels.

The present functions of the Bureau of Marine Inspection and Navigation include the inspection of vessels; the granting of licenses and certificates to officers and seamen, usually on the basis of written examinations; the investigation of marine casualties; the trial of officers and seamen to determine whether or not licenses or certificates should be revoked or suspended; the imposition and remission or

³ From 1932 until 1936 the name of the Bureau was Bureau of Navigation and Steamboat Inspection.

mitigation of fines, penalties and forfeitures for violations of the navigation laws; the collection of tonnage taxes; the administration of the load line laws; and the preparation and promulgation of regulations designed to promote safety at sea.

The Bureau has approximately 1,000 employees. The field inspection force consists in 94 local inspectors and 301 assistant inspectors. The United States and its Territories are divided into 7 districts, each of which is presided over by a supervising inspector, and these districts are in turn divided into 48 local districts, each of which is under the direction of a board of local inspectors made up of 1 inspector of hulls and 1 inspector of boilers. Ten principal traveling inspectors and 4 traveling inspectors go from district to district checking on the thoroughness of the work of local inspectors.

Inspecting vessels; granting licenses and certificates.

Inspection.—One of the Bureau's major functions is passing upon the safety and seaworthiness of all vessels subject to inspection. Typical of the numerous statutory provisions governing the inspection of vessels is the following:

The local inspectors shall, once in every year, at least, carefully inspect the hull of each steam vessel within their respective districts, and shall satisfy themselves that every such vessel so submitted to their inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for passengers and the crew, and is in a condition to warrant the belief that she may be used in navigation as a steamer, with safety to life, and that all the requirements of law in regard to fires, boats, life preservers, floats, anchors, cables, and other things are faithfully complied with; and if they deem it expedient they may direct the vessel to be put in motion, and may adopt any other suitable means to test her sufficiency and that of her equipment * * *. Whenever any inspector or assistant inspector shall, in the performance of his duty, find on-board any vessel subject to the provisions of this Title * * * as part of the required equipment thereof, any equipment, machinery, apparatus, or appliance not conforming to the requirements of law, he shall require the same to be placed in proper condition by the owner or master of the said vessel; and if said inspector or assistant inspector shall find on board any such vessel any life preservers or fire hose so defective as to be incapable of repair, he shall require that the same be destroyed in his presence by such owner or master. And in any of the foregoing cases local inspectors by whom or under whose supervision said vessel is then being inspected shall have power to enforce the foregoing requirements by revoking the certificate of the said vessel, and by refusing to issue a new certificate to the said vessel until the said requirements shall have been reversed, modified, or set aside by the supervising inspector of the district on proper appeal by the owner or master of said vessel, which appeal shall be made to the said supervising inspector within ten days after the final action as aforesaid by the local inspectors; and upon such appeal, duly made, the supervising inspector shall have power to affirm, modify, or set aside such action by the local inspectors. * * *

Among the various documentary certificates which must be secured from boards of local inspectors for vessels subject to inspection as a condition to their navigation are the following:

- Certificates of inspection for steam or motor vessels (license for vessels to navigate in specified service and route);
- Certificate of inspection for sail vessels and barges carrying passengers for hire (license for sail vessels and barges to navigate with passengers on board on specified route);
- Permit to carry excursion party (license for vessel to carry additional passengers on excursions on specified route);
- Certificates of inspection for seagoing barges of 100 gross tons or over (license to non-self-propelled vessel to navigate and carry cargo on the high seas);

- Certificate of inspection for tank barges (license to non-self-propelled vessel to have on board inflammable or combustible liquid cargo in bulk);
- Certificate of inspection for foreign passenger steamers (license for foreign passenger vessels to carry passengers from ports in the United States);
- Certificate of examination for passenger steamers (license for foreign passenger vessels of countries having reciprocal inspection agreements with the United States to carry passengers from ports of the United States);
- License to carry gunpowder (license for passenger vessel to carry gunpowder);
- Certificate relative to carrying refined petroleum on routes where there is no other practicable mode of transporting it;
- Permit to proceed to another point for repairs (license for vessels to navigate while in need of repairs);
- Supervising inspectors' permit to towing, oyster, and fishing steamers to carry persons other than crew (issued only to Great Lakes and inland vessels);
- Certificate amending certificate of inspection by changing character of vessel, route, equipment, etc. (issued when change in certificate is necessitated because of altered conditions, also to American and foreign cargo vessels to carry persons in addition to crew);
- Safety certificate (license for passenger vessels to navigate on international voyages);
- Exemption certificate (license for passenger vessels to navigate on international voyages without complying with the requirements of convention from which exempted);
- Safety radiotelegraphy certificate.⁴

The boards of local inspectors likewise exercise miscellaneous powers in connection with the inspection of vessels, such as, for example, increasing the number of licensed officers on any vessel subject to the inspection laws "if, in their judgment, such vessel is not sufficiently manned for her safe navigation"; and prescribed in every certificate of inspection granted to vessels carrying passengers, other than ferry boats, the number of passengers of each class which the vessel may carry with safety.

Most of the inspection work is done in the first instance by assistant inspectors who act under the direction of the Boards of Local Inspectors. The inspectors go aboard the vessel and fill out their respective standardized forms, furnishing all information concerning the condition of the vessel, her structure, hull, life-saving equipment, fire-fighting equipment, boilers, auxiliary and propelling machinery, compliance with manning requirements, accommodations for passengers and crews, and sanitary conditions. If no deficiencies are found or if the discovered deficiencies are remedied, certificates of inspection are issued; otherwise they are denied, and the sailing of a vessel without an inspection certificate is made criminal by statute. When certificates are

⁴ Radio certificates for both operators and ships are issued by the Bureau solely on the basis of recommendations by the Federal Communications Commission. No reason is apparent why the power with respect to vessels should not be transferred to the Communications Commission, as recommended in this Committee's Monograph No. 3, for the Bureau's function is wholly perfunctory and serves no useful purpose. However, issuance of certificates to operators gives the Bureau a control which the Bureau probably should retain.

denied, the local boards deliver to the operator or owner a statement in writing of the shortcomings.

Granting of licenses and certificates to officers and seamen.—The Boards of Local Inspectors issue documentary certificates or licenses which must be secured by individuals as a condition to their service on board vessels requiring licensed officers.⁵

Applicants for various personnel licenses and certificates are usually required to take written examinations and to comply with certain physical and character requirements.⁶ The written examinations are prepared by the Boards of Local Inspectors and are likewise graded by them. The natural result of this decentralization is considerable diversity of standards in the various districts; frequently applicants who fail examinations in one district can pass examinations in another district without further preparation. Recognizing the deficiencies of the present system, the Bureau is now engaged in preparing examinations which will be given in the field and which will thereafter be graded in Washington. At the same time, it is intended gradually to increase the complexity of the examinations, in an effort to heighten the standards of marine personnel.

Appeals from local inspectors.—Any person aggrieved by the denial of a certificate of inspection for a vessel or by denial of a personnel license or certificate may appeal from the Board of Local Inspectors to the Supervising Inspector and from the Supervising Inspector to the Director of the Bureau. The statute provides that the Director's decision "when approved by the Secretary of Commerce shall be final." All appeals are handled entirely informally. An appeal is customarily taken either by letter or by oral application. The supervising inspector considers the records of inspection or the examination papers, consults with the aggrieved person or with the local inspectors, and makes his decisions. Sometimes he will himself inspect the vessel or require an additional inspection to be made. The results of any such supplementary investigation are ordinarily embodied in a written report and become a part of the file of the case. In conducting the informal adjudication the supervising inspector has power to compel the attendance of witnesses and the production of books and records, but this power is almost never used. Oral arguments are not made a part of the record of the case, briefs are permitted but are rarely filed, and parties are very seldom represented by counsel. The supervising inspector announces his decision in a

⁵ The Bureau issues the following documentary licenses and certificates:

License for masters of steam and motor vessels;

License for masters of sail vessels;

License for masters of ocean or coastwise steam and motor vessels;

License for mates of inland steamers;

License for chief mates of sail vessels over 700 gross tons;

License for pilots of vessels (first class);

License for pilots of vessels (second class);

License for chief engineers of steam vessels;

License for assistant engineers;

License for engineers of vessels propelled by internal combustion engines, gas fluid, naphtha, or electric motors;

Certificate for tankermen of vessels carrying inflammable or combustible liquid cargo in bulk;

Licenses for operators of motor boats below 65 feet in length which carry passengers for hire;

Certificates of service for able seamen;

Certificates of service for qualified members of engine departments;

Certificates of efficiency for lifeboatmen;

Certificates of service for all other members of ships' crews.

The Bureau also issues through the shipping commissioners and collectors of customs certificates of identification for seamen and continuous discharge books. For securing these documents no examination is required.

⁶ Licenses to operators of motorboats and certificates for ordinary seamen (but not for able seamen) are issued without written examinations.

letter which gives reasons for his conclusions and sometimes even resembles an argumentative opinion.

On appeal from supervising inspectors to the Director the proceedings are likewise informal and are in all respects similar to those before the supervising inspector. The Director usually does not in practice undertake to substitute his judgment for that of the supervising inspectors on questions of fact, but occasionally the Director may find some statutory provision or regulation or interpretation that will be favorable to the applicant and make possible a decision in his favor.

MARINE CASUALTY INVESTIGATION BOARDS

All marine casualties are investigated by an appropriate Marine Casualty Investigation Board. Casualties involving loss of life and any alleged act of incompetency or misconduct in connection therewith are investigated by an "A" Board. Serious marine casualties not involving loss of life are handled by "B" Boards,⁷ and other investigations are conducted by "C" Boards.

The "A" Boards, under the statute, consist of a chairman who is an officer or employee of the Department of Justice learned in maritime laws, designated by the Attorney General; a representative of the Bureau of Marine Inspection and Navigation, designated by the Secretary of Commerce; and an officer of the United States Coast Guard, designated by the Secretary of the Treasury. The statute requires that "B" Boards shall be composed of a supervising inspector and two principal traveling inspectors of the Bureau. The statute permits "C" Boards to be made up of representatives of the Bureau designated by the Director; in practice, they usually consist of two or three assistant inspectors.

The statute confers upon the Boards the power to investigate not only marine casualties, but also "any act in violation of the provisions of this title, or regulations issued thereunder, and all cases of incompetency or misconduct committed by any licensed officer or holder of a certificate of service, while acting under the authority of his license or certificate of service, whether or not any of such acts are committed in connection with any marine casualty or accident." This provision is in practice exceedingly important, as nearly half of all cases involving trials of alleged offenders are "complaint cases," that is, cases involving alleged offenses which are unconnected with casualties. The greater portion of complaint cases concern very petty offenses, such as drunk and disorderly conduct, but this classification also includes the labor cases, some of which present the Bureau's most difficult problems. The rights to strike and to bargain collectively are sometimes deemed incompatible with enforcing discipline among seamen, and decisions concerning these questions are often of vast consequence. Whether men may strike in a safe port, what constitutes a safe port, whether strikers who remain aboard the vessel are subject to the master's orders, what the consequences are of the master's preventing the men from leaving the ship, what

⁷ Serious casualties include those in which property damage exceeds \$20,000, those involving total loss of any vessel of 500 gross tons or more, collisions between vessels either of which carries 200 or more passengers or the gross tonnage of which is 8,000 tons or more, and certain other cases. Proposed changes in the rules are now under consideration which will narrow the jurisdiction of "B" Boards and increase that of "C" Boards.

constitutes a discharge during a strike, when evidence of a strike may be introduced in a case involving disobedience of orders—these are some of the labor problems with which the Bureau must grapple.

