Appendices to
The Lost History of the APA's Foreign Affairs Exception,
31 GEO. MASON L. REV. 119 (2024)

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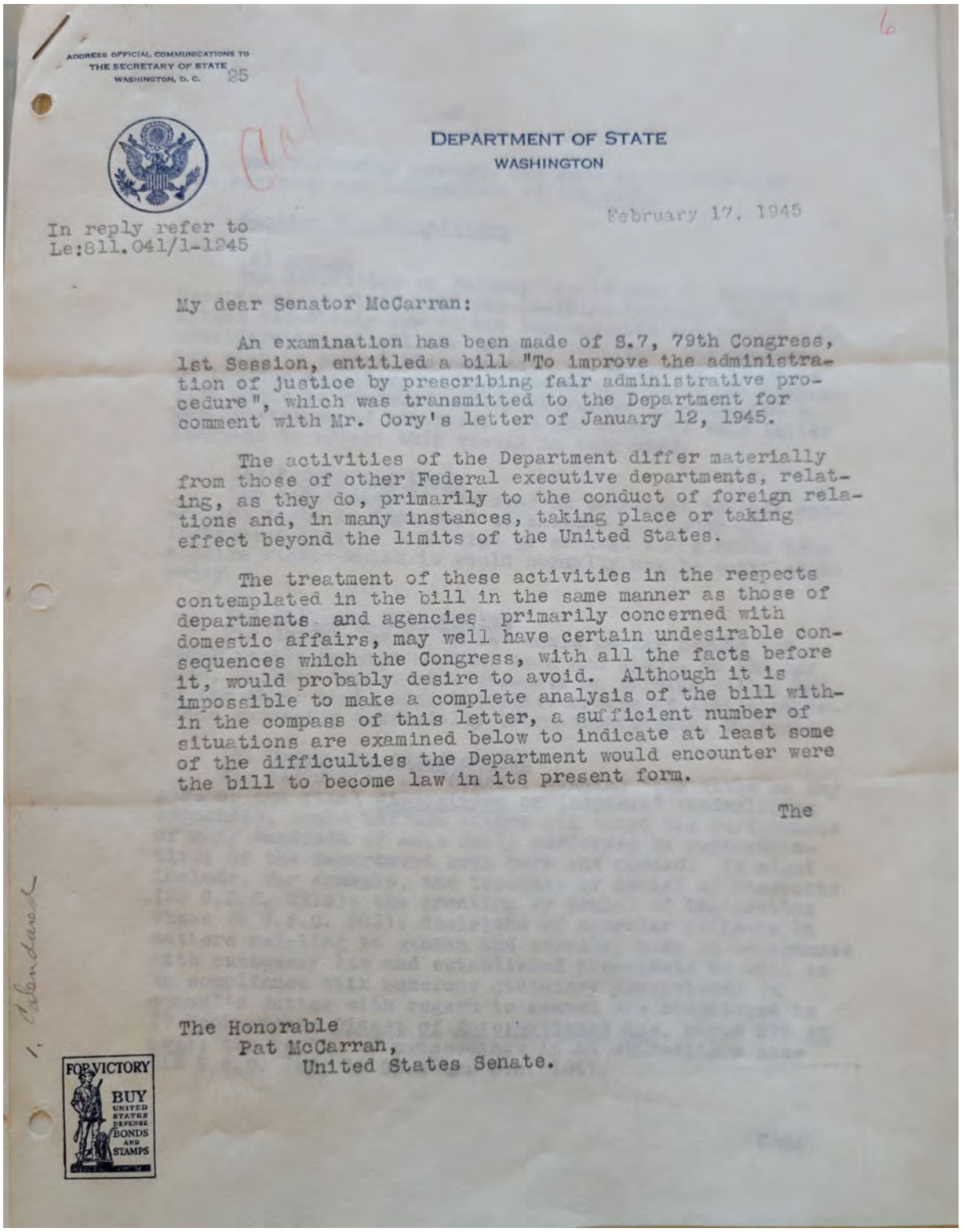
[1] All documents were photographed by the author from files in Record Group 46, Records of the U.S. Senate, 79th Cong., Senate 79A-E1 Boxes 4–6, National Archives, Washington, D.C.

[2] The Agriculture Department letters are included here because, like the letters from the State, War, and Navy Departments, they helped add certain other exceptions to the rulemaking section of the APA.

Appendix A

Letter from Joseph Grew, Acting Sec'y of State, to Senator McCarran, Chairman, S. Comm. on the Judiciary (Feb. 17, 1945) (8 pages total)



ADDRESS OFFICIAL COMMUNICATIONS TO
THE SECRETARY OF STATE
WASHINGTON, D. C. 25

DEPARTMENT OF STATE
WASHINGTON

In reply refer to
Le:811.041/1-1245

February 17, 1945

My dear Senator McCarran:

An examination has been made of S.7, 79th Congress, 1st Session, entitled a bill "To improve the administration of justice by prescribing fair administrative procedure", which was transmitted to the Department for comment with Mr. Cory's letter of January 12, 1945.

The activities of the Department differ materially from those of other Federal executive departments, relating, as they do, primarily to the conduct of foreign relations and, in many instances, taking place or taking effect beyond the limits of the United States.

The treatment of these activities in the respects contemplated in the bill in the same manner as those of departments and agencies primarily concerned with domestic affairs, may well have certain undesirable consequences which the Congress, with all the facts before it, would probably desire to avoid. Although it is impossible to make a complete analysis of the bill within the compass of this letter, a sufficient number of situations are examined below to indicate at least some of the difficulties the Department would encounter were the bill to become law in its present form.

The

The Honorable
Pat McCarran,
United States Senate.

FOR VICTORY BUY UNITED STATES DEFENSE BONDS AND STAMPS

The following comments are made in the order of the sections and subsections of the bill.

Section 2 - Definitions

(a) Agency

The definition of "Agency" would seem to include the Department of State, and the limiting language would affect relatively few of the Department's activities. On consideration of all the factors involved, the Congress may wish to expand the exemption of Section 2 (a) so as to include functions of the Department, whose administration would be rendered unduly difficult if subjected to the provisions of the bill. At the close of this letter language to effect this result is suggested.

(b) Person and Party

The definition of "Person" as contained in this subsection might be construed to include an agency or instrumentality of a foreign government which would thus acquire rights which it would normally not be entitled to enjoy.

(c) Rule and Rule Making

The definition of "Rule" would go far beyond the Department's concept of that term and might, on the one hand, include important statements on foreign policy and, on the other hand, administrative orders of little importance governing essentially intra-departmental business.

(d) Order and Adjudication

The definition of "Order", meaning "the whole or any part of the final disposition or judgment" (underlining supplied), would include within its scope the performance of many hundreds of acts daily performed by representatives of the Department both here and abroad. It might include, for example, the issuance or denial of passports (22 U.S.C. 211a); the granting or denial of immigration visas (8 U.S.C. 202); decisions of consular officers in matters relating to seamen and vessels, made in accordance with customary law and established precedents as well as in compliance with numerous statutory provisions; (a consul's duties with regard to seamen are considered in IV Hackworth's Digest of International Law, pages 876 et seq.); the review of proceedings in an extradition case (18 U.S.C. 653; 17 Op.Atty. Gen. 184).

Many

Many of the duties referred to above are performed abroad, and in many cases affect aliens rather than citizens of the United States. They constitute functions that are essentially dissimilar to those exercised by the departments of the Government concerned primarily with domestic matters, and it would be extremely difficult to administer them under the provisions of an act apparently designed to govern the administration of domestic affairs.

(e) License and Licensing

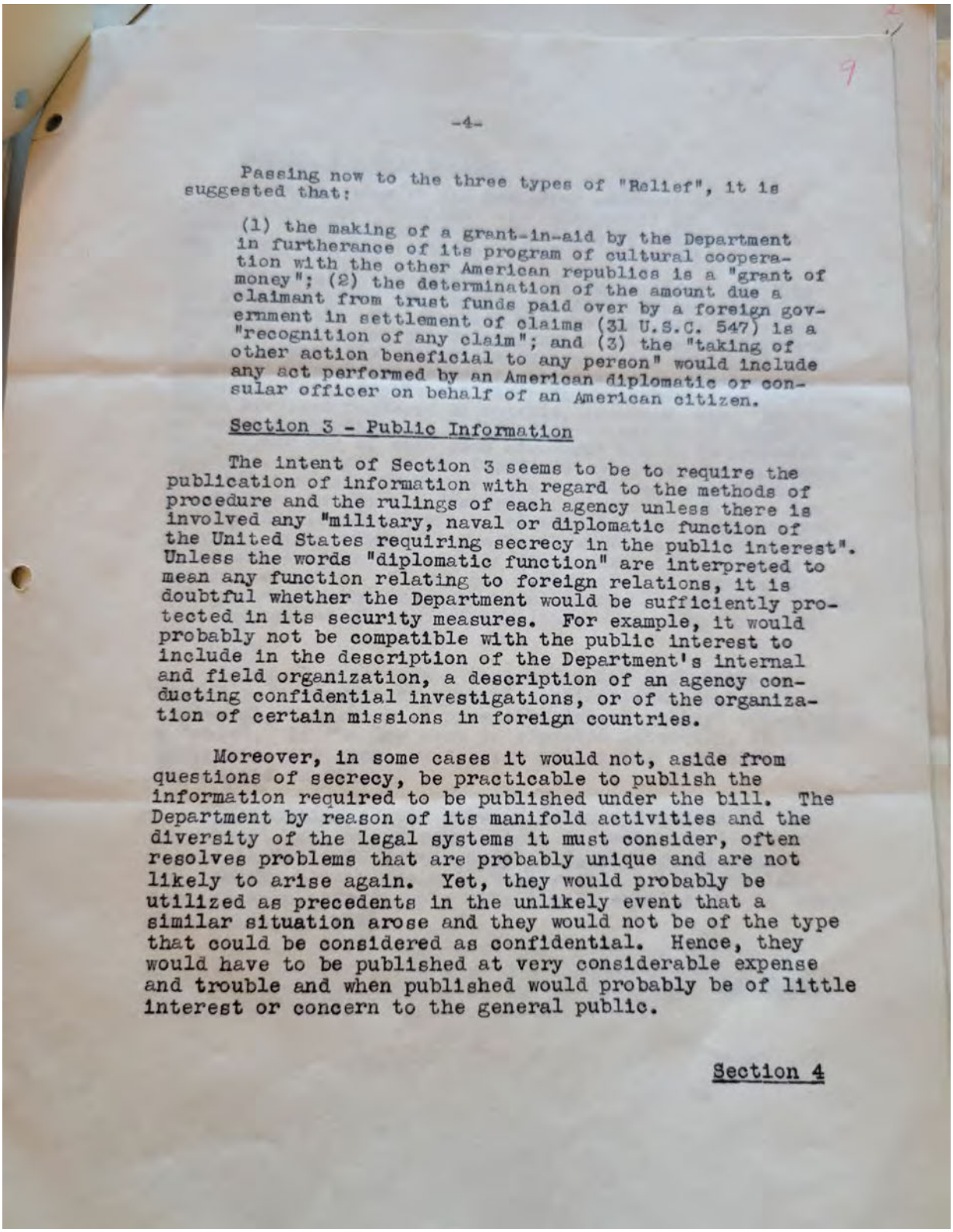
Included in the licensing authority of the Department which would presumably be covered by Subsection (e), Section 2, are: the registration of agents of foreign governments (22 U.S.C. 601); the issuance of licenses affecting lands acquired in connection with projects administered by the American Commissioner, International Boundary Commission, United States and Mexico (22 U.S.C. 277e); the granting of authorizations to aircraft forming part of the armed forces of a foreign state to navigate in the United States (49 U.S.C. 176a), and the granting of licenses to persons dealing in munitions (22 U.S.C. 452). The granting of passports and visas heretofore referred to would also seem to be included within the broad definition of license contained in the bill.

(f) Sanction and Relief

Subsection (f) of Section 2 defines "Sanction" as any of six types of action and "Relief" as any of three types of action. It is believed that a substantial number of the activities of the Department would fall within the definition of "Sanction". The following may be considered as illustrative examples:

> The failure to present a claim against a foreign government might possibly be deemed to constitute "withholding of relief"; the imposition of fees by Foreign Service officers in accordance with the tariff of Foreign Service fees prescribed by the President (Foreign Service Regulations of the United States, Chapter V, Section 15) might constitute the assessment of fees; and the requirement of a license from the Secretary of State prior to the exportation of helium (50 U.S.C. 165) might constitute the "requirement of a license".

Passing



Passing now to the three types of "Relief", it is suggested that:

(1) the making of a grant-in-aid by the Department in furtherance of its program of cultural cooperation with the other American republics is a "grant of money"; (2) the determination of the amount due a claimant from trust funds paid over by a foreign government in settlement of claims (31 U.S.C. 547) is a "recognition of any claim"; and (3) the "taking of other action beneficial to any person" would include any act performed by an American diplomatic or consular officer on behalf of an American citizen.

Section 3 - Public Information

The intent of Section 3 seems to be to require the publication of information with regard to the methods of procedure and the rulings of each agency unless there is involved any "military, naval or diplomatic function of the United States requiring secrecy in the public interest". Unless the words "diplomatic function" are interpreted to mean any function relating to foreign relations, it is doubtful whether the Department would be sufficiently protected in its security measures. For example, it would probably not be compatible with the public interest to include in the description of the Department's internal and field organization, a description of an agency conducting confidential investigations, or of the organization of certain missions in foreign countries.

Moreover, in some cases it would not, aside from questions of secrecy, be practicable to publish the information required to be published under the bill. The Department by reason of its manifold activities and the diversity of the legal systems it must consider, often resolves problems that are probably unique and are not likely to arise again. Yet, they would probably be utilized as precedents in the unlikely event that a similar situation arose and they would not be of the type that could be considered as confidential. Hence, they would have to be published at very considerable expense and trouble and when published would probably be of little interest or concern to the general public.

Section 4

Section 4 - Rule Making

As in the case of the preceding section, unless the words "diplomatic function" are interpreted extremely broadly, a great many of the functions of the Department would be included within the scope of this section.

Undoubtedly the most extensive regulations issued by the Department are the "Foreign Service Regulations of the United States". They include for the most part the standing instructions of the Department to the Foreign Service. At the present time (they are in process of revision) they constitute twenty-two chapters covering such diverse subjects as civil vessels and aircraft, negotiation of treaties, legal services rendered by consuls, accounts, etc. In view of changing conditions, it is often necessary to amend these regulations and if each such amendment had to be preceded by hearings, the work of the Department would be very considerably handicapped. Moreover, there would be considerable question as to who are "interested parties". In case the Foreign Service Regulations relating to seamen were to be amended, every seaman in the Merchant Marine, every maritime union and every ship operator would theoretically be an interested party. If any one member of these groups did not approve of the proposed regulations and wanted to hinder their promulgation, the possibilities for delay would be endless.

It is also pertinent that under the definition of "rule" a "statement of general applicability designated to implement, interpret or prescribe law or policy" constitutes a "rule". If the law were interpreted literally, it would apply to a statement on foreign policy not involving a diplomatic function.

In addition to the Foreign Service Regulations the Department has issued regulations on various matters collected in Title 22 of the Code of Federal Regulations. The remarks heretofore made with regard to the Foreign Service Regulations apply with almost equal force to these regulations as well.

Section 5

Section 5 - Adjudication

Section 5, relating to "adjudication", might affect the work of the Visa Review Committees, which pass upon the granting of visas to aliens seeking to enter this country, and possibly to certain other functions of the Department. However, there are few instances where the Department is required to make an "adjudication required by statute to be determined after opportunity for an agency hearing".

Section 6 - Ancillary Matters

(a) Appearance

In as much as "interested person" is no where defined, it is possible that that term could be construed in a very broad manner so as to permit any individual having only a collateral interest in any matter to appear and demand the prompt determination of any request. Conceivably, every citizen of the United States is "interested" in every major policy determined upon by the Department. In some cases, notwithstanding the earnest desire of the Department to achieve a prompt solution of problems before it, it may be impossible to do so because of factors beyond its control. For example, the Department may wish to prosecute a claim against a foreign government, but realizes that, because of existing conditions, knowledge of which must be kept confidential, the pressing of such a claim would result in unfortunate consequences and would probably not be conducive to the settlement of the claim . For reasons of security it may be impossible or at least highly inadvisable to furnish complete information with regard to the matter to any person seeking information relative thereto.

Moreover, in as much as the bill, if enacted into law, would presumably apply to the activities of the Department abroad, aliens, often having interests opposed to those of citizens of the United States, would be entitled to avail themselves of the benefit of the provision under discussion.

(e) Effective Dates

In view of the necessity for prompt action to meet emergency conditions abroad, the thirty-day period contemplated by this subsection would undoubtedly cause difficulties.

(f) Public

(f) Public Records

The requirement that matters of official record should be available to all interested persons might seriously jeopardize the security records of the Department, as not all information that should be held confidential is required by law to be placed in that category and it might not be possible to establish in advance "for good cause found and upon published rule" classes of information that are sufficiently inclusive to protect the Department and the United States.

Section 9 - Sanctions and Powers

(a) In General

In the comment on Section 2 (f), above, it was indicated that the word "Sanction" comprehends many of the activities of the Department. In many cases the sanctions, which according to the definition of that term are both affirmative and negative (as withholding of relief) are not "imposed" according to "statute" but according to a treaty or other international agreement or an executive order.

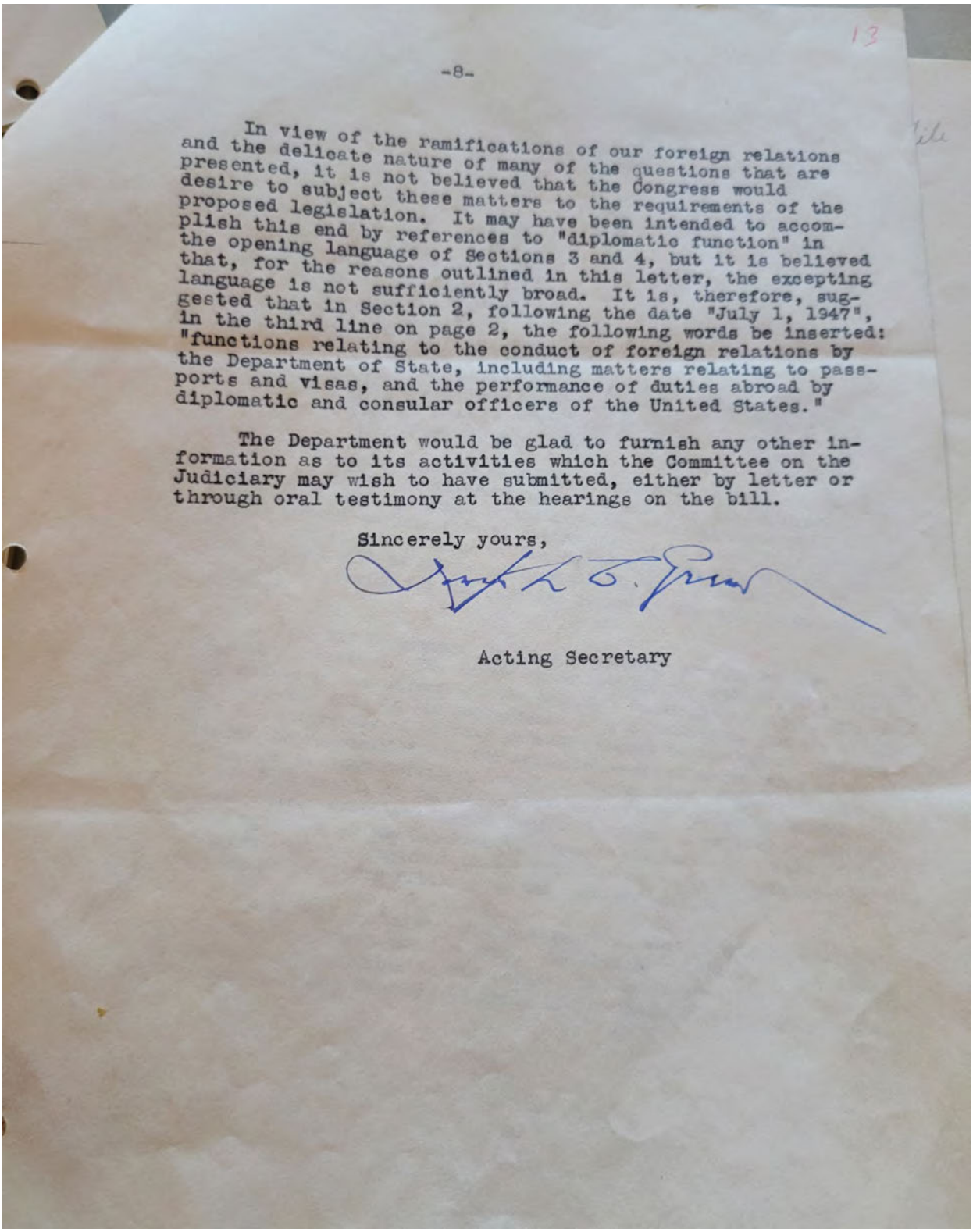
(b) Licenses

As has been heretofore indicated, the definition of licenses contained in the bill is extremely elastic and licensing would presumably include the granting of many rights and privileges. As the granting of a license may be contingent upon the obtaining of facts, some of which may be difficult to procure, particularly if they have to be obtained from sources outside of the United States, the sixty-day limitation might not furnish sufficient time within which to permit the taking of considered action.

Section 10 - Judicial Review

It is not clear to what extent the right of review impinges upon discretionary authority. If it does, the consequences to the Department could be serious. For example, the issuance of passports has been held to be a discretionary matter and must necessarily remain so for security reasons. Many other examples could be found of instances where the Secretary of State, by reason of the fact that he is dealing in the delicate field of foreign relations, must necessarily have a relatively free hand untramelled by the necessity of having a large proportion of his acts reviewable by the courts.

In view



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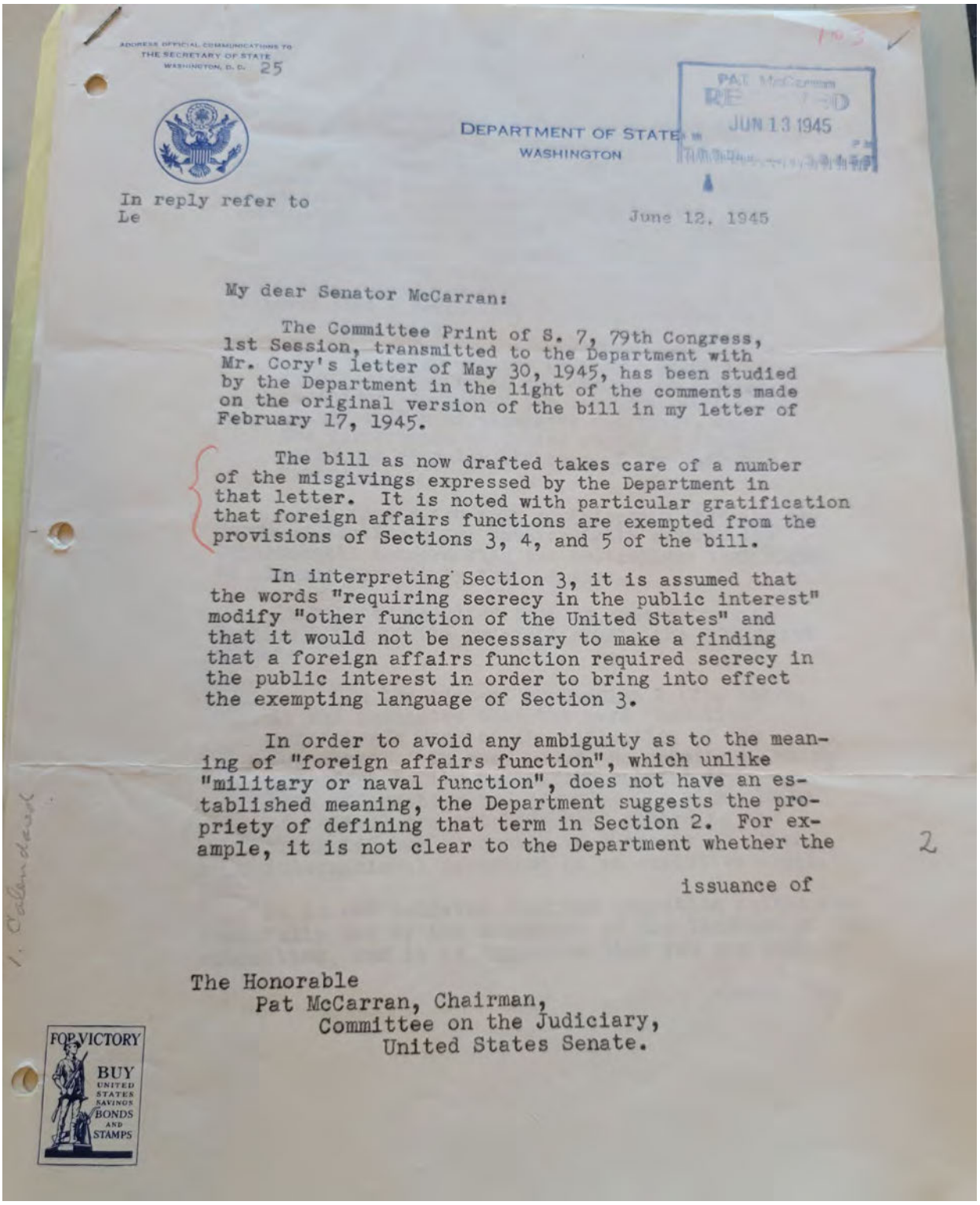
In view of the ramifications of our foreign relations and the delicate nature of many of the questions that are presented, it is not believed that the Congress would desire to subject these matters to the requirements of the proposed legislation. It may have been intended to accomplish this end by references to "diplomatic function" in the opening language of Sections 3 and 4, but it is believed that, for the reasons outlined in this letter, the excepting language is not sufficiently broad. It is, therefore, suggested that in Section 2, following the date "July 1, 1947", in the third line on page 2, the following words be inserted: "functions relating to the conduct of foreign relations by the Department of State, including matters relating to passports and visas, and the performance of duties abroad by diplomatic and consular officers of the United States."

The Department would be glad to furnish any other information as to its activities which the Committee on the Judiciary may wish to have submitted, either by letter or through oral testimony at the hearings on the bill.

Sincerely yours,

Acting Secretary

Letter from Joseph Grew, Acting Sec'y of State, to Senator Pat McCarran, Chairman, S. Comm. on the Judiciary (June 12, 1945) (3 pages total).



ADDRESS OFFICIAL COMMUNICATIONS TO
THE SECRETARY OF STATE
WASHINGTON, D. C. 25

DEPARTMENT OF STATE
WASHINGTON

PAT McCarran
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In reply refer to
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June 12, 1945

My dear Senator McCarran:

The Committee Print of S. 7, 79th Congress, 1st Session, transmitted to the Department with Mr. Cory's letter of May 30, 1945, has been studied by the Department in the light of the comments made on the original version of the bill in my letter of February 17, 1945.

The bill as now drafted takes care of a number of the misgivings expressed by the Department in that letter. It is noted with particular gratification that foreign affairs functions are exempted from the provisions of Sections 3, 4, and 5 of the bill.

In interpreting Section 3, it is assumed that the words "requiring secrecy in the public interest" modify "other function of the United States" and that it would not be necessary to make a finding that a foreign affairs function required secrecy in the public interest in order to bring into effect the exempting language of Section 3.

In order to avoid any ambiguity as to the meaning of "foreign affairs function", which unlike "military or naval function", does not have an established meaning, the Department suggests the propriety of defining that term in Section 2. For example, it is not clear to the Department whether the

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issuance of

The Honorable
Pat McCarran, Chairman,
Committee on the Judiciary,
United States Senate.

FOR VICTORY
BUY
UNITED STATES SAVINGS BONDS AND STAMPS

issuance of regulations pertaining to shipping and seamen to be applied by consular officers of the United States stationed in foreign ports relates to "foreign affairs function". Obviously a good argument could be made for such an interpretation as shipping is a vital factor in world trade the stimulation and facilitation of which is certainly part of the conduct of foreign affairs. However, if, as suggested above, a definition of foreign affairs functions could be formulated, such definition would help remove any latent ambiguities. It is believed that a definition in words somewhat as follows might serve:

> "'Foreign affairs function' means a function relating to the conduct of foreign relations, including the issuance, denial, or revocation of passports and visas, and the performance of duties abroad by diplomatic and consular officers of the United States."

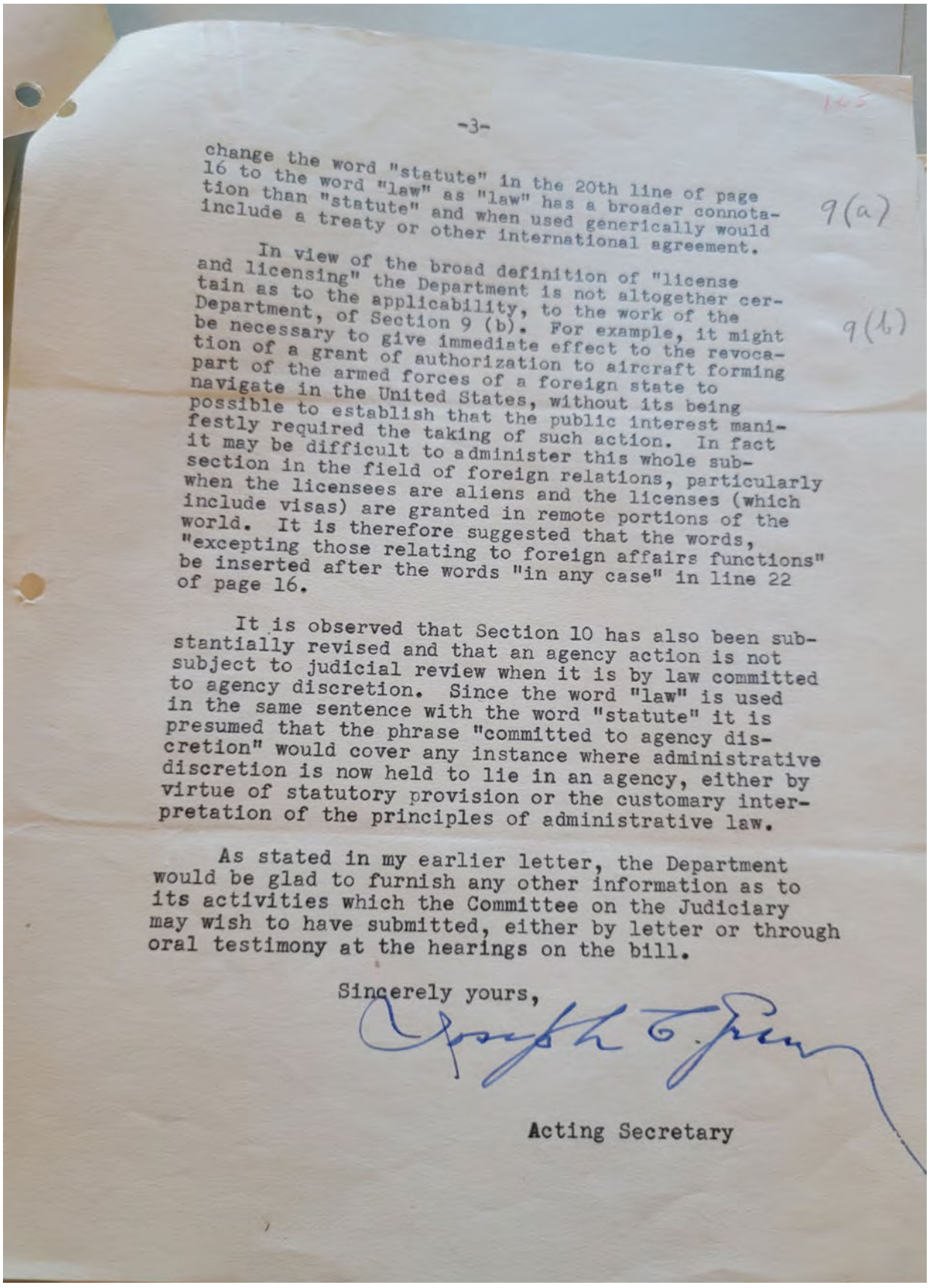
It is also noted with satisfaction that the redraft of Section 6 (a) substantially reduces the Department's concern with the obligations that might be imposed upon it by that section.

It will be recalled that in commenting on Section 9 (a) of the original draft, the Department stated:

> "In the comment on Section 2 (f), above, it was indicated that the word "Sanction" comprehends many of the activities of the Department. In many cases the sanctions, which according to the definition of that term are both affirmative and negative (as withholding of relief) are not "imposed" according to "statute" but according to a treaty or other international agreement or an executive order."

It is not believed that the objection raised has been fully met by the amendment of the language of this subsection, and it is suggested that you may wish to

change the



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change the word "statute" in the 20th line of page 16 to the word "law" as "law" has a broader connotation than "statute" and when used generically would include a treaty or other international agreement. 9(a)

In view of the broad definition of "license and licensing" the Department is not altogether certain as to the applicability, to the work of the Department, of Section 9 (b). For example, it might be necessary to give immediate effect to the revocation of a grant of authorization to aircraft forming part of the armed forces of a foreign state to navigate in the United States, without its being possible to establish that the public interest manifestly required the taking of such action. In fact it may be difficult to administer this whole subsection in the field of foreign relations, particularly when the licensees are aliens and the licenses (which include visas) are granted in remote portions of the world. It is therefore suggested that the words, "excepting those relating to foreign affairs functions" be inserted after the words "in any case" in line 22 of page 16. 9(b)

It is observed that Section 10 has also been substantially revised and that an agency action is not subject to judicial review when it is by law committed to agency discretion. Since the word "law" is used in the same sentence with the word "statute" it is presumed that the phrase "committed to agency discretion" would cover any instance where administrative discretion is now held to lie in an agency, either by virtue of statutory provision or the customary interpretation of the principles of administrative law.

As stated in my earlier letter, the Department would be glad to furnish any other information as to its activities which the Committee on the Judiciary may wish to have submitted, either by letter or through oral testimony at the hearings on the bill.

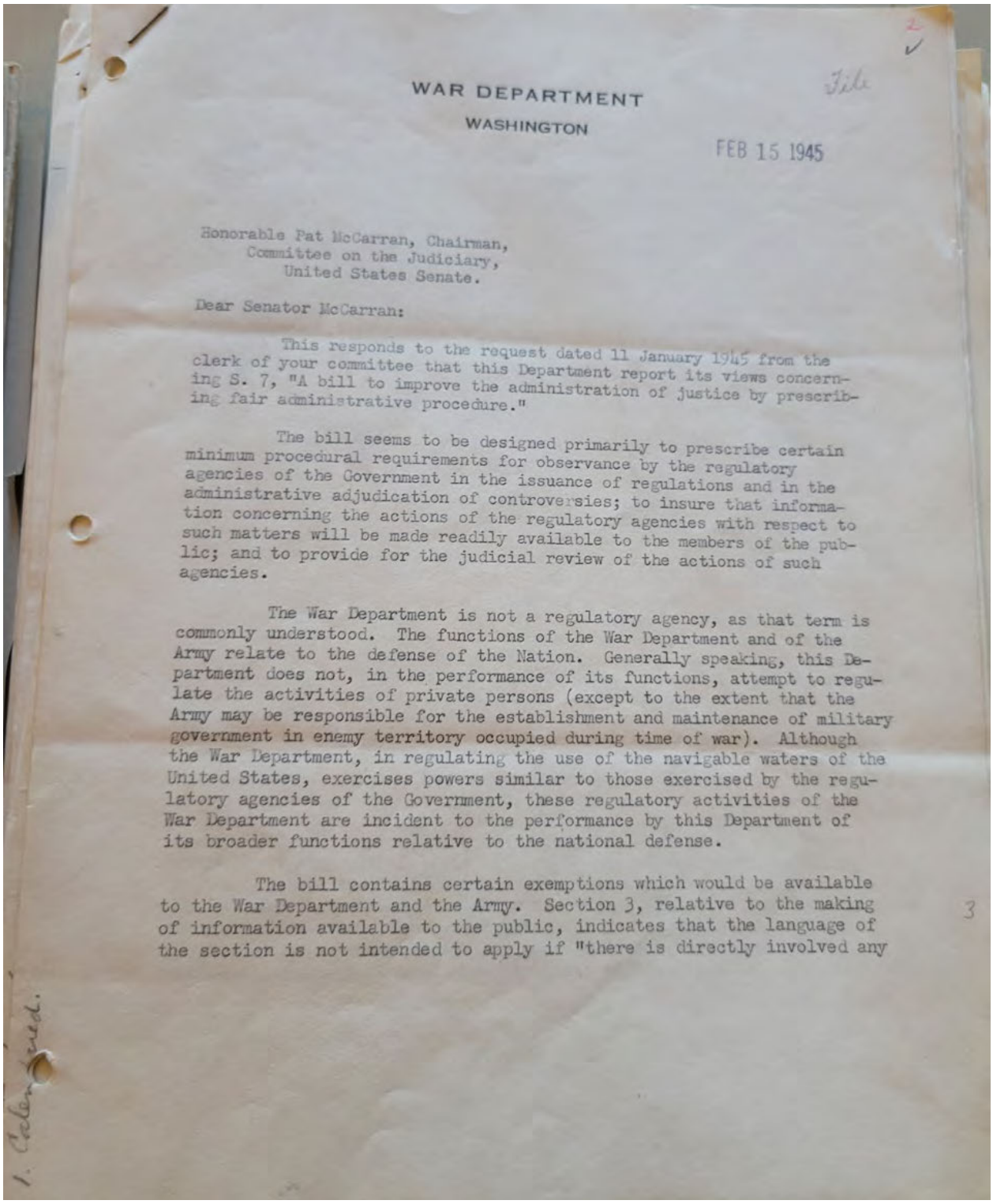
Sincerely yours,

Joseph C. Green

Acting Secretary

Appendix B

Letter from Henry L. Stimson, Sec'y of War, to Sen. Pat McCarran, Chairman, S. Comm. on the Judiciary (Feb. 15, 1945) (4 pages total)



WAR DEPARTMENT

WASHINGTON

FEB 15 1945

Honorable Pat McCarran, Chairman,
Committee on the Judiciary,
United States Senate.

Dear Senator McCarran:

This responds to the request dated 11 January 1945 from the clerk of your committee that this Department report its views concerning S. 7, "A bill to improve the administration of justice by prescribing fair administrative procedure."

The bill seems to be designed primarily to prescribe certain minimum procedural requirements for observance by the regulatory agencies of the Government in the issuance of regulations and in the administrative adjudication of controversies; to insure that information concerning the actions of the regulatory agencies with respect to such matters will be made readily available to the members of the public; and to provide for the judicial review of the actions of such agencies.

The War Department is not a regulatory agency, as that term is commonly understood. The functions of the War Department and of the Army relate to the defense of the Nation. Generally speaking, this Department does not, in the performance of its functions, attempt to regulate the activities of private persons (except to the extent that the Army may be responsible for the establishment and maintenance of military government in enemy territory occupied during time of war). Although the War Department, in regulating the use of the navigable waters of the United States, exercises powers similar to those exercised by the regulatory agencies of the Government, these regulatory activities of the War Department are incident to the performance by this Department of its broader functions relative to the national defense.

The bill contains certain exemptions which would be available to the War Department and the Army. Section 3, relative to the making of information available to the public, indicates that the language of the section is not intended to apply if "there is directly involved any

miliary * * * function of the United States requiring secrecy in the public interest". Also, section 4 excepts from the provisions relative to the issuance of regulations those matters which directly involve "any military * * * function of the United States". In connection with these sections, it should be noted that the scope of the language used for the purpose of exempting activities of the War Department and of the Army from the particular provisions of the proposed legislation is uncertain, because the term "military * * * function" has no precise statutory meaning. Furthermore, no attempt has been made by the draftsman of the bill to exempt the War Department and the Army from other provisions which, if made applicable to the War Department and the Army, would greatly hinder the conduct of military activities and would prejudice the national defense. Some of those provisions are indicated below.

The procedural requirements of sections 5, 7, and 8 are applicable to "every case of adjudication required by statute to be determined after opportunity for an agency hearing"; and section 10 confers a right to judicial review upon "Any person adversely affected by any agency action * * *". These provisions seem to be subject to a construction which would require that the adjudicatory procedure prescribed in the bill be substituted for the procedure heretofore prescribed by the Congress and the President for the conduct of court-martial proceedings in the Army, and which would confer a right to judicial review upon members of the Army convicted by courts-martial of violations of the Articles of War. Such a result would upset a system of military justice which was inaugurated in this country by the Second Continental Congress in 1775 and which has, since that time, served as the ultimate means of maintaining discipline in the Army. The system has received the consideration of, and has been improved by, the Congress from time to time. Since 1920, it has included procedures in the nature of appellate review with respect to all convictions by general courts-martial. The records pertaining to all such convictions are reviewed in the War Department by specially trained legal officers who are independent of the respective commanders appointing the courts-martial, and, in any case involving the assessment of the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, the review in the War Department is conducted by an independent board consisting of not less than three specially trained legal officers. These and other procedures prescribed by the Congress and the President with respect to trials by courts-martial are believed to protect adequately the rights of military personnel, whose status is distinct from that of the civilian population of the country. An attempt to superimpose upon or substitute for the present system of military justice a plan of administrative adjudication and judicial re-

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view, such as that contemplated in the pending bill, would be incompatible with the concept of military discipline to which this country has adhered throughout its national existence.

Subsection (b) of section 6 imposes strict limitations upon the making of inspections and investigations by governmental agencies. These restrictive provisions apparently would apply to the continuous inspections and investigations which traditionally have been made by the War Department and the Army in order to ascertain the efficiency of military organizations, to develop the facts concerning the activities of military personnel, to evaluate the effectiveness of military operations, and to insure that the materiel furnished to the Army by contractors is in compliance with the specifications of the War Department and effectively serves the uses for which it is procured. Although such inspections and investigations may not be "expressly authorized by law" in every instance or "in furtherance of requirements of law enforcement", as contemplated by this subsection of the bill, they are essential, in the opinion of this Department, to the protection of the public interest and to the efficient conduct of military operations.

The language of subsection (e) of section 6, to the effect that "The required publication * * * of any substantive and effective rule * * * or final and affirmative order * * * shall precede for not less than thirty days the effective date thereof except as otherwise authorized by law * * *", would perhaps be applicable to the regulations and orders issued by the Secretary of War and by the various military commanders for the government of the Army. This would greatly handicap the War Department and the many subdivisions of the Army throughout the United States and in foreign countries, and would so complicate the conduct of military activities as to render ineffective many of the programs devised by the War Department and the Army. The effectiveness of instructions and directives for the government of the Army and the conduct of military activities issued by various commanders throughout the United States and in overseas areas cannot be delayed for thirty days following their publication without disastrous consequences to the welfare of the Nation.

Subsection (a) of section 9 provides that "No sanction shall be imposed or substantive rule or order be issued except * * * as specified and authorized by statute." This provision might cause doubt to arise concerning the authority of the Army, in the conduct of military operations, to impose sanctions recognized as lawful by the international rules of war but not expressly authorized by any statute of the United States. Also, the subsection might be construed as an attempt to prohibit the

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issuance of rules and orders for the government of the Army and the conduct of military affairs pursuant to the constitutional powers of the President as Commander in Chief of the Army unless such rules and orders are expressly authorized by statutory enactments.

The experience during the present emergency has demonstrated that effective national defense is dependent upon the ability of the various agencies operating in that field to proceed at all times with the utmost expedition in carrying out their vital missions. The formalism and resulting delay which are contemplated by the proposed legislation would be ruinous if made applicable to the War Department and the Army. Therefore, in view of the distinctive status of the War Department and of the Army when compared with the regulatory agencies of the Government, it is recommended that a section expressly exempting the War Department and the Army of the United States from the provisions of the legislation be inserted in S. 7. Such an exemption might be stated in the following language:

> "The provisions of this statute shall not apply to the War Department, the Army of the United States, the Navy Department, or the United States Navy (including the United States Marine Corps and the United States Coast Guard when operating under the control of the Navy), or to the selection or procurement of personnel or material for the armed forces of the United States."

The War Department is unable to estimate the fiscal effect of enactment of S. 7.

In view of the request that this report be submitted not later than February 15, 1945, time has not permitted the War Department to obtain the advice of the Bureau of the Budget as to the relationship of S. 7, or of this report thereon, to the program of the President.

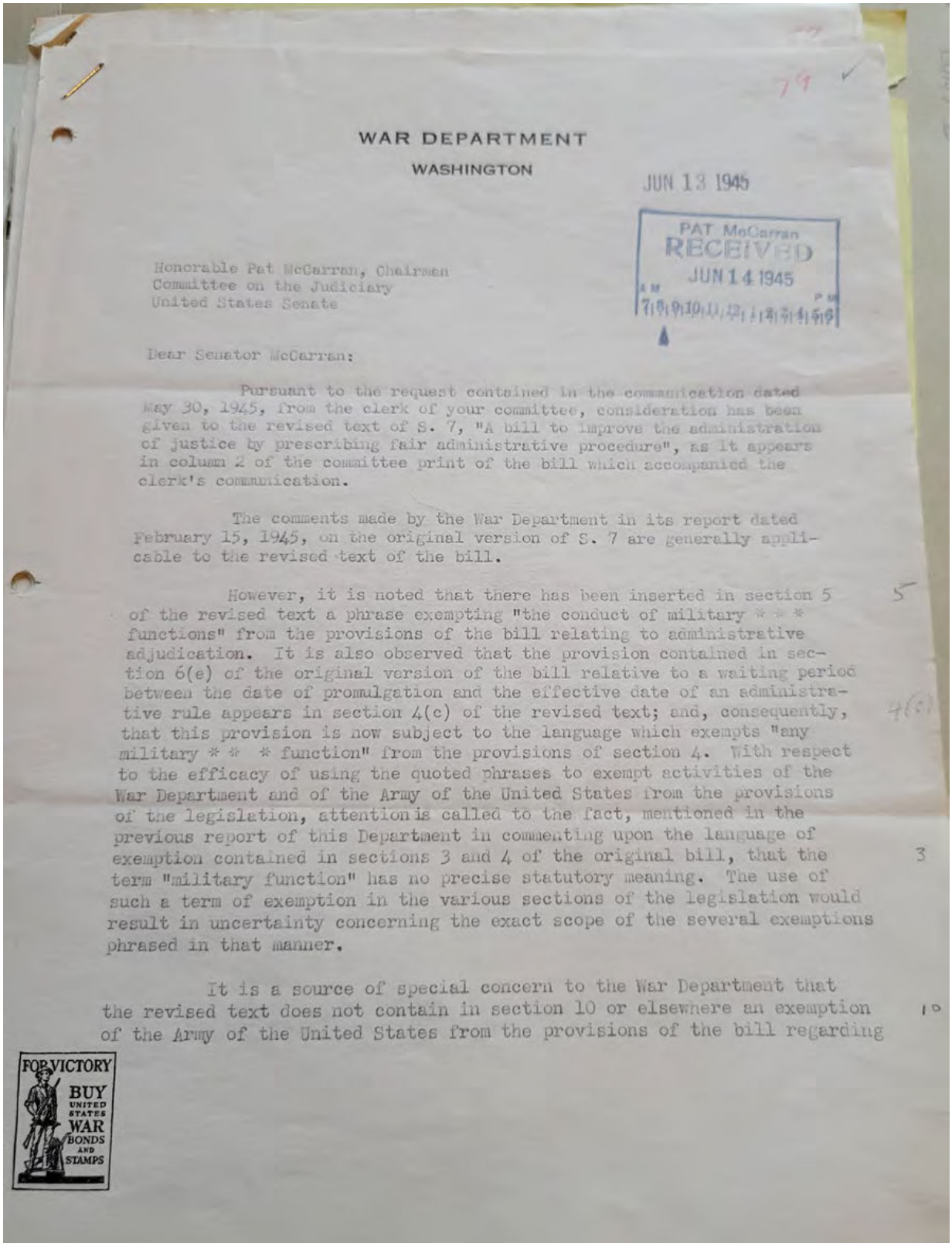
Sincerely yours,

Henry L. Stimson

Secretary of War.

- 4 -

Letter from Henry L. Stimson, Sec'y of War, to Sen. Pat McCarran, Chairman, S. Comm. on the Judiciary (June 13, 1945) (3 pages total)



WAR DEPARTMENT

WASHINGTON

JUN 13 1945

PAT McCarran
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JUN 14 1945

Honorable Pat McCarran, Chairman
Committee on the Judiciary
United States Senate

Dear Senator McCarran:

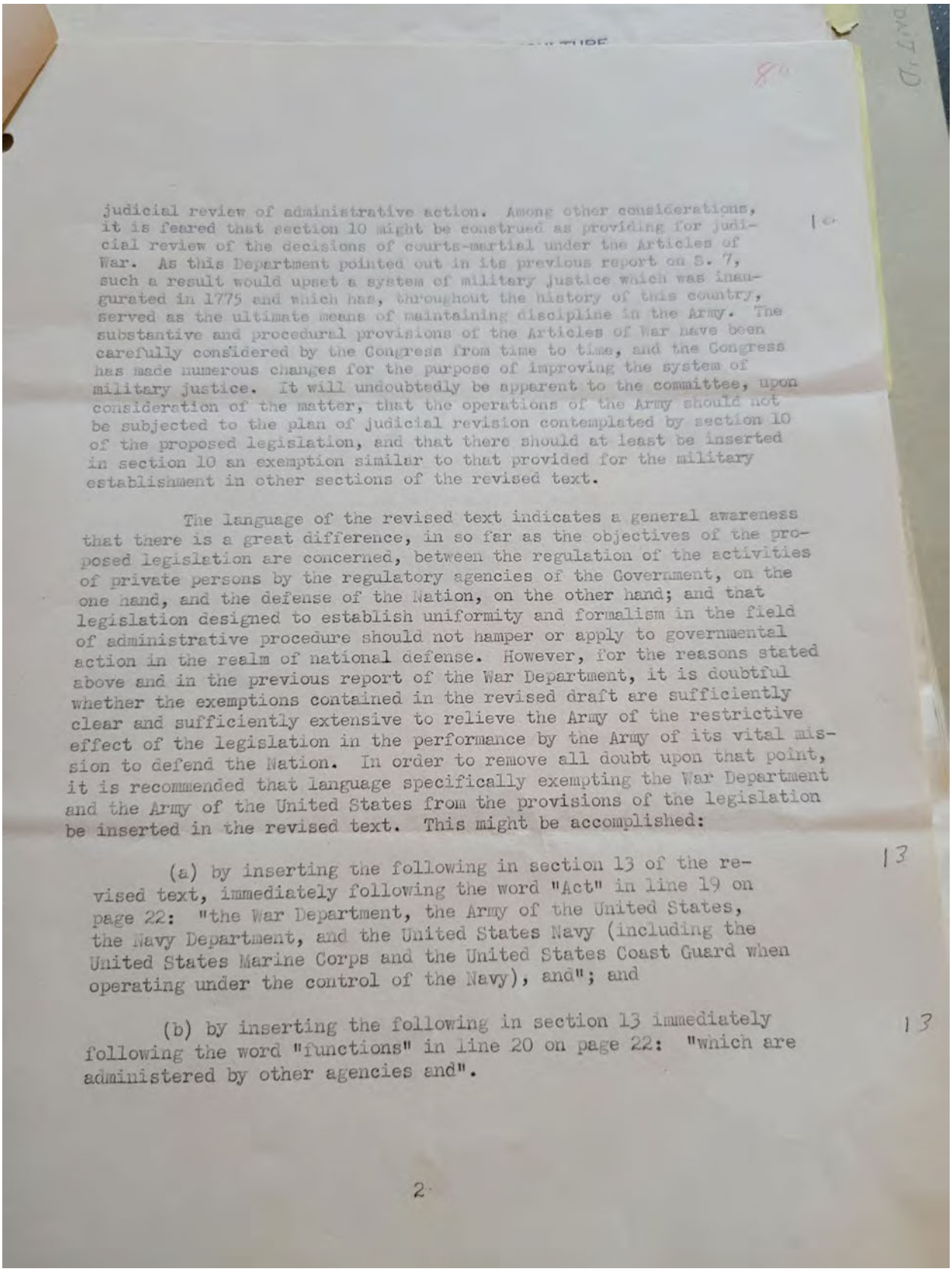
Pursuant to the request contained in the communication dated May 30, 1945, from the clerk of your committee, consideration has been given to the revised text of S. 7, "A bill to improve the administration of justice by prescribing fair administrative procedure", as it appears in column 2 of the committee print of the bill which accompanied the clerk's communication.

The comments made by the War Department in its report dated February 15, 1945, on the original version of S. 7 are generally applicable to the revised text of the bill.

However, it is noted that there has been inserted in section 5 of the revised text a phrase exempting "the conduct of military * * * functions" from the provisions of the bill relating to administrative adjudication. It is also observed that the provision contained in section 6(e) of the original version of the bill relative to a waiting period between the date of promulgation and the effective date of an administrative rule appears in section 4(c) of the revised text; and, consequently, that this provision is now subject to the language which exempts "any military * * * function" from the provisions of section 4. With respect to the efficacy of using the quoted phrases to exempt activities of the War Department and of the Army of the United States from the provisions of the legislation, attention is called to the fact, mentioned in the previous report of this Department in commenting upon the language of exemption contained in sections 3 and 4 of the original bill, that the term "military function" has no precise statutory meaning. The use of such a term of exemption in the various sections of the legislation would result in uncertainty concerning the exact scope of the several exemptions phrased in that manner.

It is a source of special concern to the War Department that the revised text does not contain in section 10 or elsewhere an exemption of the Army of the United States from the provisions of the bill regarding

FOR VICTORY BUY UNITED STATES WAR BONDS AND STAMPS



judicial review of administrative action. Among other considerations, it is feared that section 10 might be construed as providing for judicial review of the decisions of courts-martial under the Articles of War. As this Department pointed out in its previous report on S. 7, such a result would upset a system of military justice which was inaugurated in 1775 and which has, throughout the history of this country, served as the ultimate means of maintaining discipline in the Army. The substantive and procedural provisions of the Articles of War have been carefully considered by the Congress from time to time, and the Congress has made numerous changes for the purpose of improving the system of military justice. It will undoubtedly be apparent to the committee, upon consideration of the matter, that the operations of the Army should not be subjected to the plan of judicial revision contemplated by section 10 of the proposed legislation, and that there should at least be inserted in section 10 an exemption similar to that provided for the military establishment in other sections of the revised text.

