

SENATOR BLACK AND THE AMERICAN MERCHANT MARINE

Nicholas Johnson*

Mr. Justice Hugo L. Black took his seat on the United States Supreme Court in 1937. The Senior Justice on the Court since 1946, he has already served longer than 90 of the 98 other judges in the Court's history.¹ The opinions which bear his name now exceed 780, some of which must be numbered among the most significant legal opinions of this century.² He has known the satisfaction of seeing many of his dissenting opinions, written before their time, become the law of the land.³

It is quite natural, therefore, that most of us think of Justice Black (known affectionately to his family and law clerks as "The Judge") primarily as a great jurist. And his role in American jurisprudence continues to be so significant that undoubtedly he will always be known principally for his judicial contributions. The fact remains, however, that Justice Black's career did not begin in 1937. He was earlier an extraordinarily successful practicing lawyer, prosecuting attorney, and municipal judge in Alabama. Of greater national significance, he was Alabama's United States Senator from 1927 to 1937.

Justice Black's Senate career has been reported by his biographers and has left its mark in the history books,⁴ but I do not

* Commissioner, Federal Communications Commission; Maritime Administrator, U.S. Department of Commerce, 1964-1966; law clerk, Associate Justice Hugo L. Black, 1959-1960.

¹ 1 FREUND, SUTHERLAND, HOWE & BROWN, CONSTITUTIONAL LAW xliii-xlv (2d ed. 1961).

² See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Bridges v. California*, 314 U.S. 252 (1941).

³ See, e.g., *Stein v. New York*, 346 U.S. 156, 197 (1953) (Black, J., dissenting), *overruled by* *Jackson v. Denno*, 378 U.S. 368 (1964); *Colegrove v. Green*, 328 U.S. 549, 566 (1946) (Black, J., dissenting), *overruled by* *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Betts v. Brady*, 316 U.S. 455, 474 (1942) (Black, J., dissenting), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴ The major biographical works on Justice Black include DILLIARD, *ONE MAN'S STAND FOR FREEDOM* 3-27 (1963); FRANK, *MR. JUSTICE BLACK* (1949); WILLIAMS, *HUGO L. BLACK* (1950). A personal touch is provided by DAVIS, *UNCLE HUGO* (1965). Works on the New Deal often include references to Black as a senator. See, e.g., HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* 234-39 (1966); SCHLESINGER, *THE COMING OF THE NEW DEAL* 446-53 (1958). See also CRAWFORD, *THE PRESSURE BOYS* 144-59 (1939). These, of course, do not exhaust the references to Black's Senate career.

believe that it has ever been the subject of a comprehensive historical study. This is neither the time nor the place to undertake the task, but we can hope that someday the full story of this remarkable Senator will be told. Perhaps the most important reason for such a history lies within that Senate career: Black was a great Senator who had a substantial impact upon this country and the lessons of that career are worth our knowing. Moreover, the career of Senator Black illuminates the man who is Justice Black. Few Justices have so ably tempered the logical intricacies of the law with the fire of the humanity that the law both reflects and contains. How much explanation can be found in his Senate career? What does the relationship tell us about the qualities and prior experience we should seek in potential Supreme Court appointees?⁵

⁵ It would be foolish and presumptuous to claim specific opinions of Justice Black were the product of his maritime investigation. But common strains in lessons from the investigation and in his later opinions are too marked to be overlooked.

On several occasions Justice Black has opposed regulatory arrangements which required efficient economic activities to support less efficient enterprises, or which allowed regulatory discrimination with no economic justification. One cannot help but think that his experience with the baleful influence of maritime subsidies parading under other names helped shape the economic views he was to take as a judge.

The earliest examples involve railroad rate regulation. In a 1940 case, certain railroad tariffs favored freight forwarders and some large shippers, but had no relation to the service provided. Black, writing for a unanimous Court, sustained the Interstate Commerce Commission's disallowance of the tariffs. *United States v. Chicago Heights Trucking Co.*, 310 U.S. 344 (1940). Three years later, in a somewhat similar case, Black was in the minority, but again opposed discriminations not based on costs. *ICC v. Inland Waterways Corp.*, 319 U.S. 671, 692 (1943). In a case growing out of government railroad shipments during the Korean War, the railroads, which had previously performed wharfage and handling service for all shippers, refused to introduce a lower tariff for the government, which had undertaken its own wharfage and handling. Black dissented to the Supreme Court's refusal to upset the ICC's acquiescence: "There is no reason why the railroads should be allowed to operate in a manner that exacts a transportation charge from all shippers for benefits that some can enjoy and others, although in exactly the same situation, cannot." *United States v. ICC*, 352 U.S. 158, 179 (1956).

Similar problems arose in agricultural regulation. The Secretary of Agriculture, under the Agricultural Marketing Act of 1937, ordered an arrangement of payments so that milk cooperatives received compensation for services which benefited all producers, whether members or not. The Court found the Secretary had exceeded his authority. Black dissented, saying: "It seems more incongruous and wrong to me to let nonmembers get something for nothing and at the sole expense of the cooperating farmers." *Brannan v. Stark*, 342 U.S. 451, 480 (1952).

In at least one case Black was confronted with the contention that the government's money could be used to subsidize activities not otherwise economically justifiable. A War Department flood control project had forced a railroad to discontinue operation around the flood control site. The ICC allowed the railroad to abandon service entirely. A coal mine which used the railroad objected and requested that the railroad continue service over a different route. It insisted that since the government had to pay the cost of all relocation caused by the flood control project, the ICC could not take such costs into account in determining whether the relocation was economically justifiable. Black, speaking for the Court, upheld the ICC order. He said: "When materials and labor are devoted to the building of a line in an

In an article of this length I can provide no more than a brief peek at one scene from the drama of his Senatorial decade: Senator Black's maritime subsidy investigation preceding the Merchant Marine Act of 1936.⁶ Why shipping? Students of Senator Black's career may debate his "most important" achievement, but all would agree that his contribution to shipping policy would have to be considered. The Black investigation was one of the most thorough and searching investigations of American merchant shipping since the

amount that cannot be justifiable in terms of the reasonably predictable revenues, there is ample ground to support a conclusion that the expenditures are wasteful whoever foots the bill. The fostering care of the railroad system intrusted to the Commission is not so circumscribed as to leave it without authority to pass on the economic advisability of relocation in a situation where someone other than the carrier provides the money." *Purcell v. United States*, 315 U.S. 381, 385 (1942).

In his antitrust law opinions, from the very early years of *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457 (1947), to last year's decisions in *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), and *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), Black has championed competition as vital not only to our economic system but also to our body politic. "The Sherman Act," Black has written, "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).