During the fiscal year 1938, the various marine casualty investigating boards investigated 2,790 marine casualties and cases of negligence, incompetency, and misconduct on the part of licensed and unlicensed personnel on vessels of the United States; 141 investigations were conducted by "A" Boards, 209 by "B" Boards, and 2,440 by "C" Boards. During the year 100 certificates of seamen were suspended and 6 revoked; 144 licenses of officers were suspended, and 6 revoked.

During the fiscal year 1939, 108 certificates and 134 licenses were suspended. Of the licenses suspended, 74 were those of masters of vessels. Of the 74, 33 involved collisions with other vessels and 23 grounding; other cases concerned stranding, foundering, and collisions with docks. No license of a master was suspended on account of misconduct. On the other hand, the most common reason for suspension of seamen's certificates was misconduct (ranging from disobedience during a labor dispute to intoxication and altercations), which accounted for exactly 100 of the 108 suspensions of certificates. The sanction prescribed by statute in all these cases is revocation or suspension of officers' licenses and seamen's certificates. For petty offenses of seamen certificates are suspended for 5, 10, or 15 days—seldom longer. For disobedience of orders during labor disputes, some certificates have been suspended for periods of years. The suspension of licenses of officers is somewhat more serious, because owners and insurers have blacklists; sometimes the suspension for 60 days of a master's license means that the master will never again command a vessel and his career will be ruined.

Initiation of proceedings.—Regulations issued by the Secretary of Commerce provide that whenever a marine casualty occurs, immediate notice thereof must be given by telegram, radiogram, or equally prompt means of communication by the master, owner, charterer, or agent to the nearest local office of the Bureau or to the Bureau itself. The notice must furnish the names of the vessels or vessel involved, the nature and cause of the casualty or accident, the locality, the nature of injuries to persons, and the damage done to property. The regulations also provide that any officer or employee of the United States or any other person having material knowledge or information concerning a marine casualty or accident "must immediately bring such information to the attention of the Bureau."

When a notice reaches the local inspector, if the casualty is one calling for investigation by an "A" or "B" Board, the local inspector immediately notifies the Bureau, and the Director or Assistant Director designates the appropriate board. "C" Boards, on the other hand, have instructions to act at once without specific direction from the Bureau whenever the case is one falling within their jurisdiction, unless the case is one of unusual importance or interest, in which event the Bureau sometimes appoints a "C" Board made up of more important personnel, such as a representative of the Bureau's Washington office, a supervising inspector, or a principal traveling inspector.

In cases not involving casualties, complaints are usually made to local inspectors by officers of vessels or by members of the crew.

Organized labor sometimes files complaints involving allegations of improper conduct on the part of officers. Occasionally a passenger or an insurance company may make known facts which lead to an investigation. Complaints alleging unsafe conditions at sea, violation of safety-at-sea laws, and of improper conduct by officers or seamen are always initially considered by the board of local inspectors to whom they are sent, in order to determine whether further investigation seems warranted. No forms are utilized in submitting such complaints and they are not required to be made under oath; some complaints which the boards investigate are even anonymous.

Preliminary inquiries.—Upon receipt of information concerning either a casualty or an offense unconnected with a casualty, preliminary inquiry into the facts is always made by the local and assistant inspectors. Preliminary investigations consist entirely in what might be described as detective work, and hearings are never conducted at this stage. In "A" and "B" cases, the inspectors who make the preliminary inquiry submit all their data and findings to the "A" or "B" Boards, in order to give them an understanding of the nature of the case and to assist them in their later and more searching inquiries. This report is invariably oral. In "C" cases, the preliminary investigators are usually the same assistant inspectors who later preside at the hearing. Whenever a casualty occurs, the preliminary investigators have no power to determine the disposition of the case, as the "A," "B," and "C" Boards are required by statute to conduct an investigation and make a report in all cases. In cases involving wrongful conduct not in connection with a casualty, however, the officers who make the preliminary inquiry may sometimes determine, without consultation with any other officer of the Bureau, to take no further action. In such cases, reports are not always even made to the Bureau; the matter is simply dropped.

Whenever a casualty occurs in or near a foreign port, the officers of the American-flag vessels concerned make their report to an American consul, whose report to the State Department is made available to the Bureau, which refers the case to the appropriate Board for investigation. In such cases the consul is expected to make the same sort of preliminary inquiry which would have been made by the Bureau's own local inspectors if the casualty had occurred in home waters.

Investigation proceedings.—The primary purpose of the marine casualty investigation boards, is, at least in theory, by no means a disciplinary one. Rather, it is a preventive one; investigation of past casualties is undertaken in order to discover means of promoting safety at sea. The investigation looks toward the development of regulations to prevent recurrence of the type of casualty, and in fact many of the Bureau's regulations have grown from such recommendations.⁸

⁸ Since the term "casualty" involving death has been broadly interpreted by the Bureau to mean any death at sea, and since in many of the cases involving such deaths investigation by an "A" Board is obviously unnecessary either to develop the facts or to make recommendations for the future, the Bureau has, for purposes of administration, divided death cases into "major A" and "minor A" cases. In only the former do the "A" Boards conduct formal investigation proceedings. The "minor A" cases, while they are "casualties," are isolated episodes, not involving the management, navigation, or structure of vessels; they include, for example, natural deaths, falling overboard, suicide, disappearance, and homicides. In such cases the masters of vessels are required to make prompt reports, whereupon a preliminary investigation is made, as in other cases, by local and assistant inspectors. Formal investigation proceedings are thereafter conducted, as a rule, by "C" Boards, which transmit the records of their hearings, accompanied by their reports and recommendations, to the Bureau. There an individual summarizes the available materials and prepares reports on each "minor A" case; these reports are in turn referred to "A" Boards, which pass upon large groups of them at a single sitting. About 200 "minor A" cases are handled annually.

At the same time, investigation proceedings are given an anomalous character by reason of the fact that frequently they disclose that the casualty under investigation was caused not by some circumstance of a general and remediable nature, but by the punishable conduct of officers or seamen. When an investigation has progressed far enough to indicate that individual derelictions were the cause of the casualty, the investigation proceeding as such is terminated and, nominally, a new proceeding is commenced for the purpose of trying the individuals whose guilt has been brought to light by the investigation.⁹ Hence, even though an investigation proceeding does not immediately involve the determination of guilt or innocence of officers and seamen, those who participated in the particular activities under investigation are vitally interested in the proceeding, because the investigation proceeding usually determines whether or not charges should be filed, and then, almost without a perceptible pause, may be transformed into a trial of those charges. The regulations therefore provide that any "party in interest" shall have the right to appear at such proceeding in person or by counsel, to call, examine, and cross-examine witnesses, and to introduce into the record documents or other evidence. The term "party in interest" is defined as "any person whom the Board shall find to have a direct interest in the investigation and shall include an owner, a charterer, and all licensed or certificated personnel whose conduct is under investigation." Labor unions, owners of cargo, and insurers usually are not regarded as "parties in interest."¹⁰

As is required by the regulations, the investigation proceedings are conducted by a procedure which closely resembles that encountered in adversary proceedings; investigation completely gives way to hearing, and the hearing is often as between contending parties. In each case the hearing opens with the board's calling the witnesses whose knowledge of the matters at issue has been disclosed by the local inspectors' preliminary investigation. Sometimes they are questioned by the board in terms of merely general inquiry; but sometimes they appear to be the "board's witnesses," called in order to establish the truth of a theory already entertained by the board. In either event, they are cross-examined by the interested parties. Then the interested parties are permitted to introduce their evidence, which is subjected to cross-examination by the members of the board. Whenever any evidence is introduced which tends to indicate misconduct or inattention to duty on the part of any officer or seaman, he or his counsel will attempt to combat it in the same manner and to the same extent as he would if the proceeding were a trial.

It is questionable whether the essentially adversary procedure now required by statute to be used in investigation proceedings is best calculated to serve the asserted primary purpose of those proceedings. Especially when the causes of casualties are being sought in order to prevent their recurrence, rather than merely to assess the

⁹ The "A" Board which usually investigates casualties occurring on the Atlantic coast never conducts a trial of those charged with offenses; it limits itself to recommendations relative to the causes of casualties. When it obtains evidence tending to show punishable offenses by officers or seamen, it reports the evidence to the Bureau and recommends further proceedings before a "C" Board. All the other boards (including the "A" Boards which investigate casualties occurring on the Gulf, the Great Lakes, and the Pacific coast, and Puerto Rico and Hawaii) customarily proceed, upon the completion of their investigation, to try those whom they believe to be possible offenders.

¹⁰ A notice of investigation is given to all interested parties, concisely setting forth the subject matter and the time and the place of the investigation. This notice is communicated either by mail or by telegram. The licensed and unlicensed personnel of vessels concerned are notified by mail, in person, or through the captain of their vessel.

blame for their occurrence, more frankly investigative techniques seem called for, reserving until a later time in a different forum the trial of those whose fault may have been disclosed by the investigation. Arguing strongly in favor of the present trial procedure utilized at the investigation stage, however, is tradition. The investigation proceedings are conducted today as they have been for over a century. Regardless of the soundness of altering them, a change is unlikely in the absence of a recognized (as well as theoretical) deficiency in existing methods.

Charges and specifications.—Whenever, either before, during, or after an investigation proceeding, sufficient facts become known to warrant the filing of charges against an alleged offender, the board immediately issues a charge and a specification. The charge consists in a general term, such as "misconduct," "negligence," "inattention to duty," or the like, but the specification makes clear with great particularity the act or failure to act which constitutes the alleged offense. The time and place are always specified when they are known.¹¹ Because the charges and specifications are so definite, requests for bills of particulars are known. In only one case within the recollection of one of the Bureau's officers has an amendment to the charge and specification been made, although occasionally the board may cancel the original notice and substitute a new one for it. The only pleading expected of a respondent is a plea of guilty or not guilty at the opening of the hearing.

Functions of counsel.—In at least 90 percent of the trial proceedings accused persons are represented by counsel, but in most cases counsel are not in the employ of the accused person. Certificated men are usually represented by a labor union attorney, and officers are frequently represented by counsel for the owners. This representation by counsel sometimes constitutes in practice the equivalent of intervention by those who are not parties to proceedings. For example, in cases involving disobedience of seamen to the orders of officers during labor disputes, the labor union may frequently be as vitally interested as the immediate parties; but, even when this is true, the Bureau recognizes no right of intervention on the part of the union. Similarly, in a trial of an officer for negligence or misconduct, an owner may be deeply interested because a finding of guilt on the part of the officer may bear upon the liability of the owner to third persons; even so, the owner is not granted the right of intervention. That counsel representing accused seamen and accused officers are in the employ of the union or of the owners, respectively, accomplishes in practice the same objectives that would be gained by intervention on the part of the union or owners. In most cases, of course, the interests of the union coincide with the interests of the particular accused seaman, and the interests of the owners coincide with those of the officers.

