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AMEND SECTION 27 OF THE SHIPPING ACT, 1916

GOVERNMENT

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HEARINGS
BEFORE THE
SUBCOMMITTEE ON
MERCHANT MARINE AND FISHERIES
OF THE
COMMITTEE ON COMMERCE
UNITED STATES SENATE
NINETIETH CONGRESS
FIRST SESSION
ON
S. 706
TO AMEND SECTION 27 OF THE SHIPPING ACT, 1916

MAY 8 AND 9, 1967

Serial No. 90-15

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AMEND SECTION 27 OF THE SHIPPING ACT 1916

HEARINGS

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AMEND SECTION 27 OF THE SHIPPING ACT, 1916

MONDAY, MAY 8, 1967

U.S. SENATE,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON MERCHANT MARINE AND FISHERIES,
Washington, D.C.

The subcommittee met at 10 a.m. in room 5110, New Senate Office Building, Hon. E. L. Bartlett, chairman of the subcommittee, presiding.

Senator BARTLETT. The subcommittee will be in order.

Today we begin hearings on S. 706, a bill introduced at the request of the Federal Maritime Commission.

S. 706 would empower the Commission to adopt pretrial discovery procedures along with its existing power to issue subpoenas in proceedings under section 22 of the Shipping Act of 1916. The introduction of this bill follows a decision by the U.S. Court of Appeals for the Ninth Circuit in *FMC v. Anglo-Canadian Shipping Co.*, in which the court ruled that the Federal Maritime Commission did not have statutory authority to promulgate rules for discovery and production of documents.

A copy of the bill and comments from the agencies will be inserted in the record at this point.

(The bill and comments follow:)

[S. 706, 90th Cong., first sess.]

A BILL To amend section 27 of the Shipping Act, 1916

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 27 of the Shipping Act (46 U.S.C. 826), be amended by deleting the present section and substituting therefor the following:

"SEC. 27. (a) In all proceedings under section 22 of this Act, depositions and discovery shall be available, and the Commission may by subpoena compel the attendance of witnesses and the production of books, papers, documents, and other evidence, in such manner and to such an extent as the Commission may by rule or regulation require. Attendance of witnesses in response to subpoena shall be required from any place in the United States at any designated place of hearing, and witnesses so acting shall be entitled to the same fees and mileage as in the courts of the United States.

"(b) Obedience to this section shall on application by the Commission be enforced as are orders of the Commission other than for the payment of money."

FEDERAL MARITIME COMMISSION,
OFFICE OF THE CHAIRMAN,
May 5, 1967.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: In response to your letter of February 1, 1967, asking for comment on S. 706, a bill to amend section 27 of the Shipping Act, 1916, we are happy to furnish the following:

Staff member assigned to this hearing: Stanley H. Barer.

The proposed bill would empower the Federal Maritime Commission to adopt pre-trial discovery procedures. Prior to 1964, the Federal Maritime Commission was utilizing pre-trial discovery procedures pursuant to its Rule 12(k). The need for clear statutory authorization for such discovery procedures, however, arose as a result of a decision of the United States Court of Appeals for the Ninth Circuit in *Federal Maritime Commission v. Anglo-Canadian Shipping Company*, 335 F. 2d 244 (1964). That decision held that the Commission could not promulgate rules for discovery and production of documents. In lieu of seeking a grant of certiorari and reversal of the decision of the Court of Appeals, it was determined that the feeling of the Congress should be ascertained and that clear statutory authorization should be obtained.

The Federal Maritime Commission has always sought to streamline and expedite proceedings whenever to do so would not interfere with performance of regular functions and responsibilities and would not impinge upon the rights of segments of the industry regulated. To this end, promulgation of rules of procedure for pre-hearing deposition and discovery would be consistent. The Federal Rules of Civil Procedure providing for pre-trial discovery procedures have without doubt well served the interests of justice and equity. Applicability of the same practices in agency proceedings is obvious.

Under present conditions, hearings and investigations undergo considerable delay while parties spar over production of materials. Not infrequently hearings must be spread over a considerable period of time, in situations in which the delay could be abbreviated through the use of pre-trial discovery practices. The increasing delay, expense, and complexity attendant upon administrative hearings in which vast records are compiled has been a matter of growing concern. In all probability, pre-trial discovery would reduce the size of the administrative records while at the same time insuring that relevant material upon which administrative review may bear is included.

The Administrative Conference of the United States has contended that increased use of discovery rules would (1) guarantee fair treatment of the parties, (2) accelerate hearings by eliminating excess continuances which frequently result from surprise when evidence is first introduced at hearings, and (3) render existing pre-trial devices more meaningful and effective.

Accordingly, the Federal Maritime Commission recommends that Congress act favorably upon S. 706.

The Bureau of the Budget has advised that there would be no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely yours,

JOHN HARLLEE,
Rear Admiral,
U.S. Navy (Retired), Chairman.

GENERAL COUNSEL OF THE DEPARTMENT OF COMMERCE,
Washington, D.C., May 8, 1967.

Hon. WARREN G. MAGNUSON,
Chairman, Senate Commerce Committee,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request for the views of this Department with respect to S. 706, a bill to amend section 27 of the Shipping Act, 1916.

The bill would amend section 27 of the Shipping Act, 1916 (46 U.S.C. 826) by deleting the present section and substituting a new one which would empower the commission to adopt pretrial discovery procedures along with its existing power to issue subpoenas in all adjudicatory proceedings under section 22 of that Act, which provides that any person may file with the board (now the Federal Maritime Commission), a sworn complaint setting forth any violation of the Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The new section would provide that depositions and discovery shall be available and would permit the Federal Maritime Commission by subpoena to compel attendance of witnesses and the production of books, papers, documents, and other evidence, in such manner and to such an extent as the Commission may by rule or regulation require. Attendance of witnesses in response to subpoena would be required from any place in the United States at any designated place of hearing, and the witnesses so acting would be entitled to the same fees and mileage as in the courts of the United States. Subsection (b) would provide that obedience to this section would on application

by the Commission be enforced as are orders of the Commission other than for the payment of money.

The need for clear statutory authorization for discovery arose as a result of the decision in *Federal Maritime Commission v. Anglo-Canadian Shipping Co. Ltd. et al.* 335 F2d 255 (1964). In that case the Court held that Rule 12 (k) of the Federal Maritime Commission's Rules of Practice, which provided for discovery and production of documents, was invalid because it lacked a proper statutory basis.

We would recommend favorable consideration of the bill inasmuch as it would provide a means of developing facts, encouraging settlements, limiting issues, and lessening the expense of litigation. This authority would be similar to existing authority of other regulatory agencies.

We have been advised by the Bureau of the Budget that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT E. GILES,
General Counsel.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., February 16, 1967.

XXXXXXX.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U.S. Senate.*

DEAR MR. CHAIRMAN: This is in reference to your letter of February 1, 1967, requesting our comments on S. 706, a bill to amend section 27 of the Shipping Act, 46 U.S.C. 826. The amendment would empower the Federal Maritime Commission to adopt pretrial discovery procedures along with its existing power to issue subpoenas in certain adjudicatory proceedings.

We have no special information that would assist in the consideration of S. 706, and therefore have no comment to offer.

Sincerely yours,

FRANK H. WEITZEL,
Assistant Comptroller General of the United States.

OFFICE OF THE SECRETARY OF TRANSPORTATION,
Washington, D.C., May 15, 1967.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on S. 706, a bill to amend section 27 of the Shipping Act, 1916.

The proposed bill would empower the Federal Maritime Commission to adopt pre-trial discovery procedures along with its existing power to issue subpoenas in adjudicatory proceedings under section 22 of the Shipping Act. The need for this bill apparently stems from the ambiguity of the present statutory authority of the Commission to issue rules for discovery and production of documents.

The other regulatory agencies: Interstate Commerce Commission, Federal Power Commission, Civil Aeronautics Board, and the Federal Trade Commission presently have similar authority that S. 706 would give to the Federal Maritime Commission. It would appear that the procedural technique of discovery should facilitate adjudicatory proceedings before the Commission and contribute to a fair and speedy resolution of cases. For these reasons, the Department would support this legislation.

The Bureau of the Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report for the consideration of the Committee.

Sincerely yours,

JOHN L. SWEENEY,
Assistant Secretary for Public Affairs.

Senator BARTLETT. The first witness will be Rear Adm. John Harlee, Chairman, Federal Maritime Commission. We are very happy to hear from you, Admiral. The committee would appreciate your identifying, for the sake of the record, those who accompany you.

STATEMENT OF REAR ADM. JOHN HARLLEE, U.S. NAVY (RETIRED), CHAIRMAN, FEDERAL MARITIME COMMISSION; ACCOMPANIED BY EDWARD SCHMELTZER, MANAGING DIRECTOR, FEDERAL MARITIME COMMISSION; AND LEROY F. FULLER, ASSISTANT TO CHAIRMAN, FEDERAL MARITIME COMMISSION

Admiral HARLLEE. Thank you, Mr. Chairman.

I have with me Mr. Edward Schmeltzer, Managing Director of the Federal Maritime Commission and Mr. Leroy Fuller, my confidential assistant.

Would you like me to read my prepared statement, Mr. Chairman?
Senator BARTLETT. Very well.

Admiral HARLLEE. It is a pleasure to be here and offer our comments on S. 706. This bill would amend section 27 of the Shipping Act, 1916, to empower the Federal Maritime Commission to adopt pretrial deposition and discovery procedures to be used by parties in hearings required by statute before the Federal Maritime Commission.

Prior to 1964, the Federal Maritime Commission utilized pretrial discovery procedures pursuant to rule 12(k) of its rules of practice and procedure. That rule was patterned after rule 34 of the Federal Rules of Civil Procedure setting forth discovery authority for Federal district courts in civil proceedings. However, in a case in 1964 before the U.S. Court of Appeals for the Ninth Circuit, *Federal Maritime Commission v. Anglo-Canadian Shipping Co.*, 335 F. 2d 244 (1964), it was held that the Commission had no specific statutory authority for discovery procedures and could not, therefore, promulgate rules for discovery and production of documents. In lieu of petitioning the Supreme Court to grant certiorari and reverse the decision of the court of appeals, it was determined that the matter should be brought to Congress and specific authorization requested.

Under existing procedures, without discovery power, the only recourse available to a party (either a private party or the Commission itself) seeking proof of an allegation, is to obtain a subpoena requiring the respondent to produce at a hearing every requested document having relevancy to the case. This is burdensome for the respondents, leads to legal maneuvering in court, and may cause production of great quantities of files and records at the hearing, only a portion of which may ever be offered in evidence. Furthermore, because subpoenas are returnable at the hearing, delay is caused by the possibility of surprise and the necessity to postpone the proceeding for examination of documents.

The deposition and discovery process avoids such delays by enabling a litigating party to examine witnesses and review books, documents, and records of another party, before trial, and copy those which have evidentiary value.

Procedures for prehearing deposition and discovery in Federal district courts have existed since 1948, under Federal Rules of Civil Procedure, and experience has shown that these procedures have well served the interest of justice and equity. The deposition and discovery authority given to the Federal Maritime Commission under this proposed legislation would be similar to the deposition and discovery authority now available to parties in civil proceedings in the Federal district courts.

The Administrative Conference of the United States, chaired by Circuit Judge E. Barrett Prettyman, in its report, Senate Document 24, 88th Congress, urged increased use of pretrial discovery in administrative proceedings, pointing out that such procedures would—

(1) Guarantee fair treatment of the parties;

(2) Accelerate hearings by eliminating excessive continuances which frequently result from surprise when evidence is first introduced at hearings; and

(3) Render existing pretrial devices more meaningful and effective.

The Administrative Conference, in summarizing its comments on discovery procedures, urged that such procedures be extended generally throughout the Federal administrative establishment as a means of reducing delay and promoting fairness. The Conference noted that some administrative agencies have already adopted pretrial discovery procedures, and experience under these procedures has been satisfactory.

Prior to 1964 when the Commission used pretrial procedures under its rule 12(k) the examiner and parties were generally successful in reaching voluntary agreements on production of documents, without serious delays due to disputes and litigation. However, in Commission proceedings since 1964, there have been delays and postponements which might have been avoided or reduced if pretrial discovery procedures had been available. In a number of cases there were long delays because of refusal to comply with subpoenas requiring subsequent court action. It is the considered opinion of our examiners and hearing counsel who participate in our administrative proceedings that discovery procedures would have enabled the examiner and the parties at prehearing conferences in these cases to work toward voluntary agreements for production of relevant material.

Furthermore, in a number of other cases, material was produced at a scheduled hearing, pursuant to a subpoena, and the hearing was thereafter postponed for a substantial period of time in order that the parties could analyze and review the material made available. Such administrative delays would not have been necessary if the Commission had had pretrial discovery authority.

A fair procedure for prehearing deposition and discovery would streamline and expedite Federal Maritime Commission proceedings without impinging upon the rights of the parties regulated by the Commission.

We urge the passage of this legislation.

I would be happy to answer any questions which you may have. Senator BARTLETT. Thank you, Admiral.

Insofar as you know, has the American Bar Association ever examined this bill or made any comment regarding it?

Admiral HARLEE. Not to my knowledge, Mr. Chairman. However, the Administrative Conference was comprised of some 88 very outstanding lawyers, 40 percent of them not from the Government, 60 percent from the Government. I am reasonably certain that their view would reflect that of the American Bar Association.

In addition to that, of course, there are, as you know, a number of other witnesses from the maritime bar here.

In direct answer to your question, I don't think that they have.

Senator BARTLETT. You mentioned on the opening page of your statement the determination made by FMC to seek the legislative route instead of going to the Supreme Court. Why was that determination made?

Admiral HARLLEE. It was made because in the case of the ICC, the CAB, the Federal Trade Commission, and others, there is in the statutes some specific authority for this power. And even though the Commission might—and, I believe, would—have won in court had they sought certiorari, nevertheless it seemed more clear cut to seek legislation. There appeared to me and the other Commissioners no doubt whatsoever the Congress would ultimately grant such legislation.

Senator BARTLETT. The purpose of the bill, Admiral, is to provide, is it not, express statutory authority for promulgating and implementing rules for deposition and discovery in proceedings under section 22 of the Shipping Act of 1916?

Admiral HARLLEE. Yes, sir.

Senator BARTLETT. Did not the Commission have rules for deposition and discovery until the 1964 ninth circuit decision holding these rules did not rest on congressional authority?

Admiral HARLLEE. Yes, Mr. Chairman. We still have, in effect, rules relating to deposition that have not been overturned in court. Federal Maritime Commission Rules of Practice and Procedure, Nos. 12-A to 12-J. Rule 12-K stands stricken by the ninth circuit court.

Senator BARTLETT. Then S. 706 would place the procedures under section 22 proceedings in the same state as before the 1964 San Francisco decision invalidating the Commission's discovery rules?

Admiral HARLLEE. Yes, Mr. Chairman.

Senator BARTLETT. And that same court decision did not invalidate the Commission's section 27 subpoena power; is that right?

Admiral HARLLEE. That's correct, Mr. Chairman.

Senator BARTLETT. Yet S. 706 covers the subpoena power as well as deposition and discovery. Could you explain why S. 706 deals with subpoena power?

Admiral HARLLEE. That is simply because instead of presenting in S. 706 a change word by word for the present section 27, the entire section 27 is repeated so that the subpoena power is repeated along with it.

Senator BARTLETT. It appears that this bill now being considered, S. 706, would change the statutory power of the Commission in regard to subpoena because section 27 now states that the Commission may, by subpoena, compel attendance of witnesses, books, papers, documents, and other evidence from any place in the United States. Yet in S. 706, this geographical limitation is applied only to witnesses. From both a legal and practical viewpoint, what is meant by this change in subpoena power?

Admiral HARLLEE. The subpoena power under the present section 27, as you have indicated, provides that production under subpoena may be from any place in the United States. It was argued that because of this language the Commission was without power to issue a subpoena requiring production of evidence from outside the United States. But the big change that occurred here was that in the *Federal Maritime Commission v. A. T. DeSmedt, et al.*, 366 Federal, section 464, the case of 1966, which is popularly known as the *Ludlow* case, the U.S.

Court of Appeals for the Second Circuit rejected this argument and held that the Commission does have authority under section 27 to subpoena documents located outside the United States. So that this changed language merely reflects the present power of the Commission under existing law.

I might add that the Supreme Court denied certiorari in this case so that there can be no question that despite the language "any place in the United States," section 27 has been affirmed by the Supreme Court as authorizing the Commission to compel production from places without the United States.

Of course there are practical difficulties. There is no question about that. The Commission has recognized this and has undertaken by means of voluntary negotiation and other means to cope with it. But as far as court decisions are concerned, this *DeSmedt* case clearly indicates that section 27 applies outside the United States as well as in it.

Senator BARTLETT. If this language in 706 was adopted, and becomes law, would the Commission's jurisdiction be increased or would there be an enlargement of procedures, or would both be covered?

Admiral HARLLEE. The jurisdiction would positively not be increased. There would be an enlargement of procedures in this sense that pretrial discovery powers would be restored to the Commission, having been taken away by the ninth circuit court.

I may add there, as a matter of possible interest, Mr. Chairman, that S. 518, which is before the Senate for consideration now, would—I think it is section 6-H in that bill—provide essentially the same authority that we are asking now.