Black has provided a consistent and often lonely voice calling for a restrictive approach to patent grants which, if given free rein, can stifle competitive forces. Whenever he has written in the patent area, Black has placed every justifiable restriction on the scope and applicability of patents. He perceived the dangers as early as 1942, when he found the circumstances of a case "most favorable for the use of patent privileges as a deterrent to all competition. By its vagueness and generality, the patent in suit creates an overhanging threat to anyone who might want to produce any . . . [similar machinery]." *Williams Mfg. Co. v. United Shoe Mach. Corp.*, 316 U.S. 364, 381 (1942) (dissenting opinion). Using much the same language, Black wrote for the majority in a 1946 combination patent case, *Halliburton Oil Well Cementing Co. v. Walker*, 329 U.S. 1 (1946). Other noteworthy and consistent contributions of Justice Black to patent law include *Hazeltine Research, Inc. v. Brenner*, 382 U.S. 252 (1965); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Graver Tank Mfg. Co. v. Linde Air Prod. Co.*, 339 U.S. 394 (1950); *Edward Katzinger Co. v. Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947). See also *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964) ("The granting of patent monopolies under this constitutional authority represents a very minor exception to the Nation's traditional policy of a competitive business economy, such as is safeguarded by the antitrust laws. When articles are not patentable and therefore are in the public domain, as these fabric covers were, to grant them a legally protected monopoly offends the constitutional plan of a competitive economy free from patent monopolies except where there are patentable 'discoveries.'" *Id.* at 522).

It is the purpose of this article merely to suggest, rather than to develop fully, the thesis that Justice Black's opinions may have been influenced by Senator Black's experiences. Hopefully this brief footnote sketch may illustrate the point sufficiently to inspire others to the task.

⁶ 49 Stat. 1985 (1936).

founding of our nation.⁷ He produced a monumental piece of legislation which is still with us. While the shipping investigation was but one highlight in Senator Black's career, it provides an appropriate illustration of his ability and performance as a Senator.

Moreover, the story is timely. Shipping subsidy problems are again in the headlines. Industry critics and proponents alike agree that something must be done to improve the state of this industry.⁸ A revealing display of the political power of the shipping industry was seen only months ago. The industry single-handedly took on the Administration and the Congressional leadership, and obtained for itself the distinction of being the only transportation industry in America to be deleted from the President's proposed list of agencies for the new Department of Transportation. The Maritime Administration thus remains in the Department of Commerce, a half-way station to the industry's ultimate goal of independent agency status. This campaign led Congressman Holifield to the dismaying observation that:

In my 24 years in Congress I have never before encountered the atmosphere of pressure from lobbyists, such a barrage of distortion of the truth, as has occurred during the consideration of the Department of Transportation legislation.⁹

It may be that a modern-day Senator Black will have to undertake the task of thoroughly reviewing the present state of our merchant marine, and the abuses of its protracted and increasing subsidy program. Whether or not such an investigation is held, it is useful for those concerned with American maritime problems today to be familiar with the striking similarity of Senator Black's hopes, frustrations, and fears about the subsidized American merchant fleet of the 1930's.¹⁰

⁷ There had been several investigations of shipping policy and the Shipping Board before Black's investigation. See, e.g., the bibliography in ZEIS, *AMERICAN SHIPPING POLICY* (1938), which omits appropriations hearings. Subsequent to the 1933 Hearings there have been numerous congressional inquiries into various facets of merchant marine policy, but none has produced the thorough legislative revisions which was the fruit of Black's efforts. For a complete and thoughtful review of current maritime policy considerations, see LAWRENCE, *UNITED STATES MERCHANT SHIPPING POLICIES AND POLITICS* (1966). The classic evaluation of the economics of shipping subsidies is FERGUSON, LERNER, MCGEE, OI, RAPPING & SOBOTKA, *THE ECONOMIC VALUE OF THE UNITED STATES MERCHANT MARINE* (1961).

⁸ See, e.g., *Hearings Before the Subcommittee on Merchant Marine of the House Committee on Merchant Marine and Fisheries*, 89th Cong., 2d Sess. (1966).

⁹ 112 CONG. REC. 20053 (daily ed. Aug. 29, 1966).

¹⁰ Having recently concluded a somewhat tempestuous tour of duty as Maritime Administrator, I naturally possess a personal interest in this phase of Justice Black's career. Of course, I can no longer claim the objectivity present at the time of my appointment in 1964. I set forth this caveat along with the hope that to the extent to which I am both sadder and wiser I bear the qualities in equal measure.

I. THE EARLY YEARS: HOW A YOUNG ALABAMIAN
LEARNED ECONOMIC REGULATION AND THE
RESPONSIBILITY OF PUBLIC OFFICE¹¹

Black's role as Senate investigator was substantially influenced by a view of economic regulation and public responsibility gained in his early years. He was born in the poor farming community of Harlan, in Clay County, Alabama, on February 27, 1886. His father and his grandfather were Alabama storekeepers. His mother was postmistress of Harlan—in part because Harlan then consisted of the Post Office, the Black's store and house, and two tenant farmers.¹² It was not an environment calculated to produce economic royalists. Soon the entire family moved the few miles to Ashland, which was twenty-two miles from the nearest railroad but afforded more opportunity for both storekeeping and schooling. Political rallies and courtrooms provided a substantial share of the entertainment and intellectual stimulation of Clay County in the 1890's. Unlike some of the richer cotton counties of Alabama, Clay County was the home of Republican and Populist Parties which provided real competition for the Democrats.¹³ In the 1890's a successful storekeeper was distinctly part of Alabama's capitalist class. But Senator Black's earliest political education regarding taxation, government regulation of business, banking, organized labor, and government's responsibility for the economically underprivileged was heavily influenced by those early political debates.

Black graduated with honors from the two-year law school program at the University of Alabama in Tuscaloosa, and was admitted to the bar before turning twenty-one.¹⁴ He had already spent one year in the Birmingham Medical College, and thus became one of the first in the currently popular "medico-legal" education movement; he was well prepared for the personal injury practice that was

¹¹ Unless expressly noted otherwise, the factual information in the text and footnotes in the next two sections has been obtained from the excellent biography of the Justice by John P. Frank. FRANK, *op. cit. supra* note 4, at 3-94.

¹² She was well educated for a woman of that county and era, and valued education for her eight children. Her eldest son, Robert Lee Black, taught school in Harlan, and young Hugo received some of his earliest education from the back of his brother's schoolhouse at the age of three.

¹³ When, in later years, Justice Black would write about the American jury system and the role of free speech, these boyhood memories would form the earliest foundations of his convictions.

¹⁴ He was later to write: "I cannot remember the time when I did not want to be a lawyer." Black, *Reminiscences*, 18 ALA. L. REV. 3, 4 (1965). In spite of his lack of formal preparatory education, Black took the learning process seriously then as in later years. One of his professors observed: "He has learned the most of any student in school"—ungraciously adding "he had the most to learn." FRANK, *op. cit. supra* note 4, at 13.

soon to bring him both substantial income and sympathetic insight into the little man's struggle against big business. But the first years of practice were not spectacular. The young lawyer began in his home of Ashland—attracting mostly bill collecting and insurance investigations. A year later he lost his uninsured law library in a store fire, and moved to Birmingham for a new start. His practice and reputation grew, and when several police-court judgeships were consolidated into one in 1911, Black was appointed Birmingham's city judge. The judge was expected to practice law too, and Black, in partnership with other successful lawyers, built a practice which involved mostly litigation, labor matters, and contract cases.