The Bureau has given instructions to assistant inspectors that they are to act as counsel for an accused person whenever requested so to do, but in no case has an accused person ever been known to request an assistant inspector to serve as his counsel. The reason for this, it is said, is that seamen consistently regard inspectors as prejudiced

¹¹ Some "O" Boards have made vague charges and specifications, but the Bureau has consistently refused to impose a sentence unless the original specification was sufficiently precise; in some instances it has on its own motion, wholly in the absence of objection by the respondent, rejected charges for insufficiency. Usually in such instances, no new trial can be had because the witnesses are dispersed, and accordingly the case is dismissed.

against them. That most inspectors are former captains or engineers of vessels is said to give them a point of view at variance with that of seamen and especially antagonistic to the interests of labor unions.¹²

Time and place of hearings.—Hearings are usually held without delay as soon as the vessel reaches port and as soon as the members of the board can be assembled. Ordinarily not more than 1 or 2 days will elapse between the occurrence of the casualty or alleged misconduct and the beginning of the proceeding, except in cases where the acts to be investigated occurred in foreign waters. Speed often is essential, since a vessel may be scheduled for early sailing, and if the hearing is not held before the vessel departs, witnesses may scatter so widely that no satisfactory investigation or trial will be possible. Of course, the promptness with which proceedings are instituted sometimes gives accused persons very short notice.¹³ Where, however, the case is such that additional time for preparation by counsel is reasonably necessary, continuances are allowed, depending on all the circumstances. Sometimes a continuance may be allowed so that the proceeding will be conducted in the vessel's next port of call; for example, the investigation of an accident which recently occurred in New York Harbor was held in New Orleans.¹⁴

Combination of investigation, prosecuting, and judging functions.—Whatever may be the proper appraisal of the familiar outcry against combination of functions in administrative agencies, the Bureau's practices in this regard deserve special consideration. The problem is not merely one of combination of functions in the Bureau generally, as is the case in most administrative agencies. Here, the combination of functions is in the individuals who, in a role roughly equivalent to that of a trial examiner, serve on the boards. These individuals are called upon not only to determine initially, in an advisory capacity, whether the evidence introduced in hearings before them is sufficient for a finding of guilt. Before acting in that capacity they must first personally discover the evidence and must then present it against those whom they have accused. In most cases the only evidence which tends to show improper conduct on the part of the defendants is introduced by them. This often necessitates their interviewing witnesses to determine whether or not useful evidence is available, and some "C" Board members no doubt must find difficulty in formulating their recommendations solely upon the basis of evidence which is properly introduced at the hearing. It is only natural that those who make preliminary investigations and interview witnesses will learn much about a case that is not included in the record; if boards' recommended findings of fact rest in part upon evidence not of record, defendants may sometimes be deprived of their right to rebut or explain all the evidence against them. When board members exert strenuous efforts to build cases against accused persons, they may

¹² Organized labor (whether rightly or wrongly) bitterly complains of what they regard as the antilabor bias of the Bureau. Labor leaders observe that not only are local boards made up of those who are sympathetic toward employers, but that the same is true of most of the Bureau's officers.

¹³ The very speed with which proceedings are instituted gives rise to criticism on the part of labor unions in complaint cases. Representatives of unions assert that the threat of instituting proceedings for revocation or suspension of seamen's certificates sometimes is used to intimidate the men during a labor dispute. For example, union representatives maintain that supervising inspectors have told striking seamen that, unless they immediately went back to work, proceedings would be instituted that same day to determine whether or not certificates should be suspended or revoked. In the eyes of the representatives of the union the very imminence of the threatened proceeding may constitute intimidation to end a strike.

¹⁴ Most hearings are conducted in the offices of the local or supervising inspectors, but occasionally they are conducted on board a vessel, in a courthouse, or in some other public building.

sometimes tend as trial examiners to give more weight to evidence which they themselves have developed than the evidence rightly deserves. The combination of the somewhat inconsistent roles of prosecutor and presiding officer at the hearing occasionally leads to practical difficulties that are readily apparent. In one case involving a labor dispute, for example, an assistant director of the Bureau specifically instructed the "C" Board by letter that "the facts in the case are as follows." The assistant director's view of the facts was then stated in detail. The affidavits of a consul and of the captain of the vessel were enclosed for the board's consideration. The purpose of the instructions was obviously to assist the board in developing the case in its capacity as a prosecutor, but one wonders whether or not the assistant inspectors who make up the "C" Boards will regard instructions received from the assistant director as mere advice concerning the facts that might be developed or as instructions that these are the facts to be found.

Need for a manual of practice.—The Secretary of Commerce has issued regulations defining the jurisdiction of the various boards and outlining some of the more salient procedural methods, but these regulations fall far short of constituting an adequate manual of practice to assist board members who are unaccustomed to methods of conducting formal proceedings. The "A" Boards, the chairmen of which are lawyers, adequately develop records, but the "B" and "C" Boards, who are without legal talent, sometimes act in rather markedly unconventional ways in conducting proceedings. In one trial in which one of the defendants was not present the board merely "noted" his counsel's objection to proceeding in his absence and went on. Boards are sometimes apparently at a loss to know what ruling to make on motions and objections. For example, when a witness began to explain the workings of his mind and to state his beliefs, counsel for the defense objected and a long colloquy between counsel and the board members ensued, but no ruling was made and the witness proceeded with his testimony, not knowing whether he could expound his opinions or not. No doubt it is undesirable that proceedings of this character should meticulously comply with traditional legal forms, and even if this were deemed desirable, boards consisting of hull and boiler inspectors could not be expected to apply technical rules; but it does seem clear that an adequate set of instructions or a manual of practice to guide the boards would help to rectify some of the outstanding deficiencies.¹⁵

Personnel of "C" Boards.—"C" Boards, which conduct most of the trial proceedings, are usually composed of either two or three assistant inspectors. They are primarily trained for the inspection of hulls and boilers of vessels. The requirements for an assistant inspector of hulls are knowledge of ship construction and navigation and previous experience for at least 3 years as master or as chief mate of ocean vessels of over 4,000 gross tons. The requirements for an assistant inspector of boilers are technical knowledge of ships' machinery and experience for at least 3 years as engineer or first assistant engineer on a vessel of over 4,000 gross tons. The average salary of assistant

¹⁵ The present director has long recognized the need for a manual of practice. It is suggested that the manual may be made most valuable if it is specially written for those who are expected to use it, and if it relates its general propositions to illustrations drawn immediately from the experience and professional problems of the Bureau's own personnel. A compilation of detailed instructions concerning technical rules of evidence would be of dubious utility.

inspectors is approximately \$3,200. The members of the "C" Boards usually have no previous knowledge or experience in conducting formal hearings, and it is not surprising that they are frequently completely baffled by objections and motions of counsel. However, they do learn some of the rudiments of conducting hearings from actual experience, as most of the members of the "C" Boards spend the greater portion of their time serving on the boards instead of performing the ordinary duties of assistant inspectors. In some of the principal ports many assistant inspectors devote nearly full time to acting as members of "C" Boards.

The question arises whether a plural body is necessary to conduct trials in "C" cases, or whether a single trial examiner or judge would be sufficient. One suggested justification of a plurality of adjudicators is that some are qualified to inspect hulls, and others are qualified to inspect boilers. But of all the assistant inspectors throughout the country, probably 15 or 20 percent are qualified as both hull inspectors and boiler inspectors, and among the personnel of the Bureau higher in the hierarchy than assistant inspectors there are numerous individuals who are qualified to inspect both hulls and boilers. No difficulty would be encountered in obtaining men qualified in both respects to preside at hearings, if such qualifications were deemed to be necessary. Another reason given in favor of a plurality of presiding officers is the prevalence of complaints about the combination of prosecuting and judging functions; some of the officers of the Bureau defend the plurality by pointing out that inasmuch as the Boards must act as both prosecutors and judges, it is desirable to have more than one member in order to permit some division of functions. The principal reason in the minds of the officers of the Bureau for requiring two or three members of the Board, instead of one, is simply the statutory requirement that a "C" Board shall consist of "representatives" of the Bureau. One officer of the Bureau further observes that all other maritime nations use boards of three for investigating maritime casualties.

Nearly ninety percent of all cases of misconduct of seamen involve drunk or disorderly conduct, and most of the remainder involve labor disputes. One wonders whether those primarily trained to be inspectors of hulls and boilers are necessarily well qualified to adjudicate cases of this kind. Cases of collisions, grounding, foundering, and stranding call for understanding of navigation rather than for minute knowledge of ship construction. A single able magistrate having some understanding of maritime experience and some familiarity with legal forms could no doubt perform the "C" Board's tasks with greater expedition.

The process of proof.—Both investigation proceedings and trial proceedings follow the same judicial pattern. All witnesses are under oath and subject to cross-examination. It is said that the "rules of evidence" are substantially followed, but it is obvious that the members of the "B" and "C" Boards cannot be expected to apply technical rules. One individual in the Bureau says that the rules of evidence are followed, but "such rules are not permitted to defeat the objects for which such boards are convened." Another officer declares that the Boards are more strict in applying rules of evidence in trial proceedings than in investigation proceedings. But an examination of records in what seem to be typical cases does not readily reveal any

substantial difference between investigations and trials in this respect. Furthermore, even if there is a difference between investigations and trials, it is usual for counsel to stipulate at the beginning of trials that the record in the investigation proceeding will be read into the evidence of the trial proceeding.

In view of the unfamiliarity of the "B" and "C" Boards with rules of evidence, one might expect these boards to be instructed to admit any evidence that seems to them to be relevant, permitting the Bureau to determine what evidence it should consider in making the final decision. It may be that this is the result in practice, although some of the Bureau's officers seem to think that the boards apply the rules of evidence at least to some extent. The question whether or not or to what extent the rules of evidence are applied in reaching a final decision in the Bureau seems to be almost impossible of ascertainment. Of the five individuals who participate in the review of cases, the training of only one, an assistant director, is primarily legal. It is possibly not without significance that the boards sometimes have been specifically instructed by superior officers of the Bureau to incorporate into the record as exhibits *ex parte* statements or affidavits which would not be admissible under the rules of evidence. Such instructions usually are limited to investigation proceedings but, by reason of the usual stipulation incorporating the record of the investigation proceeding into the record of the trial proceeding, they are still a part of the record which is considered in making the final decision, and such an instruction was given to the board in at least one case in which the investigation and trial were amalgamated into a single proceeding. Any conclusion except that all the evidence in the record is considered for what it is worth in the making of the Bureau's decision is very difficult to reach.¹⁶

Although most of the officials of the Bureau deny that official notice is taken of facts which are not the subject of judicial notice, one officer states that this is not entirely true. He points out, for example, that he knows officially that pier 45 in San Francisco points northeast toward Alcatraz Island; he knows how far a ship will back from the pier, that it will make a broad swing to the left to pass under a bridge, and that the current at the light ship is southwesterly at a certain time. He says that if in a specific case a witness's testimony disagrees with any of these facts, he will disregard the testimony. He further says that if a master gives testimony which is inconsistent with these known facts, he will have reason to believe that the master was improperly manoeuvring his vessel, even though no more direct evidence appears in the record to that effect. Since most of the Bureau's officers have had much experience at sea, perhaps it is inevitable that they will consider evidence in the record in the light of their own understanding of maritime affairs. Just where the use of such knowledge as a background for thought ends and where the use of such knowledge to supplement or to contradict evidence of record begins, is probably impossible to define; but it seems likely that official notice must in certain classes of cases play an important part in the fact-finding process. Undoubtedly the taking of official notice in these cases by men who are specialists in maritime problems substantially assists

¹⁶ A considerable portion of the evidence in both investigations and trials is documentary. This type of evidence consists almost entirely of voyage records, including both rough and smooth deck and engine room logs, bell books, navigation charts, navigators' work books, compass deviation cards, stowage plans, radio logs, radiograms, and crews' and passengers' lists.

them in finding the true facts. Since, however, the cases are reviewed on appeal by the staff of the Secretary of Commerce, none of whose members is primarily trained in maritime activities, some difficulty could conceivably arise as a result of the taking of official notice of facts which seem obvious to the Bureau's specialists. Perhaps this possible difficulty can best be met by requiring that all facts of which official notice is taken should be clearly stated in the opinion which supports the findings of the Bureau.