The Committee on Administrative Practices and Procedures, a subcommittee of the Senate Judiciary Committee, is considering this bill, and this consideration may take a substantial period of time, the scope of S. 518 goes way beyond the issues we are discussing now. It could possibly not even be handled in this session. When it is handled, and if the Administrative Procedures Act is amended, in accordance with the Long subcommittee, it would give us the power we are asking for in S. 706.

Senator BARTLETT. S. 518—

Admiral HARLLEE. S. 518, concerning which hearings have been completed in the Senate, but not in the House—

Senator BARTLETT. This would have nothing to do with the Commission's subpoena power, would it?

Admiral HARLLEE. It wouldn't, but it would have to do with the discovery power.

Senator BARTLETT. Section 27 now gives the right for fees and mileage compensation for any person or witness complying with a subpoena. Yet S. 706 refers only to witnesses. What is the reason for this change?

Admiral HARLLEE. That change, if it is a change, and possibly it is, Mr. Chairman, was inadvertent. It was meant that fees and mileage would apply to persons involved in the production or discovery; and we would not object to clarification of S. 706 to reflect that.

Senator BARTLETT. Your remark in that respect will be duly noted.

There is another change, Admiral, in subpoena power contemplated by S. 706. As the law now reads, a witness compelled to attend a hearing by subpoena can receive fees and mileage as in a court case, except if he is an employee of the Commission. That exception is omitted in S. 706. Why the omission?

Admiral HARLLEE. The Commission pays its employees. There is no question that they would not be paid in addition for acting as a witness in a matter that a non-Government witness would before the court. Again, if the committee desires to clarify that point, it could be clarified. We have not felt there would be any question of them receiving money other than their mileage and regular salary.

Senator BARTLETT. You wouldn't have any objection to amendatory language?

Admiral HARLLEE. We would have no objection, Mr. Chairman.

Senator BARTLETT. Is the deposition and discovery power sought in this bill meant to be similar in purpose and scope to the Federal Rules of Civil Procedure?

Admiral HARLLEE. Exactly. We believe that it should be exactly similar and that in the rulemaking proceeding, if the Congress should pass this bill and enact it, the rulemaking procedure would follow the lines of the Federal Rules of Civil Procedure which clearly set forth the protection for private parties and other protections, and other procedures. It should definitely be completely consistent with the Federal Rules of Civil Procedure.

Senator BARTLETT. This would allow prehearing examination of witnesses, and documents in contrast to subpoena power, which means the documents or witnesses are returnable at the time of hearing; is this correct?

Admiral HARLLEE. Yes, Mr. Chairman.

Senator BARTLETT. Under Federal rules any party to a controversy can avail himself of the discovery and deposition rule, including the Government. And in turn, each is subject to the rules as well. Would that be in the case here?

Admiral HARLLEE. Absolutely. We would stress that. It should be the powers of discovery in depositions should be available to be exercised against the Government as well as on behalf of the Government, yes. This is a very important point. All parties would keep all rights that they otherwise have.

Senator BARTLETT. Mr. Chairman, do you think it might be wise to provide in the bill itself that deposition and discovery shall be available under rules and regulations issued by the Commission and that such rules and regulations shall, to the greatest extent practicable, be in conformity with the rules applicable in civil proceedings in district courts of the United States?

Admiral HARLLEE. Yes, I think that would be a desirable change which might allay the fears, possibly, of some of the maritime bar, or the parties that are concerned in our proceedings.

I would think that it would be a desirable change. That is really what we had in mind. As a matter of fact, rule 12-K, which was stricken, does follow its phraseology and included pretty much the same protections.

I think that would make it consistent with what we desired to do, to stipulate that it would be consistent with the Federal Rules of Civil Procedure.

Senator BARTLETT. The deposition and discovery rules of the Federal Rules of Civil Procedure come into effect of course only when there is an actual case filed and there are adverse parties, never when one party is just assessing the facts to see if he has a case to file. At what point in time would these deposition and discovery procedures be-

come applicable, particularly with reference to section 22 proceedings instituted by investigation of the FMC on its own motion?

Admiral HARLLEE. They would come into effect at the time when there are parties or respondents in specific cases, which would mean that they would come into effect only after there has been an order which set forth the issues. They would come into effect after the order was set up and when it was determined upon whom specifically the order would be served.

Senator BARTLETT. Are the extensive powers of section 21 available only to the Commission, or can private parties make use of them also?

Admiral HARLLEE. With relation to section 21, our General Counsel believes there is some possible question about it. But the preponderance of case law on the subject and the viewpoint of the General Counsel and the Managing Director and the staff of the Commission is that section 21 would not be available to private parties as a matter of right but only to the Commission. Therefore that actually underlines even more the need, necessity, and desirability of S. 706 which would give private parties the rights of discovery in depositions as well as other rights of subpoena.

Senator BARTLETT. Section 21 powers are more akin to subpoena power than deposition and discovery in the sense that section 21 powers apply only to documents and records rather than eliciting oral statements from witnesses for evidence, or to discover evidence. Is that generally a correct statement?

Admiral HARLLEE. Yes; that is generally a correct statement. The records that are dealt with in section 21 are wider material than available through the other.

Senator BARTLETT. In your statement—let me read the second sentence of the opening paragraph:

This bill would amend section 27 of the Shipping Act, 1916, to empower the Federal Maritime Commission to adopt pretrial deposition and discovery procedures to be used by parties in hearings required by statute before the Federal Maritime Commission.

Would you explain to the committee, Mr. Chairman, just what you mean by the words "required by statute"?

Admiral HARLLEE. Parties in proceedings before the Federal Maritime Commission are not entitled to hearings as a matter of right unless they are required by statute. What it means is that there has to be statutory authorization for the hearings that would be held. This phraseology follows the phraseology in the Administrative Procedure Act dealing with these matters.

Senator BARTLETT. Mr. Barer would like to ask a further question relating to this.

Mr. BARER. Admiral, in that respect would the use of discovery and deposition be limited to adjudicatory procedures rather than rulemaking?

Admiral HARLLEE. Yes; they would be limited to adjudicatory proceedings. Not only would it not be used in the rulemaking proceedings, but would not be used in what we call pipeline investigations nor in special reports to Congress of the President. They would only be used in adjudicatory proceedings.

Senator BARTLETT. Admiral, I believe you have before you a redraft of the bill with these changes incorporated.

Mr. BARER. Admiral, I believe two redrafts were carried down to you. The chairman is considering the second redraft, which is the more complete redraft.

Senator BARTLETT. I am going to have Mr. Barer present it, so the record will have the language intended to be added to the bill. (The redraft referred to follows:)

Section 27

(a) In proceedings under section 22 of this Act, deposition and discovery shall be available under rules and regulations issued by the Commission, which rules and regulations shall, to the extent practicable, be in conformity with the rules applicable in civil proceedings in the district courts of the United States. In such proceedings, the Commission may by subpoena compel the attendance of witnesses and the production of books, papers, documents, and other evidence, in such manner and to such an extent as the Commission may by rule or regulation require. Attendance of witnesses and the production of books, papers, documents, and other evidence in response to subpoena may be required from any place in the United States at any designated place of hearing, and persons so acting under the direction of the Commission and witnesses shall, unless employees of the Commission, be entitled to the same fees and mileage as in the courts of the United States.

(b) Obedience to this section shall on application by the Commission be enforced as are orders of the Commission other than for the payment of money.

Mr. BARER. You will note, again on the second line of the redraft, following the word "available" which is as it appears in the bill, the following words are added, "under rules and regulations issued by the Commission, which rules and regulations shall, to the extent practicable, be in conformity with the rules applicable in civil proceedings in the district courts of the United States."

Would this, in your opinion, be satisfactory, and would it meet the intended purpose of S. 706?

Admiral HARLLEE. Yes, I believe this is a desirable clarification which I regret the Commission did not think of itself. That was the intent, to pattern the procedures after the Federal Rules of Civil Procedure.

Mr. BARER. At line 9 of the redraft, halfway through that line, a new sentence begins with the word "attendance."

Admiral HARLLEE. Yes.

Mr. BARER. Following the words "attendance of witnesses," I would like your comment on the following additional language: "and the production of books, papers, documents, and other evidence in response to subpoena may be required from any place in the United States at any designated place of hearing, and persons so acting under the direction of the Commission and witnesses, shall, unless employees of the Commission be entitled to the same fees and mileage as in the courts of the United States."

That really is two changes. That puts the language dealing with the production of documents back to the geographical limitation as it presently exists in the statute, and also incorporates the present statutory language excepting employees of the Commission from receiving fees.

What would be your comment as to both such additions?

Admiral HARLLEE. Speaking as the chairman, and for the Commission, we have no objection whatsoever to any of these changes, with one exception, one proviso, and that is that when the words "from any place in the United States," are inserted in there, I would emphatically request that the committee make clear in the legislative

history, and it can be done in the legislative history, that there is no intent here to overrule the court's ruling in the *Federal Maritime Commission v. A. T. DeSmedt* case of 1966, which was a landmark decision, and which set forth that this legally did not restrict the procurement of documents or persons to places in the United States.

In other words, I think that the legislative history should clarify that this phraseology following that of the present 27, which was upheld in that case, does not in the intent of Congress, overrule that court decision because the court decision was awfully important, in the *DeSmedt* case.

Mr. BARER. There is some concern that changing the language may indicate that Congress wishes to change existing law as to subpoena power.

Admiral HARLLEE. I understand that completely, and I think it is probably desirable to put it in here, as long as it could be taken care of with the legislative history to indicate that the Congress intended that law remain the same as it was, which, under the *DeSmedt* decision, empowers the Commission to get documents and witnesses from places outside of the United States.

Senator BARTLETT. Admiral, I am informed a witness will be called who will tell the committee that less than 2 weeks ago, on April 27, to be exact, the Federal Maritime Commission published in the Federal Register, a notice of proposed rulemaking, saying that its own records will be made available to the public in FMC proceedings only upon the voluntary action of the Commission's attorneys.

Does that proposed rule conform with what you have stated earlier?

Admiral HARLLEE. Yes; because I think that there is a difference in making available something to the public and discovery and deposition procedures. The public rule of which you spoke was only—in the first place, it is not a final rule. It is a proposed rule. In the second place, it only pointed out one means of getting information from the Commission, not the only means. That means, through voluntary production the Commission thought tentatively would be via the hearing counsel. But, that is not a preemptive or exclusive means.

There are also the means of discovery—deposition, rather, which are available now, we would hope if this bill were passed, discovery and deposition.

There is also, in addition to that, the subpoena power.

Furthermore, there is the Freedom of Information Act, Public Law 89-487, which goes into effect on the 4th of July, 1967, which again makes available to the public in fact everything at the Commission except those that specifically fit under exemptions listed in section 3-E of that act.

But the matter of which you speak, I want to emphasize, is a proposed rule and if it leads to confusion, difficulty, as has been the case from time to time with proposed rules, we will clarify it so that there can be no doubt that those matters which should be made available to private parties in the opinion of people outside the Commission—private lawyers—will be made available in accordance with the laws I have mentioned.

Senator BARTLETT. What is the reason for the proposed rule?

Admiral HARLLEE. It is only a proposed rule, Mr. Chairman. It was only one of a number of changes. In fact, it is almost obscurely buried in a number of other changes.

The reason or purpose is simply a matter of facility to parties in hearings that we have. The hearing examiner, as you know, operates completely under the APA. The hearing counsel represents the staff of the Commission—not even the Commissioners themselves, but the staff of the Commission, the staff viewpoint. And, of course, that in turn represents the public interests.

As a matter of facility, the hearing counsel is simply a point through which something can be requested on a voluntary basis from the staff of the Commission to be produced from Commission files. But, I also want to say that should a party, even under the proposed rules, should a party request from the hearing counsel some documents, papers, evidence of any kind, and the hearing counsel should refuse to agree to produce it voluntarily, which I think is the fear of the private party, then even in that event, and even aside from the other things I talked about, a motion can be made to the examiner, who can then, if the matter is material and relevant, sign a subpoena or discovery order for the production of what the party wants.

This is, in short, I might say a procedural smokescreen.

The opposition to it is based on a lack of understanding which is, I do understand, a proposed rule. It will certainly be clarified so that should there be trouble in getting voluntary production from the staff representatives, then appeal can be made to the examiner, who without question, if the material was relevant, would grant it.

Furthermore, in addition to that, Mr. Chairman, were the freedom of information bill passed, this of course would supersede any such rule, even if the rule were in conflict, which this won't be.

Senator BARTLETT. The committee is very appreciative of your appearance, Admiral Harlee, together with the appearances of your associates. I thank you for your statement.

I want to add that for the boss of an outfit, you have a surprising grasp of technical details. I congratulate you.

Admiral HARLEE. I get it all from the gentlemen on my right and left.

Thank you very much, Mr. Chairman.

Could I add one other short statement?

Senator BARTLETT. You may add as much as you desire.

Admiral HARLEE. I think that this is particularly appropriate. It is from Judge Kaufman when he was judge of the Southern District of New York. Here is what he said in the publication, which I will quote:

In place of discovery procedures, there is substituted what one Examiner referred to as the "gimmick" of "trial at intervals", Cox In the Matter of Gulf Oil Corporation, PTC Docket 6689, (order granting motion requesting disclosure). "Trial at intervals" is predicated on the belief that surprise will be the rule rather than the exception. It would require a great deal of ingenuity to devise a system which would result in a greater waste of the time of the Hearing Examiner and the litigants. Where the hearing is interrupted for many months to permit the parties to assess the testimony thus far given, and to prepare for cross examination, it is necessary to devote a substantial part of the next session to refreshing everyone's recollection as to where they left off. Huge amounts of repetitive testimony are admitted and it is extremely difficult to rule on questions of relevancy. The stenographic records which are reviewed by the Hearing Examiner and ultimately by the Commissioner or Board, are of such fantastic proportions that the private parties frequently doubt whether it is humanly possible for the agency to review it with any degree of care. While these proceedings frequently are brought to curb actions which are detrimental to the public interest, and one would therefore imagine that speed would be of the utmost importance, the ultimate decision is generally not made for many years.

It is by Kaufman, "Have administrative agencies kept pace with modern court-developed techniques against delay—a judge's view."

Senator BARTLETT. Next, we will have a trio of witnesses, Mr. Boggs, Mr. Kharasch, and Mr. Kurrus.

STATEMENT OF THOMAS H. BOGGS, ROBERT N. KHARASCH, AND RICHARD W. KURRUS, ATTORNEYS AT LAW, WASHINGTON, D.C.

Mr. KHARASCH. I am Robert Kharasch.

Senator BARTLETT. You may proceed.

Mr. KHARASCH. Mr. Chairman, each of us is an attorney engaged primarily in administrative practice in Washington, D.C., and we frequently appear before the Federal Maritime Commission.

We are testifying today in our private capacities, as attorneys, not on behalf of a client or professional association.

The efficient conduct of litigation before a court or an agency requires an adequate pretrial discovery mechanism, which unfortunately, has been lacking at the Federal Maritime Commission.

Insofar as S. 706 has as its aim the provision of discovery procedures in litigated cases before the Federal Maritime Commission, we support the purpose of the bill.

It is true, of course, that in a particular case one side or the other might like to resist discovery. In general, however, experience with modern procedural rules providing for pretrial discovery has proved that the ability to obtain information is an essential part of the judicial or the quasi-judicial process.

We have some doubts whether S. 706 in its present form is sufficiently precise to accomplish its purpose. The bill provides only that "depositions and discovery shall be available" in Maritime Commission proceedings. This apparently means depositions and discovery under rules similar to rules 26 through 37 of the Federal Rules of Civil Procedure. These include depositions under rules 26, 27, 28, 29, and 30; written interrogatories under rules 31 and 33; discovery and production of documents under rule 34; physical and mental examinations of persons under rule 35; admissions of fact under rule 36; and the penalties for refusal to make discovery under rule 37. Some of these rules are appropriate to proceedings before the Federal Maritime Commission, and some perhaps are not. We believe it would be highly desirable for the bill and its legislative history to spell out at least the type of discovery procedure which the Commission may prescribe by its rules.

There are some instances in which the almost unlimited deposition-taking procedure under the Federal Rules of Civil Procedure may not be appropriate to administrative proceedings. It would seem that some restriction on the unlimited right of parties to initiate depositions ought to be included in any Commission rules. The deposition practice under the Federal rules is very free, and in extending it to administrative proceedings, it would be appropriate to limit it to depositions authorized by the presiding officer on good cause shown. Nevertheless, there are many cases where discovery by deposition should be encouraged and made available to the parties.

There are some potential problems under the bill as it is currently drafted if the vague powers to have depositions and discovery "available" are to be applied to investigatory or rulemaking proceedings

by the Commission. Section 22 of the Shipping Act (to which the amended sec. 27 would apply) deals both with complaint and answer litigation between two private parties and with investigations instituted by the Commission on its own motion. The litigation between two private parties before the Commission is a substitute in many instances for litigation which would be in the courts if it were not for the regulatory statute. In view of the nature of such litigation, it seems entirely appropriate that there be an adequate deposition and discovery procedure equivalent to that available in the courts. After all, in most private suits before the Commission, the Commission's jurisdiction is exclusive, and if the injured party cannot obtain relief from the Commission, he cannot obtain relief anywhere. Such a party should have the right to make his case.