The language of the revised text indicates a general awareness that there is a great difference, in so far as the objectives of the proposed legislation are concerned, between the regulation of the activities of private persons by the regulatory agencies of the Government, on the one hand, and the defense of the Nation, on the other hand; and that legislation designed to establish uniformity and formalism in the field of administrative procedure should not hamper or apply to governmental action in the realm of national defense. However, for the reasons stated above and in the previous report of the War Department, it is doubtful whether the exemptions contained in the revised draft are sufficiently clear and sufficiently extensive to relieve the Army of the restrictive effect of the legislation in the performance by the Army of its vital mission to defend the Nation. In order to remove all doubt upon that point, it is recommended that language specifically exempting the War Department and the Army of the United States from the provisions of the legislation be inserted in the revised text. This might be accomplished:

(a) by inserting the following in section 13 of the revised text, immediately following the word "Act" in line 19 on page 22: "the War Department, the Army of the United States, the Navy Department, and the United States Navy (including the United States Marine Corps and the United States Coast Guard when operating under the control of the Navy), and"; and

(b) by inserting the following in section 13 immediately following the word "functions" in line 20 on page 22: "which are administered by other agencies and".

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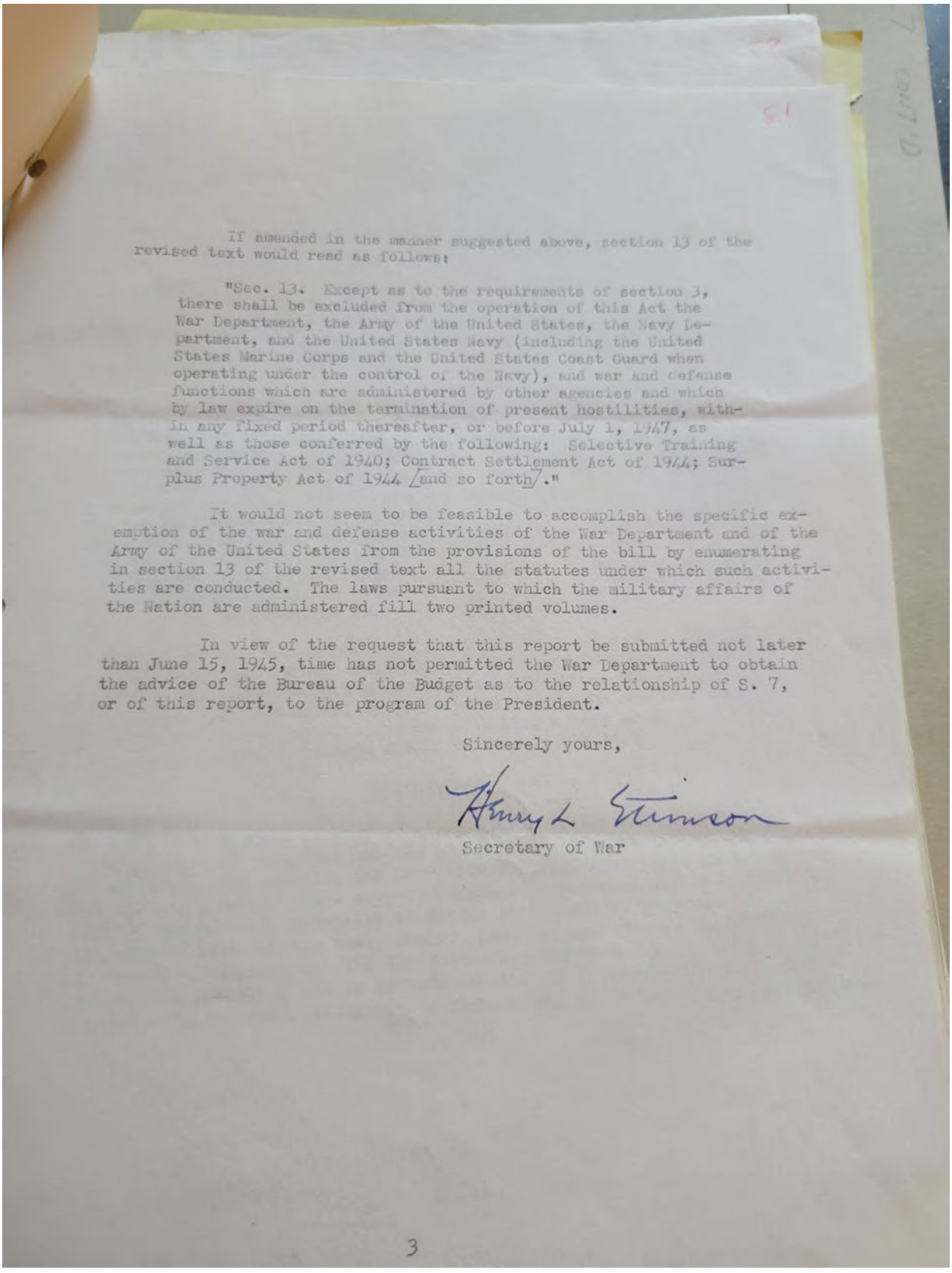

If amended in the manner suggested above, section 13 of the revised text would read as follows:

"Sec. 13. Except as to the requirements of section 3, there shall be excluded from the operation of this Act the War Department, the Army of the United States, the Navy Department, and the United States Navy (including the United States Marine Corps and the United States Coast Guard when operating under the control of the Navy), and war and defense functions which are administered by other agencies and which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, as well as those conferred by the following: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944 [and so forth]."

It would not seem to be feasible to accomplish the specific exemption of the war and defense activities of the War Department and of the Army of the United States from the provisions of the bill by enumerating in section 13 of the revised text all the statutes under which such activities are conducted. The laws pursuant to which the military affairs of the Nation are administered fill two printed volumes.

In view of the request that this report be submitted not later than June 15, 1945, time has not permitted the War Department to obtain the advice of the Bureau of the Budget as to the relationship of S. 7, or of this report, to the program of the President.

Sincerely yours,

Henry L. Stimson

Secretary of War

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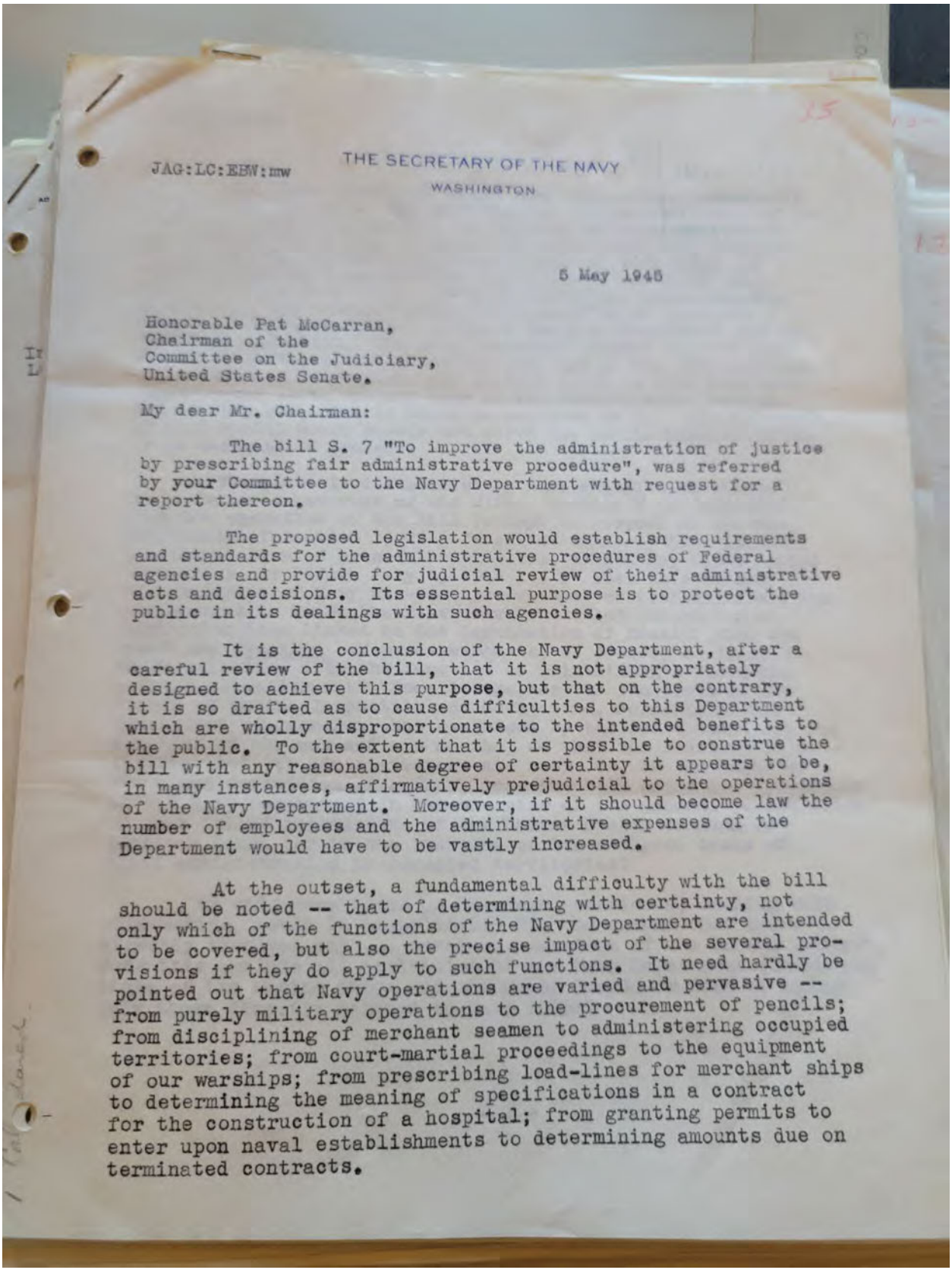

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THE SECRETARY OF THE NAVY
WASHINGTON

5 May 1945

Honorable Pat McCarran,
Chairman of the
Committee on the Judiciary,
United States Senate.

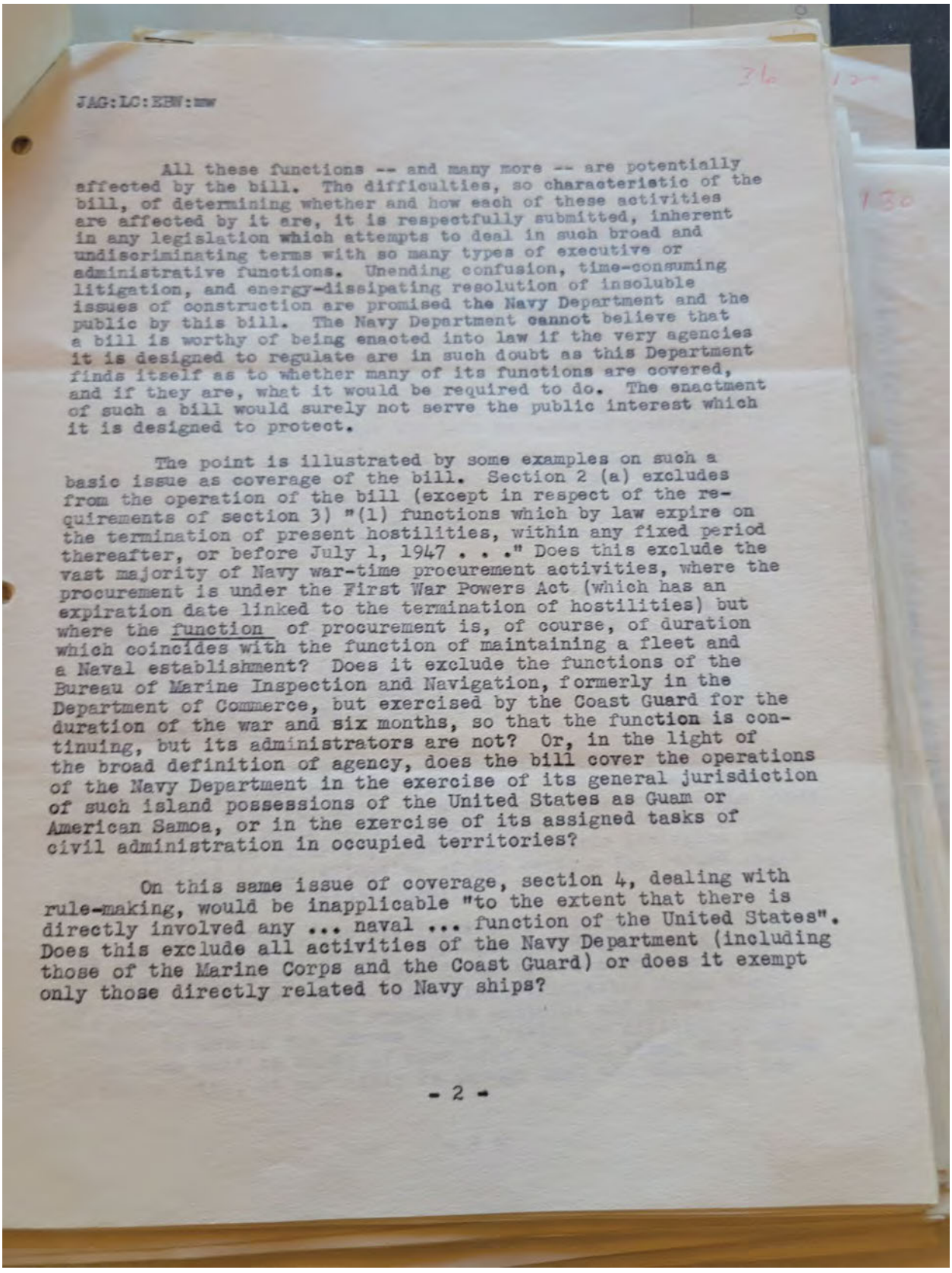
My dear Mr. Chairman:

The bill S. 7 "To improve the administration of justice by prescribing fair administrative procedure", was referred by your Committee to the Navy Department with request for a report thereon.

The proposed legislation would establish requirements and standards for the administrative procedures of Federal agencies and provide for judicial review of their administrative acts and decisions. Its essential purpose is to protect the public in its dealings with such agencies.

It is the conclusion of the Navy Department, after a careful review of the bill, that it is not appropriately designed to achieve this purpose, but that on the contrary, it is so drafted as to cause difficulties to this Department which are wholly disproportionate to the intended benefits to the public. To the extent that it is possible to construe the bill with any reasonable degree of certainty it appears to be, in many instances, affirmatively prejudicial to the operations of the Navy Department. Moreover, if it should become law the number of employees and the administrative expenses of the Department would have to be vastly increased.

At the outset, a fundamental difficulty with the bill should be noted -- that of determining with certainty, not only which of the functions of the Navy Department are intended to be covered, but also the precise impact of the several provisions if they do apply to such functions. It need hardly be pointed out that Navy operations are varied and pervasive -- from purely military operations to the procurement of pencils; from disciplining of merchant seamen to administering occupied territories; from court-martial proceedings to the equipment of our warships; from prescribing load-lines for merchant ships to determining the meaning of specifications in a contract for the construction of a hospital; from granting permits to enter upon naval establishments to determining amounts due on terminated contracts.



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All these functions -- and many more -- are potentially affected by the bill. The difficulties, so characteristic of the bill, of determining whether and how each of these activities are affected by it are, it is respectfully submitted, inherent in any legislation which attempts to deal in such broad and undiscriminating terms with so many types of executive or administrative functions. Unending confusion, time-consuming litigation, and energy-dissipating resolution of insoluble issues of construction are promised the Navy Department and the public by this bill. The Navy Department cannot believe that a bill is worthy of being enacted into law if the very agencies it is designed to regulate are in such doubt as this Department finds itself as to whether many of its functions are covered, and if they are, what it would be required to do. The enactment of such a bill would surely not serve the public interest which it is designed to protect.

The point is illustrated by some examples on such a basic issue as coverage of the bill. Section 2 (a) excludes from the operation of the bill (except in respect of the requirements of section 3) "(1) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947 . . ." Does this exclude the vast majority of Navy war-time procurement activities, where the procurement is under the First War Powers Act (which has an expiration date linked to the termination of hostilities) but where the function of procurement is, of course, of duration which coincides with the function of maintaining a fleet and a Naval establishment? Does it exclude the functions of the Bureau of Marine Inspection and Navigation, formerly in the Department of Commerce, but exercised by the Coast Guard for the duration of the war and six months, so that the function is continuing, but its administrators are not? Or, in the light of the broad definition of agency, does the bill cover the operations of the Navy Department in the exercise of its general jurisdiction of such island possessions of the United States as Guam or American Samoa, or in the exercise of its assigned tasks of civil administration in occupied territories?

On this same issue of coverage, section 4, dealing with rule-making, would be inapplicable "to the extent that there is directly involved any ... naval ... function of the United States". Does this exclude all activities of the Navy Department (including those of the Marine Corps and the Coast Guard) or does it exempt only those directly related to Navy ships?

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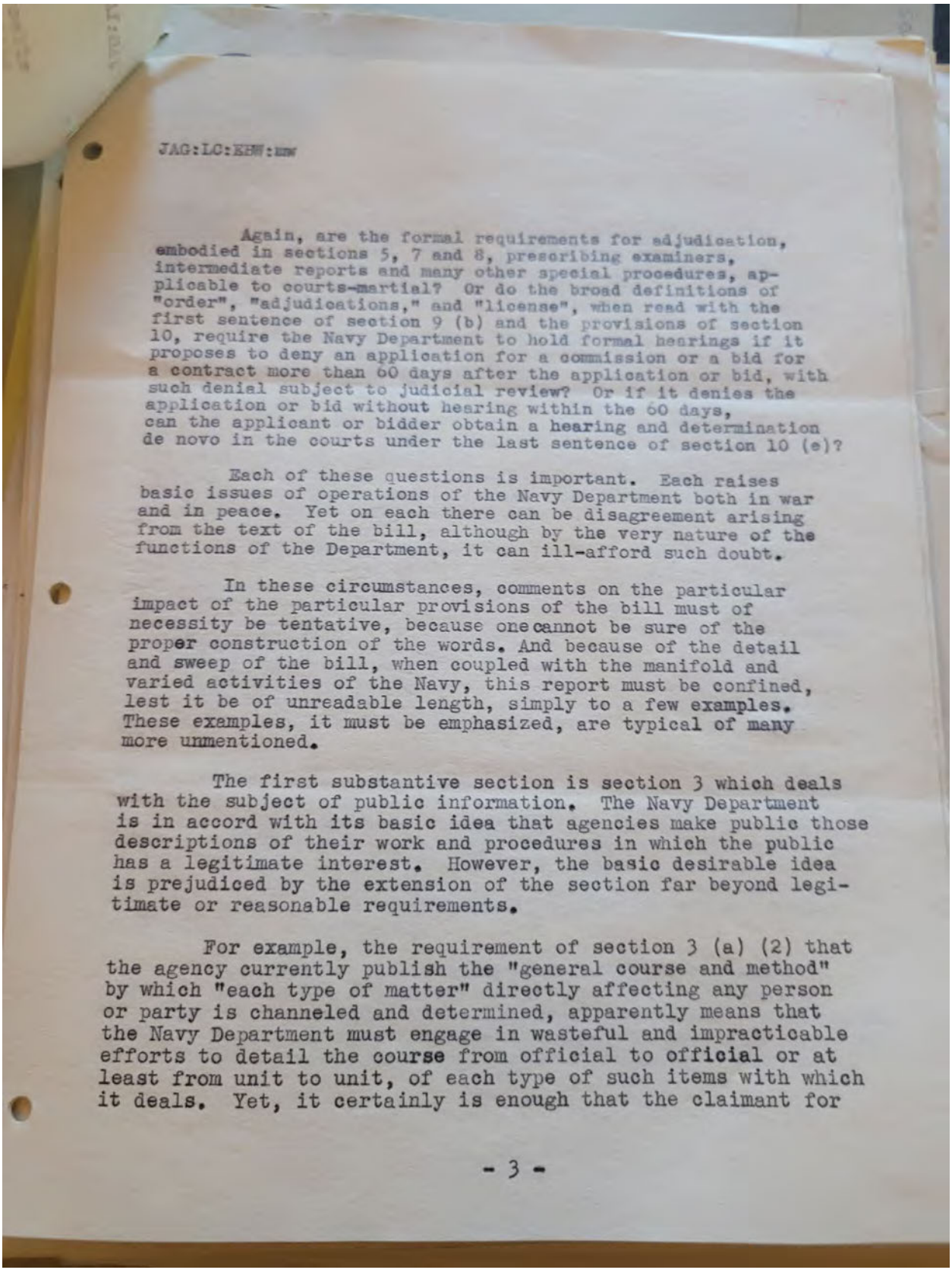

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Again, are the formal requirements for adjudication, embodied in sections 5, 7 and 8, prescribing examiners, intermediate reports and many other special procedures, applicable to courts-martial? Or do the broad definitions of "order", "adjudications," and "license", when read with the first sentence of section 9 (b) and the provisions of section 10, require the Navy Department to hold formal hearings if it proposes to deny an application for a commission or a bid for a contract more than 60 days after the application or bid, with such denial subject to judicial review? Or if it denies the application or bid without hearing within the 60 days, can the applicant or bidder obtain a hearing and determination de novo in the courts under the last sentence of section 10 (e)?

Each of these questions is important. Each raises basic issues of operations of the Navy Department both in war and in peace. Yet on each there can be disagreement arising from the text of the bill, although by the very nature of the functions of the Department, it can ill-afford such doubt.

In these circumstances, comments on the particular impact of the particular provisions of the bill must of necessity be tentative, because one cannot be sure of the proper construction of the words. And because of the detail and sweep of the bill, when coupled with the manifold and varied activities of the Navy, this report must be confined, lest it be of unreadable length, simply to a few examples. These examples, it must be emphasized, are typical of many more unmentioned.

The first substantive section is section 3 which deals with the subject of public information. The Navy Department is in accord with its basic idea that agencies make public those descriptions of their work and procedures in which the public has a legitimate interest. However, the basic desirable idea is prejudiced by the extension of the section far beyond legitimate or reasonable requirements.

For example, the requirement of section 3 (a) (2) that the agency currently publish the "general course and method" by which "each type of matter" directly affecting any person or party is channeled and determined, apparently means that the Navy Department must engage in wasteful and impracticable efforts to detail the course from official to official or at least from unit to unit, of each type of such items with which it deals. Yet, it certainly is enough that the claimant for

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damages, or the manufacturer or merchant who files bids to furnish supplies, or an applicant for a position, have available adequate regulations or procedural instructions, that he have an adequate point of contact with the Department, and that he be enabled to trace his claim, bid, or other application in its course through the administrative structure.

Again, it would be doubtful under this section whether opinions of the legal officers of the Department interpreting statutes would fall in the category of "interpretations" (which must be published) or of "rulings on questions of law" (which need only be made available to public inspection). But, if the Navy Department does not guess correctly, the curious result would follow, according to a literal reading of the bill, that no person would be liable for failure to conform to the unpublished interpretation, and presumably the question of whether publication was required would be subject to judicial review under section 10.

Since section 3 exempts only "naval function(s)...requiring secrecy in the public interest" comparatively few of the functions of the Navy Department would be excluded, particularly in time of peace. It is noteworthy in this connection that the question of whether a particular operation of the Navy Department requires secrecy in the public interest would presumably be subject to judicial review under section 10. Yet it seems apparent that litigation on the question of whether such secrecy was required, with its attendant publicity, might well defeat the purpose of the exemption.

Section 4, relating to rule-making, requires notice and opportunity to interested parties to comment before adoption of "rules" as defined by section 2 (c). Here again the obscurity of the language used makes impossible any certainty of interpretation, but this section may well be construed to reach such an absurd result as to require this procedure as a condition of the adoption of Navy recruiting policies, or even of the publication of a statement of the Department's attitude on public issues with which it is concerned.

This section is not applicable to the extent that a "naval function" is "directly" involved. Doubts concerning the sweep of the phrase "naval function" have already been noted. If the exemption does not extend to such functions, for example, as regulations relating to work at Navy yards and stations for

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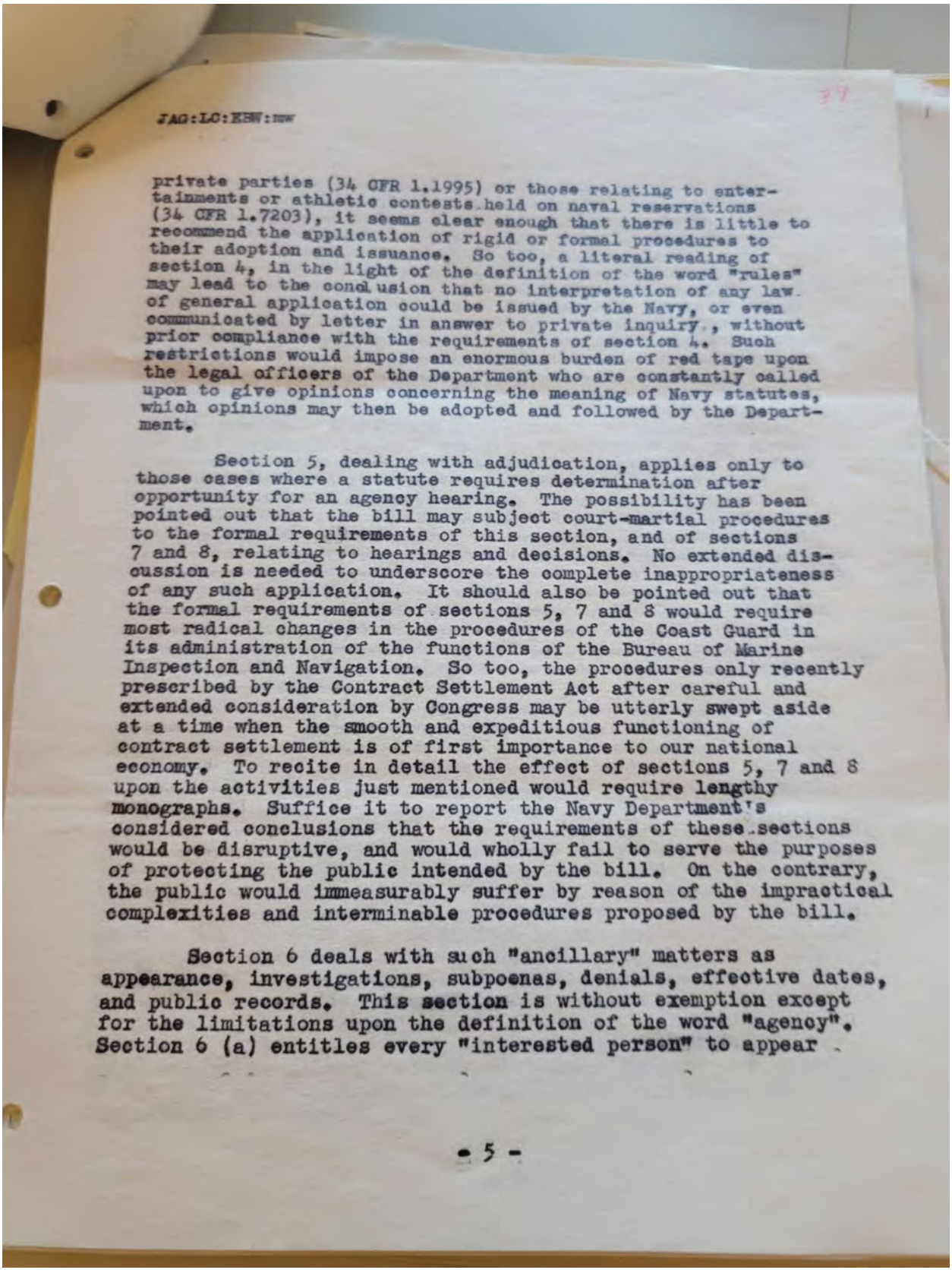

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private parties (34 CFR 1.1995) or those relating to entertainments or athletic contests held on naval reservations (34 CFR 1.7203), it seems clear enough that there is little to recommend the application of rigid or formal procedures to their adoption and issuance. So too, a literal reading of section 4, in the light of the definition of the word "rules" may lead to the conclusion that no interpretation of any law of general application could be issued by the Navy, or even communicated by letter in answer to private inquiry, without prior compliance with the requirements of section 4. Such restrictions would impose an enormous burden of red tape upon the legal officers of the Department who are constantly called upon to give opinions concerning the meaning of Navy statutes, which opinions may then be adopted and followed by the Department.

Section 5, dealing with adjudication, applies only to those cases where a statute requires determination after opportunity for an agency hearing. The possibility has been pointed out that the bill may subject court-martial procedures to the formal requirements of this section, and of sections 7 and 8, relating to hearings and decisions. No extended discussion is needed to underscore the complete inappropriateness of any such application. It should also be pointed out that the formal requirements of sections 5, 7 and 8 would require most radical changes in the procedures of the Coast Guard in its administration of the functions of the Bureau of Marine Inspection and Navigation. So too, the procedures only recently prescribed by the Contract Settlement Act after careful and extended consideration by Congress may be utterly swept aside at a time when the smooth and expeditious functioning of contract settlement is of first importance to our national economy. To recite in detail the effect of sections 5, 7 and 8 upon the activities just mentioned would require lengthy monographs. Suffice it to report the Navy Department's considered conclusions that the requirements of these sections would be disruptive, and would wholly fail to serve the purposes of protecting the public intended by the bill. On the contrary, the public would immeasurably suffer by reason of the impractical complexities and interminable procedures proposed by the bill.

Section 6 deals with such "ancillary" matters as appearance, investigations, subpoenas, denials, effective dates, and public records. This section is without exemption except for the limitations upon the definition of the word "agency". Section 6 (a) entitles every "interested person" to appear

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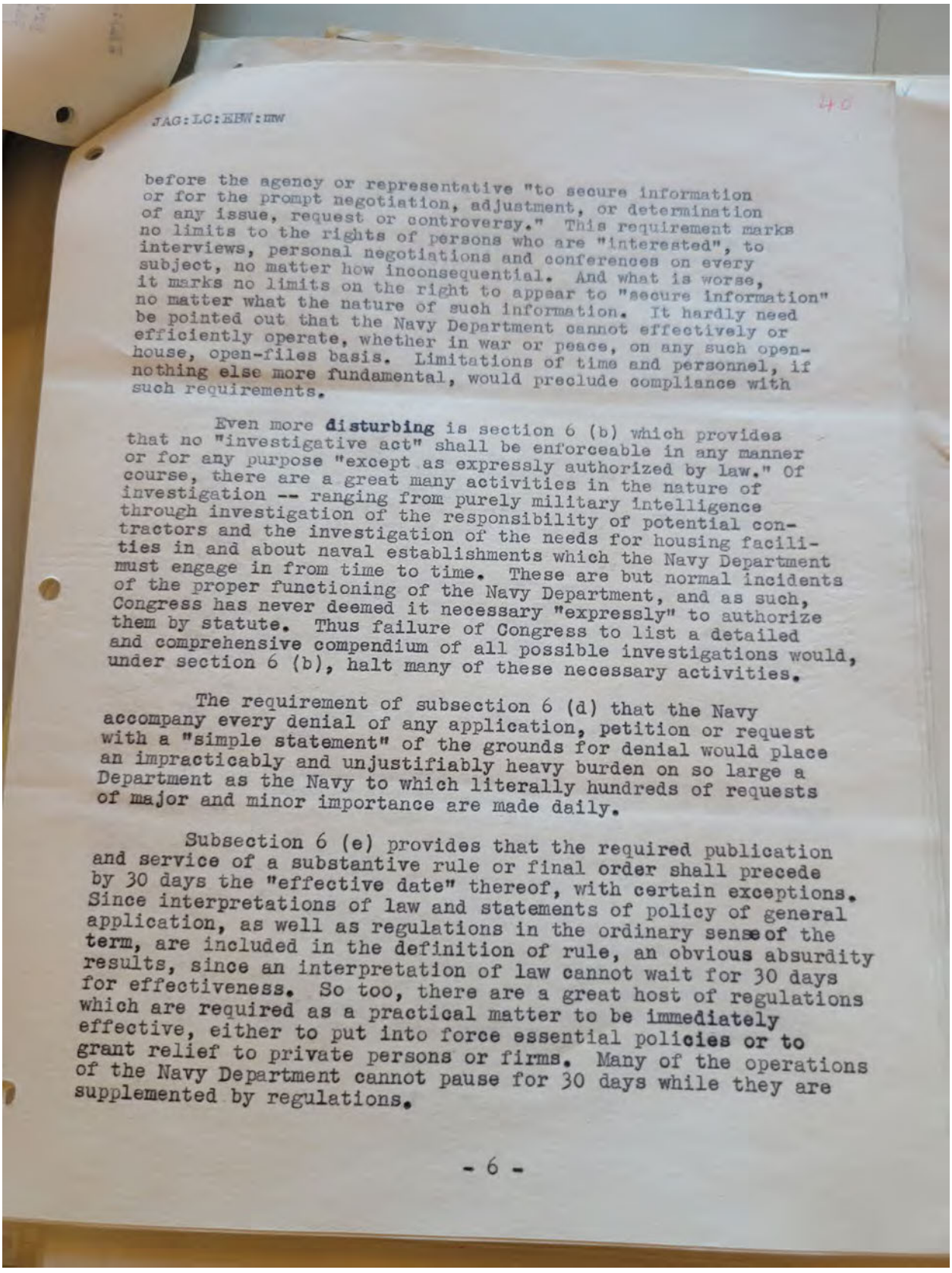

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before the agency or representative "to secure information or for the prompt negotiation, adjustment, or determination of any issue, request or controversy." This requirement marks no limits to the rights of persons who are "interested", to interviews, personal negotiations and conferences on every subject, no matter how inconsequential. And what is worse, it marks no limits on the right to appear to "secure information" no matter what the nature of such information. It hardly need be pointed out that the Navy Department cannot effectively or efficiently operate, whether in war or peace, on any such open-house, open-files basis. Limitations of time and personnel, if nothing else more fundamental, would preclude compliance with such requirements.

Even more disturbing is section 6 (b) which provides that no "investigative act" shall be enforceable in any manner or for any purpose "except as expressly authorized by law." Of course, there are a great many activities in the nature of investigation -- ranging from purely military intelligence through investigation of the responsibility of potential contractors and the investigation of the needs for housing facilities in and about naval establishments which the Navy Department must engage in from time to time. These are but normal incidents of the proper functioning of the Navy Department, and as such, Congress has never deemed it necessary "expressly" to authorize them by statute. Thus failure of Congress to list a detailed and comprehensive compendium of all possible investigations would, under section 6 (b), halt many of these necessary activities.

The requirement of subsection 6 (d) that the Navy accompany every denial of any application, petition or request with a "simple statement" of the grounds for denial would place an impracticably and unjustifiably heavy burden on so large a Department as the Navy to which literally hundreds of requests of major and minor importance are made daily.

Subsection 6 (e) provides that the required publication and service of a substantive rule or final order shall precede by 30 days the "effective date" thereof, with certain exceptions. Since interpretations of law and statements of policy of general application, as well as regulations in the ordinary sense of the term, are included in the definition of rule, an obvious absurdity results, since an interpretation of law cannot wait for 30 days for effectiveness. So too, there are a great host of regulations which are required as a practical matter to be immediately effective, either to put into force essential policies or to grant relief to private persons or firms. Many of the operations of the Navy Department cannot pause for 30 days while they are supplemented by regulations.

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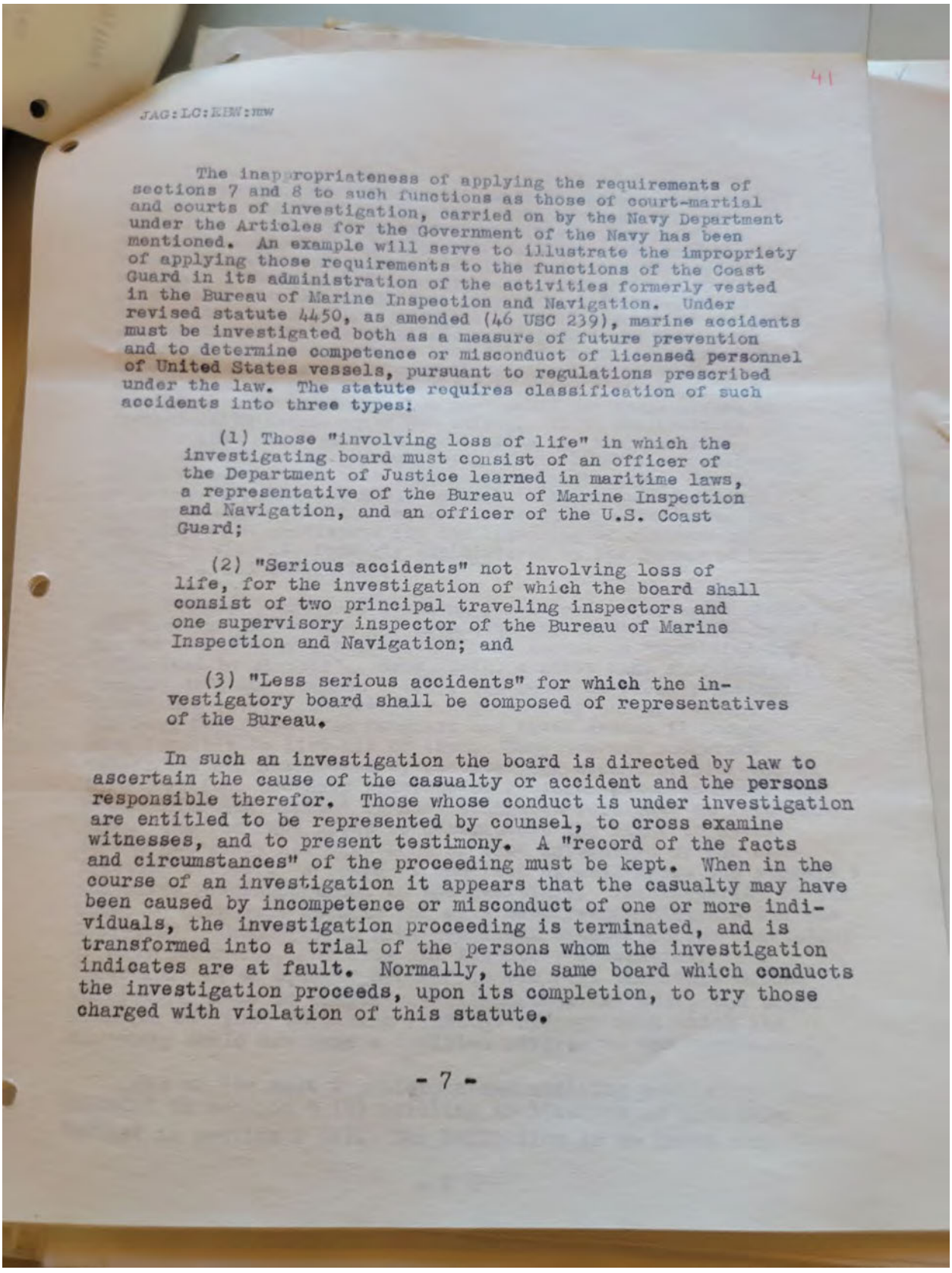

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The inappropriateness of applying the requirements of sections 7 and 8 to such functions as those of court-martial and courts of investigation, carried on by the Navy Department under the Articles for the Government of the Navy has been mentioned. An example will serve to illustrate the impropriety of applying those requirements to the functions of the Coast Guard in its administration of the activities formerly vested in the Bureau of Marine Inspection and Navigation. Under revised statute 4450, as amended (46 USC 239), marine accidents must be investigated both as a measure of future prevention and to determine competence or misconduct of licensed personnel of United States vessels, pursuant to regulations prescribed under the law. The statute requires classification of such accidents into three types:

(1) Those "involving loss of life" in which the investigating board must consist of an officer of the Department of Justice learned in maritime laws, a representative of the Bureau of Marine Inspection and Navigation, and an officer of the U.S. Coast Guard;

(2) "Serious accidents" not involving loss of life, for the investigation of which the board shall consist of two principal traveling inspectors and one supervisory inspector of the Bureau of Marine Inspection and Navigation; and

(3) "Less serious accidents" for which the investigatory board shall be composed of representatives of the Bureau.

In such an investigation the board is directed by law to ascertain the cause of the casualty or accident and the persons responsible therefor. Those whose conduct is under investigation are entitled to be represented by counsel, to cross examine witnesses, and to present testimony. A "record of the facts and circumstances" of the proceeding must be kept. When in the course of an investigation it appears that the casualty may have been caused by incompetence or misconduct of one or more individuals, the investigation proceeding is terminated, and is transformed into a trial of the persons whom the investigation indicates are at fault. Normally, the same board which conducts the investigation proceeds, upon its completion, to try those charged with violation of this statute.

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Of course, none of this long established procedure could be retained under the instant bill. The complexities and confusion into which this bill throws this procedure are enormous. Section 2 (d) defines "adjudication" to mean an agency's "process in a particular instance other than rule making." Therefore, the investigative portion of all these proceedings (to the extent that they involve "hearings") as well as the trial of the individuals, would have to be conducted, and the necessary determinations would have to be made, by examiners appointed pursuant to 7 (a) of the bill. Thus, the careful classification of casualties according to their seriousness for purposes of designating the various types of boards would be abandoned. So too, would the whole system of investigating boards as it now exists. It is difficult to believe that Congress would countenance any such sweeping modifications by the general terms of a bill which is obviously not designed to deal with such a special situation. Nor is it believed that Congress would consent to substitute examiners appointed under the bill for the Coast Guard officers who now administer the provisions for the licensing of officers and pilots of vessels, formerly administered by the Bureau of Marine Inspection and Navigation.

Section 9 embodies puzzling provisions relating to sanctions and powers. Subsection (a) prohibits the imposition of a sanction or the issuance of a substantive rule except as "specified and authorized by statute". Here again, a great many sanctions, as broadly defined (Section 2 (f)), and rules as broadly defined (Section 2 (c)), are necessary incidents of the operations of the Navy Department and Congress has never deemed it necessary or even feasible to list all of them. They are not therefore "specified and authorized by statute" and become prohibited. On this question, the Navy practice of deciding disputes under the usual "disputes clause" of Navy contracts furnishes an illustration. The contract gives to contractors the right to appeal to the Secretary all questions of fact determined by the contracting officer. A board of contract appeals hears the appeals and makes recommendations to the Secretary. The authority of the board to hear such appeals and make such recommendations and the Secretary's authority to make decisions stems from the provisions of Navy contracts, not from any statutory delegation. Yet "sanction" is so broadly defined in the bill that this method would apparently be completely eliminated. At most, the board would be confined to making findings of fact upon which the Secretary could not make a decision adverse to the contractor.

One of the most troublesome and striking provisions is embodied in section 9 (b) relating to licenses as that word is defined in section 2 (e). The definition is so broad that there

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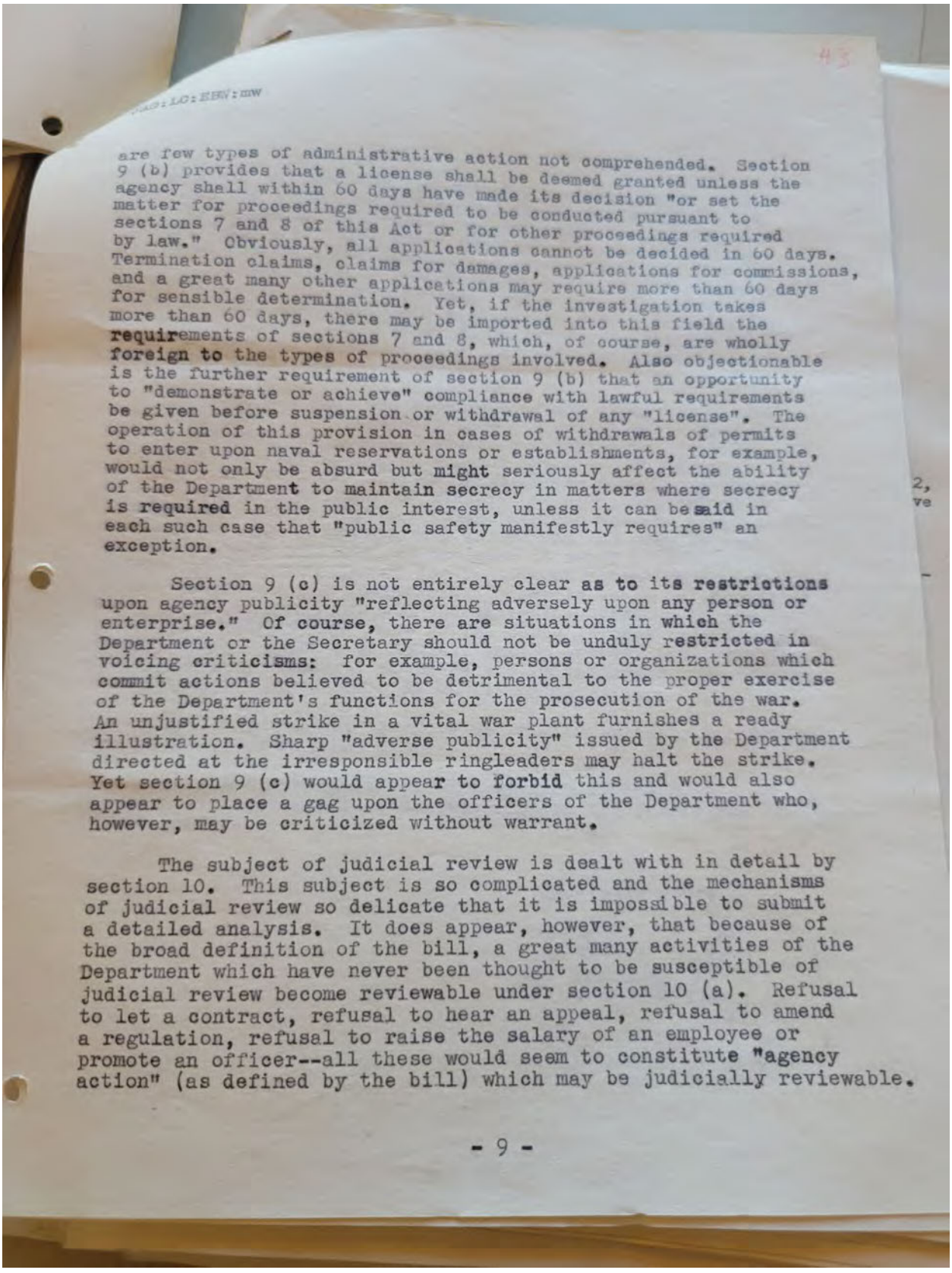

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are few types of administrative action not comprehended. Section 9 (b) provides that a license shall be deemed granted unless the agency shall within 60 days have made its decision "or set the matter for proceedings required to be conducted pursuant to sections 7 and 8 of this Act or for other proceedings required by law." Obviously, all applications cannot be decided in 60 days. Termination claims, claims for damages, applications for commissions, and a great many other applications may require more than 60 days for sensible determination. Yet, if the investigation takes more than 60 days, there may be imported into this field the requirements of sections 7 and 8, which, of course, are wholly foreign to the types of proceedings involved. Also objectionable is the further requirement of section 9 (b) that an opportunity to "demonstrate or achieve" compliance with lawful requirements be given before suspension or withdrawal of any "license". The operation of this provision in cases of withdrawals of permits to enter upon naval reservations or establishments, for example, would not only be absurd but might seriously affect the ability of the Department to maintain secrecy in matters where secrecy is required in the public interest, unless it can be said in each such case that "public safety manifestly requires" an exception.

Section 9 (c) is not entirely clear as to its restrictions upon agency publicity "reflecting adversely upon any person or enterprise." Of course, there are situations in which the Department or the Secretary should not be unduly restricted in voicing criticisms: for example, persons or organizations which commit actions believed to be detrimental to the proper exercise of the Department's functions for the prosecution of the war. An unjustified strike in a vital war plant furnishes a ready illustration. Sharp "adverse publicity" issued by the Department directed at the irresponsible ringleaders may halt the strike. Yet section 9 (c) would appear to forbid this and would also appear to place a gag upon the officers of the Department who, however, may be criticized without warrant.

The subject of judicial review is dealt with in detail by section 10. This subject is so complicated and the mechanisms of judicial review so delicate that it is impossible to submit a detailed analysis. It does appear, however, that because of the broad definition of the bill, a great many activities of the Department which have never been thought to be susceptible of judicial review become reviewable under section 10 (a). Refusal to let a contract, refusal to hear an appeal, refusal to amend a regulation, refusal to raise the salary of an employee or promote an officer--all these would seem to constitute "agency action" (as defined by the bill) which may be judicially reviewable.

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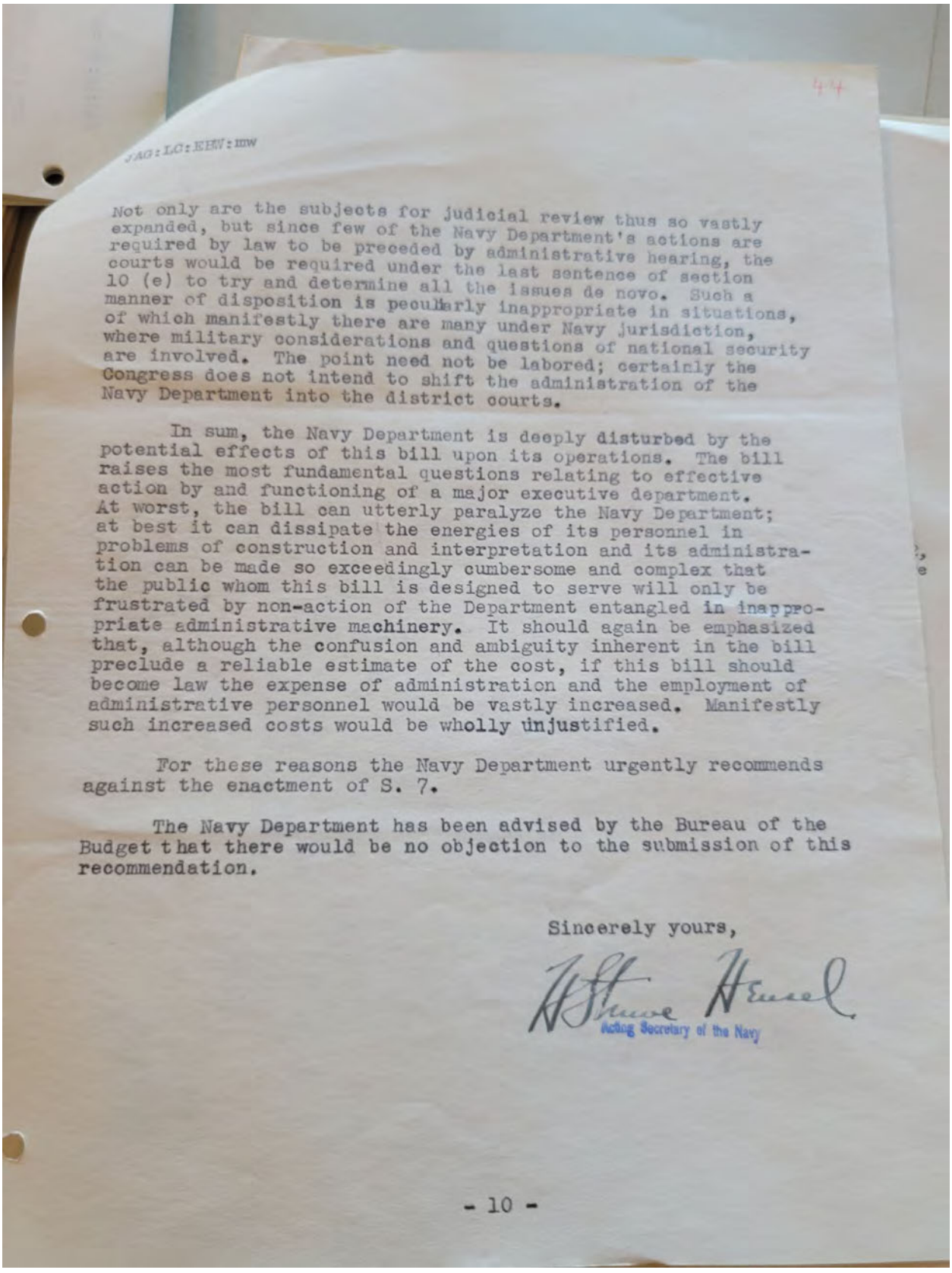

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Not only are the subjects for judicial review thus so vastly expanded, but since few of the Navy Department's actions are required by law to be preceded by administrative hearing, the courts would be required under the last sentence of section 10 (e) to try and determine all the issues de novo. Such a manner of disposition is peculiarly inappropriate in situations, of which manifestly there are many under Navy jurisdiction, where military considerations and questions of national security are involved. The point need not be labored; certainly the Congress does not intend to shift the administration of the Navy Department into the district courts.

In sum, the Navy Department is deeply disturbed by the potential effects of this bill upon its operations. The bill raises the most fundamental questions relating to effective action by and functioning of a major executive department. At worst, the bill can utterly paralyze the Navy Department; at best it can dissipate the energies of its personnel in problems of construction and interpretation and its administration can be made so exceedingly cumbersome and complex that the public whom this bill is designed to serve will only be frustrated by non-action of the Department entangled in inappropriate administrative machinery. It should again be emphasized that, although the confusion and ambiguity inherent in the bill preclude a reliable estimate of the cost, if this bill should become law the expense of administration and the employment of administrative personnel would be vastly increased. Manifestly such increased costs would be wholly unjustified.

For these reasons the Navy Department urgently recommends against the enactment of S. 7.

The Navy Department has been advised by the Bureau of the Budget that there would be no objection to the submission of this recommendation.