In 1914 Black successfully ran for county prosecuting attorney against Senator Tom Heflin's brother. He characterizes his three years as prosecutor as filled with more pressure and hostility than the years of "the lobby investigation . . . senatorial campaigns, or even . . . the attack after the court appointment."¹⁵ He brought to current status a docket backlog of over 3,000 criminal cases, thereby saving the county and state from substantial expenditures to house prisoners. It was his first personal encounter with vested economic interests; those profiting from the feeding and housing of prisoners soon threatened his impeachment. He also prosecuted coal companies for short-weighting employees, and went after insurance companies which settled claims with injured workmen before the extent of the injuries were known.¹⁶

Black spent a year in the Army during World War I, came back a captain, and continued to build his law practice. From 1919 to 1925 his firm appeared in over 100 cases in the appellate courts of Alabama—most of which were defendant's attempts to seek judicial reduction of the personal injury verdicts he had won for his clients. Except for a few speeches for John T. Davis in 1924, Black was not involved in political activity again until President Coolidge's Attorney General, Harlan Fiske Stone, turned to him to prosecute a number of persons in Mobile for violation of the Prohibition Act, able Republican lawyers being scarce in Alabama. The publicity of the trials turned out to have some political advantage and Black announced on June 10, 1925—with no organizational backing or forewarning—that he intended to run for the Senate in 1926.

In the Alabama of the 1920's, far more than today, the outcome of the election was determined in the Democratic primary. Black

¹⁵ *Id.* at 22.

¹⁶ Black also took seriously his responsibility to enforce the liquor laws, and he exposed to public hearing and censure the almost medieval torture practices of a local police department in exacting confessions.

had a tough race; by the time the primary was over he had confronted a former state supreme court judge (J.J. Mayfield), an ex-governor (Thomas E. Kilby), a millionaire with Klan backing (L. Breckenridge Musgrove), and a member of a famous political family in Alabama (John Bankhead). Campaign advertisements described Black as "the Candidate of the Masses," and his platform championed prohibition, veterans benefits, opposition to the Muscle Shoals Dam for private power, limitations on campaign expenditures, immigration restrictions, and farm relief. He sought and obtained support from none but the common people of Alabama;¹⁷ in the first thirty days of his campaign he traveled 2,000 miles and delivered sixty speeches. He wore out two automobiles before his success in the primary election of August, 1926.

II. THE MAKING OF A SENATOR

Once in the Senate, Black's role was consistent with his earlier training and experience. He continued his interest in economic regulation, and continued to set high standards of responsible performance for himself as well as others. A brief review provides useful preliminary insight and perspective for a study of his shipping investigation.

Senator Black's first term was not characterized by activity designed to gain widespread public attention.¹⁸ But the new Senator used his time responsibly and constructively,¹⁹ and during this period he also undertook a strenuous program of political and

¹⁷ To my knowledge, Justice Black has never even been charged with serving any interest save his own conscience. In 1926 he told the Alabama Klan (whose active opposition probably could have defeated a candidate for any public office in Alabama in the 1920's): "There will be, and there is now, but one way, and if my heart remains true to the God of my father and my mother, there will never be another to secure conduct from me, and that is to convince me that the thing that is wanted is right." FRANK, *op. cit. supra* note 4, at 44. Forty years later he was to recall a scene from his law school days, and relate it to the sometimes unpopular consequences of following one's convictions: "During my second or senior year, however, someone apparently suspected that my views were not always 100% in accord with the right views, to wit, the prevailing ones, and I drew this statement [in the law school year book]: 'This fellow seems to possess but one idea, and that is a wrong one.' I regret to have to admit that there are still some people who apparently seem to have this same belief about my 'one idea.'" Black, *supra* note 14, at 8.

¹⁸ The Mobile Register commented: "Alabama makes a good senatorial average, with one Senator [Heflin] talking incessantly, and one not at all." FRANK, *op. cit. supra* note 4, at 45.

¹⁹ Aside from offering a bill to suspend immigration, opposing a redistricting plan that would have taken a House seat from Alabama, and supporting Senator Norris' campaign for open executive sessions, in his first session Senator Black was principally involved only with the Muscle Shoals issue. In 1929 Senator Black actively opposed most of the provisions of the Smoot-Hawley Tariff Act, which contained some of the highest tariffs in American history.

economic self-education perhaps unparalleled in Senate history.²⁰ Given this education and his prior background, Senator Black soon found himself naturally allied with liberal Republicans such as Senators Norris, LaFollette, Cutting, and Borah, and Democrats such as Walsh, Wheeler, and Costigan.

Senator Black's first major involvement in an issue of economic theory and responsible politics occurred when the Muscle Shoals Dam question came before the Senate. It was this question that first separated Senators Black and Norris and subsequently brought them together. Senator Black was principally interested in developing the dam as a source of fertilizer—an issue in his campaign; Senator Norris was more concerned with public power. Ultimately their joint proposal passed twice: once to be pocket-vetoed by President Coolidge and later to be vetoed by President Hoover. Muscle Shoals also provided Senator Black with his first introduction to political lobbying and corruption. Senator Caraway, who chaired the Committee on Lobbying, asked Black to handle the investigation of Muscle Shoals. During this investigation Senator Black discovered, among other things, that the lobbying efforts of American Cyanamid (the fertilizer company) were being heavily financed by Union Carbide, which had a secret agreement to use electric power from the dam for other purposes.

The second session of the 71st Congress met just after the stock market crash of 1929, and Senator Black's interest in economic regulation became manifest. The Senator began to actively consider wages and hours legislation, and he took a strong stand on another major economic issue—the application of the antitrust laws:

If huge mergers and stupendous monopolies are to be granted the privilege of supplying the necessities of the people, it cannot but lead to an extended government supervision Business profits must be controlled, either by the method of enforcing competition or by strict government regulation of profits²¹

²⁰ He said of the program: "I have done more reading since I came to Washington than ever before." The first book he read in Washington was Adam Smith's *Wealth of Nations*, but he went on to digest Bryce, Locke, Marx, Mill, Montesquieu, Rousseau, and Veblen. He read all of Jefferson's writings, and sampled heavily from John Adams, Benjamin Franklin, and Alexander Hamilton. He read Greek, Roman, and European history, the writings of Charles Beard, and histories of the Supreme Court. Shakespeare, Hawthorne, Thoreau, and Mark Twain were also on the list. Before he was through he had covered several hundred volumes and had become, as he remains to this day, one of the best-educated men in American public life with respect to the history and economics of this country's founding. It is striking and revealing, yet characteristic, that Senator Black viewed his new role humbly and responsibly, not as a destination but as a journey's beginning: as a challenge requiring vast amounts of new learning.

²¹ 72 CONG. REC. 1240 (1930).

After a term of study and deference to his seniors, Senator Black was ready to play a more active role in the business of the United States Senate. And by any measure, his years in the Senate from 1932 to 1937 were full ones.

For five years he worked for the legislation that was to be enacted as the Fair Labor Standards Act. His investigation into maritime subsidies was supplemented by investigations into airmail subsidies, lobbying against the Public Utilities Holding Company Act of 1935, and lobbying in general. In addition he introduced many veterans' bills, tried to liberalize laws relating to injured railroad workmen, strongly opposed the Wagner-Costigan anti-lynching bill in 1935 (on the ground it was applicable to labor union disturbances), supported President Roosevelt's "court packing" bill in 1937, and campaigned for Roosevelt all over the country in 1936.²² His departures from the Administration's program were few: he introduced a thirty-hour-week bill ahead of the Administration's schedule, opposed the NRA (because it permitted price-fixing by business groups), opposed limiting the availability of veterans hospitals, and supported a prevailing wage for relief workers. He was, by and large, a Roosevelt man and a working member of the Administration team.

