

Winter 1980

Improving Competence in the Merchant Marine: Suspension and Revocation Proceedings

Eugene R. Fidell

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Eugene R. Fidell, *Improving Competence in the Merchant Marine: Suspension and Revocation Proceedings*, 45 MO. L. REV. (1980)

Available at: <https://scholarship.law.missouri.edu/mlr/vol45/iss1/7>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

MISSOURI LAW REVIEW

Volume 45

Winter 1980

Number 1

IMPROVING COMPETENCE IN THE MERCHANT MARINE: SUSPENSION AND REVOCATION PROCEEDINGS

EUGENE R. FIDELL*

I. INTRODUCTION

Although the public has become increasingly familiar with such functions of the United States Coast Guard as water pollution control,¹ narcotics interdiction² and fisheries law enforcement,³ and despite growing concern over the condition of the United States merchant marine, little attention has been paid to the agency's role with regard to the competency and discipline of merchant mariners.⁴ Similarly, the National Transportation Safety Board is far better known for its work in the investigation of aviation and maritime disasters⁵ than for its appellate functions with

*Partner, LeBoeuf, Lamb, Leiby & MacRae, Washington, D.C.; B.A., Queens College, 1965; LL.B., Harvard University, 1968. The author is indebted to his colleague, Austin P. Olney, for assistance in the preparation of this article, and to the several personnel of the U.S. Coast Guard and National Transportation Safety Board who graciously cooperated with the author's research efforts. The secretarial assistance of Mary C. Scheremeta and Eileen Pratt is noted with appreciation.

1. 33 U.S.C. § 1321 (1976); Exec. Order No. 11735, § 2, 38 Fed. Reg. 21243 (1973).

2. See, e.g., *United States v. Postal*, 589 F.2d 862 (5th Cir.), cert. denied, 100 S. Ct. 61 (1979); *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978); Carmichael, *At Sea with the Fourth Amendment*, 32 U. MIAMI L. REV. 51 (1977).

3. See, e.g., *United States v. F/V Taiyo Maru No. 28*, 395 F. Supp. 413 (D. Me. 1975), discussed in Fidell, *Hot Pursuit from a Fisheries Zone*, 70 AM. J. INT'L L. 95 (1976); Fidell, *Enforcement of the Fishery Conservation and Management Act of 1976: The Policeman's Lot*, 52 WASH. L. REV. 513, 581-84 (1977).

4. 46 U.S.C. §§ 216 (b), 239, 239a-b (1976); 46 C.F.R. pt. 5 (1979). For example, the otherwise admirable Gilmore and Black treatise has only the briefest reference to disciplinary procedures. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 988 & n.167 (2d ed. 1975). See also 1 M. NORRIS, *THE LAW OF SEAMEN* § 87 (3d ed. 1970 & Supp. 1978).

5. See 49 U.S.C. § 1903 (1976).

Missouri Law Review, Vol. 45, Iss. 1 [1980], Art. 7

respect to either airmen's or merchant mariners' licenses.⁶ If a renaissance is afoot for the merchant fleet, it is essential to review the procedures of both of these agencies with respect to merchant mariner discipline and fitness. The purposes of this article are to inform mariners, shipowners, proctors in admiralty, and others interested in the maritime industry of current federal administrative procedures for discipline in the merchant fleet, and to suggest changes which might profitably be made in those procedures.

II. COAST GUARD SUSPENSION AND REVOCATION HEARINGS: PURPOSES AND STAKES

The problem of maintaining discipline on shipboard is as ancient as the art of navigation. Those who go to sea tend to be more independent types than their shorebound fellows,⁷ and the facts of shipboard life—traditionally cramped quarters, separation from families, exposure to the perils of the sea—all seem to add to the difficulties of the setting.⁸ In short, as Learned Hand observed, "[s]ailors lead a rough life."⁹ Small wonder, then, that even the earliest maritime codes addressed themselves to the problems of discipline, recognizing duties on the part of the mariner as well as the master or shipowner.¹⁰

Various techniques are available today to deal with breaches of discipline aboard ships. First, just as crime on a naval vessel may be punishable by the criminal process of a court-martial, some crimes committed on the high seas on board American merchant vessels or by merchant mariners may be criminally punished in the federal courts.¹¹ Indeed, under some wartime circumstances, the court-martial may itself be a proper forum in which to try misconduct by merchant mariners, although the courts have tended of late to look with disfavor on this approach.¹²

6. 49 U.S.C. § 1903 (a) (9) (1976); 49 C.F.R. pt. 821 (1978) (Rules of Practice in Air Safety Proceedings); 49 C.F.R. pt. 825 (1978) (Rules of Practice for Merchant Marine Appeals from Decisions of the Commandant, U.S. Coast Guard). For a thoughtful and practical description of procedures applicable in airmen's cases, see Hamilton, *Appellate Practice in Air Safety Proceedings*, 10 Sw. U. Rev. 247 (1978). See also Kovarik, *Procedures Before the Federal Aviation Administration*, 42 J. AIR L. & COM. 11 (1976). For a summary of appellate procedures in medical cases involving airmen, see Hamilton, *Administrative Practice in Aviation Medical Proceedings*, 26 EMORY L.J. 565, 581-85 (1977).

7. *Commandant v. Desvaux*, No. ME-62, slip op. at 16 & n.19 (N.T.S.B. Apr. 18, 1978) ("it has been our experience in reviewing Coast Guard decisions that the master of a vessel is inclined to overlook a certain amount of hostile expression and even physical contact between seamen so long as it has not involved bodily injury"), citing *Commandant v. Bozeman*, 1 N.T.S.B. 2279, 2281 (1971).

8. See generally *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 727 (1943).

9. *Jones v. Lykes Bros. Steamship Co.*, 204 F.2d 815, 817 (2d Cir. 1953).

10. See, e.g., *Laws of Oleron arts. V, VI, XII, XIII, XX*, reprinted in 30 F. Cas. 1171 (R. Peters ed. 1807).

11. See, e.g., 18 U.S.C. §§ 1115, 2191-2198 (1976); 46 U.S.C. § 701 (1976).

12. Compare *Latney v. Ignatius*, 416 F.2d 821 (D.C. Cir. 1969), discussed in *Neutze, Court-Martial Jurisdiction over Civilians in Vietnam*, 24 JAG J. 35, 41-42

At the other end of the spectrum, the availability of civil actions against a wrongdoer (or shipowner)¹³ brought by a victim of misconduct or negligence on shipboard must be counted as a disciplinary tool. The delinquent mariner may find that he has opened himself, at least in theory, to disciplinary steps by the master of the vessel under the terms of his employment (the articles),¹⁴ and possibly by the union or pilots' association of which he is a member.¹⁵ Somewhere on the spectrum between criminal prosecutions and private civil actions lies the Coast Guard's power to discipline merchant mariners.

The United States Coast Guard's role in the discipline of merchant mariners is vital to the maintenance of competence within the shipping industry. That more is needed than purely criminal provisions is plain: A criminal penalty may be proper in a case of misconduct, but it is obviously inappropriate when the objectionable conduct amounts only to simple negligence or unskillfulness. In an era of complex shipboard machinery requiring special skills from both seamen and licensed officers,¹⁶ a broader remedial system than a criminal trial is required. Further, in an industry so clearly charged with a public interest, the existence of a competent, well-disciplined merchant marine cannot be adequately ensured by sporadic private litigation. Vindication of this interest has been entrusted in the first instance to the Coast Guard: The privilege of sailing on American vessels has been made contingent upon possession of a Coast Guard-issued license (for officers) or document (for nonofficer or unlicensed merchant mariners),¹⁷ and the Service has been granted the

(1969) and *United States v. Averette*, 19 C.M.A. 365, 41 C.M.R. 363 (1970) with *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va. 1943), noted in 30 CORNELL L.Q. 108 (1944) and *In re Berue*, 54 F. Supp. 252 (S.D. Ohio 1944).

13. Disciplinary problems among crew members may expose the owners to suit on grounds of unseaworthiness. *Boudoin v. Lykes Bros. Steamship Co.*, 348 U.S. 336, 339-40 (1955).

14. See, e.g., 46 U.S.C. § 595 (1976).

15. See 386 U.S. COAST GUARD L. BULL. 5, 9 (1968).

16. See generally Joyce, *Men at Sea—Then and Now*, 33 MARINE SAFETY COUNCIL PROC. 4 (1976).

17. 46 U.S.C. §§ 222, 224, 643 (c), 672 (i) (1976). The terminology for the various evidences of status is extensive: officers (engineers and deck) and motorboat, ocean and radio operators receive licenses, 46 U.S.C. §§ 224, 229c, 390 (1976); seamen receive documents (U.S. Merchant Mariner's Document, also known as a USMMD or "Z" card) or a continuous discharge book (no longer being issued), 46 U.S.C. § 643 (a) (1976), and a certificate of service endorsed on the USMMD, 46 U.S.C. § 672 (i) (1976); Great Lakes pilots receive a certificate of registration, 46 U.S.C. § 216b (1976); and pursers and surgeons receive a certificate of registry, 46 U.S.C. § 242 (1976). For a useful discussion of the types of mariner documents, see 422 U.S. COAST GUARD L. BULL. 11 (1979). Cf. *Laws of the Hanse Towns* art. XV, reprinted in 30 F. Cas. 1197, 1198 (R. Peters ed. 1807) ("All owners are forbidden to entertain any master unless he produces a certificate of his honesty and ability, and that he quitted the service of the merchants he served last, with their consent: if they do, they shall pay 25 crowns penalty.").

Missouri Law Review, Vol. 45, Iss. 1 [1980], Art. 7

power to take a variety of disciplinary steps in respect of such documents and licenses.¹⁸

The statute under which the vast majority of mariner licensing disputes arise, and which this article will discuss, is section 4450 of the Revised Statutes (R.S. 4450).¹⁹ This section authorizes the Coast Guard to conduct investigatory hearings in any case where a mariner is "incompetent or has

18. 46 U.S.C. §§ 214, 226, 228, 229, 239 (g), 239b (1976); see also 46 U.S.C. § 216b (c) (Great Lakes Pilotage Act of 1960) (revocation or suspension by Coast Guard of Great Lakes pilot's license or document requires revocation or suspension of registration as pilot); Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, § 5, 92 Stat. 1471, 1488 (1978) (amending 46 U.S.C. § 391a; tankermen's endorsements brought under R.S. 4450). Cf. 46 C.F.R. §§ 10.13-29, 12.02-19, 401.250, 401.600 (1979). For a discussion of selected foreign legislation on shipboard discipline, see Cadwallader, *Discipline in British Merchant Ships*, 2 J. MAR. L. & COM. 147 (1970); Kijowski, *Disciplinary Responsibility of Seamen in the Light of East German and Polish Labor Laws*, 20 MARINE TECH. & MGT. (Technika i Gospodarka Morska) 56 (1970, English trans. ed. 1973). See also The Merchant Shipping (Disciplinary Offenses) Regulations 1972, S.I. 1972/1294; Canada Shipping Act, ch. 29, 7 CAN. REV. STAT. ch. S-9, §§ 247, ch. 550 (1970); Navigation Act §§ 344, 372 (Austl. 1952); 2 Commercial Code [Neth. Maritime Law], art. 451e (Royal Neth Shipowners Ass'n ed. 1960).

19. 46 U.S.C. § 239 (g) (1976). R.S. 4450 provides:

In any investigation of acts of incompetency or misconduct or of any act in violation of the provisions of title 52 of the Revised Statutes or of any of the regulations issued thereunder, committed by any licensed officer or any holder of a certificate of service, the person whose conduct is under investigation shall be given reasonable notice of the time, place, and subject of such investigation and an opportunity to be heard in his own defense. The whole record of the testimony received by such investigation and the findings and recommendations shall be forwarded to the commandant of the Coast Guard, and if that officer shall find that such licensed officer or holder of certificate of service is incompetent or has been guilty of misbehavior, negligence, or unskillfulness, or has endangered life, or has willfully violated any of the provisions of title 52 of the Revised Statutes or any of the regulations issued thereunder, he shall, in a written order reciting said findings, suspend or revoke the license or certificate of service of such officer or holder of such certificate. The person whose license or certificate of service is suspended or revoked may, within thirty days, appeal from the order to the Commandant of the Coast Guard. On such appeal the appellant shall be allowed to be represented by counsel. The Commandant of the Coast Guard may alter or modify any finding of the investigation, but the decision of the Commandant shall be based solely on the testimony received by the said investigation and shall recite the findings of fact on which it is based.

This article will focus on proceedings against Coast Guard licenses and seamen's documents. Proceedings concerning licenses pursuant to the Great Lakes Pilotage Act shall not be treated. Similarly, questions regarding the issuance of documents or licenses will not be examined in detail. For articles dealing with this topic, see B. SHIMBERG, LICENSING OF DECK AND OFFICERS IN THE U.S. MERCHANT MARINE (1969); Anderson, *The First Step—Revised Licensing Program*, 26 MERCHANT MARINE COUNCIL PROC. 239 (1969); McLeaish, *Licensing—A Program for the Seventies*, 26 MERCHANT MARINE COUNCIL PROC. 83 (1969); Reed, *A New Look at Licensing of Merchant Marine Officers*, 26 MERCHANT MARINE COUNCIL PROC. 43 (1969). The procedures for license issuance are significantly different from those applied under R.S. 4450, although the two now coalesce at the level of the National Transportation Safety Board. See notes 158-177 and accompanying text *infra*.

endangered life, or has willfully violated any of the provisions of Title 52 of the Revised Statutes or any of the regulations issued thereunder."²⁰ Additionally, provision is made for revocation of documents of persons convicted in a court of record of violating a state or federal narcotics law, or who have used or become addicted to narcotics,²¹ and of officers refusing to perform their duties after having joined a vessel.²² Other provisions refer to suspension or revocation "upon satisfactory proof of bad conduct, intemperate habits, incapacity, [or] inattention to . . . duties."²³ Thus, administrative hearings pursuant to R.S. 4450 have broad jurisdiction over a variety of subjects.

The number of persons who fall within the Coast Guard's regulatory jurisdiction at any time is difficult to determine since many holders of licenses and documents are employed in the merchant fleet only on a seasonal basis. Some notion of the numbers involved may be gathered from the fact that in fiscal year 1978, about 51,000 seamen's documents were processed, and personnel records were maintained by the Coast Guard with respect to 167,000 mariners.²⁴ A more direct indication of the magnitude of the disciplinary program is the fact that in fiscal year 1976, 4,096 disciplinary investigations were conducted by Coast Guard marine inspection investigating officers,²⁵ leading to hundreds of formal trial-type hearings before administrative law judges.²⁶

The stakes for which a merchant mariner plays in R.S. 4450 hearings

20. 46 U.S.C. § 239(g) (1976); *see generally* 46 C.F.R. pt. 5 (1979). Parallel Commonwealth regulations may be found in Shipping Casualties and Appeals and Re-hearings Rules, [1923] STAT. R. & O. 535 (No. 762) [hereinafter cited as British Rules]; Shipping Casualty Rules, [1955] 1 CAN. STAT. O. & R. 429 (No. 1861) (1954) [hereinafter cited as Canadian Rules]; Shipping Casualty Appeal Rules, [1955] 1 CAN. STAT. O. & R. 427 (No. 1860) (1954); Navigation (Courts of Marine Inquiry) Regulations, [1943] COMMW. STAT. R. 847 (No. 53) (Austl.) [hereinafter cited as Australian Rules].

21. 46 U.S.C. §§ 239a-b (1976). The Coast Guard has concluded that these sections were not repealed by implication by the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976), or the Drug Abuse Prevention and Treatment Act of 1972, 21 U.S.C. § 1180(c)(1) (1976). 418 U.S. COAST GUARD L. BULL. 30-32 (1979). Query whether §§ 239a-b apply also to motorboat operators. *See* 46 U.S.C. § 526f (1976); 46 C.F.R. § 10.20-13 (1979). Section 239a(c) refers to "any document authorized by law or regulation to be issued to a merchant mariner." Is a licensed motorboat operator a merchant mariner? *But see* 46 U.S.C. § 643(a) (1976).

22. 46 U.S.C. § 240 (1976).

23. 46 U.S.C. § 226 (1976). *See also* 46 U.S.C. §§ 214, 228-229 (1976).

24. *Dep't of Transportation and Related Agencies Appropriations for 1980: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 96th Cong., 1st Sess., pt. 1, at 15 (1979).