Sincerely yours,

Acting Secretary of the Navy

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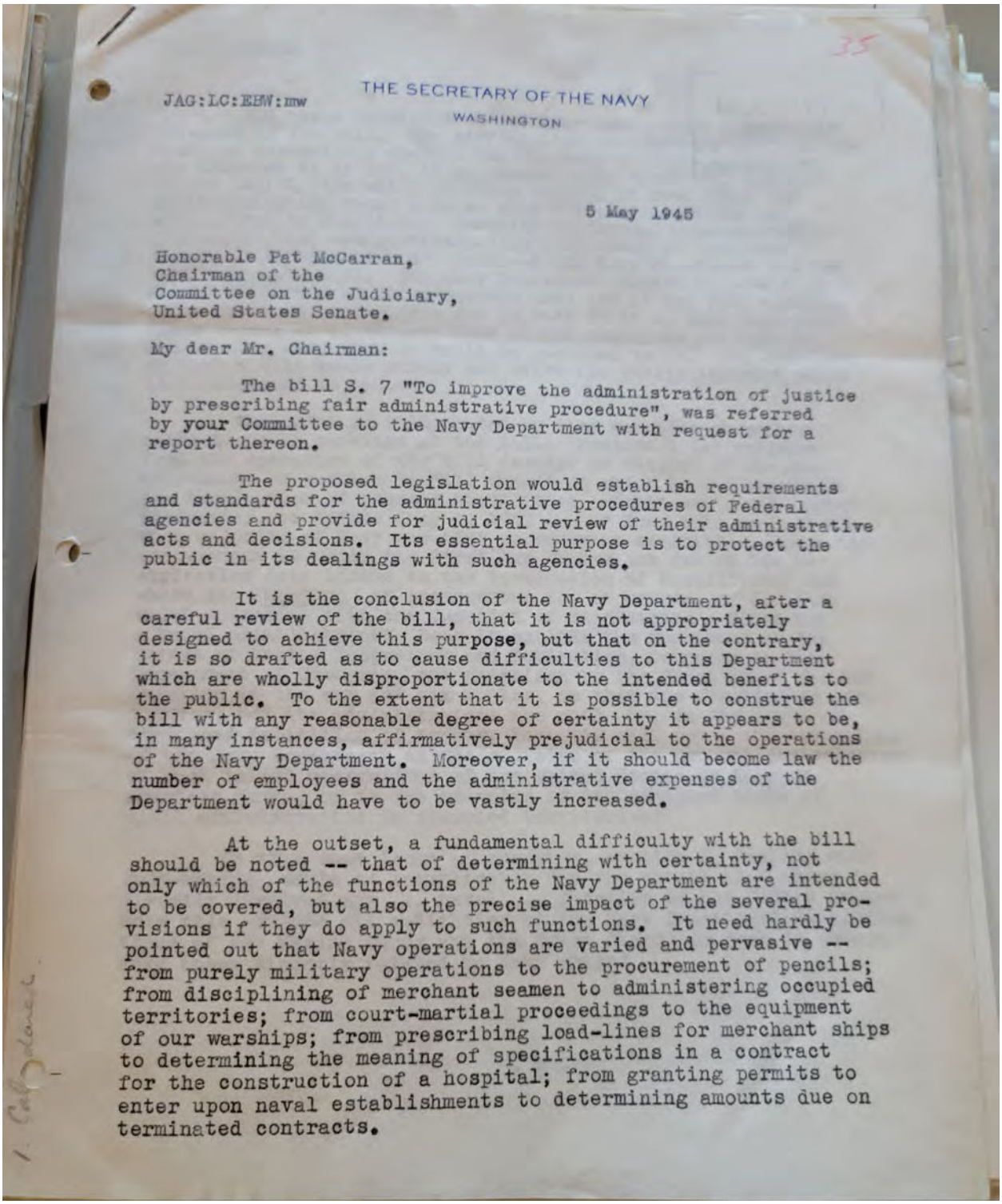
Appendix C

Letter from Herman Struve Hensel, Acting Sec'y of the Navy, to Sen. Pat McCarran, Chairman, S. Comm. on the Judiciary (May 5, 1945) (10 pages total)



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THE SECRETARY OF THE NAVY
WASHINGTON

5 May 1945

Honorable Pat McCarran,
Chairman of the
Committee on the Judiciary,
United States Senate.

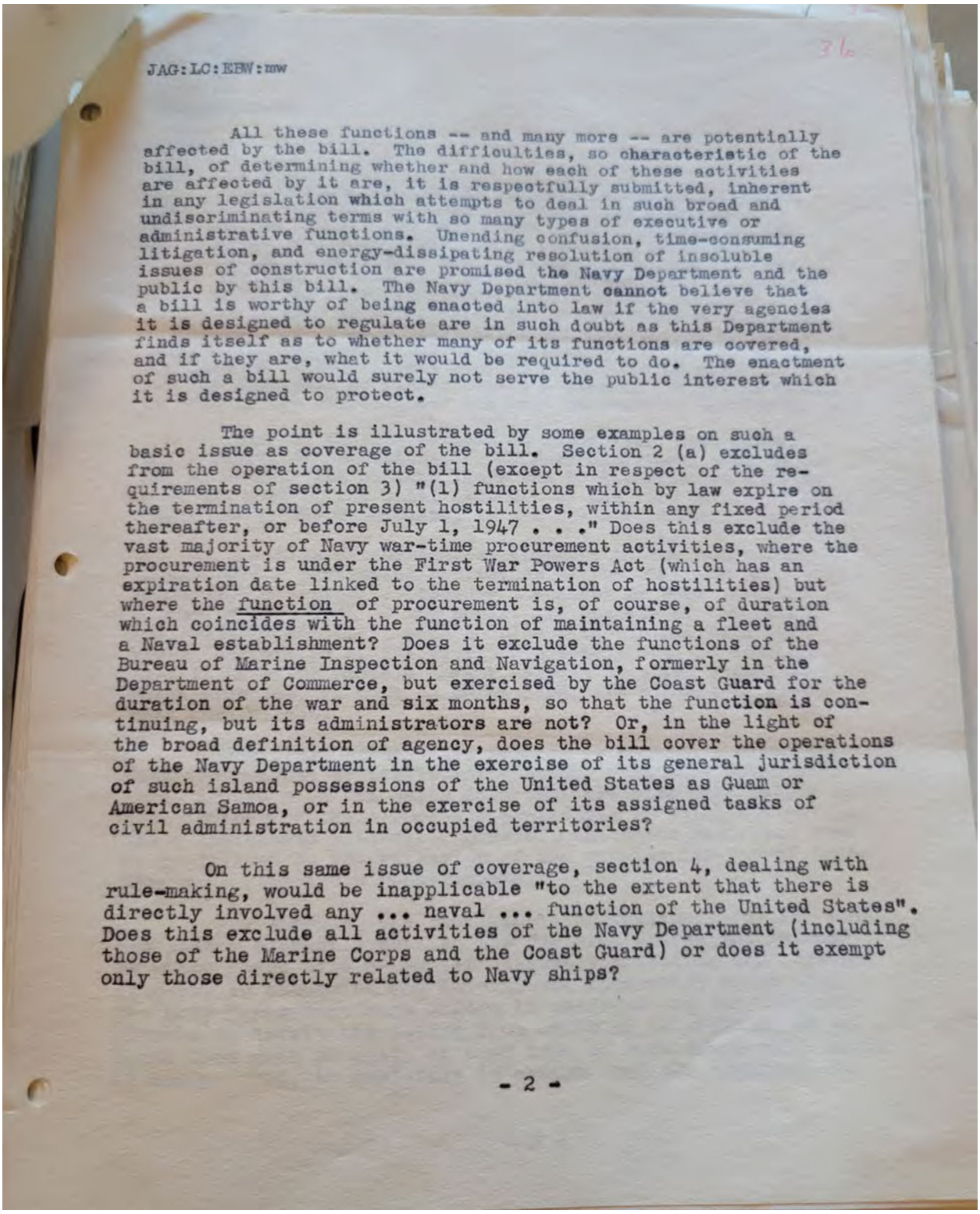
My dear Mr. Chairman:

The bill S. 7 "To improve the administration of justice by prescribing fair administrative procedure", was referred by your Committee to the Navy Department with request for a report thereon.

The proposed legislation would establish requirements and standards for the administrative procedures of Federal agencies and provide for judicial review of their administrative acts and decisions. Its essential purpose is to protect the public in its dealings with such agencies.

It is the conclusion of the Navy Department, after a careful review of the bill, that it is not appropriately designed to achieve this purpose, but that on the contrary, it is so drafted as to cause difficulties to this Department which are wholly disproportionate to the intended benefits to the public. To the extent that it is possible to construe the bill with any reasonable degree of certainty it appears to be, in many instances, affirmatively prejudicial to the operations of the Navy Department. Moreover, if it should become law the number of employees and the administrative expenses of the Department would have to be vastly increased.

At the outset, a fundamental difficulty with the bill should be noted -- that of determining with certainty, not only which of the functions of the Navy Department are intended to be covered, but also the precise impact of the several provisions if they do apply to such functions. It need hardly be pointed out that Navy operations are varied and pervasive -- from purely military operations to the procurement of pencils; from disciplining of merchant seamen to administering occupied territories; from court-martial proceedings to the equipment of our warships; from prescribing load-lines for merchant ships to determining the meaning of specifications in a contract for the construction of a hospital; from granting permits to enter upon naval establishments to determining amounts due on terminated contracts.



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All these functions -- and many more -- are potentially affected by the bill. The difficulties, so characteristic of the bill, of determining whether and how each of these activities are affected by it are, it is respectfully submitted, inherent in any legislation which attempts to deal in such broad and undiscriminating terms with so many types of executive or administrative functions. Unending confusion, time-consuming litigation, and energy-dissipating resolution of insoluble issues of construction are promised the Navy Department and the public by this bill. The Navy Department cannot believe that a bill is worthy of being enacted into law if the very agencies it is designed to regulate are in such doubt as this Department finds itself as to whether many of its functions are covered, and if they are, what it would be required to do. The enactment of such a bill would surely not serve the public interest which it is designed to protect.

The point is illustrated by some examples on such a basic issue as coverage of the bill. Section 2 (a) excludes from the operation of the bill (except in respect of the requirements of section 3) "(1) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947 . . ." Does this exclude the vast majority of Navy war-time procurement activities, where the procurement is under the First War Powers Act (which has an expiration date linked to the termination of hostilities) but where the function of procurement is, of course, of duration which coincides with the function of maintaining a fleet and a Naval establishment? Does it exclude the functions of the Bureau of Marine Inspection and Navigation, formerly in the Department of Commerce, but exercised by the Coast Guard for the duration of the war and six months, so that the function is continuing, but its administrators are not? Or, in the light of the broad definition of agency, does the bill cover the operations of the Navy Department in the exercise of its general jurisdiction of such island possessions of the United States as Guam or American Samoa, or in the exercise of its assigned tasks of civil administration in occupied territories?

On this same issue of coverage, section 4, dealing with rule-making, would be inapplicable "to the extent that there is directly involved any ... naval ... function of the United States". Does this exclude all activities of the Navy Department (including those of the Marine Corps and the Coast Guard) or does it exempt only those directly related to Navy ships?

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Again, are the formal requirements for adjudication, embodied in sections 5, 7 and 8, prescribing examiners, intermediate reports and many other special procedures, applicable to courts-martial? Or do the broad definitions of "order", "adjudications," and "license", when read with the first sentence of section 9 (b) and the provisions of section 10, require the Navy Department to hold formal hearings if it proposes to deny an application for a commission or a bid for a contract more than 60 days after the application or bid, with such denial subject to judicial review? Or if it denies the application or bid without hearing within the 60 days, can the applicant or bidder obtain a hearing and determination de novo in the courts under the last sentence of section 10 (e)?

Each of these questions is important. Each raises basic issues of operations of the Navy Department both in war and in peace. Yet on each there can be disagreement arising from the text of the bill, although by the very nature of the functions of the Department, it can ill-afford such doubt.

In these circumstances, comments on the particular impact of the particular provisions of the bill must of necessity be tentative, because one cannot be sure of the proper construction of the words. And because of the detail and sweep of the bill, when coupled with the manifold and varied activities of the Navy, this report must be confined, lest it be of unreadable length, simply to a few examples. These examples, it must be emphasized, are typical of many more unmentioned.

The first substantive section is section 3 which deals with the subject of public information. The Navy Department is in accord with its basic idea that agencies make public those descriptions of their work and procedures in which the public has a legitimate interest. However, the basic desirable idea is prejudiced by the extension of the section far beyond legitimate or reasonable requirements.

For example, the requirement of section 3 (a) (2) that the agency currently publish the "general course and method" by which "each type of matter" directly affecting any person or party is channeled and determined, apparently means that the Navy Department must engage in wasteful and impracticable efforts to detail the course from official to official or at least from unit to unit, of each type of such items with which it deals. Yet, it certainly is enough that the claimant for

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damages, or the manufacturer or merchant who files bids to furnish supplies, or an applicant for a position, have available adequate regulations or procedural instructions, that he have an adequate point of contact with the Department, and that he be enabled to trace his claim, bid, or other application in its course through the administrative structure.

Again, it would be doubtful under this section whether opinions of the legal officers of the Department interpreting statutes would fall in the category of "interpretations" (which must be published) or of "rulings on questions of law" (which need only be made available to public inspection). But, if the Navy Department does not guess correctly, the curious result would follow, according to a literal reading of the bill, that no person would be liable for failure to conform to the unpublished interpretation, and presumably the question of whether publication was required would be subject to judicial review under section 10.

Since section 3 exempts only "naval function(s)...requiring secrecy in the public interest" comparatively few of the functions of the Navy Department would be excluded, particularly in time of peace. It is noteworthy in this connection that the question of whether a particular operation of the Navy Department requires secrecy in the public interest would presumably be subject to judicial review under section 10. Yet it seems apparent that litigation on the question of whether such secrecy was required, with its attendant publicity, might well defeat the purpose of the exemption.

Section 4, relating to rule-making, requires notice and opportunity to interested parties to comment before adoption of "rules" as defined by section 2 (c). Here again the obscurity of the language used makes impossible any certainty of interpretation, but this section may well be construed to reach such an absurd result as to require this procedure as a condition of the adoption of Navy recruiting policies, or even of the publication of a statement of the Department's attitude on public issues with which it is concerned.

This section is not applicable to the extent that a "naval function" is "directly" involved. Doubts concerning the sweep of the phrase "naval function" have already been noted. If the exemption does not extend to such functions, for example, as regulations relating to work at Navy yards and stations for

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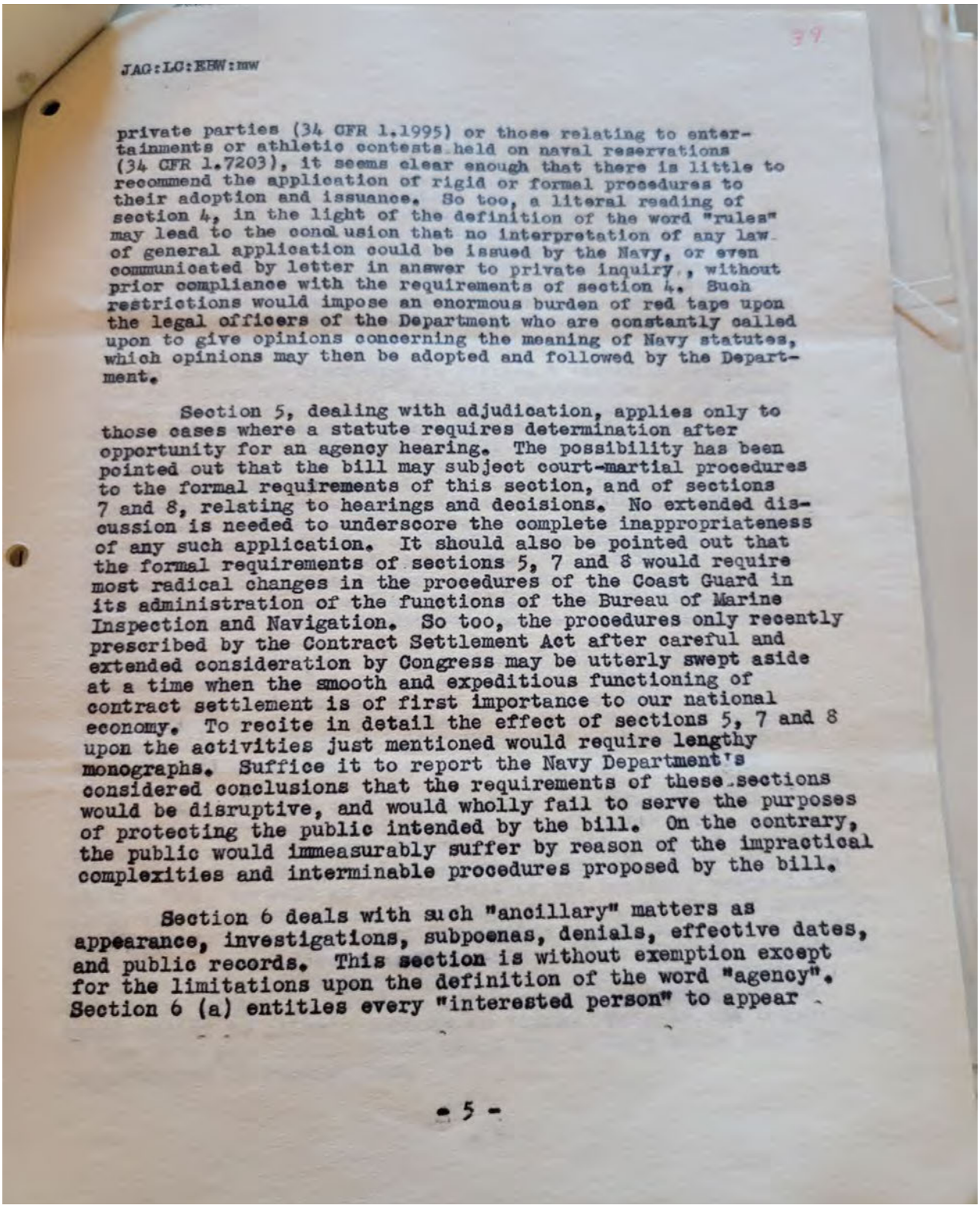

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private parties (34 CFR 1.1995) or those relating to entertainments or athletic contests held on naval reservations (34 CFR 1.7203), it seems clear enough that there is little to recommend the application of rigid or formal procedures to their adoption and issuance. So too, a literal reading of section 4, in the light of the definition of the word "rules" may lead to the conclusion that no interpretation of any law of general application could be issued by the Navy, or even communicated by letter in answer to private inquiry, without prior compliance with the requirements of section 4. Such restrictions would impose an enormous burden of red tape upon the legal officers of the Department who are constantly called upon to give opinions concerning the meaning of Navy statutes, which opinions may then be adopted and followed by the Department.

Section 5, dealing with adjudication, applies only to those cases where a statute requires determination after opportunity for an agency hearing. The possibility has been pointed out that the bill may subject court-martial procedures to the formal requirements of this section, and of sections 7 and 8, relating to hearings and decisions. No extended discussion is needed to underscore the complete inappropriateness of any such application. It should also be pointed out that the formal requirements of sections 5, 7 and 8 would require most radical changes in the procedures of the Coast Guard in its administration of the functions of the Bureau of Marine Inspection and Navigation. So too, the procedures only recently prescribed by the Contract Settlement Act after careful and extended consideration by Congress may be utterly swept aside at a time when the smooth and expeditious functioning of contract settlement is of first importance to our national economy. To recite in detail the effect of sections 5, 7 and 8 upon the activities just mentioned would require lengthy monographs. Suffice it to report the Navy Department's considered conclusions that the requirements of these sections would be disruptive, and would wholly fail to serve the purposes of protecting the public intended by the bill. On the contrary, the public would immeasurably suffer by reason of the impractical complexities and interminable procedures proposed by the bill.

Section 6 deals with such "ancillary" matters as appearance, investigations, subpoenas, denials, effective dates, and public records. This section is without exemption except for the limitations upon the definition of the word "agency". Section 6 (a) entitles every "interested person" to appear

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before the agency or representative "to secure information or for the prompt negotiation, adjustment, or determination of any issue, request or controversy." This requirement marks no limits to the rights of persons who are "interested", to interviews, personal negotiations and conferences on every subject, no matter how inconsequential. And what is worse, it marks no limits on the right to appear to "secure information" no matter what the nature of such information. It hardly need be pointed out that the Navy Department cannot effectively or efficiently operate, whether in war or peace, on any such open-house, open-files basis. Limitations of time and personnel, if nothing else more fundamental, would preclude compliance with such requirements.

Even more disturbing is section 6 (b) which provides that no "investigative act" shall be enforceable in any manner or for any purpose "except as expressly authorized by law." Of course, there are a great many activities in the nature of investigation -- ranging from purely military intelligence through investigation of the responsibility of potential contractors and the investigation of the needs for housing facilities in and about naval establishments which the Navy Department must engage in from time to time. These are but normal incidents of the proper functioning of the Navy Department, and as such, Congress has never deemed it necessary "expressly" to authorize them by statute. Thus failure of Congress to list a detailed and comprehensive compendium of all possible investigations would, under section 6 (b), halt many of these necessary activities.

The requirement of subsection 6 (d) that the Navy accompany every denial of any application, petition or request with a "simple statement" of the grounds for denial would place an impracticably and unjustifiably heavy burden on so large a Department as the Navy to which literally hundreds of requests of major and minor importance are made daily.

Subsection 6 (e) provides that the required publication and service of a substantive rule or final order shall precede by 30 days the "effective date" thereof, with certain exceptions. Since interpretations of law and statements of policy of general application, as well as regulations in the ordinary sense of the term, are included in the definition of rule, an obvious absurdity results, since an interpretation of law cannot wait for 30 days for effectiveness. So too, there are a great host of regulations which are required as a practical matter to be immediately effective, either to put into force essential policies or to grant relief to private persons or firms. Many of the operations of the Navy Department cannot pause for 30 days while they are supplemented by regulations.

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The inappropriateness of applying the requirements of sections 7 and 8 to such functions as those of court-martial and courts of investigation, carried on by the Navy Department under the Articles for the Government of the Navy has been mentioned. An example will serve to illustrate the impropriety of applying those requirements to the functions of the Coast Guard in its administration of the activities formerly vested in the Bureau of Marine Inspection and Navigation. Under revised statute 4450, as amended (46 USC 239), marine accidents must be investigated both as a measure of future prevention and to determine competence or misconduct of licensed personnel of United States vessels, pursuant to regulations prescribed under the law. The statute requires classification of such accidents into three types:

(1) Those "involving loss of life" in which the investigating board must consist of an officer of the Department of Justice learned in maritime laws, a representative of the Bureau of Marine Inspection and Navigation, and an officer of the U.S. Coast Guard;

(2) "Serious accidents" not involving loss of life, for the investigation of which the board shall consist of two principal traveling inspectors and one supervisory inspector of the Bureau of Marine Inspection and Navigation; and

(3) "Less serious accidents" for which the investigatory board shall be composed of representatives of the Bureau.

In such an investigation the board is directed by law to ascertain the cause of the casualty or accident and the persons responsible therefor. Those whose conduct is under investigation are entitled to be represented by counsel, to cross examine witnesses, and to present testimony. A "record of the facts and circumstances" of the proceeding must be kept. When in the course of an investigation it appears that the casualty may have been caused by incompetence or misconduct of one or more individuals, the investigation proceeding is terminated, and is transformed into a trial of the persons whom the investigation indicates are at fault. Normally, the same board which conducts the investigation proceeds, upon its completion, to try those charged with violation of this statute.

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Of course, none of this long established procedure could be retained under the instant bill. The complexities and confusion into which this bill throws this procedure are enormous. Section 2 (d) defines "adjudication" to mean an agency's "process in a particular instance other than rule making." Therefore, the investigative portion of all these proceedings (to the extent that they involve "hearings") as well as the trial of the individuals, would have to be conducted, and the necessary determinations would have to be made, by examiners appointed pursuant to 7 (a) of the bill. Thus, the careful classification of casualties according to their seriousness for purposes of designating the various types of boards would be abandoned. So too, would the whole system of investigating boards as it now exists. It is difficult to believe that Congress would countenance any such sweeping modifications by the general terms of a bill which is obviously not designed to deal with such a special situation. Nor is it believed that Congress would consent to substitute examiners appointed under the bill for the Coast Guard officers who now administer the provisions for the licensing of officers and pilots of vessels, formerly administered by the Bureau of Marine Inspection and Navigation.

Section 9 embodies puzzling provisions relating to sanctions and powers. Subsection (a) prohibits the imposition of a sanction or the issuance of a substantive rule except as "specified and authorized by statute". Here again, a great many sanctions, as broadly defined (Section 2 (f)), and rules as broadly defined (Section 2 (c)), are necessary incidents of the operations of the Navy Department and Congress has never deemed it necessary or even feasible to list all of them. They are not therefore "specified and authorized by statute" and become prohibited. On this question, the Navy practice of deciding disputes under the usual "disputes clause" of Navy contracts furnishes an illustration. The contract gives to contractors the right to appeal to the Secretary all questions of fact determined by the contracting officer. A board of contract appeals hears the appeals and makes recommendations to the Secretary. The authority of the board to hear such appeals and make such recommendations and the Secretary's authority to make decisions stems from the provisions of Navy contracts, not from any statutory delegation. Yet "sanction" is so broadly defined in the bill that this method would apparently be completely eliminated. At most, the board would be confined to making findings of fact upon which the Secretary could not make a decision adverse to the contractor.

One of the most troublesome and striking provisions is embodied in section 9 (b) relating to licenses as that word is defined in section 2 (e). The definition is so broad that there

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are few types of administrative action not comprehended. Section 9 (b) provides that a license shall be deemed granted unless the agency shall within 60 days have made its decision "or set the matter for proceedings required to be conducted pursuant to sections 7 and 8 of this Act or for other proceedings required by law." Obviously, all applications cannot be decided in 60 days. Termination claims, claims for damages, applications for commissions, and a great many other applications may require more than 60 days for sensible determination. Yet, if the investigation takes more than 60 days, there may be imported into this field the requirements of sections 7 and 8, which, of course, are wholly foreign to the types of proceedings involved. Also objectionable is the further requirement of section 9 (b) that an opportunity to "demonstrate or achieve" compliance with lawful requirements be given before suspension or withdrawal of any "license". The operation of this provision in cases of withdrawals of permits to enter upon naval reservations or establishments, for example, would not only be absurd but might seriously affect the ability of the Department to maintain secrecy in matters where secrecy is required in the public interest, unless it can be said in each such case that "public safety manifestly requires" an exception.

Section 9 (c) is not entirely clear as to its restrictions upon agency publicity "reflecting adversely upon any person or enterprise." Of course, there are situations in which the Department or the Secretary should not be unduly restricted in voicing criticisms: for example, persons or organizations which commit actions believed to be detrimental to the proper exercise of the Department's functions for the prosecution of the war. An unjustified strike in a vital war plant furnishes a ready illustration. Sharp "adverse publicity" issued by the Department directed at the irresponsible ringleaders may halt the strike. Yet section 9 (c) would appear to forbid this and would also appear to place a gag upon the officers of the Department who, however, may be criticized without warrant.

The subject of judicial review is dealt with in detail by section 10. This subject is so complicated and the mechanisms of judicial review so delicate that it is impossible to submit a detailed analysis. It does appear, however, that because of the broad definition of the bill, a great many activities of the Department which have never been thought to be susceptible of judicial review become reviewable under section 10 (a). Refusal to let a contract, refusal to hear an appeal, refusal to amend a regulation, refusal to raise the salary of an employee or promote an officer--all these would seem to constitute "agency action" (as defined by the bill) which may be judicially reviewabl

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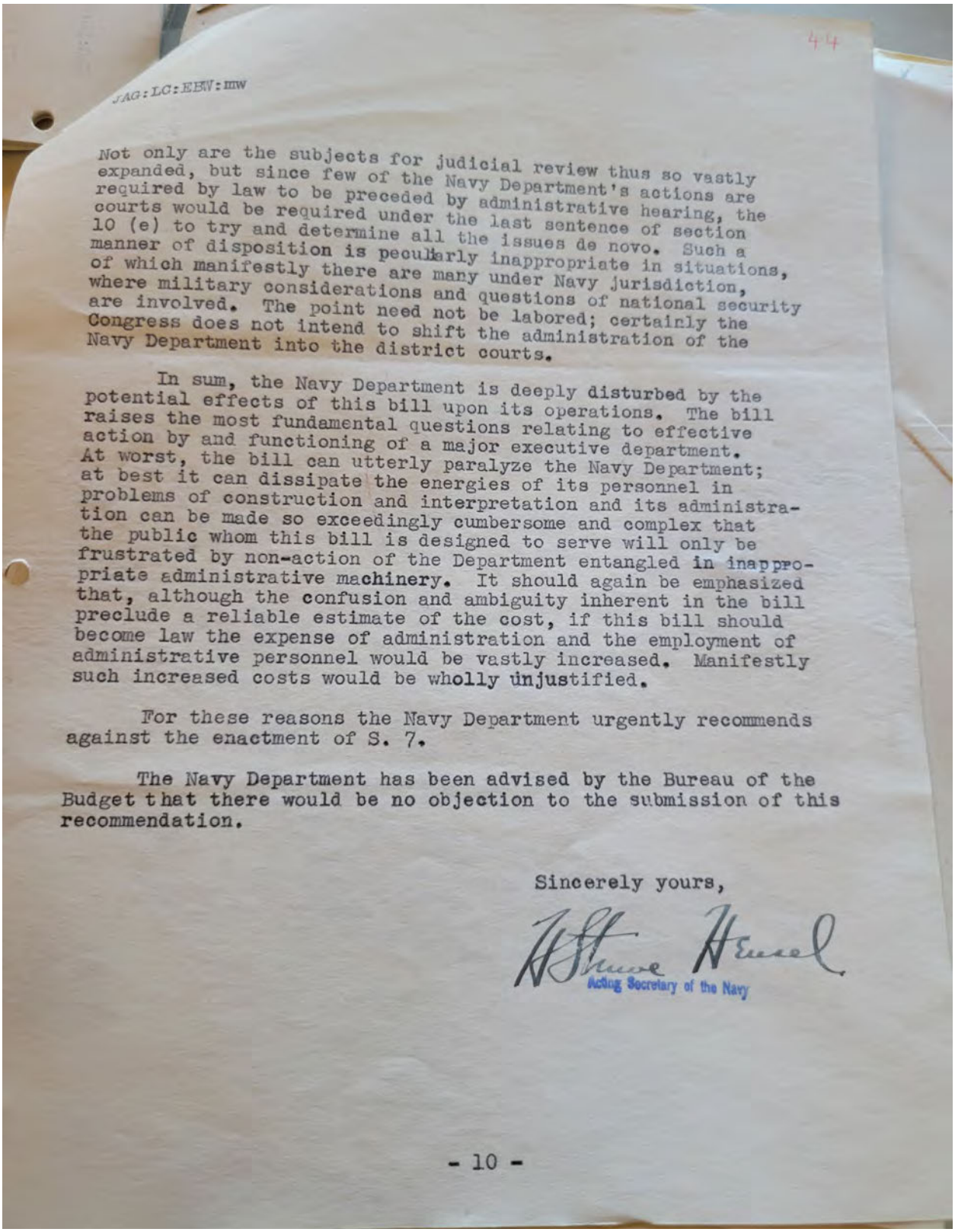

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Not only are the subjects for judicial review thus so vastly expanded, but since few of the Navy Department's actions are required by law to be preceded by administrative hearing, the courts would be required under the last sentence of section 10 (e) to try and determine all the issues de novo. Such a manner of disposition is peculiarly inappropriate in situations, of which manifestly there are many under Navy jurisdiction, where military considerations and questions of national security are involved. The point need not be labored; certainly the Congress does not intend to shift the administration of the Navy Department into the district courts.

In sum, the Navy Department is deeply disturbed by the potential effects of this bill upon its operations. The bill raises the most fundamental questions relating to effective action by and functioning of a major executive department. At worst, the bill can utterly paralyze the Navy Department; at best it can dissipate the energies of its personnel in problems of construction and interpretation and its administration can be made so exceedingly cumbersome and complex that the public whom this bill is designed to serve will only be frustrated by non-action of the Department entangled in inappropriate administrative machinery. It should again be emphasized that, although the confusion and ambiguity inherent in the bill preclude a reliable estimate of the cost, if this bill should become law the expense of administration and the employment of administrative personnel would be vastly increased. Manifestly such increased costs would be wholly unjustified.

For these reasons the Navy Department urgently recommends against the enactment of S. 7.

The Navy Department has been advised by the Bureau of the Budget that there would be no objection to the submission of this recommendation.

Sincerely yours,

Acting Secretary of the Navy

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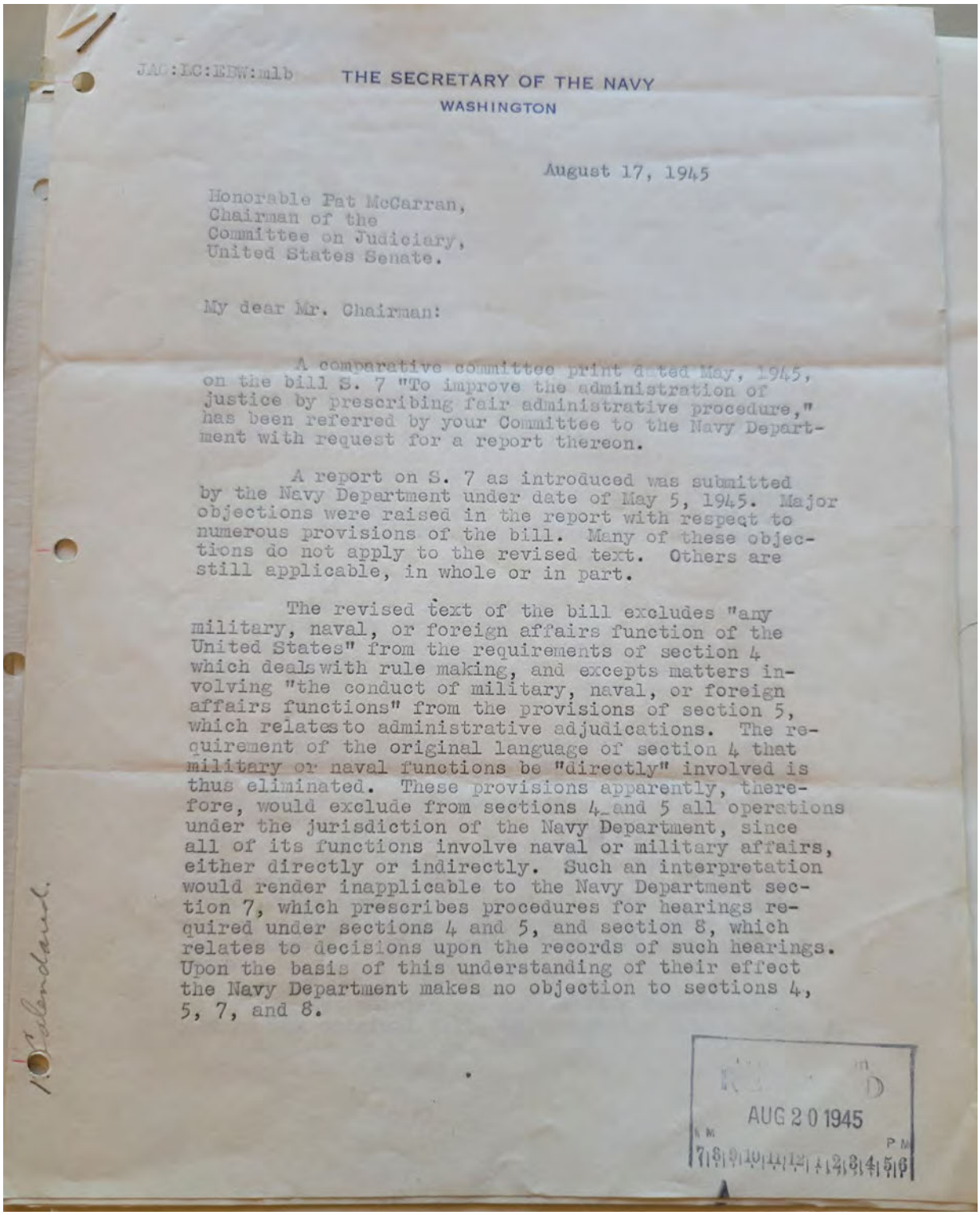
Letter from Herman Struve Hensel, Acting Sec'y of the Navy, to Sen. Pat McCarran, Chairman, S. Comm. on the Judiciary (Aug. 17, 1945) (4 pages total)



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THE SECRETARY OF THE NAVY
WASHINGTON

August 17, 1945

Honorable Pat McCarran,
Chairman of the
Committee on Judiciary,
United States Senate.

My dear Mr. Chairman:

A comparative committee print dated May, 1945, on the bill S. 7 "To improve the administration of justice by prescribing fair administrative procedure," has been referred by your Committee to the Navy Department with request for a report thereon.

A report on S. 7 as introduced was submitted by the Navy Department under date of May 5, 1945. Major objections were raised in the report with respect to numerous provisions of the bill. Many of these objections do not apply to the revised text. Others are still applicable, in whole or in part.

The revised text of the bill excludes "any military, naval, or foreign affairs function of the United States" from the requirements of section 4 which deals with rule making, and excepts matters involving "the conduct of military, naval, or foreign affairs functions" from the provisions of section 5, which relates to administrative adjudications. The requirement of the original language of section 4 that military or naval functions be "directly" involved is thus eliminated. These provisions apparently, therefore, would exclude from sections 4 and 5 all operations under the jurisdiction of the Navy Department, since all of its functions involve naval or military affairs, either directly or indirectly. Such an interpretation would render inapplicable to the Navy Department section 7, which prescribes procedures for hearings required under sections 4 and 5, and section 8, which relates to decisions upon the records of such hearings. Upon the basis of this understanding of their effect the Navy Department makes no objection to sections 4, 5, 7, and 8.

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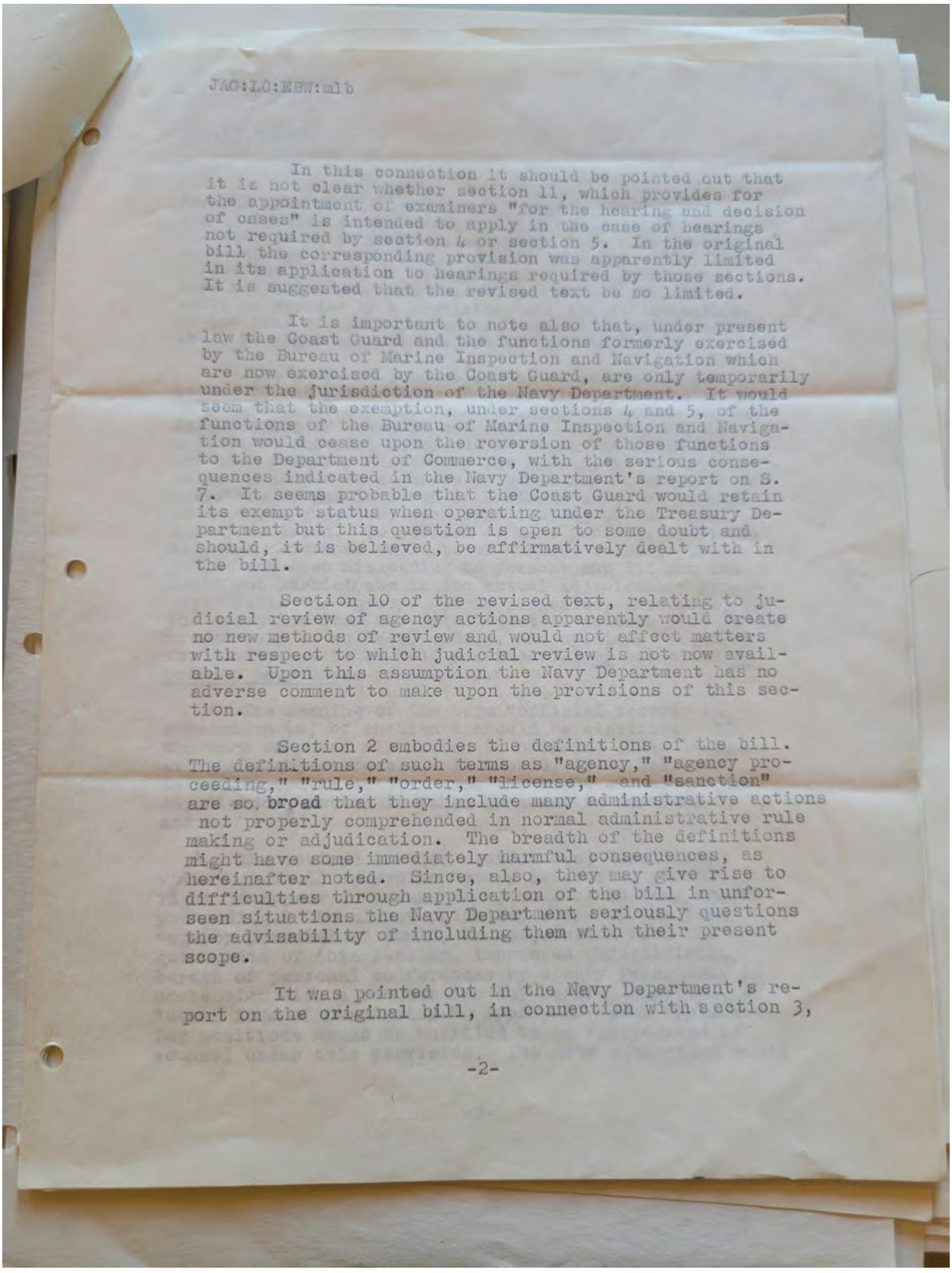

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In this connection it should be pointed out that it is not clear whether section 11, which provides for the appointment of examiners "for the hearing and decision of cases" is intended to apply in the case of hearings not required by section 4 or section 5. In the original bill the corresponding provision was apparently limited in its application to hearings required by those sections. It is suggested that the revised text be so limited.

It is important to note also that, under present law the Coast Guard and the functions formerly exercised by the Bureau of Marine Inspection and Navigation which are now exercised by the Coast Guard, are only temporarily under the jurisdiction of the Navy Department. It would seem that the exemption, under sections 4 and 5, of the functions of the Bureau of Marine Inspection and Navigation would cease upon the reversion of those functions to the Department of Commerce, with the serious consequences indicated in the Navy Department's report on S. 7. It seems probable that the Coast Guard would retain its exempt status when operating under the Treasury Department but this question is open to some doubt and should, it is believed, be affirmatively dealt with in the bill.

Section 10 of the revised text, relating to judicial review of agency actions apparently would create no new methods of review and would not affect matters with respect to which judicial review is not now available. Upon this assumption the Navy Department has no adverse comment to make upon the provisions of this section.

Section 2 embodies the definitions of the bill. The definitions of such terms as "agency," "agency proceeding," "rule," "order," "license," and "sanction" are so broad that they include many administrative actions not properly comprehended in normal administrative rule making or adjudication. The breadth of the definitions might have some immediately harmful consequences, as hereinafter noted. Since, also, they may give rise to difficulties through application of the bill in unforseen situations the Navy Department seriously questions the advisability of including them with their present scope.

It was pointed out in the Navy Department's report on the original bill, in connection with section 3,

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dealing with public information, that publicity attending litigation on the question of whether a particular function is entitled to an exemption from that section as requiring secrecy in the public interest, might well defeat the purpose of the exemption. The revised text does not eliminate that objection. This difficulty would be avoided by a provision that the determination of the head of the Department concerned on this question shall be final and not subject to judicial review.

The scope of subsection (b) of section 3, relating to the publication of generally applicable rulings on questions of law and final opinions or orders in the adjudication of cases is not clear. If, however, it applies to internal memoranda and opinions which have not been formally adopted by the agency, it is objectionable. A number of separate opinions may be prepared on questions of law involved in a single case, or perhaps on a single question, each contributing to the final agency decision. To publish or make publicly available all such memoranda would be of dubious value to the public and even misleading to persons who did not and could not participate in the actual adjudicatory process within the agency. It is suggested, therefore, that the exception from the requirement of section 3(b) should extend only to rulings, orders, and opinions "required for good cause to be held confidential or not cited to private persons as precedents."

The meaning of the term "official record" in subsection (c) of section 3 should be clarified. If the term embraces all matter in official files it is extremely objectionable. It should, it is believed, be restricted to matters upon the basis of which formal adjudicatory action is taken pursuant to sections 5, 7, and 8.

The revised text of section 6(a) "Ancillary Matters," would accord to "every interested person" the right to appear in person or by counsel in "any agency proceeding." The almost unlimited scope of the term "agency proceeding" would, in conjunction with the requirements of this section, impose an unjustifiable burden of personal conferences by agency personnel, in connection with a request for any permit, approval, or "other form of permission." Apparently even applicants for positions would be entitled to be represented by counsel under this provision. The same subsection would

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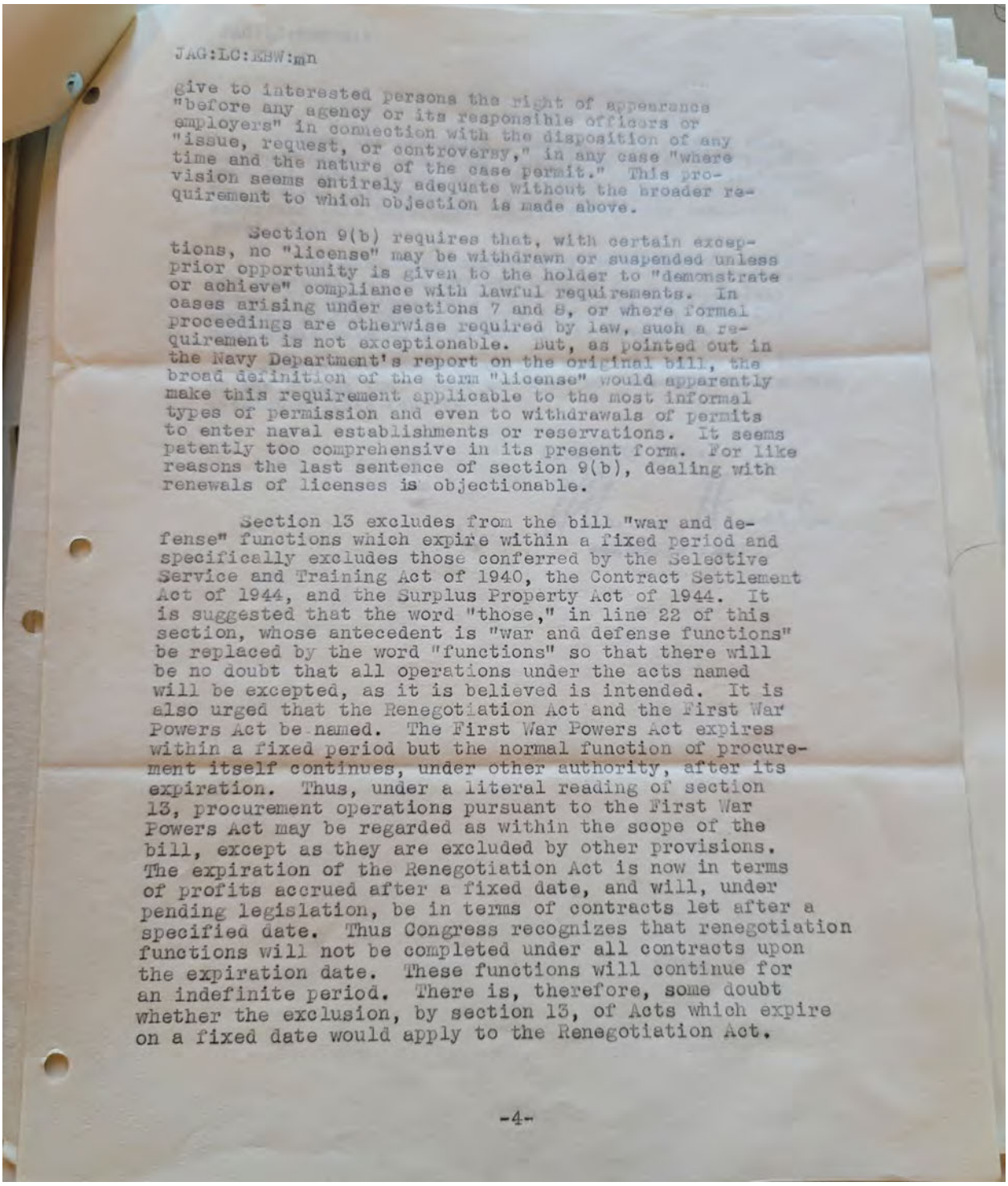

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give to interested persons the right of appearance "before any agency or its responsible officers or employers" in connection with the disposition of any "issue, request, or controversy," in any case "where time and the nature of the case permit." This provision seems entirely adequate without the broader requirement to which objection is made above.

Section 9(b) requires that, with certain exceptions, no "license" may be withdrawn or suspended unless prior opportunity is given to the holder to "demonstrate or achieve" compliance with lawful requirements. In cases arising under sections 7 and 8, or where formal proceedings are otherwise required by law, such a requirement is not exceptionable. But, as pointed out in the Navy Department's report on the original bill, the broad definition of the term "license" would apparently make this requirement applicable to the most informal types of permission and even to withdrawals of permits to enter naval establishments or reservations. It seems patently too comprehensive in its present form. For like reasons the last sentence of section 9(b), dealing with renewals of licenses is objectionable.

Section 13 excludes from the bill "war and defense" functions which expire within a fixed period and specifically excludes those conferred by the Selective Service and Training Act of 1940, the Contract Settlement Act of 1944, and the Surplus Property Act of 1944. It is suggested that the word "those," in line 22 of this section, whose antecedent is "war and defense functions" be replaced by the word "functions" so that there will be no doubt that all operations under the acts named will be excepted, as it is believed is intended. It is also urged that the Renegotiation Act and the First War Powers Act be named. The First War Powers Act expires within a fixed period but the normal function of procurement itself continues, under other authority, after its expiration. Thus, under a literal reading of section 13, procurement operations pursuant to the First War Powers Act may be regarded as within the scope of the bill, except as they are excluded by other provisions. The expiration of the Renegotiation Act is now in terms of profits accrued after a fixed date, and will, under pending legislation, be in terms of contracts let after a specified date. Thus Congress recognizes that renegotiation functions will not be completed under all contracts upon the expiration date. These functions will continue for an indefinite period. There is, therefore, some doubt whether the exclusion, by section 13, of Acts which expire on a fixed date would apply to the Renegotiation Act.

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From the preceding comments it is evident that, although many of the major objections of the Navy Department set forth in its earlier report have been eliminated, the revised text retains a number of provisions which would embarrass this Department in its day-to-day conduct of naval affairs.

The Navy Department therefore recommends against the enactment of the revised text of S. 7 in its present form. If, however, the revised text is appropriately amended in the respects above indicated, the Navy Department would make no objection to its enactment.

The Navy Department has been advised by the Bureau of the Budget that there would be no objection to the submission of this report.

Sincerely yours,

W. Struve Hensel

Acting Secretary of the Navy

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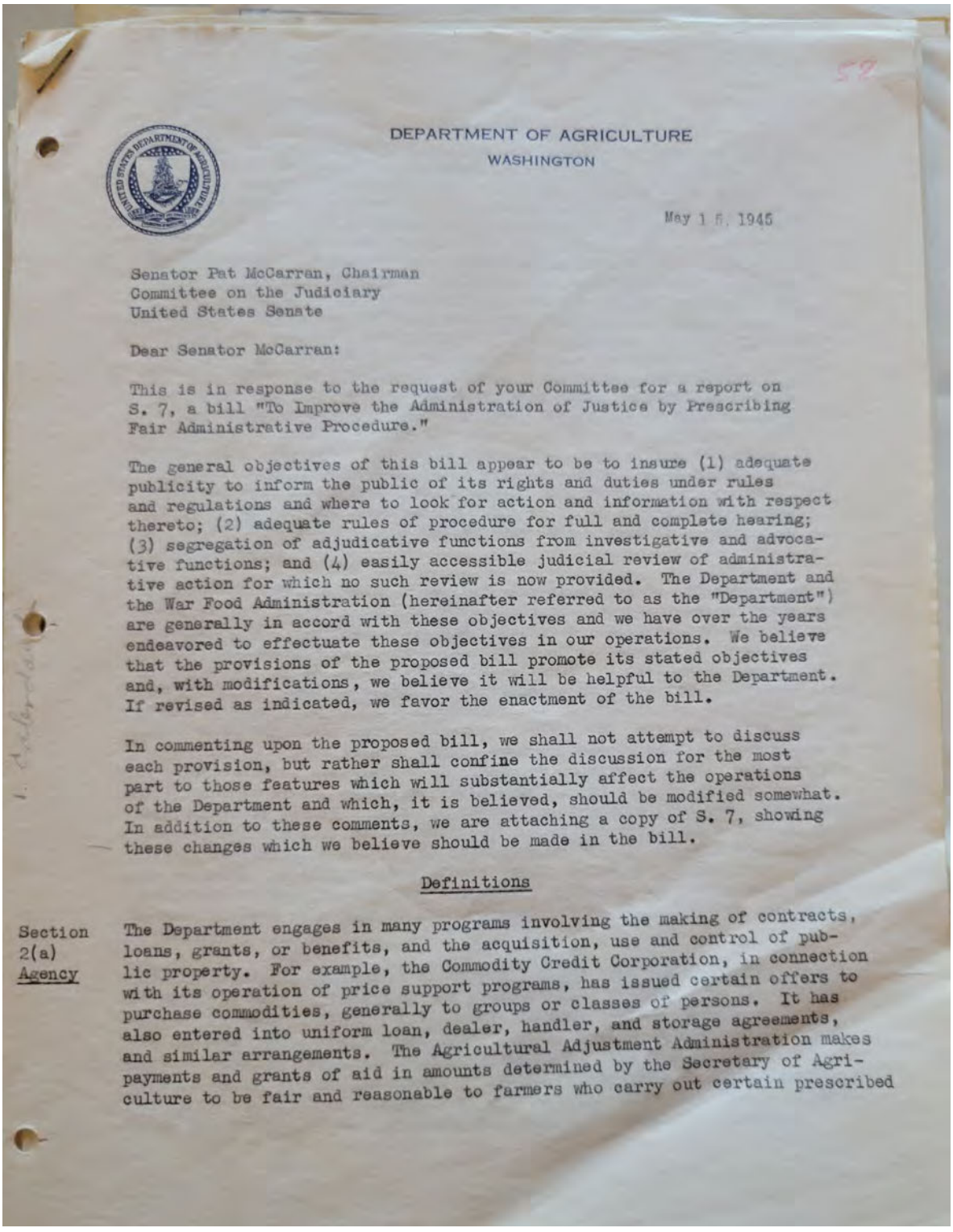
Appendix D

Letter from Claude Wickard, Sec'y of Agriculture, to Sen. Pat McCarran, Chairman, S. Comm. on the Judiciary (May 15, 1945) (11 pages total)



DEPARTMENT OF AGRICULTURE
WASHINGTON

May 15, 1945

Senator Pat McCarran, Chairman
Committee on the Judiciary
United States Senate

Dear Senator McCarran:

This is in response to the request of your Committee for a report on S. 7, a bill "To Improve the Administration of Justice by Prescribing Fair Administrative Procedure."

The general objectives of this bill appear to be to insure (1) adequate publicity to inform the public of its rights and duties under rules and regulations and where to look for action and information with respect thereto; (2) adequate rules of procedure for full and complete hearing; (3) segregation of adjudicative functions from investigative and advocative functions; and (4) easily accessible judicial review of administrative action for which no such review is now provided. The Department and the War Food Administration (hereinafter referred to as the "Department") are generally in accord with these objectives and we have over the years endeavored to effectuate these objectives in our operations. We believe that the provisions of the proposed bill promote its stated objectives and, with modifications, we believe it will be helpful to the Department. If revised as indicated, we favor the enactment of the bill.

In commenting upon the proposed bill, we shall not attempt to discuss each provision, but rather shall confine the discussion for the most part to those features which will substantially affect the operations of the Department and which, it is believed, should be modified somewhat. In addition to these comments, we are attaching a copy of S. 7, showing these changes which we believe should be made in the bill.