With respect to Commission investigations or rulemaking proceedings, however, the deposition and discovery procedure is not equally appropriate nor would it be fair. The Commission has adequate subpoena powers and other discovery powers which enable it to investigate matters within its jurisdiction. When the Commission is investigating, it acts in some respects as a prosecutor. It is elemental under our system of Anglo-American jurisprudence that the accused must be given a fairly good idea of what he is accused of before the prosecution begins. Sweeping and ill-defined discovery procedures are neither needed nor appropriate to Commission investigations under section 22. We do not intend to inject the retrogressive thought that the Commission should be deprived of its power to investigate; we mean only that under court practice or fair administrative practice, civil discovery procedures are not used in what is the equivalent of a criminal or quasi-criminal investigation.

Thus, we believe that Commission investigations on its own motion should be treated as a separate legislative matter and the present bill ought to be restricted to private disputes presented to the Commission. If, however, the committee should decide to recommend one bill which would deal with both private litigation and Commission investigations, then the need for careful spelling out of the Commission's discovery powers is even more apparent. It will be the Commission which makes its own rules for investigation, and it seems essential that Congress impose reasonable limits on the Commission's own methods of investigation. For example, in no court is it possible to require a defendant to do research and compile statistics. It should be made clear that the Commission does not have such powers under the general heading of "depositions and discovery." As another example, neither courts nor district attorneys have visitation powers allowing court officers to conduct a general rummaging into files and accounts. The Commission should not have such powers, and certainly none should be implied in a general grant of depositions-and-discovery power.

Finally, it seems appropriate to say a word about the extension of the discovery mechanism to the Commission's own files. In spite of Admiral Harlee's statement which we were pleased to hear this morning there is sometimes suggested by agency counsel a kind of double standard of administrative litigation, where the private parties are blocked from bringing out facts hidden in agency files. Here again, principles of fair play in litigation call for equal treatment. As a general matter, it is now the policy of the United States that agency records should be made available to the public with or without a

pending administrative proceeding—or so at least we read in the Public Information Act of 1966 (Public Law 487, 89th Congress.) Thus, whether in private litigation before an agency or in agency investigations where appropriate, agency records should be available to the same extent as private records. We suggest that the bill should include language making it clear that the discovery procedures apply to the agency and to private litigants alike.

In conclusion, it seems appropriate for us to commend the Commission's efforts to improve its procedures; the present bill is another step in the right direction.

Senator BARTLETT. Thank you, sir.

Mr. BARER has a few questions.

Mr. BARER. I think there has been handed to you copies of the same draft proposal that was read to the previous witness. Do you have that before you? (See p. 10).

Mr. KURRUS. We read it while he was talking, so we can comment on it. It might expedite the hearing.

Mr. BARER. One of the major points made in the statement you just presented is the problem of what having deposition and discovery available means, particularly with respect to the type of discovery procedures under the civil rules applicable in district courts.

Would the language suggested in that draft put your mind at ease so far as that problem?

Mr. KURRUS. I think the language is a great improvement insofar as that problem is concerned. Of course, it is the basic position of our ad hoc group that there is a distinction between complaint in the answer cases and investigatory proceedings. We have some suggestions, however, even in the first sentence of this proposed change, if we might comment on it.

In the first place, we feel that the language should be: "In proceedings by complaint under section 22 of the Act"—and then going on where you say "deposition and discovery," it seems to us that it is important to include written interrogatories there, too, so that it might be changed to read, "deposition, written interrogatory, and discovery procedures."

But insofar as the rules that would be issued by the Commission are concerned, conforming to the Federal rules, that certainly is an improvement.

Mr. BARER. Do you feel that—apparently you don't feel that the term "discovery" includes written interrogatories?

Mr. KURRUS. I think it does. But if you are going to follow the form of the Federal rules, rules 31 and 33 of the Federal Rules of Civil Procedure, which deal separately with written interrogatories, it seems as a matter of form you might include all three.

Mr. BARER. As was apparent from the questions asked of the previous witness, I believe that inherent in the concept of the civil rules is the concept that it is a two-way street. There is never a time in district court, so far as I am aware, when one person has the right of deposition or discovery against another when the converse is not also true.

Do you feel that this language, "which rules and regulations shall, to the extent practicable, be in conformity with the rules applicable in civil proceedings before a district court" inherently convey that type of responsibility or limitation upon the use of discovery?

Mr. KURRUS. I don't think that is necessarily true, Mr. Barer. In the first place, under Commission investigatory proceedings the Commission in a real sense is sitting as the judge in its own case. I am not saying that they are going to be unfair about it, but after all, they do initiate the investigation. I don't think there is any real parallel in anything that takes place in the Federal courts.

Certainly it is a two-way street under the civil rules. But you often have the Department of Justice, for example, bringing a complaint against a private citizen, and you have the same thing in complaint cases at the Federal Maritime Commission.

But under the Federal rules you don't have the courts instituting investigations on their own motion and then following through.

Mr. BARER. Would not the availability of the section 21 powers, in contrast to the discovery and deposition powers contemplated by this bill, indicate that discovery and deposition must be utilized only when it reached the point that it was an adversary proceeding, not when it was just investigating to see if there should be a complaint?

Mr. KURRUS. I don't know exactly what you mean by that. The thing that we fear is that if the Commission starts an investigation, they are trying to prove that there has been a violation of the act. This is why an investigation is instituted. And then if they use some discovery procedures they could, we think, be used unfairly against the private parties, to require the parties to produce and prepare records and things of that sort.

Investigation is utilizing a tool that is neither fair nor necessary. We think that the powers that the Commission now has with respect to subpoenas in section 21 are adequate to enable it to have information produced in Commission investigations. Of course, in complaint and answer cases, a Government agency may be the complainant. The Department of Justice may be the complainant; the Department of Agriculture may be the complainant; and we feel that discovery procedures should be available there along with the subpoena power, but not in Commission investigations themselves.

Mr. BARER. Your concern, then, is with section 22 proceedings brought under the last clause of section 22?

Mr. KURRUS. Yes.

Mr. BARER. Even though adjudicatory in nature, you are still concerned about it?

Mr. KURRUS. Yes. I think they could be adjudicatory in nature but we are concerned about the Commission having powers it doesn't need, and which we think could be used unfairly.

Mr. BARER. Continuing with the draft language that is before you, down to line 9, the language reincorporates the present statutory language so far as geographical limitation.

May we have your comment on what the law is, and if S. 706 as introduced, what impact removal of that geographical limitation might have?

Mr. KURRUS. I think that the amendments that you have suggested to the bill are certainly good ones. I would have to adopt the remark of Admiral Harlee. He said the changes were inadvertent. I think the effect of the bill would be to undertake changes that apparently weren't intended.

Senator BARTLETT. May I make a comment before you proceed. Mr. Barer?

I notice that representatives of the Federal Maritime Commission remained in the room. One of them, at least, is busily engaged in writing. It is my suggestion that if the witnesses now before us suggest any alterations of the original bill or the redraft of the bill, and if the witnesses suggest any further amendments, either in general or in exact language, that the Federal Maritime Commission examine the transcript at a later date and then make replies in writing.

Mr. KURRUS. I am glad you made that comment, Senator, because we want to offer our services, so to speak, in any further amendment of the bill. We would like to request the opportunity of perhaps submitting a letter, a copy of which, of course, we will send to the Chairman of the Federal Maritime Commission after the hearings have been concluded.

Senator BARTLETT. The committee will welcome it.

Mr. KURRUS. Thank you.

Mr. Schmeltzer?

Mr. SCHMELTZER. I might say they have raised one problem that I don't think we can get together and resolve. We unalterably take the position that in any proceeding under the Administrative Procedure Act, the hearing counsel of the Commission should have the same rights as any private attorneys with respect to deposition and discovery. We can't get together on that kind of change.

Most of our proceedings are in the form of Commission-ordered investigations. These are often cases where there are smaller parties who can't or don't bring their own investigations or complaints, and the hearing counsel in effect serves as the public in general.

Most of our cases in recent years have been investigation cases. I think it may be 4 to 1. I have the figures before us. It would hurt us very much if the change suggested by Mr. Kurrus were made.

I might also say that the analogy to a court is not a good one. A court has no subpoena power in itself. But the Commission in its investigation has subpoena power. This is the same kind of thing as subpoena power, to get information. We don't think that this bill should be used to tie the Commission's hands in getting information under the rules of the Administrative Procedure Act, and under the Federal Rules of Civil Procedure, and give the parties these rights.

As to your suggestion that we get together, on that point I think we can't get together.

Senator BARTLETT. I have no suggestion that you get together. I only suggest that you submit your views on changes that may be recommended in writing at a later date.

Mr. SCHMELTZER. Yes, sir.

Mr. KHARASCH. Mr. Chairman, if we may be permitted a comment, not really in rebuttal to what Mr. Schmeltzer said, but perhaps opposed a little to it.

The difference in our mind is that in a complaint-and-answer proceeding you have a specific complaint by someone who comes to the Commission and he says, for example, I was not allowed to ship on this ship. That is unfair. There have been such cases. Whereas when the Commission is investigating, it does no investigation under specific allegations of wrongdoing; it is interested in general in finding out what is going on in the field. How are rates going out and coming in? This would be a typical investigation. You have quite a different degree of specificity and you have a quite different penalty hanging

over the party being investigated and the party against whom the complaint is being made. One is a sort of a civil action which is taking place in administrative court; the other is very similar to grand jury proceedings which, as the committee knows, are quite a bit different than civil actions before the courts. And you don't take the broad sweeping depositions of parties in grand jury proceedings. You investigate, and we, not for a minute, would say the Commission should not investigate.

But you don't investigate by civil discovery procedures.

Mr. BARER. On the section 22 proceedings which are initiated by investigation on behalf of the FMC, on its own motion, at some point in the process of investigation does it become accusatory? Don't they decide whether they have enough to allege a violation?

Mr. KHARASCH. No; it is not soon, because what happens is that at the end of the proceeding, when you get up to the Commission level, the Commission decides whether or not it has found a violation of law. That may have some legal effect. But quite often it just exposes you to a future court case. The answer is, you don't know during the proceeding that they are going to accuse you until July 4, 1966, of having given a rebate. You don't know that. There is just a general investigation into what is going on in such and such a trade. Quite often it is unfocused. I am not saying that is wrong as a matter of Commission investigation. I am saying when you have an unfocused investigation of what is going on, you are not in the same position as you are when you are accused of a specific crime on a specific date.

Mr. BARER. Are you familiar with the proceedings before the ICC, FPC, or—

Mr. KHARASCH. To some extent.

Mr. BARER. What is the situation there? They have discovery deposition powers. Do they also have investigation proceedings somewhat similar to section 22 proceedings under the last clause of section 22?

Mr. KHARASCH. We will have to canvass our trio to see how far we can go with you along the line of agencies. ICC does not use its deposition powers very extensively. They are very rarely used. We recently—at this moment—have a proceeding pending before the ICC in which all we want to do is get the testimony of some 50 witnesses in Puerto Rico. The Commission refused both to send an examiner to Puerto Rico and to allow us to take their depositions in Puerto Rico. The Commission does not favor the deposition procedure—the Interstate Commerce Commission.

Mr. KURRUS. Furthermore, I might add, Mr. Schmeltzer said in many of the investigations that are conducted by the Maritime Commission, the investigations are small. I don't see really what difference that makes. But he also says that the investigatory proceedings outnumber the complaints in the instant proceedings 4 to 1. I really doubt the figures. But let's assume it is right. In the Interstate Commerce Commission I would assume that the complaint and answer proceedings outnumber the investigations by maybe 100 to 1.

Mr. BARER. I would like to add my appreciation, along with that mentioned by Senator Bartlett, if you would submit in writing any suggestions you have as to how, in accord with your testimony, you would handle the problem of deposition discovery in section 22 proceedings.

Mr. KURRUS. Mr. Boggs has one comment about the phrase "in the United States" that we are in agreement on.

Mr. BOGGS. Mr. Barer, in your proposed changes you do restore the words "in the United States." And I would agree with Admiral Harlee, and I think they would, too, that that should only be included if it was understood not to overrule the *Ludlow* case.

Mr. KURRUS. I hope that will be known as the *Ludlow* case, not as the *DeSmedt* case. That happens to be my client. We were in there only by accident. [Laughter.]

Mr. KHARASCH. I would also like to say that my clients are always in cases by accident.

Senator BARTLETT. Thank you, gentlemen.

The next witness is Leonard G. James.

Mr. GARDNER. Mr. James has generously let me precede him because of some schedules of mine and on my further assurance that I will be very brief.

Senator BARTLETT. Very well. We will now hear Mr. Gardner.

**STATEMENT OF WARNER W. GARDNER, OF SHEA & GARDNER,
WASHINGTON, D.C.**

Mr. GARDNER. I have, Mr. Chairman, given to the committee counsel a copy of my brief statement. I shall here undertake an even briefer oral summary of that.

I am Warner W. Gardner, of the firm of Shea & Gardner. In round figures, I have been in Government service for about a decade, and in private practice for two decades.

I must say, Mr. Chairman, it is hard to believe that it has been 20 years since you were beating me over the head on fish traps. But it has been, by the calendar.

Senator BARTLETT. It just seems like a glorious yesterday.

Mr. GARDNER. I am here to support the enactment of S. 706 with two qualifications, one of which is academic after the testimony of Admiral Harlee this morning, as to the assumptions upon which I support them.

The reason for supporting it is very simple. So far as the private practitioner is concerned, we have for 30 years been accustomed to the luxury of pretrial preparation under the Federal rules. That is not possible without discovery procedures. And if the private practitioner feels uncomfortable without that pretrial preparation, the job of the Commission makes it even more dependent upon him. I, at least, cannot comfortably practice law without pretrial discovery. They need as much power as they can have to get documents which, after all, are more reliable than testimony after a number of years as to what has happened.

Confined to the time when there has been a formal investigation with regular respondents, it seems to me we are subject only to the normal hazards of administrative abuse which I don't believe any statute of Congress can adequately guard against.

The two qualifications that I have, one is academic; that is, I want to be sure that this Committee would recognize that discovery works two ways, and that the Commission evidence would be available to us as well as our evidence to the Commission.

Admiral Harlee I think has made that entirely plain.

The other one is a much more difficult problem of documents located without the United States. It is entirely plain that the Commission, by its proposed language, and by its request that the *Ludlow* rule of the second circuit be maintained, views the reach of its process as worldwide.

I ordinarily represent U.S.-flag lines, which are wholly vulnerable to all the Commission's process. I would, therefore, favor rather strongly the Commission's powers to reach documents anywhere in the world if I thought they could do it. I don't believe they can do it.

They have the theoretical power under section 21 and subpoenas under section 27, to reach any document. How do they enforce it?

I believe they are at present wrestling between the unpalatable choice between two collateral and overexcessive penalties, either putting the local agent of the foreign-flag line in jail or disapproving a conference because a minority of its members have refused to supply documents.

I don't know the answer to it. I have for some years been urging, whenever I could, that the Commission ought frankly to recognize that it cannot enforce against foreign-flag lines its powers with respect to transactions which occurred on foreign soil. That solution, however, is thoroughly unpalatable and I am not pressing it on this committee at this time in connection with this procedural bill.

I would hope, however, that the lesson and the teaching of the so-called *Alcoa* case in accordance with the theories of the fifth circuit would be recognized by this committee in its report. That case, as I read it, says, to my mind correctly, that the Congress never intended burdens to be placed upon the U.S.-flag lines that are not borne by the foreign competitors.

With that sort of a general recognition I would hope that on a case-by-case basis we could achieve tolerable fairness among the lines subject in theory to the Commission's jurisdiction.

I would like to make two comments on matters that were either raised or that occurred to me during this testimony. I have grown a little disturbed as I listened this morning lest the enactment of S. 706 might do unintended damage to the procedures of other agencies.

As I believe Mr. James will point out in his testimony, the statutory basis of the four agencies which now exercise discovery powers is not crystal clear. And if S. 706 were enacted, it might quite possibly be that an unintended consequence of that specific enactment would be, if not to cripple, at least to afford new arguments against the rules of other agencies.

I believe that could be met again by cautionary language in the report. But I would urge that upon committee counsel, to bear that problem in mind.

The second problem, I believe, adheres—I haven't had an opportunity to read the proposed redraft—adheres in the use of the Federal Rules of Civil Procedure. I think that is admirable and should be done. But the language ought to be checked and I have not checked it, to insure that we do not require adoption of those parts of the Federal rules which are irrelevant here, such as the physical examination of the personal injury plaintiff.

That, sir, concludes my statement. Thank you very much.

(The full text of Mr. Gardner's statement follows:)

STATEMENT OF WARNER W. GARDNER

I am Warner W. Gardner, of Shea & Gardner, 734 Fifteenth Street, N.W. in this City. I have, in round figures, spent about a decade in Government service followed by two decades in private practice. I have, largely by accident, been preponderantly engaged in maritime litigation for the past 15 years.

I support the enactment of S. 706 without amendment, but wish to make express that this support assumes a sensible solution of two difficulties which lurk beneath the surface of the simple words of S. 706.

I should like first to note what seem to me to be the chief reasons why the bill should be enacted.