25. *Dep't of Transportation and Related Agencies Appropriations for 1978: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 1st Sess., pt. 1, at 313 (1977).

26. In the year ending June 30, 1973, Coast Guard administrative law judges held over 600 merchant mariner hearings. 30 MARINE SAFETY COUNCIL PROC. 213 (1973). In the succeeding two years nearly 800 and over 650 hearings were held, respectively. 31 MARINE SAFETY COUNCIL PROC. 196 (1974); 32 MARINE SAFETY COUNCIL PROC. 165 (1975).

are high. A Coast Guard hearing may lead to revocation of the seaman's document or license, suspension for an extended period, a probationary period during which the mariner may continue to sail, an admonition, and in some cases, reduction in the grade of license held.²⁷ A revocation does not prevent eventual reapplication, but both it and a suspension without probation will serve to keep a mariner "on the beach." For a person who has sailed for an entire adult lifetime and knows no other trade, this may have devastating emotional and financial effects.²⁸

III. THE AGENCY; THE PLAYERS; THE RULES OF THE GAME

The initial proceedings conducted pursuant to R.S. 4450 may be best understood by reference to two statements of policy enunciated by the Commandant of the Coast Guard:

The suspension and revocation proceedings are remedial and not penal in nature²⁹ because they are intended to maintain standards of competence and conduct essential to . . . the safety of life and property at sea by insuring that the licensed or certificated persons continue to be qualified to carry out their duties and responsibilities.³⁰ The regulations in this part shall be liberally construed so as to obtain just, speedy and economical determination of the issues presented.³¹

The nonpenal nature of the proceedings has been recognized by the National Transportation Safety Board,³² which has appellate jurisdiction in such matters.³³ The Coast Guard's regulations also note that the interests vindicated by the proceedings include those of "passengers, crews, cargoes, shipowners and the general public."³⁴ Taken together, these concepts and interests provide a vantage point from which to survey the process. The

27. 46 U.S.C. § 229 (1976); 46 C.F.R. § 5.20-170 (1971). For an illustration of downgrading of an officer under Canadian law, see *Gamache v. Jones*, [1968] 1 Can. Exch. 345 (1967).

28. The gravity of the consequences is illustrated by *Rechany v. Roland*, 235 F. Supp. 79, 80 (S.D.N.Y. 1964) and *Juan v. Grace Line, Inc.*, 299 F. Supp. 1259, 1260 (S.D.N.Y. 1969). In addition to financial and other adverse effects, delicensing may cause a mariner to become ineligible for other privileges. See, e.g., 46 U.S.C. § 216b (c) (1976) (loss of Great Lakes pilot registration); WASH. REV. CODE § 88.16.100 (1962) (ineligibility for state-issued pilot licenses); Mass. Div. of Motorboats R. 24 (ineligibility for carrying passengers for hire).

29. Compare 24 OP. ATT'Y GEN. 136, 142 (1902) with *United States v. Fuller*, 330 F. Supp. 303, 305 (S.D.N.Y. 1970) (R.S. 4450 proceedings treated as "of a quasipenal nature") and *Fredenberg v. Whitney*, 240 F. 819, 824 (W.D. Wash. 1917). See also Reich, *The New Property*, 73 YALE L.J. 733, 784 (1964). Australian courts have also encountered the problem of characterizing a merchant marine statute. See *In re Hummel*, 3 Queensl. L.J. & R. 50, 51 (1887); *In re Medley*, 28 Vict. L.R. 475, 490 (1902). Cf. *The Corchester*, [1956] 3 All E.R. 878, 888.

30. 46 C.F.R. § 5.01-20 (1979).

31. *Id.* § 5.01-25.

32. *Commandant v. Gillman*, No. ME-59, slip op. at 4-5 (N.T.S.B. Mar. 22, 1977); *Commandant v. Payne*, No. ME-61, slip op. at 5-6 (N.T.S.B. Nov. 9, 1978).

33. See generally text accompanying notes 158-177 *infra*.

34. 46 C.F.R. § 5.01-15 (1979).

following discussion will describe in brief the agency selected to vindicate these policies and interests, the personnel involved, and the rules under which the proceedings are conducted.

The history of federal administrative proceedings to discipline merchant mariners is ultimately traceable to the Steamboat Inspection Act of 1852,³⁵ which, among other important provisions, empowered the local boards of inspectors of the Treasury Department's Steamboat Inspection Service to grant and revoke licenses of pilots and engineers. This early system was supplanted in 1871 by more detailed procedures for discipline, including the requirements of written notice and a formal hearing by the inspectors.³⁶ In time the Steamboat Inspection Service was joined with the Bureau of Navigation and became the Bureau of Marine Inspection and Navigation in the Commerce Department.³⁷ In 1936 the Bureau's "marine boards" were given suspension and revocation jurisdiction over seamen's papers held by unlicensed mariners.³⁸ After being temporarily declared a part of the Coast Guard in 1942,³⁹ the Bureau was abolished and its duties formally absorbed by that agency in 1946.⁴⁰ In 1967, the Coast Guard was transferred to the newly-created Department of Transportation.⁴¹ In the same year a National Transportation Safety Board was created and given appellate review power in certain merchant marine cases.⁴² This body was made independent of the Department of Transportation and its jurisdiction expanded slightly in 1975.⁴³

Disregarding these changes in agency control and sundry amendments

35. 10 Stat. 61 (1852). Cf. 5 Stat. 305 (1838) (owners and masters liable for damages resulting from failure to employ properly trained engineers).

36. 16 Stat. 447 (1871). See generally H. BLOOMFIELD, COMPACT HISTORY OF THE UNITED STATES COAST GUARD 263-65 (1966); R. ELLIS, COAST GUARD LAW ENFORCEMENT 29, 37-39 (1943).

37. 47 Stat. 415 (1932); 49 Stat. 1380 (1936).

38. Act of May 27, 1936 § 4, 49 Stat. 1380 (1936).

39. Exec. Order No. 9083, 7 Fed. Reg. 1609 (1942); see generally McCune v. Kilpatrick, 53 F. Supp. 80, 87-88 (E.D. Va. 1943).

40. Reorg. Plan No. 3 of 1946, § 101, 11 Fed. Reg. 7875, 60 Stat. 1097 (1946). The permanent transfer was not without problems. For a time R.S. 4450 hearings were suspended while Congress debated whether to exempt the hearings from the hearing examiner provision of the APA, thus continuing the wartime practice of using Coast Guard officers as hearing officers. The controversy came about because Reorganization Plan No. 3 of 1946, approved after the APA, apparently unintentionally removed R.S. 4450 cases from an APA exception for hearings authorized by statute to be held by a board of officials (the Bureau's "marine boards"). See generally *Conduct of Disciplinary Hearings by Coast Guard Commissioned Officers: Hearings on H.R. 2966 and S. 1077 before Subcomm. No. 3 of the House Comm. on the Judiciary, 80th Cong., 1st & 2d Sess., ser. no. 17, at 76, 85 (1948).*

41. 49 U.S.C. § 1655 (b) (1976).

42. Department of Transportation Act, Pub. L. No. 89-670, § 5 (b) (2), 80 Stat. 931 (1966).

43. Independent Safety Board Act of 1974, Pub. L. No. 93-633, § 304 (a) (9) (B), 88 Stat. 2166, 2169.

Missouri Law Review, Vol. 45, Iss. 1 [1980], Art. 7

to the underlying legislation,⁴⁴ the twin fountainheads of modern federal maritime discipline are section 4450 of the Revised Statutes⁴⁵ and the Administrative Procedure Act (APA).⁴⁶ Section 4450 is the enabling jurisdictional statute; the Administrative Procedure Act establishes the procedural framework for the hearings.⁴⁷

Presiding at an R.S. 4450 hearing will be a civilian administrative law judge appointed under the APA, who will render an initial decision for the agency.⁴⁸ Also present will be the respondent merchant mariner, who will be defending his right to his license or document. He may be accompanied by legal counsel or anyone else he feels will aid his cause.⁴⁹ In practice, legal counsel may be an experienced proctor in admiralty, an attorney with the local legal aid service, or counsel provided by the mariner's union.

Representing the Coast Guard at this adversary proceeding will be a commissioned investigating officer, attached to a Marine Inspection or Marine Safety Office.⁵⁰ Several other officials may be indirectly involved in the process. For example, the Chief Administrative Law Judge exercises a supervisory role over the administrative law judges who preside at R.S. 4450 hearings.⁵¹ In addition, the Commandant of the Coast Guard plays a crucial role. He has the power to promulgate regulations and to decide individual cases.⁵² Although the initial power to decide cases has been delegated to the administrative law judges,⁵³ the Commandant also retains

44. 36 Stat. 1167 (1911); 49 Stat. 1381 (1936); 50 Stat. 544 (1937); Reorg. Plan No. 3 of 1946, 11 Fed. Reg. 7875, 60 Stat. 1097 (1946).

45. 16 Stat. 447 (1871) (codified in 46 U.S.C. § 239 (g) (1976)).

46. 5 U.S.C. ch. 551 (1976).

47. *Van Teslaar v. Bender*, 365 F. Supp. 1007, 1011 (D. Md. 1973); *O'Kon v. Roland*, 247 F. Supp. 743 (S.D.N.Y. 1965). Although the Coast Guard is a military service, 14 U.S.C. § 1 (1976), certain of its functions are within the APA. See, e.g., *United States v. Aarons*, 310 F.2d 341, 347 (2d Cir. 1962).

48. 46 C.F.R. § 1.25 (b) (1979); *Miller v. Smith*, 292 F. Supp. 55, 56 (S.D.N.Y. 1968). Unless the mariner consents or the case does not involve conflicting testimony requiring a decision on the credibility of witnesses, the administrative law judge rendering the initial decision must have presided at the evidentiary hearing. *Van Teslaar v. Bender*, 365 F. Supp. 1007, 1010-13 (D. Md. 1973).

49. See 5 U.S.C. § 555 (b) (1976); 46 C.F.R. § 5.20-45 (a) (1) (1979). *But see* 46 C.F.R. § 401.615 (1978).

50. A Marine Safety Office combines Captain of the Port and marine inspection functions. U.S. Comp. Gen., *How Effective is the Coast Guard in Carrying Out its Commercial Vessel Safety Responsibilities*, No. CED-79-54, at 3 (May 25, 1979) [hereinafter GAO Report]. The investigating officer is the lowest ranking member in a rather complicated chain of command which terminates with the Commandant of the Coast Guard. See 33 C.F.R. § 1.01-20 (a), pt. 3 (1979); 46 C.F.R. § 1.20 (b) (1979). The agency regulations do not suggest that a mariner may obtain interagency review of prosecutorial decisions by ascending the chain of command, *id.* § 1.20 (c), in contrast to license denial cases. See note 159 *infra*.

51. 46 C.F.R. § 1.10 (b) (1) (1979). Decisions in those rare cases in which the Chief Administrative Law Judge presides enjoy no special weight. See *In re License No. 288507*, 1969 A.M.C. 2141, 2153 (13th Coast Guard Dist. 1969).

52. 46 C.F.R. § 1.10 (a) (1979).

53. 46 C.F.R. § 5.20-190 (a) (1979).

an important appellate jurisdiction which he exercises with the assistance of various officers in Coast Guard Headquarters, including the Chief Administrative Law Judge, the Chief Counsel and the Chief of Staff.⁵⁴ There is also an Administrative Clemency Board in Headquarters which considers applications for new or reissued licenses from persons whose licenses or documents have been revoked or surrendered.⁵⁵

In some extraordinary cases the Commandant has reserved "the personal right to make the initial determination" as to the disposition of a mariner's document or license.⁵⁶ However, this provision should not be interpreted as providing for personal review by the Commandant; rather, it indicates only that the initial decision as to the disposition of the document or license is lodged in the Headquarters procedure as opposed to the administrative law judges. In all other cases the Maritime and International Law Division of the Office of the Chief Counsel prepares a proposed decision in cases appealed for the Commandant's consideration.⁵⁷

In addition to the participants listed above, active roles are played by physicians of the United States Public Health Service who attend to the medical needs of merchant mariners⁵⁸ and who may recommend that a

54. These officers previously constituted a Permanent Board to Hear Oral Argument, *see* Miller v. Smith, 292 F. Supp. 55, 57 (S.D.N.Y. 1968), but the Board fell into disuse and no longer exists. *See* text accompanying notes 151-152 *infra*. The Chief Administrative Law Judge does not participate in the review of appealed cases where he has presided at the hearing. Decision on Appeal No. 1441 (1964) (denying motion to disqualify Chief Examiner). This has not happened in recent years, so the question has little practical significance.

55. *See generally* Word v. United States, 223 F. Supp. 614, 616 (S.D. Ala. 1963); Cruz v. Siler, Civ. No. 76-5348 (S.D.N.Y. June 23, 1978).

56. 46 C.F.R. § 5.20-190 (b) (1979).

57. 46 C.F.R. § 1.10 (c) (1) (1979).

58. *See generally* 42 U.S.C. §§ 246, 251 (a) (3) (1976); 42 C.F.R. pt. 32 (1978); U.S. Public Health Service, Div. of Hospitals and Clinics, Operations Manual, pt. B, ch. 1, § 2; G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 301-02 (2d ed. 1975). A perplexing aspect of R.S. 4450 proceedings is the ambiguous manner in which the decision making authority between the Public Health Service and the Coast Guard is divided when the mariner faces revocation on medical grounds. *See* Hendry v. United States, 418 F.2d 774, 780 n.3 (2d Cir. 1969), *aff'g* 280 F. Supp. 27 (S.D.N.Y. 1968) (voluntary deposit case). For an enlightening review of the overlapping roles of the Coast Guard and other agencies concerned with maritime casualties and occupational health and safety, *see* Seiders, *Inter-Agency Investigations of Marine Casualties Involving Public Vessels of the Navy*, 30 JAG J. 87 (1978); Comment, *Regulation of Maritime Safety: A Conflict of Standards*, 4 MAR. LAW. 89 (1979). The potential areas in which the Coast Guard and Public Health Service interact are numerous. *See, e.g.*, U.S. Public Health Service, Div. of Hospitals and Clinics, Operations Manual, pt. B, ch. 1, § 2.4.2 (granting the Chief Medical Officer, U.S. Coast Guard (a Public Health Service physician) "the final decision as to fitness for sea duty"); 46 C.F.R. § 5.05-20 (a) (3) (1978) (mental incompetency decisions); 46 U.S.C. § 239 (b) (2) (1976) (where proof of cure is an issue in a narcotics revocation hearing); Matter of USMMD No. Z 607977-D7, 1969 A.M.C. 995, 999 (12th Coast Guard Dist. 1968) (alcoholism raised as a defense to a misconduct charge). As the Comptroller General has properly urged, the medical standards and procedures applied to merchant mariners by the Public Health Service and the Coast Guard should be revised. This effort is apparently already underway. *See* GAO Report, *supra* note 50, at 57-58.

mariner be found not fit for sea duty,⁵⁹ the members of the National Transportation Safety Board,⁶⁰ and by the judges of federal courts,⁶¹ to the extent that these latter two groups exercise review powers over decisions of the Commandant.

While not involved formally in the course of an R.S. 4450 hearing, a labor union will frequently be interested in the outcome, as will the shipping company whose vessel figured in the charged misconduct or negligence. Victims of misconduct also tend to be interested in the results of the proceedings, for obvious reasons. The hearing may have direct and indirect legal significance for future legal proceedings,⁶² and can function as a litigant's "dry run" in a case, or serve as a discovery tool for subsequent litigation.

The rules by which the conduct of the participating officials will be governed spring from varied sources. The Coast Guard in its capacity as disciplinarian of merchant mariners will be guided by the applicable statutory provisions and by regulations promulgated by the Commandant. Among the statutes, the Administrative Procedure Act and the other

59. See *Juan v. Grace Line, Inc.*, 299 F. Supp. 1259 (S.D.N.Y. 1969); 42 C.F.R. §§ 32.6 (c) (6) (iii), 32.11-23 (1978); 46 C.F.R. § 5.10-1 (b) (1979); *Hendry v. United States*, 280 F. Supp. 27 (S.D.N.Y. 1968), *aff'd*, 418 F.2d 774 (2d Cir. 1969).