Definitions

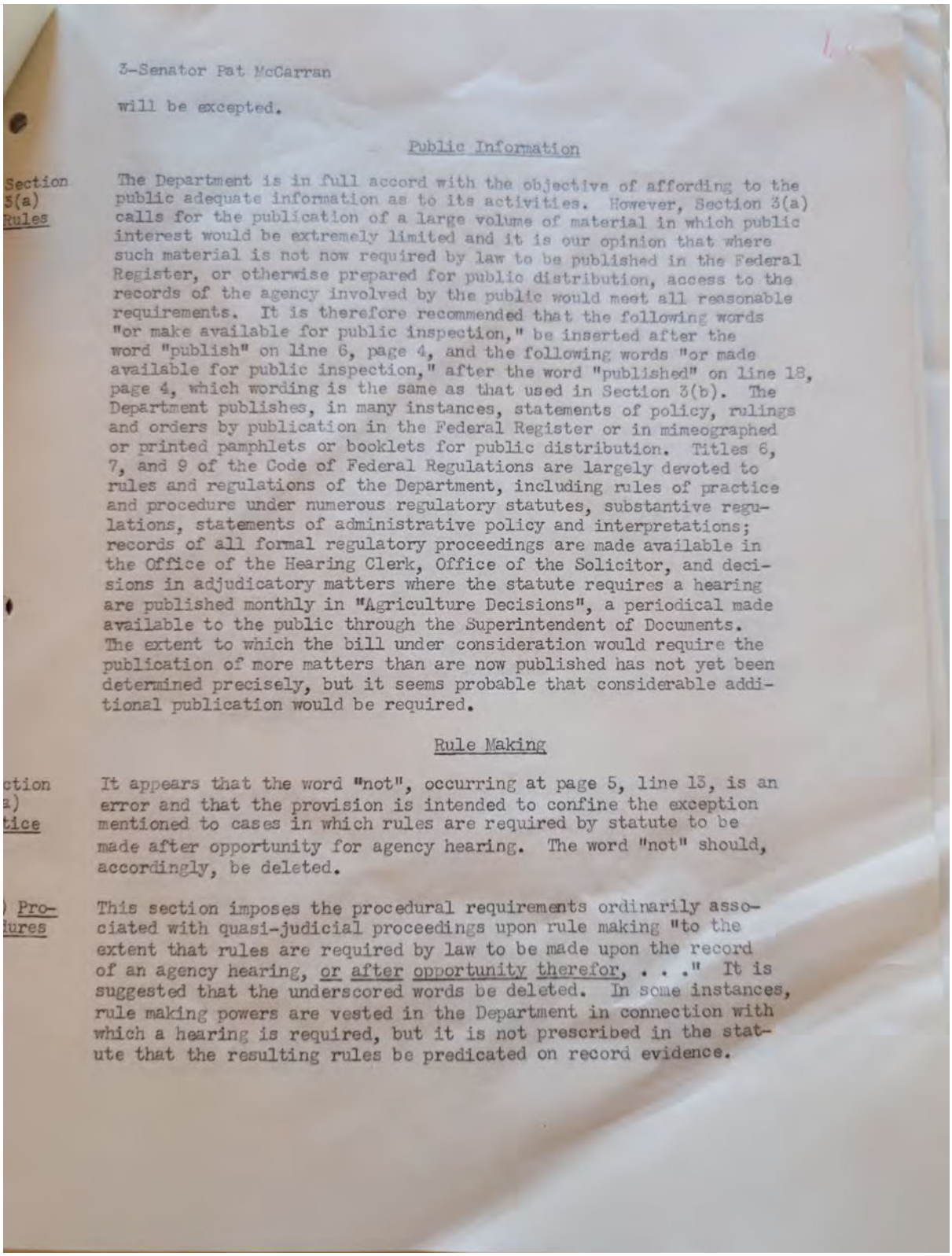
Section 2(a) Agency

The Department engages in many programs involving the making of contracts, loans, grants, or benefits, and the acquisition, use and control of public property. For example, the Commodity Credit Corporation, in connection with its operation of price support programs, has issued certain offers to purchase commodities, generally to groups or classes of persons. It has also entered into uniform loan, dealer, handler, and storage agreements, and similar arrangements. The Agricultural Adjustment Administration makes payments and grants of aid in amounts determined by the Secretary of Agriculture to be fair and reasonable to farmers who carry out certain prescribed

practices designed to effectuate the conservation purposes of the Soil Conservation and Domestic Allotment Act, as amended. The Farm Credit and Farm Security Administrations engage in extensive lending operations necessitating the issuance of regulations and general statements of policy, while the Rural Electrification Administration makes loans for the purpose of financing the construction and operation of electric facilities. The Forest Service and the Soil Conservation Service, in connection with their control over the use of public lands, issue generally applicable rules, which, since they primarily involve the use and control of public property, stand on an entirely different footing than regulations controlling the relations or rights of private persons. If this bill is enacted in its present form and its provisions are literally construed and applied to the management of these lands it will so complicate such management and other activities as to make them, from the Government standpoint, excessively and, we believe, needlessly difficult, cumbersome and costly to handle, and by the same token equally unsatisfactory to those using such lands and their resources. None of the activities mentioned involves adjudication, and, with the exception of the regulations under the Soil Conservation and Domestic Allotment Act, and in connection with some operations, such as a portion of those of the Farm Credit Administration, they involve rule making only if the term is construed in an extremely broad sense.

We doubt whether the need or desirability of a bill to effectuate the purposes of S. 7 arises from the performance of functions such as those just described. For the most part, administrative procedure has been the subject of legislation or of judicial review only where incident to governmental action which impinges on private rights recognized by the Constitution. When engaging in activities such as making benefit payments, grants or loans, or conferring other forms of benefits or privileges, the agencies of the Government, either by implication or by express authorization, have been permitted to employ such procedures as they have found to be appropriate or expedient. In instances in which Congress has felt the need for prescribing specific procedures, it has done so by statutory provision dealing directly with the particular function involved. We believe that any other policy would seriously hamper the performance of such functions. There is, of course, no objection to giving adequate publicity to the programs and their method of operation, and hence, exemption from the provisions of Section 3 is not suggested, although, as pointed out below we wish to call attention to the desirability of one change in the language of Section 3(a).

For the foregoing reasons it is strongly urged that the following language be added to page 2, line 5 of the proposed bill (relating to the definition of "agency"), after striking out the word "and" appearing on page 2, line 3, and substituting a semicolon for the period at the end of line 5, page 2: "and (3) functions primarily concerned with the making of contracts, loans, grants, or benefits, or the procurement, acquisition, disposal, use, control or occupancy of public property." The following comments are predicated on the assumption that the foregoing functions



will be excepted.

Public Information

Section 3(a) Rules

The Department is in full accord with the objective of affording to the public adequate information as to its activities. However, Section 3(a) calls for the publication of a large volume of material in which public interest would be extremely limited and it is our opinion that where such material is not now required by law to be published in the Federal Register, or otherwise prepared for public distribution, access to the records of the agency involved by the public would meet all reasonable requirements. It is therefore recommended that the following words "or make available for public inspection," be inserted after the word "publish" on line 6, page 4, and the following words "or made available for public inspection," after the word "published" on line 18, page 4, which wording is the same as that used in Section 3(b). The Department publishes, in many instances, statements of policy, rulings and orders by publication in the Federal Register or in mimeographed or printed pamphlets or booklets for public distribution. Titles 6, 7, and 9 of the Code of Federal Regulations are largely devoted to rules and regulations of the Department, including rules of practice and procedure under numerous regulatory statutes, substantive regulations, statements of administrative policy and interpretations; records of all formal regulatory proceedings are made available in the Office of the Hearing Clerk, Office of the Solicitor, and decisions in adjudicatory matters where the statute requires a hearing are published monthly in "Agriculture Decisions", a periodical made available to the public through the Superintendent of Documents. The extent to which the bill under consideration would require the publication of more matters than are now published has not yet been determined precisely, but it seems probable that considerable additional publication would be required.

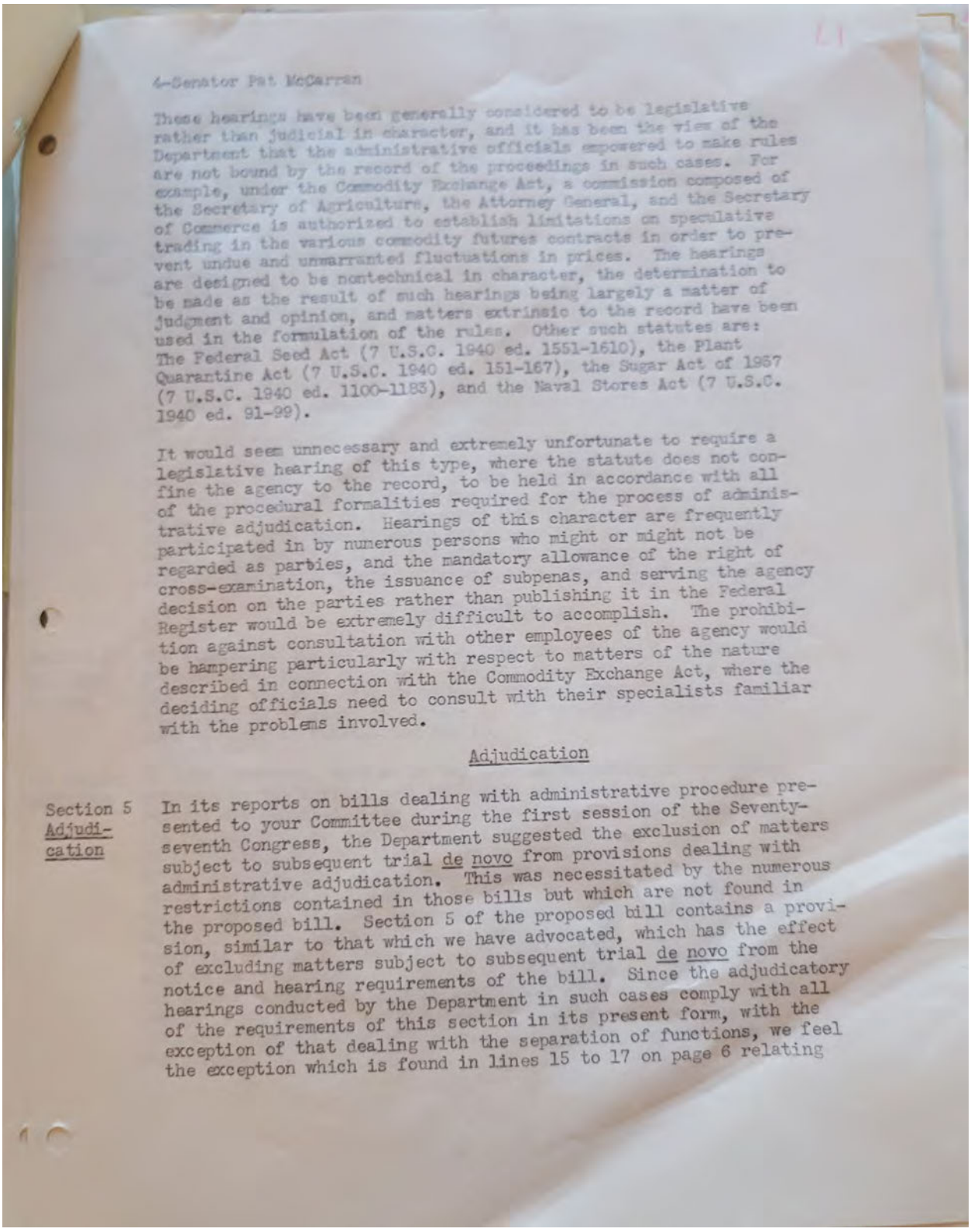
Rule Making

ction a) tice

It appears that the word "not", occurring at page 5, line 13, is an error and that the provision is intended to confine the exception mentioned to cases in which rules are required by statute to be made after opportunity for agency hearing. The word "not" should, accordingly, be deleted.

) Pro- iures

This section imposes the procedural requirements ordinarily associated with quasi-judicial proceedings upon rule making "to the extent that rules are required by law to be made upon the record of an agency hearing, or after opportunity therefor, . . ." It is suggested that the underscored words be deleted. In some instances, rule making powers are vested in the Department in connection with which a hearing is required, but it is not prescribed in the statute that the resulting rules be predicated on record evidence.



4-Senator Pat McCarran

These hearings have been generally considered to be legislative rather than judicial in character, and it has been the view of the Department that the administrative officials empowered to make rules are not bound by the record of the proceedings in such cases. For example, under the Commodity Exchange Act, a commission composed of the Secretary of Agriculture, the Attorney General, and the Secretary of Commerce is authorized to establish limitations on speculative trading in the various commodity futures contracts in order to prevent undue and unwarranted fluctuations in prices. The hearings are designed to be nontechnical in character, the determination to be made as the result of such hearings being largely a matter of judgment and opinion, and matters extrinsic to the record have been used in the formulation of the rules. Other such statutes are: The Federal Seed Act (7 U.S.C. 1940 ed. 1551-1610), the Plant Quarantine Act (7 U.S.C. 1940 ed. 151-167), the Sugar Act of 1937 (7 U.S.C. 1940 ed. 1100-1183), and the Naval Stores Act (7 U.S.C. 1940 ed. 91-99).

It would seem unnecessary and extremely unfortunate to require a legislative hearing of this type, where the statute does not confine the agency to the record, to be held in accordance with all of the procedural formalities required for the process of administrative adjudication. Hearings of this character are frequently participated in by numerous persons who might or might not be regarded as parties, and the mandatory allowance of the right of cross-examination, the issuance of subpenas, and serving the agency decision on the parties rather than publishing it in the Federal Register would be extremely difficult to accomplish. The prohibition against consultation with other employees of the agency would be hampering particularly with respect to matters of the nature described in connection with the Commodity Exchange Act, where the deciding officials need to consult with their specialists familiar with the problems involved.

Adjudication

Section 5 Adjudication

In its reports on bills dealing with administrative procedure presented to your Committee during the first session of the Seventy-seventh Congress, the Department suggested the exclusion of matters subject to subsequent trial de novo from provisions dealing with administrative adjudication. This was necessitated by the numerous restrictions contained in those bills but which are not found in the proposed bill. Section 5 of the proposed bill contains a provision, similar to that which we have advocated, which has the effect of excluding matters subject to subsequent trial de novo from the notice and hearing requirements of the bill. Since the adjudicatory hearings conducted by the Department in such cases comply with all of the requirements of this section in its present form, with the exception of that dealing with the separation of functions, we feel the exception which is found in lines 15 to 17 on page 6 relating

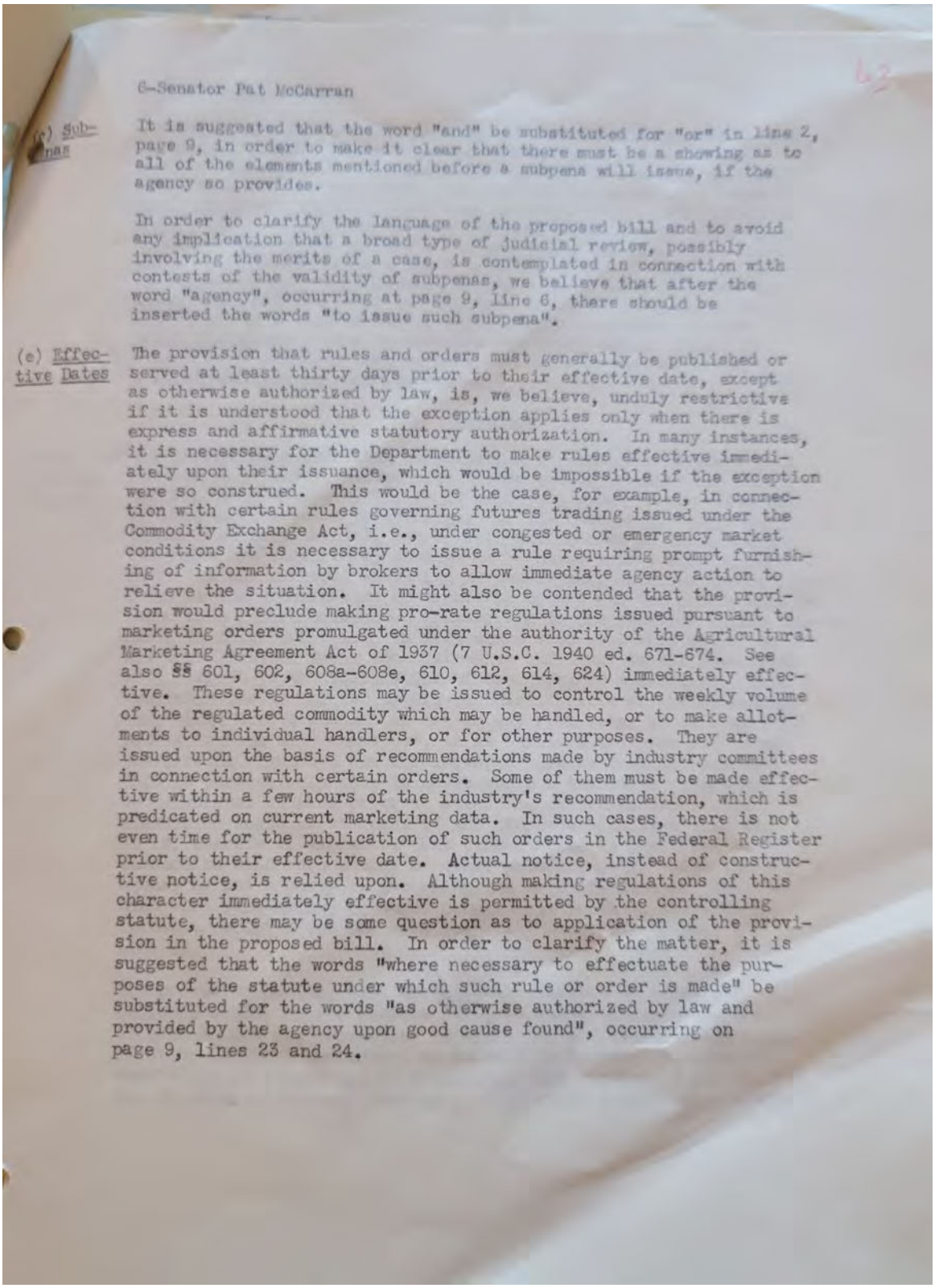
to matters subject to a subsequent trial de novo might well be deleted if our suggestion made hereafter with respect to Section 5(c) (separation of functions) is adopted. This omission would have the desirable effect of assuring adequate but not unnecessarily restrictive procedural safeguards in connection with all administrative adjudications.

(c) Separation of Functions — The requirement of separation of functions, as stated in the proposed bill, is clearly desirable in connection with proceedings in which the agency is interested in an adversary capacity. However, we do not believe it to be necessary in connection with matters such as reparation proceedings instituted under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 1940 ed. 181-229), and the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 1940 ed. 499a-r). In such proceedings, the Government has no interest and is not represented by counsel. It is desirable to permit consultation by the presiding officer with agency officials in order to aid in the development of the decision because of their familiarity with trade practices and other technical matters. It is believed that the purposes of the proposed bill would not be impaired and that the operations of the Department would be facilitated if separation of functions were not required in this situation. Accordingly, it is suggested that this requirement be limited to situations in which the agency is a party to the proceeding by inserting after the figure 8, appearing on page 7, line 17, the words: "where the agency is a party to the proceeding".

Ancillary Matters

Section 6 Ancillary Matters — The meaning of the word "authority" in the introductory phrase of this section, found on page 8, line 2, seems uncertain, in view of the use of the same word in an apparently different sense in the definition of "agency" in Section 2. It is suggested that the word "action" be substituted for it.

(b) Investigations — In some instances, such as in the case of marketing orders issued pursuant to the Agricultural Marketing Agreement Act of 1937, reports are required under a provision of the statute permitting the inclusion of necessary and incidental provisions in such orders. It is doubtful whether these could be required under the language of the proposed bill making unenforcible any requirement of a report except as expressly authorized by law. The word "expressly" occurring on page 8, line 18, seems to impose an unnecessary restriction on agency action and should be deleted. Clauses (2), (3), and (4), occurring on page 8, lines 18 to 21, stating additional restrictions, seem to be unnecessary in view of the requirement of clause (1) that all investigatory acts must be authorized by law. We believe they should be deleted, in order to remove uncertainty in connection with the interpretation of the provision, since they serve no useful purpose.



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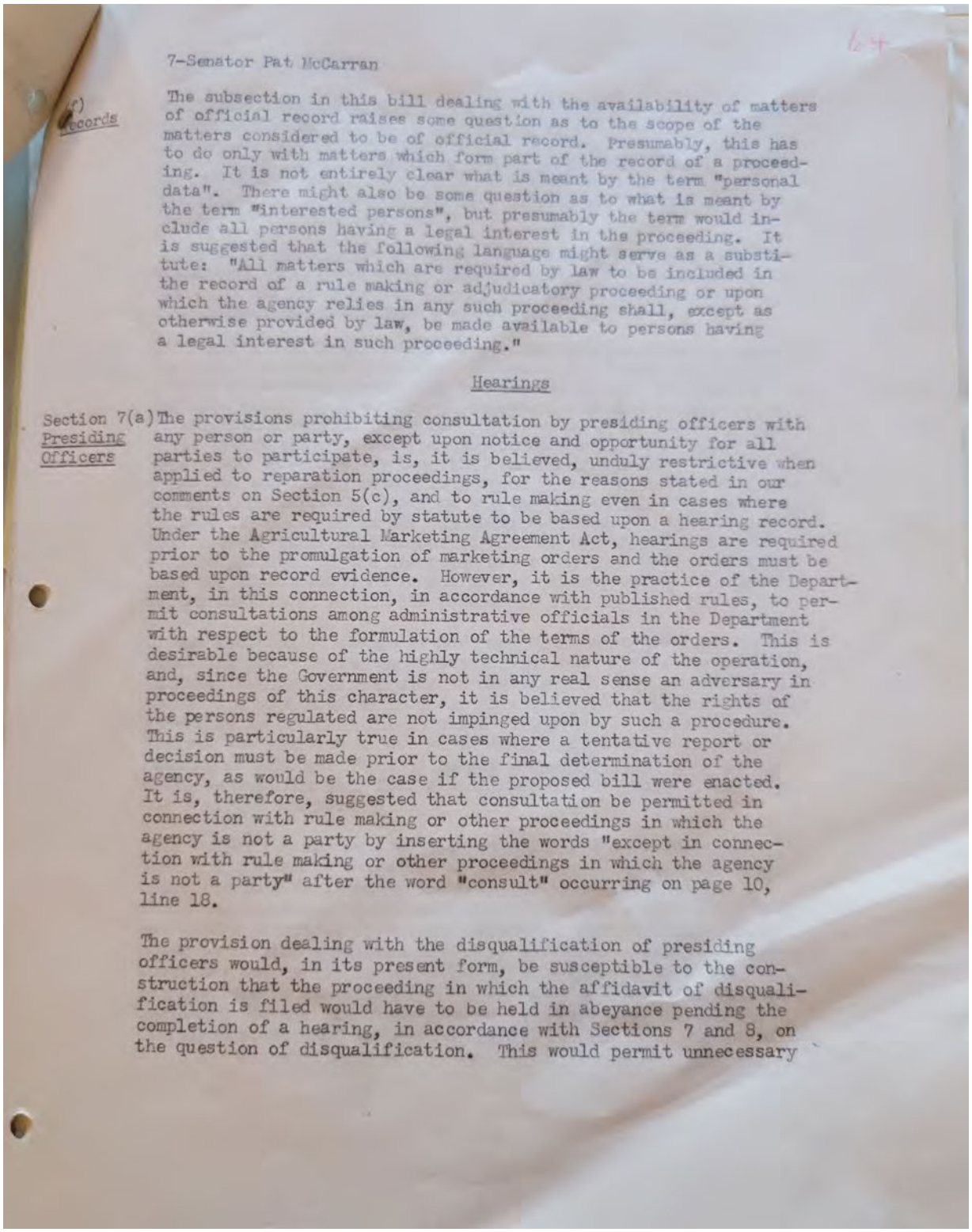
(c) Subpenas

It is suggested that the word "and" be substituted for "or" in line 2, page 9, in order to make it clear that there must be a showing as to all of the elements mentioned before a subpena will issue, if the agency so provides.

In order to clarify the language of the proposed bill and to avoid any implication that a broad type of judicial review, possibly involving the merits of a case, is contemplated in connection with contests of the validity of subpenas, we believe that after the word "agency", occurring at page 9, line 6, there should be inserted the words "to issue such subpena".

(e) Effective Dates

The provision that rules and orders must generally be published or served at least thirty days prior to their effective date, except as otherwise authorized by law, is, we believe, unduly restrictive if it is understood that the exception applies only when there is express and affirmative statutory authorization. In many instances, it is necessary for the Department to make rules effective immediately upon their issuance, which would be impossible if the exception were so construed. This would be the case, for example, in connection with certain rules governing futures trading issued under the Commodity Exchange Act, i.e., under congested or emergency market conditions it is necessary to issue a rule requiring prompt furnishing of information by brokers to allow immediate agency action to relieve the situation. It might also be contended that the provision would preclude making pro-rate regulations issued pursuant to marketing orders promulgated under the authority of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1940 ed. 671-674. See also §§ 601, 602, 608a-608e, 610, 612, 614, 624) immediately effective. These regulations may be issued to control the weekly volume of the regulated commodity which may be handled, or to make allotments to individual handlers, or for other purposes. They are issued upon the basis of recommendations made by industry committees in connection with certain orders. Some of them must be made effective within a few hours of the industry's recommendation, which is predicated on current marketing data. In such cases, there is not even time for the publication of such orders in the Federal Register prior to their effective date. Actual notice, instead of constructive notice, is relied upon. Although making regulations of this character immediately effective is permitted by the controlling statute, there may be some question as to application of the provision in the proposed bill. In order to clarify the matter, it is suggested that the words "where necessary to effectuate the purposes of the statute under which such rule or order is made" be substituted for the words "as otherwise authorized by law and provided by the agency upon good cause found", occurring on page 9, lines 23 and 24.



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(f) Records

The subsection in this bill dealing with the availability of matters of official record raises some question as to the scope of the matters considered to be of official record. Presumably, this has to do only with matters which form part of the record of a proceeding. It is not entirely clear what is meant by the term "personal data". There might also be some question as to what is meant by the term "interested persons", but presumably the term would include all persons having a legal interest in the proceeding. It is suggested that the following language might serve as a substitute: "All matters which are required by law to be included in the record of a rule making or adjudicatory proceeding or upon which the agency relies in any such proceeding shall, except as otherwise provided by law, be made available to persons having a legal interest in such proceeding."

Hearings

Section 7(a) Presiding Officers

The provisions prohibiting consultation by presiding officers with any person or party, except upon notice and opportunity for all parties to participate, is, it is believed, unduly restrictive when applied to reparation proceedings, for the reasons stated in our comments on Section 5(c), and to rule making even in cases where the rules are required by statute to be based upon a hearing record. Under the Agricultural Marketing Agreement Act, hearings are required prior to the promulgation of marketing orders and the orders must be based upon record evidence. However, it is the practice of the Department, in this connection, in accordance with published rules, to permit consultations among administrative officials in the Department with respect to the formulation of the terms of the orders. This is desirable because of the highly technical nature of the operation, and, since the Government is not in any real sense an adversary in proceedings of this character, it is believed that the rights of the persons regulated are not impinged upon by such a procedure. This is particularly true in cases where a tentative report or decision must be made prior to the final determination of the agency, as would be the case if the proposed bill were enacted. It is, therefore, suggested that consultation be permitted in connection with rule making or other proceedings in which the agency is not a party by inserting the words "except in connection with rule making or other proceedings in which the agency is not a party" after the word "consult" occurring on page 10, line 18.

The provision dealing with the disqualification of presiding officers would, in its present form, be susceptible to the construction that the proceeding in which the affidavit of disqualification is filed would have to be held in abeyance pending the completion of a hearing, in accordance with Sections 7 and 8, on the question of disqualification. This would permit unnecessary

and unwarranted delay. It is recommended that such pleas be handled by the presiding officer at the hearing in the same way they are treated in judicial proceedings, the petitioner's rights being protected by the decision being made a part of the record, subject to review on appeal. This could be accomplished by striking the word "another" in line 23, page 10, and the words "after hearing" in line 24 on the same page.

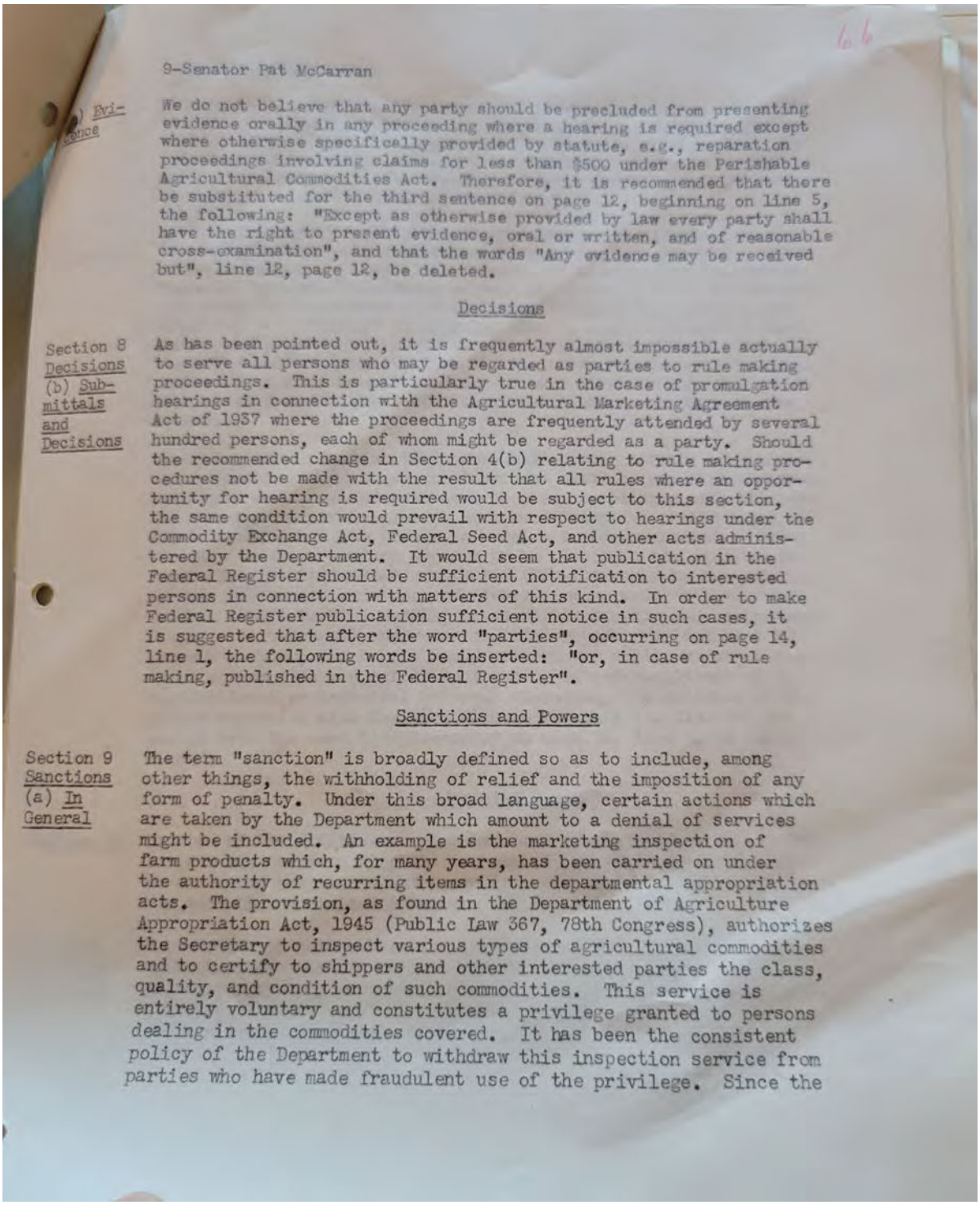
In order to clarify the provision dealing with the appointments of examiners, it is recommended that the word "by" be substituted for the word "for" on page 11, line 2, thus making it clear that the agency concerned would make the appointments.

(b) Hearing Powers

In connection with the enumeration of hearing powers to be exercised by presiding officers, it seems desirable to provide substantive authority in the proposed bill for the issuance of subpenas by such officers rather than confining the use of subpenas to those cases in which authority to issue them is given by other statutes. This would insure that all parties in proceedings conducted under the prescribed procedure may have the benefit of the use of this process, under the conditions stated in Section 6(c). We believe that this can be accomplished by deleting the words "authorized by law" found on page 11, lines 17 to 18. In order to remove any ambiguity in this regard, it is also suggested that Section 6(c) of the proposed bill be modified by the insertion after the word "by" on page 8, line 24, of the words "this Act or any other", and by the deletion of the words "and within its powers" in line 16, page 11.

If the recommended change is made and hearing officers are thereby given the power to summon witnesses, it would appear desirable to include in this bill a provision dealing with the fees and mileage to be paid to witnesses in order to avoid any hardship which might otherwise result from the issuance of subpenas. Accordingly, we suggest the addition of a new subsection after line 22, page 12, reading as follows: "(e) Witnesses subpenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts."

This subsection may be viewed as attempting to enumerate all powers which can be exercised by presiding officers under the bill. If this is intended to be an exclusive enumeration, it should be broadened by the addition of certain powers which are ordinarily exercised by hearing officers. Specifically, the power to examine witnesses should be included. Instead of the power set out as (5) in the bill, it is suggested that the following language be substituted: "Do all acts and take all measures necessary for the maintenance of order at the hearing and the efficient conduct of the proceeding."



9-Senator Pat McCarran

(a) Evidence

We do not believe that any party should be precluded from presenting evidence orally in any proceeding where a hearing is required except where otherwise specifically provided by statute, e.g., reparation proceedings involving claims for less than $500 under the Perishable Agricultural Commodities Act. Therefore, it is recommended that there be substituted for the third sentence on page 12, beginning on line 5, the following: "Except as otherwise provided by law every party shall have the right to present evidence, oral or written, and of reasonable cross-examination", and that the words "Any evidence may be received but", line 12, page 12, be deleted.

Decisions

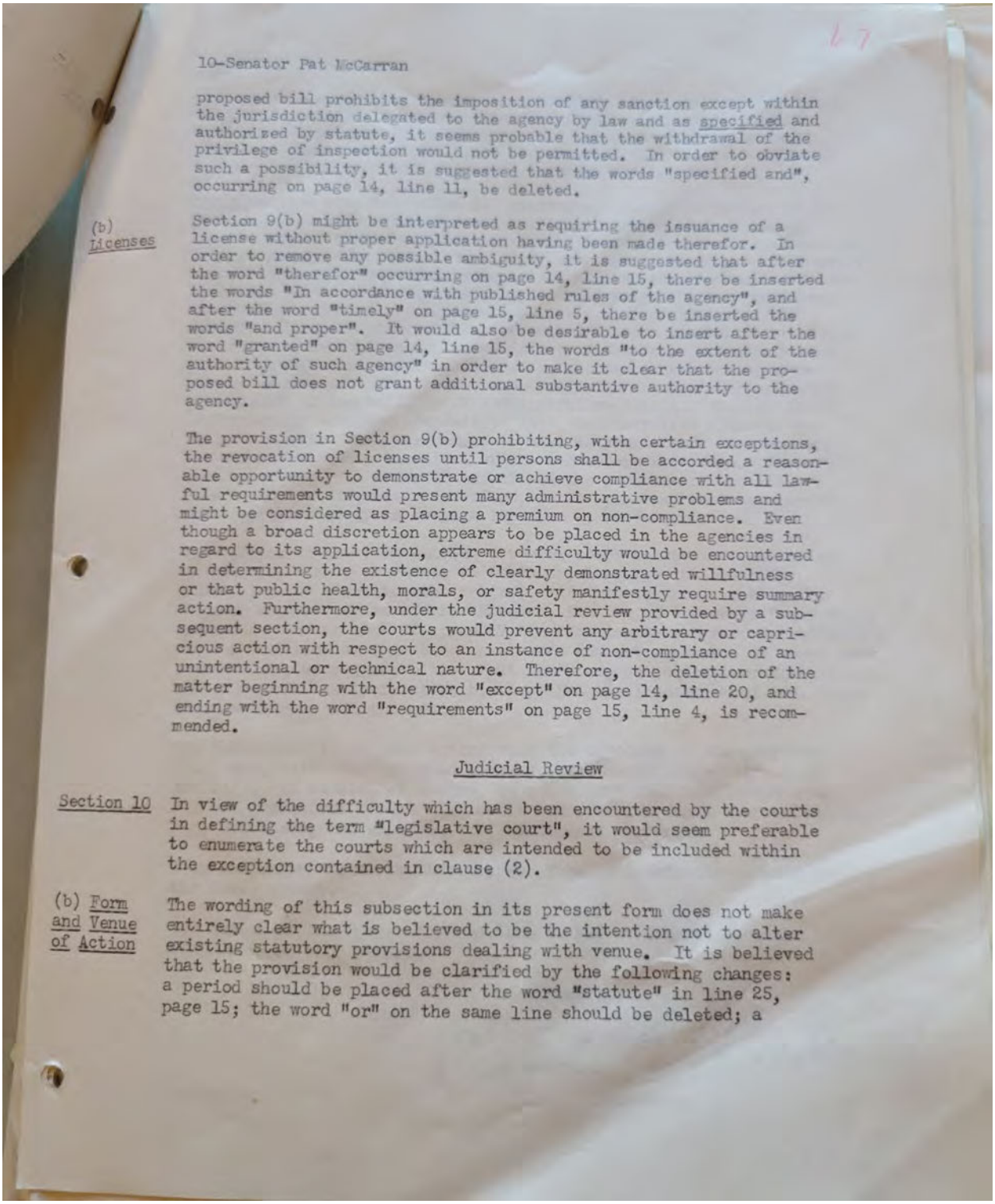
Section 8 Decisions (b) Submittals and Decisions

As has been pointed out, it is frequently almost impossible actually to serve all persons who may be regarded as parties to rule making proceedings. This is particularly true in the case of promulgation hearings in connection with the Agricultural Marketing Agreement Act of 1937 where the proceedings are frequently attended by several hundred persons, each of whom might be regarded as a party. Should the recommended change in Section 4(b) relating to rule making procedures not be made with the result that all rules where an opportunity for hearing is required would be subject to this section, the same condition would prevail with respect to hearings under the Commodity Exchange Act, Federal Seed Act, and other acts administered by the Department. It would seem that publication in the Federal Register should be sufficient notification to interested persons in connection with matters of this kind. In order to make Federal Register publication sufficient notice in such cases, it is suggested that after the word "parties", occurring on page 14, line 1, the following words be inserted: "or, in case of rule making, published in the Federal Register".

Sanctions and Powers

Section 9 Sanctions (a) In General

The term "sanction" is broadly defined so as to include, among other things, the withholding of relief and the imposition of any form of penalty. Under this broad language, certain actions which are taken by the Department which amount to a denial of services might be included. An example is the marketing inspection of farm products which, for many years, has been carried on under the authority of recurring items in the departmental appropriation acts. The provision, as found in the Department of Agriculture Appropriation Act, 1945 (Public Law 367, 78th Congress), authorizes the Secretary to inspect various types of agricultural commodities and to certify to shippers and other interested parties the class, quality, and condition of such commodities. This service is entirely voluntary and constitutes a privilege granted to persons dealing in the commodities covered. It has been the consistent policy of the Department to withdraw this inspection service from parties who have made fraudulent use of the privilege. Since the



10-Senator Pat McCarran

proposed bill prohibits the imposition of any sanction except within the jurisdiction delegated to the agency by law and as specified and authorized by statute, it seems probable that the withdrawal of the privilege of inspection would not be permitted. In order to obviate such a possibility, it is suggested that the words "specified and", occurring on page 14, line 11, be deleted.

(b) Licenses

Section 9(b) might be interpreted as requiring the issuance of a license without proper application having been made therefor. In order to remove any possible ambiguity, it is suggested that after the word "therefor" occurring on page 14, line 15, there be inserted the words "In accordance with published rules of the agency", and after the word "timely" on page 15, line 5, there be inserted the words "and proper". It would also be desirable to insert after the word "granted" on page 14, line 15, the words "to the extent of the authority of such agency" in order to make it clear that the proposed bill does not grant additional substantive authority to the agency.

The provision in Section 9(b) prohibiting, with certain exceptions, the revocation of licenses until persons shall be accorded a reasonable opportunity to demonstrate or achieve compliance with all lawful requirements would present many administrative problems and might be considered as placing a premium on non-compliance. Even though a broad discretion appears to be placed in the agencies in regard to its application, extreme difficulty would be encountered in determining the existence of clearly demonstrated willfulness or that public health, morals, or safety manifestly require summary action. Furthermore, under the judicial review provided by a subsequent section, the courts would prevent any arbitrary or capricious action with respect to an instance of non-compliance of an unintentional or technical nature. Therefore, the deletion of the matter beginning with the word "except" on page 14, line 20, and ending with the word "requirements" on page 15, line 4, is recommended.

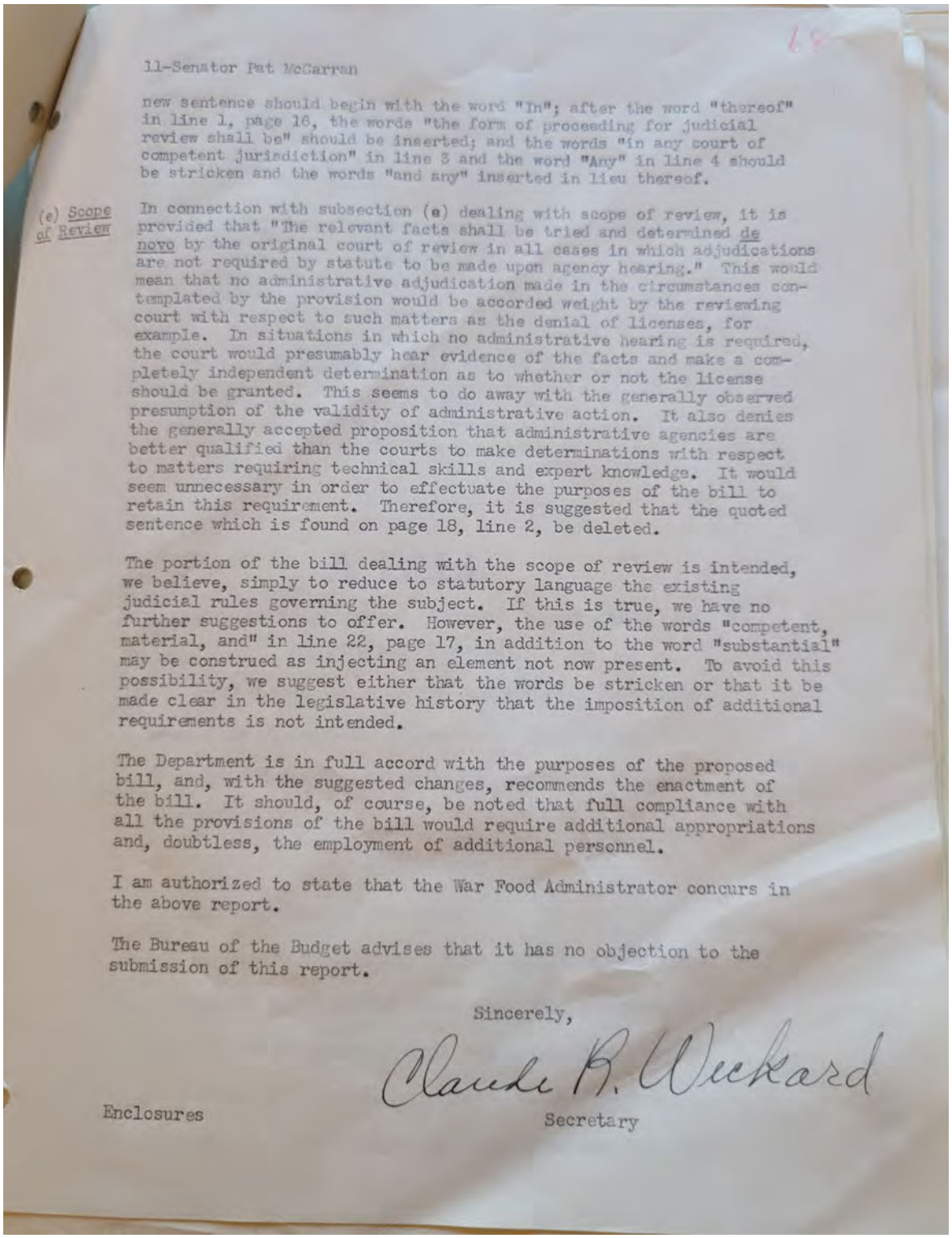
Judicial Review

Section 10

In view of the difficulty which has been encountered by the courts in defining the term "legislative court", it would seem preferable to enumerate the courts which are intended to be included within the exception contained in clause (2).

(b) Form and Venue of Action

The wording of this subsection in its present form does not make entirely clear what is believed to be the intention not to alter existing statutory provisions dealing with venue. It is believed that the provision would be clarified by the following changes: a period should be placed after the word "statute" in line 25, page 15; the word "or" on the same line should be deleted; a



11-Senator Pat McCarran

new sentence should begin with the word "In"; after the word "thereof" in line 1, page 16, the words "the form of proceeding for judicial review shall be" should be inserted; and the words "in any court of competent jurisdiction" in line 3 and the word "Any" in line 4 should be stricken and the words "and any" inserted in lieu thereof.

(e) Scope of Review

In connection with subsection (e) dealing with scope of review, it is provided that "The relevant facts shall be tried and determined de novo by the original court of review in all cases in which adjudications are not required by statute to be made upon agency hearing." This would mean that no administrative adjudication made in the circumstances contemplated by the provision would be accorded weight by the reviewing court with respect to such matters as the denial of licenses, for example. In situations in which no administrative hearing is required, the court would presumably hear evidence of the facts and make a completely independent determination as to whether or not the license should be granted. This seems to do away with the generally observed presumption of the validity of administrative action. It also denies the generally accepted proposition that administrative agencies are better qualified than the courts to make determinations with respect to matters requiring technical skills and expert knowledge. It would seem unnecessary in order to effectuate the purposes of the bill to retain this requirement. Therefore, it is suggested that the quoted sentence which is found on page 18, line 2, be deleted.

The portion of the bill dealing with the scope of review is intended, we believe, simply to reduce to statutory language the existing judicial rules governing the subject. If this is true, we have no further suggestions to offer. However, the use of the words "competent, material, and" in line 22, page 17, in addition to the word "substantial" may be construed as injecting an element not now present. To avoid this possibility, we suggest either that the words be stricken or that it be made clear in the legislative history that the imposition of additional requirements is not intended.

The Department is in full accord with the purposes of the proposed bill, and, with the suggested changes, recommends the enactment of the bill. It should, of course, be noted that full compliance with all the provisions of the bill would require additional appropriations and, doubtless, the employment of additional personnel.

I am authorized to state that the War Food Administrator concurs in the above report.

The Bureau of the Budget advises that it has no objection to the submission of this report.

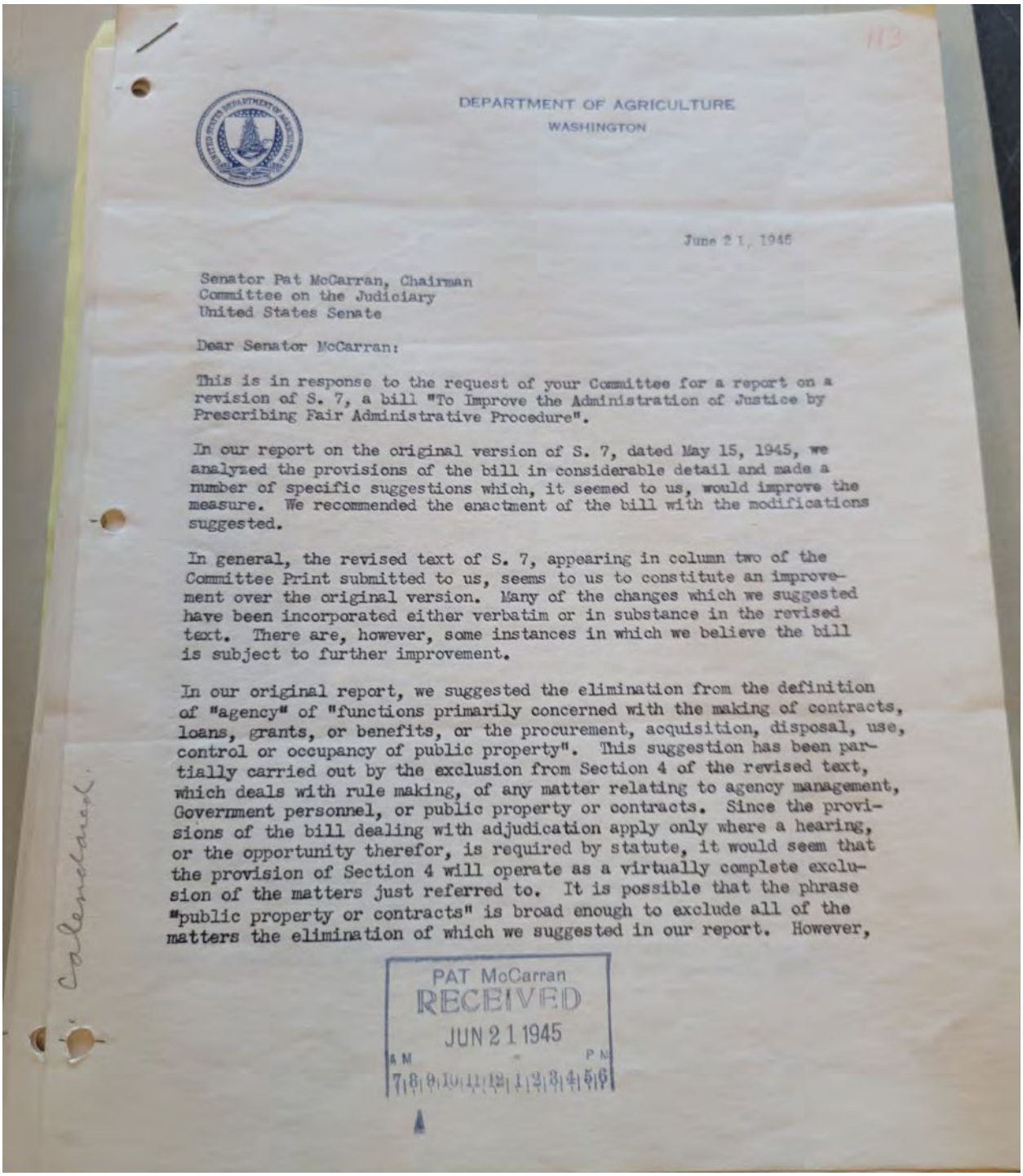
Sincerely,

Claude R. Wickard

Secretary

Enclosures

Letter from Claude Wickard, Sec'y of Agriculture, to Sen. Pat McCarran, Chairman, S. Comm. on the Judiciary (June 21, 1945) (7 pages total)



DEPARTMENT OF AGRICULTURE
WASHINGTON

June 21, 1945

Senator Pat McCarran, Chairman
Committee on the Judiciary
United States Senate

Dear Senator McCarran:

This is in response to the request of your Committee for a report on a revision of S. 7, a bill "To Improve the Administration of Justice by Prescribing Fair Administrative Procedure".

In our report on the original version of S. 7, dated May 15, 1945, we analyzed the provisions of the bill in considerable detail and made a number of specific suggestions which, it seemed to us, would improve the measure. We recommended the enactment of the bill with the modifications suggested.

In general, the revised text of S. 7, appearing in column two of the Committee Print submitted to us, seems to us to constitute an improvement over the original version. Many of the changes which we suggested have been incorporated either verbatim or in substance in the revised text. There are, however, some instances in which we believe the bill is subject to further improvement.