The Washington bar, along with the federal bar generally, has for nearly 30 years become accustomed to the luxury of the discovery procedures of the Federal Rules. Trial preparation can be done in advance, and the fumbling and the surprises of trial are greatly minimized. (I at least cannot comfortably practice law without pre-trial discovery.)

If that is a strongly felt need of the private attorney, the need is multiplied for the Commission's own attorneys. A major part of their work is the investigation of alleged violations of law. That cannot be done effectively without discovery procedures. This, typically, centers on the production of documents which usually speak with a freshness and an accuracy about the recorded events which can never be matched by the oral testimony of later years.

The Court of Appeals for the 9th Circuit, in *Federal Maritime Commission v. Anglo-Canadian Shipping Co.*, 335 F. 2d 255 (1964), held that the discovery provisions formerly in the Commission rules of practice were invalid for want of statutory authority. For reasons not clear to me Supreme Court review of that decision was not sought and the Commission has since operated without any compulsory discovery procedures. The subpoena power remains, but that is a slow and awkward device. It compels production of specified documents at the hearing itself and thus requires either hasty study in the courts of hearing or an adjourned hearing.

For 2-3 years the Commission hearings have been largely based upon voluntary discovery, backed up by subpoena if a party refuses access to really important material. The result is at best a haggling over what will be produced and at the worst a flat refusal to produce. This has impaired pre-trial preparation of all parties and has in my judgment been some impediment to effective enforcement of the Act by the Commission. At least three other administrative agencies—the Interstate Commerce Commission, the Civil Aeronautics Board and the Federal Power Commission—have been considered to have a statutory authorization for discovery procedures. There is no reason why the Federal Maritime Commission should not have the same powers.

For those reasons I support the enactment of S. 706. But its enactment should be with full recognition of its effect in one area of great difficulty. This is the almost insoluble problem of documents located abroad. S. 706 eliminates the present limitation of subpoena powers to "evidence from any place in the United States." While those words have been held not to mean what they seem to say, their elimination is plain evidence that the Commission views the world as its preserve. That, speaking as one who usually represents American-flag lines, is all to the good, if only the Commission's reach were in fact as long as its sight. I believe that it is not, and that in practice the Commission's arms will not reach beyond American boundaries. At present, as most dramatically shown in the *Ludlow* litigation (last reported in *FMC & Ludlow Corp. v. DeSmedt*, 366 F.2d 464 (CA 2, 1966), cert. den. 385 U.S. 974), the Commission's subpoena can be enforced against documents held abroad only by collateral sanctions of excessive severity: possibly imprisonment of the local agent for contempt or possibly dissolution of a conference the great majority of whose members have complied with the subpoena. And even if some papers are dutifully sent in from overseas, I know of nothing in human experience to indicate that these will invariably include the important or the incriminating documents.

As I know of no way to insure a genuine enforcement of the Act in an extra-territorial context, my own solution for this problem is simply a frank recognition that the Act is not ordinarily enforceable against acts done on foreign soil. That is, however, a widely unpalatable solution, and I am not now urging it on this Committee. So far as concerns S. 706, I wish simply to record that my support of its enactment is based upon the assumption that the discovery and subpoena procedures, like the substantive provisions of the Act, cannot be used to cast a burden on the U.S.-flag lines which is not borne by their foreign competitors.

This I believe to be the teaching of *Alcoa SS Co. v. FMC*, 348 F. 2d 756 (CADC, 1965), and I should hope that the Committee in reporting S. 706 would recognize its salutary rule.

I should like also to note that the discovery authorized by S. 706 should be understood to be a two-way street. The Commission can discover evidence held by my clients, and I can discover evidence, not kept secret in the national interest, held by the Commission. I don't believe this to be a problem. In the first place the Commission itself has been rather sympathetic to the needs of public disclosure, and is taking steps which with some adjustment would improve some awkward procedures at the staff level. In the second place the Government Information Act of last Congress, 80 Stat. 250, should serve to put this beyond doubt. I should be glad, however, if the Committee in its report were to ensure that S. 706 is so understood.

Upon the assumptions which I have noted, I know of no reason why the Commission should be denied tools needed for the effective enforcement of the Act, nor why those who practice before the Commission should be denied the discovery machinery which has proved so useful in permitting sensible litigation under the Federal Rules.

Senator BARTLETT. The committee will be in recess for whatever time is required while Mr. Gardner reviews this new draft to make any comment concerning it which he desires.

Mr. GARDNER. I have only two comments, neither of which can be conclusive, I am sorry to say.

I believe the problem with respect to the Federal Rules of Civil Procedure does adhere in this language. I have not been able to suggest alternative language. It ought to be something in the direction "which rules and regulations shall to the extent practicable be in conformity with the Rules of Civil Procedure of the Rules of the United States to the extent there applicable to the Commission proceedings."

Perhaps you could do it by "to the extent practicable and to the extent such rules are applicable."

And the second one, I regret to say I can't answer here. I don't have the reasoning of the *DeSmedt-Ludlow* case in mind sufficiently to be sure.

It is possible that the rather strange construction which they placed upon "from any place within the United States," I don't criticize. I think the result is sound. But it is a strange construction, nevertheless.

It is possible that the construction adopted by the second circuit might inadvertently be carried by this language. I simply don't know. I would have to have the opinion before me and read it with some care to insure that the result of the Ludlow litigation was preserved by this. I can read it, or I can commend it to Mr. Barer to read.

Mr. BARER. I would point out that language in this draft insofar as it affects the *Ludlow* case situation is identical to the statutory language at the time the *Ludlow* case was decided.

Mr. GARDNER. If that includes more than the particular phrase and the context in which that phrase is located, then that answers my question.

Senator BARTLETT. You made some mention of the *Alcoa* case and its importance to that which we are considering. I would like to enlarge the record upon this point. Would you explain in greater detail what relevance it has?

Mr. GARDNER. The *Alcoa* case in very broad summary, which is about all that I am capable of, I am afraid, held that a Commission order for investigation and audit of the books of the *Alcoa* Steamship

Co., which was attacked by the steamship company upon other grounds as an unfair burden upon Alcoa because its foreign-flag competitors could not be similarly examined.

The court of appeals remanded the case to the Commission to determine whether or not a disproportionate burden would be placed upon Alcoa by such an investigation.

That principle on at least one occasion has been accepted by the Commission. A small and unimportant proceeding which has since been terminated.

I happened to represent the only U.S.-flag—it was a pooling investigation—line. And I took with the approval of the examiner and hearing counsel the position that we would supply any documents they wanted, but only to the extent that they were supplied by the foreign-flag lines.

That may not in every case be practicable, but it was a sensible solution of that problem.

I am convinced that the legislation of the Congress and the decisions of the courts for a period of nearly a century indicate that the shipping laws of all forms in the United States are not intended to lay a heavy hand upon the American lines and a light hand on the foreign lines.

It is my hope that in the rather extensive powers which 706 would grant, properly to my mind, to the Commission, that the Congress and the committee recognize that there is this inherent problem, and for my purposes I could be content if there were just a general recognition of the Alcoa principle and let its application depend upon the varied circumstances of the future investigations.

That is, I think, probably as far as I can profitably go this morning.

Senator BARTLETT. Thank you very much, Mr. Gardner. The committee is appreciative of your appearance.

Mr. GARDNER. Thank you, Mr. Chairman.

Senator BARTLETT. Mr. Leonard G. James?

At your pleasure, Mr. James.

STATEMENT OF LEONARD G. JAMES, ATTORNEY AT LAW, SAN FRANCISCO, CALIF.; ACCOMPANIED BY F. CONGER FAWCETT

Mr. JAMES. Thank you, Mr. Chairman.

I have with me Mr. F. C. Fawcett, my assistant. And I have a prepared statement which I will read.

It is my privilege to testify on S. 706 in behalf of an unusually large number of steamship conferences. I have attached to my statement a list showing the names of the conferences.

Mr. Chairman, may I add to that list the name of two conferences that were inadvertently omitted. Please add the names "Atlantic & Gulf Haiti Conference" and "The United States Atlantic & Gulf, Australia, and New Zealand Conference" in the appendix to my statement.

Since the subject matter of S. 706 is the production and discovery of evidence, a purely legal matter, it was felt among the lines that testimony should be presented by an attorney and that duplication should be avoided by employment of common counsel.

Perhaps I should identify myself by explaining that I was the attorney in the case that decided, in 1964, that an attempt by the Federal Maritime Commission to order the production of records for

discovery purposes without statutory authority was unlawful and invalid. This decision was cited by the Federal Maritime Commission in its message to Congress on January 18, 1967, with which the Commission transmitted the terms of S. 706 and the companion bill in the House of Representatives, H.R. 4231.

In both its transmittal letter to Congress and in the Federal Court proceedings in the *Anglo-Canadian* case, the Commission stressed its "need" for pretrial discovery powers. However, Circuit Judge Walter Pope filed a separate, concurring opinion in the *Anglo-Canadian* case, saying—

POPE, CIRCUIT JUDGE (CONCURRING)

My concurrence here is induced in part by my feeling that pre-trial discovery is much less important in administrative proceedings than in cases tried in a district court. In the latter cases, once trial is begun the parties would expect the trial to proceed to a conclusion without interruption, and to make their entire case during that time. But with an administrative hearing before an examiner a common procedure is to take testimony at different sittings, often in different cities, and at more or less widely separated intervals. With its subpoena power the Commission can compel the attendance of witnesses who are, or who represent, adverse parties, and upon their examination the Examiner can readily ascertain what correspondence or other papers are in the possession of the witness. Production of these can be procured for use at subsequent sessions.

I cannot believe that the correspondence sought here cannot be obtained under existing valid procedures.

Also, in its transmittal message to Congress, the FMC stated that other Federal administrative agencies already have production and discovery authority similar to that sought by the FMC in S. 706. The Commission mentioned specifically the ICC, the FPC, the CAB, and the FTC. However, in its brief in the court of appeals, the Commission made exactly the opposite statement, saying that none of the four agencies mentioned has an "express delegation of discovery powers." On the contrary, said the Commission, the statutory powers of the other agencies "contain subpoena and rulemaking powers similar to those granted the FMC." The truth of the matter is that there is no other agency—neither the four cited to you by the FMC nor any other—that has statutory authority to use production and discovery in the broad, unrestricted way provided in S. 706, that is "in such manner and to such extent as the Commission may by rule or regulation require."

Congress has, however, delegated limited production and discovery authority to some Federal agencies. In each instance, the statute prescribes safeguards for the protection of the public against the unrestricted demands that might otherwise be expected from over-zealous agency personnel.

For example, the ICC's authority is limited to the taking of depositions before trial. It has no other discovery powers. The same is true of the FPC, the FCC, the CAB, and the FTC. The latter has the added power to inspect company records. This special treatment of the FTC is obviously because it has greater responsibilities than any other Federal agency, being required to police all unfair trade practices throughout the domestic and foreign commerce of the United States. I am attaching to my prepared statement the statutory authority of each of these agencies, for your convenient reference. It will be seen that each also has the same authority to subpoena witnesses and evidence that the FMC has in section 27 of the Shipping Act. None,

however, has the sweeping "discovery" power sought by the FMC in S. 706.

If the FMC were really seeking pretrial discovery authority similar, as it says, to that already granted to the ICC, the FPC, and the CAB—the three other agencies that regulate transportation—then we would not object. It is true that the power to order the taking of depositions before trial in order to preserve evidence is a useful procedure that serves to expedite litigation and to encourage amicable settlements. However, we have had too much experience in the past with the FMC's unauthorized production and discovery orders to stand idly by in the face of S. 706. Since that bill simply endows the FMC with carte blanche authority to write its own rule or regulation "on the manner and extent" that it will use production and discovery, we are satisfied that the enactment of S. 706 would be followed by an FMC rule designed to reinstate production and discovery in the FMC similar to the former FMC rule that was declared unlawful in 1964 by the court of appeals in the *Anglo-Canadian* case.

The FMC issued many production and discovery orders from 1958 to 1964 without statutory authority of any kind. First, the Commission adopted a rule which it called a mere "rule of procedure." It was designated rule 12(k) and authorized the Commission's hearing examiners, "upon the motion of any party," to—

"* * * direct any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things * * *."

(The information referred to above follows:)

DISCOVERY POWERS GRANTED TO OTHER FEDERAL AGENCIES

Civil Aeronautics Board (49 U.S.C. 1484(e)—1484(h))

"(e) The Board may order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Board and having power to administer oaths. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Board, as hereinbefore provided.

"(f) Every person deposing as herein provided shall be cautioned and shall be required to swear (or affirm, if he so requests) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent. All depositions shall be promptly filed with the Board.

"(g) If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken, provided the laws of the foreign country so permit, by a consular officer or other person commissioned by the Board, or agreed upon by the parties by stipulation in writing to be filed with the Board, or may be taken under letters rogatory issued by a court of competent jurisdiction at the request of the Board.

"(h) Witnesses whose depositions are taken as authorized in this chapter, and the persons taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States: *Provided*, That with respect to commissions or letters rogatory issued at the initiative of the Board, executed in foreign countries, the Board shall pay such fees, charges, or expenses incidental thereto as may be found necessary, in accordance with regulations on the subject to be prescribed by the Board."

Federal Communications Commission (47 U.S.C. 409(h)–409(k))

“(h) The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any United States commissioner, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor, or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided.

“(i) Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

“(j) If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

“(k) Witnesses whose depositions are taken as authorized in this chapter, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.”

Federal Power Commission (16 U.S.C. 825f(d)–825f(f))

“(d) The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after the proceeding is at issue. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any person authorized to administer oaths not being of counsel or attorney to either of the parties, nor interested in the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

“(e) If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

“(f) Witnesses whose depositions are taken as authorized in this chapter, and the person or officer taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States.

Federal Trade Commission (15 U.S.C. 49)

“For the purposes of sections 41–46 and 47–58 of this title the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against. . . .”

* * * * *

"The commission may order testimony to be taken by deposition in any proceeding or investigation pending under said sections at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produced documentary evidence before the commission as hereinbefore provided."

* * *

Interstate Commerce Commission (49 U.S.C. 12(4)-12(7); 49 U.S.C. 305(d))

"(4) The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any United States commissioner, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

"(5) Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so requests) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

"(6) If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

"(7) Witnesses whose depositions are taken pursuant to this chapter, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States."

In Federal and State court cases, production and discovery is never employed by the court itself as an investigatory scheme. It is invoked only upon the request of one of the private parties in the case in order to expedite determination of their dispute. This was ostensibly true under rule 12(k), too, but the Commission got around that limitation by adopting a scheme of putting one or more of its own staff attorneys in each of its own cases and calling them "parties." Then, under the Commission's rule 12(k), the Commission's attorneys would obtain from the Commission's hearing examiners long, rambling production and discovery orders against the private parties, or some of them, depending upon which ones the Commission's attorneys wanted to investigate.

I know of no other agency that engages in such an extraordinary practice.

As a result of this arrangement, the genuine, useful purpose of pretrial discovery was soon obliterated in FMC cases. In almost every case, the Commission's attorneys demanded production and discovery of everything conceivable. The orders became stereotyped. We all know as soon as a new case started in the FMC that our clients would

promptly receive a "Production and discovery order" and be called upon to search through their files and deliver to the Commission's hearing counsel all records, accounts, memoranda, cost studies, correspondence, and so on, however remotely connected to the issues actually involved or not connected at all. The expense to the private parties became enormous but it did no good to protest. To make matters worse the Commission's attorneys invariably sided with anyone who would come into a case against conference carriers. It became a popular practice for conference opponents, including competitors such as the self-styled "contract carrier" in the *Anglo-Canadian* case, to invoke production and discovery, with the aid of Commission attorneys, simply to fish through conference records looking for useful information.

It is also important to point out that pretrial discovery in FMC proceedings was a one-way street. The Commission's own attorneys in the cases, who are called hearing counsel, would serve their endless discovery demands upon the private parties but any attempt by a private party to reverse the process was invariably opposed by the same hearing counsel.

In this connection, you will note that the FMC has referred in its message transmitting S. 706 to Congress to the 1962 report of the Administrative Conference of the United States. The FMC states that the Administrative Conference report "approved * * * the principle of discovery in administrative proceedings * * * as a means of reducing delay and promoting fairness." That statement is accurate as far as it goes. However, it is highly misleading because of its failure to explain that the purpose of the Administrative Conference was exactly the opposite from the purpose of the FMC in S. 706. The Administrative Conference said clearly in its report that it approved pretrial discovery between private parties, as in the Federal courts, but when the agency itself is investigating private parties, the Administrative Conference did not recommend discovery by the agencies against the private parties. Quite the contrary was the Administrative Conference's intent and recommendation. The conference recommended discovery against the agencies.

The members of the Administrative Conference declared that it was unfair for the agencies to have almost unlimited access to private records without the private parties having the right to see reports and documents in the agencies' files that the agencies assemble to use against the private parties. As stated in the Conference's report to the President, the members of the Administrative Conference found that—even without pretrial discovery power—the agencies have many means and devices for getting at the files and records of private parties, just as Judge Pope observed in the *Angelo-Canadian* case which I have quoted above. On the other hand, the report states, the private parties cannot see the agencies' records unless the agencies voluntarily choose to make them available. It was to correct this unfair situation that the Administrative Conference recommended production and discovery in agency proceedings to be used against the agencies.