In medical cases, especially in circumstances where a seaman has voluntarily deposited his document pending the issuance of a Fit for Sea Duty certificate by the Public Health Service, see 46 C.F.R. § 5.05-15 (a) (1979), consideration should be given to securing intra-agency review of adverse decisions of a Public Health officer. However, counsel would be well advised not to attempt to obtain a fitness for duty certificate through another marine hospital. This route, although apparently successful in some cases, is not as desirable as an appeal to the director of a Public Health Service marine hospital, corroborated by opinions of private physicians. See *Commandant v. Howell*, 1 N.T.S.B. 2165 (1969) (counsel argued that a good faith doubt existed as to the validity of the prior marine hospital's decision); GAO Report, *supra* note 50, at 57 (seamen obtaining a favorable decision from another marine hospital have apparently been successful in a few cases).

60. See text accompanying notes 158-177 *infra*.

61. See text accompanying notes 178-250 *infra*. For another role of federal judges in this area, see 33 U.S.C. § 412 (1976); 33 C.F.R. § 70.05-10 (1979) (where a licensed officer is convicted of injuring or destroying an aid to navigation, license shall be revoked or suspended for a term to be fixed by the judge).

62. See, e.g., *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir.), *cert. denied sub nom. Alvarez v. American Export Lines, Inc.*, 434 U.S. 954 (1978) (testimony at R.S. 4450 hearing admissible in later civil action because Coast Guard investigating officer was "predecessor in interest" to plaintiff; administrative law judge's decision and order held admissible in civil litigation under Fed. R. Evid. 803 (8) (C)); Comment, *Former Testimony—Coast Guard Hearing Officer is Predecessor in Interest to Civil Litigant Under Federal Rule of Evidence 804(b)(1)*, 10 RUT.-CAM. L.J. 479 (1979); Note, *"Evaluative Reports" and "Predecessor in Interest" Construed to Admit Coast Guard Hearing Report and Testimony Under Federal Rules of Evidence—Lloyd v. American Export Lines, Inc.*, 4 MAR. LAW. 155 (1979). *But see* *The Charles Morgan*, 115 U.S. 69, 77 (1885).

measures specifically relevant to the proceedings are paramount.⁶³ At times, other requirements of federal law will also govern the agency, and in some instances state laws will be in issue, for example, where a document is revoked because of conviction of a state drug offense,⁶⁴ or where state pilotage questions arise.⁶⁵ Issues of constitutional dimension have, of course, also arisen.⁶⁶

Rounding out the sources of law applicable in R.S. 4450 hearings are judicial decisions (particularly the customary law developed in the admiralty courts), prior appeal or review⁶⁷ decisions of the Commandant⁶⁸

63. The Great Lakes Pilotage Act and § 239b (narcotics), which post-date the APA, refer *in haec verba* to the APA. The Coast Guard indicated in 1967 in a note to a proposed general revision of Title 46 that "the provisions of [46 U.S.C. § 239 (g)] . . . have been superseded" by the APA. *U.S. Coast Guard, Supplement to a Committee Print of a Draft Bill Entitled "The Marine Safety and Seamen's Welfare Act of 1967,"* 90th Cong., 1st Sess., at 103 (Comm. Print 1967). Consistent with this view, the more recent provision regarding tankerman endorsements makes no such reference. Because § 239 (g) goes beyond procedural matters to the extent that it sets forth criteria for revocation, the supersession is in any event not complete. Indeed, it was this very section which triggered the applicability of 5 U.S.C. § 554 (a) by creating a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." One lower court has confirmed this by looking, in effect, to § 239 (g) rather than to the APA to determine agency procedures. *Miller v. Smith*, 292 F. Supp. 55, 56 (S.D.N.Y. 1968). For a subsequent proposal to revise R.S. 4450, see note 258 *infra*.

64. *E.g.*, *Commandant v. Ogeron*, No. ME-63 (N.T.S.B. Nov. 23, 1977). See also 421 U.S. COAST GUARD L. BULL. 2-3 (1979) (analyzing effect of state pardon).

65. *E.g.*, *Commandant v. Nelson*, No. ME-60 (N.T.S.B. May 12, 1977).

66. See, *e.g.*, *Harris v. Smith*, 1969 A.M.C. 1921 (S.D.N.Y.), *aff'd*, 418 F.2d 899 (2d Cir. 1969) (right to counsel); *Commandant v. Chapman*, No. ME-50, slip op. at 4-6 (N.T.S.B. Jan. 25, 1977) (right to counsel; self-incrimination). The Commandant, however, has held he is without power to inquire into the constitutionality of acts of Congress. *Decision on Appeal No. 1786*, 1 N.T.S.B. 2312, 2315-16 (1970), *modified on other grounds sub nom. Commandant v. Nickels*, 1 N.T.S.B. 2309 (1972).

67. For the distinction between *appeals to* and *reviews by* the Commandant, see text accompanying note 134 *infra*. The captions used in R.S. 4450 cases are unbelievably varied. Before the administrative law judge and Commandant, the cases are styled "United States of America, United States Coast Guard v. License No. 123456 and Merchant Mariners' Document Z-123456789-D3, issued to Richard Roe, respondent." *American Maritime Cases* alter this to a "Matter of" format, and the Commandant refers to his own prior decisions variously as "Appeal Decision No. 1234 (Roe)" or "Decision on Appeal No. 1234." The Safety Board cites the Commandant's decision as "Appeal No. 1234 (Roe)." Before the Safety Board, the caption on slip opinions becomes, *e.g.*, "John B. Hayes, Commandant, U.S. Coast Guard v. Richard Roe, appellant." Bound Safety Board decisions are captioned simply "Richard Roe, appellant." The Board does not substitute names when a new Commandant takes office, see, *e.g.*, *Commandant v. Christen*, No. ME-72, slip op. at 1 n.1 (N.T.S.B. Sept. 14, 1978), and cites its own opinions as "Commandant v. Roe," although the Commandant's decisions cite the Board's rulings as "Bender v. Roe." Some order should certainly be introduced into the present chaos of case names. It is also not clear why Safety Board decisions show one date as the date of issuance and another, often a week or more later, as the date of service. Such practices can lead to confusion. See *In re Consolidated Edison Co.*, ALAB-414, 5 N.R.C. 1425, 1427-28 (1977).

68. These "Decisions on Appeal" are not yet systematically published, although they are available from Coast Guard Headquarters, district offices, and

and the National Transportation Safety Board,⁶⁹ and internal agency publications such as the *Coast Guard Law Bulletin*, *Administrative Law Judges' Circulars*,⁷⁰ *Administrative Law Judges' Internal Practices and Procedures*, volume V of the *Marine Safety Manual* of the Coast Guard, chapter 71 of which deals with suspension and revocation procedures,⁷¹ and internal regulations of the Public Health Service.⁷² It is to these sources that the participants will look in preparing, trying, arguing, and deciding a merchant marine suspension or revocation case.

IV. HEARING PROCEDURES

A hearing under R.S. 4450 can arise in a variety of ways. The mariner may, for example, have been given a diagnosis of "Not Fit for Duty" by a physician of the United States Public Health Service.⁷³ He may have been "logged" by the master of his vessel for some act of misconduct or incompetence and the entry will be examined by the Coast Guard at the "payoff" that concludes a voyage. He may have been reported to a Coast Guard Marine Inspection or Marine Safety Office by a victim or witness to an act of misconduct or incompetence. Word may also reach the Coast Guard through a United States consul⁷⁴ or an overseas Coast Guard

Marine Inspection and Safety Offices. An index is also available for cases decided since the APA was fully applied to R.S. 4450 cases in 1948. See U.S. Coast Guard, Index of Decisions of the Command in Suspension and Revocation Proceedings Under 46 C.F.R. 5 (Supp. 1977) (CG-440). Occasional rulings are reproduced in *American Maritime Cases*, and where a case has been taken to the National Transportation Safety Board, the Board appends both a summary of the initial decision and the full text of the Commandant's ruling to its own decision.

69. Slip "Marine Decisions" of the Safety Board are available from the Board. At this writing, two bound volumes of the Board's decisions in airmen's and merchant marine safety enforcement cases have been issued by the Government Printing Office. See also Hamilton, *Administrative Practice in Aviation Medical Proceedings*, 26 EMORY L.J. 565, 586 n.118 (1977). Occasional Safety Board decisions are reproduced in *Pike & Fischer Administrative Law Service*. E.g., McKee v. Hawke, 1 N.T.S.B. 7, 22 Ad. L.2d 527 (1967).

70. See 46 C.F.R. § 1.20 (d) (1979).

71. 5 U.S. COAST GUARD, MARINE SAFETY MANUAL (Oct. 17, 1977) (CG-495). Under a questionable Freedom of Information Act ruling, the Marine Safety Manual was for a time considered unavailable for public inspection. See U.S. Coast Guard, Commandant Instruction 5212.6 (June 26, 1969); 5 U.S.C. § 552 (1976). The current manual, however, is available and may be purchased from the Government Printing Office. Supplemental information on agency policies may also be found in various "Instructions" and "Notices." See, e.g., U.S. Coast Guard, Commandant Notice 5952 (Dec. 9, 1975), implementing *Duarte v. United States*, 1976 A.M.C. 277 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 850 (2d Cir. 1976).

72. See GAO Report, *supra* note 50, at 57 (noting reliance on P.H.S. Division of Hospitals and Clinics Operations Manual).

73. See U.S. Public Health Service, Div. of Hospitals and Clinics, Operations Manual, pt. B. ch. 1, § 2.4.1; 5 U.S. COAST GUARD, MARINE SAFETY MANUAL art. 71-4-10A.

74. See 46 U.S.C. § 703 (1976), Vienna Convention on Consular Relations, art. V, 1, entered into force Dec. 24, 1969, T.I.A.S. No. 6820, 21 U.S.T. 77, 596 U.N.T.S. 261; 7 M. WHITEMAN, DIGEST OF INT'L LAW 695-700 (1970). See generally Harris, *The United States Consul's Role in Civil Matters Concerning Seamen*, 6 CUMB. L. REV. 559 (1976).

Merchant Marine Detail⁷⁵ of conduct or conditions which warrant an investigation or hearing before an administrative law judge. Marine casualty investigations⁷⁶ may and often do lead to suspension and revocation proceedings.⁷⁷

Not all misconduct will give rise to a Coast Guard investigation. The point at which an activity constitutes an offense for which the merchant mariner may be subjected to proceedings under R.S. 4450 may at times be blurred; for our purposes it is enough to note that (with the exception of narcotics cases and willful violations of provisions of Title 52 and regulations thereunder) the mariner must have been acting *under the authority* of his license or document.⁷⁸

When the report of an incident reaches the Marine Inspection or Marine Safety Office, an investigation will be conducted by one of the investigating officers to determine what official action, if any, is required. Standards are not likely to vary substantially between investigating officers within a particular office, as any differences will probably be minimized by the senior investigating officer. However, differing standards for case selection between marine inspection zones may create some inequities. Forum-shopping sometimes occurs in instances where mariners anticipate that an administrative law judge in one district will be more lenient than in another.⁷⁹ Generally, attempts at forum-shopping are made under the guise of pleas of inconvenience to the seaman. As can be expected, individual officers are reluctant for this reason to agree to transfer a case to another area. A change of venue also may make it more difficult to try the case if a number of witnesses must be called. Because of the necessarily itinerant nature of the merchant mariner's way of life, requests for a change of venue call for a careful balancing of the need to permit adequate time for each side to prepare its case and the need to minimize inconvenience to shipping.

A particular investigating officer will evaluate some, but not all, of the factors and alternatives generally associated with the exercise of administrative prosecutorial discretion in determining whether a particular aspect of misconduct warrants an R.S. 4450 heading. The investigating officer will consider the actions complained of, the mariner's explanation

75. See 5 U.S. COAST GUARD, MARINE SAFETY MANUAL art. 71-3-40A.

76. See generally 46 C.F.R. pt. 4 (1979).

77. 46 C.F.R. §§ 4.09-35, 5.01-30 (a) (1979); 5 U.S. COAST GUARD, MARINE SAFETY MANUAL art. 71-3-1.

78. Thus, action may not be taken against a license when the mariner's violation of law arose from the fact that he owned the vessel, no personal license being required for mere vessel ownership. *Commandant v. Soriano*, No. ME-70, slip op. at 8 (N.T.S.B. May 16, 1978). See also *Soriano v. United States*, 494 F.2d 681 (9th Cir. 1974) (no jurisdiction where pilot acted under state pilot license, even though federal license was prerequisite for state license); *Dietze v. Siler*, 414 F. Supp. 1105 (E.D. La. 1976).

79. See also GAO Report, *supra* note 50, at 17 (noting "relative autonomy of districts and field units in carrying out their responsibilities, resulting in different interpretations of marine safety requirements").

(if one is requested and given),⁸⁰ the vigor with which a master or victim demands that action be taken and, of course, the difficulty of proving the case at a hearing. However, factors such as the seaman's prior record (known as a "MERMARPER") at Coast Guard Headquarters may no longer be weighed at this time.

The alternatives open to the investigating officer are relatively few in number: (1) close the case (*e.g.*, where a complaint is frivolous, or unfounded and motivated by personal animosity, or involves what is essentially a labor-management dispute);⁸¹ (2) issue a warning to the mariner; (3) request a voluntary surrender of the mariner's document or license in preference to facing a hearing; (4) institute a hearing by serving charges on the seaman;⁸² or (5) request that the matter be referred to the Department of Justice or, in some cases, to local law enforcement authorities. It should be clear that the mariner who has counsel at this early stage of the process enjoys a considerable advantage over his less fortunate or less affluent shipmates since counsel can at least attempt to persuade the investigating officer to adopt a course short of a hearing.

The above discussion should not be understood as suggesting that legally trained counsel invariably will be available to the mariner in R.S. 4450 cases. In fact, many cases are decided without legal representation of the respondent.⁸³ Sometimes this will be the result of a conscious choice by the seaman, perhaps in anticipation of an order lenient enough to permit him to continue to sail. At other times the lack of counsel may be due to the confusion and ignorance of the seaman, while in some cases the absence of counsel will certainly be due to genuine indigency. Even with the rising cost of legal services, most mariners earn enough to engage the

80. 46 C.F.R. § 5.05-10 (a) (1979) (requiring the officer to advise the seaman of the complaint against him and to afford him the right to comment upon it). *But see* Van Teslaar v. Bender, 365 F. Supp. 1007, 1010 (D. Md. 1973) (failure to comply with this procedure will not vitiate a later hearing).

81. Compare 46 C.F.R. § 5.03-20 (1979) with *In re George*, 1955 A.M.C. 2064 (3d Coast Guard Dist. 1955) (R.S. 4450 case may be instituted for refusal to obey an order relating to vessel safety even if labor disputes also involved).

82. Personal service of the charges may be deemed waived if the mariner voluntarily absents himself, provided the hearing record includes evidence that the respondent has actual notice he was about to be charged. The hearing may then proceed *in absentia*. *Commandant v. Sybiak*, No. ME-64, slip op. at 4-6 (N.T.S.B. Feb. 17, 1978). Irregularities in service of the charges will also be deemed waived if not pressed at the hearing and on intra-agency appeals. *Christen v. N.T.S.B.*, No. 78-3500, slip op. at 3 (5th Cir. May 25, 1979) (*per curiam*).

83. The regulations under 46 U.S.C. § 239 (1976) construe the right to counsel to include nonlawyers. 46 C.F.R. § 5.20-45 (a) (1) (1979). The author's view is that—while nonlawyers may be helpful as expert consultants—"counsel" means "lawyer." *But see* Argersinger v. Hamlin, 407 U.S. 25 (1972). This is the position taken in the Great Lakes pilotage regulations, 46 C.F.R. § 401.615 (1978), and seems to have been implicit in a decision holding that there is no right to counsel when a mariner surrenders his license to avoid a hearing. *Harris v. Smith*, 1969 A.M.C. 1921 (S.D.N.Y.), *aff'd*, 418 F.2d 899 (2d Cir. 1969). Pertinent Australian regulations contemplate appearances *pro se* or "by barristers or solicitors." *See* Australian Rule 44, at 853.

services of an attorney, and thus would not qualify for legal aid even if it were available for administrative hearings. However, the costs of legal representation may exceed the means of many seamen if such representation includes not only the evidentiary hearing but also appeals to the Commandant and National Transportation Safety Board, not to mention judicial review.