In our original report, we suggested the elimination from the definition of "agency" of "functions primarily concerned with the making of contracts, loans, grants, or benefits, or the procurement, acquisition, disposal, use, control or occupancy of public property". This suggestion has been partially carried out by the exclusion from Section 4 of the revised text, which deals with rule making, of any matter relating to agency management, Government personnel, or public property or contracts. Since the provisions of the bill dealing with adjudication apply only where a hearing, or the opportunity therefor, is required by statute, it would seem that the provision of Section 4 will operate as a virtually complete exclusion of the matters just referred to. It is possible that the phrase "public property or contracts" is broad enough to exclude all of the matters the elimination of which we suggested in our report. However,

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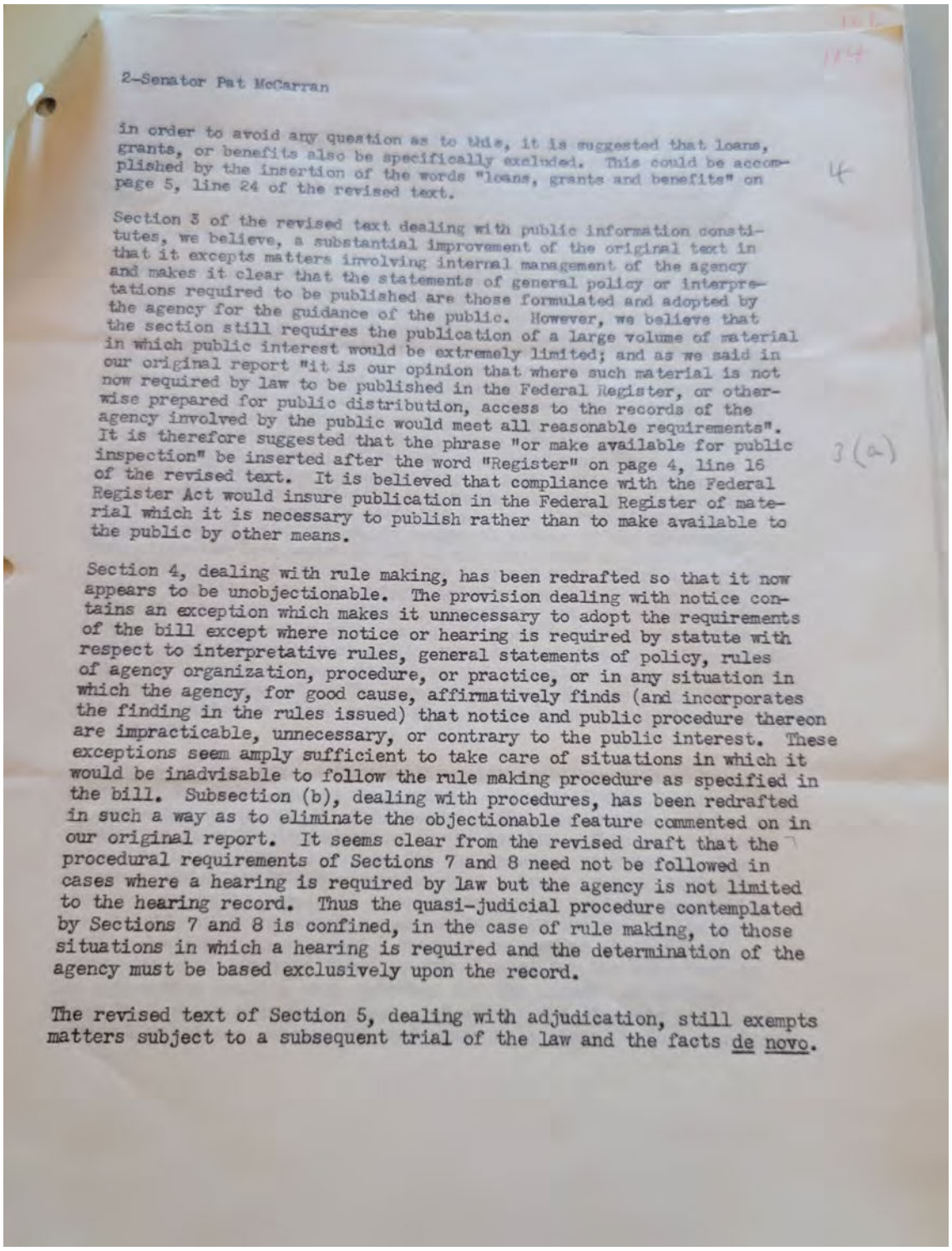


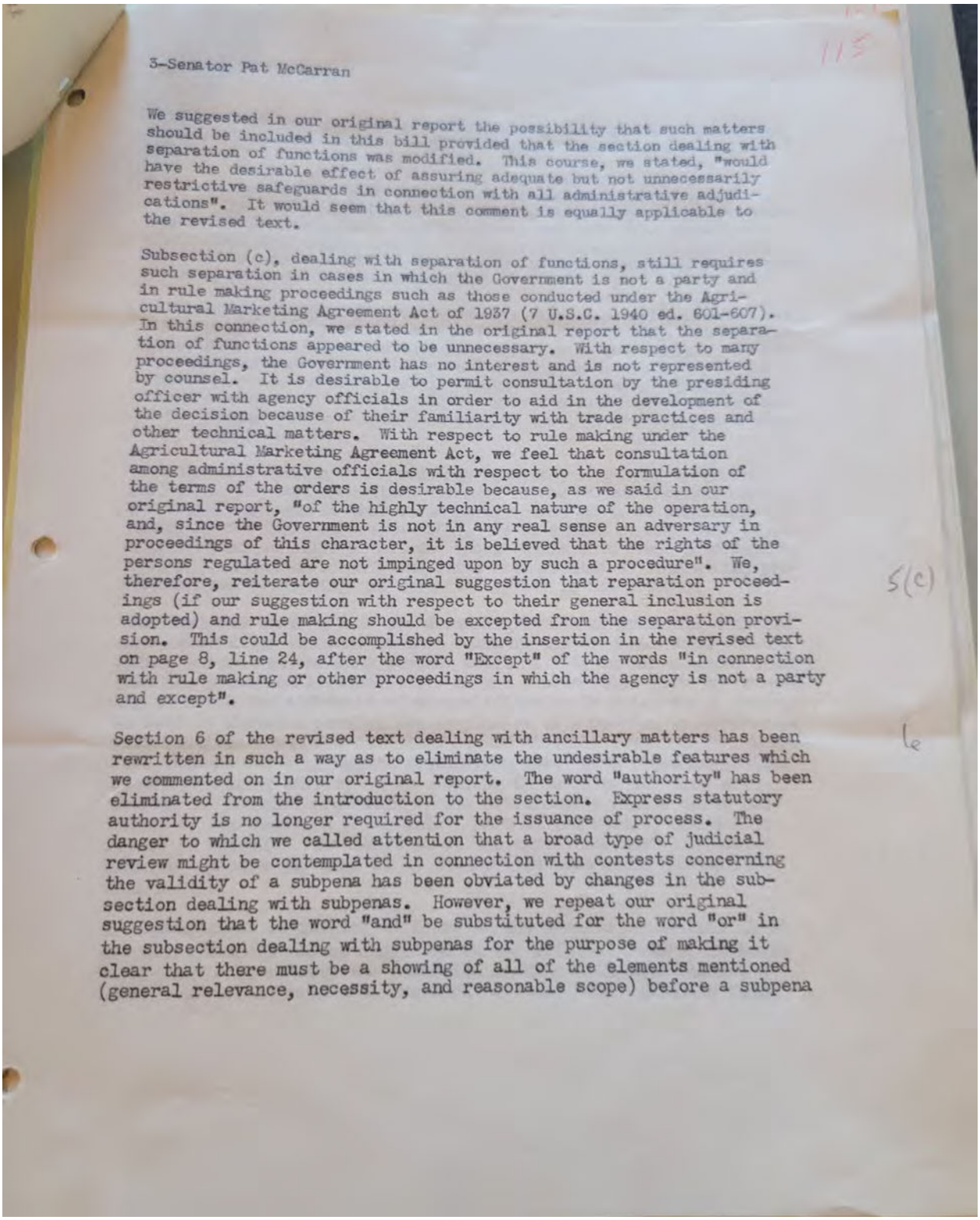
2-Senator Pat McCarran

in order to avoid any question as to this, it is suggested that loans, grants, or benefits also be specifically excluded. This could be accomplished by the insertion of the words "loans, grants and benefits" on page 5, line 24 of the revised text.

Section 3 of the revised text dealing with public information constitutes, we believe, a substantial improvement of the original text in that it excepts matters involving internal management of the agency and makes it clear that the statements of general policy or interpretations required to be published are those formulated and adopted by the agency for the guidance of the public. However, we believe that the section still requires the publication of a large volume of material in which public interest would be extremely limited; and as we said in our original report "it is our opinion that where such material is not now required by law to be published in the Federal Register, or otherwise prepared for public distribution, access to the records of the agency involved by the public would meet all reasonable requirements". It is therefore suggested that the phrase "or make available for public inspection" be inserted after the word "Register" on page 4, line 16 of the revised text. It is believed that compliance with the Federal Register Act would insure publication in the Federal Register of material which it is necessary to publish rather than to make available to the public by other means.

Section 4, dealing with rule making, has been redrafted so that it now appears to be unobjectionable. The provision dealing with notice contains an exception which makes it unnecessary to adopt the requirements of the bill except where notice or hearing is required by statute with respect to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency, for good cause, affirmatively finds (and incorporates the finding in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. These exceptions seem amply sufficient to take care of situations in which it would be inadvisable to follow the rule making procedure as specified in the bill. Subsection (b), dealing with procedures, has been redrafted in such a way as to eliminate the objectionable feature commented on in our original report. It seems clear from the revised draft that the procedural requirements of Sections 7 and 8 need not be followed in cases where a hearing is required by law but the agency is not limited to the hearing record. Thus the quasi-judicial procedure contemplated by Sections 7 and 8 is confined, in the case of rule making, to those situations in which a hearing is required and the determination of the agency must be based exclusively upon the record.

The revised text of Section 5, dealing with adjudication, still exempts matters subject to a subsequent trial of the law and the facts de novo.



3-Senator Pat McCarran

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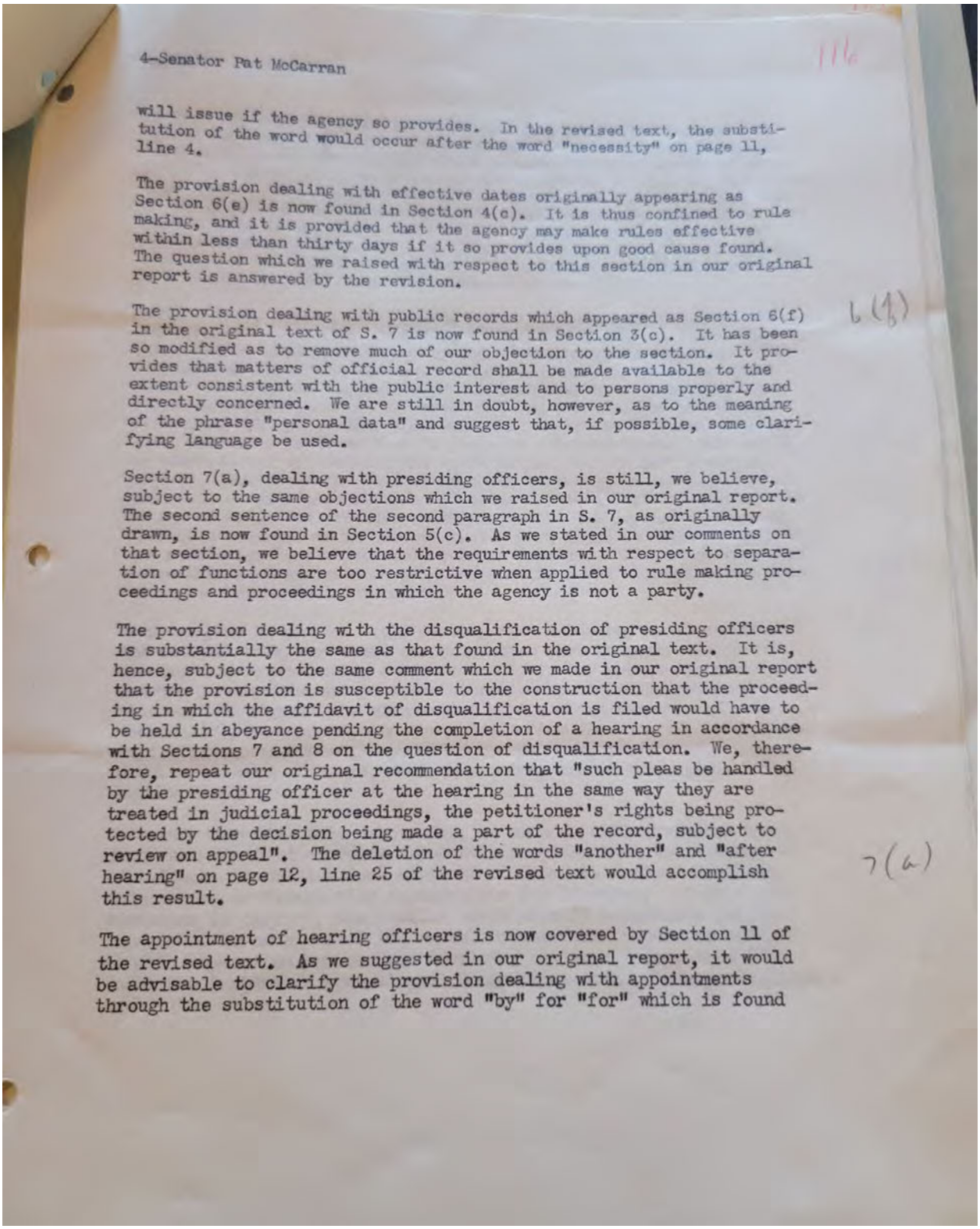
We suggested in our original report the possibility that such matters should be included in this bill provided that the section dealing with separation of functions was modified. This course, we stated, "would have the desirable effect of assuring adequate but not unnecessarily restrictive safeguards in connection with all administrative adjudications". It would seem that this comment is equally applicable to the revised text.

Subsection (c), dealing with separation of functions, still requires such separation in cases in which the Government is not a party and in rule making proceedings such as those conducted under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 1940 ed. 601-607). In this connection, we stated in the original report that the separation of functions appeared to be unnecessary. With respect to many proceedings, the Government has no interest and is not represented by counsel. It is desirable to permit consultation by the presiding officer with agency officials in order to aid in the development of the decision because of their familiarity with trade practices and other technical matters. With respect to rule making under the Agricultural Marketing Agreement Act, we feel that consultation among administrative officials with respect to the formulation of the terms of the orders is desirable because, as we said in our original report, "of the highly technical nature of the operation, and, since the Government is not in any real sense an adversary in proceedings of this character, it is believed that the rights of the persons regulated are not impinged upon by such a procedure". We, therefore, reiterate our original suggestion that reparation proceedings (if our suggestion with respect to their general inclusion is adopted) and rule making should be excepted from the separation provision. This could be accomplished by the insertion in the revised text on page 8, line 24, after the word "Except" of the words "in connection with rule making or other proceedings in which the agency is not a party and except".

5(c)

Section 6 of the revised text dealing with ancillary matters has been rewritten in such a way as to eliminate the undesirable features which we commented on in our original report. The word "authority" has been eliminated from the introduction to the section. Express statutory authority is no longer required for the issuance of process. The danger to which we called attention that a broad type of judicial review might be contemplated in connection with contests concerning the validity of a subpena has been obviated by changes in the subsection dealing with subpenas. However, we repeat our original suggestion that the word "and" be substituted for the word "or" in the subsection dealing with subpenas for the purpose of making it clear that there must be a showing of all of the elements mentioned (general relevance, necessity, and reasonable scope) before a subpena



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will issue if the agency so provides. In the revised text, the substitution of the word would occur after the word "necessity" on page 11, line 4.

The provision dealing with effective dates originally appearing as Section 6(e) is now found in Section 4(c). It is thus confined to rule making, and it is provided that the agency may make rules effective within less than thirty days if it so provides upon good cause found. The question which we raised with respect to this section in our original report is answered by the revision.

The provision dealing with public records which appeared as Section 6(f) in the original text of S. 7 is now found in Section 3(c). It has been so modified as to remove much of our objection to the section. It provides that matters of official record shall be made available to the extent consistent with the public interest and to persons properly and directly concerned. We are still in doubt, however, as to the meaning of the phrase "personal data" and suggest that, if possible, some clarifying language be used.

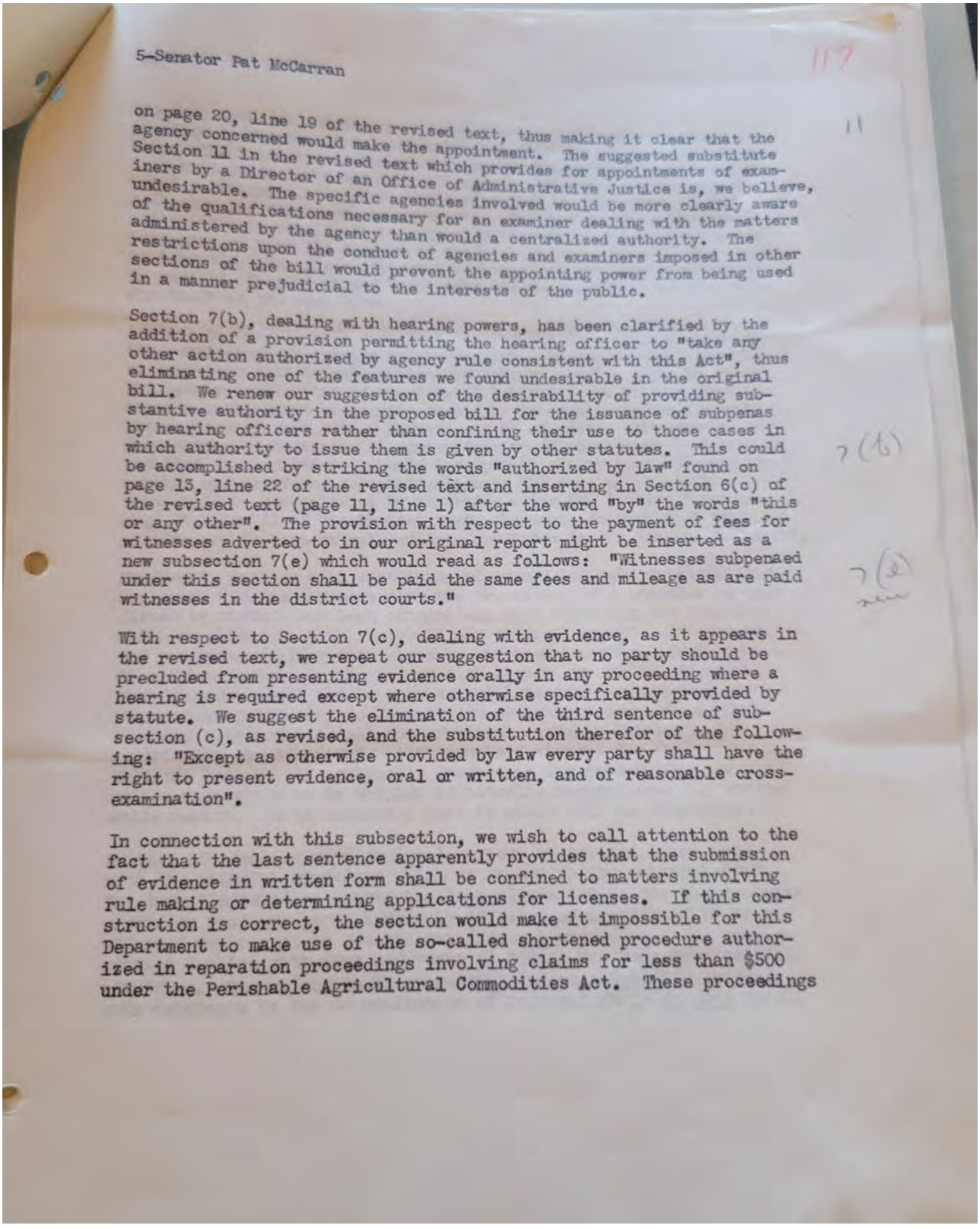
6(f)

Section 7(a), dealing with presiding officers, is still, we believe, subject to the same objections which we raised in our original report. The second sentence of the second paragraph in S. 7, as originally drawn, is now found in Section 5(c). As we stated in our comments on that section, we believe that the requirements with respect to separation of functions are too restrictive when applied to rule making proceedings and proceedings in which the agency is not a party.

The provision dealing with the disqualification of presiding officers is substantially the same as that found in the original text. It is, hence, subject to the same comment which we made in our original report that the provision is susceptible to the construction that the proceeding in which the affidavit of disqualification is filed would have to be held in abeyance pending the completion of a hearing in accordance with Sections 7 and 8 on the question of disqualification. We, therefore, repeat our original recommendation that "such pleas be handled by the presiding officer at the hearing in the same way they are treated in judicial proceedings, the petitioner's rights being protected by the decision being made a part of the record, subject to review on appeal". The deletion of the words "another" and "after hearing" on page 12, line 25 of the revised text would accomplish this result.

7(a)

The appointment of hearing officers is now covered by Section 11 of the revised text. As we suggested in our original report, it would be advisable to clarify the provision dealing with appointments through the substitution of the word "by" for "for" which is found



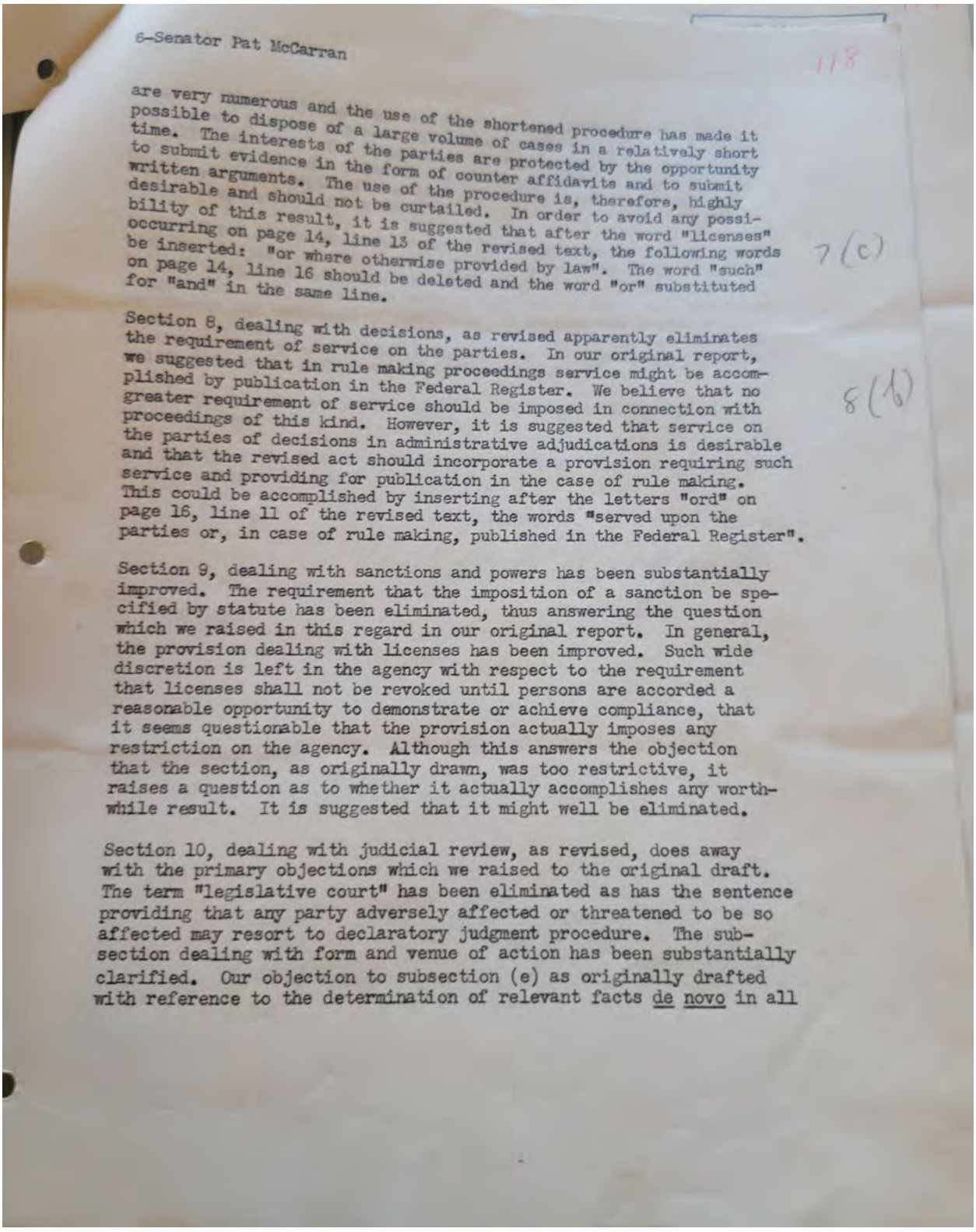
5-Senator Pat McCarran

on page 20, line 19 of the revised text, thus making it clear that the agency concerned would make the appointment. The suggested substitute Section 11 in the revised text which provides for appointments of examiners by a Director of an Office of Administrative Justice is, we believe, undesirable. The specific agencies involved would be more clearly aware of the qualifications necessary for an examiner dealing with the matters administered by the agency than would a centralized authority. The restrictions upon the conduct of agencies and examiners imposed in other sections of the bill would prevent the appointing power from being used in a manner prejudicial to the interests of the public.

Section 7(b), dealing with hearing powers, has been clarified by the addition of a provision permitting the hearing officer to "take any other action authorized by agency rule consistent with this Act", thus eliminating one of the features we found undesirable in the original bill. We renew our suggestion of the desirability of providing substantive authority in the proposed bill for the issuance of subpenas by hearing officers rather than confining their use to those cases in which authority to issue them is given by other statutes. This could be accomplished by striking the words "authorized by law" found on page 13, line 22 of the revised text and inserting in Section 6(c) of the revised text (page 11, line 1) after the word "by" the words "this or any other". The provision with respect to the payment of fees for witnesses adverted to in our original report might be inserted as a new subsection 7(e) which would read as follows: "Witnesses subpenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts."

With respect to Section 7(c), dealing with evidence, as it appears in the revised text, we repeat our suggestion that no party should be precluded from presenting evidence orally in any proceeding where a hearing is required except where otherwise specifically provided by statute. We suggest the elimination of the third sentence of subsection (c), as revised, and the substitution therefor of the following: "Except as otherwise provided by law every party shall have the right to present evidence, oral or written, and of reasonable cross-examination".

In connection with this subsection, we wish to call attention to the fact that the last sentence apparently provides that the submission of evidence in written form shall be confined to matters involving rule making or determining applications for licenses. If this construction is correct, the section would make it impossible for this Department to make use of the so-called shortened procedure authorized in reparation proceedings involving claims for less than $500 under the Perishable Agricultural Commodities Act. These proceedings



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are very numerous and the use of the shortened procedure has made it possible to dispose of a large volume of cases in a relatively short time. The interests of the parties are protected by the opportunity to submit evidence in the form of counter affidavits and to submit written arguments. The use of the procedure is, therefore, highly desirable and should not be curtailed. In order to avoid any possibility of this result, it is suggested that after the word "licenses" occurring on page 14, line 13 of the revised text, the following words be inserted: "or where otherwise provided by law". The word "such" on page 14, line 16 should be deleted and the word "or" substituted for "and" in the same line.

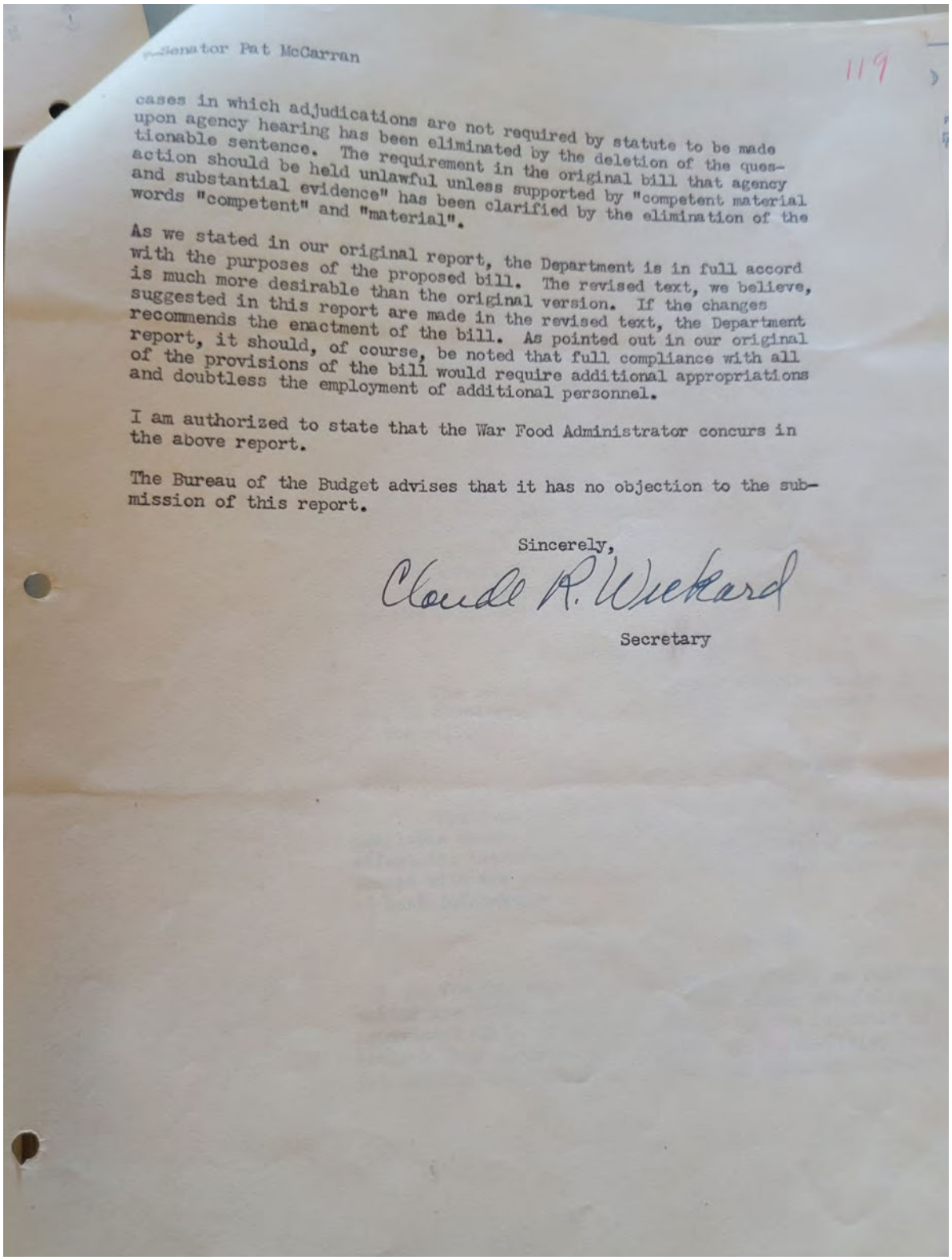
7(c)

Section 8, dealing with decisions, as revised apparently eliminates the requirement of service on the parties. In our original report, we suggested that in rule making proceedings service might be accomplished by publication in the Federal Register. We believe that no greater requirement of service should be imposed in connection with proceedings of this kind. However, it is suggested that service on the parties of decisions in administrative adjudications is desirable and that the revised act should incorporate a provision requiring such service and providing for publication in the case of rule making. This could be accomplished by inserting after the letters "ord" on page 16, line 11 of the revised text, the words "served upon the parties or, in case of rule making, published in the Federal Register".

8(b)

Section 9, dealing with sanctions and powers has been substantially improved. The requirement that the imposition of a sanction be specified by statute has been eliminated, thus answering the question which we raised in this regard in our original report. In general, the provision dealing with licenses has been improved. Such wide discretion is left in the agency with respect to the requirement that licenses shall not be revoked until persons are accorded a reasonable opportunity to demonstrate or achieve compliance, that it seems questionable that the provision actually imposes any restriction on the agency. Although this answers the objection that the section, as originally drawn, was too restrictive, it raises a question as to whether it actually accomplishes any worthwhile result. It is suggested that it might well be eliminated.

Section 10, dealing with judicial review, as revised, does away with the primary objections which we raised to the original draft. The term "legislative court" has been eliminated as has the sentence providing that any party adversely affected or threatened to be so affected may resort to declaratory judgment procedure. The subsection dealing with form and venue of action has been substantially clarified. Our objection to subsection (e) as originally drafted with reference to the determination of relevant facts de novo in all



Senator Pat McCarran

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cases in which adjudications are not required by statute to be made upon agency hearing has been eliminated by the deletion of the questionable sentence. The requirement in the original bill that agency action should be held unlawful unless supported by "competent material and substantial evidence" has been clarified by the elimination of the words "competent" and "material".

As we stated in our original report, the Department is in full accord with the purposes of the proposed bill. The revised text, we believe, is much more desirable than the original version. If the changes suggested in this report are made in the revised text, the Department recommends the enactment of the bill. As pointed out in our original report, it should, of course, be noted that full compliance with all of the provisions of the bill would require additional appropriations and doubtless the employment of additional personnel.

I am authorized to state that the War Food Administrator concurs in the above report.

The Bureau of the Budget advises that it has no objection to the submission of this report.

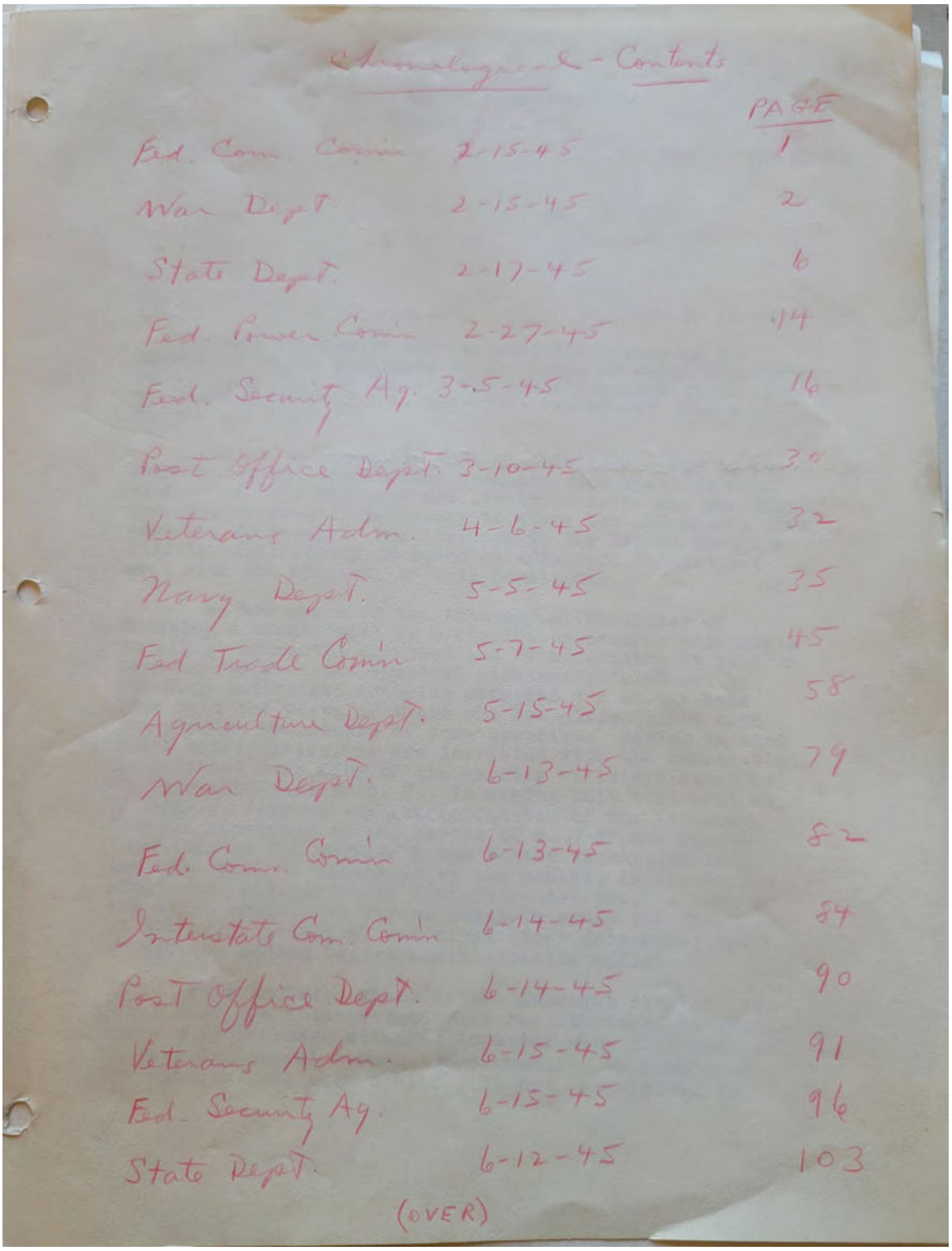
Sincerely,

Claude R. Wickard

Secretary

Appendix E

S. Judiciary Committee Staff List of Agency Responses to the Draft APA bill:
As introduced in January 1945, for which a first round of agency responses were received, followed by a revised draft circulated in May 1945, which garnered a second round of responses.



Chronological - Contents

		PAGE
Fed. Com. Comm	2-15-45	1
War Dept	2-15-45	2
State Dept.	2-17-45	6
Fed. Power Comm	2-27-45	14
Fed. Security Ag.	3-5-45	16
Post Office Dept.	3-10-45	30
Veterans Adm.	4-6-45	32
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Post Office Dept.	6-14-45	90
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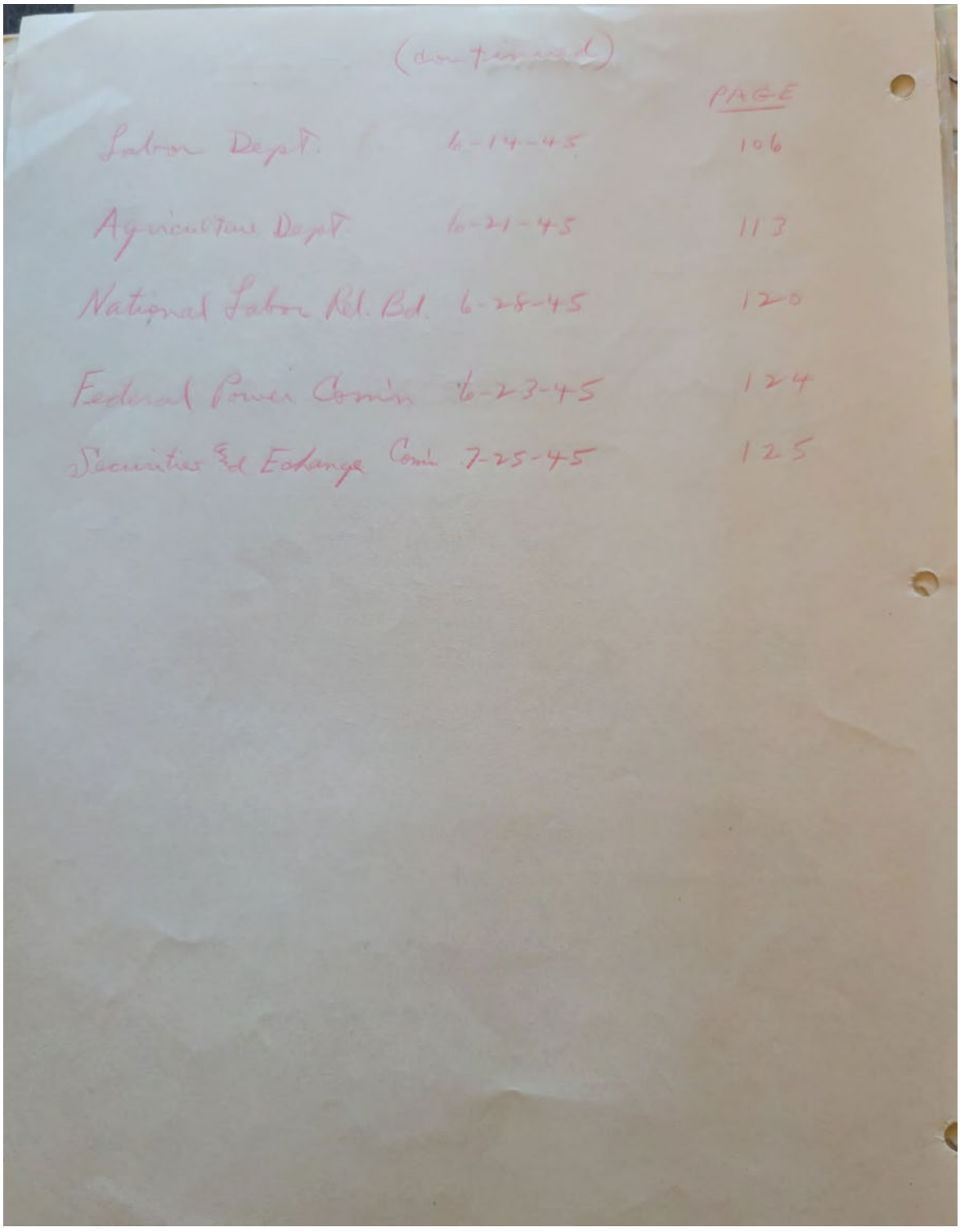


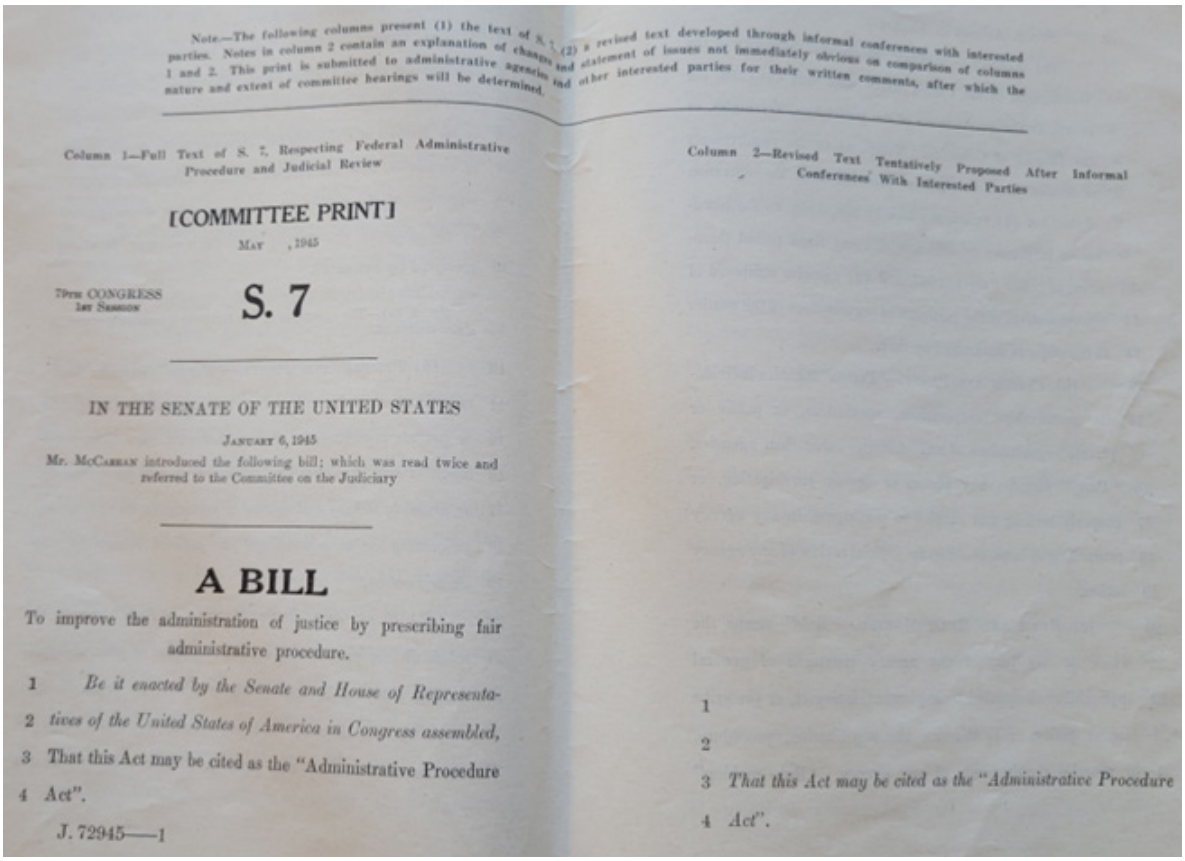
Should other agencies' responses be of interest, please contact the author, who has photographs of all such responses on file.

Appendix F

Based on the first round of agency comments to S.7 (as introduced in January 1945), the Senate Judiciary Committee staff incorporated many desired changes, some of which are shown by the department letters reproduced or referenced in the preceding appendices.

This May 1945 committee print shows changes made between these two versions side by side.

Notably, a substantial number of first-round comments were incorporated into the text of the draft bill and the final APA. This May 1945 committee print had no annotations and would subsequently be circulated to agencies for another round of review and comment in June 1945.



Note.—The following columns present (1) the text of S. 7, (2) a revised text developed through informal conferences with interested parties. Notes in column 2 contain an explanation of changes and statement of issues not immediately obvious on comparison of columns 1 and 2. This print is submitted to administrative agencies and other interested parties for their written comments, after which the nature and extent of committee hearings will be determined.

Column 1—Full Text of S. 7, Respecting Federal Administrative Procedure and Judicial Review

[COMMITTEE PRINT]

MAY , 1945

79TH CONGRESS
1ST SESSION

S. 7

IN THE SENATE OF THE UNITED STATES

JANUARY 6, 1945

Mr. MCCARRAN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

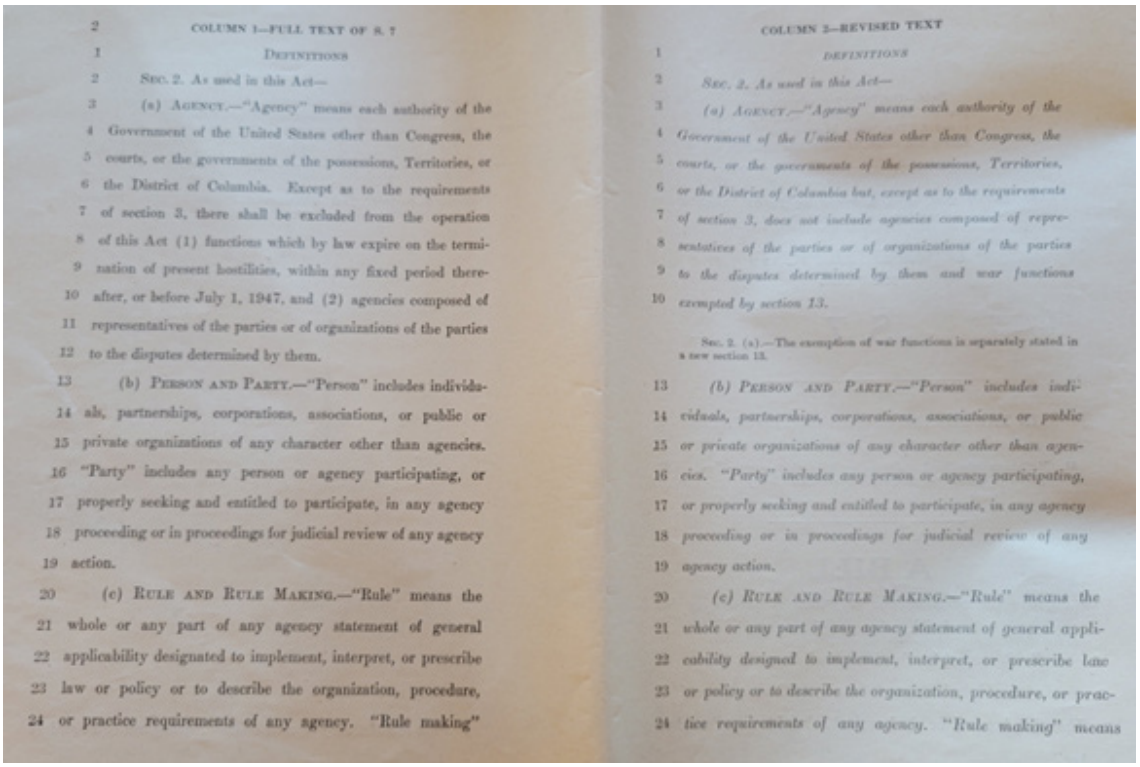
To improve the administration of justice by prescribing fair administrative procedure.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Procedure Act".

J. 72945——1

Column 2—Revised Text Tentatively Proposed After Informal Conferences With Interested Parties

That this Act may be cited as the "Administrative Procedure Act".



COLUMN 1—FULL TEXT OF S. 7

DEFINITIONS

SEC. 2. As used in this Act—

(a) AGENCY.—"Agency" means each authority of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and (2) agencies composed of representatives of the parties or of organizations of the parties to the disputes determined by them.

(b) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency participating, or properly seeking and entitled to participate, in any agency proceeding or in proceedings for judicial review of any agency action.

(c) RULE AND RULE MAKING.—"Rule" means the whole or any part of any agency statement of general applicability designated to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency. "Rule making"

COLUMN 2—REVISED TEXT

DEFINITIONS

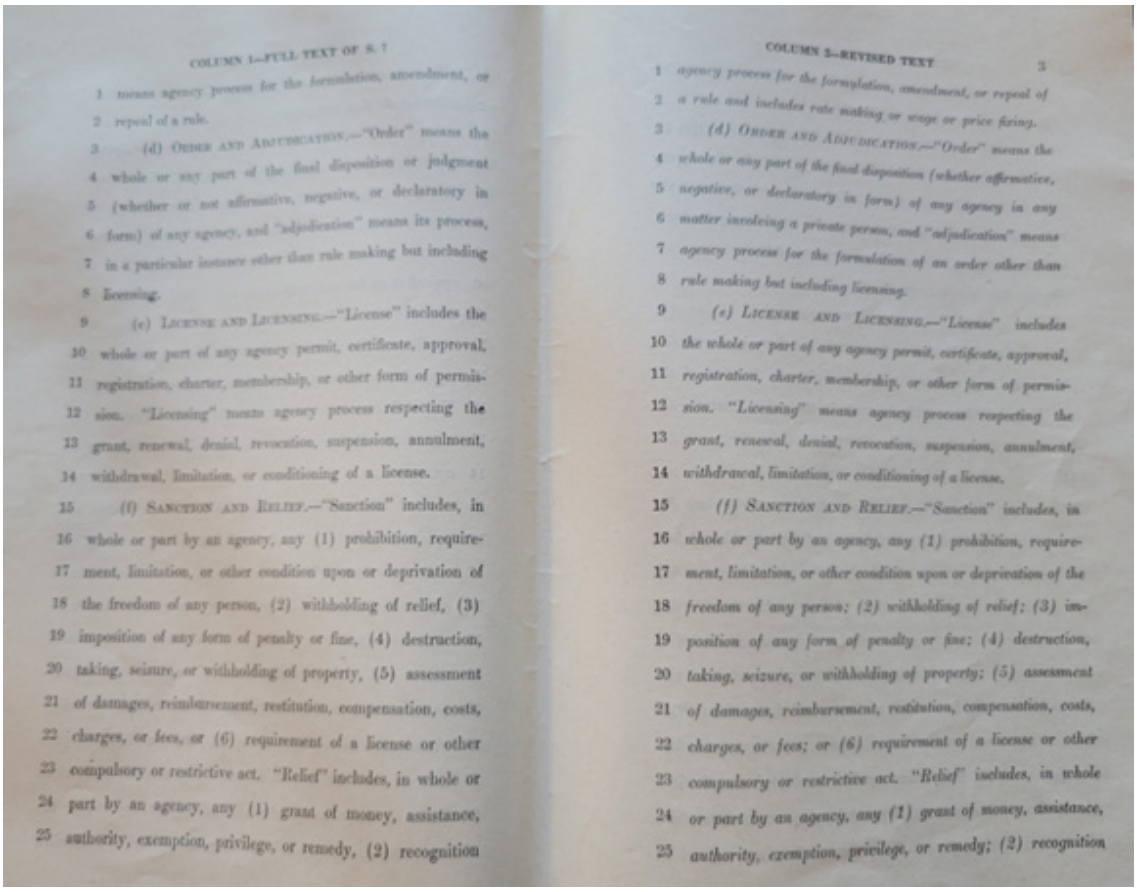
SEC. 2. As used in this Act—

(a) AGENCY.—"Agency" means each authority of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia but, except as to the requirements of section 3, does not include agencies composed of representatives of the parties or of organizations of the parties to the disputes determined by them and war functions exempted by section 13.

SEC. 2. (a)—The exemption of war functions is separately stated in a new section 13.

(b) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency participating, or properly seeking and entitled to participate, in any agency proceeding or in proceedings for judicial review of any agency action.

(c) RULE AND RULE MAKING.—"Rule" means the whole or any part of any agency statement of general applicability designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency. "Rule making" means



COLUMN 1—FULL TEXT OF S. 7

means agency process for the formulation, amendment, or repeal of a rule.

(d) ORDER AND ADJUDICATION.—"Order" means the whole or any part of the final disposition or judgment (whether or not affirmative, negative, or declaratory in form) of any agency, and "adjudication" means its process, in a particular instance other than rule making but including licensing.

(e) LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, or other form of permission. "Licensing" means agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, or conditioning of a license.

(f) SANCTION AND RELIEF.—"Sanction" includes, in whole or part by an agency, any (1) prohibition, requirement, limitation, or other condition upon or deprivation of the freedom of any person, (2) withholding of relief, (3) imposition of any form of penalty or fine, (4) destruction, taking, seizure, or withholding of property, (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees, or (6) requirement of a license or other compulsory or restrictive act. "Relief" includes, in whole or part by an agency, any (1) grant of money, assistance, authority, exemption, privilege, or remedy, (2) recognition

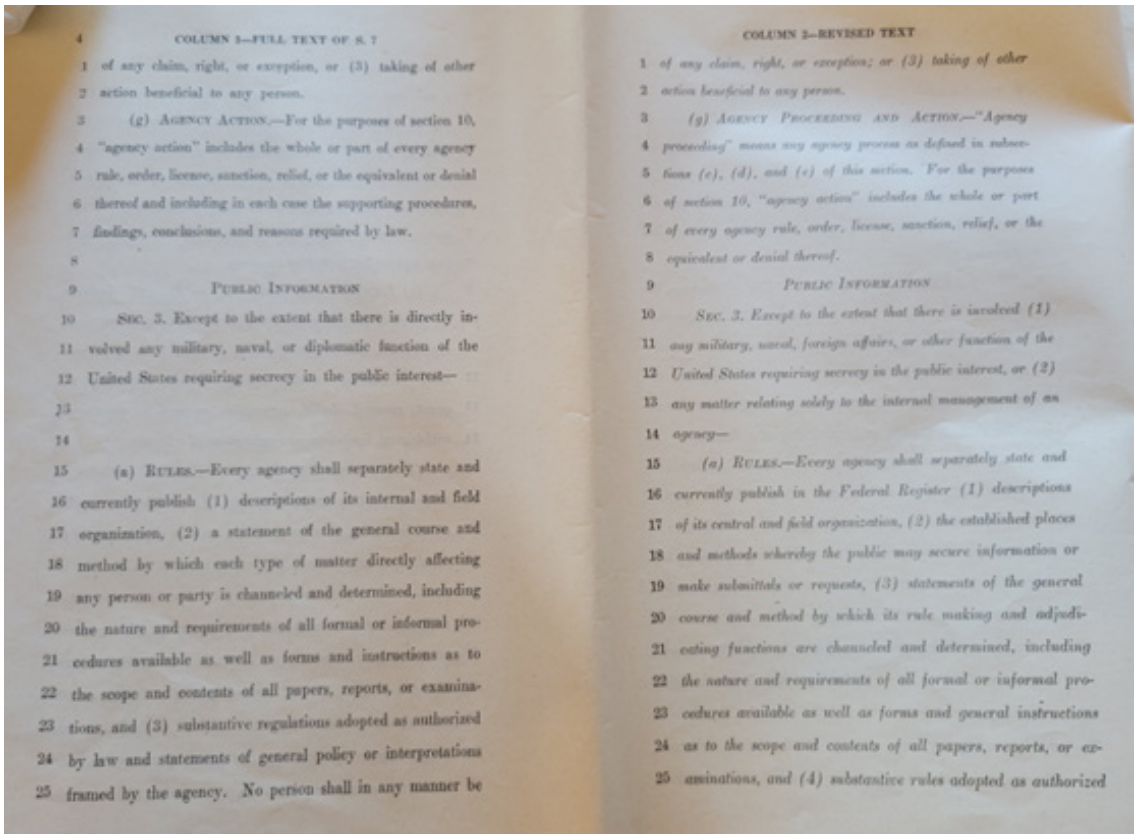
COLUMN 2—REVISED TEXT 3

agency process for the formulation, amendment, or repeal of a rule and includes rate making or wage or price fixing.

(d) ORDER AND ADJUDICATION.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, or declaratory in form) of any agency in any matter involving a private person, and "adjudication" means agency process for the formulation of an order other than rule making but including licensing.

(e) LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, or other form of permission. "Licensing" means agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, or conditioning of a license.

(f) SANCTION AND RELIEF.—"Sanction" includes, in whole or part by an agency, any (1) prohibition, requirement, limitation, or other condition upon or deprivation of the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; or (6) requirement of a license or other compulsory or restrictive act. "Relief" includes, in whole or part by an agency, any (1) grant of money, assistance, authority, exemption, privilege, or remedy; (2) recognition



COLUMN 1—FULL TEXT OF S. 7

of any claim, right, or exception, or (3) taking of other action beneficial to any person.

(g) AGENCY ACTION.—For the purposes of section 10, "agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof and including in each case the supporting procedures, findings, conclusions, and reasons required by law.