The report contains much valuable information on agency proceedings that is pertinent in connection with S. 706. For example, after explaining the use of pretrial discovery between private litigants before an unbiased Federal or State court, the report states as follows—

The situation in the administrative process is very different. As a natural concomitant of the typical administrative obligation to protect and conserve the "public interest," the agencies are in general armed with substantial and sweeping powers of inspection, investigation, and testing that are of course either denied to or beyond the usual capacity of private parties. In addition, agencies have at their command formidable accumulations of expertise in the area of agency competence; and agency positions are fortified, not only in their own proceedings, but as well in the courts, by the realization that the agency seeks vindication not so much of its own interest as it does that of the public. This aspect of the governmental advantage is even more marked in administrative than in criminal proceedings. Agencies are not required to prove their cases beyond a reasonable doubt, nor is the privilege against self-incrimination ordinarily a substantial obstacle in the way of achieving their objectives. When viewed from this perspective, agency reluctance to relinquish the advantages of nondisclosure is very understandable. Agencies see at first little to be gained in return save greater difficulty in establishing positions which they believe, in good conscience, to be in the public interest.

In this respect, the FMC's practice was, and still is, typical of the problems that troubled the President's Administrative Conference. We have had some really amazing experiences with the FMC when we have tried to obtain any of their records, even though we have asked only for documents that are essential for us to be in a position to defend our clients against charges of misconduct by the Commission. One example involved an investigation of the Pacific Coast European Conference by the Commission pursuant to a complaint filed by the manager of the Port of Stockton. Throughout the proceeding, the Commission refused to furnish a copy of the complaint to us or even to let us see it. This experience is not unique.

In another case, the Commission's "hearing counsel" flatly refused to produce the Commission's records even when ordered to do so by the trial examiner.

Thus, if any legislation is enacted on this subject, we urge that it follow substantially the recommendations of the President's Advisory Committee as set forth in the 1962 Report of the Administrative Conference. Excerpts from that report were published in 1963 by the Senate Judiciary Committee in Senate Document 24 of the 88th Congress, first session.

I have obtained from the chief counsel of the Senate Judiciary Committee a copy of S. 518 which was introduced on January 19, 1967, by Senator Dirksen. This bill appears to be a general revision of the Administrative Procedure Act along the lines, generally, of the earlier report of the Administrative Conference. I understand that the Judiciary Committee has already held hearings on the bill. It is manifestly the intent of S. 518 to retain a high degree of uniformity in the legal procedures of the various Federal agencies.

S. 518 contains a provision requiring all agencies to make their records available to private parties. This was an objective of the Administrative Conference and has been long sought by other groups directly concerned with administrative law, including the Federal Bar Association and the American Bar Association. It is particularly interesting to note, however, that on April 27, 1967—less than 2 weeks ago—the FMC published in the Federal Register a notice of proposed rulemaking saying that its own records will be made available to the public in FMC proceedings only upon the "voluntary" action of the Commission's attorneys. It is thus abundantly clear that, if S. 706 were enacted, the precise situation sought to be corrected by the Administrative Conference and S. 518 would be perpetuated in the

FMC. The FMC could, and would as it has in the past, compel private parties to come forth with all of their records and files while the Commission would arbitrarily continue to keep evidence in its own files and confidential from the private parties.

S. 518 contains, also, a specific clause dealing with production and discovery. It would make available in all agency proceedings:

"Depositions and discovery. . . to the same extent and in the same manner as in Civil proceedings in the district courts of the U.S. . . ."

This is very different from S. 706 which would not restrict discovery in the FMC to the procedures in the Federal courts but would leave the FMC free to define the manner and extent of its discovery orders simply by issuing a rule or regulation.

If S. 706 were enacted, the uniformity in agency procedures sought by S. 518 would be destroyed, possibly forever, but, at least, for a generation. It must be remembered that the APA, which brought the first degree of uniformity to agency proceedings, was enacted in 1946 only after 20 years of effort by the private bar associations and the Judiciary Committees in both Houses of Congress. Changes since 1946 have been very slow in coming.

Since a tremendous amount of study and labor has already gone into S. 518, it would seem prudent to pursue that bill and deal with pretrial discovery in the agencies on an overall basis rather than on a piecemeal basis, as provided in S. 706. There can be no doubt that the passage of S. 706 would lead other agencies to demand similar freedom to devise their own discovery procedures without statutory restrictions or guidelines. This was the general situation before enactment of the APA and S. 706 would surely open the door to return to the same chaotic condition. It would be a long step backward.

In concluding, I strongly urge that S. 706 be tabled or dropped in favor of S. 518. If, nevertheless, the subcommittee should consider it favorably, then, at least, the bill should be modified to incorporate some measure of protection for private parties in FMC proceedings.

First, among such changes, I recommend that the subcommittee consider limiting production and discovery in FMC proceedings to the adjudication of disputes between private parties initiated under section 22 of the Shipping Act. This would conform FMC procedure to the discovery practice in the Federal courts. I fear that if this is not done, the FMC will reinstate its former practice of issuing production and discovery orders for its own attorneys so that they can fish through the files of the private parties at their individual whim and caprice. As pointed out by Judge Pope in the *Anglo-Canadian* case and in the report of the Administrative Conference, the agencies already have sweeping investigatory powers without the addition of new, specific discovery powers.

Incidentally, this is particularly true of the FMC—more so than any other agency, including the FBI. In fact, the FMC has organized its own bureau of investigation and has a staff of field investigators. In addition, the staff attorneys who participate in the FMC's own formal cases under the label "hearing counsel" also act as field investigators soliciting and collecting reports and information for the prosecution of private parties.

The FMC now has, of course, the same subpoena power that all other agencies have and, unlike other agencies, it uses the reports provision of the Shipping Act, section 21, as a pretrial discovery

device to collect information, records, and documents from all over the world. In fact, the court of appeals has upheld the use by the Commission of section 21 to compel production discovery before trial just as though section 21 were a specific delegation of discovery authority. This was done last year in a case entitled *Pacific Coast European Conference v. Federal Maritime Commission*, decided on April 7, 1966, in the ninth circuit.

The Commission now serves section 21 orders constantly. Some demand special reports and records; other demand periodic reports, ad infinitum. One such order contains a reporting form to be filled out every 6 months. It is 95 pages long. Many steamship companies could not afford to complete this report every 6 months.

The FMC has recently fashioned a new and ingenious discovery device all its own. Under section 15 of the Shipping Act, as you know, carriers are required to file certain types of rate-fixing agreements with the FMC for its approval. The Commission recently conceived of the idea of holding up agreements or refusing to approve them unless the parties consented to add provisions whereby they promise to file with the Commission various periodical reports and notices of all of their actions and conduct, whether related to rate fixing or not, and whether carried out in the United States or carried out wholly within the borders of other nations. By this device, the Commission now extracts countless reports from all over the world to be added to the massive volume filed by the same people pursuant to section 21 orders, section 27 subpoenas and rules and regulations under section 43 of the act. Apparently, the FMC has hired an electronic computer to analyze reports that it receives. However, we have not found a computer to search the files and prepare the reports for the steamship companies.

Surely, among all the agencies of the Federal Government, the one least in need of additional investigatory powers is the Federal Maritime Commission.

I suggested that S. 706 be amended expressly to limit it to adjudication proceedings. Otherwise, I fear the FMC would employ discovery orders in its rulemaking proceedings, as well. It is true that S. 706 refers only to proceedings under section 22 of the Shipping Act, and that section 22 contemplates only adjudication. However, the Commission initiated its so-called dual-rate cases under section 22 in 1963, and demanded production and discovery under its rule 12(k), which was then still in effect. The proceedings were all labeled "adjudication." However, without prior notice during the proceedings, the Commission began to call the cases "adjudication in the nature of rule-making," and in its final report in March 1964, the Commission, again without notice to the parties, converted all of the adjudicatory cases to a single rule or regulation. To avoid this happening again, it is necessary that S. 706 be expressly amended to apply specifically to adjudication only.

You will note, additionally, that S. 706 appears on its face to apply to the United States. It appears to authorize the compulsory attendance of witnesses and production of documents only " * * * from any place in the United States at any designated place of hearing * * *."

Although these words seem to say that the Commission can subpoena witnesses only from a place in the United States, the strange truth is that the FMC recently convinced an accommodating court that

Congress really meant these words, now appearing in section 27 of the Shipping Act, to mean "from any place in the world." The Commission, therefore, is now engaged in reaching across the seas to demand records prepared and filed in the carriers' offices abroad. A storm of protest has arisen from overseas and several friendly nations in Europe have already enacted new laws designed to preserve the property of their own citizens that is physically located within their territorial jurisdiction.

Unquestionably, the FMC would interpret S. 706 exactly as it interpreted the same words in present section 27, and undoubtedly it would extend its new power of pretrial discovery to the people and their files located in England, France, Italy, Japan, and elsewhere, including presumably, the U.S.S.R. Only dissention can accompany such extraterritorial interferences in the affairs of other nations. Therefore, I strongly urge that S. 706 be clarified so that it cannot be misinterpreted by the FMC to endow it with the power of production and discovery outside the United States of America. This can readily be done simply by adding a sentence at the end of the bill saying—

Nothing herein shall be construed to authorize witnesses or documents to be subpoenaed or demanded from any location outside the United States, its territories and possessions.

Regrettably, if Congress does not include such a provision in any statutory grant of discovery or subpoena power to the FMC, it is a foregone conclusion that the Commission will construe the intent of Congress to authorize production and discovery abroad.

Finally, I wish to point out that the FMC has requested new and greater search and seizure powers in each of its annual reports to Congress with the single exception of fiscal 1964. In each instance, and in every test case in the Federal courts, the Commission has fervently declared that additional search and seizure powers are absolutely essential or it will be unable to carry out its responsibilities under the Shipping Act.

Since the Maritime Commission already has the same statutory subpoena power that the ICC and CAB have, and since it is actually exercising much greater investigatory powers than either the ICC or CAB, it certainly seems appropriate for the Congress to inquire into the manner in which the FMC has been interpreting its responsibilities under the Shipping Act. I do not see how Congress can determine whether a statutory agency really needs more powers without first determining how it has exercised the powers already given to it.

For example, there is a very recent, outstanding example of the manner in which the FMC would use production and discovery power, if it had that power. This occurred in connection with a formal investigation of freight rates in the trade from Hong Kong to the Atlantic coast, the Commission's docket No. 1083. On April 20, 1967, the Congressional Information Bureau published the decision of the FMC's hearing examiner in the case who took occasion to explain why, in his opinion, the FMC needs production and discovery powers. The examiner (who was also the examiner in the *Anglo-Canadian* case) complained that the case took 4 years to complete because, in part, some of the members of the Conference, he said, "endeavored, regrettably but not unlawfully, to avoid compliance with subpoenas duces tecum." Examiner Marshall said—

A proper remedy for this ever present and admittedly difficult problem, which is prevalent in all types of cases, would be for Congress to provide the Commission with pre-hearing discovery authority.

Examiner Marshall did not explain just how prehearing discovery authority would have expedited the proceeding in docket No. 1083. The truth is that when discovery orders were issued by the FMC, its proceedings were delayed, not expedited. However, he did give some indication of the type of information that would be demanded. He said—

The first need, of course, is for facts . . . actual facts which show whether rates are compensatory, or fail to cover even direct costs. These facts must come from the carriers' books of account.

Examiner Marshall then went on to admit that the Commission already has authority to get such information by orders issued under section 21 of the Shipping Act, and he recommended that the Commission demand periodical reports showing the earnings, expenses, and profits of all steamship lines, American and foreign. He said that, with such operating cost data the Commission could then determine immediately whether "rates should not be found noncompensatory and therefore disapproved as being detrimental to the commerce of the United States."

Now, does it not become pertinent to inquire whether the FMC should be given any new power that would be used to disapprove rates in foreign trade because they are noncompensatory? Where, in the Shipping Act, has the Commission been authorized to decide whether freight rates in foreign trade are compensatory or non-compensatory? And where, in the Shipping Act, was the Commission given authority to investigate—by any means—the operating costs of steamship lines in foreign trade—whether American flag or foreign flag? On the contrary, the report of the Senate Commerce Committee Public Law 87-346 in 1962 made it unmistakably clear that the Commission was not to pry into the operating costs of the lines. The committee noted that it had received objections to such regulation from 12 foreign nations. Nevertheless, that type of rate control has recently become one of the FMC's principal activities. The last annual report of the FMC to Congress mentions, briefly, that the Commission has successfully imposed control over the level of freight rates in foreign trade.

To make matters worse, it should be noted particularly that the rates Examiner Marshall was talking about were rates charged to Chinese shippers in Hong Kong. Examiner Marshall said that, in his opinion, the Commission should force the carriers to charge more for their services to the people of Hong Kong. Surely, another necessary inquiry before passing upon the merits of S. 706 is whether the Congress has determined that the FMC should attempt to decide how much the people of Hong Kong should pay for transportation or how much foreign steamship lines should charge for the operation of their ships on the high seas.

In summary, I respectfully submit that the FMC does not need pretrial discovery powers. If, however, it is decided to give them such additional powers, it should be done in a general modification of the APA such as pending S. 518. As a third alternative, S. 706, if pursued, should be amended to afford protection to private parties.

Thank you, gentlemen.

(The list of conferences referred to follows:)

LIST OF CONFERENCES

Atlantic and Gulf-Singapore, Malaya and Thailand Conference.
 Atlantic and Gulf Indonesia Conference.
 American West African Freight Conference.
 Atlantic & Gulf/West Coast of South America Conference.
 Atlantic & Gulf/Panama Canal Zone, Colon & Panama City Conference.
 Atlantic and Gulf West Coast Central America & Mexico Conference.
 Calcutta, East Coast of India and East Pakistan/U.S.A. Conference.
 East Coast Colombia Conference.
 Far East Conference.
 Gulf Mediterranean Ports Conference.
 Gulf Scandinavian and Baltic Sea Ports Conference.
 Gulf/United Kingdom Conference.
 Latin America/Pacific Coast Steamship Conference.
 Leeward & Windward Island & Guianas Conference.
 North Atlantic Mediterranean Freight Conference.
 North Atlantic Continental Freight Conference.
 North Atlantic French Atlantic Freight Conference.
 North Atlantic United Kingdom Freight Conference.
 Pacific Coast European Conference.
 Pacific Coast River Plate Brazil Conference.
 Pacific Westbound Conference.
 Red Sea Outward Freight Conference.
 River Plate Brazil Conference.
 South and East Africa Rate Agreement.
 The United States Atlantic & Gulf Jamaica Conference.
 The Persian Gulf Outward Freight Conference.
 The United States Atlantic & Gulf Santo Domingo Conference.
 The India, Pakistan, Ceylon and Burma Outward Freight Conference.
 The United States Atlantic & Gulf-Venezuela & Netherland Antilles Conference.
 United States Great Lakes, Scandinavian and Baltic Eastbound Conference.
 West Coast South America Northbound Conference.
 West Coast of India and Pakistan/U.S.A. Conference.

Senator BARTLETT. Off the record.

(Discussion off the record.)

Senator BARTLETT. Considering all things, I think it best that we return tomorrow morning at 9:45 a.m. when we will resume with Mr. James.

The committee stands in recess.

(Whereupon, at 12:04 p.m., the subcommittee recessed, to reconvene at 9:45 a.m., Tuesday, May 9, 1967.)

AMEND SECTION 27 OF THE SHIPPING ACT, 1916

TUESDAY, MAY 9, 1967

U.S. SENATE, COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON MERCHANT MARINE AND FISHERIES,
Washington, D.C.

The subcommittee met at 9:45 a.m. in room 5110, New Senate Office Building, Hon. E. L. Bartlett (chairman of the subcommittee) presiding.

Senator BARTLETT. The committee will be in order. If you will be good enough, Mr. James, to return. Actually, we didn't have very many questions to put to you. We regret that you have been discommoded to a degree by having to return this morning.

You represent how many conferences?

Mr. JAMES. Actually 35, Mr. Chairman. There is a new one to be added this morning. Mr. Barer has it.

Mr. BARER. I am having a little trouble reading the handwriting.

Mr. JAMES. It is not mine.

Senator BARTLETT. U.S. Bordeaux Hamburg Range Eastbound Conference.

Mr. JAMES. Yes, sir.

Senator BARTLETT. Is this substantially all the conferences there are? Or are there others?

Mr. JAMES. This is mostly the outbound conferences. I imagine it is about half the number of the total conferences.

Senator BARTLETT. Do you have any personal knowledge as to the views of the other conferences regarding this bill?

Mr. JAMES. The lines that are members of the conferences that I do represent here are also members of the inbound conferences that I do not represent, and who are not participating. So I would certainly have to assume that the views of the inbound conferences would be exactly the same as those of the outbound conferences.

Perhaps if I put it this way, Mr. Chairman: I believe that virtually all of the steamship lines that are conference members are represented in these 35 conferences.

Senator BARTLETT. Would you agree with that which has been said, that section 21 powers give the Commission authority to obtain just about any report or memorandum they may desire?

Mr. JAMES. I would agree that the court of appeals has held that the Commission is entitled under section 21 to obtain production and discovery in their formal proceedings. Personally, I think they were wrong. But that is the law today.