It is fair to expect that there are some mariners who would qualify for legal assistance if they were on trial in a criminal proceeding.⁸⁴ For these seamen one could suggest that the Coast Guard administrative law judge should arrange for the assistance of counsel, as the Federal Trade Commission urged in the *American Chinchilla* case.⁸⁵ Despite the Government's successful argument in *Harris v. Smith*⁸⁶ that there is no right to counsel in voluntary surrender cases and the district court's indication in that case in dictum that there is no right to appointed counsel at disciplinary hearings,⁸⁷ the Coast Guard nevertheless is "armed with all of the panoply of legal machinery (funds, investigatory resources, staff of skilled attorneys, etc.)."⁸⁸ Since R.S. 4450 hearings may have practical results as grave as FTC proceedings or criminal cases, similar principles should govern, rather than a ritualistic application of the sixth amendment's requirement of a criminal prosecution as occurred in *Harris*. As Commissioner Jones wrote for an unanimous Commission in the *Chinchilla* case, "the Examiner or the respondent may obtain counsel on aid request of either a local bar association or a local legal aid agency."⁸⁹ Relying on *FTC v. Dean Foods Co.*,⁹⁰ Commissioner Jones suggested a petition by the FTC complainant to a court of appeals for appointed counsel under the All Writs Act.⁹¹

In a Coast Guard proceeding the administrative law judge could

84. See, e.g., *Commandant v. Mills*, 2 N.T.S.B. 2725, 2729 (1975) (noting appearance of Legal Services Center attorney); *Commandant v. Snider*, 1 N.T.S.B. 2177, 2183 (1969) (noting appearance of Legal Aid Society attorney). At times a legal aid society lawyer defending a client against a criminal narcotics charge may accept the "pendent" proceeding initiated under § 239b.

85. F.T.C. Dkt. No. 8774, 26 Ad. L.2d 284 (1969).

86. 1969 A.M.C. 1921 (S.D.N.Y.), *aff'd*, 418 F.2d 899 (2d Cir. 1969). In *Hasler v. United States*, 1972 A.M.C. 2185 (N.D. Cal. 1971), the court found that a mariner had been deprived of the statutory right to counsel where there was evidence that he had surrendered his license based on misinformation from a Coast Guard investigating officer. The surrender was held for this reason not to have been voluntary. See also *Duarte v. United States*, 1976 A.M.C. 277 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 850 (2d Cir. 1976).

87. Cf. *McKee v. Hawke*, 1 N.T.S.B. 7, 9, 22 Ad. L.2d 527, 530 (1967) ("The government is under no duty to provide attorneys for respondents in [FAA] safety enforcement proceedings.").

88. 26 Ad. L.2d at 284, 288.

89. *Id.* at 289 & n.11.

90. 384 U.S. 597, 603-05 (1966).

91. 28 U.S.C. § 1691 (a) (1976). It is more likely that counsel could be appointed for an indigent mariner at the judicial review stage, 28 U.S.C. § 1915 (d) (1976), but even this is not free from doubt.

instruct the investigating officer to petition for counsel, for the person charged, from the court of appeals (from which judicial review would ultimately be available),⁹² but there seems to be no foundation for the appointment of counsel by that court while a case is still before the agency. If appropriate guarantees of independence could be developed, it would be preferable to detail a Coast Guard law specialist not regularly assigned to Marine Inspection duties to act as counsel for the respondent,⁹³ just as the service provides free legal counsel to its members who are tried by court-martial for criminal offenses under the Uniform Code of Military Justice.⁹⁴ Even the provision of such counsel, of course, might be faulted on the ground that the attorney had divided loyalties, and evidently it was for this reason that the Coast Guard abandoned its previous practice of giving free counsel to respondents. However, if the mariner were advised of the potential conflict of interest and waived any objection on the record, the result would seem clearly preferable to his being unrepresented by any counsel, thereby having to rely on the administrative law judge for assistance in the presentation of his case.

As has been indicated above in the preliminary discussion of the *dramatis personae*, labor unions, shipowners, and others may have an interest in the hearing. These groups may have interests that sharply conflict with those of the respondent mariner as well as the Coast Guard. Without suggesting that they necessarily should play a more extensive formal role in the hearings than merely observing and perhaps counseling a respondent, and recognizing that there is no direct support in the regulations for the notion, the question may be raised whether a more direct role could be played by them: Could they become "parties"?

The Administrative Procedure Act provides the best guide to answer this question. The APA covers both intervention before the agency and

92. See generally text accompanying notes 178-250 *infra*.

93. Although the provision of free counsel in agency cases has been a matter of active controversy in the past several years, and although Congress has made express provision for it in limited cases, see, e.g., Magnuson-Moss Warranty-FTC Improvement Act, § 202, 15 U.S.C. § 57a (h) (1) (1976), the notion has not received general acceptance. E.g., 4 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 31.02 & n.16 (1977 & Supp. 1979). Nonetheless, there is precedent for such counsel in the history of the marine inspection program itself. Both the Coast Guard and the Bureau of Marine Inspection and Navigation had policies to make personnel available as defense counsel in R.S. 4450 cases, but this was apparently done more often in practice by the Coast Guard than by the Bureau; mariners never requested defense counsel from the Bureau. See *Conduct of Disciplinary Hearings by Coast Guard Commissioned Officers: Hearings on H.R. 2966 and S. 1077 before Subcomm. No. 3 of the House Comm. on the Judiciary, 80th Cong., 1st & 2d Sess., ser. no. 17, at 52, 99 (1948)*. For some years the regulations included this provision: "Should the person charged desire counsel and has [sic] no means of obtaining one, the examiner will secure an officer, if one is available, to act in his defense." 46 C.F.R. § 137.09-5 (a), at 6325 (1947 Supp.). Compare Decision on Appeal No. 776 (1954) with Decision on Appeal No. 1608 (1967). The practice fell into desuetude and is no longer authorized by the regulations. See 46 C.F.R. § 5.20-45 (a) (1) (1979).

94. UCMJ art. 27 (b), 10 U.S.C. § 827 (b) (1976).

entitlement to judicial review. Section 6 (a) of the Act states that “[s]o far as the orderly conduct of public business permits, an interested person may appear before an agency,”⁹⁵ while section 10 (a) confers a right to judicial review upon any “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.”⁹⁶ Additionally, the Independent Safety Board Act of 1974 confers upon “any person disclosing a substantial interest” the right to obtain review of orders of the Safety Board.⁹⁷

Are there any persons or groups whose interests warrant granting them the status of parties? One point is clear: The provision in the regulations which recites the interests vindicated by the proceedings is not in itself a concession of standing.⁹⁸ A mere interloper, though a member of the “general public” within the terms of the regulations, would not be a proper party.⁹⁹

Does a victim of misconduct have a strong enough interest? In general, such a victim would not have a right to intervene, on the ground that such a right would turn what is basically a public function of prosecution into a forum for the vindication of private rights. However, there is ample precedent for the interaction of public and private remedies in other fields.¹⁰⁰ Even if there were indications that allowing intervention by the victim would contribute to the conduct of the hearing,¹⁰¹ standing should be denied. Victims of misconduct apparently could not maintain standing on appeal to higher stages of the process even if they were allowed to intervene in the initial R.S. 4450 hearing since their interest could not be “distinguished from the public’s interest in the administration of the law.”¹⁰² Granting victims of misconduct the status of a party to the hearing, when they could not maintain standing at higher levels of review, would have anomalous consequences.

On the other hand, in intricate cases arising out of collisions, where the fact-finding process could be assisted by additional counsel and parties, and where the uncharged master of “the other vessel” might seek to clear his professional reputation, permission to intervene might properly be

95. 5 U.S.C. § 555 (b) (1976).

96. 5 U.S.C. § 702 (1976).

97. 49 U.S.C. § 1903 (d) (1976).

98. 46 C.F.R. § 5.01-15 (1979). Indeed, another regulation, since revoked on other grounds, had expressly stated that “[a]ppellants in [suspension and revocation] proceedings are the only persons considered to be directly concerned” and hence entitled to free hearing records. 46 C.F.R. § 5.55-35 (a) (1978), *deleted*, 44 Fed. Reg. 5293 (1979).

99. *See* Joyce v. Bulger, 240 F. 817, 818 (W.D. Wash. 1916).

100. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

101. *See* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 765-66 (1967).

102. Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940).

granted at the hearing stage.¹⁰³ The same result would be correct where, as in *Lloyd v. American Export Lines, Inc.*,¹⁰⁴ a person other than the respondent later might be held to be the successor in interest to the investigating officer. Similarly, one can imagine a case where the seaman's conduct complained of is inextricably intertwined with a collective bargaining agreement—as where an order is not complied with because it conflicts with the terms of such an agreement.¹⁰⁵ In these circumstances it is arguable that both the union and the shipowner or charterer should be permitted to intervene or seek review.¹⁰⁶ A shipowner's financial interest may be linked sufficiently to that of the respondent under other circumstances as well, as where a penalty may be assessed against the vessel for acts of the master.¹⁰⁷

In view of such developments in the field of standing as *Scenic Hudson Preservation Conference v. FPC*,¹⁰⁸ and *Office of Communication*,¹⁰⁹ still others may be entitled to participate in R.S. 4450 hearings. For example, if a master were charged with abusing members of his crew for racial or religious reasons,¹¹⁰ groups active in the representation of members of the relevant minorities should be permitted either to intervene or to assume a role of limited participation. Participation as *amici curiae* could also be permitted.

To date there has been a marked hostility toward all such interventions. Recently, however, the Seafarers International Union instituted a civil action against the Coast Guard in order to obtain rights to intervene in marine casualty investigations, which are closely related to disciplinary proceedings, and at this writing has obtained temporary injunctive relief.¹¹¹ On the other hand, the Safety Board, in what it described as a case of first impression, reversed a decision of one of the administrative law

103. Note, however, that present suspension and revocation regulations do not permit counsel for a witness to participate in the hearing other than by advising his client as to his rights. 46 C.F.R. § 5.20-93 (a) (1979), cited in Note, 4 MAR. LAW. 155, 163 n.81 (1979).

104. 580 F.2d 1179 (3d Cir.), cert. denied sub nom. Alvarez v. American Export Lines, Inc., 434 U.S. 954 (1978).

105. But see 24 OP. ATT'Y GEN. 136, 137 (1902); Matter of George, 1955 A.M.C. 2064, 2076-77 (3d Coast Guard Dist. 1955).

106. But see 46 C.F.R. § 5.03-20 (1979); Curran v. Laird, 420 F.2d 122 (D.C. Cir. 1969).

107. See *Fredenberg v. Whitney*, 240 F. 819 (W.D. Wash. 1917); Edw. 7, ch. 48, § 66; BRITISH RULES 4-5, at 536; CANADIAN RULE 7 (1), at 430. In Australia, "[a]ny person who satisfies the Court [of Marine Inquiry] that he has an interest in the inquiry may appear, any other person may, by leave of the Court, appear." AUSTRALIAN RULE 7, at 848. Illustrating this broader Commonwealth approach, in *The Seistan*, [1960] 1 All E.R. 32 (Adm. Div.), a ship's officer, not a party to the investigation, was criticized by one of the assessors, see note 245 *infra*, and was permitted to seek judicial review.

108. 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

109. 359 F.2d 994 (D.C. Cir. 1966).

110. But see *In re Niagara Mohawk Power Co.*, 3 A.E.C. 5, 10 (1965).

111. *Seafarers Int'l Union v. Adams*, Civ. No. 78-4698 (S.D.N.Y. Sept. 17, 1979) (granting temporary restraining order).

judges granting to the Airline Passenger Association the right to intervene in the *DC-10* investigation.¹¹² That ruling plainly would appear to be wrong in light of the terms of the statute governing parties to Safety Board proceedings. Presumably, however, the Board's decision would be similar in a suspension and revocation case, where, if anything, the adversary quality of the proceedings makes it less likely that third party groups could make a showing that their interests would be affected. Taken together, the *DC-10* and *Seafarers* cases should serve to clarify this long-obscure area.

At the hearing, unless a plea of guilty is entered,¹¹³ the investigating officer will be required to prove the charge. The burden of proof is, of course, not as difficult to satisfy as in a criminal prosecution; all that is necessary is substantial, reliable and probative evidence.¹¹⁴ While there is authority that the strict rules of evidence do not apply to the proceedings,¹¹⁵ administrative law judges occasionally hold the Coast Guard to the rules of evidence applied in the district courts, and the suggestion has been made that the Federal Rules of Evidence be made applicable to R.S. 4450 hearings.¹¹⁶ Even though the admission of hearsay evidence is nominally permitted, some administrative law judges may be disinclined to find a charge "proved" unless there is substantial, reliable, and probative *nonhearsay* evidence to support the finding. In fact, the Marine Safety Manual takes the view that valid findings "cannot be based upon hearsay alone, nor upon hearsay corroborated by a mere scintilla" of nonhearsay evidence.¹¹⁷ While circumstantial evidence is allowed, it has been held that the doctrine of *res ipsa loquitur* may not be applied in R.S. 4450 proceedings.¹¹⁸

Log entries play an important role in many R.S. 4450 proceedings. Entries made by a vessel's master in substantial compliance with the federal logbook statute¹¹⁹ are considered prima facie evidence of the facts so

112. *Bond v. McDonnell Douglas Corp.*, Order No. EA-1305 (N.T.S.B. July 9, 1979).

113. Pleas of *nolo contendere* were disallowed by Decision on Appeal No. 1925 (1973) (*Abbott*). Despite the terms of 46 C.F.R. § 5.03-1 (a) (1979), such a plea was accepted in one recent hearing. See Note, 4 MAR. LAW. 155, 164 n.86 (1979) (discussing No. 16722/828 (*Ellison*) (8th Coast Guard Dist. Oct. 23, 1978)). The *Ellison* case is currently pending review at Coast Guard Headquarters.

114. 46 C.F.R. § 5.20-95 (b) (1979).

115. *Id.* § 5.20-95 (a).

116. See Note, 4 MAR. LAW. 155, 158 n.35 (1979). The Federal Rules of Evidence do not apply *ex proprio vigore* to R.S. 4450 hearings, FED. R. EVID. 101, 1101, but it is obvious that they "have a bearing" on agency proceedings. See 4 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 22.04 (1979).

117. 5 U.S. COAST GUARD, MARINE SAFETY MANUAL art. 71-7-45D, citing *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 690 (9th Cir.), cert. denied, 338 U.S. 860 (1949).

118. 417 U.S. COAST GUARD L. BULL. 23 (1979).

119. 46 U.S.C. § 702 (1976).

recorded.¹²⁰ Conversely, the fact that no log entry has been made where one might have been made has been held to be irrelevant to a finding of guilty.¹²¹ In order to comply with the statute, the log entry must be made in a timely fashion and read to the mariner. The mariner must then be given an opportunity to comment; this comment must also be recorded in the logbook. A log entry made in this fashion will shift the burden of going forward with the evidence to the respondent.¹²² Even if not made in substantial compliance with the law, the Safety Board has ruled, a log entry is admissible as a business record, though it will be afforded little probative value.¹²³

One thoughtful commentator on procedures in airmen's cases, which in some respects parallel those applicable to marine cases, has suggested that practitioners "make peace with the relaxed rules of evidence in the administrative setting and, rather than impeding the proceedings by repeatedly raising futile hearsay objections, plan to use these ground rules to his client's best advantage."¹²⁴ This advice is sound, but it should not deter counsel in R.S. 4450 cases from insisting that the statutory requirements for log entries be scrupulously observed as a precondition to their admission into evidence.

After the evidence has been heard, the administrative law judge will render a decision and order. Since the administrative procedure reflects the possibility of adverse consequences for the person charged, the Table of Average Orders¹²⁵ merits discussion. On its face this chart, published as part of the Coast Guard's R.S. 4450 regulations, purports to approximate the severity of the order a mariner may expect upon proof of a particular charge. The Table is advisory only, and indicates neither maxima or minima for disciplinary actions. Indeed, the explanatory notes seem to authorize departures from it whenever convenient.¹²⁶

The difficulty is that the Table is included in the Code of Federal Regulations, thereby suggesting that it has considerable if not binding weight in hearings.¹²⁷ Furthermore, the Table is misleading because it

120. 46 C.F.R. § 5.20-107 (b) (1979).