III. SENATOR BLACK'S MARITIME INVESTIGATION

A. *Early Interest*

How Senator Black first became interested in national shipping policy is not clear. During his 1933 hearings on maritime subsidies, reference was made to a concern Black had expressed years earlier about the awarding of mail contracts in the Gulf area—which includes the port of Mobile, Alabama.²³ In 1928 he attempted to amend an appropriations bill to limit salaries of Shipping Board officials. It was apparent during the discussion that Black had had an earlier and unsuccessful encounter with some of those same officials.²⁴

Maritime subsidies were not a new subject to the Senate. Because of local constituent interest, Black undoubtedly listened to

²² Black joined a Progressive group supporting President Roosevelt in 1936, a time when some Progressive appeal was engendered by the anti-Plutocrats led by Father Coughlin and their presidential nominee Lemke. N.Y. Times, Sept. 12, 1936, p. 4, col. 3.

²³ *Hearings Before a Special Senate Committee to Investigate Air Mail and Ocean Mail Contracts*, 73d Cong., 2d Sess., pt. 1, at 405 (1933-1934) [hereinafter cited as *Hearings*].

²⁴ 69 CONG. REC. 2327 (1928).

Senate debates on the subject, learning a great deal in the process.²⁵ On occasion Black himself had participated in the criticism of the Shipping Board prior to his frontal assault in 1933. Although he criticized the members' high salaries in 1928, he was more concerned about the substance and procedure of the Board's operations.²⁶ In 1929 Black placed in the Congressional Record a memorandum from the Mobile, Alabama shipping board, pointing out the need for the federal Shipping Board to give preference to local concerns in the allocation of fleets and contracts.²⁷ And in 1930 Black, discussing a bill on local ownership preference for mail contracts, said: "I voted against it because it was a subsidy; but if the Government is going to grant subsidies, I want them to be equitably distributed."²⁸

At the beginning of the 72nd Congress, Senator McKellar, a vigorous critic of the Shipping Board, introduced for a second time a resolution calling for an investigation of ocean mail contracts.²⁹ Although nothing came of the resolution, McKellar did challenge the reappointment of T. V. O'Connor as chairman of the Shipping Board, and during the debate he made many charges and critical comments.³⁰ The nomination was confirmed, but Black voted with McKellar.³¹ The debate on the Post Office Appropriation bill for the fiscal year 1933 was also filled with charges of wrongdoing in the administration of ocean mail subsidies.³²

For whatever reasons, on February 6, 1933 Black introduced and the Senate passed a resolution to provide for a special investigation of air mail and ocean mail contracts.³³ On March 11, 1933 Black was appointed chairman of the investigating committee in accordance with the Senate's practice of awarding the chairman-

²⁵ As Senator King said during one of the 1928 debates over salaries for the Shipping Board: "The Shipping Board has met with serious criticism ever since it was organized, and many investigations of its work and activities have justified much of the criticism, particularly that relating to its lack of business ability, and to waste, extravagance, and inefficiency." *Id.* at 2427. Senator McKellar of Tennessee had been particularly vigorous in criticizing the Shipping Board both on the floor and in committee hearings. During the 71st Congress McKellar proposed a Senate resolution calling for a special investigation of the merchant marine. It was passed, only to be killed during reconsideration by the filibuster of Senator Copeland, a strong maritime supporter. It was made clear in a letter placed in the record of Black's hearings that McKellar had caused concern to the shipping interests since 1922.

²⁶ *Id.* at 2431.

²⁷ 70 CONG. REC. 3080 (1929).

²⁸ 72 CONG. REC. 8852 (1930).

²⁹ 75 CONG. REC. 220 (1931). See note 25 *supra*.

³⁰ 75 CONG. REC. 13376 (1932).

³¹ *Id.* at 13497.

³² *Id.* at 14137-45.

³³ 76 CONG. REC. 3452, 5008-09 (1933).

ship to the sponsor of a resolution. Senator Black was joined on the committee by Senators McCarran and King (both of whom would be critical of the current policies), and Senators Austin and White—the latter associated with the drafting of the 1928 Merchant Marine Act.³⁴ Even then efforts were being made to influence the outcome of the investigation by affecting the composition of the committee and the appointment of its staff, as Black later learned.³⁵

That this investigation caused radical changes—cancelled contracts and new legislation—can be explained not only by the new administration, but also by the diligence and skill which the former prosecuting attorney displayed. As *Fortune* noted in a 1937 issue devoted to the new Merchant Marine Act, there would have been no Act without Black's efforts.³⁶

B. *The Hearings*

The hearings were a noteworthy undertaking. Whatever the outcome, merely to amass and analyze the quantity of information and documents essential to an investigation of two major industries such as airlines and shipping is a formidable achievement. The hearings began on September 26, 1933 and ended on May 25, 1934. More than 120 witnesses were called before the committee, and the printed record runs 4,180 pages.³⁷ Throughout the hearings Senator Black was a model of the well-prepared investigator. He mastered a mountain of factual material, asked precisely the right questions, and had determined probable answers well in advance of framing the questions.³⁸ Many have observed his capacity to pose from the bench the single question that reaches the heart of a case before the Court and often determines the outcome;³⁹ it is not a skill newly learned.

³⁴ 45 Stat. 689-98 (1928). White was a representative from Maine when he introduced H.R. 10765 in 1928. 69 CONG. REC. 2822 (1928). A Senate substitute introduced by Senator Jones became the 1928 Act. 70 CONG. REC. 342 (1928). White was elected to the Senate in 1931. 74 CONG. REC. 1511 (1931).

³⁵ *Hearings*, pt. 1, at 158-59. The Secretary-Treasurer of the American Steamship Owners' Association had received a letter from his Washington representative, Mr. Duff, who said: "I think this committee is about as good as we could have expected and there may be something in the fact that the name of the chairman is Black and one of the Republican members is White.

"In other words, we start with everything looking black and end up with it white." *Ibid.*

³⁶ *Fortune*, Sept. 1937, p. 76.

³⁷ These figures include the ocean mail and air mail parts of the investigation. The printing of the hearings is in nine parts, with most of parts 1, 2, 3, and 9 devoted to the ocean mail contracts. Roughly 60 of the 120 witnesses testified about the ocean mail aspects of the investigation.

³⁸ See, e.g., *Newsweek*, Nov. 11, 1933, p. 17.

³⁹ See, e.g., Lewis, *Justice Black at 75*, *N.Y. Times*, Feb. 26, 1961, § 6 (Magazine), p. 13, at 75.

The Committee's burden in amassing and analyzing the relevant data was considerably augmented by the ignorance and reluctance of the witnesses. At one point, Senator Black found John J. Farrell, of American-South African Lines, Inc., seemingly unaware of the officerships and directorships which he himself held. This led Mr. Farrell to acquiesce to Senator Black's observation that it is not "conducive to good business in this country to have men serve on so many directorates, and so to draw salaries from so many companies as officers, that they do not know what companies they are in."⁴⁰

Ignorance was not the only problem, however, and Senator Black began his committee report with the observation that:

It was found extremely difficult to bring to light the essential facts regarding the companies which have been receiving from the Government millions of dollars each year under so-called "mail contracts." Most of them have made such effective use of the corporate fiction that their holding companies, subsidiaries, affiliates, and associates present a vast financial puzzle which yields true facts only to the most persistent investigation and painstaking analysis. Such investigation and analysis, however, supplemented by the testimony—a great deal of which was reluctantly given—of many witnesses, has resulted in an understandable picture of marine subsidy in action.⁴¹

The picture was not a pretty one.