PUBLIC INFORMATION

SEC. 3. Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States requiring secrecy in the public interest—

(a) RULES.—Every agency shall separately state and currently publish (1) descriptions of its internal and field organization, (2) a statement of the general course and method by which each type of matter directly affecting any person or party is channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations, and (3) substantive regulations adopted as authorized by law and statements of general policy or interpretations framed by the agency. No person shall in any manner be

COLUMN 2—REVISED TEXT

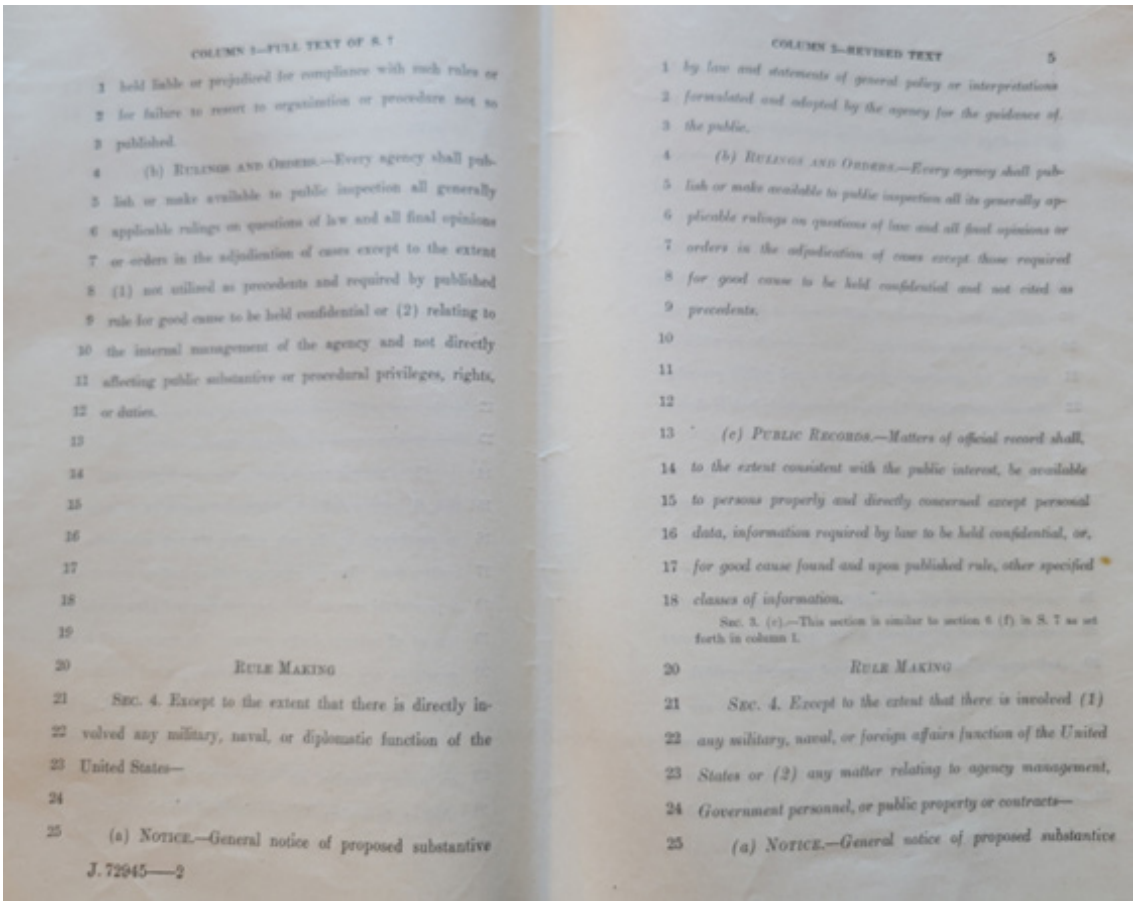
of any claim, right, or exception; or (3) taking of other action beneficial to any person.

(g) AGENCY PROCEEDING AND ACTION.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. For the purposes of section 10, "agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof.

PUBLIC INFORMATION

SEC. 3. Except to the extent that there is involved (1) any military, naval, foreign affairs, or other function of the United States requiring secrecy in the public interest, or (2) any matter relating solely to the internal management of an agency—

(a) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization, (2) the established places and methods whereby the public may secure information or make submittals or requests, (3) statements of the general course and method by which its rule making and adjudicating functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and general instructions as to the scope and contents of all papers, reports, or examinations, and (4) substantive rules adopted as authorized



COLUMN 1—FULL TEXT OF S. 7

hold liable or prejudiced for compliance with such rules or for failure to resort to organization or procedure not so published.

(b) RULINGS AND ORDERS.—Every agency shall publish or make available to public inspection all generally applicable rulings on questions of law and all final opinions or orders in the adjudication of cases except to the extent (1) not utilized as precedents and required by published rule for good cause to be held confidential or (2) relating to the internal management of the agency and not directly affecting public substantive or procedural privileges, rights, or duties.

RULE MAKING

SEC. 4. Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States—

(a) NOTICE.—General notice of proposed substantive

J. 72945——2

COLUMN 2—REVISED TEXT 5

by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public.

(b) RULINGS AND ORDERS.—Every agency shall publish or make available to public inspection all its generally applicable rulings on questions of law and all final opinions or orders in the adjudication of cases except those required for good cause to be held confidential and not cited as precedents.

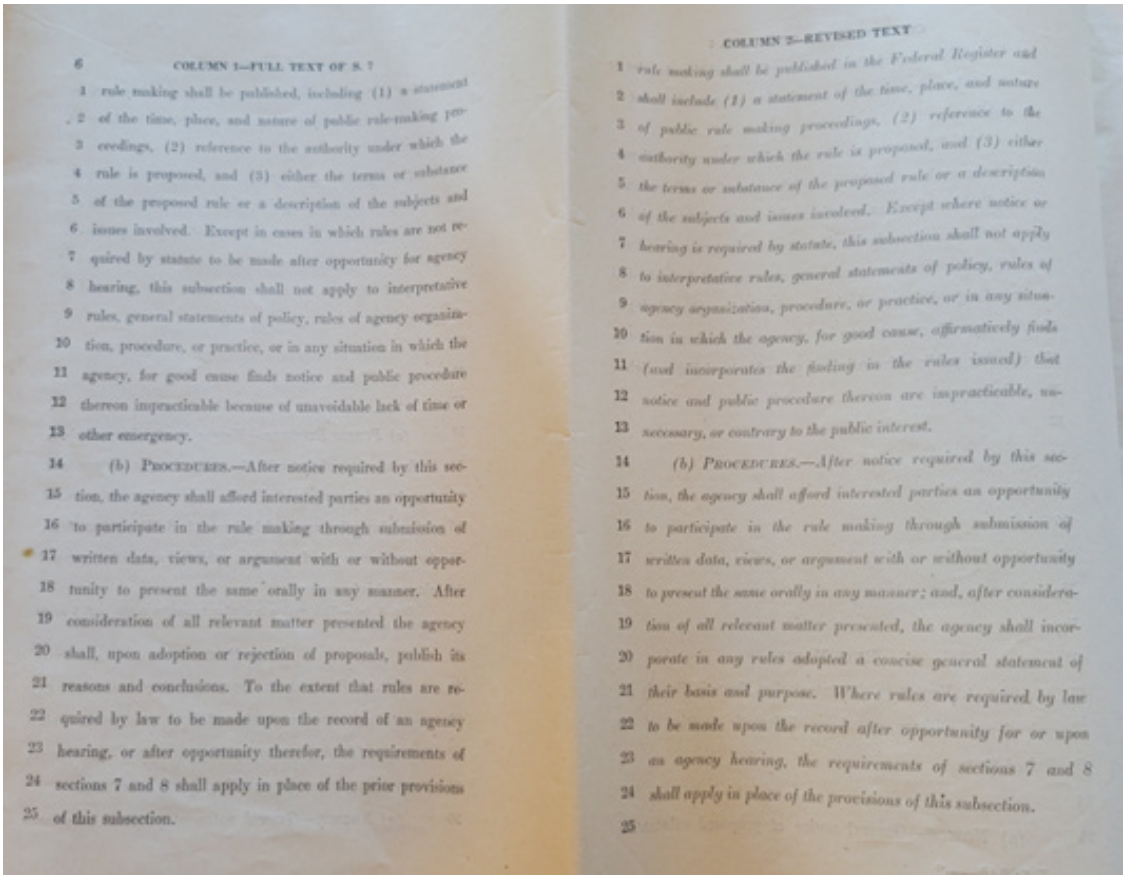
(c) PUBLIC RECORDS.—Matters of official record shall, to the extent consistent with the public interest, be available to persons properly and directly concerned except personal data, information required by law to be held confidential, or, for good cause found and upon published rule, other specified classes of information.

SEC. 3. (c).—This section is similar to section 6 (f) in S. 7 as set forth in column 1.

RULE MAKING

SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management, Government personnel, or public property or contracts—

(a) NOTICE.—General notice of proposed substantive



6 COLUMN 1—FULL TEXT OF S. 7

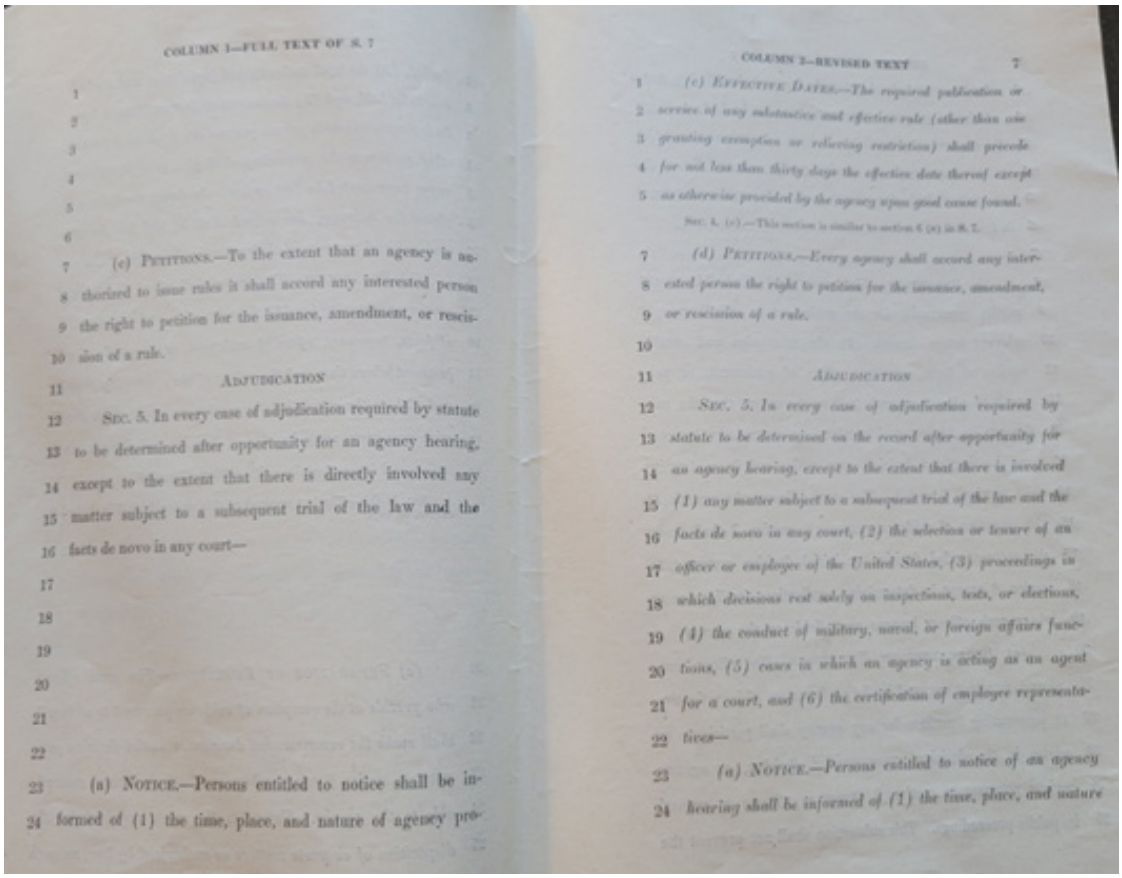
rule making shall be published, including (1) a statement of the time, place, and nature of public rule-making proceedings, (2) reference to the authority under which the rule is proposed, and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except in cases in which rules are not required by statute to be made after opportunity for agency hearing, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency, for good cause finds notice and public procedure thereon impracticable because of unavoidable lack of time or other emergency.

(b) PROCEDURES.—After notice required by this section, the agency shall afford interested parties an opportunity to participate in the rule making through submission of written data, views, or argument with or without opportunity to present the same orally in any manner. After consideration of all relevant matter presented the agency shall, upon adoption or rejection of proposals, publish its reasons and conclusions. To the extent that rules are required by law to be made upon the record of an agency hearing, or after opportunity therefor, the requirements of sections 7 and 8 shall apply in place of the prior provisions of this subsection.

COLUMN 2—REVISED TEXT

rule making shall be published in the Federal Register and shall include (1) a statement of the time, place, and nature of public rule making proceedings, (2) reference to the authority under which the rule is proposed, and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency, for good cause, affirmatively finds (and incorporates the finding in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) PROCEDURES.—After notice required by this section, the agency shall afford interested parties an opportunity to participate in the rule making through submission of written data, views, or argument with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by law to be made upon the record after opportunity for or upon an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.



COLUMN 1—FULL TEXT OF S. 7

(c) PETITIONS.—To the extent that an agency is authorized to issue rules it shall accord any interested person the right to petition for the issuance, amendment, or rescission of a rule.

ADJUDICATION

SEC. 5. In every case of adjudication required by statute to be determined after opportunity for an agency hearing, except to the extent that there is directly involved any matter subject to a subsequent trial of the law and the facts de novo in any court—

(a) NOTICE.—Persons entitled to notice shall be informed of (1) the time, place, and nature of agency pro-

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(c) EFFECTIVE DATES.—The required publication or service of any substantive and effective rule (other than one granting exemption or relieving restriction) shall precede for not less than thirty days the effective date thereof except as otherwise provided by the agency upon good cause found.

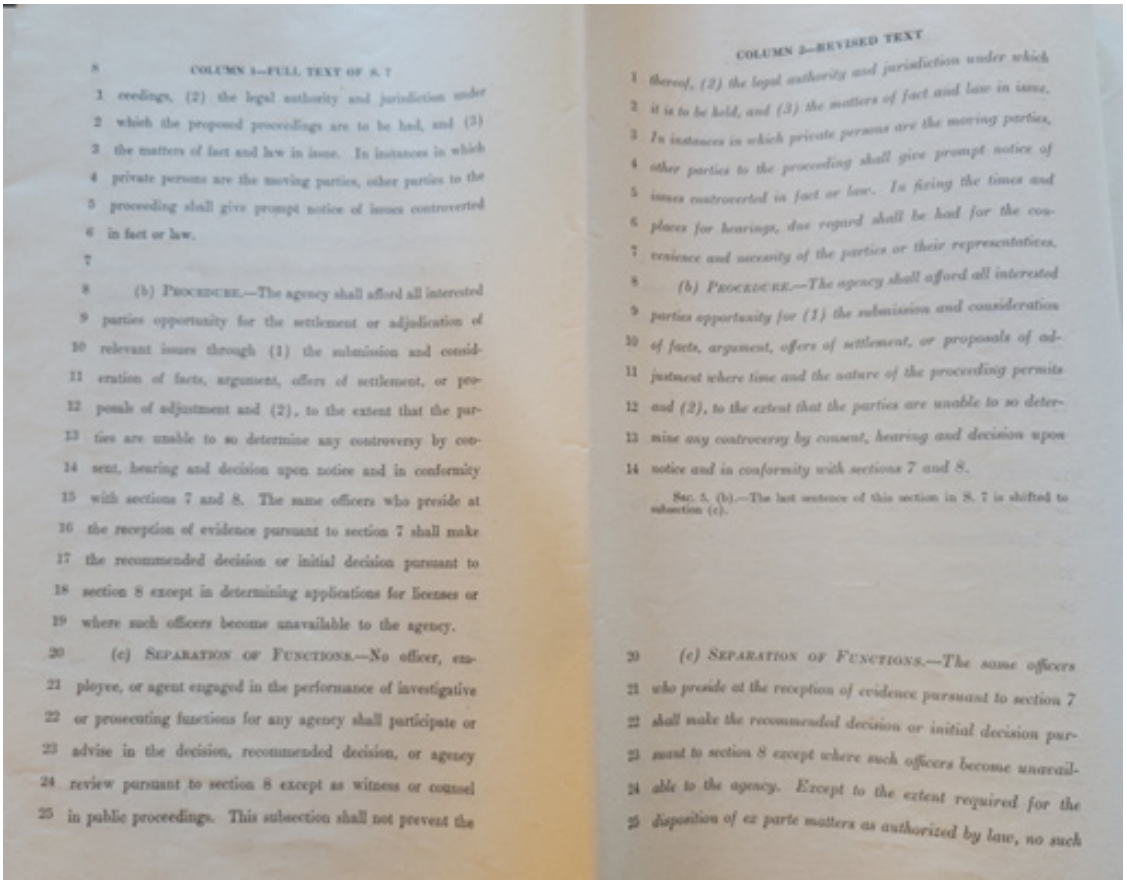
SEC. 5. (c).—This section is similar to section 6 (a) in S. 7.

(d) PETITIONS.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or rescission of a rule.

ADJUDICATION

SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court, (2) the selection or tenure of an officer or employee of the United States, (3) proceedings in which decisions rest solely on inspections, tests, or elections, (4) the conduct of military, naval, or foreign affairs functions, (5) cases in which an agency is acting as an agent for a court, and (6) the certification of employee representatives—

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be informed of (1) the time, place, and nature



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ceedings, (2) the legal authority and jurisdiction under which the proposed proceedings are to be had, and (3) the matters of fact and law in issue. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for the settlement or adjudication of relevant issues through (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment and (2), to the extent that the parties are unable to so determine any controversy by consent, hearing and decision upon notice and in conformity with sections 7 and 8. The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision pursuant to section 8 except in determining applications for licenses or where such officers become unavailable to the agency.

(c) SEPARATION OF FUNCTIONS.—No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency shall participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not prevent the

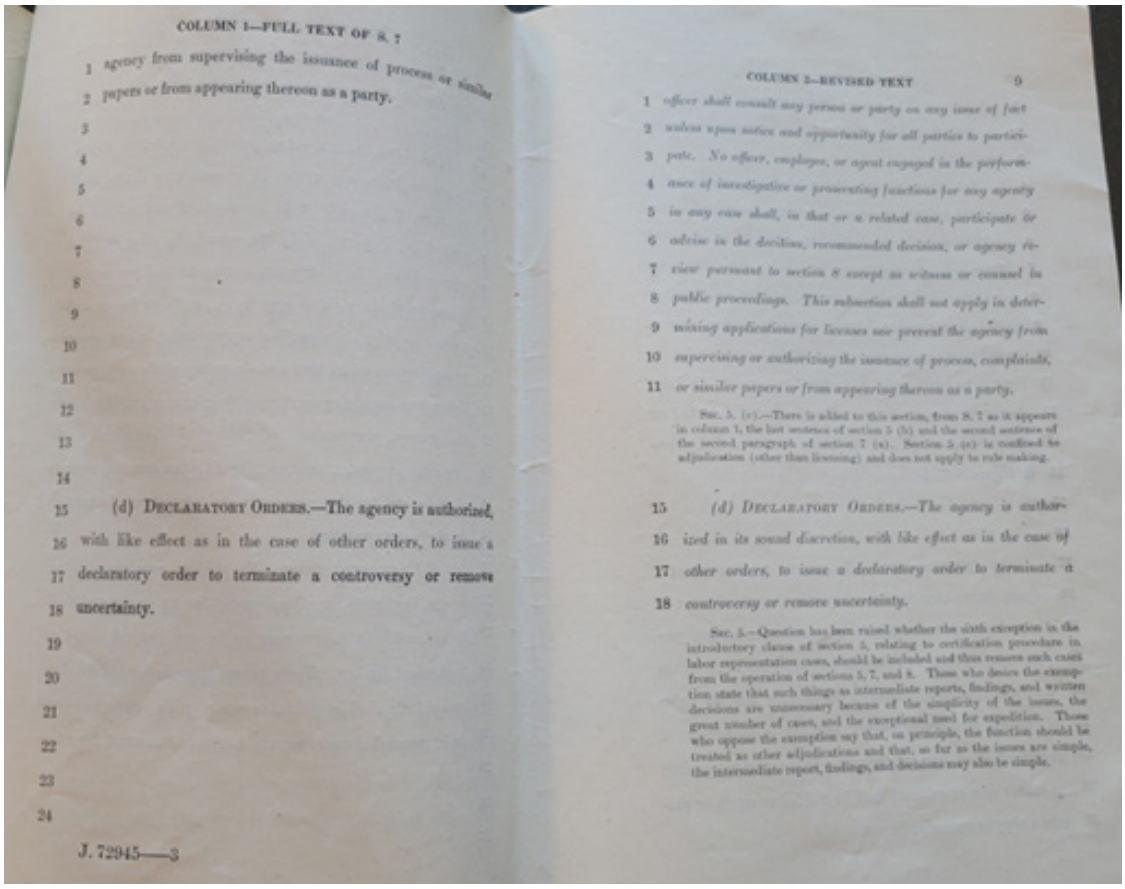
COLUMN 2—REVISED TEXT

thereof, (2) the legal authority and jurisdiction under which it is to be held, and (3) the matters of fact and law in issue. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment where time and the nature of the proceeding permits and (2), to the extent that the parties are unable to so determine any controversy by consent, hearing and decision upon notice and in conformity with sections 7 and 8.

SEC. 5. (b).—The last sentence of this section in S. 7 is shifted to subsection (c).

(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision pursuant to section 8 except where such officers become unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, no such



COLUMN 1—FULL TEXT OF S. 7

agency from supervising the issuance of process or similar papers or from appearing thereon as a party.

(d) DECLARATORY ORDERS.—The agency is authorized, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

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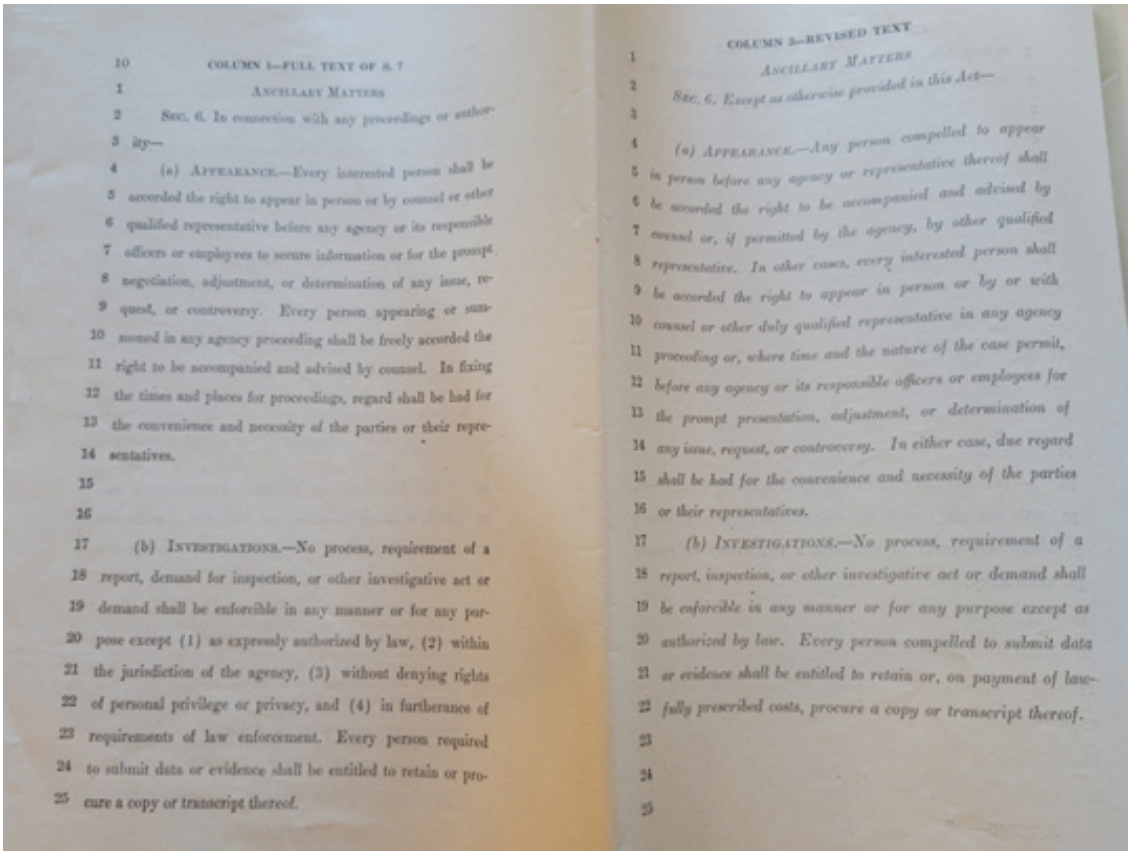
officer shall consult any person or party on any issue of fact unless upon notice and opportunity for all parties to participate. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for licenses nor prevent the agency from supervising or authorizing the issuance of process, complaints, or similar papers or from appearing thereon as a party.

SEC. 5. (c).—There is added to this section, from S. 7 as it appears in column 1, the last sentence of section 5 (b) and the second sentence of the second paragraph of section 7 (c). Section 5 (c) is confined to adjudication (other than licensing) and does not apply to rule making.

(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

SEC. 5.—Question has been raised whether the sixth exception in the introductory clause of section 5, relating to certification procedure in labor representation cases, should be included and thus remove such cases from the operation of sections 5, 7, and 8. Those who desire the exemption state that such things as intermediate reports, findings, and written decisions are unnecessary because of the simplicity of the issues, the great number of cases, and the exceptional need for expedition. Those who oppose the exemption say that, on principle, the function should be treated as other adjudications and that, so far as the issues are simple, the intermediate report, findings, and decisions may also be simple.



COLUMN 1—FULL TEXT OF S. 7

ANCILLARY MATTERS

SEC. 6. In connection with any proceedings or authority—

(a) APPEARANCE.—Every interested person shall be accorded the right to appear in person or by counsel or other qualified representative before any agency or its responsible officers or employees to secure information or for the prompt negotiation, adjustment, or determination of any issue, request, or controversy. Every person appearing or summoned in any agency proceeding shall be freely accorded the right to be accompanied and advised by counsel. In fixing the times and places for proceedings, regard shall be had for the convenience and necessity of the parties or their representatives.

(b) INVESTIGATIONS.—No process, requirement of a report, demand for inspection, or other investigative act or demand shall be enforcible in any manner or for any purpose except (1) as expressly authorized by law, (2) within the jurisdiction of the agency, (3) without denying rights of personal privilege or privacy, and (4) in furtherance of requirements of law enforcement. Every person required to submit data or evidence shall be entitled to retain or procure a copy or transcript thereof.

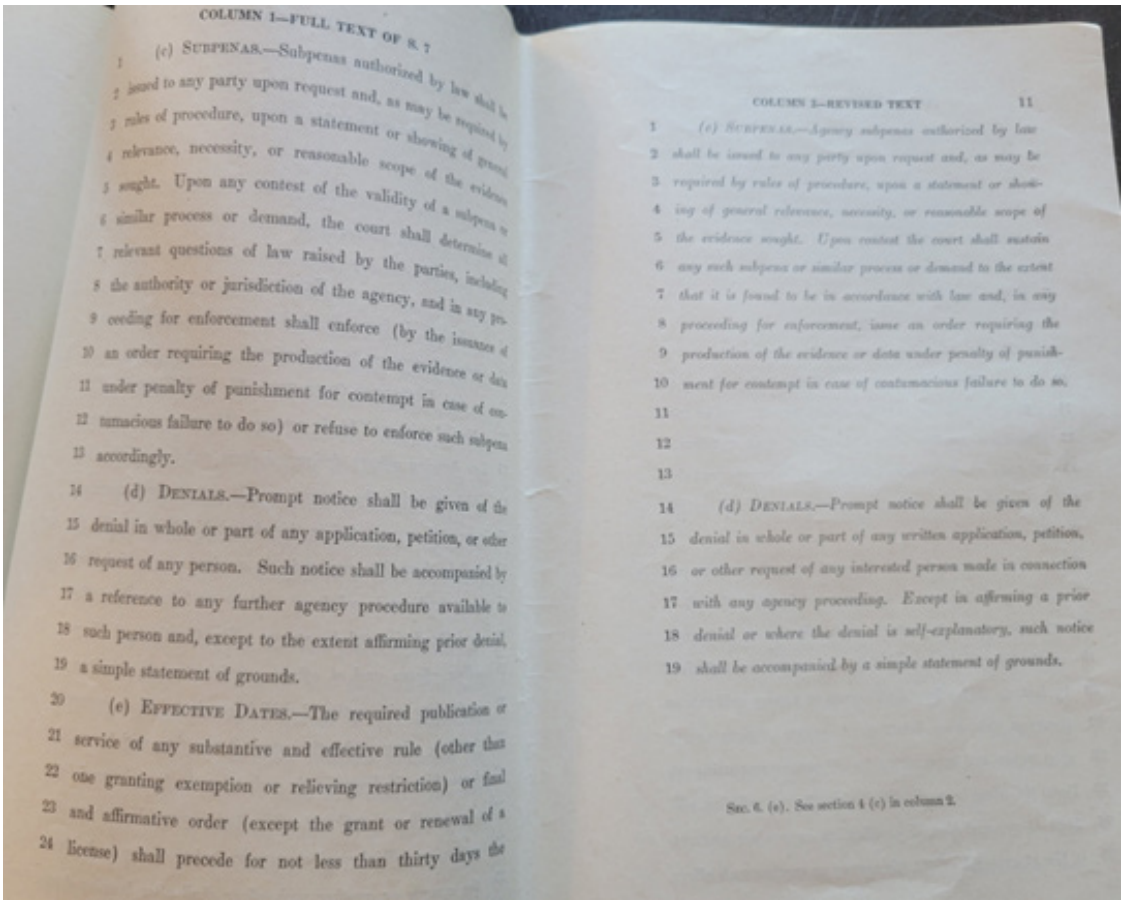
COLUMN 2—REVISED TEXT

ANCILLARY MATTERS

SEC. 6. Except as otherwise provided in this Act—

(a) APPEARANCE.—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied and advised by counsel or, if permitted by the agency, by other qualified representative. In other cases, every interested person shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding or, where time and the nature of the case permit, before any agency or its responsible officers or employees for the prompt presentation, adjustment, or determination of any issue, request, or controversy. In either case, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) INVESTIGATIONS.—No process, requirement of a report, inspection, or other investigative act or demand shall be enforcible in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof.



COLUMN 1—FULL TEXT OF S. 7

(c) SUBPENAS.—Subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance, necessity, or reasonable scope of the evidence sought. Upon any contest of the validity of a subpena or similar process or demand, the court shall determine all relevant questions of law raised by the parties, including the authority or jurisdiction of the agency, and in any proceeding for enforcement shall enforce (by the issuance of an order requiring the production of the evidence or data under penalty of punishment for contempt in case of contumacious failure to do so) or refuse to enforce such subpena accordingly.

(d) DENIALS.—Prompt notice shall be given of the denial in whole or part of any application, petition, or other request of any person. Such notice shall be accompanied by a reference to any further agency procedure available to such person and, except to the extent affirming prior denial, a simple statement of grounds.

(e) EFFECTIVE DATES.—The required publication or service of any substantive and effective rule (other than one granting exemption or relieving restriction) or final and affirmative order (except the grant or renewal of a license) shall precede for not less than thirty days the

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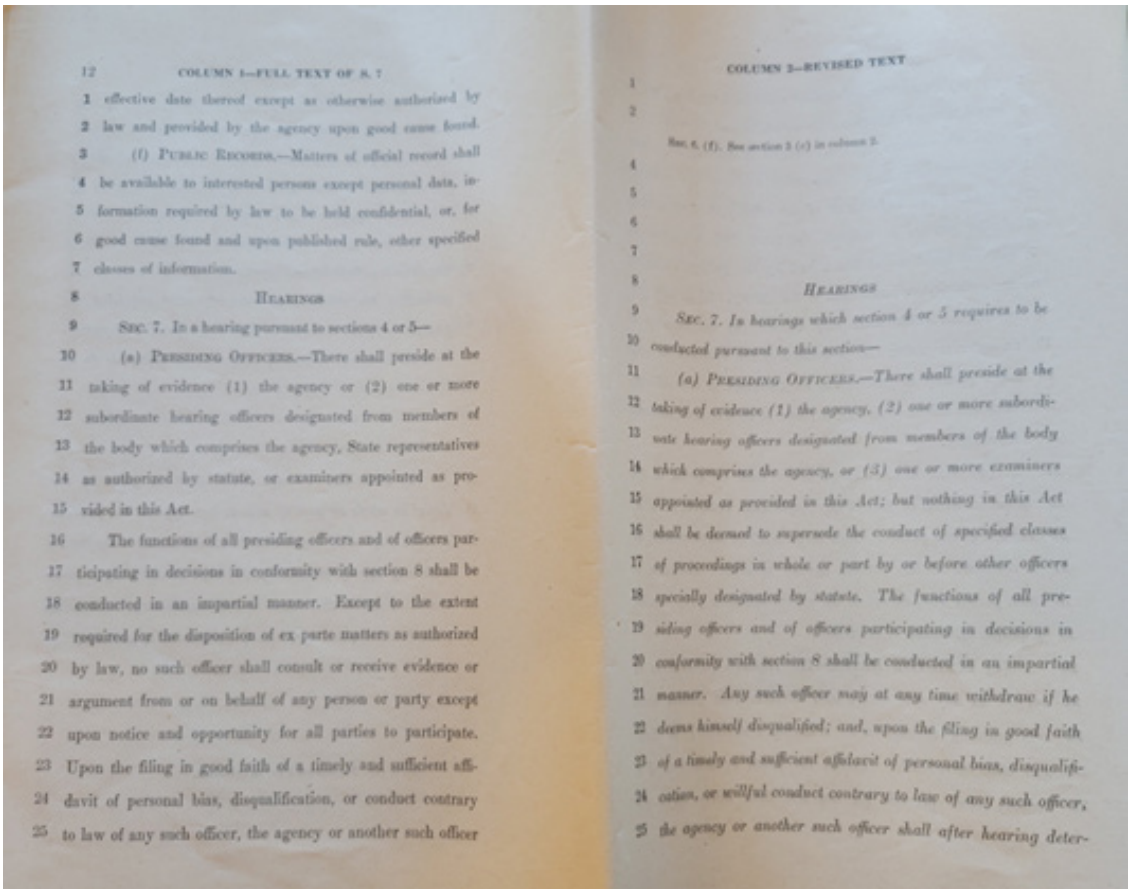
(c) SUBPENAS.—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance, necessity, or reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, issue an order requiring the production of the evidence or data under penalty of punishment for contempt in case of contumacious failure to do so.

(d) DENIALS.—Prompt notice shall be given of the denial in whole or part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of grounds.

SEC. 6. (e). See section 4 (c) in column 2.



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effective date thereof except as otherwise authorized by law and provided by the agency upon good cause found.

(f) PUBLIC RECORDS.—Matters of official record shall be available to interested persons except personal data, information required by law to be held confidential, or, for good cause found and upon published rule, other specified classes of information.

HEARINGS

SEC. 7. In a hearing pursuant to sections 4 or 5—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency or (2) one or more subordinate hearing officers designated from members of the body which comprises the agency, State representatives as authorized by statute, or examiners appointed as provided in this Act.

The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Except to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult or receive evidence or argument from or on behalf of any person or party except upon notice and opportunity for all parties to participate. Upon the filing in good faith of a timely and sufficient affidavit of personal bias, disqualification, or conduct contrary to law of any such officer, the agency or another such officer

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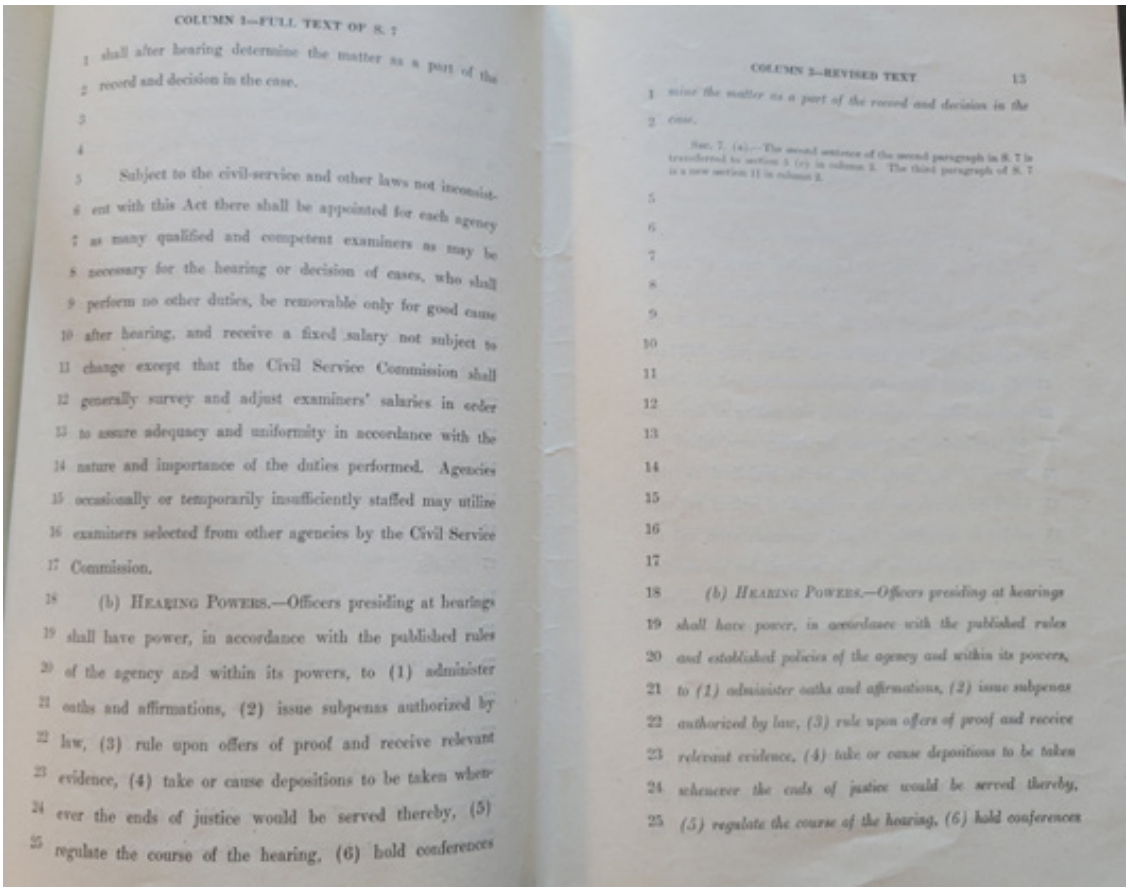
SEC. 6. (f). See section 3 (c) in column 2.

HEARINGS

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more subordinate hearing officers designated from members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before other officers specially designated by statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias, disqualification, or willful conduct contrary to law of any such officer, the agency or another such officer shall after hearing deter-



COLUMN 1—FULL TEXT OF S. 7

shall after hearing determine the matter as a part of the record and decision in the case.

Subject to the civil-service and other laws not inconsistent with this Act there shall be appointed for each agency as many qualified and competent examiners as may be necessary for the hearing or decision of cases, who shall perform no other duties, be removable only for good cause after hearing, and receive a fixed salary not subject to change except that the Civil Service Commission shall generally survey and adjust examiners' salaries in order to assure adequacy and uniformity in accordance with the nature and importance of the duties performed. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected from other agencies by the Civil Service Commission.

(b) HEARING POWERS.—Officers presiding at hearings shall have power, in accordance with the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences

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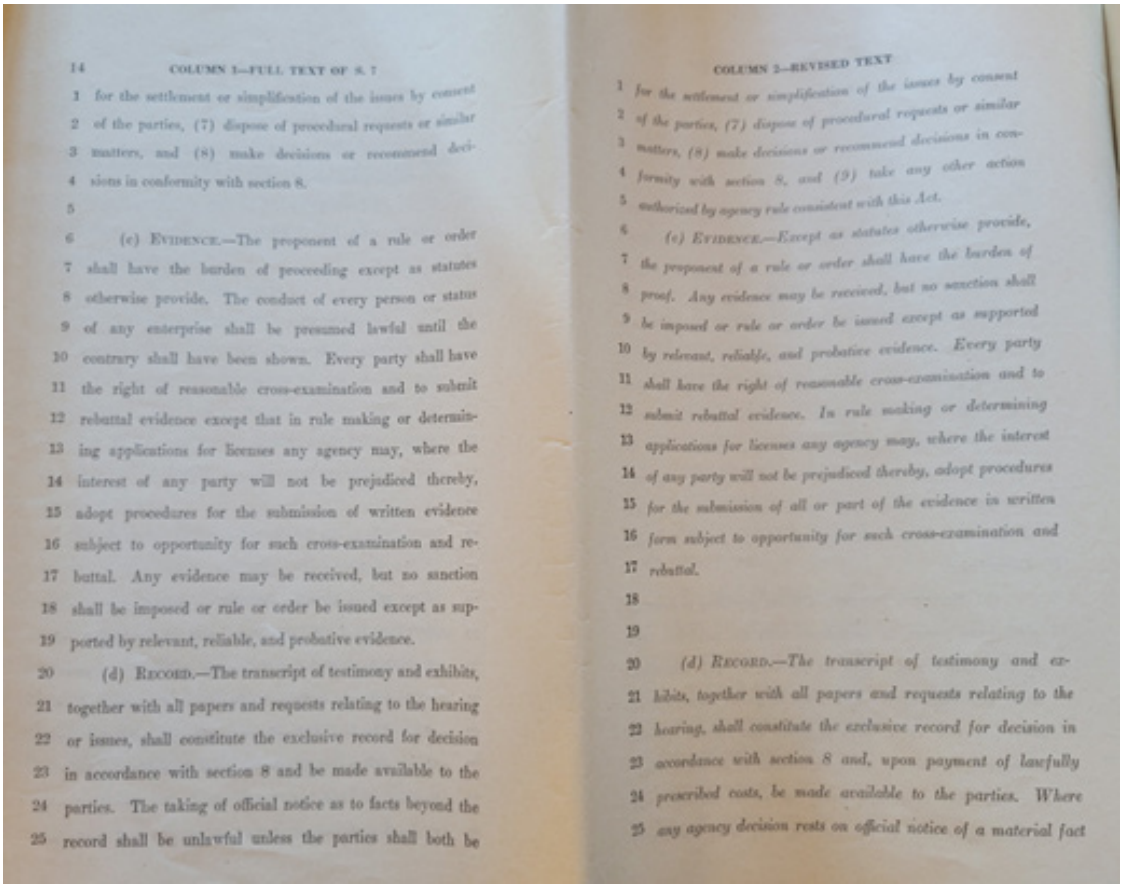
mine the matter as a part of the record and decision in the case.

SEC. 7. (a).—The second sentence of the second paragraph in S. 7 is transferred to section 3 (c) in column 2. The third paragraph of S. 7 is a new section 11 in column 2.

(b) HEARING POWERS.—Officers presiding at hearings shall have power, in accordance with the published rules and established policies of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences



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for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, and (8) make decisions or recommend decisions in conformity with section 8.

(c) EVIDENCE.—The proponent of a rule or order shall have the burden of proceeding except as statutes otherwise provide. The conduct of every person or status of any enterprise shall be presumed lawful until the contrary shall have been shown. Every party shall have the right of reasonable cross-examination and to submit rebuttal evidence except that in rule making or determining applications for licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of written evidence subject to opportunity for such cross-examination and rebuttal. Any evidence may be received, but no sanction shall be imposed or rule or order be issued except as supported by relevant, reliable, and probative evidence.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests relating to the hearing or issues, shall constitute the exclusive record for decision in accordance with section 8 and be made available to the parties. The taking of official notice as to facts beyond the record shall be unlawful unless the parties shall both be

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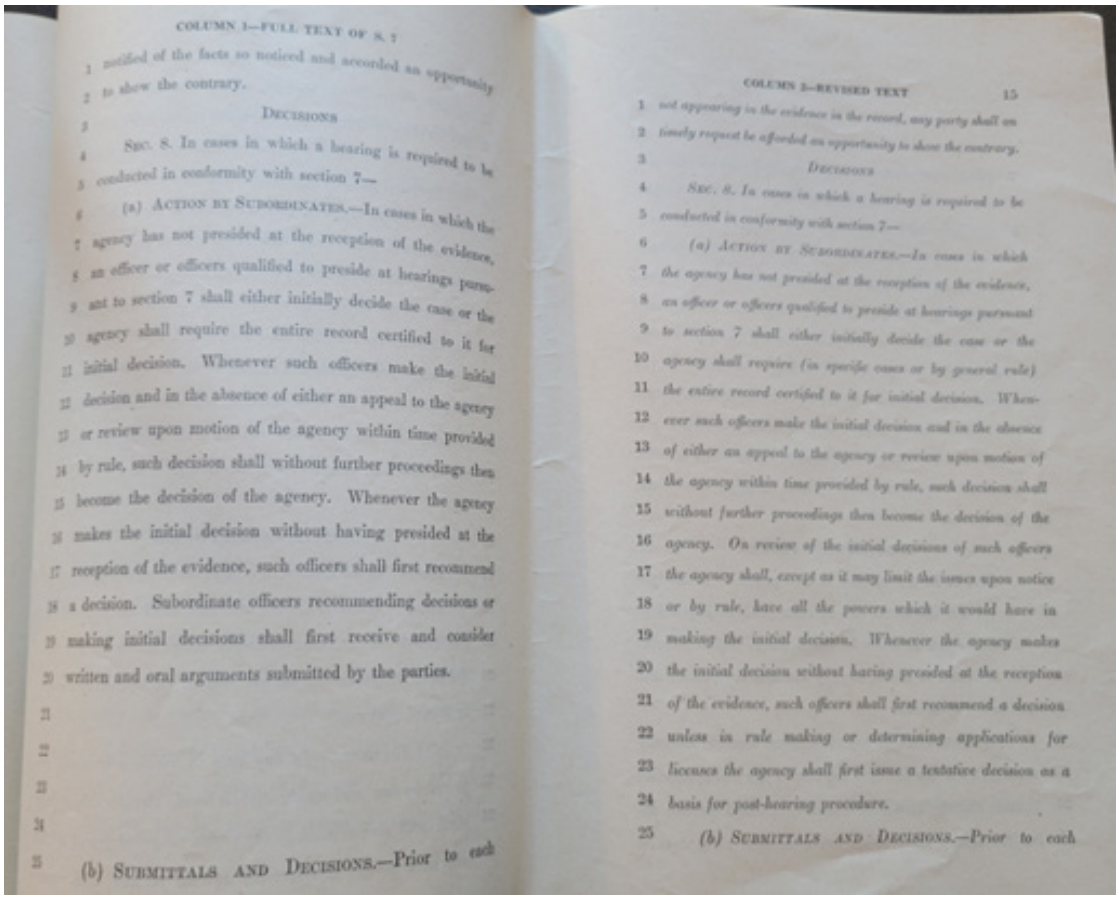
for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any evidence may be received, but no sanction shall be imposed or rule or order be issued except as supported by relevant, reliable, and probative evidence. Every party shall have the right of reasonable cross-examination and to submit rebuttal evidence. In rule making or determining applications for licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form subject to opportunity for such cross-examination and rebuttal.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests relating to the hearing, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, be made available to the parties. Where any agency decision rests on official notice of a material fact



COLUMN 1—FULL TEXT OF S. 7

notified of the facts so noticed and accorded an opportunity to show the contrary.

DECISIONS

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, an officer or officers qualified to preside at hearings pursuant to section 7 shall either initially decide the case or the agency shall require the entire record certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision. Subordinate officers recommending decisions or making initial decisions shall first receive and consider written and oral arguments submitted by the parties.

(b) SUBMITTALS AND DECISIONS.—Prior to each

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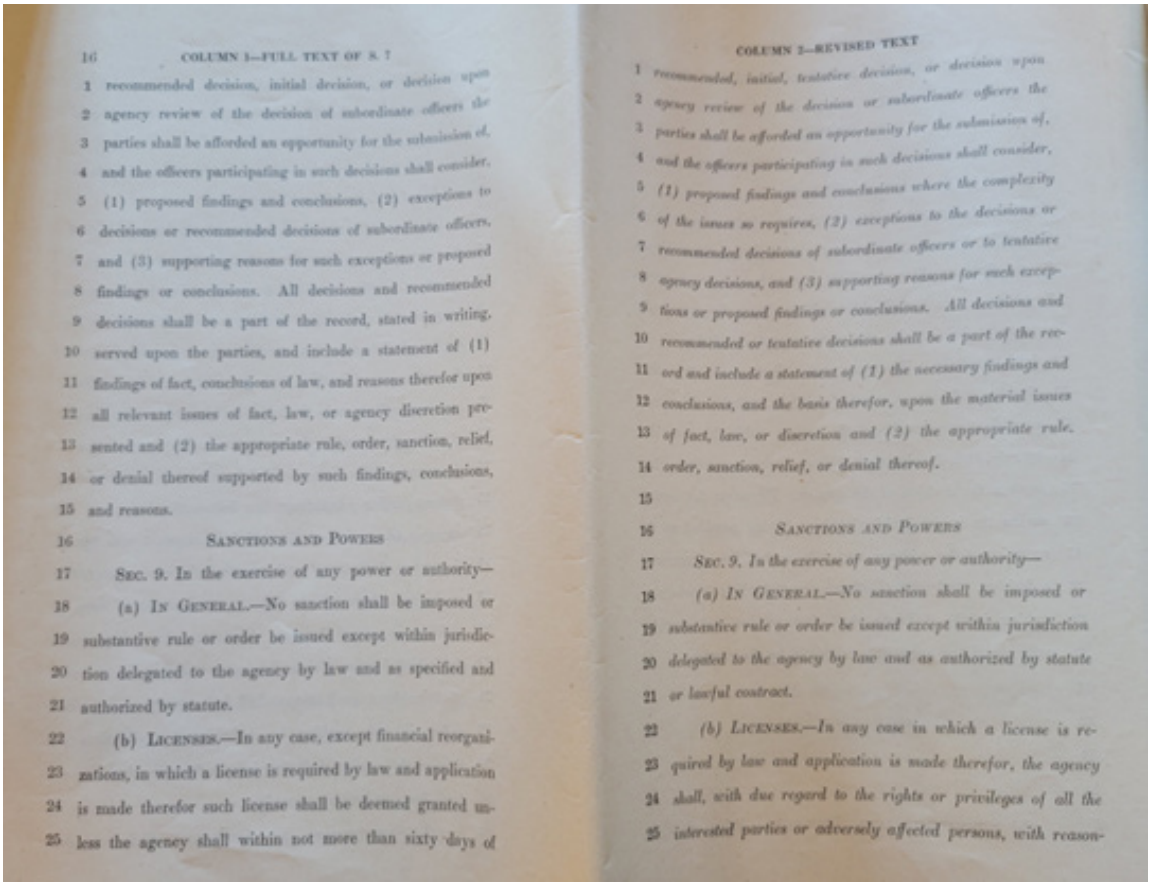
not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

DECISIONS

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, an officer or officers qualified to preside at hearings pursuant to section 7 shall either initially decide the case or the agency shall require (in specific cases or by general rule) the entire record certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision unless in rule making or determining applications for licenses the agency shall first issue a tentative decision as a basis for post-hearing procedure.

(b) SUBMITTALS AND DECISIONS.—Prior to each



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recommended decision, initial decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded an opportunity for the submission of, and the officers participating in such decisions shall consider, (1) proposed findings and conclusions, (2) exceptions to decisions or recommended decisions of subordinate officers, and (3) supporting reasons for such exceptions or proposed findings or conclusions. All decisions and recommended decisions shall be a part of the record, stated in writing, served upon the parties, and include a statement of (1) findings of fact, conclusions of law, and reasons therefor upon all relevant issues of fact, law, or agency discretion presented and (2) the appropriate rule, order, sanction, relief, or denial thereof supported by such findings, conclusions, and reasons.

SANCTIONS AND POWERS

SEC. 9. In the exercise of any power or authority—

(a) IN GENERAL.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency by law and as specified and authorized by statute.

(b) LICENSES.—In any case, except financial reorganizations, in which a license is required by law and application is made therefor such license shall be deemed granted unless the agency shall within not more than sixty days of

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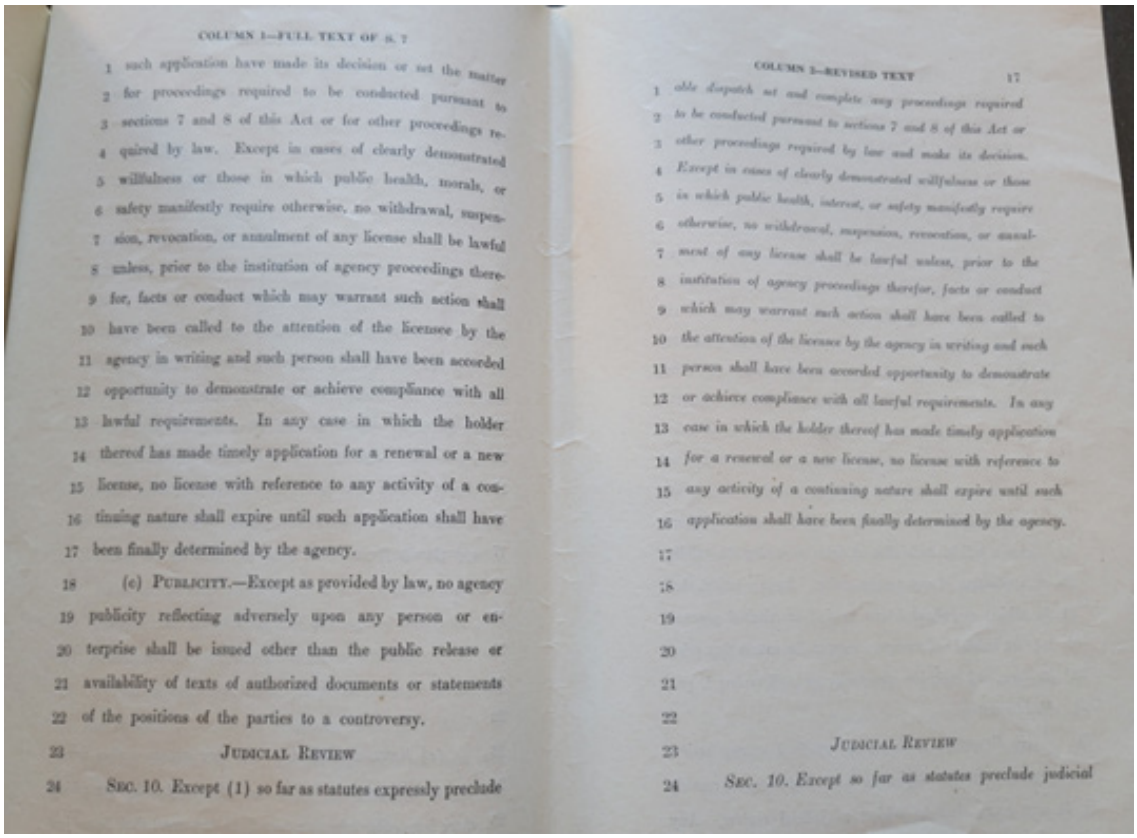
recommended, initial, tentative decision, or decision upon agency review of the decision or subordinate officers the parties shall be afforded an opportunity for the submission of, and the officers participating in such decisions shall consider, (1) proposed findings and conclusions where the complexity of the issues so requires, (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. All decisions and recommended or tentative decisions shall be a part of the record and include a statement of (1) the necessary findings and conclusions, and the basis therefor, upon the material issues of fact, law, or discretion and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SANCTIONS AND POWERS

SEC. 9. In the exercise of any power or authority—

(a) IN GENERAL.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency by law and as authorized by statute or lawful contract.