Senator BARTLETT. Since there is agreement that that is the case, what significant additions would S. 706 make or add to the Commission's authority to secure reports and documents, rather than section 21 powers and subpoena powers vested by reason of section 27?

Mr. JAMES. It would do this, Senator Bartlett, as I see it. The Commission presently has authority to issue section 21 orders. Section 21 has been interpreted by the courts in a number of cases now to be practically the blank check for the Commission to obtain records, documents, reports, and so on. That requires the Commission to issue the order itself. Whereas under 706, or under any form of pretrial discovery arrangement, the examiner in each individual case would be given the authority to issue an order for pretrial discovery. I can't see any other significant difference.

Senator BARTLETT. You have testified, Mr. James, to the difficulties you have had in obtaining material from the Commission in section 22 proceedings. Would not the enactment of deposition and discovery procedures along the lines of the Federal rules be of great benefit to private parties as against the Commission?

Mr. JAMES. I am not satisfied myself, Mr. Chairman, that relating pretrial discovery to the Federal rules would accomplish that purpose, because the Federal rules state that a party in a proceeding shall be entitled to discovery. The Commission, properly speaking, is not a party in its cases against us. It puts in an attorney under the title "hearing counsel" and calls him a party.

This attorney has taken the position in cases that he does not represent the Commission. He says that he represents the public, and so has refused to produce. It seems to me that, say S. 518 were enacted, which simply relates administrative provisions to the Federal Rules of Civil Procedure. I believe that there would be a serious question whether a respondent in an administrative proceeding would have the right to demand the production of documents from the agency itself. I would certainly hope that anything that is enacted on this subject would be very clear, as it is in the rules of the Federal Trade Commission, and would expressly provide that pretrial discovery, if available against any parties, is also available against the agency. Again referring to the rule of the FTC, which seems to be the most advanced rule on the subject, I would hope that the legislation will provide expressly that pretrial discovery shall be at the sole discretion of the trial examiner.

Finally, and once again relating to the FTC rule, that the party requesting pretrial would be required to show cause, to give some reason to convince the examiner that he is entitled to it rather than leave it wide open as it has been in the past under the Commission; namely, anyone designating documents shall be entitled to receive them. That is too broad, sir.

Senator BARTLETT. The contention has been made, as you know, that deposition and discovery procedures before the Federal Maritime Commission in adjudicatory proceedings that were available against the Commission as well as private parties would aid private parties more, perhaps, than the Commission. Your comment on that, please?

Mr. JAMES. I think it would help the private parties a great deal; yes. Probably help the private parties more than it would help the Commission, provided there is the requirement that I have suggested; namely, that the examiner have the right in his discretion to determine whether pretrial shall be ordered, and that each individual party shall have the burden of showing cause when he asks for pretrial discovery. The reason I say that is this: It would be helpful to the private parties to have the right to obtain discovery against the agency. But it would

not be a very useful right if the Commission itself had the right of reviewing the examiner's determination, which under the present rules of the Maritime Commission, they have to do in all cases.

Secondly, if the hearing counsel in the Commission is to have the right to call for documents without establishing cause, then I think the overall effect would be more harmful than beneficial to us, because our experience in the past, Mr. Chairman, was that hearing counsel abused that privilege by demanding documents that were wholly irrelevant and putting the respondents to tremendous expense in digging out their files for hearing counsel's personal use.

Senator BARTLETT. As I recall the testimony yesterday, you assert that S. 706 would give FMC regulatory authority far beyond that given to any similar agency.

Mr. JAMES. Oh, yes. I know of no other agency that has the power of pretrial discovery without any limitations at all.

Senator BARTLETT. You have had opportuntiy, I trust, to examine the redrafted bill?

Mr. JAMES. Yes; I have.

Senator BARTLETT. Would you care to comment on that?

Mr. JAMES. I think it is a very definite improvement on S. 706.

The redraft of the bill still, in my opinion, has the fatal flaws of not spelling out exactly how in practice this pretrial discovery thing is going to work. It still leaves it to the agency to determine itself by its own rules and regulations the extent and manner to which they are going to use the pretrial discovery. And, just thinking of the practical work of the subject, this means to me that the Commission will issue a rule substantially similar to its last rule. When we objected to the production in the past of documents where no showing of need had been made by hearing counsel, we invariably were overruled.

I think this is a step in the right direction, S. 706. But I would still like to see in there a specific provision saying how it is actually going to work by relating to the Federal Rules of Civil Procedure. You just leave the door wide open when the only control on that is as to the extent practicable and the Commission is given the authority to determine how practicable it is.

I would like to see in this law a provision that the examiner has the sole discretion in the Commission's hearings to issue pretrial discovery orders. And that anyone asking for it must establish to his satisfaction that he should have it. And I would also like to see specifically spelled out in the staff draft that it will apply only to adjudication under section 22, and that it will apply in both directions.

Senator BARTLETT. Mr. Barer has a question.

Mr. BARER. Do the deposition provisions for the Federal Communications Commission, Federal Power Commission, Federal Trade Commission, Interstate Commerce Commission, provide that they should be used only in adjudicatory proceedings? Does the word "adjudicatory" appear in the enabling statute of Congress?

Mr. JAMES. The procedure in the Federal Maritime Commission is substantially different from the procedure in the—let's take the Federal Trade Commission, for example. The procedure before the Federal Trade Commission is outlined specifically in the statute. The Federal Trade Commission does not adjudicate private disputes. They have no power of awarding damages or reparations to a private party in a suit.

Mr. BARER. They do act in an adjudicatory manner, isn't that correct?

Mr. JAMES. Yes; they do. They adjudicate disputes between their own counsel and private parties. And this is all laid out very carefully by statute, how it is to be done.

The Maritime Commission not only adjudicates deposition power. In fact, the Commission has a separate rule on depositions which we have never objected to. I can't see why the taking of a deposition in any kind of proceeding should not be permitted. What we objected to primarily in the Commission's action under rule 12(k) was production, massive production, of documents which are not available under any other agency's pretrial powers.

Mr. BARER. But those same documents—you mean if we shouldn't pass a discovery enabling statute, those same documents would still have to be produced at the hearings, pursuant to the subpoena power?

Mr. JAMES. Yes. But what we consider so critically important is that pretrial discovery does not limit production to evidence. It is wide open.

The party can call for documents looking for evidence, or hoping that he might find some evidence, whereas the subpoena is intended to be limited to relevant material. Some showing must be made of relevancy before a subpoena can be properly issued.

In the Federal courts, as you know, the pretrial powers are very liberally administered. They are practically fishing expeditions, and to a certain extent this is available between two litigating parties who have exactly the same status before an unbiased court. But in our case the Maritime Commission is certainly not unbiased. They are a prosecuting organization. Their purpose in the cases which they bring against us is conviction. And under such circumstances, for them to be given even the broad power of simply fishing through documents in the hope that they will find some evidence of wrongdoing is simply subjecting the industry to a type of persecution that no other industry is subjected to that I know of, and certainly never goes on in a court of law.

Mr. BARER. If a requirement does exist as to the subpoena power of a document being of relevancy, does that same requirement exist under section 21?

Mr. JAMES. No, no.

Mr. BARER. They can still get the documents, isn't that correct?

Mr. JAMES. Section 21 provides that the Commission may call for reports. It is basically a reportorial section not intended to be used for the development of evidence in a case that is brought against the private parties. Reports are filed pursuant to section 21 by the individuals, without usually the slightest thought that they are anything except advising the Commission, giving the Commission information for its general knowledge, not to be used against them. Whereas a pretrial discovery is exactly the opposite. You see, section 21 refers to the "The Commission may require reports to be filed." And it has been held by the Commission, admitted and held, that the information which they call for under section 21 orders is for their private use and not available to the public, either parties in the proceeding or otherwise. So there is a substantial difference in the scope of a section 21 order and the purpose of it, and pretrial orders. I think I should point this out to you, Mr. Barer, that we have been greatly

troubled in our cases with the Commission because of the very loose way in which orders of discretion are couched. The usual order of the Maritime Commission directed against us simply says in appearing that the following steamship lines may have violated sections 14, 15, 16, 17, and 18. They simply name everything in the statute, and it is a shotgun approach. We do not know what the issues are. When we ask if we are accused of unjust discrimination under sections 16 and 17, will you tell us who we are supposed to have discriminated against so we can ascertain whether it is true and defend ourselves, we are always told, no, that will come out in the hearing, and you will be given an opportunity to answer in your brief.

Mr. BARER. Of course —

Mr. JAMES. With such a wide-open order of investigation and wide-open discovery powers, we have very little ability of defense.

Mr. BARER. Of course, if you had S. 706, you could depose and find out.

Mr. JAMES. If 706 in fact will apply against the Commission, and if the Commission does not have the right to review a pretrial order against it, issued by its own examiner. If it does, we won't have much of a right.

Senator BARTLETT. Mr. James, the committee is appreciative of your appearance and that of your associate, Mr. Fawcett. If you have any suggested language changes, we would welcome them in writing.

Mr. JAMES. Thank you, sir.

(The following letter was subsequently received from Mr. James:)

GRAHAM JAMES & ROLPH,
San Francisco, Calif., May 17, 1967.

Re S. 706 — Production and Discovery

STANLEY BARER, Esq.

Chief Counsel, Subcommittee, Committee on Commerce, U.S. Senate, Washington, D.C.

DEAR MR. BARER: As was requested at the hearings on S. 706 last week, on May 9, I have revised the Bill along the lines of my testimony in behalf of the Conferences and enclose a copy herewith. I have also sent a copy to Senator Bartlett and to Admiral Harlee at the FMC.

I should like to explain to you the changes that I have made in the Bill and my reasons for them. First, I have limited the use of production and discovery in FMC proceedings to those of an adjudicatory nature. Since Admiral Harlee testified that the FMC agreed that production and discovery should not be used in rule-making proceedings, presumably the FMC will not object to this modification. I consider it advisable to have it in the statute itself to avoid any possibility of the Commission's returning to its former practice, under its old Rule 12(k), of demanding the production of documents in rule-making.

I have also limited the application of the production and discovery to persons and evidentiary matter located in the United States. No doubt this will be a controversial point with the FMC in view of Admiral Harlee's testimony that the Commission is not one to "rock the boat" while the *Ludlow* case is still active. That is the case, as you remember, which held that the Commission may subpoena documents from abroad. While I can understand the Commission's desire not to jeopardize their victory in the *Ludlow* case, nevertheless, it seems to me that the Congress of the United States is the proper body to decide as a matter of policy whether an administrative agency should have the power to extend its jurisdiction beyond the United States.

I have also included a requirement that the party requesting production and discovery must first show good cause. The purpose for this amendment is probably obvious, namely, to avoid burdensome and aimless fishing expeditions. Under Rule 12(k) the practice was to demand all of the records and files of the respondents in the FMC's proceedings and the P&D orders were issued without any inquiry

into the need of relevancy of the material demanded. In effect, the rule of the FMC applied to all and every document that was "designated", without question.

I have limited production and discovery to parties complainant and respondent. My purpose, of course, is to avoid its being used again by the Commission's "Hearing Counsel" who has been characterized by the Commission in its Rules of Practice as a "party". So far as I know, the only legitimate purpose of production and discovery procedure is to enable the parties who are litigants in a proceeding to uncover evidence in the files of their opponents in order better to prosecute or defend their position. Production and discovery was never intended to be a form of investigatory power and, has not been used in that fashion by any other administrative agency nor even sought by any other administrative agency.

No doubt the Commission will object to this change and, will probably object equally to the provision that I have included to the effect that Hearing Examiners shall decide whether production and discovery orders are to be issued, and their decision shall not be reviewable by the Commission. My purpose is two-fold. First, to conform with the objectives of the Judiciary Committee which, in S. 518 are designed to strengthen the Hearing Examiners position in the adjudicatory proceedings of all federal agencies. Secondly, the practice of the FMC has been to review interim decisions of the Hearing Examiners and to reverse them as a matter of course whenever they appeared to the Commission to interfere with pre-determined objectives in adjudicatory cases. In fact, not long ago the Commission adopted a management regulation which placed the whole Office of Hearing Examiners under the Commission's "Managing Director" and, provided that in all matters of policy the examiners were to be guided by the Managing Director's orders. Although the rule has apparently been abandoned, the practice still persists in the FMC of attempting to conduct adjudicatory proceedings as though they were forums for the administration of Commission policy. It is only through the independence of the Hearing Examiners that we can hope for unbiased decisions, which are extremely important, particularly in litigation between private parties where reparations in large amounts are involved.

I have, of course, not interfered with the Commission's authority to review any decision of the Examiner on the subject of production and discovery in connection with a review of an initial or recommended decision. This is in conformity with the practice in the federal and state courts which permit judicial review of interim orders during review of a final decision.

The change which I have made with respect to the Commission's authority to promulgate rules and regulations to implement P&D procedures is simply to require the Commission to make an affirmative finding of impracticality between its rules and the rules in the federal courts, rather than the provision in the present draft which is phrased in negative terms. It seems to me that the Commission should be under an affirmative statutory mandate to follow the rules of Civil Procedure unless the Commission finds that it cannot do so in any particular instance. In other words, the burden should be upon the agency to make a valid finding that it cannot follow the Federal Civil Rules rather than follow them only to the extent it wishes to do so, as in the present draft.

I should be happy to discuss the matter further with you, if you wish.

I should like to add that, even if S. 706 were modified along the lines of the draft which I have enclosed, I should still feel that the subject is one which should be treated uniformly among the agencies. The enactment of S. 706 is any form will tend to defeat uniformity and undermine the long years of hard work that have gone into the Administrative Procedure Act and the amendments and changes that have been developed by the Bar Associations and the Judiciary Committees of the two Houses of Congress. Since the Shipping Act has been administered for 50 years without production and discovery procedures, and since there are approximately 60 other federal agencies that do not have that authority, it seems very difficult to believe that the FMC's need for production and discovery "power" can be as important as the basic objective of the Administrative Procedure Act to maintain uniform administrative procedures.

I wish to express my sincere thanks for the privilege of submitting a modified version of S. 706 and, also, for your unusually helpful attention to this important subject.

Yours Sincerely,

LEONARD G. JAMES.

PROPOSED MODIFICATION OF S. 706

SEC. 27(a). In adjudicatory proceedings under section 22 of this Act, depositions and discovery against persons, and against evidentiary matter located in the United States, shall be available upon a showing of good cause by any party complainant or respondent, directed to any other party or to the Commission. In any proceeding conducted by a Hearing Examiner, his decision shall be reviewable by the Commission only upon exceptions of a party to the Examiner's initial or recommended decision.

The Commission shall issue rules to carry out the provisions of this section, which rules shall be in conformity with the rules applicable in civil proceedings in the district courts of the United States, unless the Commission finds that conformity to such rules is impractical, in whole or in part.

Obedience to orders issued under this section shall on application by the Commission be enforced as are orders of the Commission other than for the payment of money.

Senator BARTLETT. Mr. John Mason?

Be seated, Mr. Mason, and proceed when you are ready.

**STATEMENT OF JOHN MASON, ESQ. OF RAGAN & MASON,
WASHINGTON, D.C.**

Mr. MASON. In the interest of time, could I truncate at least the first part of my statement, Mr. Chairman, by saying that I have had occasion to appear frequently before the Maritime Commission, that I favor the purposes of this bill. On the whole, I think it will be more beneficial to me in representing private persons before the Commission than it will be to the Commission, in the sense that the Commission already has as a practical matter, the authorities which this bill would give to them.

This bill would, as to the Commission, put them only in a better position to exercise authority which they already have.

Mr. Chairman, my name is John Mason. I am a member of the firm of Ragan & Mason, a Washington, D.C. law firm. I appear today to testify in support of S. 706, which would provide for discovery procedures in investigations before the Federal Maritime Commission commenced under section 22 of the Shipping Act, 1916.

I am a member of the Bars of the District of Columbia, Maryland, and California. My firm has occasion to represent clients in Federal Maritime Commission proceedings rather regularly. In the past 4 years, we have represented clients in broad, multiparty economic proceedings before that Commission on an average of two or three times a year. During that time, we have represented vessel-operating common carriers, a non-vessel-operating common carrier, a terminal operator, an association of shippers, and a freight forwarder. However, the views I express today are my own; and not on behalf of any client.

I am sure that other witnesses will testify with respect to the need of this legislation from a regulatory point of view, and point out that other comparable Federal agencies already have discovery procedures available in parallel proceedings. Accordingly, I shall limit my remarks in the main to what I believe to be the practical benefits that would accrue to parties in Commission proceedings from the enactment of this legislation.

First, I would point out that, as I interpret this bill, no new substantive investigative power will be given to the Commission by virtue of enactment of this proposed legislation. If I felt otherwise,

I am not so sure I would be here supporting it today. That is to say, the Commission's present subpoena power, as it has been interpreted by the Federal courts, is broad enough to reach any documents or testimony that shall be within the reach of the proposed discovery procedures. Thus, what is proposed here is a more expeditious means by which to attain an end which is already attainable by a more cumbersome means under existing legislation.

Secondly, I cite Professor Davis in his "Administrative Law Treatise" for the proposition that: "Probably no sound reason can be given for failure to extend to administrative adjudications the discovery procedures worked out for judicial proceedings." (S. 815, at p. 589).