In fact, as Senator Black apparently suspected, the hearing documented the suspicion that government subsidy of private industry may prove to be bad government and bad politics as well as bad economics. As the committee report concluded, "the history of marine subsidy in the United States does not encourage this committee to believe that such a subsidy is likely to be honestly administered in the future."⁴² Nevertheless, recognizing the pressures and need for continued subsidy, the committee framed legislation to minimize the inherent difficulties in the future subsidy systems. The committee hearings, and the discussion they prompted, provided one of the rare opportunities in our history for national focus upon the reasons for an American merchant marine and the propriety of subsidy to sustain it.

C. *The Abuses of Subsidy*⁴³

At one point the committee summarized its view of the then current subsidy system as follows:

⁴⁰ *Hearings*, pt. 3, at 954.

⁴¹ S. REP. NO. 898, 74th Cong., 1st Sess. 1 (1935) [hereinafter cited as REPORT].

⁴² REPORT 42.

⁴³ It is neither necessary nor possible to provide here a detailed analysis of the

Private ownership and operation of merchant and aerial transportation with Government subsidy has resulted in a saturnalia of waste, inefficiency, unearned exorbitant salaries, and bonuses and other forms of so-called "compensation", corrupting expense accounts, exploitation of the public by the sale and manipulation of stocks, the "values" of which are largely based on the hope of profit from robbing the taxpayer, and a general transfer of energy and labor from operating business to "operating on" the taxpayer. Measured by results, the subsidy system, as operated, has been a sad, miserable, and corrupting failure. Many of its apologists have been shown to be those who have directly received financial profit, or those, who for various reasons, have been influenced by those who did directly profit from it. Not the least of these influences has been the millions of Government dollars flowing through the hands of the immediate recipients, their associates, affiliates, subsidiaries, holding companies, and allies, into the treasuries of newspapers, magazines, and publicity agencies. Evidence before this

operation of all subsidy systems, except as they relate to reforms proposed by the Black committee. But perhaps a general sketch would be useful.

For the past 100 years, Americans have suffered two handicaps in the shipping business: the high cost of American-built ships, and the high cost of the American labor necessary to operate the ships. (One might argue, as I did while Maritime Administrator, that such discrepancies exist elsewhere in our economy, and that they simply pose a challenge to American ingenuity to increase productivity.)

Government assistance in the acquisition of ships has taken many forms over the years. After World War I (and World War II) large numbers of war-built merchant ships were disposed of at prices far below cost. Government-guaranteed mortgage and loan agreements have also been available to aid in ship construction. With the exception of the "Mariner" program in the late 1950's (about thirty ships built to standard design were sold to the industry), the acquisition of ships in recent years has been assisted by the "construction differential" subsidy program. This program enables shipowners to acquire their ships from American shipyards at world market prices (less than one-half the American yards' prices); the government pays the difference.

Government financial assistance for the operation of subsidized ships has also taken many forms. The 1920 Act, 41 Stat. 988, provided that operators were to be paid under the terms of "managing and operating agreements." These contracts were similar to our present General Agency Agreement contracts, which govern American shipowners' operation of the Government reserve fleet ("mothballed") ships in the Viet Nam trade. Such contracts reimburse owners for expenses plus a per diem fee. This system is obviously open to substantial potential abuse in calculating expenses, and it was a problem under the 1920 Act. The 1928 "mail subsidy" Act represented a different approach; operators were paid for carrying the mail on a formula basis. The amount of mail carried was irrelevant; the subsidy was computed on a per-mile basis, taking into account factors such as the speed of the ship. Subsidies were to be awarded on the basis of bids; in fact, however, virtually all contracts were let without bidding, and at the maximum rates permitted under the law. The system proposed by the 1936 Act, and still in effect today, provides for the payment of a fixed percentage of enumerated expense items, principally wages. The expenses of the American operators' principal competitors are obtained as accurately as possible by Maritime Administration representatives. The American operators' actual expenses are obtained by Maritime Administration auditors. The difference, expressed as a weighted percentage based on all foreign competitors, is used, for example, as the "wage differential" subsidy percentage—currently running about 72% of most American operators' wage costs. (That is, 72% of the wage cost is paid from tax dollars, not by the operators.)

committee has illustrated the existence and effect of these evil influences.⁴⁴

That is strong and shocking language. But the committee had heard strong and shocking testimony.

The committee uncovered one instance in which the Dollar interests took a \$500 investment and some government ships and ended up, a very few years later, with a \$4,600,000 profit from shipping, a \$2,100,000 profit from other sources, and ownership of the ships.⁴⁵ States Steamship Company was found to have realized an average rate of return on investment of 45 per cent per annum from 1928 to 1932.⁴⁶ In 1933 Lykes Brothers Steamship Company had \$322,000 invested in ships on one trade route. From 1928 to 1933, the committee reported, "this company would have earned a profit, before deductions for income tax, *without any mail pay whatsoever*, of \$327,694.71."⁴⁷ As the mail subsidy amounted to \$1,600,000, the company's total profits were close to \$2,000,000.⁴⁸

During the 1920's States Steamship Company had purchased from the government for \$1,000,000 eleven ships which had been constructed at a cost of \$24,500,000. In return for the bargain prices, States promised to operate the ships in regular mail service from the West Coast to the Orient for five years—during which time the government agreed to protect the company from any American flag competition. Subsequently, States received \$3,500,000 in mail subsidy payments from the government (in addition to payment for the mail service)—or more than three times what it had initially paid for the ships! In view of the company's existing obligation to provide service on these trade routes, the result was quite reasonably described by Senator Black as a "multiple subsidy system." He listed an additional twenty-five companies' trade route services which had profited under this system.⁴⁹

Despite this assistance, companies occasionally fell into financial difficulty. When that happened, they were simply reorganized,

⁴⁴ REPORT 39-40.

⁴⁵ *Id.* at 5.

⁴⁶ *Id.* at 15.

⁴⁷ *Id.* at 29.

⁴⁸ As might be expected, the compensation received by chief executives of subsidized shipping companies was more than adequate. From 1920 to 1933, the president of the International Mercantile Marine, P. A. S. Franklin, received over \$139,000 a year from salaries, bonuses, and commissions. His son, J. M. Franklin, also well-compensated, subsequently became head of the United State Lines—a company which his son-in-law, William Rand, until recently served as president. *Id.* at 26. In 1928 alone, J. P. Grace, president of W. R. Grace and Company, earned just under \$1,000,000 in salary, commissions, and dividends. *Id.* at 22.