Subpenas.—At the instance of any party in interest, any member of a board may issue subpenas, both for witnesses and for the production of books, papers, and documents. The statute permits enforcement of subpenas in the district court, but never yet has the power of a court been invoked. Subpenas are very seldom necessary, as most of the witnesses are officers and seamen who come in voluntarily. In practice, when the board notifies the master of the vessel that it will require the attendance of all officers and men involved in the proceedings, the captain orders those officers and men to appear, and no more than this is necessary. The practical sanction for the enforcement of subpenas, when they are issued, is not the threat of district court proceedings, but it is the threat of action by the board against licenses or certificates. The Attorney General of the United States has ruled that the boards have authority to revoke or suspend licenses or certificates if a subpoena is disobeyed or if an officer or seaman improperly refuses to answer a question. Subpenas are not necessary to obtain ships' papers, as they are always voluntarily introduced. Some difficulties might arise in connection with the issuance of subpenas to merchant seamen of foreign nations, but so far such subpenas have always been observed without the necessity of enforcement proceedings.¹⁷

Oral arguments and briefs.—At the close of the introduction of evidence, opportunity for oral argument is invariably afforded to the defendant or his counsel and in nearly all cases oral argument is made, whereupon it is incorporated in the transcript.¹⁸ Any party in interest is permitted to file a brief as a matter of right. The form and style of briefs are not controlled by uniform rule and apparently no such rule is needed. Inasmuch as briefs are filed only in behalf of the defendant in most cases, no occasion arises for either supplementary or reply briefs. No formal limitation is made upon the time for filing briefs with the boards, but the customary period is 4 or 5 days except in unusually long cases, and apparently formal limitation is unnecessary. The briefs filed with the boards are the only briefs submitted except on appeal to the Secretary of Commerce.

Reports of the boards.—The boards always prepare reports which include findings, conclusions, and recommendations. The reports ordinarily do not contain reasoned opinions or discussions of law or policy. They are limited to summaries of facts, statements of conclusions, and suggested sentences. They are prepared without the benefit of proposed findings submitted by parties, as the issues are

¹⁷ Subpenas may be served by a United States marshal or his deputy, or by a local inspector, or by any person especially appointed by the board for that purpose. Questionnaires are very seldom used, but the regulations issued by the Secretary of Commerce specifically provide for them: "In order to facilitate the work of the board any party in interest or other person shall, within such time as designated after any questionnaire respecting matters relating to a casualty or accident shall have been served upon them, file with the board or its designated agent the exact information requested by such questionnaire."

¹⁸ Until very recently no time limit was placed on such oral arguments, but some months ago the boards were advised that a maximum limit of one hour should be placed upon oral argument in all cases, because it was thought that oral arguments theretofore had occasionally been much too lengthy.

nearly always simple and proposed findings, it is thought, would serve little purpose. The reports until very recently have never been submitted to parties; in fact, the regulations provide that "all matters and records, other than records of public proceedings, shall be treated as confidential during the pendency of any investigation, unless the Director or Secretary shall otherwise order." In a recent case a specific request was made by counsel for a copy of the board's report, and after considerable deliberation and consultation with the Solicitor of the Department, the Bureau decided to grant the request. Since that time the boards have been instructed to furnish a copy of their reports to any party in interest who requests it. The boards might easily in all cases supply the parties with copies of the report, but since neither briefs nor oral arguments are made before the Bureau, perhaps in most cases there would be little advantage in such a practice. The issues are ordinarily so clear-cut and the findings are so simple that no need exists for the filing of exceptions to the report of the boards. In some of the more complicated cases, which are usually the proceedings involving labor disputes, something might possibly be gained by affording the parties opportunity to file exceptions to the reports of the boards.

Reports are cooperative products of the various members of the boards. Ordinarily at the close of the formal proceeding a conference of the board members will determine which member will prepare a preliminary draft, that draft will be submitted to the other members for their comments upon it, and changes will be made by the original draftsman before the report is finally put before the Board members for signature. Sometimes this process consumes considerably more time than would be required if a single trial examiner or judge were to replace the present Boards. This is especially true in the case of "A" and "B" Boards, whose members frequently disperse upon the completion of the formal proceedings. Dissenting opinions of board members are very rare, but are sometimes filed.

Preparation of Director's decision.—Upon the receipt by the Bureau of the transcript of testimony and of the board's report, the case is first studied by the review section. The head of the section reviews all "A" and "B" cases in the first instance, but the "C" cases are initially considered by his assistants. The head of the section, however, reads the records in all "A," "B," and "C" cases without exception; this, of course, duplicates the work of one of his assistants in the "C" cases. A report is then prepared, which is submitted with the record to the Assistant Director. The Assistant Director declares that he always reads the records to the same extent that he would if he had the sole responsibility of deciding the case. The Assistant Director substitutes his judgment for that of the Review Section and revises or changes the report prepared by the Review Section in such manner as he sees fit. The case then goes to the Director. If the problem is not unusually important and if the review section and the Assistant Director are in agreement, the Director does not look at the record. This is true in spite of the provision of 46 U. S. C. 239 as follows:

The whole of the testimony received by the board conducting such investigation and the findings and recommendations of such Board shall be forwarded to the Director of the Bureau of Marine Inspection and Navigation, and if that officer shall find that such licensed officer or holder of certificate of service is incompetent or has been guilty of misbehavior, negligence or unskillfulness, or has endangered

life, or has willfully violated any of the provisions of this title or any of the regulations issued thereunder, he shall, in a written order reciting said findings, suspend or revoke the license or certificate * * *

If the matter be viewed realistically, it is difficult to discover any harm which results from the Director's failure to give independent consideration to the unimportant cases on which his subordinates are all in agreement. In all the more important cases and in those in which the members of the staff are in disagreement, the Director reads the record to whatever extent he deems necessary in order to apply his own independent judgment. The Director always reads the proposed report, even in the unimportant cases, and frequently makes alterations of form and style.

The decision of the Bureau is theoretically made solely on the basis of the record and the report of the board. Briefs in addition to those submitted to the boards are never filed with the Bureau and no oral argument before the Director has ever been requested. The fact seems to be, however, that attorneys frequently consult the head of the review section concerning cases pending before him for decision. Occasionally attorneys who have only an indirect interest in a case will consult with the deciding officers of the Bureau.

Opinions.—The decision of the Director is announced in the form of a letter to the alleged offender which states the charge and specification, the findings, and the sentence. The letter also states, whenever a license or certificate is suspended or revoked, that the alleged offender will have 30 days in which to file his appeal with the Secretary of Commerce, and that the suspension or revocation will not begin until the end of the 30-day period unless the alleged offender indicates his intention to take no appeal. Simultaneously with the sending of the letter to the alleged offender, a similar letter is sent to the board or to the local inspectors announcing the decision and instructing that the license or certificate be at once taken up if the alleged offender indicates his intention of foregoing his privilege of appeal.

The letter announcing the decision ordinarily does not contain a reasoned or argumentative opinion discussing questions of law or policy. In some cases, particularly those involving labor disputes, exceedingly difficult problems are presented, many of which have been passed upon by various courts, and much benefit might often be derived from a careful analysis of authorities and a thoroughly reasoned discussion of merits. These opinions might well be published in the monthly bulletin of the Bureau whenever they contribute to the law on any particular subject. Instructions have been given that significant decisions should be so published, but of all the important cases of the past year, none has appeared in the monthly bulletin. Published opinions would constitute precedents for future decisions and the Bureau would thereby build a body of law to guide its decisions. Under present practices the advantages that might be gained from thoughtful utilization of the principle of stare decisis are very largely lost and the discretion of the adjudicating officials is not sufficiently guided.¹⁹ Furthermore, a reasoned opinion would tend to cause the Bureau to decide in accordance with such authorities as are

¹⁹ A principal traveling inspector who spends a third of his time serving on "B" Boards complains that unless he makes a specific request, he never knows what disposition the Bureau makes of the cases in which he participates. The inference is that the Bureau makes little effort to inform "B" Boards of its policies in adjudications, a circumstance which seems absolutely indefensible from every point of view.

available on any given point, whereas at the present time authoritative decisions seem to be sometimes insufficiently consulted.

Appeals.—The statute (46 U. S. C., sec. 239) prescribes that a person whose license or certificate is suspended or revoked “may within 30 days appeal from the order of the said Director to the Secretary of Commerce. On such appeal the appellant shall be allowed to be represented by counsel. The Secretary of Commerce may alter or modify any finding of the board which conducted the investigation or of the Director of the Bureau of Marine Inspection and Navigation, but the decision of the Secretary of Commerce shall be based solely on the testimony received by the said board and shall report the findings of fact on which it is based.” Appeals filed with the Secretary of Commerce are ordinarily accompanied by briefs, but no oral argument is permitted.²⁰ Heretofore the 30-day limit has applied only to the appeals and not to the briefs in support of appeals, but this practice is at present being changed so that the briefs must be filed within the 30-day limit.

The appeal and brief, surprisingly enough, are first submitted to the same officers of the Bureau who have decided the case in the first instance. The question presented to them, of course, is whether or not their decision should be reversed. The head of the review section first writes an opinion on appeal, and this opinion is transmitted to the Assistant Director, who in turn sends it to the Director. The initials of all three of these officers appear on the proposed opinion when it is sent “upstairs,” together with the record, the brief in support of the appeal, and a memorandum of the Bureau answering the appellant’s brief. The case usually goes first to one of the Solicitor’s assistants, who invariably reviews the record with considerable care. He makes his report to the Solicitor, who likewise reads the record in all cases and usually confers at some length with his assistant. The case then goes to an assistant of the Assistant Secretary who also reads the record, he says, to the same extent as he would if he had the sole responsibility of deciding the case. At last the case finds its way to the Assistant Secretary. This officer, who signs the decision, declares that he looks at a part of the record in about 50 percent of the cases, but that he never reads a whole record. Usually by the time the case reaches him it has been so thoroughly considered that little of his attention is required. Whenever the decision is of importance, however, he discusses it with his assistant and, if the problems involved are sufficiently difficult, he may sometimes call in the Solicitor and even a Bureau official for conference before the final decision is made. Of course, the current practice raises the question whether the Assistant Secretary’s failure to give his personal and independent consideration to all cases constitutes a violation of the principle of the first Morgan decision (298 U. S. 468). But, to one who approaches the matter without preconception, it appears that, far from inadequately safeguarding the parties’ rights, the Department may be erring on the side of excessive consideration of the questions in issue. If participation by the officers of the Bureau in the decision on appeal is included, the entire case is apparently considered by six individuals, all of whom declare that they give as much consideration to it as they would give if they had the sole responsibility of decision. Whether or not it is

²⁰ A recent request for oral argument before the Secretary was rejected after careful consideration by the Solicitor. Since that time several such requests have been summarily denied.

necessary that the assistant of the Solicitor, the Solicitor himself, and the assistant of the Assistant Secretary should all read the record in every case is certainly at least subject to question.