(b) LICENSES.—In any case in which a license is required by law and application is made therefor, the agency shall, with due regard to the rights or privileges of all the interested parties or adversely affected persons, with reason-



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such application have made its decision or set the matter for proceedings required to be conducted pursuant to sections 7 and 8 of this Act or for other proceedings required by law. Except in cases of clearly demonstrated willfulness or those in which public health, morals, or safety manifestly require otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and such person shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the holder thereof has made timely application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

(c) PUBLICITY.—Except as provided by law, no agency publicity reflecting adversely upon any person or enterprise shall be issued other than the public release or availability of texts of authorized documents or statements of the positions of the parties to a controversy.

JUDICIAL REVIEW

SEC. 10. Except (1) so far as statutes expressly preclude

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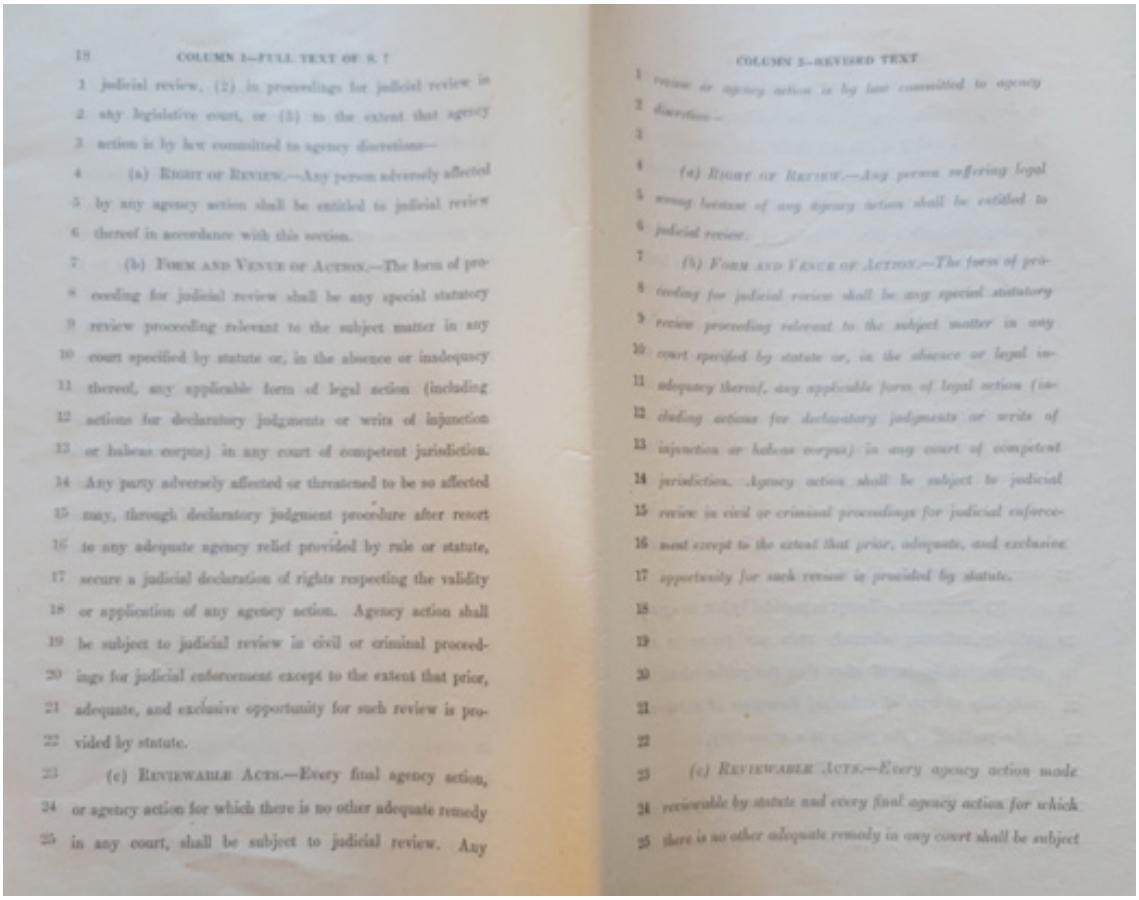
able dispatch set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and make its decision. Except in cases of clearly demonstrated willfulness or those in which public health, interest, or safety manifestly require otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and such person shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the holder thereof has made timely application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

JUDICIAL REVIEW

SEC. 10. Except so far as statutes preclude judicial



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judicial review, (2) in proceedings for judicial review in any legislative court, or (3) to the extent that agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person adversely affected by any agency action shall be entitled to judicial review thereof in accordance with this section.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of injunction or habeas corpus) in any court of competent jurisdiction. Any party adversely affected or threatened to be so affected may, through declaratory judgment procedure after resort to any adequate agency relief provided by rule or statute, secure a judicial declaration of rights respecting the validity or application of any agency action. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by statute.

(c) REVIEWABLE ACTS.—Every final agency action, or agency action for which there is no other adequate remedy in any court, shall be subject to judicial review. Any

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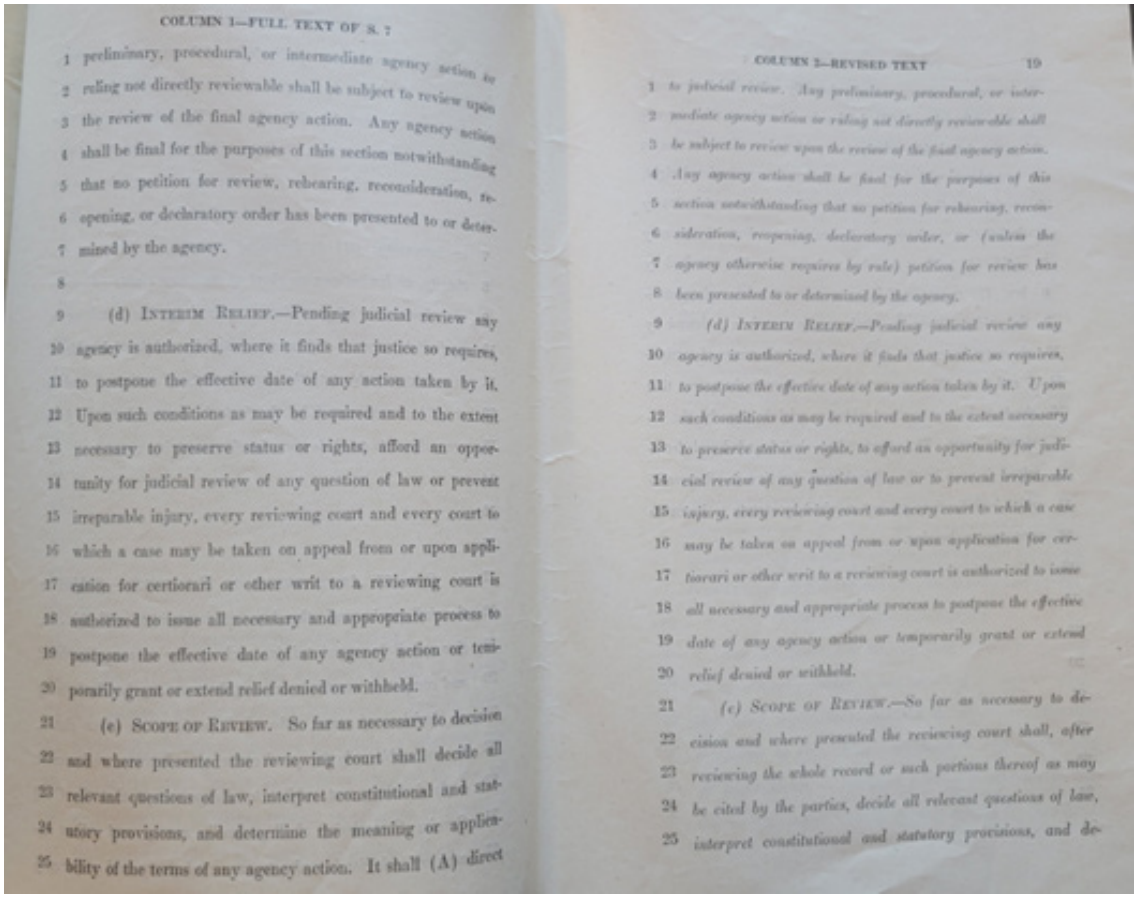
review or agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action shall be entitled to judicial review.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or legal inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by statute.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject



COLUMN 1—FULL TEXT OF S. 7

preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Any agency action shall be final for the purposes of this section notwithstanding that no petition for review, rehearing, reconsideration, reopening, or declaratory order has been presented to or determined by the agency.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to preserve status or rights, afford an opportunity for judicial review of any question of law or prevent irreparable injury, every reviewing court and every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or temporarily grant or extend relief denied or withheld.

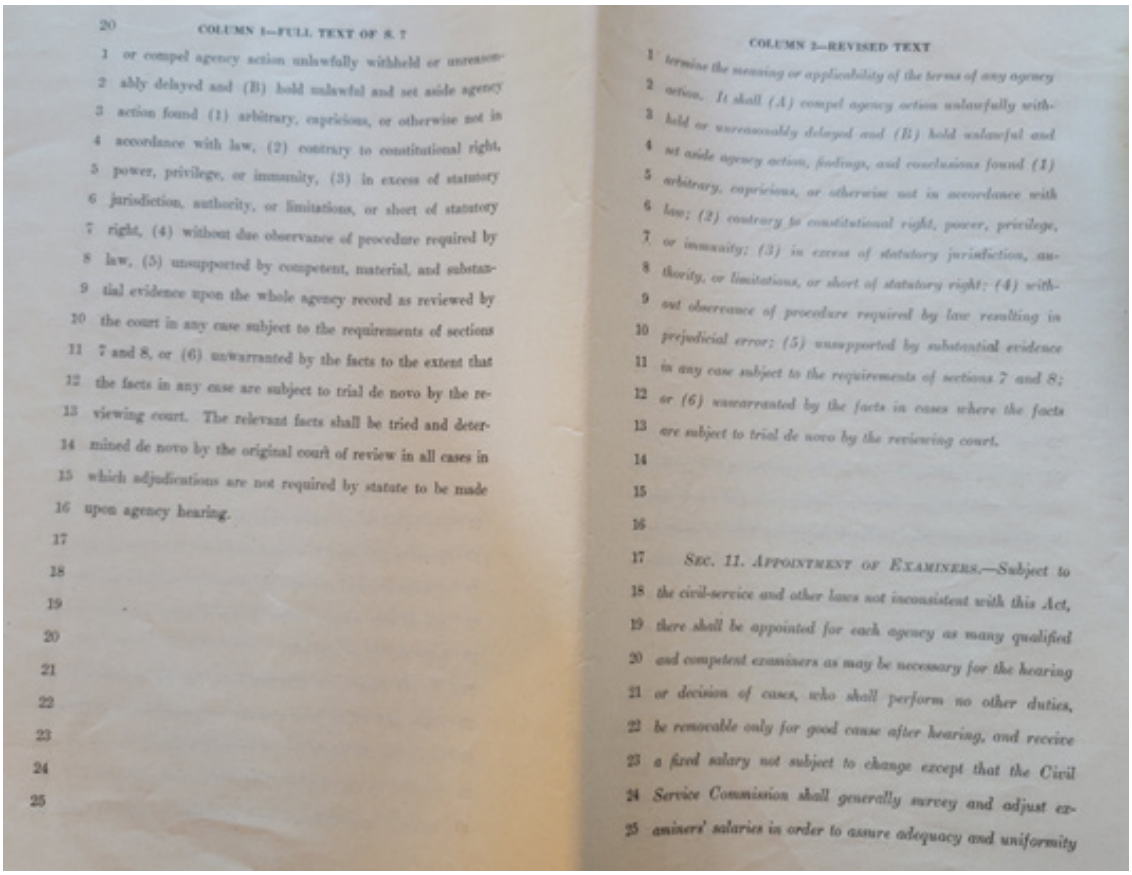
(e) SCOPE OF REVIEW. So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) direct

COLUMN 2—REVISED TEXT 19

to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Any agency action shall be final for the purposes of this section notwithstanding that no petition for rehearing, reconsideration, reopening, declaratory order, or (unless the agency otherwise requires by rule) petition for review has been presented to or determined by the agency.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to preserve status or rights, to afford an opportunity for judicial review of any question of law or to prevent irreparable injury, every reviewing court and every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or temporarily grant or extend relief denied or withheld.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall, after reviewing the whole record or such portions thereof as may be cited by the parties, decide all relevant questions of law, interpret constitutional and statutory provisions, and de-



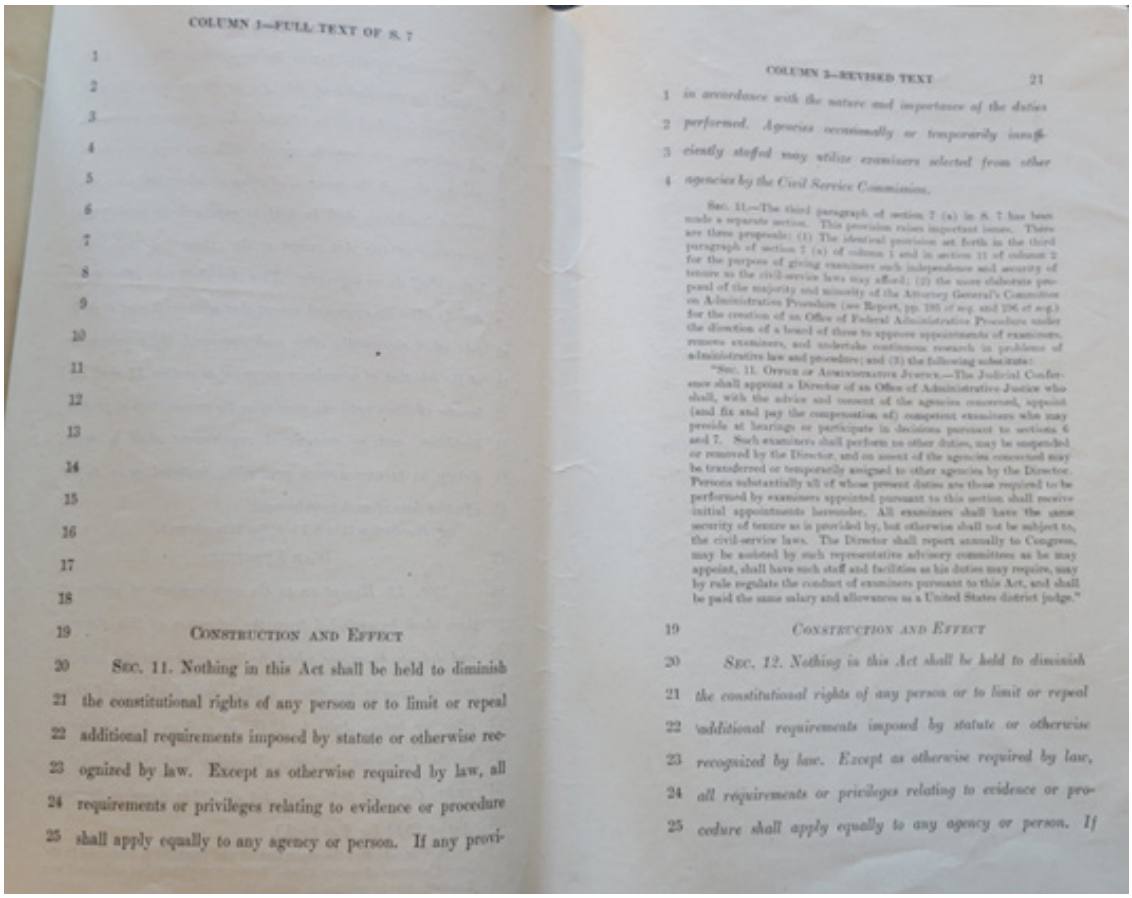
COLUMN 1—FULL TEXT OF S. 7

or compel agency action unlawfully withheld or unreasonably delayed and (B) hold unlawful and set aside agency action found (1) arbitrary, capricious, or otherwise not in accordance with law, (2) contrary to constitutional right, power, privilege, or immunity, (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, (4) without due observance of procedure required by law, (5) unsupported by competent, material, and substantial evidence upon the whole agency record as reviewed by the court in any case subject to the requirements of sections 7 and 8, or (6) unwarranted by the facts to the extent that the facts in any case are subject to trial de novo by the reviewing court. The relevant facts shall be tried and determined de novo by the original court of review in all cases in which adjudications are not required by statute to be made upon agency hearing.

COLUMN 2—REVISED TEXT

termine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed and (B) hold unlawful and set aside agency action, findings, and conclusions found (1) arbitrary, capricious, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law resulting in prejudicial error; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8; or (6) unwarranted by the facts in cases where the facts are subject to trial de novo by the reviewing court.

Sec. 11. Appointment of Examiners.—Subject to the civil-service and other laws not inconsistent with this Act, there shall be appointed for each agency as many qualified and competent examiners as may be necessary for the hearing or decision of cases, who shall perform no other duties, be removable only for good cause after hearing, and receive a fixed salary not subject to change except that the Civil Service Commission shall generally survey and adjust examiners' salaries in order to assure adequacy and uniformity



COLUMN 1—FULL TEXT OF S. 7

Construction and Effect

Sec. 11. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to any agency or person. If any provi-

COLUMN 2—REVISED TEXT 21

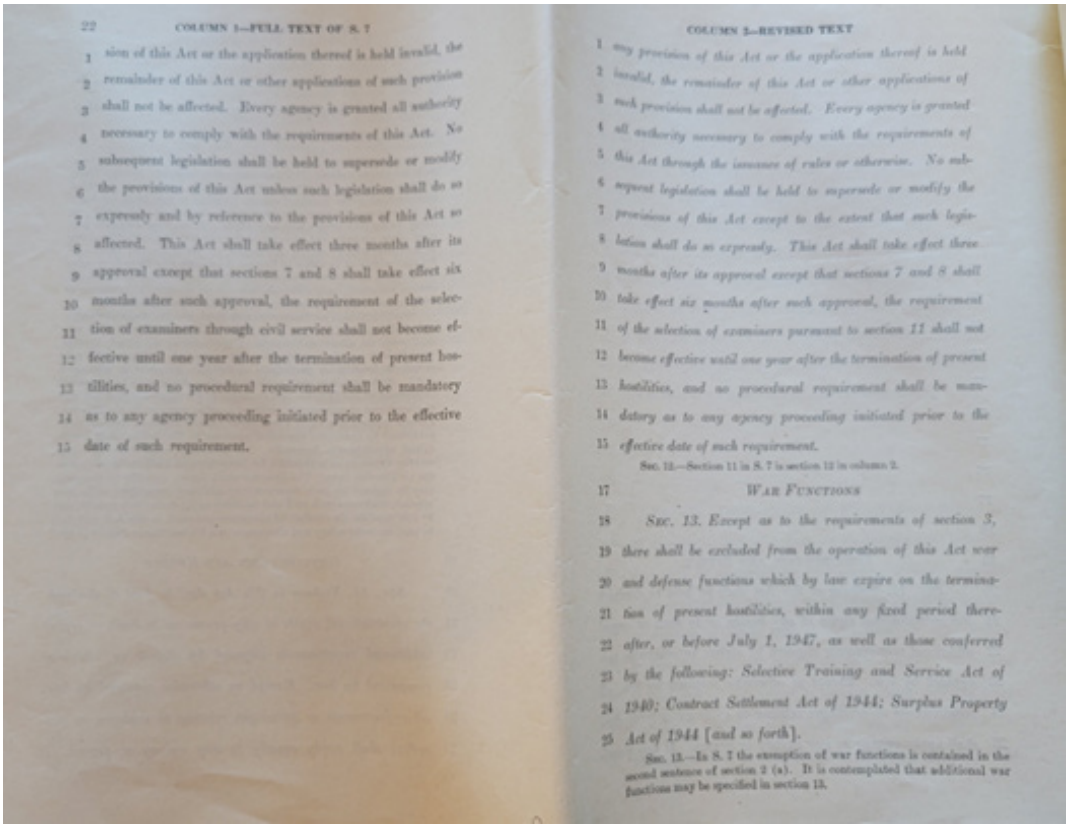
in accordance with the nature and importance of the duties performed. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected from other agencies by the Civil Service Commission.

Sec. 11.—The third paragraph of section 7 (a) in S. 7 has been made a separate section. This provision raises important issues. There are three proposals: (1) The identical provision set forth in the third paragraph of section 7 (a) of column 1 and in section 11 of column 2 for the purpose of giving examiners such independence and security of tenure as the civil-service laws may afford; (2) the more elaborate proposal of the majority and minority of the Attorney General's Committee on Administrative Procedure (see Report, pp. 193 *et seq.* and 196 *et seq.*) for the creation of an Office of Federal Administrative Procedure under the direction of a board of three to approve appointments of examiners, remove examiners, and undertake continuous research in problems of administrative law and procedure; and (3) the following substitute:

"Sec. 11. Office of Administrative Justice.—The Judicial Conference shall appoint a Director of an Office of Administrative Justice who shall, with the advice and consent of the agencies concerned, appoint (and fix and pay the compensation of) competent examiners who may preside at hearings or participate in decisions pursuant to sections 6 and 7. Such examiners shall perform no other duties, may be suspended or removed by the Director, and on assent of the agencies concerned may be transferred or temporarily assigned to other agencies by the Director. Persons substantially all of whose present duties are those required to be performed by examiners appointed pursuant to this section shall receive initial appointments hereunder. All examiners shall have the same security of tenure as is provided by, but otherwise shall not be subject to, the civil-service laws. The Director shall report annually to Congress, may be assisted by such representative advisory committees as he may appoint, shall have such staff and facilities as his duties may require, may by rule regulate the conduct of examiners pursuant to this Act, and shall be paid the same salary and allowances as a United States district judge."

Construction and Effect

Sec. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to any agency or person. If



22 COLUMN 1—FULL TEXT OF S. 7

sion of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act. No subsequent legislation shall be held to supersede or modify the provisions of this Act unless such legislation shall do so expressly and by reference to the provisions of this Act so affected. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners through civil service shall not become effective until one year after the termination of present hostilities, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

COLUMN 2—REVISED TEXT

any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after the termination of present hostilities, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

SEC. 12.—Section 11 in S. 7 is section 12 in column 2.

WAR FUNCTIONS

SEC. 13. Except as to the requirements of section 3, there shall be excluded from the operation of this Act war and defense functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, as well as those conferred by the following: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944 [and so forth].

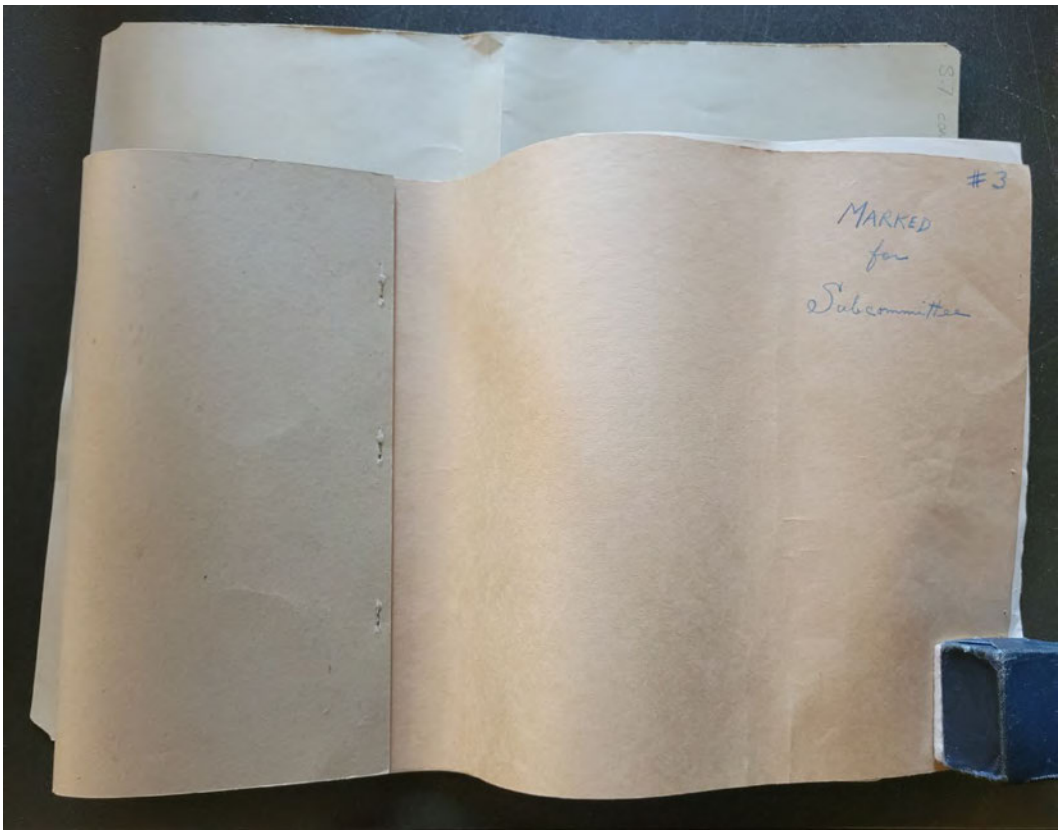
SEC. 13.—In S. 7 the exemption of war functions is contained in the second sentence of section 2 (a). It is contemplated that additional war functions may be specified in section 13.

Appendix G

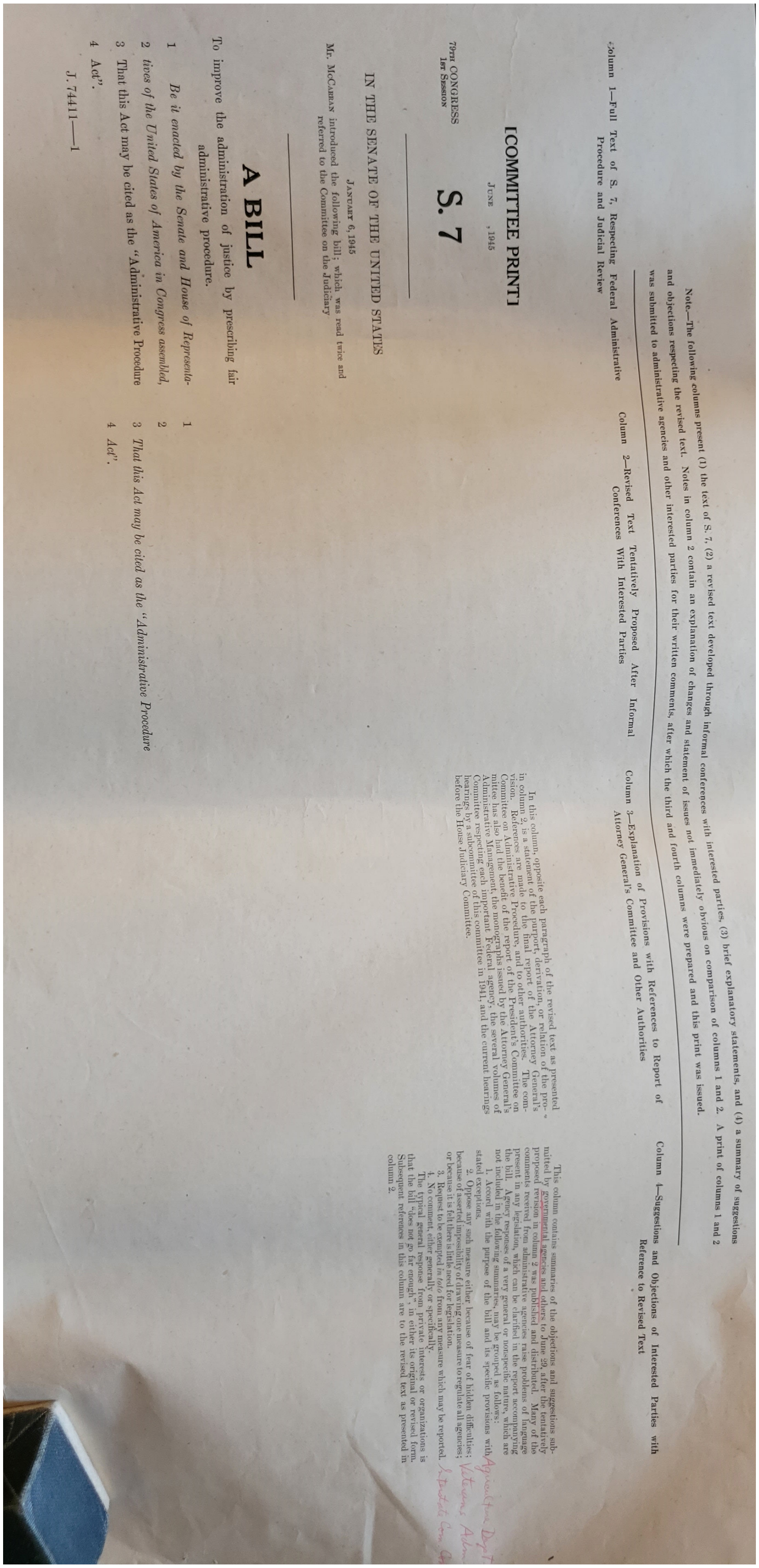
After the May 1945 draft APA committee print was circulated, agencies again were asked to comment on the bill's provisions. Fewer edits appear to have been made to the bill based on agencies' second-round comments. Still, this June 1945 committee print shows that agencies' substantive feedback was considered, and notes which agency originated each comment.

Though these photographed original oversize pages show four columns side by side, a textual version of three of the four columns was reproduced in S. DOC. NO. 79-248 (1946).[3]

The whole markup is included here to help scholars learn about provisions other than the foreign affairs rulemaking exception, which was the focus of this article.



[3] *See* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, 79th Congress, 1944–46, at 11–44 (1946) (printed as S. DOC. NO. 79-248 (1946)). The textual reproduction, however, does not provide the attributions or as helpful of a side-by-side comparison as this June 1945 committee print, and so it is reproduced here.



Note.—The following columns present (1) the text of S. 7, (2) a revised text developed through informal conferences with interested parties, (3) brief explanatory statements, and (4) a summary of suggestions and objections respecting the revised text. Notes in column 2 contain an explanation of changes and statement of issues not immediately obvious on comparison of columns 1 and 2. A print of columns 1 and 2 was submitted to administrative agencies and other interested parties for their written comments, after which the third and fourth columns were prepared and this print was issued.

Column 1—Full Text of S. 7, Respecting Federal Administrative Procedure and Judicial Review

[COMMITTEE PRINT]

June , 1945

79th CONGRESS
1st Session

S. 7

IN THE SENATE OF THE UNITED STATES

January 6, 1945

Mr. McCarran introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To improve the administration of justice by prescribing fair administrative procedure.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Procedure Act".

J. 74411——1

Column 2—Revised Text Tentatively Proposed After Informal Conferences With Interested Parties

That this Act may be cited as the "Administrative Procedure Act".

Column 3—Explanation of Provisions with References to Report of Attorney General's Committee and Other Authorities

In this column, opposite each paragraph of the revised text as presented in column 2, is a statement of the purport, derivation, or relation of the provision. References are made to the final report of the Attorney General's Committee on Administrative Procedure, and to other authorities. The committee has also had the benefit of the report of the President's Committee on Administrative Management, the monographs issued by the Attorney General's Committee respecting each important Federal agency, the several volumes of hearings by a subcommittee of this committee in 1941, and the current hearings before the House Judiciary Committee.

Column 4—Suggestions and Objections of Interested Parties with Reference to Revised Text

This column contains summaries of the objections and suggestions submitted by governmental agencies and others to June 29, after the tentatively proposed revision in column 2 was published and distributed. Many of the comments received from administrative agencies raise problems of language present in any legislation, which can be clarified in the report accompanying the bill. Agency responses of a very general or nonspecific nature, which are not included in the following summaries, may be grouped as follows:

1. Accord with the purpose of the bill and its specific provisions with stated exceptions. Agriculture Dept.
2. Oppose any such measure either because of fear of hidden difficulties; because of asserted impossibility of drawing one measure to regulate all agencies; or because it is felt there is little need for legislation. Veterans Adm.
3. Request to be exempted *in toto* from any measure which may be reported. Interstate Com.
4. No comment, either generally or specifically.

The typical general response from private interests or organizations is that the bill "does not go far enough", in either its original or revised form. Subsequent references in this column are to the revised text as presented in column 2.

COLUMN 1—FULL TEXT OF S. 7

DEFINITIONS

SEC. 2. As used in this Act—

(a) AGENCY.—"Agency" means each authority of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and (2) agencies composed of representatives of the parties or of organizations of the parties to the disputes determined by them.

(b) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency participating, or properly seeking and entitled to participate, in any agency

COLUMN 2—REVISED TEXT

DEFINITIONS

SEC. 2. As used in this Act—

(a) AGENCY.—"Agency" means each authority of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia but, except as to the requirements of section 3, does not include agencies composed of representatives of the parties or of organizations of the parties to the disputes determined by them and war functions exempted by section 13.

SEC. 2. (a).—The exemption of war functions is separately stated in a new section 13.

(b) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency participating, or properly seeking and entitled to participate, in any agency

COLUMN 3—EXPLANATION

SEC. 2. (a).—The term "agency" is defined substantially as in the Federal Reports Act of 1942 (Public, No. 831, 77th Cong., 2d sess., Dec. 24, 1942), the Federal Register Act (sec. 4, 49 Stat. 500, 44 U. S. C. 304), and the Federal Register Regulations (1 C. F. R. 2.1 (b), as revised by 6 F. R. 4397). It should be noted that the definition of agencies does not mean that all acts of such agencies are subject to the procedural requirements. The definition of agency is merely a preliminary device for inclusion and exclusion. If an agency is subject to the proposal under this section, nevertheless it is subject thereto only to the extent that acts, rules, or orders are defined and not further excluded in the following sections and subsections.

SEC. 2 (b).—The words "person" and "party" are defined as in many statutes and regulations. The definition stated is self-explanatory.

COLUMN 4—SUGGESTIONS AND OBJECTIONS

SEC. 2.—It has been suggested that "foreign-affairs functions" should be defined and added to section 2 in order to exclude from the operation of the measure all passport and visa functions as well as all duties of consular and diplomatic officers abroad. However, so far as these are not foreign affairs functions "requiring secrecy in the public interest," there would seem to be no reason why they should not be subject to the simple public information requirements of section 3. Whether or not they are in all aspects strictly "foreign-affairs functions," the rule making provisions of section 4 do not apply to organizational or procedural rules nor to other rules where the simple procedures required are found impracticable. Since these functions are not required by statute to be made upon administrative hearing, sections 5,7, and 8 relating to adjudications, hearings, and decisions are inapplicable. (State Dept)

SEC. 2 (a).—The following agency comments have been received:

(1) It is suggested that all functions of the War and Navy Departments as well as of the Army and Navy should be exempted. However, since the bill relates to functions rather than agencies, it would seem better to define functions. All departments may, and often do, exercise civil and regulatory powers which should be subject to an administrative procedure statute. So far as war powers should be exempted, that should be done in section 13 where appropriate comment is made. (War Dept. Navy Dept)

(2) Question has been raised as to the definition of "agency", but it would seem that the matter may be sufficiently explained in the committee report. It is necessary to define agency as "authority" rather than by name or form, because of the present system of including one agency within another or of authorizing internal boards or "divisions" to have final authority. "Authority" means any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority. Thus "divisions" of the Interstate Commerce Commission and the so-called Schwellenbach Officer of the Department of Agriculture would be "agencies" within this definition. Any other form of definition would raise serious difficulties in several Federal agencies. If deemed necessary, appropriate language may be added to the definition. (Federal Security Agency)

"Authority" means any one or more officers or employees (whether or not within, or subject to review by, another agency but not including examiners provided in this Act) having power to take final or binding action.

COLUMN 1—FULL TEXT OF S. 7

proceeding or in proceedings for judicial review of any agency action.

(c) Rule and Rule Making.—"Rule" means the whole or any part of any agency statement of general applicability designated to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) Order and Adjudication.—"Order" means the whole or any part of the final disposition or judgment (whether or not affirmative, negative, or declaratory in form) of any agency, and "adjudication" means its process, in a particular instance other than rule making but including licensing.

(e) License and Licensing.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, or other form of permission. "Licensing" means agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, or conditioning of a license.

(f) Sanction and Relief.—"Sanction" includes, in whole or part by an agency, any (1) prohibition, requirement, limitation, or other condition upon or deprivation of the freedom of any person, (2) withholding of relief, (3)

COLUMN 2—REVISED TEXT

proceeding or in proceedings for judicial review of any agency action.

(c) Rule and Rule Making.—"Rule" means the whole or any part of any agency statement of general applicability designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency. "Rule making" means agency process for the formulation, amendment, or repeal of a rule and includes ~~rate making or wage or price fixing~~.

(d) Order and Adjudication.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, or declaratory in form) of any agency in any matter involving a private person, and "adjudication" means agency process for the formulation of an order other than rule making but including licensing.

(e) License and Licensing.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, or other form of permission. "Licensing" means agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, or conditioning of a license.

(f) Sanction and Relief.—"Sanction" includes, in whole or part by an agency, any (1) prohibition, requirement, limitation, or other condition upon or deprivation of the freedom of any person; (2) withholding of relief; (3) im-

COLUMN 3—EXPLANATION

Sec. 2 (c).—The definition of rule making and rule follows essentially the definitions of the Federal Register Act (secs. 5 (a) and 11 (a), 49 Stat. 500, 44 U. S. C. 305 (a) and 311 (a)), in which the essential language is "general applicability and legal effect." The reason for the sharp distinction between rule making and adjudication (see the next subsection) is that they are the two main types of administrative justice (see the *Final Report*, Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Cong., 1st sess., 1941, pp. 1–2, 5, and chs. IV, V, and VI, hereinafter referred to as "*Final Report*, Attorney General's Committee" with page references). The procedure in rule making differs from adjudication in essential respects.

Sec. 2 (d).—"Adjudication" has not been defined generally in statutes, except by implication or reference to particular subjects and orders. However, since there are only two basic types of administrative justice—rule making and adjudication—the words "other than rule making" serve to make the essential distinction.

Sec. 2 (e).—"License" and "licensing" is defined in order to make definite and inclusive the functional provisions and exceptions contained in various subsequent sections.

Sec. 2 (f).—"Sanction" and "relief" are defined in order to simplify the language of parts of sections 9 and 10.

COLUMN 4—SUGGESTIONS AND OBJECTIONS

Sec. 2 (c).—The House Judiciary Committee hearings and some of the agency comments disclose a misunderstanding that "rule making" includes rate making or price or wage fixing, although both on principle, under the repeated decisions of the Supreme Court, and by the specific language of subsection 2 (c) such functions are definitely rule making. The classification of these functions as rule making, which they properly are, is important because many provisions of the bill do not apply to rule making. If deemed necessary, the language of the definition may be amplified by adding, after the word "include" in the second sentence, the words "the prescription for the future of rates, wages, prices, facilities, appliances, services, allowances therefor, or of valuations, costs, accounting, or practices bearing thereon."

COLUMN 1—FULL TEXT OF S. 7

imposition of any form of penalty or fine, (4) destruction, taking, seizure, or withholding of property, (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees, or (6) requirement of a license or other compulsory or restrictive act. "Relief" includes, in whole or part by an agency, any (1) grant of money, assistance, authority, exemption, privilege, or remedy, (2) recognition of any claim, right, or exception, or (3) taking of other action beneficial to any person.

(g) AGENCY ACTION.—For the purposes of section 10, "agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof and including in each case the supporting procedures, findings, conclusions, and reasons required by law.

PUBLIC INFORMATION

SEC. 3. Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States requiring secrecy in the public interest—

(a) RULES.—Every agency shall separately state and currently publish (1) descriptions of its internal and field organization, (2) a statement of the general course and method by which each type of matter directly affecting

COLUMN 2—REVISED TEXT

position of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; or (6) requirement of a license or other compulsory or restrictive act. "Relief" includes, in whole or part by an agency, any (1) grant of money, assistance, authority, exemption, privilege, or remedy; (2) recognition of any claim, right, or exception; or (3) taking of other action beneficial to any person.

(g) AGENCY PROCEEDING AND ACTION.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. For the purposes of section 10, "agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof.

PUBLIC INFORMATION

SEC. 3. Except to the extent that there is involved (1) any military, naval, foreign affairs, or other function of the United States requiring secrecy in the public interest, or (2) any matter relating solely to the internal management of an agency—

(a) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization, (2) the established places and methods whereby the public may secure information or

COLUMN 3—EXPLANATION

SEC. 2 (g).—"Agency proceeding" and "agency action" are defined in order to simplify the language of some of the remaining provisions.

SEC. 3.—The Attorney General's Committee unanimously agreed that "an important and far-reaching defect in the field of administrative law has been a simple lack of adequate public information concerning its substance and procedure," in which connection the Committee also pointed out that the *Federal Register* and *Code of Federal Regulations* statutes "did not provide affirmatively for the making of needed types of rules or for the issuance of other forms of information. * * * A primary legislative need, therefore, is a definite recognition, first, of the various kinds or forms of information which ought to be available and, second, of the authority and duty of agencies to issue such information" (*Final Report*, pp. 25–26, and see also pp. 123–124). The introductory exception is self-explanatory.

SEC. 3 (a).—This subsection states the kinds of rules agencies shall state or publish. The Final Report of the Attorney General's Committee at pages 26–28 lists them as the types of rules which "agencies should be authorized and directed to make and issue." The Committee also emphasized that the several types of information should be separately stated and their publication kept current. Section 3 (a), however, does not require the making of any substantive or interpretative rules or statements of policy.

COLUMN 4—SUGGESTIONS AND OBJECTIONS

SEC. 3 (a).—The following agency comment has been made: Federal Security Agency

(1) It is said that a requirement that agencies describe in rules the "course and method" by which its rule making and adjudicating functions are carried out would be contrary to the public interest. If that is said because of the difficulty of stating details, the answer is that the provision requires only a statement of the "general" course and method. If it is meant literally, the answer is given by the Attorney General's Committee comment quoted in column 3.

(2) It is said that this section requires agencies to include the "substantive criteria" whereby cases are decided, but the language obviously makes no such

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COLUMN 1—FULL TEXT OF S. 7

any person or party is channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations, and (3) substantive regulations adopted as authorized by law and statements of general policy or interpretations framed by the agency. No person shall in any manner be held liable or prejudiced for compliance with such rules or for failure to resort to organization or procedure not so published.

(b) RULINGS AND ORDERS.—Every agency shall publish or make available to public inspection all generally applicable rulings on questions of law and all final opinions or orders in the adjudication of cases except to the extent (1) not utilized as precedents and required by published rule for good cause to be held confidential or (2) relating to the internal management of the agency and not directly affecting public substantive or procedural privileges, rights, or duties.

(c) PUBLIC RECORDS.—Matters of official record shall, to the extent consistent with the public interest, be available to persons properly and directly concerned except personal data, information required by law to be held confidential, or, for good cause found and upon published rule, other specified classes of information.

SEC. 3. (c).—This section is similar to section 6 (f) in S. 7 as set forth in column 1.

COLUMN 2—REVISED TEXT

make submittals or requests, (3) statements of the general course and method by which its rule making and adjudicating functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and general instructions as to the scope and contents of all papers, reports, or examinations, and (4) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public.

(b) RULINGS AND ORDERS.—Every agency shall publish or make available to public inspection all its generally applicable rulings on questions of law and all final opinions or orders in the adjudication of cases except those required for good cause to be held confidential and not cited as precedents.

SEC. 3 (b).—This section requires that rulings and orders either be published or otherwise made available to public inspection. Since rulings and orders are the sources of administrative law, it is obviously necessary that they be published or made available to public inspection. The essential nature and value of this type of material were emphasized by the Attorney General's Committee at pages 36-38 of its Final Report.

(c) PUBLIC RECORDS.—Matters of official record shall, to the extent consistent with the public interest, be available to persons properly and directly concerned except personal data, information required by law to be held confidential, or, for good cause found and upon published rule, other specified classes of information.

SEC. 3 (c).—This subsection merely provides that appropriate matters of official record shall be made available to properly interested persons.

COLUMN 3—EXPLANATION

COLUMN 4—SUGGESTIONS AND OBJECTIONS

5

requirement until indeed the last numbered category, extremely difficult to identify material need be published only where affirmatively required by law "for the guidance of the public." As a matter of fact, perhaps the best agency for the guidance of the public should be omitted because the public should have the benefit of any applicable [illegible] or directions the agency may frame. [illegible] (3). It is suggested that procedural [illegible] required to be published, however, in the alternative, merely made available to public inspection, but the answer in the alternative would seem to be that the Federal Register is the established organ whereby information is conveyed to the public. It was established for that purpose and the Attorney General's Committee recommends that it be used for that purpose in connection with administrative procedure. Not to do so will in most cases leave parties without any practical recourse to the information.

Sec. 3 (c).—It has been suggested that the phrase "personal data" be clarified, which if necessary, may be done in the committee report.

6

COLUMN 1—FULL TEXT OF S. 7

RULE MAKING

SEC. 4. Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States—

(a) NOTICE.—General notice of proposed substantive rule making shall be published, including (1) a statement of the time, place, and nature of public rule-making proceedings, (2) reference to the authority under which the rule is proposed, and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except in cases in which rules are not required by statute to be made after opportunity for agency hearing, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency, for good cause finds notice and public procedure thereon impracticable because of unavoidable lack of time or other emergency.

(b) PROCEDURES.—After notice required by this section, the agency shall afford interested parties an opportunity to participate in the rule making through submission of written data, views, or argument with or without oppor-

COLUMN 2—REVISED TEXT

RULE MAKING

SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management, Government personnel, or public property or contracts—

(a) NOTICE.—General notice of proposed substantive rule making shall be published in the Federal Register and shall include (1) a statement of the time, place, and nature of public rule making proceedings, (2) reference to the authority under which the rule is proposed, and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency, for good cause, affirmatively finds (and incorporates the finding in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) PROCEDURES.—After notice required by this section, the agency shall afford interested parties an opportunity to participate in the rule making through submission of written data, views, or argument with or without opportunity

COLUMN 3—EXPLANATION

SEC. 4.—The introductory exceptions to the procedural requirements of rule making are self-explanatory.

SEC. 4 (a).—The Attorney General's Committee found that public rule making procedures "are likely to be diffused and of little real value either to the participating parties or to the agency, unless their subject matter is indicated in advance. * * * In principle, therefore, each agency should be obliged to announce with the greatest possible definiteness the matters to be discussed in rule making proceedings" (*Final Report*, Attorney General's Committee, p. 108). Subsection (a) requires notice only in the making of substantive rules and then only where not impracticable or unnecessary or contrary to public interest, and lists the types of information to be contained in such notices. The limitation of the notice requirement is significant, because upon it depends the requirement of procedures contained in subsection (b) which follows. The reason for the exclusion of rules of organization, procedure, interpretation, and policy is threefold: First, it is desired to encourage the making of such rules. Secondly, those types of rules vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned. Thirdly, the provision for petitions contained in subsection (c) affords an opportunity for private parties to secure a reconsideration of such rules when issued. Another reason, which might be added, is that "interpretative" rules—as merely interpretations of statutory provisions—are subject to plenary judicial review, whereas "substantive" rules involve a maximum of administrative discretion.

SEC. 4 (b).—This subsection, which provides for public rule making procedures, applies only to the type of rules for which notice is required by subsection (a) above—that is, substantive rules, which involve true administrative legislation. As to that type of rules, moreover, it leaves agencies free to choose from the several common types of informal public rule making procedures, the simplest of which is to permit interested persons to submit written views or data, except where Congress has required that rules be issued only upon a hearing. In the latter case, the hearing and decision procedures of sections 7 and 8 necessarily apply. Thus, the provision does not extend present requirements

COLUMN 4—SUGGESTIONS AND OBJECTIONS

SEC. 4.—The following comments have been made:

(1) The phrase "military functions" should be clarified, particularly for the purpose of including within it all proceedings relating to courts martial. As heretofore indicated, the subject would seem more appropriate for section 13.

(2) Objection is made to the entire section on the ground that it should not be applied to minimum wage determinations of the Department of Labor in connection with public contracts. The last sentence of the following subsection (a), however, amply provides for proper exemptions.

(3) It is suggested that the second part of the introductory clause of the section should include public "loans, grants, benefits." If the exemption provision of the last sentence of the following subsection (a) is not deemed sufficient to care for any question in this respect, those words may be added after the word "property" in the introductory clause.

SEC. 4 (a).—The following comment has been made:

(1) It is suggested that "substantive" should be defined and clarified. The meaning of the phrase "substantive rule" is well defined in court decisions and upon principle. Further clarification may be supplied in the committee report. Furthermore, the second sentence enumerates what is not made mandatory in the first.

(2) The subsection has been criticized on the ground that the two sentences, read together, raise a "confusing implication that 'rules of agency organization, procedure, or practice' constitute substantive rules" because the phrase "substantive rule making" is used as the subject of the first sentence and the others are then included in the kinds of rules exempted by the second. Strictly speaking, it should be unnecessary to provide in the second sentence that procedural or organizational rules are exempted; but the exemption was specified out of an abundance of caution lest it be thought by those unversed in administrative law definitions that they might be included in the notice requirement.

(3) Objection is made that the final clause of the subsection is too broad an avenue through which agencies may "escape" the requirement of notice and procedure, but the answer would seem to be that the language as written requires agencies to act in good faith and dispense with the requirements only for good cause.

SEC. 4 (b).—Private parties complain that this subsection provides inadequate procedure, particularly in the matter of findings and conclusions. However, the requirement that agencies consider "all relevant matter presented" and issue "a concise general statement of their basis and purpose" would seem to achieve all that more elaborate procedure could do effectively. The statement of the "basis and purpose" of rules issued will vary with the rule, but in any case should be fully explanatory of the complete factual and legal basis as well as the real object or objects sought. It is deemed better to have some public procedure in most cases than to have rigorous procedure in a few cases.

COLUMN 1—FULL TEXT OF S. 7

tunity to present the same orally in any manner. After consideration of all relevant matter presented the agency shall, upon adoption or rejection of proposals, publish its reasons and conclusions. To the extent that rules are required by law to be made upon the record of an agency hearing, or after opportunity therefor, the requirements of sections 7 and 8 shall apply in place of the prior provisions of this subsection.

(e) Petitions.—To the extent that an agency is authorized to issue rules it shall accord any interested person the right to petition for the issuance, amendment, or rescission of a rule.

Adjudication

Sec. 5. In every case of adjudication required by statute to be determined after opportunity for an agency hearing, except to the extent that there is directly involved any

COLUMN 2—REVISED TEXT

to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by law to be made upon the record after opportunity for or upon an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) Effective Dates.—The required publication or service of any substantive and effective rule (other than one granting exemption or relieving restriction) shall precede for not less than thirty days the effective date thereof except as otherwise provided by the agency upon good cause found.

Sec. 4. (c).—This section is similar to section 6 (e) in S. 7.

(d) Petitions.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or rescission of a rule.

Adjudication

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved

COLUMN 3—EXPLANATION

except to require agencies, in the issuance of substantive rules, to permit at least the submission of written views or suggestions. This minimum requirement is based upon the premise stated as follows by the Attorney General's Committee (*Final Report*, pp. 101–102): "An administrative agency * * * is not ordinarily a representative body. * * * Its deliberations are not carried on in public and its members are not subject to direct political controls as are legislators. * * * Its knowledge is rarely complete, and it must always learn the * * * viewpoints of those whom its regulations will affect. * * * [Public] participation * * * in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford safeguards to private interests. It may be accomplished by oral or written communication and consultation; by specially summoned conferences; by advisory committees; or by hearings." It should be noted that no requirement of formal administrative hearing is imposed except where Congress has by some other statute required that rules be issued upon hearing.

Sec. 4 (c).—The Attorney General's Committee found that: "Some procedure should be provided to correct error or oversight in regulations before, rather than after, they become effective. This can be done by deferring their effectiveness until a specified period after their announcement. A provision of this sort will, moreover, insure notice of the regulations to interested parties. * * * A number of statutes now in force provide for the deferred effectiveness of regulations promulgated under them." *Final Report*, Attorney General's Committee, pages 114–115.

Sec. 4 (d).—Subsection (d) requires agencies to receive and consider requests of private parties for the making, modification, or rescission of rules. The Attorney General's Committee proposed that such a provision be included in legislation (*Final Report*, pp. 195, 230).

Sec. 5.—This section defines generally the procedure for the administrative adjudication of particular cases. The introductory clause removes from the operation of sections 5, 7, and 8 all administrative procedures in which Congress has not required orders to be made upon a hearing, and the first of the further exceptions eliminates matters subject to a subsequent trial of the law and the facts *de novo* in any court. Limiting application of the sections to those cases in which statutes require a hearing is particularly significant,

COLUMN 4—SUGGESTIONS AND OBJECTIONS

Sec. 4 (c).—The following comments have been made:

(1) It is suggested that the words "effective rule" should be clarified. This may be done by committee report. They mean a rule which is binding as distinguished from "tentative" or "proposed" rules which agencies often publish and are encouraged to publish. The first use of the word "effective" in the sentence might be omitted if any real confusion results; but with or without it the meaning of the provision is clear on its face.

(2) Objection is made to the application of the provision to minimum wage determinations in connection with public contracts, but subsection (a) contains adequate exemption for good cause which is operative in any proper case.

(3) It is suggested that the provision should not apply to interpretative rules or statements of policy. If the exemption clause is not deemed ample to care for these types of rules, it may be well to add "or interpretative rules and statements of policy" at the end of the parenthetical expression in the subsection.

Sec. 4 (d).—One agency objects to the statutory statement of a right of petition on the ground that it would "force" a "tremendous" number of hearings. The alternative implied is that no one should have a right of petition, leaving action or inaction to the initiative of the agency concerned. Even Congress, under the Bill of Rights, is required to accord the right of petition to any citizen. If a petitioner states and supports a valid ground for hearing or relief, manifestly he should be entitled to hearing or relief. Not every petition need result in a hearing, just as not every complaint in court need result in trial.

Sec. 5.—The following comments have been received:

(1) It is suggested that "military functions" be further defined or clarified. This may be done by committee report. So far as the objection relates to the possible inclusion of courts martial proceedings, see the comment to section 13.