⁴⁹ *Id.* at 18.

the losses absorbed by the Shipping Board, and the ships again set sail under subsidy. The United States Lines went through this process in 1931. Outstanding notes for \$8,900,000 owed to the Shipping Board were offered to the reorganized company for \$3,100,000—with all payments on principal and interest waived for three years.⁵⁰

The utter fiction of the entire undertaking was central to the abuse of the mail subsidy system, as this delightful passage from the report indicates:

The incorrigible optimism of the Postmaster General as to the “substantial volume of parcel post which might be developed” on routes whereon no mail moved when the contract was let has been equalled only by the ingenuity of the operators in making this optimism bear fruit in correspondence addressed by themselves to their agents abroad and especially earmarked for carriage by their “mail contract” ships (lest benighted postal employees, concerned with service rather than subsidy, dispatch it by speedier means), and even in transporting empty mail sacks.

The Postmaster General has advised the President that out of 43 such active mail routes only 12 are of substantial value as mail carriers, 8 are of slight postal value, 23 have no postal value whatever, and that a number of them are actually detrimental to the speedy transmission of the mails.⁵¹

These inherent problems were exacerbated by what Senator Black described as “public officials who flagrantly betrayed their trust” and “individuals who publicly posing as patriots, prostituted [the law] . . . for their private profit.”⁵² For example, although the law expressly required competitive bidding for mail subsidy contracts, the Postmaster General reported to the President that of forty-three outstanding and active mail subsidy contracts, forty were subject to cancellation “because let in open defiance of the legal requirement for competitive bidding.”⁵³ On occasion abuse was ingenious as well as crude. Under the 1928 Merchant Marine Act subsidy payments varied with the speed and tonnage of ships. Tonnage is easily measured. The speed of a ship, however, is a function of many factors, not the least of which is weather; to determine speed with precision requires considerable investigation. The committee concluded that “millions of dollars” had been

⁵⁰ *Id.* at 35.

⁵¹ *Id.* at 36. See also DEPARTMENT OF THE POST OFFICE, REPORT ON INVESTIGATION OF AIR MAIL AND OCEAN MAIL CONTRACTS (Comm. Print 1935).

⁵² REPORT 3.

⁵³ *Id.* at 12.

illegally received by the shipping companies for deliberately falsifying and misrepresenting the speed of their ships.⁵⁴

D. *Rationale for Maritime Subsidies*

It is perhaps inherent in the democratic process, or in the operation of any large institution, that the rationale for our human undertakings are seldom articulated and closely examined. This is as true for programs we instinctively consider "good" as for those we view as questionable or economically wasteful. Given the staff resources available to a special Senate investigating committee, the relative lack of sophistication in techniques of systems analysis, the urgency of action, and the obfuscation of the issues by shipping propagandists, it is to Senator Black's credit that the committee provided as much rational analysis as it did.

The committee did not believe its job complete merely upon the discovery of abuses; it was mindful of its responsibility for the adequacy of the American merchant marine. The committee concluded that "our system of marine subsidy has not produced to date and will not, if continued in its present form, ever produce an adequate and efficient Merchant Marine."⁵⁵ It expressly noted that "the passage of proper laws and their vigorous enforcement would give us better ships, faster ships, more ships, and a merchant marine which could really be a source of pride to the people of America."⁵⁶ And its report succinctly posed the urgency of action:

Having in mind the policies of the past, and the present regrettable status of the American Merchant Marine in which these policies have resulted, it is evident that certain decisions must be made, and that it is imperative for those decisions to be made *immediately*. It is abundantly shown that the present situation is intolerable.⁵⁷

Considerable question was expressed by the committee as to the merits of any subsidy system. At one point it noted that "the history of marine subsidy in the United States does not encourage this committee to believe that such a subsidy is likely to be honestly

⁵⁴ *Ibid.* An example was the Lykes Brothers' ship, the *Margaret Lykes*. The committee reported: "It was testified by a former first officer of this ship that he was instructed to falsify the log to show weather conditions in excess of those actually noted. It has been recently established by speed tests, under the supervision of an inspector of the Department of Commerce and an officer of the United States Navy, that the *Margaret Lykes* is not, and has never been, capable of maintaining a speed of 13 knots at seas in ordinary weather." *Id.* at 13. This single indiscretion on this single ship brought Lykes Brothers \$437,000 in undeserved and illegal mail subsidy payments. *Ibid.*

⁵⁵ *Id.* at 37.

⁵⁶ *Id.* at 2.

⁵⁷ *Id.* at 38.

administered in the future."⁵⁸ At another point, in characterizing the ingredients of a "sound system of marine subsidy," the report parenthetically commented: "if any subsidy can be sound."⁵⁹ The committee unanimously preferred "true private ownership" to either subsidized private operation or government ownership and operation.⁶⁰ The majority, however, did "not believe . . . it . . . possible to bring about private ownership and operation."⁶¹

The heart of the committee's substantive analysis of the rationale for a maritime subsidy program is set forth here in full:

The first question (and it must be decided upon the sole ground of public interest) is whether or not the Government shall expend taxpayers' money to create and maintain a merchant marine. This Government may, should it see fit, leave the business of shipbuilding and the operation of ships in foreign trade to the natural forces and elements of private business, and refrain from using public funds in these enterprises. If this course should be followed, it is believed by many that fewer ships would be built in America, and that some non-self-supporting ship lines would be abandoned. The natural result of declining shipbuilding in America would probably be the decline of facilities for shipbuilding to such an extent that this country would have inadequate shipyards capable of expanding the American merchant marine to necessary size under emergency conditions.⁶²

Earlier in this report, the committee noted that:

The theory of marine subsidy is based upon three major objectives. These are:

⁵⁸ *Id.* at 42.

⁵⁹ *Id.* at 21.

⁶⁰ "[A]ssuming that the public interest requires the expenditure of Government funds to create and maintain an American Merchant Marine, a . . . complex problem is presented as to the *method* by which the Government is to create and maintain the desired merchant marine. There are several major alternatives which the Government may adopt:

- (1) It may provide for Government ownership and operation.
- (2) It may provide for Government ownership and private operation, the operation to be subsidized where this is proved necessary.
- (3) It may provide for private ownership and private operation, the operation to be subsidized where this is proved necessary."

Id. at 38.

"As between true Government ownership and operation of a merchant marine and true private ownership and operation, your committee would choose the latter.

"As between true Government ownership and operation and private ownership and operation subsidized by the Government, your committee believes that Government ownership and operation would best serve the interest of the people." *Id.* at 39.

⁶¹ *Id.* at 41. To this Senator William H. King expressly excepted: "In my opinion an American Merchant Marine can be developed and operated without bounties or subsidies . . . I cannot believe that with the genius, wealth, and commerce of the United States, bounties or subsidies are essential to the building and operation by private capital of the Merchant Marine." *Id.* at 47.

⁶² *Id.* at 38.

To make certain that American farmers, manufacturers, and all American producers of goods marketable abroad can transport their products to foreign markets regularly, speedily, and at reasonable cost regardless of economic or war disturbances in any part of the world.

To make available constantly an efficient and sufficient fleet of potential naval auxiliaries, manned by American citizens, whose ability, training, courage, and loyalty will assure the successful operation of the fleet in time of peace as well as war.

In accomplishing the foregoing ends to give steady employment to American working men in shipyards and industries supplying ship-building material and the plants wherein they work, thus keeping ready for instant action the means of rapid ship construction in time of emergency.⁶³

Today the most significant problem of maritime subsidy policy is not so much the effectiveness of the maritime operating subsidies, as it is the effectiveness of the ship construction subsidy program. Not only is the present program of little benefit to American shipyards and absolutely devastating in terms of the replacement needs of the American merchant marine, but it is also of limited relevance to America's defense needs.