121. Decision on Appeal No. 1987 (*Brown*), 2 N.T.S.B. 2698, 2700 (1973), *aff'd*, 2 N.T.S.B. 2696 (1974).

122. *Commandant v. Burke*, 2 N.T.S.B. 2784, 2786 n.6 (1976), *citing* 28 U.S.C. § 1732 (1976); *Commandant v. Reed*, No. ME-60, slip op. at 6 & n.7 (N.T.S.B. July 29, 1977), *quoting In re Keller*, 273 F. Supp. 945, 947 (E.D. Va. 1967).

123. *Commandant v. Christen*, No. ME-72, slip op. at 7 (N.T.S.B. Sept. 14, 1978), *quoting* *United States v. Strassman*, 241 F.2d 784, 786 (2d Cir. 1959).

124. Hamilton, *Administrative Practice in Aviation Medical Proceedings*, 26 EMORY L.J. 565, 588 (1977).

125. 46 C.F.R. § 5.20-165 (1979); Decision on Appeal No. 1711 (1968).

126. 46 C.F.R. § 5.20-165 (a) (1979).

127. *See, e.g.,* *Commandant v. Reed*, No. ME-60, slip op. at 8 (N.T.S.B. July 29, 1977) ("The case before us neither requires nor supports any deviation from the scale of average orders in Coast Guard regulations.")

does not reflect a current average of actual orders.¹²⁸ These shortcomings could be corrected by a study of the severity of recent decisions and orders and a recomputation from the data obtained. Alternatively, the wisdom of including such a table in the Code of Federal Regulations could be questioned. In regard to the severity, one commentator has suggested that future versions of the Table of Average Orders place greater emphasis on the administrative law judge's power to reduce an officer's rating,¹²⁹ reserving more severe orders to cases of "delinquencies in navigation and seamanship."¹³⁰ Until some reform is undertaken along these or similar lines, the mariner and his counsel will be forced to rely on whatever intelligence may be gleaned locally concerning "sentencing" patterns in the port in which the hearing is to be conducted.

V. APPELLATE POWERS OF THE COMMANDANT

Once the administrative law judge has rendered a decision and order and it is served on the respondent,¹³¹ barring a petition to reopen the hearing on the basis of newly-discovered evidence,¹³² the seaman may seek relief by appealing an adverse decision to the Commandant of the Coast Guard.¹³³ Provision is also made for *sua sponte* review on the Commandant's own motion in cases not appealed.¹³⁴ The regulations in this area are straightforward, but a few matters require special mention.

First, time is of the essence in securing appellate review within the agency; there is a thirty-day limit for filing the notice of appeal, and a sixty-day limit for noting the grounds relied on.¹³⁵ Under the exhaustion doctrine, failure to comply with these rules will bar judicial review as

128. Ironically, the Coast Guard has recently found that certain statistics it has used for the rating of its own personnel were not accurate, despite the fact that they purported to represent an "experienced distribution" of marks on officers' fitness reports. See, e.g., *In re McFarland*, No. 91-77 (Coast Guard Board for Correction of Military Records Sept. 18, 1978); Hunter, *Officer Fitness Reports—Let's Scrap Numerical Grades*, U.S.C.G. ACAD. ALUMNI BULL., at 32 (Jan.-Feb. 1979). Stale information can work a substantial unfairness in such situations. The Coast Guard has, it may be added, resisted the attempt to compare the procedures for discipline within the service with those applicable in R.S. 4450 cases. See Decision on Appeal No. 1786, 1 N.T.S.B. 2312, 2315-16 (1970), *modified on other grounds sub nom.* *Commandant v. Nickels*, 1 N.T.S.B. 2309 (1972).

129. See 46 U.S.C. § 229 (1976); 46 C.F.R. § 5.20-170 (d) (1979).

130. Viewpoint, 16 THE COMPASS 30 (1969).

131. See note 82 *supra*.

132. 46 C.F.R. § 5.25 (1979).

133. *Id.* § 5.30-1 (a). The Commandant has delegated his authority to rule on appeals from non-revocation proceedings to the Vice-Commandant. See *id.* §§ 1.10 (b), 5.01-1 (d), 5.02-1.

134. Compare 46 C.F.R. § 5.30 (1979) with *id.* § 5.35. By the end of 1979, the Commandant had issued decisions in over 2166 appealed cases, as well as 12 "reviews" on his own motion. Decision on Review No. 12 (1979) (*Conley*) was the first such action in nearly a decade. 36 MARINE SAFETY COUNCIL PROC. 43 (1979).

135. 46 C.F.R. § 5.30-3 (1979).

effectively as would a total failure to seek relief from the Commandant.¹³⁶ These limits run from the effective date of the order, which usually will be the time of its delivery to the respondent.¹³⁷ However, the sixty-day period for noting the grounds for the appeal runs from the receipt by the respondent of a copy of the transcript, if it has been requested.¹³⁸ The transcript, which is free,¹³⁹ must be requested simultaneously with the filing of the notice of appeal.¹⁴⁰ An appeal, however, may be taken without a transcript.¹⁴¹

Secondly, the scope of appellate review at this stage is quite broad, extending to any matters excepted to by the seaman, the sufficiency of the evidence, clear errors in the record, and matters going to jurisdiction.¹⁴² Further, the Commandant retains plenary power to "affirm, reverse; alter, or modify . . . or . . . remand" the initial decision.¹⁴³ This could be read to mean that he may *increase* the severity of the order as well as decrease it, but the Commandant's Decisions on Appeal refute the notion,¹⁴⁴ and the regulation concerning *sua sponte* review expressly bars such action.¹⁴⁵ Hence, this possibility has not served and should not serve to deter respondents from seeking relief from the Commandant. Particularly where a respondent has raised issues of a constitutional dimension, the administrative law judge's order should not be made harsher on appeal since this would place a burden on the privilege of raising constitutional questions.¹⁴⁶

Thirdly, provision has been made for stays¹⁴⁷ as well as for the issuance of temporary seaman's documents pending decision on the appeal.¹⁴⁸

136. *Bradshaw v. Siler*, 1976 A.M.C. 1924 (E.D. Va. 1975) (sustaining Commandant's refusal to entertain untimely appeal); *Jennings v. Smith*, 280 F. Supp. 1022 (S.D.N.Y. 1967) (same). See also *Cabales v. United States*, 300 F. Supp. 1323 (S.D.N.Y. 1968), *aff'd*, 412 F.2d 1187 (2d Cir. 1969). If an appeal is not timely filed, the administrative law judge's decision "is final and binding on the person charged as of the date that the decision is delivered to the person charged or his authorized representatives." 46 C.F.R. § 1.25 (b) (1979).

137. Compare 46 C.F.R. §§ 5.20-175 (a)-(c) (1979) with *id.* § 5.30-170 (f).

138. 46 C.F.R. § 5.30-3 (a) (1979).

139. *United States v. Fuller*, 330 F. Supp. 303, 305 (S.D.N.Y. 1970) (unsuccessful action by government to recover transcript cost from attorney for R.S. 4450 respondent).

140. 46 C.F.R. § 5.30-1 (c) (1979).

141. *Id.*

142. *Id.* § 5.30-1 (f).

143. *Id.* § 5.30-10.

144. See Decision on Appeal No. 570 (1952) (*Casper*); Decision on Appeal No. 1750 (1969).

145. 46 C.F.R. § 5.35-15 (a) (1979).

146. See also *North Carolina v. Pierce*, 395 U.S. 711, 744 (1969) (Harlan, J., concurring and dissenting), 726 (Douglas, J., concurring), noted in *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 187-92 (1969); *United States v. Jackson*, 390 U.S. 570 (1968), noted in *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 156 (1968).

147. 46 C.F.R. § 5.30-35 (c) (1979).

148. 46 C.F.R. § 5.30-15 (1979). Denial of a request for a temporary document must be appealed to the Commandant within 10 days of the administrative law judge's decision. *Id.* § 5.30-15 (a) (1).

The latter could be critical to a seaman who is without skills salable on shore. In many instances, of course, it may take as long to secure a decision on the temporary document application as it would to determine finally the pending appeal. Also of importance are the provisions for the exercise of clemency by the Commandant following a revocation or surrender of documents,¹⁴⁹ although it would be a mistake to consider this an effective way to reopen collaterally a suspension or revocation decision.¹⁵⁰

Finally, while a decision of the Commandant will be signed by him, it will have been formulated within the Office of the Chief Counsel at Coast Guard Headquarters. For a time, there was also a Permanent Board to Hear Oral Argument.¹⁵¹ Although oral argument could be made before this Board, it was not encouraged. Any memorandum the members prepared, and which might have found its way to the Commandant, was not subject to examination at the judicial review stage.¹⁵² More recently, however, the Permanent Board has fallen into disuse; no appeals have been heard in this fashion for over twenty years.

A reading of the regulations alone might lead one to believe that the only way a case could be examined by the Commandant would be if the administrative law judge had found the charges proved. There is no provision for appeals by the investigating officer who prosecuted the case. However, an examination of the Administrative Procedure Act leads to the alarming conclusion that even a finding of not guilty may be appealable within the agency at the instance of a party other than the respondent.¹⁵³ Even without a regulation specifically authorizing such appeals, once an interested person had been permitted to intervene at the hearing stage, he would be entitled under the APA to vindicate his interest at the Commandant level.¹⁵⁴ Could such a person claim reliance on the prosecutorial efforts of the Marine Inspection Office?¹⁵⁵ The possibility of an appeal by a party other than the respondent in not guilty cases would be consistent with a remedial theory underlying the proceedings; but if the proceedings

149. 46 C.F.R. § 5.13-1 (1979).

150. *See, e.g.,* Word v. United States, 223 F. Supp. 614 (S.D. Ala. 1963); Cruz v. Siler, Civ. No. 76-5348 (S.D.N.Y. June 23, 1978).

151. *See generally* Miller v. Smith, 292 F. Supp. 55, 57 (S.D.N.Y. 1968). *See also* 160 U.S. COAST GUARD L. BULL. 12 (1949); 163 U.S. COAST GUARD L. BULL. 6 (1949); 167 U.S. COAST GUARD L. BULL. 9 (1950).

152. On the other hand, in Cruz v. Siler, Civ. No. 76-5348 (S.D.N.Y. June 23, 1978), the district court had before it—and relied on—the report of the Clemency Board, as this was plainly part of the agency record.

153. 5 U.S.C. § 555 (b) (1976).

154. *See* text accompanying notes 95-107 *supra*.

155. *But see* Lloyd v. American Export Lines, Inc., 580 F.2d 1179 (3d Cir.), *cert. denied sub nom.* Alvarez v. American Export Lines, Inc., 434 U.S. 954 (1978); Spanish Int'l Broadcasting Co. v. FCC, 385 F.2d 615 (D.C. Cir. 1967).

seem to have a penal flavor,¹⁵⁶ then such a right could not be supported under current standards.¹⁵⁷

VI. APPELLATE REVIEW BY THE NATIONAL TRANSPORTATION SAFETY BOARD

If the order of the administrative law judge has been less drastic than revocation or suspension of a license or document (*i.e.*, if it has merely been an "admonition"), or if it has been so modified by the Commandant, the mariner may seek direct judicial review of the decision.¹⁵⁸ However, where a license or document has been revoked, suspended, denied,¹⁵⁹ or where the mariner is placed on probationary suspension,¹⁶⁰ further administrative review in the form of an appeal to the National Transportation Safety Board is required under the doctrine of exhaustion of administrative remedies.¹⁶¹

Review by the Safety Board is not only a legal prerequisite to judicial review,¹⁶² it is desirable because of the Board's independence from the Coast Guard. The Safety Board consists of five members appointed by the

156. *Compare* *Fredenberg v. Whitney*, 240 F. 819 (W.D. Wash. 1917) and *Bulger v. Benson*, 262 F. 929 (9th Cir. 1920), *aff'g* 251 F. 757 (W.D. Wash. 1918) with 24 OP. ATT'Y GEN. 136 (1902).

157. 46 C.F.R. §§ 1.20 (b), 5.35-1 (a) (1979). For an example of an abortive attempt by a supervising inspector of the Coast Guard's predecessor agency to take such action, see *Alwen v. Fisher*, 279 F. 164 (W.D. Wash. 1922), *aff'd*, 290 F. 8 (9th Cir. 1923).

158. *See* *Cabales v. United States*, 300 F. Supp. 1323 (S.D.N.Y. 1968), *aff'd*, 412 F.2d 1187 (2d Cir. 1969).

159. In license denial cases, there will not have been an APA hearing before an administrative law judge. Rather, the appeal will have been taken through the Coast Guard chain of command from the OCMI to the Commandant or his delegate. *See* 46 C.F.R. §§ 1.20 (b), 10.02-33, 10.13-33, 12.02-25 (1979). *See also* 46 C.F.R. § 10.25-7 (e) (2) (1979) (Commandant review of rejection of application for staff officer registration). Such appeals must be taken within 30 days of the decision appealed from. In the case of appeals from a denial of a request for a temporary license or document, however, the request, which evidently goes directly from the administrative law judge to Headquarters, must be filed within 10 days. 46 C.F.R. § 5.30-15 (a) (1) (1979). For regulations governing appeals from decisions regarding vessel inspections, see 46 C.F.R. § 2.01-70 (1979).

160. *Commandant v. Leskinen*, No. ME-57 (N.T.S.B. May 9, 1977) (dismissing appeal for want of jurisdiction).

161. *See generally* 49 U.S.C. § 1903 (a) (9) (1976); 49 C.F.R. pt. 825 (1978); 46 C.F.R. § 5.30-30 (1979).

162. *Desvaux v. Siler*, 1976 A.M.C. 2352 (S.D.N.Y. 1976). *But see* *Commandant v. Christen*, No. ME-72, slip op. at 3 & n.6 (N.T.S.B. Sept. 14, 1978) (noting civil action in M.D. La. brought by respondent against Coast Guard in which Safety Board was neither party nor privy). The district court's assertion of jurisdiction in *Christen* after the Safety Board had ruled was plainly wrong in light of the exhaustion doctrine and the statutory grant of jurisdiction to the courts of appeals. *Christen's* case was ultimately taken to the Fifth Circuit, which affirmed the Safety Board in an unpublished *per curiam* decision. *Christen v. N.T.S.B.*, No. 78-3500 (5th Cir. May 25, 1979).

President with senatorial confirmation,¹⁶³ and, although part of the Department of Transportation from 1967 to 1975, it now operates under a clear statutory mandate of independence from that Department and its subagencies.¹⁶⁴ At this stage the Coast Guard, in the person of the Commandant, becomes a party to an adversary proceeding which may (at the Safety Board's discretion)¹⁶⁵ include oral argument. The Chief Counsel's Office represents the Commandant before the Safety Board.¹⁶⁶

Although the Safety Board's regulations for seaman appeals are mercifully brief, a few aspects should be mentioned. The regulations establish a very short ten-day period from the date of receipt of the Commandant's decision in which to file a notice of appeal, and a twenty-day period thereafter for filing supporting briefs and memoranda and requesting oral argument.¹⁶⁷ Significantly, while the grounds for Safety Board review appear to be of a broader and perhaps more policy-oriented nature than those for Commandant appeals and reviews,¹⁶⁸ the alternatives open to the Safety Board are narrower than those of the Commandant.¹⁶⁹ The broad power of the Commandant to review an order and amend its terms is supplanted by a power to affirm or reverse, remand or dismiss. This difference creates an ambiguity as to the role of the Safety Board. Its powers on review make it more like an appellate court than a higher level in a regulatory agency, and yet the Safety Board may correct an "erroneous" finding of fact¹⁷⁰—a power the Commandant possesses only as to matters excepted to at the initial hearing or "clear errors in the record."¹⁷¹ The latter power is exercised sparingly.

The Safety Board has taken the view that it is powerless to consider the reasonableness or constitutionality of regulations of the agencies it oversees.¹⁷² Unlike the Commandant, the Safety Board cannot grant interim

163. 49 U.S.C. § 1902 (1976). Despite its multi-member composition, the Safety Board's decisions are nearly always unanimous. Separate opinions and dissents are extremely rare. *See, e.g.*, *Commandant v. Neilson*, 2 N.T.S.B. 2684, 2687 (1974) (Thayer, dissenting); *Commandant v. Neves*, 2 N.T.S.B. 2775, 2777 (1976) (Thayer, dissenting). The dissenting opinion is an equally *rara avis* in airmen's cases before the Safety Board. *See, e.g.*, *Administrator v. Pirkey*, 2 N.T.S.B. 2272, 2276 (1976) (Bailey, dissenting); *Administrator v. Wilson*, 2 N.T.S.B. 2454, 2456 (1976) (Bailey, dissenting); *Administrator v. Cooper*, 1 N.T.S.B. 1315, 1319 (1971) (McAdams & Burgess, dissenting).