Participation by the Bureau in the decision of appeals from the Bureau.—The propriety of permitting the Bureau to review its own decisions is doubtful, even in the minds of the Assistant Secretary and of the officers of the Bureau who engage in this practice. In only one case within the recollection of the present officials has the Bureau recommended that its own decision be reversed, and in that case the original decision was announced in ignorance of a controlling judicial decision. This means, of course, that the Bureau always studies the brief in support of the appeal in order to write a memorandum answering the arguments presented in the appellant's brief. The officers of the Department then have what amounts to briefs on both sides to assist them in making their decision. The present Acting Secretary dislikes the participation by the Bureau in the review of its own cases, but he believes that the decision of the Department should be submitted to the Bureau for its approval before the decision is issued to the parties.²¹

Delay in reaching decisions.—The primary object of all the legislation administered by the Bureau is to promote safety at sea; if the Bureau's goal is to be achieved, cases involving incompetency of officers and seamen should be decided with dispatch. Furthermore, in the discipline cases not involving incompetency the purpose of the administration will be better attained if decisions are prompt. The present system is hardly in keeping with these objectives. The boards are above reproach in this respect, as the investigation and the trial are almost invariably held within a few days after the casualty occurs or immediately after a complaint is made, and the reports of the boards are made with reasonable promptness, although a little more time may be required by reason of a plurality of members of the boards than might be necessary if single magistrates or examiners were to preside at the hearings. The cumbersomeness of the present system results from the fact that all decisions must be made in Washington. It is not easy for the Bureau to keep abreast of its docket, and frequently the simplest of cases wait many months for decision. Examination of a half dozen cases involving pleas of guilty, selected from the Bureau's files at random, disclosed that the average time consumed between the initiation of the proceedings and the Director's decision was about 8 months. In the *Lee case*, for example, a steward was charged with being intoxicated and disorderly in a dining room on August 15, 1938. He pleaded guilty before the board, the entire record filling only one page. The director's decision suspending his certificate for 5 days was handed down March 14, 1939, 7 months after the proceeding began. The *Boe case* involved a plea of guilty to the charge of being drunk and insulting. The defendant's only testimony was that he remembered nothing that had happened. The proceeding began February 1, 1939, and the Director's decision to suspend for 15 days was handed down June 14, 1939. In the *LaRoche case* a night saloon watchman pleaded guilty to the charge of being intoxicated and unable to attend to his duties. The proceeding began in September 1938, and a 15-day suspension was

²¹ The Solicitor of the Department is now planning to add a man to his staff in order that the Bureau's participation in review of its own decisions may be discontinued.

decided upon in June 1939. The *Hennessey case*, involving an intoxicated waiter who pleaded guilty, required from September 1938, until June 1939, before the Director suspended the certificate for 15 days. In the *Staniszewski case*, the defendant had already served 1 year in prison for perjury and he pleaded guilty to the charge of falsifying in obtaining his seaman's certificate. The trial was held in January of 1939 and the decision was not made until August. Wilkinson admitted in July 1938, that he was guilty of the charge of using offensive language and the Director decided in April 1939, to suspend his license for 10 days. Cases involving petty offenses of this kind make up a large portion of the adjudications, although pleas of not guilty predominate. The delay is, of course, not necessarily inherent in the system of requiring all decisions to emanate from Washington, but certainly the record of the time consumed for decisions involving suspensions of 5, 10, or 15 days is exceedingly impressive. An obvious alternative for handling such cases would be to permit a magistrate in the field to decide all such cases with finality, subject to review by higher administrative authority on appeal.

Sanctions.—The only sanction provided by statute for punishing offenses of officers and seamen is the suspension or revocation of licenses and certificates. Undoubtedly this sanction is the proper one for cases involving incompetency. Certainly the objective of promoting safety at sea clearly requires that whenever an officer or seaman is found incompetent to perform his duties, his license or certificate should be forthwith revoked or suspended until such time as he measures up to the specified requirements. This is true in most cases involving officers. Most of the cases involving misconduct of seamen, however, have nothing whatsoever to do with competency in the narrower sense, but concern such offenses as intoxication, assaults, altercations, insults to passengers, and use of offensive language. If a steward gets drunk in the dining room and insults a passenger, the offense has only a very indirect bearing upon safety, and may have no relation at all to the question of competency. If most seamen drink when they reach port, and if the frequent consequence is improper or disorderly conduct, should the men be deprived of their right to work in order that they may be properly disciplined, or would some other sanction be more appropriate? If a certificate is suspended for 10 days, the result may well be that the seaman will miss an entire voyage of his ship. It seems at least questionable whether Congress deliberately intended that in these petty discipline cases the offending seamen should be deprived of their right to work. The purpose of conferring the power of revocation or suspension of licenses or certificates upon the Bureau was to permit the Bureau to weed out the incompetents. The main thought back of the statute was to permit the "A", "B", and "C" Boards to investigate casualties in order to prevent their recurrence and it is only an incidental clause of the statute which permits imposition of penalties for misconduct unrelated to casualties or to safety. One wonders whether in order to enforce discipline the statute should not provide an additional and sometimes more appropriate sanction, namely, the imposition of fines, to be used as an alternative to the suspension of licenses and certificates.

A difficulty of some importance arises out of the exercise in Washington of the power to suspend licenses and certificates. When the

director decides to suspend, he sends a letter to local inspectors instructing them to take up the license or certificate at once. He has no knowledge of the schedule of the convicted offender, and he does not know whether the sentence that he is imposing will turn out to be a severe one or a light one. For example, when the ship happens to be in port for 11 days, a 10-day suspension is almost meaningless. If, on the other hand, the vessel happens to be in port for only 9 days the sentence may be an unexpectedly heavy one because the unfortunate officer or seaman will miss the entire voyage.²² Both the director in making original decisions and the Secretary in deciding cases on appeal act utterly blindly with respect to the severity of the sentences they impose.²³ If the decision could be made by a magistrate in the port who would have knowledge of the vessel's schedule at the time of imposing sentence, this hit-or-miss method would be alleviated.

A suggested revision of procedure for trial proceedings.—The foregoing presentation of the Bureau's methods of conducting trial proceeding reveals five major difficulties: (1) The assistant inspectors who serve on "C" Boards are primarily qualified as inspectors of hulls and boilers and are not necessarily equipped to participate in the process of adjudication; the supervising inspectors and principal traveling inspectors who serve on "B" Boards, although appreciably more capable than the assistant inspectors, are likewise untrained in the art of adjudication; (2) the combination of functions of investigator-advocate, and adjudicator in the person of a single individual gives rise to a probably justified dissatisfaction among the parties and their counsel; (3) incompetents are allowed to continue to sail the seas for many months while their cases are pending in Washington, and discipline suffers from the long delays occasioned by the necessity under the present practice of taking every case to the Washington office of the Bureau; (4) despite the apparent absence of any substantial harm in the present practice, the doctrinal requirement of the first *Morgan case* may not be satisfied by the prevailing procedure, since, although the statutory power of decision is vested in the Director, the Director does not personally review or consider every case which he purportedly decides; and (5) when sentences of suspension are imposed, no one knows in advance whether the sentence will happen to be heavy or light, as the sentencing officials act without knowledge whether or not the particular suspension will cause the convicted offender to miss an entire voyage of his vessel.

These five difficulties in combination suggest the possibility of decentralizing adjudicating power, for all of these difficulties yield to the solvent of decentralization.

A single magistrate in each principal port could be given authority to decide each case as soon as the ship comes in, his decision to be final unless an aggrieved party chooses to take an appeal to the Secretary of Commerce (or his delegate). Present deficiencies in qualifications of Board members would be remedied if the magistrate were a person who combined an ability to understand maritime experience with some knowledge of legal forms and of customary prac-

²² Seamen, of course, are notoriously transitory. Until very recently, few would stay long on one vessel. However, following the lead of the Maritime Commission, some lines have now inaugurated a system of "longevity bonus" which has had remarkable effects in producing a greater continuity of service.

²³ Sometimes a suspension does not become effective until long after the final decision is rendered. Local boards are ordered to take up the certificate or license, and they must wait to do so until the convicted person comes to port.

tices in the adjudication of cases. The office could be made one of dignity and could be set up in such a fashion as to attract a high calibre of personnel. If this objective were achieved, the quality of the decisions, it may confidently be expected, would be much superior to the reports now made by inspectors.

Present objections to combination of several variegated and possibly inharmonious functions in the same individuals would be met by relieving the magistrate of the necessity of acting as investigator or advocate, thus permitting him to devote his entire effort to the relatively passive role of adjudication. In most cases, as at present, an assistant inspector would first develop the facts by investigation and would then present the evidence tending to show guilt of accused persons; in the more important or more intricate cases, a second individual might be supplied by the Bureau for the latter task.

Perhaps paramount among the many improvements that would result would be the promptness of decision which would be possible if it were no longer necessary to send each case to the Bureau in Washington. Those who are incompetent would no longer be allowed to endanger life and property at sea while their cases are in the files of the Bureau awaiting decision, and the effects upon discipline of a much more speedy justice might be marked. Doubts concerning the theoretical legality of present adjudicatory methods would be resolved if decisions were to be made at the ports by officers designated for that purpose, for in that event the one who heard would very definitely be the one who decided.

The present practice of blind sentencing would no longer prevail, as the magistrate in deciding the case in the port would then and there know the schedule of the particular vessel and could easily take into account that schedule in determining the duration of the suspension. Thus, all five of the present major difficulties would be completely eliminated.

As against the advantages of the proposed system of magistrates in the ports, what disadvantages may be suggested?

Centralized administration promises uniformity; decentralized administration might result in diversity, for different magistrates might hold widely variant philosophies of punishment. In the type of cases here involved, however, strict uniformity is not essential. A reasonable degree of consistency could easily be maintained through the coordinating efforts of the Bureau in supervising the magistrates. In cases involving doctrines of law, policy judgments, or complicated factual situations the writing of argumentative opinions explaining and justifying decisions seems appropriate, and these opinions might well be exchanged with other magistrates. Appeals would still be taken to a higher administrative authority, and if adequate opinions in support of the decisions on appeal were made available to the magistrates, these authoritative documents would have a unifying effect. Furthermore, recommendations growing out of investigation proceedings would still be acted upon in Washington; the magistrates would have final authority (subject to appeal) to determine only questions of guilt or innocence.

One suggested objection to the proposed plan is the asserted undesirability of the diffusion of responsibility. At the present time the Director and the Secretary of Commerce have the responsibility of administering the safety-at-sea laws. If another *Morro Castle* disaster

occurs and someone is at fault, the responsibility may immediately be placed upon these officers. They cannot shift the blame to semi-independent magistrates in the field who might have failed to be sufficiently exacting in their requirements. This objection undoubtedly has in it a small measure of merit, but it hardly seems sufficient to overcome the clear advantages of the proposed plan. The magistrates would still be subject to the Bureau's authority and the responsibility would continue to be that of the Bureau's key officers. The power of the Director under any system must to some extent be delegated, and the amount of the delegation under the proposed plan would not greatly exceed that of the present system. Practical differences from the standpoint of diffusion of responsibility would in the final analysis probably be very slight. And in any event it is not proposed to transfer the present controls over design, construction, equipment, and inspection of vessels, but only the disciplinary proceedings against the officers and crews who man them.²⁴

Some opinion has been expressed that the vesting of power in individual magistrates in the ports might be undesirable on account of the possibility that local magistrates might be easily susceptible to corruption of various kinds. Possibly it is true that local magistrates can be more easily "reached" than officers in Washington, and perhaps this factor is one that should be taken into account. It is further said that one of the advantages of the present system lies in the fact that since all decisions must emanate from Washington, bargaining by the Boards in consideration for pleas of guilty is impossible, and no shady practices may grow up as a result of power to settle the cases without formal proceedings. A decentralization of authority might very possibly give rise to a tendency toward informal settlement, but this very fact might prove to be one of the major gains achieved through the proposed system. Any undesirable consequences from the informal settlement of cases would spring not from the system but from abuses of the system, and it can hardly be assumed as an original proposition that the magistrates would abuse their power. At all events, if practices in connection with the settlement of cases should become unsatisfactory, the power of settlement could always be readily denied to the magistrates.