American shipowners are, in effect, required by law to build all their ships in American shipyards.⁶⁴ The benefit of this prohibition to American shipyards is limited. It is true that no American merchant ships are built in foreign yards. It is also true, however, that very few merchant ships are built in American yards. American yards' prices are more than double the average prices for comparable ships built abroad. In fairness to American shipowners—who, through no fault of their own, are effectively precluded from building abroad by the government—the government subsidizes the difference in the cost of ships.⁶⁵ The price differential was not as

⁶³ *Id.* at 2.

⁶⁴ The Merchant Marine Act of 1936 requires that subsidized ships be built in American yards. 49 Stat. 2001 (1936), 46 U.S.C. § 1171(a) (1964). The Cargo Preference Act requires that to carry preference cargoes, ships built or registered abroad must have been registered in the United States for three years. 75 Stat. 565 (1961), 46 U.S.C. § 1241(b) (1964). Ships in the domestic trade must be American-built. 41 Stat. 999 (1920), 46 U.S.C. § 883 (1964). Ships operated under the American flag generally must have a subsidy (direct or indirect, such as preferential rates in reserved trades) in order to be profitable. One unsubsidized company has announced plans to replace its war-built ships with foreign-built ships and if necessary go into foreign flag operations. See *N.Y. Times*, May 29, 1966, § V, p. 20, col. 1.

⁶⁵ To require America's shipowners to patronize American shipyards without subsidy, with prices over double the going world rates, goes substantially beyond the bounds of "Buy America" policies requiring American purchases when differentials are no more than 6% or 10%. Construction subsidies by the Maritime Administration are now around the legal ceiling of 55% of the total cost of a ship—the percentage of the total cost that represents the difference between the foreign cost and the domestic cost.

great in 1935 as it is today. Indeed, the 1936 Act provided that the construction subsidy should not exceed one-third of the American price for the ship.⁶⁶ Subsidy funds are, of course, limited; for the past ten years taxpayers have subsidized the construction of no more than fifteen merchant ships a year. (The Federal Budget has provided funds for thirteen ships a year for the past two years). This work constitutes only five to ten per cent of the roughly \$2,000,000,000 worth of work in American shipyards, most of which is funded by the United States Navy.⁶⁷ Thus, not only is the program of little benefit to American shipyards, but it has also produced an American merchant marine of 2,500 active and reserve fleet ships, of which less than 100 are ships capable of twenty knots or better and built since World War II.

The defense needs for ship construction could have been projected in 1935 to be substantially greater than our needs today—a projection which would have been proved accurate less than a decade later in World War II. Today, the instant response of modern warfare suggests more of a need for rapid airlift of cargo, or for ships in being, than for a capacity to build ships over a long, drawn out world conflict. It is understandable that the committee did not focus on the protectionist aspect of the prohibition against obtaining ships abroad, as it might if it addressed the issue today. But the factual premise of the majority's argument—that “the natural result of declining shipbuilding in America would probably be the decline of facilities for shipbuilding to such an extent that this country would have inadequate shipyards capable of expanding the American Merchant Marine to necessary size under emergency conditions”⁶⁸—has been substantially altered today. Two to three *billion* dollars of federal money goes each year to American shipyards wholly independent of the Maritime Administration program. Thus today, even if the entire maritime ship construction subsidy program were immediately eliminated (which no one has proposed), the impact on America's defense capability for shipbuilding would not be affected very substantially—certainly not as much as it would have been in 1935.⁶⁹

⁶⁶ 49 Stat. 1996 (1936), 46 U.S.C. § 1152(b) (1964). (The affirmative vote of four members of the Board could raise it as high as 50% on “convincing evidence.”) The construction subsidy ceiling has been periodically raised and extended by Congress to what is today a 55% level. See, e.g., 74 Stat. 362 (1960), 46 U.S.C. § 1152(b) (1964).

⁶⁷ See Exec. Order No. 10582, 19 Fed. Reg. 8723 (1954), amended by Exec. Order No. 11051, 27 Fed. Reg. 9683 (1962).

⁶⁸ REPORT 38. See text accompanying note 62 *supra*.

⁶⁹ Even in 1935, Senator King expressly excepted to the committee's finding in

E. *Subsidy Reform Proposals*

Recognizing the probability that some form of subsidy system would be perpetuated, the committee set forth "conclusions with respect to the administration of a subsidy."⁷⁰ These conclusions began:

The system to be adopted must be as simple as the complexity of the problem permits. It must possess the maximum of elasticity compatible with existence of essential safeguards. Above all it must be no temporary subterfuge, but the candid crystallization of painful experience into permanent policy worthy of a great nation.⁷¹

Open ended systems. The committee took the view that "the construction subsidy should be available to all American shipping operators . . . upon the same terms . . ." ⁷² It thereby recognized a problem which has grown only more serious with the passage of time. Whatever the amount of money involved during the 1920's, Congress could not have foreseen the day when the direct and indirect financial benefits to the shipping and shipbuilding industries would approach their present level of \$500,000,000 a year.⁷³ From 1950 to 1965 the operating differential subsidy alone grew from \$50,000,000 to \$200,000,000. The amounts of money involved and the rate of increase have naturally brought the program under closer budgetary scrutiny. Thus, although the committee's shipbuilding subsidy recommendation found its way into the 1936 Act (there is no statutory limitation on the availability of construction subsidy funds), the economic and budgetary realities have created an industry of "haves" and "have nots."

Thus a major issue today is how to devise a subsidy system which permits totally free access to responsible and financially qualified new management and capital, and which also makes possible the necessary budgetary control. One answer would be a formula to exclude the least efficient operators or ships from the subsidy program in such numbers as necessary to permit free entry and to keep the budget within the bounds dictated by competing national programs. Because the committee and the Congress did not anticipate the budgetary problem, they did not provide a formula for dis-

this regard: "Undoubtedly, if American citizens were not prevented from purchasing ships built in foreign countries and operating them under American registry and under the American flag, one of the obstacles to the realization of an effective Merchant Marine would be removed." *Id.* at 47.

⁷⁰ *Id.* at 42.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ For a current estimate of the costs of the present merchant marine program, see 112 CONG. REC. 19299 (daily ed. Aug. 22, 1966).

tinguishing between mutually exclusive applications for subsidy. But they did recognize the need for free entry, which is equally with us today.

Subsidy and domestic trades. There had been some subsidy payments to shipping companies in domestic trade under the 1928 Act. The committee recommended that "no operating subsidy should be paid to a shipping operator whose business or interests are in the protected coastlines or intercoastal . . . trades . . ." ⁷⁴ Since 1817 American domestic shipping has benefited from prohibitions against foreign competition. Only ships built and registered in the United States can carry cargo between ports in the United States (as distinguished from trade between U. S. ports and foreign ports). As a consequence, it has quite properly been argued that the domestic trade should not be subsidized; the reason for subsidy is the difference in wages and other costs faced by American ship-owners and their foreign competitors. The issue remains with us today. In a recent case the subsidized States Company was permitted to compete for the California-Hawaii trade against the unsubsidized Matson Lines. ⁷⁵

Accounting systems. The Committee recommended that subsidized shipowners be compelled to "maintain a uniform system of bookkeeping" and to make books of account available to the appropriate government employees. ⁷⁶ This recommendation was embodied in the 1936 Act, and uniform accounting standards are today prescribed by the Maritime Administration. ⁷⁷ Maritime Administration accountants and auditors are actually housed within the subsidized companies' offices and maintain continuous surveil-

⁷⁴ REPORT 42-43.