164. 49 U.S.C. §§ 1901 (2), 1902 (a) (1976).

165. 49 C.F.R. § 825.25 (1978). *See, e.g.*, *Commandant v. Kuntz*, 1 N.T.S.B. 2158, 2161 (1969).

166. 46 C.F.R. §§ 5.30-30 (b)-(c) (1979).

167. 49 C.F.R. §§ 825.5, .20 (1978). On the requirement for filing a brief in order to perfect an appeal, *see* *Commandant v. Peters*, 1 N.T.S.B. 2152 (1968).

168. *Compare* 49 C.F.R. § 825.15 (1978) *with* 46 C.F.R. §§ 5.30-1 (f), 5.35-10 (1979).

169. *Compare* 49 C.F.R. § 825.30 (1978) *with* 46 C.F.R. § 5.30-10 (1979).

170. 49 C.F.R. § 825.15 (a) (1978).

171. 46 C.F.R. §§ 5.301-1 (f) (1)-(2) (1979).

172. *Graham v. N.T.S.B.*, 530 F.2d 319 (8th Cir. 1976).

réfief in the form of an extension of a temporary document.¹⁷³ While filing an appeal with the Commandant or the Safety Board does not automatically stay the decision below, such stays may be granted when a case has been appealed to the Board.¹⁷⁴

Having come into existence on April 1, 1967, the Safety Board's part in the regulatory process is becoming fairly well-defined, although the process has been slow. As of January 1, 1979, the Safety Board had issued only seventy-two marine decisions. This is a much smaller caseload than the Board has with respect to airman licenses.¹⁷⁵ There is still almost no body of judicial review case law dealing with Safety Board marine decisions,¹⁷⁶ although decisions of the Commandant had from time to time been the subject of judicial review.¹⁷⁷ Since review is available in the courts, it is to them that the inquiry now turns.

VII. JUDICIAL REVIEW

Considering the fact that the federal government has been granting and revoking mariners' documents of one sort or another for well over a century, it is surprising that so few revocation or suspension decisions have come before the courts on direct review. A number of cases have involved collateral attacks on R.S. 4450 proceedings. These cases will be considered first.

Perhaps the most frequent form of collateral attack has been the so-called "turnover" proceedings. These are statutory actions by seamen who have been logged for desertion and wish to reclaim their wages and effects from the custody of a district court.¹⁷⁸ The usual course is for the petitioning seaman to question the efficacy of the master's log entry,¹⁷⁹ perhaps demonstrating that the desertion logging has not been sustained in a Coast Guard hearing. For example, in *Petition of Sanuiti*,¹⁸⁰ the district judge noted that "[a]ttached to the petition was a typewritten copy of finding by the United States Coast Guard Examiner . . . to the effect that the petitioner was not in fact a deserter, but that he violated cer-

173. Compare note 148 *supra* with *Commandant v. Pompey*, 1 N.T.S.B. 2176 n.4 (1969). See also *Commandant v. Kuntz*, 1 N.T.S.B. 2158, 2161 n.7 (1969).

174. See 46 C.F.R. § 5.30-35 (c) (1979); 5 U.S. COAST GUARD, MARINE SAFETY MANUAL art. 72-9-25B. See, e.g., *Commandant v. Ernsler*, No. ME-67, slip op. at 4 n.5 (N.T.S.B. Dec. 1, 1978); *Commandant v. Neves*, 2 N.T.S.B. 2775 & n.4 (1976).

175. Coast Guard cases account for only a small part of the Safety Board's appellate business. For example, in 1976 the Safety Board decided 130 appeals by airmen but only 6 marine cases. 1976 N.T.S.B. Ann. Rep. 45 (1977).

176. At this writing there are no published opinions of the courts of appeals in marine cases, and only one unpublished opinion, *Christen v. N.T.S.B.*, No. 78-3500 (5th Cir. May 25, 1979). The Safety Board's Annual Reports to Congress for the years 1972-76 refer to only two judicial review actions in marine cases, both in district court.

177. See generally text accompanying notes 178-196 *infra*.

178. See 46 U.S.C. §§ 701, 705-706 (1976).

179. See 46 U.S.C. § 702 (1976).

180. 124 F. Supp. 69 (N.D.N.Y. 1954).

tain regulations relative to his failure to report to the ship, of which he was a crew member."¹⁸¹ The court went on to observe that "[t]he finding of the Coast Guard Examiner, unauthenticated in any manner, is not binding upon this court on the question of desertion."¹⁸²

From the decision one would have assumed that *Sanuiti* might be limited to its facts due to the informal way in which the court had been apprised of the Coast Guard decision. But it has been cited and relied on in later "turnover" cases as support for a more broad-ranging rejection of findings in R.S. 4450 cases. In *Larson v. United States*,¹⁸³ a seaman attempted to vacate a statutory forfeiture ordered for desertion, arguing that the Coast Guard had found him guilty of a "failure to join" and not guilty of desertion, thereby attempting to use the hearing examiner's decision as a shield. The claimant was allowed to recover his personal effects but not his wages. The district court commented, "The Examiner obviously misinterpreted the log. . . . In any event, the findings by a Coast Guard Examiner with respect to desertion are not binding upon the court."¹⁸⁴ On appeal, the Fourth Circuit stated, "The District Court, as we think rightly, attributed little weight to the examiner's findings in view of the fact that they were based on the statement of the appellant alone."¹⁸⁵

The "turnover" cases may be viewed as a variety of collateral review of Coast Guard decisions in which the agency decisions have been accorded little or no weight.¹⁸⁶ This raises the question whether the same underlying conduct should result in divergent consequences in actions by agencies of the same government theoretically applying separate parts of a single rational regulatory program. As will be seen shortly, there is a marked contrast between the weight given R.S. 4450 decisions in collateral areas such as "turnover" proceedings and those on direct judicial review.¹⁸⁷

181. *Id.* at 70.

182. *Id.*

183. 152 F. Supp. 252, 254 (E.D. Va. 1957), *aff'd*, 255 F.2d 166, 169 (4th Cir. 1958), *noted in* 1 P. EDELMAN, MARITIME INJURY AND DEATH 52 n.21 (1960).

184. 152 F. Supp. at 254 (citing *Sanuiti*).

185. 255 F.2d at 169. *See also* Petition of Tomkins, 1967 A.M.C. 1133 (S.D. Tex. 1965) (seaman unable to show captain had logged him improperly); *Kellar v. United States*, 273 F. Supp. 945, 951 (E.D. Va. 1967) (court ignored a letter from the Coast Guard advising it that an administrative hearing found desertion not proved).

186. In contrast, judicial decisions in "turnover" proceedings have been cited and relied on by the Safety Board, the Commandant, and Coast Guard administrative law judges as authoritative in the desertion area. *Commandant v. Kuntz*, 1 N.T.S.B. 2158, 2160 (1969), *citing In re Scott*, 143 F. Supp. 175 (N.D. Cal. 1956); *Decision on Appeal No. 1075* (1958); *In re USMMD No. Z607977-D7*, 1969 A.M.C. 995, 1001-03 (12th Coast Guard Dist. 1968).

187. Had the plaintiff in *Cabales v. United States*, 300 F. Supp. 1323 (S.D.N.Y. 1968), *aff'd*, 412 F.2d 1187 (2d Cir. 1969), refrained from commencing his action until the hearing and review process had concluded, this divergence would have been squarely presented, since his action presumably would then have included both an attack on the forfeiture of his wages and effects and a request for judicial review of the agency decision.

In *Juan v. Grace Line, Inc.*,¹⁸⁸ the Coast Guard process was not itself the subject of a cause of action, but rather was raised in defense by a shipowner in a Jones Act case. The seaman had voluntarily deposited his document with the Coast Guard pending the issuance of a Fit for Duty slip from the Public Health Service.¹⁸⁹ The examining physician described the man as *permanently* not fit for duty and the mariner commenced an action to recover for the injuries leading to his incapacitation. The court held that the jury's verdict in favor of the seaman was excessive and ordered a partial new trial on damages, and found that no regulation authorized the Public Health Service to render a *permanent* Not Fit for Duty finding.¹⁹⁰ As the opinion properly points out, the voluntary deposit of a document is to be distinguished from a revocation on grounds of physical or mental incompetence.¹⁹¹ Nevertheless, the case suggests yet another context in which collateral review might be available from the courts.

The final variety of collateral attack which may be available in R.S. 4450 cases is closely related to the direct judicial review. This method is seen in *Cabales v. United States*,¹⁹² which involved a log entry for desertion, and, like *Juan*, illustrates how judicial review of a disciplinary decision may be intertwined with the vindication of other rights of the seaman. In *Cabales* a prayer for an injunction against a pending Coast Guard hearing was joined with claims against the United States as shipowner, the master, and the general agent for the ship, to recover wages and personal effects as well as statutory penalties for nonpayment of wages.¹⁹³ Although distinct yet related causes of action were raised in the single suit by the seaman, the court decided each on separate grounds, rejecting the request for an injunction because of a failure to exhaust available administrative remedies.

*Hendry v. United States*¹⁹⁴ also illustrates how questions relating to R.S. 4450 hearings may be raised collaterally in another related cause of action. Hendry sued under the Federal Tort Claims Act for negligence and malpractice arising out of a Public Health Service finding that he was physically not fit for duty as a merchant marine deck officer. As in *Juan*, the Coast Guard refused, after a voluntary deposit, to return the plaintiff's papers when the doctors found him unfit for sea duty. The district court found no evidence of the negligence, malpractice, or emotional injuries alleged, and, significantly, held the medical evaluations of

188. 299 F. Supp. 1259 (S.D.N.Y. 1969).

189. See 46 C.F.R. § 5.05-15 (4) (1979).

190. 299 F. Supp. at 1263. See also U.S. PUBLIC HEALTH SERVICE, DIV. OF HOSPITALS AND CLINICS, OPERATIONS MANUAL, pt. B, ch. 1, § 2.4. But see *Commandant v. Owens*, 1 N.T.S.B. 2186, 2188 (1969).

191. 299 F. Supp. at 1263. See also *Hendry v. United States*, 280 F. Supp. 27 (S.D.N.Y. 1968), *aff'd*, 418 F.2d 774 (2d Cir. 1969).

192. 300 F. Supp. 1323 (S.D.N.Y. 1968), *aff'd*, 412 F.2d 1187 (2d Cir. 1969).

193. 46 U.S.C. §§ 596-597 (1976).

194. 280 F. Supp. 27 (S.D.N.Y. 1968), *aff'd*, 418 F.2d 774 (2d Cir. 1969).

Fidell: Fidell: Improving Competence in the Merchant Marine:

seamen by the Public Health Service at the request of the Coast Guard to be discretionary acts not within the ambit of the Tort Claims Act.¹⁹⁵ (If the lower court in *Hendry* was correct, then Coast Guard proceedings would be discretionary for FTCA purposes, but nondiscretionary for purposes of judicial review under the Administrative Procedure Act.) On appeal, the Second Circuit agreed that there was no evidence of negligence, but held the "discretionary function" exception inapplicable after examining the agency action involved and finding it not of a policy-making nature.¹⁹⁶ As a result, the *Hendry* route may be a promising one if negligence can be proven. Rewards could be great in the case of success since money damages could be awarded as well as the reinstatement of the mariner's document or license.

Thus far the discussion has focused on collateral remedies for seamen involved in R.S. 4450 proceedings. Turning to direct judicial review of such cases, the final agency decision, as has been indicated, may rest with either the Commandant or the National Transportation Safety Board, depending upon whether the order is one that may be appealed to the Safety Board. If the Commandant is the final arbiter, review is available in district court.¹⁹⁷ Where a Safety Board decision is on review, jurisdiction lies in the courts of appeals.¹⁹⁸ District court review will also be available regarding Commandant decisions denying clemency or refusals

195. 280 F. Supp. at 31-35. See also 28 U.S.C. § 2680 (a) (1976); Saferstein, *Nonreviewability: A Functional Analysis of "Committed To Agency Discretion,"* 82 HARV. L. REV. 367 (1968) (discussing 5 U.S.C. § 701 (a) (1976)). See also *Garipey v. The King*, [1939] Ex. C.R. 321, [1940] 2 D.L.R. 12 (1939).

196. 418 F.2d at 779-84. Under Judge Waterman's analysis, if a particular delicensing or refusal to return a surrendered document attacked in a Federal Tort Claims Act action were found to be an exercise of discretion—one indication of which would be the relative rank of the officials involved—the district court would lack jurisdiction. The opinion thus encourages appellants to couch their complaints on a factual as opposed to a policy basis, and forecloses the FTCA suit as a means of collateral review of a regulation.

197. Under the Safety Board's original judicial review provision, its decisions were to be reviewed "to the same extent and in the same manner as if such orders and actions had been by the department or agency exercising such functions, powers, and duties immediately preceding their transfer" to the Board. 49 U.S.C. § 1653 (c) (1970). Thus, while aviation certificate cases were reviewable in the courts of appeals, merchant marine cases would be heard in a district court. *E.g.*, *Keating v. United States*, Civ. No. 74-262 (E.D. La. Apr. 14, 1975), *dismissing appeal from Commandant v. Keating*, 2 N.T.S.B. 2654 (1973). The Independent Safety Board Act of 1974 corrected this anomaly by making the Safety Board's marine decisions reviewable in the courts of appeals, but left the situation with respect to judicial review of any Commandant's Decisions on Appeal that are not reviewable by the Board as it had always been. The suggestion in 1 M. NORRIS, *THE LAW OF SEAMEN* § 87 (3d ed. 1970 & Supp. 1978), that the district courts have no role at all in direct review of R.S. 4450 cases, therefore, is incorrect. *Dietze v. Siler*, 414 F. Supp. 1105 (E.D. La. 1976), went directly from the Commandant to district court because the Safety Board had redelegated its jurisdiction in suspension cases to the Commandant. Under current procedures, the case would have gone from the Commandant to the Board and then on to a court of appeals.

198. 49 U.S.C. § 1903 (d) (1976).

to return documents which have been voluntarily surrendered in order to avoid a hearing.¹⁹⁹

The courts are loath to interfere with administrative processes prior to entry of a final order of the agency. Under the exhaustion doctrine,²⁰⁰ interlocutory relief has been denied with respect to a pending R.S. 4450 hearing despite the mariner's claim that he was not subject to Coast Guard disciplinary jurisdiction.²⁰¹ Similarly, where no hearing has been conducted, a district court will not enjoin a Coast Guard proceeding on grounds of agency bias or alleged inadequacy of the time allowed for preparation of a defense.²⁰² Issues not raised before the administrative agency will not be entertained on judicial review.²⁰³

Some interlocutory matters may be brought properly to a district court. In *Ingham v. Smith*,²⁰⁴ an action to review the revocation of a merchant mariner's document for possession of marijuana, the court directed the Commandant to issue a temporary document to the plaintiff pending judicial review. Whether this assistance from the court, like decisions to grant bail in a criminal case²⁰⁵ or issue a preliminary injunction,²⁰⁶ is a function of the likelihood of a litigant's success on the merits cannot be determined from the court's opinion; in this case the Commandant prevailed. In another case, *Miller v. Smith*,²⁰⁷ the Commandant obtained interlocutory relief from the district court in the form of a protective order against an interrogatory posed by the plaintiff which requested access to memoranda of the now-defunct Permanent Board to Hear Oral Argument.

199. *Word v. United States*, 223 F. Supp. 614 (S.D. Ala. 1963), noted in 332 U.S. COAST GUARD L. BULL. 19 (1963). But see *Popham v. Arzt*, 1960 A.M.C. 987 (S.D.N.Y. 1960), noted in 288 U.S. COAST GUARD L. BULL. 15 (1960); *Perkins v. Captain of the Port*, 1961 A.M.C. 1271 (D. Md. 1961) (*semble*). See also *Harris v. Smith*, 1969 A.M.C. 1921 (S.D.N.Y.), *aff'd*, 418 F.2d 899 (2d Cir. 1969) (no right to counsel at time of voluntary surrender); *Hasler v. United States*, 1972 A.M.C. 2185 (N.D. Cal. 1971) (voluntary surrender set aside where Coast Guard misled mariner, finding deprivation of statutory right to counsel).