(2) It is proposed that proceedings for claims to money damages be exempted from the section, but such proceedings are not ordinarily required

COLUMN 1—FULL TEXT OF S. 7

matter subject to a subsequent trial of the law and the facts de novo in any court—

(a) NOTICE.—Persons entitled to notice shall be informed of (1) the time, place, and nature of agency proceedings, (2) the legal authority and jurisdiction under which the proposed proceedings are to be had, and (3) the matters of fact and law in issue. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for the settlement or adjudication of relevant issues through (1) the submission and consideration of facts, argument, offers of settlement, or pro-

COLUMN 2—REVISED TEXT

(1) any matter subject to a subsequent trial of the law and the facts de novo in any court, (2) the selection or tenure of an officer or employee of the United States, (3) proceedings in which decisions rest solely on inspections, tests, or elections, (4) the conduct of military, naval, or foreign affairs functions, (5) cases in which an agency is acting as an agent for a court, and (6) the certification of employee representatives—

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be informed of (1) the time, place, and nature thereof, (2) the legal authority and jurisdiction under which it is to be held, and (3) the matters of fact and law in issue. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment where time and the nature of the proceeding permits

COLUMN 3—EXPLANATION

because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing. The exception of matters subject to a subsequent trial of the law and the facts *de novo* in any court exempts such matters as the tax functions of the Bureau of Internal Revenue (which are triable *de novo* in The Tax Court), the administration of the customs laws (triable *de novo* in the customs courts), the work of the Patent Office (since judicial proceedings may be brought to try out the right to a patent), and subjects which might lead to claims determinable subsequently in the Court of Claims. This exception also exempts administrative reparation orders assessing damages, such as are issued by the Interstate Commerce Commission and the Secretary of Agriculture, since such orders are subject to trial *de novo* in court upon attempted enforcement. It also exempts contract and property matters triable in the courts. There should be no disposition to compel administrative hearings where Congress has not already so provided because, as pointed out below in connection with judicial review, the established law permits a trial *de novo* of the facts in all cases of adjudications where statutes do not require an administrative hearing. Moreover, as to subjects triable *de novo* in the courts, although the administrative procedure may in some instances shift the burden of proof the parties have a right to ultimate full judicial process. The other exemptions are self-explanatory.

SEC. 5 (a).—Since this section, and thereby sections 7 and 8 relating to hearings and decisions, applies only where statutes require a hearing, notice of hearing is an obvious and indispensable requisite. The only purpose of subsection (a) is to require adequate notice, because "a * * * prerequisite to fair formal proceedings is that when formal action is begun, the parties should be fully apprised of the subject matter and issues involved. Notice * * * must fairly indicate what the respondent is to meet. * * * Room remains for considerable improvement in the notice practices of many agencies" (*Final Report*, Attorney General's Committee, p. 63). The second sentence requiring a statement of controverted issues is essential because of the general lack of requirement for responsive pleadings in administrative proceedings; without such provision moving parties do not know what issues are controverted.

SEC. 5 (b).—Subsection (b) provides that, even where formal hearing and decision procedures are available to parties, the agencies and the parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process (*Final Report*, Attorney General's Committee, p. 35). The statutory recognition of such informal

COLUMN 4—SUGGESTIONS AND OBJECTIONS

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by statute to be made after agency hearing. Hence, by operation of the introductory provision, they are exempt from the section. It is similarly suggested that pension and benefit proceedings be expressly exempted, but for the same reason these are not subject to section 5.

(3) One agency requests that its reparation proceedings—though subject to trial *de novo* in the courts—be made subject to section 5 but not to subsection (c) relating to the separation of functions. On principle and for the reason stated in the previous paragraph, this type of proceeding is exempted. If the suggestion is deemed a good one, after the word "except" the following parenthetical expression might be inserted "(unless an agency shall by published rule elect to be governed by this subsection with or without subsection (c))", thereby permitting proceedings under any of the exempt categories to be brought under the measure.

(4) It is urged that the second numbered exception should not apply to examiners appointed pursuant to this Act, so that, if their sole protection remains the civil service system, they may be removed only after a hearing pursuant to the proposed statute. For this purpose it is suggested that the following words be added at the end of the second exception: "other than examiners appointed pursuant to section 11".

(5) Question has been raised whether the sixth exception in the introductory clause of section 5, relating to certification procedure in labor representation cases, should be included and thus remove such cases from the operation of sections 5, 7, and 8. Those who desire the exemption state that such things as intermediate reports, findings, and written decisions are unnecessary because of the simplicity of the issues, the great number of cases, and the exceptional need for expedition. Those who oppose the exemption say that, on principle, the function should be treated as other adjudications and that, so far as the issues are simple, the intermediate report, findings, and decisions may also be simple.

COLUMN 1—FULL TEXT OF S. 7

posals of adjustment and (2), to the extent that the parties are unable to so determine any controversy by consent, hearing and decision upon notice and in conformity with sections 7 and 8. The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision pursuant to section 8 except in determining applications for licenses or where such officers become unavailable to the agency.

(c) SEPARATION OF FUNCTIONS.—No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency shall participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not prevent the agency from supervising the issuance of process or similar papers or from appearing thereon as a party.

COLUMN 1—FULL TEXT OF S. 7

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or from appearing thereon as a party.

COLUMN 2—REVISED TEXT

and (2), to the extent that the parties are unable to so determine any controversy by consent, hearing and decision upon notice and in conformity with sections 7 and 8.

SEC. 5. (b).—The last sentence of this section in S. 7 is shifted to subsection (c).

(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision pursuant to section 8 except where such officers become unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any issue of fact unless upon notice and opportunity for all parties to participate. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency shall, in any case shall, in that or a related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for licenses nor prevent the agency from

COLUMN 3—EXPLANATION

methods should both strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations. It should be noted that the precise nature of informal procedures is left to development by the agencies themselves.

SEC. 5 (c).—The first sentence of subsection (c) is designed to assure, in so-called "accusatory" proceedings, that those who hear the case shall participate in its decision. The remainder of the subsection, in such cases, is designed to achieve an "internal" segregation of deciding and prosecuting functions. The minority of the Attorney General's committee took the position that there should be a complete separation of functions—that is, that hearings should be held and decisions made by an administrative tribunal separate from the agency engaged in investigations and prosecutions, or by a court (*Final Report*, pp. 203–209). The majority, however, took the position that, while "a man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions" and the "comingling of functions of investigation or advocacy with the function of deciding are * * * plainly undesirable," the situation could and should be remedied "by appropriate internal division of labor. * * * The problem is simply one of isolating those who engage in the activity. * * * Independent hearing [officers] insulated from all phases of a case other than hearing and deciding will * * * go far toward solving this problem at the level of final decision on review by the agency heads by permitting the views of the investigators and advocates to be presented only in open hearing where they can be known and met by those who may be adversely affected by them" (*Final Report*, pp. 55–57). This majority view is adopted here.

COLUMN 4—SUGGESTIONS AND OBJECTIONS

SEC. 5 (c).—It is suggested that this subsection be made inapplicable to rule making proceedings and reparation cases. But the answer is that the entire section applies only to "adjudications", as shown by the introductory provision, thereby eliminating rule making proceedings under the definitions stated in subsections 2 (c) and (d). The first numbered exception in the introductory provision of section 5, of proceedings subject to trials *de novo* in the courts, exempts reparation proceedings from the entire section.

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COLUMN 1—FULL TEXT OF S. 7

(d) DECLARATORY ORDERS.—The agency is authorized, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

ANCILLARY MATTERS

SEC. 6. In connection with any proceedings or authority—

(a) APPEARANCE.—Every interested person shall be accorded the right to appear in person or by counsel or other qualified representative before any agency or its responsible officers or employees to secure information or for the prompt negotiation, adjustment, or determination of any issue, request, or controversy. Every person appearing or summoned in any agency proceeding shall be freely accorded the right to be accompanied and advised by counsel. In fixing the times and places for proceedings, regard shall be had for the convenience and necessity of the parties or their representatives.

COLUMN 2—REVISED TEXT

supervising or authorizing the issuance of process, complaints, or similar papers or from appearing thereon as a party.

SEC. 5. (c).—There is added to this section, from S. 7 as it appears in column 1, the last sentence of section 5 (b) and the second sentence of the second paragraph of section 7 (a). Section 5 (c) is confined to adjudication (other than licensing) and does not apply to rule making.

(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

ANCILLARY MATTERS

SEC. 6. Except as otherwise provided in this Act—

(a) APPEARANCE.—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied and advised by counsel or, if permitted by the agency, by other qualified representative. In other cases, every interested person shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding or, where time and the nature of the case permit, before any agency or its responsible officers or employees for the prompt presentation, adjustment, or determination of any issue, request, or controversy. In either case, due regard shall be had for the convenience and necessity of the parties or their representatives.

COLUMN 3—EXPLANATION

SEC. 5 (d).—Courts have long recognized the validity of declaratory judg-
ment procedures; but the administrative process has been slow to adopt such
procedures. The Attorney General's Committee strongly recommended that
the declaratory ruling be made a part of the administrative process and subject
to judicial review (*Final Report*, pp. 6, 30–33).

SEC. 6.—The provisions of section 6 are designed to recognize or provide the
basic rule for the several types of matters which may be subsidiary to rule
making, adjudication, or other administrative powers and proceedings. They
are largely self explanatory and of obvious application.

SEC. 6 (a).—This subsection recognizes the right of parties to appear before
administrative agencies and be accorded facilities for the negotiation or settle-
ment of any matter within the jurisdiction of the agency. It is thus designed
to inform both the uninitiated administrator and the unfamiliar party of the
right of appearance, thereby precluding either administrators or parties from
the view that interviews and negotiations must be handled through favored
representatives or as a discretionary dispensation. The first sentence is a recog-
nition that, in the administrative process, the benefit of counsel shall be accorded
as of right just as recognized by the Bill of Rights in connection with the
judicial process, and as proposed by the Attorney General's Committee (*Final
Report*, pp. 193, 219). It is to be noted that nonlawyers, if permitted by the
agency to practice before it, are not excluded from representing interested
parties in administrative matters; for example, class "B" practitioners recog-
nized by the Interstate Commerce Commission.

COLUMN 4—SUGGESTIONS AND OBJECTIONS

SEC. 5 (d).—Private parties object to leaving the issuance of declaratory
orders to agency discretion. However, the phrase "sound discretion" means a
reviewable discretion and will prevent agencies from either giving improvident
declaratory orders or arbitrarily withholding such orders in proper cases.

SEC. 6 (a).—The following suggestions have been made:

(1) Clarify "interested person." This may be done by committee report.
The phrase is one of recognized meaning, and the Attorney General's Committee
on Administrative Procedure has pointed out that attempts at more refined
statutory definition are probably futile (*Final Report*, p. 84).

(2) Define "agency proceeding." This has been done in subsection 2 (g).

(3) In the first sentence after "accompanied" insert a comma and the word
"represented", so that counsel may present as well as advise. There seems to
be no reason why this change may not be made. That is the meaning of the
sentence. In most cases, even where the party must be personally present as
in judicial proceedings of a criminal nature, the representation by counsel may
be helpful both to the agency concerned and the party.

COLUMN 1—FULL TEXT OF S. 7

(b) Investigations.—No process, requirement of a report, demand for inspection, or other investigative act or demand shall be enforcible in any manner or for any purpose except (1) as expressly authorized by law, (2) within the jurisdiction of the agency, (3) without denying rights of personal privilege or privacy, and (4) in furtherance of requirements of law enforcement. Every person required to submit data or evidence shall be entitled to retain or procure a copy or transcript thereof.

(c) Subpenas.—Subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance, necessity, or reasonable scope of the evidence sought. Upon any contest of the validity of a subpena or similar process or demand, the court shall determine all relevant questions of law raised by the parties, including the authority or jurisdiction of the agency, and in any proceeding for enforcement shall enforce (by the issuance of an order requiring the production of the evidence or data under penalty of punishment for contempt in case of contumacious failure to do so) or refuse to enforce such subpena accordingly.

(d) Denials.—Prompt notice shall be given of the denial in whole or part of any application, petition, or other request of any person. Such notice shall be accompanied by

COLUMN 2—REVISED TEXT

(b) Investigations.—No process, requirement of a report, inspection, or other investigative act or demand shall be enforcible in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof.

(c) Subpenas.—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance, necessity, or reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, issue an order requiring the production of the evidence or data under penalty of punishment for contempt in case of contumacious failure to do so.

(d) Denials.—Prompt notice shall be given of the denial in whole or part of any written application, petition, or other request of any interested person made in connection

COLUMN 3—EXPLANATION

Sec. 6 (b).—Many statutes conferring administrative powers contain authorization to conduct investigations, but the same statutes rarely include language indicating that such investigations must be confined to the jurisdiction and purposes of the agency to which the authority is delegated. Subsection (b) states the established limitations. Although scattered precedents hold that such investigative powers are necessarily so confined, since otherwise delegations would be unrestrained and therefore unconstitutional, the basic rule should be included in any administrative procedure statute.

Sec. 6 (c).—Statutory provisions conferring administrative subpena powers are usually incomplete. They confer powers, but say nothing of the conditions of issuance or the rights of private parties. Subsection (c) is designed to: (1) Assure that private parties as well as agencies shall have a right to such subpenas. This is an indispensable requisite to fair procedure since if the private party does not have the benefit of compulsory process he may not be able to secure witnesses or evidence while the agency can have such process for its own purposes. (2) Limit the showing required of private parties so that they may not be required to disclose their entire case for the benefit of agency prosecutors. (3) Recognize that a private party may contest the validity of an administrative subpena issued against him prior to incurring penalties for disobedience, since otherwise parties may in effect be deprived of all opportunity to contest the search or seizure involved. The "haphazard" and often unfair methods of issuance of administrative subpenas were recognized in the *Final Report* of the Attorney General's Committee (pp. 124–125, 414–415).

Sec. 6 (d).—Subsection (d) calls for prompt notice of denial of applications, and is designed to require notice not only of action but of the grounds in appropriate cases.

COLUMN 4—SUGGESTIONS AND OBJECTIONS

Sec. 6 (c).—The following suggestions have been made:

(1) In the first sentence use the phrase "and reasonable" rather than "or reasonable" to indicate that the agency may require a showing of "relevance, necessity *and* reasonable scope". If the change were made, agencies would, strictly speaking, be compelled to require all the elements or none; as written, agencies may require all or some.

(2) Provide for witness fees. Such provision, like authority to issue subpenas hereinafter mentioned, probably should be made in separate legislation relating to particular agencies or powers rather than by a general statute.

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(3) Private parties urge that after the word "be" in the second sentence there be added, "within the jurisdiction of the agency and otherwise", so that no administrative subpena may be enforced beyond the lawful jurisdiction of the agency. It is felt that "in accordance with law" as now stated in column 2 means that. If adopted, the suggestion should be understood as not authorizing a complete pretrial in the courts of factual issues committed to exclusively administrative determination; courts should, instead, do no more than satisfy themselves that, legally upon the general factual situation shown, the agency has jurisdiction of the specific subject matter involved.

COLUMN 1—FULL TEXT OF S. 7

a reference to any further agency procedure available to such person and, except to the extent affirming prior denial, a simple statement of grounds.

(e) EFFECTIVE DATES.—The required publication or service of any substantive and effective rule (other than one granting exemption or relieving restriction) or final and affirmative order (except the grant or renewal of a license) shall precede for not less than thirty days the effective date thereof except as otherwise authorized by law and provided by the agency upon good cause found.

(f) PUBLIC RECORDS.—Matters of official record shall be available to interested persons except personal data, information required by law to be held confidential, or, for good cause found and upon published rule, other specified classes of information.

HEARINGS

SEC. 7. In a hearing pursuant to sections 4 or 5—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency or (2) one or more subordinate hearing officers designated from members of the body which comprises the agency, State representatives as authorized by statute, or examiners appointed as provided in this Act.

The functions of all presiding officers and of officers par-

COLUMN 2—REVISED TEXT

with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of grounds.

SEC. 6. (e). See section 4 (c) in column 2.

SEC. 6. (f). See section 3 (c) in column 2.

HEARINGS

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more subordinate hearing officers designated from members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before other officers

or State representatives as authorized by statute

Suggested by Nat. Assn. of Railroads & Utilities Com.

COLUMN 3—EXPLANATION

SEC. 7.—As stated in the comment to section 5, the provisions of section 7 respecting hearings are not designed to require hearings where Congress has not already done so by statute.

SEC. 7 (a).—This subsection contains merely formal provisions with reference to hearing officers. The problem of their selection is presented in section 11 and the comment thereon.

COLUMN 4—SUGGESTIONS AND OBJECTIONS

SEC. 7 (a).—The following comments have been received:

(1) It is feared that the provision for disqualification of presiding officers for "willful conduct contrary to law" may be used to try, in interlocutory fashion, the rulings of such officers during the course of the hearing. No such result is intended or reasonable. The type of conduct contrary to law warranting disqualification is that specified in section 5 (c) regarding the separation of functions. It should be possible to care adequately for the point by committee report.

(2) It is also feared that disqualification proceedings may require the main hearing to be held in abeyance. However, such proceedings will take place rarely if at all, and then usually before the main case gets under way. There is nothing in the provision which prevents both proceedings taking place simultaneously.

COLUMN 1—FULL TEXT OF S. 7

Adjudication in decisions in conformity with section 8 shall be conducted in an impartial manner. Except to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult or receive evidence or argument from or on behalf of any person or party except upon notice and opportunity for all parties to participate. Upon the filing in good faith of a timely and sufficient affidavit of personal bias, disqualification, or conduct contrary to law of any such officer, the agency or another such officer shall after hearing determine the matter as a part of the record and decision in the case.

Subject to the civil-service and other laws not inconsistent with this Act there shall be appointed for each agency as many qualified and competent examiners as may be necessary for the hearing or decision of cases, who shall perform no other duties, be removable only for good cause after hearing, and receive a fixed salary not subject to charge except that the Civil Service Commission shall periodically survey and adjust examiners' salaries in order to ensure adequacy and uniformity in accordance with the nature and importance of the duties performed. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected from other agencies by the Civil Service Commission.

COLUMN 2—REVISED TEXT

specially designated by statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias, disqualification, or willful conduct contrary to law of any such officer, the agency or another such officer shall after hearing determine the matter as a part of the record and decision in the case.

Sec. 7 (a).—The second sentence of the second paragraph in S. 7 is transferred to section 5 (c) in column 2. The third paragraph of S. 7 is a new section 11 in column 2.

COLUMN 3—EXPLANATION

COLUMN 4—SUGGESTIONS AND OBJECTIONS

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COLUMN 1—FULL TEXT OF S. 7

(b) HEARING POWERS.—Officers presiding at hearings shall have power, in accordance with the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, and (8) make decisions or recommend decisions in conformity with section 8.

(c) EVIDENCE.—The proponent of a rule or order shall have the burden of proceeding except as statutes otherwise provide. The conduct of every person or status of any enterprise shall be presumed lawful until the contrary shall have been shown. Every party shall have the right of reasonable cross-examination and to submit rebuttal evidence except that in rule making or determining applications for licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of written evidence subject to opportunity for such cross-examination and rebuttal. Any evidence may be received, but no sanction

COLUMN 2—REVISED TEXT

(b) HEARING POWERS.—Officers presiding at hearings shall have power, in accordance with the published rules and established policies of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any evidence may be received, but no sanction shall be imposed or rule or order be issued except as supported by relevant, reliable, and probative evidence. ~~Every party shall have the right of reasonable cross-examination and to submit rebuttal evidence.~~ In rule making or determining applications for licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form subject to opportunity for such cross-examination and rebuttal.

COLUMN 3—EXPLANATION

SEC. 7 (b).—The statement of the powers of administrative hearing officers is designed to secure that responsibility and status which the Attorney General's Committee stressed as essential (*Final Report*, pp. 43–53 particularly at pp. 45–46 and 50).

SEC. 7 (c).—No attempt is made to require the application of the so-called "common law" or "jury trial" rules of evidence in administrative hearings. "The absence of a jury and the technical subject matter with which agencies often deal, all weigh heavily against a requirement that administrative agencies observe what is known as the 'common law rules' of evidence for jury trials" (*Final Report*, Attorney General's committee, p. 70). As a matter of fact, those rules are no longer applicable in judicial trials, at least in trials in equity or before a court sitting without a jury. On the other hand, where private parties have the burden of proof, or seek to adduce evidence or establish defenses, agencies often require precisely that conformity with technical and outmoded rules of proof. Some recognizable rule, therefore, should be adopted for both private parties and government agencies. That some rule is necessary is evident from the fact that courts require administrative action to be supported by "substantial *evidence*". As a result, "although administrative agencies may be freed from the observance of strict common law rules of evidence for jury trials, it is erroneous to suppose that agencies do not * * * observe some 'rules of evidence'", regulations of some agencies "embody extensive rules governing the modes of proving * * * crucial issues," and the Attorney General's committee "found no general pattern of departure from the basic principles of evidence among administrative agencies" (*Final Report*, p. 70). Accordingly, subsection (c) adopts the "reliable, probative, and relevant" standard stated by the Attorney General's committee (*Final Report*, p. 71). The courts have used the same standard. *Edison Co.* v. *Labor Board*, 305 U. S. 197, 226, 229, 230; *Labor Board* v. *Remington Rand*, 94 F. 2d 862, 873 (C. C. A. 2, 1938); *Martel Mills Corp.* v. *Labor Board*, 114 F. 2d 624, 629 (C. C. A. 4, 1940); *Labor Board* v. *Service Wood Heel Co.*, 124 F. 2d 470, 473 (C. C. A. 1, 1941); *Ellers* v. *Railroad Retirement Board*, 132 F. 2d 637 (C. C. A. 2, 1943). The provision for rights of cross examination and rebuttal is in keeping with the recognition of those rights by the Attorney General's committee (*Final*

COLUMN 4—SUGGESTIONS AND OBJECTIONS 14

SEC. 7 (b).—It has been suggested that this bill should grant the subpena power to all hearing officers, whether or not the agency has been granted such power. It may seem logical that hearing officers should have compulsory process powers, but it has been felt that the grant of such powers is of such a nature and so important as to be better left to Congress in connection with specific legislation rather than dealt with by a general statute. If, however, the suggestion is deemed meritorious, the phrase "authorized by law" should be eliminated from the second numbered power in the subsection and witness fees should be provided as mentioned in the comment to subsection 6(c).

SEC. 7. (c).—The following objections and suggestions have been made:

(1) The application of the "rules of evidence" should be provided. But, assuming that this does not mean the strict jury trial rules, the difficulty is that there is no definite body of rules of evidence in Federal courts applicable to nonjury cases. There is also serious question whether an attempt to adapt the rules in private litigation to administrative procedure would aid either private parties or government agencies.

(2) It is said that the right of cross examination and rebuttal should not apply in all cases, but the answer would seem to be that only "reasonable" cross examination and rebuttal is provided—thus leaving such examination and rebuttal to be adapted to the needs of the case or type of case.

(3) It is said that "relevant, reliable, and probative evidence" varies the present and tested rule in administrative law, but this is erroneous (see column 3).

(4) It is suggested by one agency that the third sentence should be revised to affirmatively state a right to submit oral evidence by making it read, "Every party shall have the right to present oral or documentary evidence and reasonable opportunity for cross examination and to submit rebuttal evidence." Since the next sentence provides for the submission of written evidence in appropriate cases, there would be no objection to the change.

(5) Several suggestions have been made respecting the provision for submission of written evidence. The first is that the provision should apply to adjudications as well as to rule making and determining applications for licenses. However, adjudications (or "accusatory" proceedings) are traditionally the type of proceeding in which seeing and hearing the witnesses is required and subsection 7 (b) permits even in those cases the taking of depositions "whenever the ends of justice would be served thereby".

(6) The remaining suggestions as to written evidence are that the written-evidence provision should be made applicable to claims and reparation cases.

COLUMN 1—FULL TEXT OF S. 7

shall be imposed or rule or order be issued except as supported by relevant, reliable, and probative evidence.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests relating to the hearing or issues, shall constitute the exclusive record for decision in accordance with section 8 and be made available to the parties. The taking of official notice as to facts beyond the record shall be unlawful unless the parties shall both be notified of the facts so noticed and accorded an opportunity to show the contrary.

DECISIONS

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, an officer or officers qualified to preside at hearings pursuant to section 7 shall either initially decide the case or the agency shall require the entire record certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend

COLUMN 2—REVISED TEXT

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests relating to the hearing, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

DECISIONS

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, an officer or officers qualified to preside at hearings pursuant to section 7 shall either initially decide the case or the agency shall require (in specific cases or by general rule) the entire record certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice

COLUMN 3—EXPLANATION

Report, pp. 69–70). Submission of written evidence was also recommended by the Attorney General's committee (*Final Report*, pp. 67–70). The provision relating to burden of proof is the standard rule.

SEC. 7 (d).—This subsection provides that administrative hearings shall be reduced to a record, and made available to all parties. The statement of the exclusiveness of the record of the administrative hearing is a necessary recognition that upon it, and no other evidence, the further administrative proceedings must be had, the final administrative decision made, and judicial review be confined. Unless the record is so recognized as exclusive, the purpose and value of the hearing may be rendered nil, for it is only the record that informs the parties of the evidence for or against them. The rule of official notice is that recommended by the Attorney General's committee, particularly the safeguard that parties be apprised of matters so noticed and accorded an "opportunity for reopening of the hearing in order to allow the parties to come forward to meet the facts intended to be noticed." (*Final Report*, pp. 71–73).

SEC. 8.—This section relating to decisions, like section 7 relating to hearings, applies only in cases in which a hearing is required by statute. See also the other exceptions to section 5, which automatically carry over into sections 7 and 8.

SEC. 8 (a).—The Attorney General's Committee recommended that the officer or officers who presided at the reception of evidence should not merely make recommendations to the agency in which they serve, but should go further and make an initial decision binding upon the parties in the absence of administrative or judicial review (*Final Report*, pp. 50–53). This subsection, however, leaves it to the agency to choose either in the individual case or in all cases whether the officer or officers who heard the evidence shall actually decide the case or merely make a recommended decision for the further consideration of the agency. Such a provision not only allows the agency a discretion to be adapted to different subjects or cases, but it does not require a sharp break with current practice. In licensing or rule making, however, the agency may issue a tentative decision in lieu of either an initial decision or recommended decision by the officer who presided at the hearings.

COLUMN 4—SUGGESTIONS AND OBJECTIONS

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If the suggestion is adopted, the introductory language of the last sentence should read, "In rule making or determining claims for money or benefits or applications for licenses any agency may", and so forth.

SEC. 8 (a).—The requirement of a recommended decision by the presiding officer is objected to in wage-hour and in general or regional railroad rate cases. But, because those cases are rule making rather than adjudication, the last sentence permits the agency to issue a tentative decision in lieu of a recommended decision of the presiding officer. To the extent that the issues are simple—which is the ground put forward for eliminating the intermediate report in wage-hour cases—the recommended or tentative decision may also be simple. The objection stated in wage-hour cases does not indicate whether the requirement of a tentative report is also objectionable. The objection in general or regional railroad rate cases is taken to either the requirement of a recommended decision or tentative decision. If either or both of these objections are felt to require recognition in the bill, some or all of the following parenthetical language may be added after the first word of the last sentence: "(except in establishing or adjusting industry wide minimum wages or in general or regional railroad rate proceedings)".

out

[Wage Hour changed mind]

COLUMN 1—FULL TEXT OF S. 7

a decision. Subordinate officers recommending decisions or making initial decisions shall first receive and consider written and oral arguments submitted by the parties.

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended decision, initial decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded an opportunity for the submission of, and the officers participating in such decisions shall consider, (1) proposed findings and conclusions, (2) exceptions to decisions or recommended decisions of subordinate officers, and (3) supporting reasons for such exceptions or proposed findings or conclusions. All decisions and recommended decisions shall be a part of the record, stated in writing, served upon the parties, and include a statement of (1) findings of fact, conclusions of law, and reasons therefor upon all relevant issues of fact, law, or agency discretion presented and (2) the appropriate rule, order, sanction, relief, or denial thereof supported by such findings, conclusions, and reasons.

COLUMN 2—REVISED TEXT

or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision unless in rule making or determining applications for licenses the agency shall first issue a tentative decision as a basis for post-hearing procedure.

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, tentative decision, or decision upon agency review of the decision or subordinate officers the parties shall be afforded an opportunity for the submission of, and the officers participating in such decisions shall consider, (1) proposed findings and conclusions where the complexity of the issues so requires, (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. All decisions and recommended or tentative decisions shall be a part of the record and include a statement of (1) the necessary findings and conclusions, and the basis therefor, upon the material issues of fact, law, or discretion and (2) the appropriate rule, order, sanction, relief, or denial thereof.

COLUMN 3—EXPLANATION

SEC. 8 (b).—This subsection, in its first sentence, merely states the recognized rule respecting proposed findings, exceptions, and argument. The second sentence deals with the form and content of final decisions and determinations. The requirement of written findings and conclusions, coupled with a statement of reasons, is indispensably necessary so far as administrative agencies undertake to make decisions upon the record of a hearing. The Attorney General's Committee pointed out the desirability of written opinions or statements of reasons (*Final Report*, pp. 29–30). The second sentence also requires administrative agencies to determine not merely whether they have power but whether and why, upon the facts, their discretion should be exercised. Such a requirement is illustrated in the decision of the Supreme Court that when an agency determines only "the dry legal question of its power" it fails to determine "whether in employing that power the policies of the act [involved] would be enforced" (*Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194–197 (1941)).

COLUMN 4—SUGGESTIONS AND OBJECTIONS

SEC. 8 (b).—One agency recommends that the subsection include provision for service on the parties in adjudication, and publication in the Federal Register in rule making. While such a provision would not seem necessary in view of the existing law and practice, it may be added by inserting after the word "record" in the last sentence, a comma and the words, "served on parties appearing or specifically named and, in the case of rule making, published in the Federal Register". Agriculture Dept.

unnecessary

COLUMN 1—FULL TEXT OF S. 7

SANCTIONS AND POWERS

SEC. 9. In the exercise of any power or authority—

(a) IN GENERAL.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency by law and as specified and authorized by statute.

(b) LICENSES.—In any case, except financial reorganizations, in which a license is required by law and application is made therefor such license shall be deemed granted unless the agency shall within not more than sixty days of such application have made its decision or set the matter for proceedings required to be conducted pursuant to sections 7 and 8 of this Act or for other proceedings required by law. Except in cases of clearly demonstrated willfulness or those in which public health, morals, or safety manifestly require otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and such person shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the holder thereof has made timely application for a renewal or a new

COLUMN 2—REVISED TEXT

SANCTIONS AND POWERS

SEC. 9. In the exercise of any power or authority—

(a) IN GENERAL.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency by law and as authorized by statute, ~~*or lawful contract.*~~

(b) LICENSES.—In any case in which a license is required by law and application is made therefor, the agency shall, with due regard to the rights or privileges of all the interested parties or adversely affected persons, with reasonable dispatch set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and make its decision. Except in cases of clearly demonstrated willfulness or those in which public health, interest, or safety manifestly require otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and such person shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the holder thereof has made timely application for a renewal or a new license, no license with reference to

COLUMN 3—EXPLANATION

SEC. 9 (a).—This provision, limiting administratively imposed requirements to the authority granted and delegated, is designed to afford statutory recognition for the basic rule of law embodied in judicial decisions. The creation of penalties or benefits is exclusively the province of Congress.

good

SEC. 9 (b).—This subsection is designed to ameliorate the difficulties where private parties are required to secure licenses. The first sentence requires that applications be determined promptly. The second sentence is designed to preclude the withdrawal of licenses, except in cases of willfulness or the stated cases of urgency, without affording the licensee an opportunity for the correction of conduct questioned by the agency. Similar provisions are now contained in the banking statutes, except that the latter provide in addition that stated periods of time—sometimes more than one period of warning—shall elapse prior to the revocation of the equivalent of licenses (Banking Act of 1933, secs. 20, 30, and 31, 48 Stat. 162, as amended, 12 U. S. C. 377, 77, and 71a; Federal Reserve Act, sec. 13, 38 Stat. 251, as amended, 12 U. S. C. 347; R. S. 5144, as amended, 12 U. S. C. 61). The third sentence automatically extends a license in any case in which the licensee has made timely application for renewal but the granting agency fails to act prior to the expiration of the existing license. A similar provision is contained in the licensing procedure act of the State of Ohio (Act of June 3, 1943, sec. 1 amending secs. 154–167 of the General Code; Amended substitute Senate bill No. 36).

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SEC. 9 (a).—It is suggested that the subsection be amended to recognize sanctions specified in international agreements. If deemed desirable the subsection might be amended by adding a comma after the word "statute" and having the remainder of the sentence read, "treaty, authorized international agreement, or lawful contract."

State Dept.

SEC. 9(b).—It is suggested that the provision for the withdrawal of licenses in the second sentence should not be applicable to foreign affairs, including such matters as visas or airplane permits granted foreigners. If deemed desirable, foreign affairs might be excluded by adding after the second word of the second sentence the words and figures "(1) matters of foreign affairs or (2) in".

State Dept.

COLUMN 1—FULL TEXT OF S. 7

license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

(c) PUBLICITY.—Except as provided by law, no agency publicity reflecting adversely upon any person or enterprise shall be issued other than the public release or availability of texts of authorized documents or statements of the positions of the parties to a controversy.

JUDICIAL REVIEW

SEC. 10. Except (1) so far as statutes expressly preclude judicial review, (2) in proceedings for judicial review in any legislative court, or (3) to the extent that agency action is by law committed to agency discretions—

(a) RIGHT OF REVIEW.—Any person adversely affected by any agency action shall be entitled to judicial review thereof in accordance with this section.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of injunction or habeas corpus) in any court of competent jurisdiction.

COLUMN 2—REVISED TEXT

any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

JUDICIAL REVIEW

SEC. 10. Except so far as statutes preclude judicial review or agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action shall be entitled to judicial review.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or legal inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of injunction or habeas corpus) in any court of competent

COLUMN 3—EXPLANATION

SEC. 10.—The introductory exceptions state the two present general or basic situations in which judicial review is precluded—where (1) the matter is discretionary or (2) statutes withhold judicial powers. Other fundamental limitations are included in subsections (a) and (c).

SEC. 10 (b).—The first sentence states the general situation, that methods of review are "of two kinds: (a) those contained in statutes and (b) those developed by the courts in the absence of legislation. * * * The nonstatutory remedies * * * are available * * * where the remedy provided by statute is not an adequate substitute or does not include the particular situation involved" (*Final Report*, Attorney General's Committee, pp. 80–82). Although the declaratory judgment "proceeding has not yet been extensively used to bring Federal administrative action before the Federal courts, its potentialities are indicated by its wide use in other fields" (*Final Report*, Attorney General's Committee, p. 81). In his letter accompanying the veto of the Logan-Walter bill, the Attorney General stated that "Under the Declaratory Judgments Act of 1934, any person may now obtain a judgment as to the validity of * * * administrative rules, if he can show such an interest and present injury therefrom as to constitute a 'case or controversy'" (H. Doc. No. 986, 76th Cong., 3d sess.). The second sentence states the present rule as to enforcement proceedings.

COLUMN 4—SUGGESTIONS AND OBJECTIONS 18

SEC. 10.—The following suggestions have been received:

(1) It is proposed that the phrase "by law committed to agency discretion" might be clarified to indicate that judicial review is conferred only to correct an "abuse of discretion granted by law". So far as necessary, the matter may be explained by committee report. Federal Security Agency

(2) It is urged that military functions—particularly courts martial proceedings—require specific exemption. This is dealt with in the comment to section 13. War Dept.

(3) It is said that the section would render a rate making agency "impotent". But, as indicated in column 3 with reference to subsection (e) of this section, the rule of review stated is that which is judicially recognized.

(4) It is urged that money claim cases—including tort claims and those for pensions or benefits—be expressly exempted. However, tort claims are determined in the discretion of agencies and hence are not subject to review; and, to the extent if any that they may not be committed to absolute discretion, they should be reviewable somewhere. Contract or quasi-contract claims are reviewable *de novo* in the Court of Claims or district courts and hence, under subsection 10 (b), are not affected by the procedure recognized by this section. Where Congress has desired to place pension or benefit cases beyond court review, it has—as in the case of the Veteran's Administration—done so by express statute which is specifically preserved by the introductory clause of this section. Veteran's Adm.

SEC. 10 (b).—An agency suggests that this subsection provides a new form of review in *de novo* cases. But it is expressly provided that "any special statutory review relevant to the subject matter" shall not be disturbed, and the recognition of the so-called common-law type of review is in accord with the authoritative statement of existing law as set forth in column 3. Veteran's Adm.

COLUMN 1—FULL TEXT OF S. 7

Any party adversely affected or threatened to be so affected may, through declaratory judgment procedure after resort to any adequate agency relief provided by rule or statute, secure a judicial declaration of rights respecting the validity or application of any agency action. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by statute.

(c) Reviewable Acts.—Every final agency action, or agency action for which there is no other adequate remedy in any court, shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Any agency action shall be final for the purposes of this section notwithstanding that no petition for review, rehearing, reconsideration, reopening, or declaratory order has been presented to or determined by the agency.

(d) Interim Relief.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent

COLUMN 2—REVISED TEXT

jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by statute.

(c) Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Any agency action shall be final for the purposes of this section notwithstanding that no petition for rehearing, reconsideration, reopening, declaratory order, or (unless the agency otherwise requires by rule) petition for review has been presented to or determined by the agency.

(d) Interim Relief.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary

COLUMN 3—EXPLANATION

Sec. 10 (c).—Subsection (c), defining reviewable acts, is designed also to negative any intention to make reviewable merely preliminary or procedural orders where there is a subsequent and adequate remedy at law available, as is presently the rule (*Final Report*, Attorney General's Committee, pp. 85–86; *Shields* v. *Utah Idaho Central Ry.*, 305 U. S. 177 (1938); *Utah Fuel Co.* v. *Bituminous Coal Commission*, 306 U. S. 56 (1939)).

Sec. 10 (d).—The first sentence merely confirms administrative authority to grant a stay. The second sentence authorizes courts to postpone the effective dates of administrative judgments or rules in cases in which, as by subjection to criminal penalties, parties could otherwise have no real opportunity to seek judicial review except at their peril. There is no reason why such a rule should not be recognized as to administrative agencies, since it is applied in the case of legislation of Congress itself. *Cotting* v. *Kansas City Stockyards*, 183 U. S. 79, 101–102; *Ex parte Young*, 209 U. S. 123, 145, 147, 163; *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651, 662; *Chesapeake & Ohio Railway Co.* v. *Conley*,

COLUMN 4—SUGGESTIONS AND OBJECTIONS

Sec. 10 (c).—The following objections have been made:

(1) One agency objects to the recognition of a right of review in public contract and other cases where Congress has not specifically provided for judicial review. But, as set forth in column 3 with respect to subsection 10 (b) above, the so-called nonstatutory or common-law type of review was recognized by the Attorney General's Committee as properly obtaining wherever special statutory review is not provided by Congress and legislation does not indicate that judicial review is precluded or withdrawn. The exceptions stated in the introductory clause of section 10 appear to set forth the proper type of issues not subject to judicial review. If a party can show that he is "suffering legal wrong" as provided in subsection (a), he should have some means of judicial redress.

(2) It is objected that the provision for judicial review of "every final agency action for which there is no other adequate remedy in any court" would provide judicial review of certification proceedings in labor representation cases. But it is admitted that the language of the first sentence is a statement of the present general state of the law. See also column 3 opposite subsection (b) of section 10. Whether NLRB representation cases are so reviewable in equity has not yet been decided by the Supreme Court. The question the Court must decide under general law or this subsection is whether subsequent review in enforcement proceedings is "adequate". To except certification proceedings in this bill would prejudge that question.

(3) A final objection is that this section, read in the light of the definition of agency action in subsection (g) of section 2, would enable courts to review the failure of an agency to institute proceedings in labor cases. The point made is that, out of the numerous complaints and requests received, the responsible agency must have discretion to choose which shall be set down for proceedings. The answer, however, is that the introductory clause of section 10 expressly exempts "agency action * * * by law committed to agency discretion".

COLUMN 1—FULL TEXT OF S. 7

necessary to preserve status or rights, afford an opportunity for judicial review of any question of law or prevent irreparable injury, every reviewing court and every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or temporarily grant or extend relief denied or withheld.

(e) SCOPE OF REVIEW. So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) direct or compel agency action unlawfully withheld or unreasonably delayed and (B) hold unlawful and set aside agency action found (1) arbitrary, capricious, or otherwise not in accordance with law, (2) contrary to constitutional right, power, privilege, or immunity, (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, (4) without due observance of procedure required by law, (5) unsupported by competent, material, and substantial evidence upon the whole agency record as reviewed by the court in any case subject to the requirements of sections 7 and 8, or (6) unwarranted by the facts to the extent that

COLUMN 2—REVISED TEXT

to preserve status or rights, to afford an opportunity for judicial review of any question of law or to prevent irreparable injury, every reviewing court and every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or temporarily grant or extend relief denied or withheld.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall, after reviewing the whole record or such portions thereof as may be cited by the parties, decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed and (B) hold unlawful and set aside agency action, findings, and conclusions found (1) arbitrary, capricious, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; ~~resulting in prejudicial error;~~ (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8;

COLUMN 3—EXPLANATION

230 U. S. 513, 521; *St. L. I. M. & So. Ry.* v. *Williams*, 251 U. S. 56, 63; *Oklahoma Operating Company* v. *Love*, 252 U. S. 331, 337; *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160, 172; *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 395; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 417; *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19.

SEC. 10 (e).—A restatement of the scope of review, as set forth in subsection (e), is obviously necessary lest the proposed statute be taken as limiting or unduly expanding judicial review. "The objections to judicial review have been generally not to its availability but to its scope" (*Final Report*, Attorney General's Committee, p. 80). It is not possible to specify all instances in which judicial review may operate. Subsection (e), therefore, seeks merely to restate the several categories of questions of law subject to judicial review. Each category has been recognized (see *Final Report*, Attorney General's Committee, pp. 87 *et seq.*). The several categories, constantly repeated by courts in the course of judicial decisions or opinions, were first established by the Supreme Court as the minimum requisite under the Constitution (*Interstate Commerce Commission* v. *Illinois Cent. R. Co.*, 215 U. S. 452, 470 (1910); *Interstate Commerce Commission* v. *Union Pac. R. Co.*, 222 U. S. 541, 547 (1912)) and have also been carried into State practice, in part at least, as the result of the identical due process clauses of the Fourteenth Amendment, applicable to the States, and the Fifth Amendment, applicable to the Federal Government (*New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345, 348 (1917)). The fifth category necessarily limits the substantial evidence rule to cases in which Congress has required an administrative hearing in which the administrative record may be made. The sixth category expresses the correlative situation in which Congress has not provided by statute for an administrative hearing and consequently any relevant facts must be presented *de novo* to original courts of review (see *Kessler* v. *Streeker*, 307 U. S. 22, 35 (1939)). It should be noted that the sixth category, in accordance with the established rule, would permit trial *de novo* to establish the relevant facts as to the applicability of any rule and as to the propriety of adjudications where there is no statutory administrative hearing. But it does not attempt to state in what other instances evidence may be presented originally to courts of review since the latter subject is one which the courts themselves have not fully settled (see *Final Report*, Attorney General's Committee, p. 87; *Baltimore & O. R. Co.* v. *United States*, 298 U. S. 349, 368,, 372 (1936); *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 48 (1936); *Morgan* v. *United States*, 298 U. S. 468, 476 (1936); *Morgan* v. *United States*, 304 U. S. 1, 14 (1938); *United States* v. *Idaho*, 298 U. S. 105, 109 (1926)).

COLUMN 4—SUGGESTIONS AND OBJECTIONS

SEC. 10 (e).—The following suggestions or objections have been received:

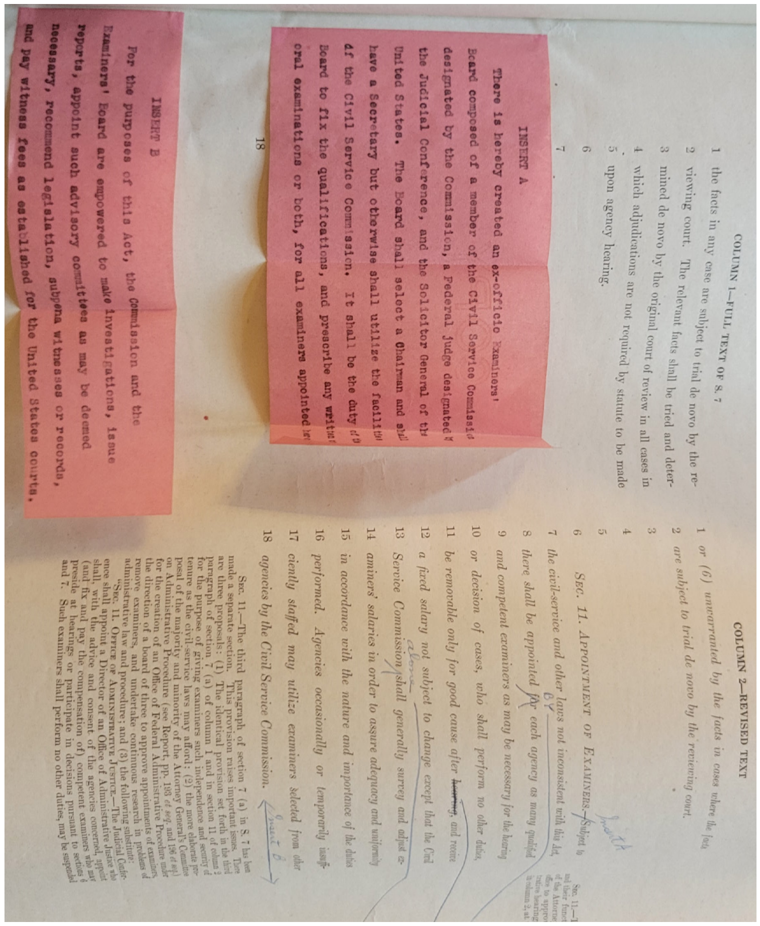
(1) The section fails to remedy the great defect in the rule of review because it does not provide for a review of the "preponderance of the evidence", to determine whether the administrative action is "manifestly wrong", or the like. However, "substantial evidence" would seem to be as sound a rule as language will permit. The real difficulty has been that reviewing courts either accept something less than really substantial evidence or devise formulas of administrative discretion which render the absence of proof immaterial. The failure to follow the real meaning of "substantial", like the failure to follow other statutory language, is not likely to be cured by new language. The expansion of the area of administrative discretion must be remedied, if at all, by the more precise statement of the statutory definitions and directions or limitations in legislation conferring administrative powers.

(2) It is suggested, on the other hand, that the subsection unduly extends the scope of review by authorizing courts to specify administrative action to be taken. But the provision means that the court may compel the agency to act where it has "unlawfully withheld" action, rather than to both direct action and state what it shall be in detail. The court may require agencies to act, but may not under this provision tell them how to act in matters of administrative discretion.

(3) It is said that review and invalidation of agency action "short of statutory right" is something new. But, with the judicial abolition of the "negative order" doctrine, there is certainly nothing new in judicial review of an administrative failure to act in whole or part. Furthermore, if Congress has prescribed a measure of right or relief, on principle the citizen is entitled to the full measure and there should be no arbitrary power in administrative agencies to grant less in specific cases.

(4) It is suggested that the word "unjust" be added after the word "capricious" in the second numbered category. But it may be that all that legitimately should be done is accomplished by the existing wording of that category.

(5) It is strongly urged that the phrase "resulting in prejudicial error" should be omitted from the fourth numbered category and the word "due" inserted before the word "observance", on the ground that the materiality of error should be tested by the usual rules and that the present statement requiring a showing of prejudicial error may be unjust and unworkable where the failure of the agency to afford procedure is so severe that the party has no opportunity to even present his case. All necessary protection would be afforded by the usual phrase "due observance."


COLUMN 1—FULL TEXT OF S. 7

the facts in any case are subject to trial de novo by the reviewing court. The relevant facts shall be tried and determined de novo by the original court of review in all cases in which adjudications are not required by statute to be made upon agency hearing.

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INSERT A

There is hereby created an ex-officio Examiners' Board composed of a member of the Civil Service Commission designated by the Commission, a Federal judge designated by the Judicial Conference, and the Solicitor General of the United States. The Board shall select a Chairman and shall have a Secretary but otherwise shall utilize the facilities of the Civil Service Commission. It shall be the duty of the Board to fix the qualifications, and prescribe any writte[n] oral examinations or both, for all examiners appointed

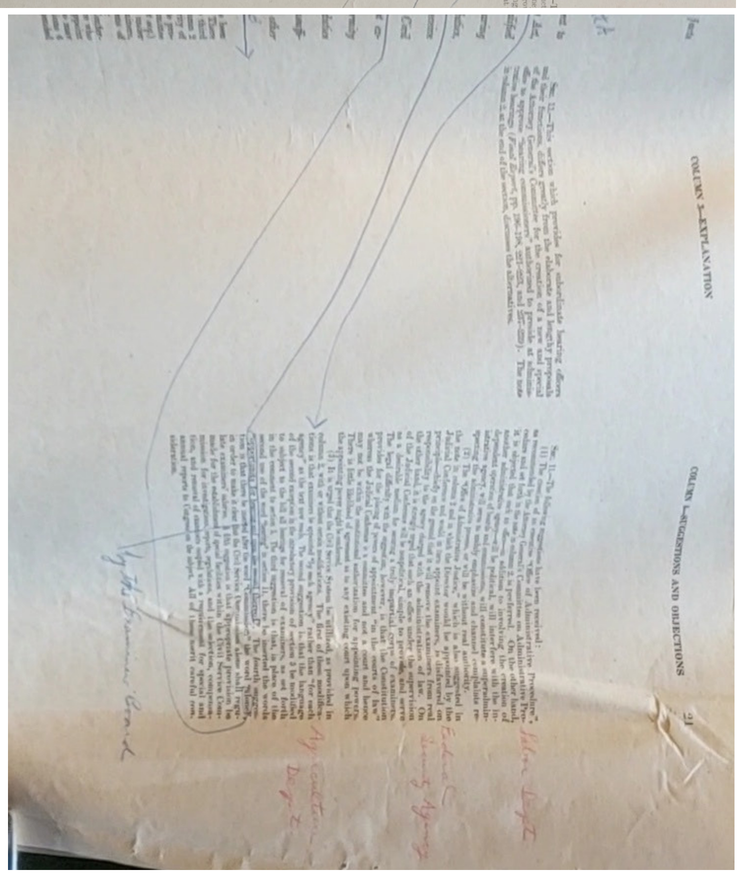
INSERT B

For the purposes of this Act, the Commission and the Examiners' Board are empowered to make investigations, issue reports, appoint such advisory committees as may be deemed necessary, recommend legislation, subpena witnesses or records, and pay witness fees as established for the United States courts.

COLUMN 2—REVISED TEXT

or (6) unwarranted by the facts in cases where the facts are subject to trial de novo by the reviewing court.

SEC. 11. *APPOINTMENT OF EXAMINERS.—Subject to the civil-service and other laws not inconsistent with this Act, there shall be appointed for each agency as many qualified and competent examiners as may be necessary for the hearing or decision of cases, who shall perform no other duties, be removable only for good cause after hearing, and receive a fixed salary not subject to change except that the Civil Service Commission shall generally survey and adjust examiners' salaries in order to assure adequacy and uniformity in accordance with the nature and importance of the duties performed. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected from other agencies by the Civil Service Commission.*


COLUMN 3—EXPLANATION

COLUMN 4—SUGGESTIONS AND OBJECTIONS

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COLUMN 1—FULL TEXT OF S. 7

CONSTRUCTION AND EFFECT

SEC. 11. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to any agency or person. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act. No subsequent legislation shall be held to supersede or modify the provisions of this Act unless such legislation shall do so expressly and by reference to the provisions of this Act so affected. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners through civil service shall not become effective until one year after the termination of present hostilities, and no procedural requirement shall be mandatory

COLUMN 2—REVISED TEXT

or removed by the Director, and on assent of the agencies concerned may be transferred or temporarily assigned to other agencies by the Director. Persons substantially all of whose present duties are those required to be performed by examiners appointed pursuant to this section shall receive initial appointments hereunder. All examiners shall have the same security of tenure as is provided by, but otherwise shall not be subject to, the civil-service laws. The Director shall report annually to Congress, may be assisted by such representative advisory committees as he may appoint, shall have such staff and facilities as his duties may require, may by rule regulate the conduct of examiners pursuant to this Act, and shall be paid the same salary and allowances as a United States district judge."

CONSTRUCTION AND EFFECT

SEC. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to any agency or person. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after the termination of present hostilities, and no procedural requirement shall be man-

COLUMN 3—EXPLANATION

SEC. 12.—This section includes provisions respecting the construction and effect of the measure. The requirement that implied amendments shall be precluded is familiar in Federal legislation. It should be noted, moreover, that the effective date of the proposal is postponed for periods of time sufficient to afford agencies ample opportunity to revise their practices as required; and the proposal is not to have retroactive effect as to proceedings "initiated or completed prior to the effective date" of any requirement.

COLUMN 4—SUGGESTIONS AND OBJECTIONS

COLUMN 1—FULL TEXT OF S. 7

as to any agency proceeding initiated prior to the effective date of such requirement.

COLUMN 2—REVISED TEXT

datory as to any agency proceeding initiated prior to the effective date of such requirement.

Sec. 12.—Section 11 in S. 7 is section 12 in column 2.

War Functions

Sec. 13. Except as to the requirements of section 3, there shall be excluded from the operation of this Act war and defense functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, as well as those conferred by the following: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944 [*and so forth*].

Sec. 13.—In S. 7 the exemption of war functions is contained in the second sentence of section 2 (a). It is contemplated that additional war functions may be specified in section 13.

O

COLUMN 3—EXPLANATION

Sec. 13.—War agencies functions are exempted because it would take at least a year for any adequate proposal to be placed in operation (see section 12). There seems to be no reason, however, why war agencies should not be required to publish the materials required by section 3, since the simple publication of the procedure and policies of war agencies, or as to war functions, would undoubtedly aid in the prosecution of the war by informing the public.

COLUMN 4—SUGGESTIONS AND OBJECTIONS

Sec. 13.—The following suggestions have been made:

(1) It is suggested that, in place of the words "those functions authorized by the following" in the text, there be substituted the words, "courts martial, military or naval authority exercised in the field in time of war or in occupied territory, and the functions conferred by the following statutes". This may properly be done to remove any question of the application of the measure to purely military functions.

War Dept.

(2) It is also suggested that there is no real reason for exempting the Contract Settlement and Surplus Property statutes since there is little, if any, application to them in the measure.

(3) It is suggested also that, apart from the military functions specified in the first suggestion above, the exemption of special war functions should be for a limited period so that, if they continue for appreciable periods after the war, they will be subject to the measure so far as its terms otherwise apply.

(4) A fourth and strongly urged suggestion is that there should be no exemption of war functions except those relating to courts martial and the authority of the Army and Navy as set forth in the first suggestion above.

(5) If the exemption of military and war functions is limited, it is suggested that, as a matter of form, the exemptions may be incorporated in subsection 2 (a), and section 13 thus eliminated.