But, are there sound reasons for extending by statute such discovery procedures? In my judgment there are, at least with respect to Federal Maritime Commission hearings.

As this committee well knows, one of the most serious problems with respect to the administrative procedure generally is the length of time involved in obtaining final adjudications. This problem is not without application in Federal Maritime Commission proceedings.

In the broad, multiparty economic proceedings before the Federal Maritime Commission, it is not unusual for a period of 2 or more years to pass between issuance of an order of investigation or filing of a complaint, and the final decision of the Commission. These broad investigations are, of course, the ones where discovery provisions would most likely be taken advantage of. Much of the time lapses in such proceedings can be traced directly to the necessity for holding hearings in many places; subpoena issuance, opposition, compliance or noncompliance, and enforcement; and adjustment of hearing dates and places to witnesses' convenience. In my opinion, production under discovery procedures, held within the bounds of the precedents under the Federal Rules of Civil Procedure, would go a long way toward obviating these occasions for delay.

It has been suggested by earlier witnesses that the discovery procedure should be available under complaint and answer cases under section 22, but not under section 22 where the investigation is upon the Commission's own motion. I differ. It has been widely recognized that the Commission, through section 21, already has available to it a powerful discovery tool. The Commission has an able and vigorous staff of investigators and it seems to me reasonable to assume that in every investigation of their own motion the Commission, through its investigators armed with the threat of section 21 orders, will already have enjoyed a very substantial discovery by means not available to the respondent carrier or other persons subject to the act. It seems to me then that making discovery available in investigations brought by the Commission of its own motion, while not materially enlarging the Commission's investigative and discovery means, does make available to the respondent tools which they do not now have for an adequate defense.

In the same way, it should also be recognized that many proceedings, although nominally of the Commission's own motion, nevertheless are adversary proceedings between private parties just as surely as complaint and answer proceedings. As a specific example, carrier A may protest an agreement filed for approval under section 15 of the act by carriers B and C. An ensuing investigation, although upon

protest, is nevertheless of the Commission's own motion. In any event, it is not a complaint under section 22. Certainly carriers A, B, and C should have their rights and interests determined upon an adequate record and for that reason, carriers A, B, and C should have available to them the rights of pretrial discovery.

It has also been suggested that the discovery procedures be available only in adjudicatory cases and not in rulemaking proceedings. To the extent that ratemaking is rulemaking, I suggest, that the same need for discovery exists in proceedings under section 3 and 4 of the Intercoastal Shipping Act as in any other case. A protesting shipper, or a competing carrier should not be in a less favored position than a complainant in a section 22 case.

If you think it will serve a useful purpose, I can cite to you from practical experiences that I have had which bear upon the subject.

Senator BARTLETT. Do so, please.

Mr. MASON. The steamship lines, the carriers themselves, do not have offices and outlets in every port that they serve in this country. In many ports they use independent agencies. I have had occasions where the Commission's investigators, either through voluntary product of these agents or through the threat or showing of force of a section 21 record, have obtained from these agents, documents, documentary information, evidence that really isn't the property of the agent to give out, because it is the property of the carrier himself.

I am fairly certain that most any agent in those circumstances is going to serve his own interest in what he tells the Commission investigators and the documents that he produces.

I have no way whatever of finding out what the agent did say. If it comes to a hearing and I subpoena him and call him as my witness, I am bound by what he says, and I have no idea of what he will say. This rule gives me an opportunity to find out something before trial that the Commission itself already knows.

I would like to mention one other very recent proceeding just concluded 2 weeks ago in New York. There my opponent used the subpoena for discovery purposes. The hearing opened, he put on a witness to constitute the proceeding as a hearing. Then he put on his three, six, nine witnesses that he had subpoenaed from adverse parties for purely discovery purposes. We all sat around through a lot of questions that meant nothing to the disposition of the case itself. My opponent obviously had to ask, and the examiner very graciously gave him, adjournments, so that he could put into the pot what he had found out from these witnesses. And, the end consequences of the hearing is that with an adequate pretrial development, it could have been disposed of in 3 or 4 days, took 5 days in 1 week and 3 days in another week.

It is true, of course, that you are going to have to pay attention, and you are going to have to attend at a deposition under pretrial proceeding, but you could at least be selective. You don't have to sit through the examination of three, or four witnesses that you have no concern with at all.

Thank you.

Senator BARTLETT. Thank you, Mr. Mason.

Is it your feeling that S. 706 would be of assistance to private parties in proceedings before the Commission?

Mr. MASON. Precisely. Much, of course, depends on the Commission's rules. But, I state quite frankly that in my experience with the Commission, they are pretty enlightened in their procedures, certainly compared with their sister agency in the Department of Commerce.

Senator BARTLETT. In light of the powers granted in section 21, and the subpoena power, would you be of the opinion that 706 might enhance the tools of the private litigant more than civil, adding to the Commission's available tools?

Mr. MASON. That is precisely why I am here, because I believe that will be the case.

Senator BARTLETT. As I understand your testimony, you favor deposition and discovery being available in all section 22 adjudications, including those investigations initiated on the motion of the Commission.

Is that correct?

Mr. MASON. It is correct, but it doesn't go far enough. I don't know why it is limited to section 22. It should go to any proceeding that the Commission is required to hold on record in a public hearing.

Senator BARTLETT. It has been suggested that domestic rate-making, such as the case you mentioned at the end of your statement, where a protesting shipper or competing carrier is involved, is properly adjudicatory in nature.

What is your view?

Mr. MASON. I have read the textbooks and the cases, and I would say it is rulemaking.

Senator BARTLETT. Have you seen the redraft?

Mr. MASON. No, I didn't see it. I have a copy here.

Senator BARTLETT. Take a moment and look it over, if a moment is sufficient, and tell us what you think of it.

Mr. MASON. The two changes are the references to the civil rules and the "any place from the United States" language. They are the only two changes here.

While the civil rules should be the guide that the Commission should follow, I have assumed we would have a rulemaking proceeding before the Commission, and I have a little hesitancy on certain phases of it. Under the civil rules, for example, relevancy of course is not a bar to the questioning in the deposition in the pretrial deposition, and rules on the competency or relevancy of particular informations is reserved until it is attempted to be brought before the court.

In most court cases that presents no problem. But, I can foresee that in this agency we will have some "wise guys," who will try to run all over the lot on it. I would therefore hope that the Commission rules would have some restraints.

Mr. James referred to a showing of cause. Perhaps in this way before the examiner, you can get some general guidelines of the scope of the examination and deal with it in that manner. On the whole, the Federal rules are the guide.

Senator BARTLETT. Thank you, Mr. Mason.

Mr. MASON. Thank you, Mr. Chairman.

Senator BARTLETT. Joseph A. Klausner, please. You are the windup man, Mr. Klausner.

**STATEMENT OF JOSEPH A. KLAUSNER, ATTORNEY AT LAW,
WASHINGTON, D.C.**

Mr. KLAUSNER. In view of the nature of the testimony which has preceded me, I think I probably can be most helpful if I ask that you incorporate my written statement in the record as it stands and allow me to address myself to some of the critical points that have actually arisen in the discussion. May I do that.

Senator BARTLETT. That will be done.

I can see after reading the first sentence why you want to do it. You said, in that first sentence of your written statement, "I have had some difficulty in framing my arguments for this legislation (S. 706) because it is so hard to conceive what can at this date be said against it."

Since you wrote that you have heard Mr. James.

Mr. KLAUSNER. Yes, I have heard Mr. James. I have also heard my three young colleagues of yesterday, and I am bound to say that on the whole I add here to that first sentence.

Senator BARTLETT. In what capacity do you appear before the committee?

Mr. KLAUSNER. I appear merely as an attorney interested in the proficient enforcement of the shipping act, and with some considerable practice before the Maritime Commission.

Senator BARTLETT. Not connected with Government?

Mr. KLAUSNER. Not connected with Government.

Senator BARTLETT. Proceed, if you will, in your own manner.
[Mr. Klausner's prepared statement follows:]

**PREPARED STATEMENT OF JOSEPH A. KLAUSNER, ATTORNEY AT LAW,
WASHINGTON, D.C.**

I have had some difficulty in framing new arguments for this legislation (S. 706) because it is so hard to conceive what can at this date be said against it. The principle of discovery is by now so free of responsible challenge that it is only surprising to find that courts should deem specific authorization necessary to permit it. I shall not therefore recite the long-accepted arguments, which can be found set forth at any desired length in the fourth volume of Moore's Federal Practice. It is enough to remember that the Supreme Court has described the instruments of discovery and pretrial procedure as major achievements of the federal civil rules, *Miner v. Atlass*, 363 U.S. 641, 649 (1960); because they make a trial less a game of blindman's buff by disclosing the basic issues and facts to the fullest possible extent, *U.S. v. Procter and Gamble Co.*, 356 U.S. 677 (1958); and since no epitome of this subject is complete without invoking *Hickman v. Taylor*, we may remind ourselves of the object of this mechanism in the court's words there: "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

It cannot be said that this procedure is unnecessary in litigation before the Commission. Whether viewed from the standpoint of (1) litigation between private parties, (2) the Commission as investigator, or (3) the private party as respondent in such an investigation it is not the case that current pretrial procedure is a particularly useful instrument either for lightening the Commission's burdens or simplifying and expediting the litigator's task. Prehearing conferences in my experience tend to be perfunctory, and not at all a deep search to simplify issues and determine facts and thereby to shorten litigation. It is true that our bar have by a sort of self-defense developed a tacit agreement to exchange information in certain areas, chiefly statistical, but there is no method of compelling disclosure other than the subpoena, which in modern practice is mainly an adjunct

to discovery. I should say that for private litigants it remains the actual hearing that elicits most of what they come to learn about the other party's case, and even then within comparatively rigid limits that they elect for themselves. That is a condition incompatible with the whole modern approach to litigation.

It may be said that the Commission as investigator already has formidable powers under § 21. But these are not essentially of a litigative character, look chiefly to writings, and are of course not readily available, if at all, to the private party. In any case § 21 has the same deficiencies as the subpoena. As to both, the defect of non-oral inquiry is precisely the same that led to the substitution of modern deposition and discovery for all the former methods of pretrial investigation by bill of discovery, letters rogatory or interrogatory, bill of particulars, and so on, that it is too narrow, too slow, too tentative. The most efficient use of these old devices meant repeated renewal and redrafting of demands as ingenuity exerted itself to duck and dodge them. See *Pressed Steel Car Co. v. Union Pac. R. Co.*, 241 F. 964, 967 (SNDY 1917), per L. Hand, J. It should be added that other agencies with powers like or modeled on § 21, for instance, the Interstate Commerce Commission, also possess deposition-discovery authority so that there is no question of duplication.

There is one aspect of this matter that I recommend to the careful attention of those who have often as respondents had to face a Commission investigation. In federal courts, the government is on the whole subject to the same discovery rules as any other party or witness. That is not true at present before the Commission. Often have I heard complaint when Commission counsel declined to reveal the nature of his case before trial, sometimes frankly because he wished to preserve the element of surprise. That complaint will be much ameliorated by the bill and I cannot conceive the nature of any industry objection to it.

Another subject tends to be confused with the discovery issue and should be distinguished. That is whether the Commission can reach evidence physically situated abroad, a matter having more political than legal overtones. I should not have thought it necessary to make this observation but I notice that the State Department fell into the same confusion on an earlier occasion. It is obvious that pretrial discovery has nothing to do with that matter, all it does as the Supreme Court said in *Hickman v. Taylor* is to advance the stage at which disclosure can be compelled from the time of trial to the period preceding it. It does not confer any jurisdiction that the Commission does not already possess in point of geographical situs. As it happens, I consider the Commission has full jurisdiction in this area, but if it does not, enactment of this device, a convenience to the Commission and a necessity for the litigator, will not in itself confer it.

I recommend enactment of this legislation.

Mr. KLAUSNER. The comments that were made yesterday fall into two classes. I really read Mr. James' statement as a broad attack on the Commission's general use of its investigatory powers. And that includes both the use of the subpoena and section 2, against which he has carried on a long, and I would say on the whole, constructive warfare.

I don't wish to see these powers enlarged. But I think we ought to recognize that Congress has conferred these powers on the Commission and that in general the courts have sustained their exercise by the Commission.

As a consequence I do not believe that as long as the courts are open to correct abuses, this general attack is one that is particularly relevant at this time on this legislation.

Mr. James seems to agree that the deposition and discovery powers themselves are valuable tools, and in fact he gives us cases in which their absence seems to handicap their defense.

What he fears is that on the one hand the Commission will abuse this instrument, and enforcement of the Shipping Act, and on the other that the Commission will not own a store of facts as wide as private parties are expected to.

Mr. Chairman, the admiral's agreement with your suggestion yesterday that the new power should follow the Federal Rules of Civil Procedure seems to me to satisfy both of these objections.

In following the rules they acquire not only very constructive and clear outlines in themselves, but a tremendous loss of judicial precedent that goes back for 30 years now, and which has clarified an enormous number of problems such as have been discussed here.

Very prominent in that large body of law are two principles: that discovery may not be used oppressively, the rules themselves are clear on that point. And all the normal privileges against testimony are preserved, including the fifth amendment;

The second principle is that the Government is just as much subject to discovery as the other parties. In fact, there are students of this field who are doubtful that the Government should be as open as it will be under the admiral's agreement with you yesterday.

That is why I was gratified that the point was made so clear in colloquy with the admiral yesterday.

I really feel that I should especially commend to the attention of my colleagues who have to defend investigations before the Commission the value of this two-way street. I have very often heard them complain bitterly that the Commission doesn't tell them enough.

You have heard some of those complaints today. The answer to it is this statute.

The other class of objection which was set forth in the statement of my three young friends yesterday was in fact that in effect discovery in depositions should be available as between private parties but not in Commission investigations.

By this I think they mean that the Commission staff should not be empowered to use discovery.

I don't think that they can have reflected that this will eliminate something between two-thirds and three-quarters of all Commission proceedings from discovery by statute including, of course, those of the highest public interest.

The great mass of section 15 cases, the dual-rate cases under section 14, the domestic rate cases, and the new and tremendously important proceedings under section 18 to decide whether rates are so high or so low as to constitute a detriment to the commerce of the United States.

It will be very unusual for proceedings of that scale to be forward as private litigation, and in my time they have always been conducted on the Commission's order.

Obviously only the Government can carry them forward in the public interest which cannot, I should think, be safely confided to private parties even if they were rich enough and even if they had legal standing to do all that has to be done in such cases.

Is it sound to say that this instrument, so valuable, as all have testified here, for finding the facts, should be available only in the smallest and least significant of cases and shall not be available in those of the most overriding public importance, and to the agency charged with protecting the public interest?

I am really sure that my friends would not press their objection that far.

As to this question of being unfairly used in that they call quasi-criminal proceedings, the Commission has no quasi-criminal powers of any kind.

The Commission's investigations are solely of regulatory character and at most it can order a party to cease and desist from specified conduct, or to pay reparations. It refers findings of illegal conduct to

the Department of Justice from time to time, but that doesn't initiate a criminal prosecution and, of course, in criminal prosecutions you go to a jury, and there are quite extensive discovery powers even available in the criminal courts.

These rules preserve all the usual privileges against enforced testimony. They have the standard of relevance, I venture to correct my friend, Mr. Mason, if I understood him right. The standard of relevance is decidedly present. And they have all the privileges protected which witnesses may invoke against testifying.

If the testimony is still needed in a case where a witness would be incriminating himself if he testified, then the Commission has authority to drop the proceeding or to grant him immunity.

I must venture to correct a statement of Mr. James', too. There has by no means been a clear and correct statement of the rules and statutory powers of the agencies that are sister agencies of the Maritime Commission.

I have not seen a case in examining these rules—and I have brought along photostats which I hope the committee will agree to incorporate in its record for its own study of the relevant rules.

Most of these agencies have powers that are much more extensive than section 21 to begin with. They permit the actual physical examination of records and the copying of records of the various respondents, a privilege which by the way has only with reluctance been thought to be inherent in section 21, under a recent ruling of the court of appeals in the District of Columbia.

In addition to that they all have discovery powers. And I might say that the discovery rules which the Commission dropped when the ninth circuit ruled, were a great deal more modest than any of the standards set up, with one exception, by the other agencies, and much less far reaching than in my opinion they ought to be, and that they will be if they follow the Federal Rules of Civil Procedure.

For instance, to satisfy Mr. James' particular objection, I refer him to the rule which is still printed in the Maritime Commission rule book, which required before a deposition could be ordered a statement to the Commission of why it was wanted and why this form of procedure was necessary. It was even necessary to set out fairly clearly what you had in mind to interrogate about, and there is some confusion in fact as to whether it doesn't have to be by written interrogatory which is then read off to the proposed witness.

All these restrictions should be abandoned. But it is perfectly clear that the Commission moved with caution, almost with excessive caution, in working with this doctrine—with this instrument of discovery.

I have one final comment which is with reference to the actual draft before you. I think it is always a mistake to tinker with a statute which has been through the mill and has had a gloss put on it by the courts.

Instead of rewriting section 27 in its entirety, I would have preferred simply to add a sentence along the lines which we have now agreed with the Commission, which would have added discovery powers and would have imposed a condition that they should follow as nearly as they could the Federal rules.