200. See, e.g., *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

201. *Cabales v. United States*, 300 F. Supp. 1323 (S.D.N.Y. 1968), *aff'd*, 412 F.2d 1187 (2d Cir. 1969); *Miller v. Siler*, Civ. No. 75-308 (E.D. La. Feb. 14, 1975); *McDevitt v. Gunn*, 182 F. Supp. 335 (E.D. Pa. 1960).

202. *Colucci v. Carpenter*, 47 F.R.D. 549, 551, 1968 A.M.C. 2356, 2353-59 (S.D.N.Y. 1968).

203. See *Christen v. N.T.S.B.*, No. 78-3500, slip op. at 3 (5th Cir. May 25, 1979), quoting *United States v. Tucker Truck Lines*, 344 U.S. 33, 37 (1952).

204. 274 F. Supp. 137, 138 (S.D.N.Y. 1967). See also *Commandant v. Burke*, 2 N.T.S.B. 2784, 2787-88 (1976), noting *Burke v. Bender*, Civ. No. 74-H-1411 (S.D. Tex. Nov. 8, 1974); *Commandant v. Neves*, 2 N.T.S.B. 2775 n.4 (1976) (noting district court order requiring Commandant to return license pending N.T.S.B. appeal).

205. See 18 U.S.C. § 3146 (b) (1976) ("weight of evidence against the accused" is to be considered in setting conditions for pretrial release).

206. See, e.g., *Virginia Petroleum Jobbers' Ass'n v. F.P.C.*, 259 F.2d 921 (D.C. Cir. 1958).

207. 292 F. Supp. 55 (S.D.N.Y. 1968).

When necessary, the district courts have displayed a willingness to place their powers at the service of the Coast Guard for the purpose of enforcing agency subpoenas, whether at the request of the presiding officer²⁰⁸ or the respondent.²⁰⁹ The courts have acted to enforce *subpoenas duces tecum*²¹⁰ as well as *subpoenas ad testificandum*,²¹¹ although a merchant mariner's document itself may not be subpoenaed unless it is required as evidence in the case.²¹² On the whole, the courts have been cooperative with Coast Guard hearings as to interlocutory matters, providing contrast to the course they have set in the area of collateral review.

Given a reviewable action by either the Commandant or the Safety Board, and assuming available administrative remedies have been exhausted, the practitioner will be faced initially with the task of finding a court with jurisdiction over the subject matter and the parties, and in which venue can properly be laid. Before the Independent Safety Board Act of 1974 was passed, the usual course was for the seaman to seek review by the district court in the district of his residence or in which the R.S. 4450 hearing had been held; an approach that for some years effectively shut off review for a variety of reasons.²¹³

These obstacles to review²¹⁴ were removed through the passage of the Mandamus and Venue Act of 1962.²¹⁵ Under section 1391 (e) of the

208. *In re Merchant Mariners Documents Issued to Dimitratos*, 91 F. Supp. 426 (N.D. Cal. 1949). The request for judicial enforcement of a subpoena is instituted by letter to the cognizant United States Attorney. 417 U.S. COAST GUARD L. BULL. 2-3 (1979). Agency subpoenas not so enforced cannot be the basis for a civil penalty as a contempt. *Id.*

209. *Ismail v. Isbrantsen Co.*, 1951 A.M.C. 529 (S.D.N.Y. 1949).

210. *In re License 60376*, 1950 A.M.C. 1647 (E.D. Mich. 1950).

211. *Ismail v. Isbrantsen Co.*, 1951 A.M.C. 529 (S.D.N.Y. 1949).

212. *In re License 60376*, 1950 A.M.C. 1647 (E.D. Mich. 1950).

213. The Commandant was thought to be an indispensable party to the action. *See Perkins v. Captain of Port*, *supra* note 199 (dismissing appeal on grounds that only Commandant could reissue documents involved in the dispute); *Popham v. Arzt*, 1960 A.M.C. 987 (S.D.N.Y. 1960) (reaching a similar result as in *Perkins* where defendant was the senior investigating officer at the Marine Inspection Office in New York). *See also Provenzano v. Richmond*, 1960 A.M.C. 985 (S.D.N.Y. 1960), noted in 288 U.S. COAST GUARD L. BULL. 15 (1960) (held that service of process on a Captain in Coast Guard Headquarters would not suffice as service on the Commandant); *Warren v. Arzt*, 18 F.R.D. 11, 1955 A.M.C. 2024 (S.D.N.Y. 1955), noted in 233 U.S. COAST GUARD L. BULL. 12 (1955) (FED. R. CIV. P. 4 (d)(4) requires service on U.S. Attorney and Attorney General in addition to agency). *But see Colucci v. Carpenter*, 47 F.R.D. 549, 550, 1968 A.M.C. 2356, 2357 (S.D.N.Y. 1968) (failure to serve not fatal where U.S. Attorney appeared for all defendants). *See generally* Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1493-99 (1962).

214. *E.g.*, effecting personal service on the Commandant in Washington, D.C., held void when process issued out of district court in New York. *Provenzano v. Richmond*, 1960 A.M.C. 985 (S.D.N.Y. 1960); *Popham v. Arzt*, 1960 A.M.C. 987 (S.D.N.Y. 1960).

215. 28 U.S.C. § 1391 (e) (1976), discussed in *Jacoby, The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review*, 53 GEO. L.J. 19, 32-45 (1964).

Code it is now possible to secure jurisdiction over the Commandant by service of process in the form of certified mail. As a result, it is still desirable to name the Commandant as a party if the case does not involve review of a Safety Board decision. Doing so, however, will now not involve an attempt to use the process of a court beyond its limits. Despite a *quaere* as to venue in *Miller v. Smith*,²¹⁶ section 1391 (e) seems to have done its job so well that the issue of venue is almost never mentioned in the post-1962 cases.²¹⁷

More fundamental than venue is the subject matter jurisdiction of the reviewing court. At times the district courts had taken a mechanical approach in this regard, and had looked more at the form of the action than the merits. The early case of *In re Soto*,²¹⁸ unsuccessful for other reasons, was styled a petition to review and an order to show cause. In *Warren v. Arzt*,²¹⁹ which arose as a petition for a show cause order, the district court felt constrained to remind the plaintiff that the proper method for commencing an action for judicial review of an agency order was the familiar technique of serving the summons and complaint on the defendants.

Actions for review have occasionally been cast in the mandamus mold. Thus, in *Popham v. Arzt*,²²⁰ Judge Levet noted that "the complaint must be viewed in the nature of mandamus,"²²¹ and denied relief, among other reasons, because the district court did not then possess mandamus jurisdiction.²²² This obstacle was also eliminated by the Mandamus and Venue Act of 1962, which, in addition to expanding venue as noted above, conferred jurisdiction "in the nature of mandamus" upon all district courts.²²³ Consequently, since 1962, cases couched in the language of mandamus have not failed on the jurisdictional question.²²⁴

Section 10 of the APA was long thought to be an alternative source of jurisdiction to section 1361. Before the Supreme Court held that section 10 is not a grant of jurisdiction to the district courts,²²⁵ courts in R.S. 4450 cases had consistently sustained jurisdiction "under" the Act.²²⁶ Some

216. 292 F. Supp. at 56.

217. Venue was specifically approved by the court in *Rechany v. Roland*, 235 F. Supp. 79 (S.D.N.Y. 1964).

218. 73 F. Supp. 725 (S.D.N.Y. 1947).

219. 18 F.R.D. 11, 1955 A.M.C. 2024 (S.D.N.Y. 1955).

220. 1960 A.M.C. 987 (S.D.N.Y. 1960).

221. *Id.* at 988.

222. See *M'Intire v. Wood*, 11 U.S. (7 Cranch) 504 (1813), discussed in Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 310-13 (1967).

223. 28 U.S.C. § 1361 (1976).

224. *Ingham v. Smith*, 274 F. Supp. 137 (S.D.N.Y. 1967); *Jennings v. Smith*, 280 F. Supp. 1022 (S.D.N.Y. 1967), noted in 378-79 U.S. COAST GUARD L. BULL. 6 (1967).

225. *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

226. See, e.g., *Wheatley v. Shields*, 292 F. Supp. 608 (S.D.N.Y. 1968); *Rechany v. Roland*, 235 F. Supp. 79 (S.D.N.Y. 1964).

courts even treated matters under section 10 which, because they requested mandatory injunctive relief, could have been viewed as section 1361 cases.²²⁷ In *Ingham v. Smith*²²⁸ the opinion referred to an "action in the nature of mandamus [sic] brought under" the APA,²²⁹ thus running together the section 10 and section 1361 bases for jurisdiction.

Even after the rejection of section 10 as a grant of jurisdiction, counsel for an R.S. 4450 respondent should encounter no difficulty in finding a court with jurisdiction to review a decision of either the Commandant or the Safety Board. If, as will generally now be the case, review is sought of a decision of the Safety Board (rather than of the Commandant), the proper course is for "any person disclosing a substantial interest in the order" to file a petition for review in the "appropriate" United States court of appeals or the United States Court of Appeals for the District of Columbia Circuit.²³⁰ The petition must be filed within sixty days after entry of the order on review.²³¹ The Coast Guard appears to have no right to seek judicial review of an adverse ruling of the Safety Board.²³²

Whether judicial review will ultimately benefit the mariner is another matter. The following language from a license *issuance* case is instructive:

The courts have no authority to review the findings of the steamboat inspectors by appeal or writ of error. The most they can do is to see that the inspectors act within their jurisdiction, and that the constitutional and statutory rights of citizens are not impaired.²³³

Though the case is old, this language may still convey the flavor of judicial review of merchant marine hearings. While no one today would agree that "there is serious doubt that . . . [a] court has any authority to interfere with" a decision of the Commandant²³⁴ or the Safety Board, the availability of judicial review in R.S. 4450 cases generally has proven to be of rather little practical value to persons charged. In point of fact, aside from state pilotage cases where the courts have ruled that the mariner was not sailing under the authority of his federal license (and hence was not subject to R.S. 4450 jurisdiction),²³⁵ the only respondents known to have

227. *O'Kon v. Roland*, 247 F. Supp. 743, 745 (S.D.N.Y. 1965), noted in 359 U.S. COAST GUARD L. BULL. 11 (1966).

228. 274 F. Supp. 137 (S.D.N.Y. 1967).

229. *Id.* at 138.

230. 49 U.S.C. § 1903(d) (1976).

231. *Id.*

232. See *Lee v. CAB*, 225 F.2d 950 (D.C. Cir. 1955) (reaching this conclusion in an airman's case; court split two to one), cited in Hamilton, *Administrative Practice in Aviation Medical Proceedings*, 26 EMORY L.J. 565, 585 n.110 (1977).

233. *Williams v. Potter*, 223 F. 423, 424 (2d Cir. 1915), *aff'g* 210 F. 318 (N.D.N.Y. 1913).

234. *In re Soto*, 73 F. Supp. 725, 726 (S.D.N.Y. 1947), citing 11 Fed. Reg. 13971 (1946).

235. *Soriano v. United States*, 494 F.2d 681 (9th Cir. 1974); *Dietze v. Siler*, 414 F. Supp. 1105 (E.D. La. 1976).

succeeded in securing permanent judicial reversal of a modern²³⁶ American merchant marine administrative decision were the plaintiffs in *Clinton v. Commandant*,²³⁷ *Rechany v. Roland*,²³⁸ and *Van Teslaar v. Bender*.²³⁹

The reason for this pattern of successes in court by the government is the very narrow scope of review powers conferred upon the courts. Review is limited to determining whether the agency decision is supported by substantial, reliable and probative evidence based on the record as a whole.²⁴⁰ In *Wheatley v. Shields*,²⁴¹ for instance, a Coast Guard decision was sustained because there was substantial evidence "upon which a reasonable mind could properly arrive at the conclusion reached."²⁴² In applying this test the courts have consistently distinguished the scope of agency review from the scope of review exercised by an appellate court with regard to a trial court,²⁴³ or from the supposed result if the court had been empowered to make a de novo ruling on the record.²⁴⁴ These principles are

236. Appellants from decisions of the predecessor agencies seem to have been more successful in obtaining judicial review. See *Fisher v. Alwen*, 290 F. 8 (9th Cir. 1923), *aff'g* 279 F. 164 (W.D. Wash. 1922); *Bulger v. Benson*, 262 F. 929 (9th Cir. 1920), *aff'g* 251 F. 757 (W.D. Wash. 1918), *discussed in* Decision on Appeal No. 891 (1956) and Decision on Appeal No. 1574 (1966); *Fredenberg v. Whitney*, 240 F. 819 (W.D. Wash. 1917); *Joyce v. Bulger*, 240 F. 817 (W.D. Wash. 1916).

237. Civ. No. 63-577-S (S.D. Cal. Mar. 31 and Apr. 7, 1965). Judge Stephens set aside a Commandant decision in a case involving a charge that a license renewal had been secured by means of a false statement. The court made factual findings at odds with those of the Commandant, and concluded that no false statement had in fact been made by the mariner. The case is discussed in the administrative law judge's opinion in *Commandant v. O'Callaghan*, No. ME-58 (N.T.S.B. July 29, 1977).

238. 235 F. Supp. 79 (S.D.N.Y. 1964).

239. 365 F. Supp. 1007 (D. Md. 1973) (unjustified change of hearing examiners during hearing).

240. The record on review includes the transcript of proceedings before the administrative law judge, his decision and order and associated documents, and decisions of the Commandant and Safety Board. It has been held not to include memoranda prepared by the members of the board that formerly heard oral argument. *Miller v. Smith*, 292 F. Supp. 55, 57-58 (S.D.N.Y. 1968); *Ingham v. Smith*, 274 F. Supp. 137, 145 (S.D.N.Y. 1967); *Rechany v. Roland*, 235 F. Supp. 79, 81 n.2 (S.D.N.Y. 1964). The transcript taken before the latter board *may*, however, constitute a portion of the record. *Ingham v. Smith*, 274 F. Supp. 137 (S.D.N.Y. 1967). In Britain and Canada, in contrast, the reviewing court may take new evidence, even as to events occurring after the decision being appealed. See BRITISH RULE 20 (h), at 539; CANADIAN RULE 14, at 429.

241. 292 F. Supp. 608 (S.D.N.Y. 1968).

242. See also *Ingham v. Smith*, 274 F. Supp. 137, 146 (S.D.N.Y. 1967).

243. *O'Kon v. Roland*, 247 F. Supp. 743, 750 (S.D.N.Y. 1965).

244. Compare *Wheatley v. Shields*, 292 F. Supp. 608, 610 (S.D.N.Y. 1968) with *Craddock v. Minister of Transport*, [1948] Ex. C.R. 501, 506. The broader scope of review in Canada probably reflects both an expansive concept of the "record on review," see note 240 *supra*, and the availability of technical expertise to the reviewing court in the form of assessors with maritime qualifications. See CANADIAN RULE 11, at 428. Where a technical matter of seaman's judgment is concerned, the assessor's decision will be given considerable weight. See, e.g., *In re Merchant Shipping Acts*, 80 L.I. L. Rep. 692, 698 (Adm. Div. 1947); *The Corchester*, [1956] 3 All E.R. 878, 890 (Adm. Div.). But see *Afran Transport. Co. v. S.S. Transcolorado*, 458 F.2d 164, 170-71 & n.15 (5th Cir. 1972) (district judge held "entitled to receive

illustrated by *Rechany*, where the central question was whether a purser had committed an act of misconduct by entering a female passenger's stateroom for reasons unrelated to the passenger's welfare or safety. The court held "substantial evidence to support [the critical] finding is wholly lacking."²⁴⁵ Admittedly Judge Bryan's extended comment on the evidence considered by the hearing examiner and the Commandant suggests a broad-ranging and energetic review, but the case may equally be viewed as an application of the "no evidence" rule established by the Supreme Court in *Thompson v. Louisville*²⁴⁶ because the district court found no basis for the examiner's central finding.

The concept of "probative evidence" may be used defensively by the government in R.S. 4450 cases, as in *Jennings v. Smith*,²⁴⁷ where the reviewing court noted that no such evidence had been adduced by the respondent in support of a request to the Commandant for permission to file an untimely notice of appeal from an examiner's decision. Related categories of "arbitrary and capricious" agency action are corollaries of the evidentiary scope of review rules, and may apply more specifically to cases involving attacks on the regulatory process, as opposed to actions to review findings of fact and the application of legal standards to such findings.²⁴⁸

In view of the consistency with which courts have sustained the administrative agency in suspension and revocation proceedings, the reported cases offer little cause for rejoicing among defense counsel seeking to reverse findings and orders under R.S. 4450. Where a relatively lenient order has been entered, involving no period of "outright" suspension of a document or license, the economics of the situation effectively may preclude seeking review.