Many of the details of the proposed system would call for careful planning. No close study of such details has been made. A superficial consideration of the probable expense of operating the proposed system indicates that it is likely to be less expensive than the present arrangement. Three assistant inspectors, with average salaries of \$3,200, take a total from the Bureau's budget of nearly \$10,000, and the combined salaries of members of "B" Boards total much more than this. Much time of the Bureau's Washington officers would be saved. It seems likely that, without increasing the Bureau's budget, well-qualified magistrates could be obtained to consider cases in which assistant inspectors had presented evidence developed by their earlier investigations. Probably three magistrates would be required for the

²⁴ Prior to 1935 the power to revoke or suspend licenses was vested in the boards of local inspectors. Broadly speaking, the revocations and suspensions were limited to incompetency and did not extend to acts of mere misconduct. The amendment of 1935 was actuated in part by the desire to centralize responsibility and in part by dissatisfaction with a system which permitted the same inspectors who had issued licenses to individuals found by the inspectors to be competent to determine later whether or not those same individuals' licenses should be revoked for incompetency. The proposed plan to establish magistrates in the ports would not be a return to the system in operation before 1935, although its decentralization feature might in some respects be considered somewhat comparable.

port of New York to take the place of the boards which now try cases; perhaps two would be needed for San Francisco, and one each for such ports as Boston and New Orleans. It seems feasible to group some other ports together and make the magistrate for a group of ports peripatetic. The magistrates should not completely replace the "A," "B," and "C" Boards. Major casualties certainly should still be investigated by "A" Boards, which are apparently very well qualified for their tasks and perform their duties with the utmost of efficiency and dispatch. Perhaps the "B" Boards also should continue to exercise their duties of investigating casualties and making recommendations. The magistrate's jurisdiction might well be limited to the business now conducted in trial proceedings and not be extended to what is now handled in the investigation proceedings.

The present statute prescribes that a "C" Board shall consist of "representatives of the Bureau of Marine Inspection and Navigation designated by the Director thereof." A plurality of members is apparently contemplated, and an amendment would be necessary to confer authority upon a single magistrate. A statutory amendment would also be necessary to relieve the Director of the duty of considering all cases, since the statute now provides that the record and the findings and recommendations of the board shall be forwarded to the Director, who shall suspend or revoke the license or certificate of the officer or seaman.

REMISSION OR MITIGATION OF FINES, PENALTIES, AND FORFEITURES

For violations of various provisions of the navigation laws and regulations issued thereunder, the statutes provide in many instances for the imposition of fines, penalties, and forfeitures. The statute confers upon the Secretary of Commerce the power to—

remit or mitigate any fine, penalty, or forfeiture provided for in laws relating to vessels, or discontinue any prosecution to recover penalties or relating to forfeitures denounced in such law, excepting the penalty of imprisonment, or of removal from office, upon such terms as he, in his discretion, shall deem proper. * * *

For the fiscal year 1939, 1,140 steamship navigation fine cases were opened, covering 2,297 violations, with the assessment of \$493,235 in aggregate penalties. These penalties were mitigated to \$75,621,²⁶ of which \$17,006 had been collected July 1, 1939. In addition to those penalties, 11,522 violations of the motorboat laws were reported, for which \$10,038 were collected during the fiscal year. In the typical month of July 1939, 341 violations of motorboat laws were reported involving maximum penalties assessed in the amount of \$68,260, which aggregate amount was mitigated to \$1,201, and 11 cases involving maximum penalties of \$570 were held for further investigation. In August 1939 maximum motorboat penalties assessed in the amount of approximately \$59,000 were mitigated to \$1,040 and 16 cases involving maximum penalties of \$3,170 were held for further investigation. In September 1939 maximum penalties of \$52,500 were mitigated to \$910, and 20 cases involving maximum penalties of \$2,200 were held for further investigation.

²⁶ One of the chief complaints of the National Maritime Union against the Bureau is what the Union calls the "amazing tendency on the part of the Bureau to deal patiently, tenderly, sympathetically, and affectionately with ship-owner violators—even after they have been found guilty and fine imposed." In reply to such assertions, the Bureau's officers point out that it was not the intent of Congress that maximum penalties should be imposed in all cases.

The annual report of the Secretary of Commerce for the fiscal year 1938 declares: "While the fines reported run into large figures, the attitude of the Department has been directed to a continuing and progressive education of the operators to equip and operate with due regard to safety, and in considering mitigation and remission of penalties, a liberal attitude in this respect has been taken." Since the maximum penalties that may be assessed under the various statutes so clearly exceed the amounts to which penalties are usually mitigated, the power to remit or mitigate is in practice one of enormous consequence.

Representative of the offenses for which fines, penalties and forfeitures may be imposed are the following: A \$100 penalty for employing an uncertified seaman; a fine of \$500 to \$5,000 against an owner, and \$50 to \$500 against a master, for failure to carry life-saving equipment specified in the statute; a fine of \$500 against a master or owner, one-half to go to the informer, for noncompliance with certain inspection requirements, the master and owner to be liable to passengers for resulting damages; a fine of \$1,000 for failure to keep a watchman as prescribed by statute; a fine of \$50 imposed against a master for his failure to make entries in discharge books; a forfeiture of the amount of passage money and a fine of \$10 for each passenger carried in excess of the prescribed number; a fine of \$2,000 and 10 months' imprisonment for unlawfully shipping dangerous articles, one-half of the fine to go to the informer, and the articles shipped to be liable to forfeiture; a fine of \$100 for failure to comply with certain motorboat requirements.²⁶

Original imposition of penalties, fines, and forfeitures.—The Bureau maintains three navigation ships and numerous small motorboats for the use of its enforcement officers, who do detective work in discovering violations of the navigation laws. In addition, the Coast Guard, the shipping commissioners, the local inspectors, and the collectors of customs serve as enforcement officers of the Bureau. When an enforcement officer thinks he has discovered a violation, he makes a report to that effect to the Bureau in Washington. Members of the Bureau's staff who review these reports often find that no statute has been violated and the case is terminated. Sometimes they find that the wrong statute has been cited and a correction is necessary. If they reach the conclusion that prima facie evidence of a violation exists a notice to that effect is sent to the collector of customs who has jurisdiction of the offense and the collector sends to the alleged offender a letter assessing the maximum statutory penalty for the offense. Whatever the circumstances may be, the maximum penalty is always assessed upon a showing of prima facie evidence of a violation. The letter of the collector, however, encloses a form on which the alleged offender may make application to the Secretary of Commerce for remission or mitigation. In nearly all cases the accused person applies for a remission or mitigation, but he usually files a brief instead of using the form which is furnished. The form or the brief is always required to be submitted under oath. The application is delivered to the collector of customs, who considers it and transmits it to the Bureau with a letter of comments and recommenda-

²⁶ The statute prescribing a \$100 fine for failure to carry a fire extinguisher on certain motorboats specifically provides that the fine may not be remitted or mitigated.

tions, which, it is only accurate to add, seem to be little relied upon by the Bureau.

In only about 10 percent of the applications does the alleged offender deny the offense. Most applications consist in admission of the violation with statements of mitigating circumstances and pleas for leniency.

Action upon petitions for remission or mitigation.—In the Bureau the applications are divided into two categories. One section considers motorboat cases, and another section all other cases. The disposition of each case is determined on the basis of the original information sent in by the enforcement officer and the facts stated in the application for remission or mitigation. If the enforcement officer and the applicant do not tell the same story, the Bureau must decide which statement is true and if differences are not readily reconciled by correspondence, naturally will usually give more credit to the field officer's veracity. No hearing is ever held—the theoretical justification for this lack being the necessity that the matter be tried *de novo* in a Federal court if the alleged offender persists in denying liability—and no effort is ever made to conduct a separate investigation, although records of the Bureau and information on file with the shipping commissioners are frequently utilized. Members of the staff prepare a letter addressed to the collector of customs disposing of the case. These letters are reviewed by the Assistant Director, who makes such changes as he sees fit and passes them on to the Director. The Director seldom makes substantive alterations, but usually edits the language. The letters are then sent "upstairs" where an assistant of the Assistant Secretary "reviews" them. He sometimes suggests that the amount of the penalty be reduced, but has seldom increased it in recent times. The letters then go to the Assistant Secretary for signature; he gives independent consideration to them only when important or novel questions are presented. About one case in ten is referred to the Solicitor of the Department to pass upon legal questions.

Although no formal hearing is ever conducted, the parties and their counsel come into the offices of the Bureau on many occasions. They often ask for an opportunity to be heard, and it is accorded them in the form of informal conference and negotiation with the officers of the Bureau. They usually come first to the office of the Assistant Secretary, who refers them to the Assistant Director of the Bureau. The administrators usually make known to the alleged offenders that they are willing to consider offers in compromise, and one of the Bureau's officers estimates that about one-sixth of the cases are compromised in the Bureau in the first instance. If the Bureau's officers believe, for example, that a fine should be mitigated to \$1,000, they will usually accept an offer of \$500 in compromise in order to save time and expense which would be necessary for enforcing collection if no compromise were effected. Recommendations of the Assistant Director for compromise are almost invariably approved by the Assistant Secretary.

No standards are prescribed by statute to guide administrative discretion in remitting or mitigating. The power is one which because of its very nature is likely to be exercised with some degree of arbitrariness. An offender who is willing to recognize that he has violated the navigation laws and that he deserves punishment will

pay a large penalty. One who is content to submit a written application for mitigation or remission is likely to pay a much larger fine than the individual or corporation which sends a representative to Washington to address argument to the officials. It is undeniable that pressures substantially affect the ultimate conclusion. Particularly is it true that an offer to compromise will frequently reduce the final amount of the penalty to a figure much lower than the amount which would otherwise be assessed.²⁷

Collection of mitigated amounts.—If a compromise is not reached, the letter prepared by the Bureau and signed by the Assistant Secretary is sent to the collector of customs with the instructions to collect the mitigated amount of the fine. The collector informs the violator of the amount which is owing and attempts to collect it. If after a reasonable time he does not succeed in collecting, he may choose between the alternatives of forgetting the matter or turning it over to a Federal district attorney for an action in the Federal district court. The district attorney can sometimes collect without filing an action, simply through threatening to institute proceedings.²⁸ However, in many cases the ponderous machinery of the judicial process must be invoked if the fines are to be collected. Some of the statutes specify that the vessel shall be liable and others are silent on this point; the district attorney sometimes has a choice between a libel of the vessel and an action in debt in personam.

Cumbersomeness of the judicial process and resulting difficulties.—Many of the mitigated amounts are very small, the great preponderance being under \$100. In motorboat cases the mitigated penalties are frequently \$5, \$10, or \$15. To require the time of district attorneys and Federal judges to be spent in dealing with such cases seems wholly unfortunate. And by reason of the very dignity of these officers and the triviality of the amounts involved, the enforcement machinery fails in its purpose. District attorneys very naturally are uninterested in the collection of small penalties and frequently fail to file proceedings. As a result operators of vessels learn that they may violate navigation laws practically with impunity, and safety may be imperiled.