Then all of this concern about building a substantial record here before you to make sure that the *Ludlow* case is not upset, could have been laid on the shelf without concern.

I venture to suggest that if there is to be a redraft, consideration should be given to leaving the present section intact and simply adding the new matter.

The excerpts to which I referred I now hand the reporter, and I trust they will be incorporated.

Senator BARTLETT. They will be incorporated in the file, Mr. Klausner. Mr. Barer has a few questions to put to you.

Mr. BARER. Mr. Klausner, as I understand your testimony you would favor deposition and discovery being available in all section 22 adjudications including those initiated by motion of the Commission?

Mr. KLAUSNER. Yes. This is, other rules of the other agencies specifically provide that they shall apply to investigations. And I venture to agree with Mr. Mason as well that there is no reason to limit this to the adjudicator field. And that indeed the rulemaking process which the courts believe is constantly of growing importance—recently there have been decisions in this district that the court of appeals, which has urged that the trend be followed of moving away from individual piecemeal litigation on great points of law to rulemaking, there, if ever, is a sovereign need for this device. People would be a lot less afraid of it if they realized exactly what it is.

Mr. BARER. You agree that deposition and discovery procedures have no impact upon the jurisdiction of the Commission?

Mr. KLAUSNER. Exactly.

Mr. BARER. They merely provide a means by which establishment within the jurisdiction may be obtained.

Mr. KLAUSNER. Exactly.

Mr. BARER. I have no further questions.

Senator BARTLETT. The committee is grateful to you, Mr. Klausner. We will study your suggestions.

Since all of us like to be complimented, I want to say to you that yesterday afternoon I found myself on a plane bound for New York, seated next to a Washington attorney, and I told him that you were left at the post when we concluded yesterday.

He informed me that you are one of the most able maritime attorneys in the Nation. I wouldn't fail to disclose his identity to you for anything. It is Richard Shivner, who said those kind words about you.

Mr. KLAUSNER. I am very grateful.

Senator BARTLETT. The committee will be in recess and will reconvene at 10:45 in executive session.

Those who might be expecting an immediate decision in executive session on S. 706 need not hold their breath. We are going to meet on another matter.

The committee stands adjourned.

(Whereupon, at 10:40 a.m., the hearing was adjourned.)

(The following was submitted for the record:)

FEDERAL MARITIME COMMISSION,
Washington, D.C., May 18, 1967.

Hon. E. L. BARTLETT,
Chairman, Subcommittee on Merchant Marine and Fisheries,
U.S. Senate, Washington, D.C.

DEAR SENATOR BARTLETT: During the hearings before the Subcommittee on Merchant Marine and Fisheries on S. 706 on May 8 and 9, 1967, you expressed the desire that all parties should comment on certain modifications to the pending bill which were proposed by your Committee staff. In addition you indicated that

we should comment on any other changes in this legislation which were suggested by other parties.

As I stated in my testimony before the Committee, the suggested language changes in S. 706 as proposed by the Committee staff at the hearing, would be entirely acceptable to the Commission. In our view they would improve and clarify the legislation.

The suggested changes, as I understand them, would be as follows:

First, the rules and regulations to be issued by the Commission in effectuating deposition and discovery should, to the extent practicable, be in conformity with the rules applicable in civil proceedings in the District Courts of the United States. This is the Commission's intention, and we are agreeable to such a change.

Second, production of documents in response to a subpoena, as well as the attendance of witnesses, would be required "from any place in the United States at any designated place of hearing." It is my understanding that this change is desired so that the language of Section 27, as it relates to subpoenas, will be the same as the present language in Section 27, since this language was construed by the court in the *Ludlow Case* as giving the Commission power to obtain documents by subpoena from places outside of the United States. We agree with this objective.

Third, the provision that persons acting under the direction of the Commission in "producing documents or appearing as witnesses would be entitled to fees and mileage as in United States courts, would not apply to employees of the Commission. This is acceptable to the Commission.

During the hearings before the Committee on May 8th and 9th a number of suggestions were made to change or limit the pretrial deposition and discovery authority, which would be made available to the Federal Maritime Commission under S. 706, which I feel require some further comment.

First, it was alleged that other regulatory agencies, such as the Interstate Commerce Commission, Civil Aeronautics Board, Federal Communications Commission and Federal Power Commission, do not have pretrial discovery of the type which would be given to the Federal Maritime Commission under this proposed bill. Second, and somewhat related to that first allegation, the suggestion was made that deposition and discovery under this bill should be available to private parties in complaint proceedings, but should not be available to Commission Hearing Counsel in proceedings instituted by the Commission on its own motion.

The statement that other regulatory agencies do not have discovery powers as broad as those which would be given to the Federal Maritime Commission under this bill is incorrect. Each of those agencies has powers to discover and require production of documents which are far broader than the rather restricted pretrial discovery powers which would be granted to the Federal Maritime Commission in this bill. In addition to their pretrial deposition and production of documents authority, they have express statutory power *at any time* to inspect and examine all accounts, records, documents and memoranda in the possession of the regulated industry. For example, with respect to the Civil Aeronautics Board, Section 1377 (e) of the Federal Aviation Act provides as follows:

"The Board shall at all times have access to all lands, buildings, and equipment of any carrier and to all accounts, records, and memoranda, including all documents, papers, and correspondence, now or hereafter existing, and kept or required to be kept by air carriers; and it may employ special agents or auditors, who shall have authority under the orders of the Board to inspect and examine any and all such lands, buildings, equipment, accounts, records, and memoranda. The provisions of this section shall apply, to the extent found by the Board to be reasonably necessary for the administration of this chapter, to persons having control over any air carriers, or affiliated with any air carrier within the meaning of Section 5(g) of this title. Pub. L. 85-726, Title IV, p. 407, Aug. 23, 1958, 72 Stat. 766."

The Interstate Commerce Commission, Federal Power Commission and Federal Communications Commission have very similar statutory powers.

With such broad access and inspection authority these agencies have no need for use of specific pretrial discovery orders of the type which would be made available to the Federal Maritime Commission under this proposed legislation.

In contrast, the Federal Maritime Commission does not have any statutory authority to inspect and examine at any time all accounts, records, documents and memoranda in the possession of the regulated industries. And even the pretrial discovery authority which would be available to the Commission under S. 706 is, in comparison with the powers of the other regulatory agencies, very

limited and circumscribed. Under rules which would conform to the Federal Rules of Civil Procedure on discovery, this power could be used only in adjudicatory proceedings with defined issues; application for a discovery order must be made to a hearing examiner with notice to the opposing party; good cause must be demonstrated; the material to be examined must be found relevant to issues in the proceeding; and the discovery must be ordered by the hearing examiner.

I will now comment on the suggestion that deposition and discovery power under this bill should be available only to private parties in complaint proceedings, but not to Commission Hearing Counsel for use in proceedings instituted by the Commission on its own motion.

We of course recognize that the Commission does have the function of hearing and settling complaint cases between disputing private litigants, and we recognize that deposition and discovery procedures should be available to such parties. This bill would provide them with such procedures. However, the Commission's primary responsibility is to effectuate the Congressional regulatory purpose of the Shipping Act of 1916, and the Intercoastal Shipping Act of 1933, and this is accomplished most effectively by the Commission through investigatory proceedings instituted on its own motion. Without adequate power to discover and obtain documents in advance of hearing it is handicapped in protecting the public interest.

In this connection it is important to keep in mind the very basic difference in purpose and function between civil courts and regulatory agencies. Courts are designed primarily to settle disputes between private litigants; whereas regulatory agencies have been established by Congress to carry out express regulatory policies in the public interest. I am sure you are aware that many regulatory agencies have been charged with failure to carry out their regulatory responsibilities, and one recurring criticism has been that they merely wait to hear private complaint cases, rather than affirmatively carrying out their regulatory responsibilities. The Federal Maritime Commission in the past has received its share of this type of criticism.

The great majority of adjudicatory proceedings which have been heard by the Federal Maritime Commission since its establishment in 1961, have been instituted on its own motion, and were not based upon complaint and answer proceedings. For example, in the five years from 1961 through 1966, the Commission conducted 367 adjudicatory cases, of which only 80 were private complaint cases and 287 were investigations on the Commission's own motion. This comparison becomes even more significant when it is recognized that private complaint cases tend to involve relatively limited issues of direct concern to the private parties, whereas Commission investigative cases generally involve much broader issues of greater regulatory concern to the general public. It would be strange indeed if pretrial discovery powers should be made available to private parties for settlement of their own private litigation cases, but should be denied to attorneys of the Commission for use in its own investigations in the public interest.

In certain of the Commission's regulatory proceedings, particularly those which involve broad general public interest questions, it would be virtually impossible for private parties to file a complaint and assume the burden of proof and the burden of enforcing the regulatory statutes.

In investigations of rate increases under the Intercoastal Shipping Act, involving carriers in the offshore domestic trades, individual shippers sometimes object and protest rate increases, but very few formal complaints are filed. In the proper case the Commission must, in the public interest, assume the burden in a formal adjudicatory proceeding on its own motion of determining whether such rate increases are lawful or unlawful under the statute. Pretrial deposition and discovery power are essential to the expeditious and proper handling of these cases.

The Commission is charged with regulatory supervision over concerted anti-competitive action by ocean carriers in our foreign commerce. Under Section 15 of the Shipping Act the Commission can approve anti-competitive agreements unless it finds them to be detrimental to the Commerce of the United States or contrary to the public interest. When approved by the Commission, such activity is exempt from the anti-trust laws.

The Commission under Section 14(b) of the Shipping Act may permit steamship conferences to use anti-competitive exclusive patronage dual rate contracts unless found to be detrimental to the Commerce of the United States or contrary to the public interest. The Commission can only disapprove agreements under Section 15, and dual rate contracts under Section 14(b) after notice and hearing, and when specific findings are made that such agreements or contracts would be detrimental to our commerce or contrary to the public interest. In order to

properly carry out this responsibility of granting sweeping exemptions from our anti-trust laws, the Commission needs adequate pretrial discovery powers.

I appreciate the opportunity to present these further comments to the Committee, and I again urge passage of S. 706, as modified by the changes suggested by your Committee.

Sincerely yours,

JOHN HARLEE,
Rear Admiral, U.S. Navy (Retired), Chairman.

FEDERAL MARITIME COMMISSION,
Washington, D.C., May 29, 1967.

Hon. E. L. BARTLETT,
Chairman, Subcommittee on Merchant Marine and Fisheries,
U.S. Senate, Washington, D.C.

DEAR SENATOR BARTLETT: We have received, from Mr. Leonard G. James, of the law firm of Graham James and Rolph, a revised form of S. 706, to make deposition and discovery authority available in certain proceedings before the Federal Maritime Commission. A copy of this revision has been furnished to you and the staff of the Sub-committee on Merchant Marine and Fisheries. In accordance with your invitation during the course of the hearings on this bill before your sub-committee on May 8 and 9, 1967, I would like to make certain comments regarding this proposed revision of S. 706.

First, the proposed revision would limit deposition and discovery to persons and evidentiary matter located only in the United States, and not to persons or evidence outside the United States. As I indicated to you in my oral testimony on May 8th, present Section 27 of the Shipping Act has been construed by the Federal Courts as giving this Commission authority to subpoena documents located outside the United States. The present form of S. 706 would make deposition and discovery procedures similarly available against persons and documents located outside the United States. It would not extend the Commission's jurisdiction to obtain documents located outside the United States, it would merely advance the time at which such material could be obtained. This authority is essential if the Federal Maritime Commission is to continue to carry out its regulatory responsibilities under the Shipping Act.

Second, the proposed revision would make deposition and discovery procedures available only to private parties and not to Commission Hearing Counsel in investigations on the Commission's own motion. Since this proposed change in S. 706 was suggested in oral testimony before your committee, my letter to you of May 18, 1967, set forth very significant reasons why pretrial discovery procedures are necessary to attorneys of the Commission in investigations instituted on the Commission's own motion, and I will make no further comments.

Third, the proposed revision would make a hearing examiner's decision with respect to pretrial deposition and discovery reviewable by the Commission only upon exceptions made to the examiner's initial or recommended decision. The extent to which rulings of a hearing examiner can be reviewed by the Commission is a matter which should be determined by the Commission under its own procedural rules. It should not be limited by statute. For example, present Rule 10(m) of the Commission's Rules of Practice and Procedure allows appeal under certain conditions from rulings of hearing examiners during the course of a hearing. It is customary for administrative agencies to establish procedures for appeal from rulings of trial examiners, and I know of no regulatory agency which is prohibited by statute from reviewing actions of its trial examiners prior to final review on exceptions to the initial or recommended decision. Under this kind of statutory limitation of review by the Commission, an important regulatory proceeding might go on for many months or even a year or more, without the Commission being able to determine whether an examiner's refusal to grant a discovery order might have been improper. By the time the Commission would correct an erroneous denial of a discovery order, not only would the hearing have been completed without the evidence, but briefs and reply briefs would have been prepared and filed by the parties, and the examiner's initial or recommended decision would already have been issued. To go back at such a late point in a proceeding and correct such an error by the examiner would obviously cause excessive delay and expense to the parties. Indeed it might require a second hearing of some duration.

Finally, I would like to comment upon the use of the phrase "adjudicatory proceedings under Section 22 of this Act" as used in the proposed revision. The

present language of S. 706 would permit the use of deposition and discovery in "proceedings under Section 22 of this act", and I would like to make certain that this language is not interpreted too restrictively.

Section 22 authorizes the complaints "setting forth any violation of this act", and proceedings on the Commission's own motion to "investigate any violation of this act." Arguments have been made in the past that since Section 27 makes the subpoena power available "for the purpose of investigating alleged violations of this act," the subpoena was not available in investigations conducted by the Commission under sections of the act which did not in terms provide for investigations of "violations", but merely provided that the Commission had power to disapprove certain rates or practices which, after hearing, it found to be detrimental to the commerce of the United States or contrary to the public interest. This contention was considered and completely rejected by the United States Court of Appeals for the Second Circuit in *Federal Maritime Commission v. Caragher, et al.*, 364 Fed. 2d 709, in August of 1966. I would like to quote certain of the language of the court's decision in that case.

In setting forth this contention, the court said—

"Section 27 of the 1916 Act gave the Commission power to issue subpoenas 'for the purpose of investigating alleged violations', of the Act. Respondents' contention, sustained below, is that the grant of this power in Section 27 only permits the Commission to issue subpoenas in Section 22 investigations commenced to determine whether there has been a violation of a provision like Section 14 that proscribes certain anticompetitive practices; and that this grant of subpoena power does not permit the Commission to issue subpoenas in Section 22 investigations commenced in furtherance of the Commission's responsibility under a provision like Section 15, or like Section 18(b)(5), that requires the Commission to decide in light of broad normative criteria whether certain practices should be disapproved. Respondents apparently argue that a practice that the Act does not, in terms, denominate unlawful but instead subjects to Commission scrutiny cannot be said to 'violate' the Act until the Commission has held a hearing and disapproved it. Respondents thus urge that we conclude that an investigation commenced in order to decide whether a certain practice should be disapproved is not an investigation 'for the purpose of investigating alleged violations' of the Act and that the subpoena power is therefore not available to the Commission in conducting such an investigation."

The Court, disagreeing with that contention, stated—

"We rejected respondents' contention as inconsistent with both the ostensible purpose of the regulatory pattern established by the Shipping Act of 1916, and the legislative history of Section 27."

and

"... it must be recognized that the adoption of respondent's contention would result in a regulatory statute that is unworkable in several significant respects. If a Commission investigation commenced in order to discharge its duty under provisions like Section 15 or Section 18(b)(5), which require it to decide in light of broad criteria whether certain practices should be disapproved, is not 'for the purpose of investigating alleged violations' of the Act within Section 27, it presumably is also not an investigation authorized by Section 22. The result would be a regulatory statute that, for example, expressly required the Commission to hold hearings and disapprove unfair or unjustly discriminatory agreements and those detrimental to United States commerce or contrary to the public interest and yet anomalously failed to provide the Commission, charged with statutory responsibility, with authority to compel the attendance of witnesses or production of documents at the hearings, or indeed with authority to conduct an investigation, in order to discharge this statutory responsibility."

After a thorough review of the legislative history of the Shipping Act of 1916 and the regulatory scheme contained in that Act the court concluded as follows—

"To summarize, we hold that Section 27 of the Shipping Act of 1916 authorizes the Commission to exercise its power of subpoena during investigations commenced under Section 18(b)(5) and under provisions like Section 18(b)(5) that give the Commission power to disapprove certain practices in light of broad statutory criteria."

The reasoning of the court in the *Caragher Case* would logically apply to interpretation of the language of S. 706. The language "in all proceedings under Section 22 of this act" would include hearings conducted by the Commission under sections of the act brought to determine whether certain rates or activities should be disapproved. These types of proceedings would include those involving dual rate contracts under Section 14(b); agreements under Section 15; regulations or

practices under Section 17; and rates under Section 18(b)(5). The use of discovery procedures is essential to the Commission in performing its functions under these sections.

For your information I am enclosing a copy of the Caragher decision, and suggest that it be included in the transcript of hearings before the subcommittee.

I appreciate this opportunity to comment on these proposed revisions to S. 706.

Sincerely,

JOHN HARLLEE,

Rear Admiral, U.S. Navy (Retired), Chairman.

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