To some extent the decision to seek review may also be a function of the type of alleged conduct or condition that gave rise to the Coast Guard hearing. For example, a reviewing court will be better able to decide a case, and therefore arguably more likely to reverse a decision, that involves a revocation based upon a state or federal conviction for a narcotics violation than one involving a charge of negligence leading to a collision, grounding or boiler casualty. In the former situation, there is little reason for a reviewing court to defer to an agency decision that a state court is or is not a "court of record" for purposes of the narcotics revocation statute.²⁴⁹ The closer the inquiry approaches highly technical factual or

and consider the report and findings [of C. Z. Board of Local Inspectors] somewhat like his English Brothers would the assistance of the Elder Brethren of Trinity House"), but where an assessor ventures to use lawyers' language the contrary may result. See *In re Merchant Shipping Acts*, 80 Ll. L. Rep. at 694-95 (argument of counsel).

245. 235 F. Supp. at 84.

246. 362 U.S. 199 (1960).

247. 290 F. Supp. 1022 (S.D.N.Y. 1967).

248. See, e.g., *id.*; *Word v. United States*, 223 F. Supp. 614 (S.D. Ala. 1963).

249. 46 U.S.C. §§ 239a-b (1976).

interpretive matters, the more likely it becomes that a court will rely upon and defer to the expertise of the agency.

On the other hand, federal courts sitting in admiralty have confronted difficult, technical, and "salty" issues since the earliest days of the Republic.²⁵⁰ A charge of negligent management of a propulsion system similarly would not make an impossible demand on a court which regularly hears negligence matters as part of its diversity jurisdiction. Consequently, it is as difficult to indicate the contexts in which R.S. 4450 decisions may enjoy a special weight on judicial review as it is to make a similar judgment as to the court's posture in cases involving a review of any agency's actions.

VIII. CONCLUSIONS AND RECOMMENDATIONS

In a time of increasing concern over the proliferation of federal regulatory programs, there can be little question as to the need for an administrative mechanism for ensuring personnel competence and suitability in the merchant fleet. Issues of crew competence are becoming increasingly critical to vessel owners and operators. Greater capital investment in more sophisticated ships and equipment, coupled with the imposition of increasingly strict liability for pollution-causing accidents will place a premium on professional conduct by master and crew alike. The stakes are bigger, and management and labor require a rational, comprehensive and well-organized administrative process for governance of crew licensing and conduct.

Whether the same is true with respect to disciplinary actions is not as clear. It is tempting to suggest that purely disciplinary issues should be relegated to the criminal justice system subject only to the power of the vessel master to take immediate action at sea. Beyond this, there are several specific areas where changes in the R.S. 4450 program could profitably be considered.

Suspension and revocation proceedings should have greater impact on the persons being regulated. In some ports the conclusion has been reached by mariners that misconduct or incompetence will be overlooked by the Coast Guard. As in any prosecutorial scheme, there is an unavoidable element of discretion in selecting cases for R.S. 4450 hearings. Not every case can be followed through to a hearing, nor should every case be brought before an administrative law judge. However, in those cases selected for prosecution, more stringent orders than have generally been

250. For example, one may wonder how far a reviewing court should defer to agency expertise in deciding whether a respondent has been "cured" for purposes of the narcotics provisions, given the fact that the legislative history suggests that the test for "cure" is drawn from the traditional admiralty doctrine of maintenance and cure. See *Revocation or Denial of Seamen's Documents to Narcotics Law Violators: Hearing on H.R. 8538 Before a Subcomm. of the Sen. Comm. on Interstate and Foreign Commerce*, 83d Cong., 2d Sess. 4 (1954) (testimony of Capt. James D. Craik, Chief, Merchant Vessel Personnel Div., U.S. Coast Guard).

entered will help to vindicate the interest of the government and the maritime industries in the safety of life and property at sea. Orders requiring additional or remedial training could also be considered.

Even if R.S. 4450 hearings are properly described as remedial, the deterrent effect of an order on other mariners should be considered by the presiding administrative law judge. For this deterrent effect to be felt, however, orders should be better published among mariners, rather than the present reliance on the harbor "grapevine" for dissemination of hearing results. Wider dissemination could be accomplished by the preparation and distribution in every Coast Guard district, for example, of a quarterly summary—in plain English—of decisions rendered. Responsible labor organizations, which have already shown substantial interest in aiding the cause of shipboard discipline and safety in many cases, should also be encouraged to carry home to their members the serious consequences of misconduct, negligence, or violation of the law. Close contact between union locals and Marine Inspection or Marine Safety Offices already exists in joint supervision of the payment of earnings to mariners. This avenue of communication should be nurtured to maximize the role of the unions as allies in the campaign for shipboard safety and discipline.

The rights of respondents in suspension and revocation hearings should be scrupulously protected. The adverse consequences of an administrative law judge's order or of a voluntary surrender to avoid a hearing have been suggested early in this article. Since Coast Guard hearings are fundamentally adversary proceedings, the two sides should start out on substantially the same footing. Most notably, there should be a rethinking of the issue of a right to free lawyer counsel for indigent seamen, and of the issue of a right to counsel at the investigatory and voluntary surrender stages. Additionally, legal aid societies and local bar associations should be encouraged to make their members available upon request for Coast Guard hearings. The availability and effectiveness of legal assistance from the bar, however, probably will be reduced if the procedures and precedents remain scattered and undefined, leaving assigned attorneys with the unfortunate task of trying to unravel this arcane area of law. Looking to the government side, the disciplinary process also would be assisted by the assignment of additional officers with legal training to marine inspection investigative functions, particularly as mariners avail themselves increasingly of lawyer counsel.

Related to the right to counsel is the role of precedent in Coast Guard hearings. Since one purpose of the doctrine of *stare decisis* is to provide notice to regulated persons of the likelihood of adverse administrative action, the continued growth of a body of thoughtful precedent should be encouraged. The Safety Board's decisions, as well as those of the Commandant, already show an understanding of the value of precedent. Expanded distribution and speedier publication of Commandant and Safety Board decisions under R.S. 4450 would be desirable, and could be

accomplished through an expansion of the editorial policies of *American Maritime Cases* or the *Proceedings of the Marine Safety Council*, a Coast Guard publication. Decisions on Appeal not reviewed by the Safety Board should, in particular, be the subject of a formal reporting service. Continued maintenance of the Coast Guard's index to R.S. 4450 decisions on a current basis will also be useful in this connection.

One area in which a reevaluation is long overdue is the Table of Average Orders. A mariner subject to governmental sanctions which could result in a loss of his livelihood is entitled to more accurate notice of the possible consequences of his misconduct than the Table currently provides. The Table is stale and should be either updated or scrapped.

Finally, the evidentiary status of log entries could be reconsidered. While the present statute affords a semblance of confrontation rights, preparation of the entry by one who may well be an interested party raises a substantial issue as to the fairness of the doctrine giving the entry prima facie weight. Despite the special status the law has long afforded to log entries, the use of such entries as evidence should be restricted to the rare case where the author cannot conveniently be deposed, and even then should comport with standards similar to those governing proffers of business records into evidence. The balance between the need to keep vessels moving in commerce and the mariner's right to be confronted by adverse witnesses can properly be reexamined to this extent without detriment to the needs of the industry.

A continuing search for further ways to rationalize the legislative and administrative framework should be conducted. Because of the haphazard way in which federal maritime safety policy has developed, the statutes and regulations are laden with anomalies and antiquities. For example, there is no reason that charges of violations of statute or regulation under section 239 (g) should today be limited to Title 52 of the Revised Statutes and regulations issued thereunder,²⁵¹ since in any event they can be charged as misconduct. The needless complications surrounding the exercise of federal jurisdiction over pilots sailing under the authority of state licenses²⁵² should be corrected by legislation.²⁵³ Malpractice as a pilot—

251. 46 C.F.R. § 5.05-20 (b) (1979). For example, violation of various federal environmental laws should be chargeable as violations of law rather than as misconduct, as is presently done. See Fidell, *Enforcement of the Fishery Conservation and Management Act of 1976: The Policeman's Lot*, *supra* note 3, at 538 n.134, citing *United States v. License No. 87816 (Cox)*, No. 11-0056-HJG-75 (11th Coast Guard Dist. Nov. 4, 1975) (charge of misconduct based upon harassment of seal in violation of Marine Mammal Protection Act); *United States v. License No. 438175 (Connors)*, No. 11-044-HJG-74 (11th Coast Guard Dist. Oct. 22, 1974).

252. See, e.g., *Soriano v. United States*, 494 F.2d 681 (9th Cir. 1974); *Herring v. Bender*, Civ. No. 73-3860 (D. Haw. June 19, 1974); *Dietze v. Siler*, 414 F. Supp. 1105 (E.D. La. 1976); 5 U.S. COAST GUARD, MARINE SAFETY MANUAL art. 71-6-35A.

253. Such legislation has been urged by the Comptroller General, GAO Report, *supra* note 50, at 58-61, proposed by the Administration and passed by the Senate. S. No. 682, 95th Cong., 1st Sess. (1977). The cognizant House committee conducted hearings but declined to report a bill "since none of the advocates of

whether serving under a state license or not—fairly raises a question as to whether the individual's federal license should be withdrawn.

The process of eliminating anomalies also requires that procedures for the disposition of wages and effects of deserting seamen be changed. The decision in the R.S. 4450 case should be given greater weight in "turn-over" proceedings in district court, or the Coast Guard's administrative law judges should be given the district court's present jurisdiction over wages and effects.²⁵⁴ The latter approach would leave to the courts a reviewing role and would lessen the possibility of different results in "turn-over" and R.S. 4450 proceedings arising out of the same facts. The long-awaited overhaul of Title 46 of the United States Code should address itself to this problem. In addition, the suspension and revocation regulations generally should be simplified and updated and disciplinary procedures should be identical for Great Lakes pilots and all other mariners subject to Coast Guard and National Transportation Safety Board jurisdiction.

Most importantly, suspension and revocation procedures should be subject to more regular study. The inquiry should look beyond the Coast Guard's own experience to that of other federal regulatory bodies and the solutions found by other maritime nations to the problems of marine discipline and safety. For example, it may be desirable and cost-effective to expand the Coast Guard's present limited program of assigning marine inspectors to selected merchant vessels, just as observers have been placed on foreign fishing vessels to monitor compliance with the Fishery Conservation and Management Act of 1976,²⁵⁵ or for that matter, much like the Coast Guard's own "resident inspector" program at shipyards. Should the cost of such assignments or industry resistance be obstacles, observers could be assigned to those vessels routinely experiencing crew problems, assuming this can be done without subverting the function of the master.

As more cases are reviewed by the National Transportation Safety Board and the courts, further areas of needed change may appear. To what extent, for example, will NTSB decisions on appeals from airman and

the changes provided specific details or statistics to support their position for changes." *Report on the Activities of the [House] Merchant Marine and Fisheries Comm., 95th Cong., 2d Sess., ser. no. 95-G, 271-72 (1979).*

254. Attention could also be given to the desirability of expanding the jurisdiction of the Coast Guard's administrative law judges to include not only disputes over the issuance of licenses and documents, *see* note 159 *supra*, but also the administrative adjudication of violations of § 311 of the Clean Water Act, 33 U.S.C. §§ 1321 (b) (6), (j) (2) (1976), and other civil penalty statutes. At present such penalties are imposed by commissioned officers of the Coast Guard. 33 C.F.R. §§ 1.07-9, 153.105 (a) (1), (4), 153.107 (1979). These penalty regulations are being revised. 418 U.S. COAST GUARD L. BULL. 21 (1979).

255. 16 U.S.C. § 1821 (c) (2) (D) (1976); 50 C.F.R. § 611.8 (1978). *See also* Fidell, *Enforcement of the Fishery Conservation and Management Act of 1976: The Policeman's Lot*, *supra* note 3, at 580 & n.364. *But see* 10 C.F.R. §§ 50.70 (b), 70.50 (c) (1979) (nuclear licensee obligation to provide facilities for on-site resident NRC inspectors).

marine cases define a single cohesive body of law? And is it necessary, on balance, to have two levels of agency review in cases subject to the APA before a mariner may obtain judicial review? Does a two-tiered system, when coupled with the exhaustion doctrine, unfairly restrict access to the courts? Does it take too long for a case to proceed from initial hearing to Safety Board decision?²⁵⁶

Taken together, the foregoing comments suggest the need for a fresh look at R.S. 4450 in its entirety. The Department of Transportation has already gone on record that "a literal reading of R.S. 4450 no longer reflects the state of the law," and that the provision is "stylistically archaic."²⁵⁷ A reading of the terms of the statute, reproduced at the beginning of this article, confirms the accuracy of both of these remarks. It is not clear that the revision proposed by the Department²⁵⁸ is in all respects

256. See, e.g., *Commandant v. Ernser*, No. ME-67 (N.T.S.B. Dec. 1, 1978) (administrative law judge's decision and order entered May 24, 1976; Decision on Appeal entered Jan. 31, 1977; Safety Board opinion and order served Dec. 11, 1978). Between 1974 and 1977, the average interval between the date of appeal to the Safety Board and the date of service of the Board's final order ranged from 9-12 months. *Coast Guard Miscellaneous: Hearings on Tanker Safety Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess., ser. no. 95-14, 303 (1977) (testimony of Kay Bailey, Acting Chmn., N.T.S.B.).

257. See Letter from John G. Wofford, Acting Gen. Counsel, U.S. Dep't of Transp., to Rep. John M. Murphy, Chmn., House Comm. on Merchant Marine and Fisheries, May 11, 1978, Attachment II, at 1, in H.R. Rep. No. 95-1384, 95th Cong., 2d Sess., pt. 1, 34, 38 (1978) (unpublished attachment on file at University of Missouri Law Review, Columbia, Mo.). For an illustration of the textual difficulties with R.S. 4450, one need only refer to the fact that, read literally, the law provides for appeals to the Commandant from decisions of the Commandant.

258. (k) Suspension and revocation: To promote safety at sea and to protect the navigable waters of the United States, any license, certificate of registry or merchant mariner's document issued to a person under title 52 of the Revised Statutes or laws amendatory or supplementary thereto, may be suspended or revoked by the Secretary after notice and opportunity for a hearing. Hearings for such purposes shall be in accordance with sections 551 through 559 of title 5, United States Code.

(l) Basis for orders of suspension or revocation: The basis for orders of suspension or revocation authorized under this section are that the holder—

- (1) is physically, mentally, or professionally incompetent;
- (2) is physically or mentally incapacitated to perform his duties;
- (3) has, whether or not he was at the time of the act or omission acting under the authority of his license, certificate of registry, or merchant mariners document—

- (i) willfully violated or failed to comply with any law or regulation relating to the promotion of marine safety or the protection of the navigable waters of the United States;
- (ii) committed an act of misconduct or negligence while in the service of a vessel;
- (iii) committed an act, related to the performance of duties, which is of such a nature as to render him unfit or unsuitable to retain the license, certificate of registry, or merchant mariner's document.

Attachment II, *supra* note 257, at 5-6.

desirable,²⁵⁹ and it certainly does not address a number of the problems here identified. Nevertheless, it definitely can serve a useful purpose by providing a catalyst for further discussion. The matter clearly merits detailed attention in Congress.

The American merchant marine only can be as productive and dependable as its personnel. Currently the merchant fleet is experiencing a crisis in attracting and retaining mariners of high personal and professional calibre. In order to retain those already committed to the sea and to attract others, as well as to insure the safety of life and property at sea, the quality of shipboard life must be improved. This responsibility cannot be met by government alone. Therein lies the challenge to the marine transportation industry as a whole.

259. For example, the language in proposed § 4450 (k) making suspension and revocation hearings subject to 5 U.S.C. §§ 551-559 (1976) obviously requires additional reflection: Why should there be any reference here to rulemaking provisions, §§ 553, 556-557, in connection with these unmistakably adjudicatory licensing proceedings? If the intent was to grant rulemaking powers, this will have already been done by the second sentence of subsection (a).