No one knows what proportion of the mitigated amounts is ultimately collected. Figures compiled for the fiscal year 1939 indicate that, apart from the motorboat penalties, less than one-fourth of the mitigated amounts assessed during the year had been collected by July 1, 1939, and perhaps even a smaller proportion of the motorboat penalties was collected. What proportion of the remaining three-fourths will ever be collected no one seems able even to estimate, and the figures for past years could be found only by having a compilation made through an examination of the files of each case. About 1,500 navigation fine cases are now in the hands of the Federal District Attorney for the eastern District of New York; a few months ago the Collector of Customs sent to him in one batch 631 such cases. A recent report by the Director of the Bureau to the Assistant Secretary declares that the amounts not collected "would seem to indicate an obvious break-down in the administrative system with respect to the

²⁷ Partly because pressure from organized labor was sufficiently strong, not a single fine imposed upon owners in connection with a recent tanker strike was mitigated. The fines have not yet, however, been paid.

²⁸ District attorneys sometimes enter into compromise agreements, but such agreements are always first submitted to the Bureau for approval. The power to mitigate or remit continues even after judgment of a court has been entered.

collection of penalties which have been assessed, and I am of the opinion that steps should be taken immediately to correct this situation." Two recommendations made in the Director's report have recently been adopted: First, a recommendation that a member of the Bureau's staff be sent into the field to give district attorneys encouragement in enforcing collections. Second, a recommendation that mitigations should be made conditional upon prompt payment. Until very recently, mitigations have been unconditional. The question is as yet unsettled whether a district attorney may successfully sue for a maximum penalty that the Department has mitigated. This question should be settled by a case now pending; a \$27,000 penalty was mitigated to \$1,000, and upon the respondent's continued failure to pay the reduced sum, action is being brought for the entire \$27,000.

A suggested plan for administrative enforcement of penalties.—Although the Director's report calls the situation a "break-down in the administrative system," it seems rather to be a break-down in the judicial process of the Federal district courts, which are not equipped to handle large volumes of cases involving small amounts. The possibility is at once suggested that the power of enforcement ought properly to be reposed in hands other than those which now so unwillingly hold it.

One possibility would be simply to confer upon the Bureau the power of enforcement of its orders imposing penalties. In the case of ocean-going vessels clearance could be denied until the penalty was paid or bond posted, the violator being given an opportunity to bring his action to recover the amount paid or to release the bond. This of course could not be applied to small vessels that operate on inland waterways, because clearance is not granted for them. It might be possible to seize little vessels until fines are paid or bonds posted or to permit the administrative levy of execution upon other property of vessel owners. All such possibilities of direct administrative enforcement are deficient, however, because of the looseness of the present practices of imposing penalties. These present practices may be justified on the ground that under the existing system no penalty may be enforced without a *de novo* judicial determination in the district court. But if administratively assessed penalties were to be made enforceable by direct action, those who may be affected should be safeguarded by insistence upon an opportunity for hearing before the penalties become collectible.

If magistrates in the ports are established to conduct trial proceedings now handled by the marine casualty investigation boards, these magistrates would be eminently qualified to perform the functions now exercised by the district courts. The present administration of penalty cases could remain substantially as it is except that the power of the courts would be transferred to the newly established magistrates. The magistrates would conduct hearings and determine *de novo* whether or not offenses have been committed and fix the amount of the penalties. In order to assure uniformity in the amount of penalties, the Bureau should have the power, on its own motion and upon the record made before the magistrate, to review and to modify the magistrate's decision. This supervisory and revisory examination of the magistrates' decisions should and could be completed with marked expedition. The final decision of the Department should then be communi-

cated immediately to the respondent, who should be entitled to appeal within a fixed period to an appropriate Federal district court. In order to resolve any doubts concerning the constitutionality of the proposed procedure, the review by the court might in actuality take the form of a trial *de novo*.²⁹ Even with so amply extended a scope of review, the stresses of the present system would be relieved, for only exceptional cases would go to court. The desideratum is not to relieve the administration entirely from control by courts, but it is to establish a method of administrative enforcement so that such cases as reach the courts will be instituted by the alleged violator in seeking relief from allegedly wrongful administrative action instead of by the Bureau in an effort to collect innumerable petty fines in essentially routine cases. If the respondent chooses not to seek judicial review, the decision of the magistrate, as confirmed or modified by the Department, should become the final judgment in the case, enforceable without further proceedings.

To transfer the power of the district court to the newly created magistrate would be simple and apparently feasible from a practical standpoint. If the collectors of customs were permitted to institute proceedings before the magistrates, certainly occasion would not arise for 1,500 cases to accumulate in one tribunal. No reason is apparent why the cases could not be handled with the greatest of dispatch. Not only might such fines as are imposed be more readily collected, but operators would become aware of the efficient enforcement and the policy of the statutes to promote safety at sea would be furthered. The proposed plan is not objectionable on the score of vesting too much power in the magistrates, for most of the cases involve small amounts, decisions would be made only after full hearing, the magistrates would be subject to some administrative control, and opportunity for complete judicial review could be accorded.

RULE MAKING

Regulations issued by the Bureau are exceedingly voluminous. Some of the more comprehensive sets of regulations are those with respect to load lines, which fill a printed pamphlet of some 140 pages; those with respect to measurement of vessels, of about the same volume; those concerning ocean and coastwise navigation, nearly 300 pages; those governing tank vessels, 127 pages; and what is known as the fifty-first supplement to General Rules and Regulations, 183 pages.

A new set of ocean and coastwise regulations approximating 1,000 mimeographed pages has been prepared and is now awaiting promulgation. As soon as the ocean and coastwise regulations are adopted, the Bureau contemplates the preparation of another such comprehensive set to govern the Great Lakes; a third to govern bays, lakes, and sounds; and a fourth to control river navigation.

Each set of regulations contains provisions of all kinds, some dealing with procedure, some with substance, some with highly technical matter, and others with basic questions of policy. No attempt is made to segregate the various types of questions dealt

²⁹ Such doubts might arise from the circumstance that money penalties have traditionally been imposed by courts, so that such imposition might be regarded as a "judicial function" which could not validly be transferred to an administrative agency. But cf. *Elting v. North German Lloyd* (287 U. S. 324 (1932)); *Lloyd Sabado Societa v. Elting* (287 U. S. 329 (1932)). The doubts, however insubstantial they might be, would, it is thought, be dissipated by the procedure here suggested.

with by the regulations, which are planned to treat comprehensively the whole subject matter to which they pertain. For example, the proposed ocean and coastwise regulations deal with construction of vessels, subdivision and stability, fire control, engineering, life-saving equipment, special appliances, ship personnel, and inspection and operation. They range all the way from specifications concerning the ingredients of rivet steel to be used in certain parts of certain vessels to the requirements that license blanks shall be filled out by inspectors with pen and black ink. Because each provision of the regulations interlocks with the others, there is no disposition to vary, in respect of the different sorts of rules, the procedure preceding their formulation and promulgation.

Origin of regulations.—New regulations find their inception to a very large extent in casualties. The purpose of the marine casualty investigating boards, as has been noted previously, is primarily to investigate casualties in order to determine their causes and to discover what new regulations, if any, will prevent their recurrence. The revision of the ocean and coastwise regulations now in process of preparation has its inception to a great extent in the agitation which followed the *Morro Castle* and *Mohawk* disasters of 1934; it is based in large measure upon a report of a Senate technical committee which was appointed soon after the occurrence of those disasters. A considerable portion of new regulations probably originates in the observations and recommendations of individual supervising inspectors, who of course are constantly advised by the local and assistant inspectors. The whole tendency is continually to stiffen the various safety requirements. The greatest progress is made not in requiring the improvement of the construction and equipment of old vessels, but in raising the requirements for the construction and equipment of new vessels. The raising of standards therefore depends in large measure upon technological developments. Although inventors are seldom helpful, manufacturers of new equipment give considerable impetus to the Bureau's prescription of improved methods, materials, and designs.

Personnel engaged in preparation and issuance of regulations.—The bulk of the rule-making power is vested by statute not in the Bureau, not in the Director, not in the Secretary of Commerce, but in the Board of Supervising Inspectors, which is made up of the seven supervising inspectors who preside over the seven districts and direct the work of the local inspectors.³⁰ The statute provides that they shall come to Washington for an annual meeting in January and at such other times as the Secretary of Commerce shall prescribe. The statute also provides for an executive committee of the Board of Supervising Inspectors, which is composed of the Director of the Bureau and any two supervising inspectors. This committee is given power "to alter, amend, add to, or repeal any of the rules and regulations" promulgated by the Board of Supervising Inspectors. The executive committee customarily meets two or three times during the year.

The main thought and action of the supervising inspectors are devoted to their work in the field and of necessity they can give only incidental attention to the huge tasks of promulgating regulations which will keep abreast of the times. They are men who are qualified

³⁰ Some rule-making power is vested by statute in the Secretary of Commerce, including load line regulations, rules of procedure, and some scattered powers of relative unimportance.

to inspect ships and to direct the activities of the local inspectors, but they have no special skill in the drafting of comprehensive regulations. It would be utterly impossible, for example, for the supervising inspectors to undertake to prepare the set of ocean and coastwise regulations scheduled to be passed upon at their meeting of January 1940.³¹

From the time the Board of Supervising Inspectors was established in 1852 until very recent years, however, most of the drafting of new regulations was done by the supervising inspectors themselves. Since 1935 the tendency has been very sharply in the direction of delegation of the actual draftsmanship to others in the Bureau. The annual meeting of 1935 following the *Morro Castle* and *Mohawk* disasters lasted for 2½ months. At that meeting the volume of business was altogether too much for the board to handle without substantial assistance from the Bureau. At the instance of individual supervising inspectors many of the employees of the Bureau would draft proposed regulations for submission to the board, and for the first time the Board of Supervising Inspectors realized that its own personnel was not adequate to cope with the large tasks it was required to perform. Since that time the board has relied more and more upon the Bureau's staff for the preparation of proposed regulations. The great burden of the work of preparing the proposed set of ocean and coastwise regulations was borne by two principal traveling inspectors, one of whom has been working on the project for more than 2 years.

At the last four annual meetings of the Board of Supervising Inspectors very few regulations have been adopted that were not on the agenda prepared in advance by the Bureau. Many new ideas came to light at the meeting of the board, but for the most part their consideration was postponed until they could be adequately studied in the Bureau.³²

Many are of the opinion that the rule-making power should be transferred to the Director or to the Secretary of Commerce, because they believe that the Board of Supervising Inspectors is archaic and that it impairs efficient administration. Undoubtedly the supervising inspectors by reason of their work in the field are peculiarly qualified as practical men to determine whether or not proposed regulations will be workable, but others may be in a better position to keep abreast of new technical developments. No one would question that the judgment of the supervising inspectors is probably highly useful in determining what regulations ought to be promulgated; but whether the power to promulgate regulations should be vested in them is quite another question. Certain of the Bureau's officers are emphatically of the opinion that the Board of Supervising Inspectors should continue to exercise the power to issue regulations, their principal reasons being that the present system constitutes a protection against the exertion of undue pressures by those who have important interests at stake. They believe that if the ultimate power were vested in the Director or the Secretary, its exercise would be more readily susceptible to extraneous pressures. One of the Bureau's officers suggests that a possible remedy for some of the present seeming inadequacies of the Board as now constituted might be to increase the number of super-

³¹ It now appears probable that because of the volume and complexity of this proposed set of regulations, the Board of Supervising Inspectors will give the industry additional time for study and comment, and will not act on the regulations until March or April.

³² The board is markedly free from domination by the Director. A former director made some recommendations which were rejected by the board and the present director's policy is to avoid any attempt to force his individual ideas on the board.

vising inspectors so that three or more could spend full time in Washington, with a possible arrangement permitting the Washington positions to rotate among all the supervisors.

The various statutes conferring the rule-making power upon the Board of Supervising Inspectors require the approval by the Secretary of Commerce before any regulations may become effective. In practice this power of the Secretary amounts only to a submission of regulations adopted by the Board to the Solicitor of the Department for his approval of their legality. The approval by the Secretary or the Assistant Secretary is usually perfunctory.

Issuance of tentative regulations.—Before 1936 proposed regulations were not issued to the industry in advance of their promulgation. In that year a statute conferring upon the Board of Supervising Inspectors the power to issue rules and regulations with respect to tanker vessels specifically required that proposed rules and regulations should be issued and hearings held thereon before they could become effective. This procedure was followed with such success that since that time the Bureau has made a conscious effort to make available to the industry proposed regulations in advance of their adoption. Since 1936 very few regulations or amendments to regulations have been issued without prior submission to the industry.³³ The Bureau has planned to submit copies of proposed amendments to the industry by December 1 preceding each January meeting, but so far amendments to regulations have not been submitted until late December. At the 1939 meeting no new regulations or amendments were adopted which had not been previously submitted, and preceding each of the three executive committee meetings during 1939 proposed changes in regulations were submitted in every instance.

Copies of proposed regulations are sent to all associations of shipbuilders and shipowners, such as the National Council of American Shipbuilders, the American Merchant Marine Institute, the Pacific Steamship Owners Association, and the Lake Carriers Association.³⁴ In addition they have been sent to labor unions, to the Maritime Commission, to the Navy Department, and to the Coast Guard. Others have been sent to associations and corporations not engaged directly in the maritime industry, such as, for example, the United States Steel Co., the Westinghouse Co., the American Petroleum Institute, the Standard Oil Co., and the General Electric Co. Copies have also been sent to engineering professors in various universities. Much newspaper publicity has accompanied the preparation of the proposed regulations and notice has been given in the Federal Register and in the Bureau's monthly bulletin. Copies of the proposed regulations are furnished to anyone who makes request. One thousand copies of the proposed ocean and coastwise regulations were mimeographed, of which about 800 had been sent out by November 1.

Accompanying each set of proposed ocean and coastwise regulations are forms on which suggestions for changes may be made. Each form

³³ No distinction has been made in this regard between questions involving basic standards of safety and those which rest on scientific propositions discoverable through experience and laboratory research (e. g., the amount of wear which will require replacement of a cable). The desirability of securing the views of affected interests is more apparent in the former than in the latter type of question. But it is present in greater or lesser degree, from the standpoint both of the Bureau and of the affected parties, throughout all the regulations. Even those which are "scientific" in character involve policy choices in determining whether and when they are to be promulgated, for frequently they entail substantial expenditures for compliance, a factor which must be weighed against the advantages of their adoption. As to the plicyune regulations which are sometimes submitted for comment, it is probably easier to circulate them than to disentangle them from the mass of those which are of more serious concern.

³⁴ Most such associations have their own weekly publications, in which they reprint proposed regulations.

provides blanks for the section number; the suggested rewording of the specified section, with an underlining of all changes from the existing wording; reasons for the rewording; and the name, address, and persons represented by the individuals submitting the suggested changes. The Bureau's officers have estimated that some 10,000 of these forms are likely to be returned to the Bureau. An elaborate system for tabulating suggested changes has been worked out and the expectation is that the Board of Supervising Inspectors will profit greatly from the suggestions submitted. It is through these written comments that the rule-makers are informed of the views of those whom the rules may affect. Formal hearings, which are described below, contribute little to the administrative understanding, in comparison with the rich cargo of information and opinion which comes to the Bureau through the mails.³⁵

Public hearings and prehearing consultation.—Although the Board of Supervising Inspectors did not until 1936 hold special public hearings on proposed regulations, its meetings, ever since they commenced in 1852, have been open to the public, and anyone desiring to be heard has been permitted to express himself to his heart's content, as no limitations have been imposed upon oral argument before the board. Representatives of the industry have always attended meetings of the board and, it is said, have occasionally made valuable suggestions.

At the 1939 meeting of the Board of Supervising Inspectors the Director of the Bureau spoke as follows:

At this time I would like to say that I am sure that all of us have for years looked forward to the time when resolutions and other business affecting the industry to be transacted at these meetings should be circularized to the industries in advance so that they might have an opportunity to know what we are working at and have an opportunity to come here and present their views at these hearings.

An announcement of January 7, 1939, to owners and operators of vessels subject to inspection by the Bureau, asserts the following:

The Bureau has adopted, as a general policy, the procedure of advising the industry insofar as is practicable on all new regulations which will affect the inspection of their vessels. It is the intent of the Bureau, furthermore, to hold a public hearing on all proposed regulations of extensive scope and character, at which all interested parties will be heard.

But long before the proposed regulations are circulated preparatory to a hearing upon them, the Bureau has made good use of consultative techniques, so that the proposed regulations may be products of cooperation, rather than of purely administrative consideration. The preparation of the Tanker Regulations of 1936, for example, was undertaken with the active assistance of experts in the employ of the companies affected. The Director has asserted that without their assistance the Bureau would not have produced so highly perfected a set of regulations. He further observes that by reason of the interest and cooperation of the affected companies, the general level of standards prescribed in the tanker regulations is probably somewhat higher than it would be if the industry had not contributed. The Bureau has learned by experience not only that the regulations may be substantially improved, but also that the tendency to resist and to violate them is greatly diminished if, instead of simply being

³⁵ Vessels and shipping conditions are so diverse that it is frequently impossible to visualize all probable effects of broad regulatory provisions. This circumstance emphasizes, of course, the desirability of giving to those affected an opportunity to call attention to undue hardships that proposed regulations might cause.

thrust upon industry, they are formulated only after consultation and joint deliberation.

It is precisely this prehearing consultation, taken in conjunction with the written comments received by the Bureau, which has proved chiefly valuable in the rule-making process. Public hearings as such have been largely empty forms, adding nothing to what is already known. No speech at a public hearing has proved to be so moving as a letter addressed to the Bureau or as a conference with the members of the Bureau's technical staff while the regulations were still in their formative stage. So well is this appreciated by those who may be affected by the regulations that one officer of the Department has in all seriousness estimated that the hearing on the 1,000 pages of proposed ocean and coastwise regulations—covering literally tens of thousands of separate items—may last only an hour.

The hearings themselves, as would be expected, resemble a conventional legislative committee hearing on a bill. Arguments instead of evidence are the order of the day. No oaths are required, and cross-examination is absent. Such questioning as occurs comes from the members of the Board who preside at the hearing. The number in attendance at hearings is very small, because ship builders and owners are well organized and usually it is the representatives of the various organizations who are present. One man may represent one-third of the merchant marine. To assist in conducting hearings in an orderly fashion attendance cards are required to be filled in with indication of the part of the proposed regulations on which the party desires to be heard; but this precaution has thus far proved to have been superfluous, for the hearings are rapidly concluded without confusion, despite their theoretically broad scope and the variety of subjects hypothetically to be discussed. No specific limitation is prescribed upon the length of oral arguments, as experience has shown that no such limitation is necessary.

Load lines.—Load-line regulations are in a class by themselves and must be considered separately. The first load-line statute was enacted in 1929, authorizing the Secretary of Commerce to promulgate regulations. The Secretary appointed an advisory committee composed of 1 member of the Bureau's staff and representatives of various shipbuilders and operators and their respective associations, including the American Bureau of Shipping. The committee prepared tentative regulations, but its further labors were interrupted by the international load-line conference in London, in which some 30 nations, including the United States, participated. As a result of the conference, a convention was entered into which governed load lines for nearly all commercial vessels engaged in international trade. The committee then made its recommendations to the Secretary. These recommendations amounted to a virtual adoption of the International Convention, although the standards of safety were somewhat lower than those tentatively agreed upon theretofore by the committee. Because the Senate in ratifying the convention had held public hearings, no further public hearing was deemed necessary.

In 1935 Congress authorized the Secretary of Commerce to issue load-line regulations for coastwise and Great Lakes vessels. The Secretary immediately promulgated coastwise regulations based upon the international convention. Another committee of representatives of the industry was appointed to make recommendations to the

Secretary concerning regulations for the Great Lakes. Most of the actual drafting was done by the representatives of the American Bureau of Shipping and of the Bureau of Marine Inspection and Navigation. Some of the industry's men contended for somewhat lower standards of safety than those which were ultimately adopted, but, as a result of considerable negotiation and cajolery, the committee was unanimous in its final recommendations. Tentative drafts of the proposed recommendations were submitted to the industry by the committee, which thereafter held public hearings, as a result of which some minor changes were made. The Secretary then promulgated the regulations recommended by the committee. Neither the Secretary nor anyone in his behalf (other than the Bureau's representative on the committee) exercised independent judgment on the merits of the recommendations.³⁶

TONNAGE TAXES

The tonnage-tax laws are administered by the Bureau through the collectors of customs.³⁷ When a vessel subject to this tax comes into port, the collector computes the amount of the tax and presents a bill. The vessel is denied clearance until the prescribed amount has been paid. If the vessel's owner or master is aggrieved, he may pay under protest and assert a claim for refund, in which event a letter of protest and a letter of the collector are sent to the Bureau for its decision. Approximately 50 protests are filed annually. A member of the Bureau's staff prepares a draft of a letter to the collector, deciding the case. This letter is reviewed by an Assistant Director and by the Director. Very seldom does either the Assistant Director or the Director make substantial changes in the letter as first drafted. The questions presented are almost invariably questions of statutory interpretation and application of the statutory provisions to the facts of particular cases. Disputes of fact are virtually nonexistent; therefore no opportunity to present evidence is necessary. Furthermore, the nature of the questions is such that argument may be as well presented in writing as orally. The letters of decision present reasons, and opportunity is afforded for supplemental protests, although supplemental protests are very rarely made.

The only questionable feature of the present practice with respect to collection of tonnage taxes is the apparent lack of any effective method of reviewing collectors' decisions which are favorable to vessels. Decisions unfavorable to taxpayers are reviewed, and accounts of collections are, of course, audited, but no independent inquiry is made into the question whether or not a collector may have erroneously decided a question of interpretation in favor of a vessel. Close questions are sometimes presented, and the probability seems to be that decisions of collectors vary widely in the strictness with which the statutes are applied. The collectors might easily be required to make reports which would be reviewed in the Bureau.

In addition to normal tonnage taxes of 2 and 6 cents, the statutes provide for duties of 50 cents, called "light money," and discriminatory

³⁶ The collectors of customs are given authority by statute to detain vessels loaded in violation of the regulations. In addition, a \$500 penalty is prescribed by statute for violation. Provisions of marine insurance policies for nonliability of insurers if load-line regulations are violated constitute a further sanction.

³⁷ Although collectors of customs draw their pay through the Treasury Department, they are regarded as employees of the Bureau for some purposes, including the collection of tonnage taxes. That they serve two masters gives rise to numerous administrative difficulties.

duties of 30 cents and 50 cents per net ton upon vessels of nations with which the United States has no reciprocal treaties concerning tonnage taxes. The fact seems to be that only in extraordinary cases have either the discriminatory duties or the light money been collected since 1917. In recent years the collectors of customs have not been supplied with information concerning treaties, and they have apparently assumed, for lack of knowledge, that the United States has reciprocal treaties with all nations. Officers of the Bureau do not now know with what nations reciprocal treaties are in effect, but the entire question of collection of discriminatory tonnage duties and light money is now said to be undergoing careful study in cooperation with the State Department. At the present time it is entirely possible that taxes due and payable under acts of Congress are neither collected nor even sought to be collected.