⁷⁵ States S.S. Co., No. S-121, Secretary of Commerce, July 7, 1965, *aff'd sub nom.*, Matson Nav. Co. v. Connor, Civil No. 44080 (N.D. Cal. Aug. 10, 1966). This case has had an extended odyssey. A Maritime Administration hearing examiner issued his initial decision on March 11, 1963, refusing permission for States Steamship Company, the subsidized line, to participate in the Hawaiian trade. States S. S. Co., 1 Maritime Subsidy Bd., Maritime Administration, Dept. of Commerce Reports 60 (1963). This was reversed by the Maritime Subsidy Board. States S. S. Co., 1 Maritime Subsidy Bd., Maritime Administration, Dept. of Commerce Reports 42 (1963). This was in turn reversed by the Secretary of Commerce. States S. S. Co., Maritime Subsidy Bd., Maritime Administration, Dept. of Commerce Reports 37 (1964). Before a District Court could review the decision the Secretary requested opportunity to reconsider because of certain nonsubstantive facts which had come to light. The Secretary then submitted the case to a hearing examiner of the Federal Maritime Commission on January 14, 1965. This hearing examiner decided that States could operate in the Hawaiian trade without permission. States S. S. Co., No. S-121, Fed. Maritime Comm'n, January 14, 1965. It was the Secretary's reversal of this decision with which this footnote began.

⁷⁶ REPORT 43.

⁷⁷ See 46 C.F.R. §§ 282.00-282.0-40 (1966).

lance of the books. This is an administratively costly operation, and one open to company-auditor influence, but it does potentially provide the government with the necessary information.

Minimum wage scales and labor conditions. Shipowners could find little of which to be proud in the history of maritime labor relations in the nineteenth and early twentieth centuries. A congressional reaction was apparent in the 1930's, and it was strengthened by the committee recommendation that "government-required manning and wage scales and labor conditions" be imposed on subsidized operators "to see that this portion of the subsidy reaches its intended beneficiaries"⁷⁸ Congressional concern found expression principally in Title 3 of the 1936 Act, which provided that the maritime agency should hold hearings to establish minimum wages, maximum hours, and working conditions.⁷⁹

Certainly no one could be expected to foresee in 1935 that today Joe Curran, president of the National Maritime Union, would be the highest paid labor leader in America—at \$102,000 per year plus expenses—or that his men would be compensated accordingly.⁸⁰ Because the Act provides that a subsidized shipowner will receive as "operating differential subsidy" the difference between his foreign competitors' costs of operation and his own, every dime of wage increases from collective bargaining is passed on to the government in the form of increased subsidy payments.⁸¹ The government is not represented at the bargaining table, and this process has no doubt had something to do with the spiraling labor costs in American merchant shipping.

It has been proposed that Title 3 be reactivated and used as a means by which the government can establish maximum wages and minimum hours, so that it may play at least some role in

⁷⁸ REPORT 43.

⁷⁹ 49 Stat. 1992-93 (1936), 46 U.S.C. §§ 1131-32 (1964). Lawrence concludes that "much of the political support for the program was based on a desire to provide useful employment to seamen, shipbuilders, and suppliers of the maritime industry." LAWRENCE, *op. cit. supra* note 7, at 49.

⁸⁰ U.S. News & World Report, May 17, 1965, p. 88.

⁸¹ Wage differential subsidy payments now total about \$175,000,000 annually out of the total "operating differential subsidy" of about \$200,000,000.

As an illustration of how the system works, suppose a European shipowner pays his crew \$10,000 per month per ship, and his American competitor pays his crew \$40,000 per ship per month. The difference, \$30,000 per ship per month, will be paid by the government to the American shipowner as operating differential subsidy. Now assume (as is usually the case) that foreign wages hold relatively steady, and, as a result of collective bargaining, American wages go up to \$50,000 per ship per month. Where does the extra \$10,000 per ship per month come from? The operating differential subsidy simply increases by \$10,000—to \$40,000 per ship per month. As a result, American subsidized operators have very little *economic* incentive (whatever other motivations may be present) to hold down rising wage costs.

determining how tax money is spent by private parties.⁸² It should also be noted that after contracts are signed by maritime management and labor, they are submitted to the Maritime Subsidy Board for approval. Traditionally, disallowances have been miniscule; one statutory standard is that subsidy payments be "fair and reasonable," and the argument is made that the product of collective bargaining is, by definition, fair and reasonable. An effort by the Maritime Subsidy Board to fix maximum subsidizable wages at levels requiring some disallowances, in accordance with another statutory mandate that none but "the most economical and efficient" operations be subsidized, met with an industry outburst and prompt reversal by the Secretary of Commerce in 1965.⁸³ Contracts becoming effective in July of that year have not yet been signed and submitted to the Maritime Subsidy Board, let alone ruled upon—and thus the standards to be applied are still undetermined.

Restrictions on conglomerate corporations in shipping. The Committee provided that "no subsidy be paid for the benefits of any operator whose financial or corporate structure . . . permits the diversion of the subsidy into activities other than bona fide American-flag foreign-trade shipping enterprises . . ." ⁸⁴ This issue is also very much alive today. It came before the Maritime Subsidy Board in 1964 when Moore-McCormack Lines, Inc. proposed to reorganize and change its corporate structure. On that occasion the Board tentatively denied the request, and declared:

The Board must question closely whether those who labor long and profit but little from the sea truly advance our maritime power by combing the countryside for income from other endeavors that may balance overall profitability in the cause of shareholder seamanship.⁸⁵

The decision was appealed, and reversed by the Secretary of Commerce,⁸⁶ following which permission for diversified activities was promptly granted to American Export-Isbrandtsen Lines, Grace Lines, and United States Lines.⁸⁷

⁸² INTERAGENCY MARITIME TASK FORCE, *THE MERCHANT MARINE IN NATIONAL DEFENSE AND TRADE* 18-23 (1965).

⁸³ Opinions of the Secretary of Commerce in Maritime Subsidy Board Dockets A-14, A-15, A-16 issued July 23, 1965, to be printed in Maritime Subsidy Board, Maritime Administration, Department of Commerce Reports. The Board had suggested that perhaps the 3.2% wage guidelines of the President's Council of Economic Advisors should be of some relevance in passing upon what is "economical and efficient" for wages subsidized 72% by the President's budget.

⁸⁴ REPORT 43.

⁸⁵ 1 Maritime Subsidy Board, Maritime Administration, Department of Commerce Reports 676, 681 (1964).

⁸⁶ *Id.* at 676.

⁸⁷ N.Y. Times, Oct. 25, 1965, p. 93, col. 5; *id.*, Oct. 11, 1965, p. 77, col. 8; *id.*, Oct. 26, 1964, p. 26, col. 1.

Recapture of subsidy. The committee considered the theory "that no profit other than compensation for personal services . . . should accrue to private individuals from activities aided by Government funds,"⁸⁸ but it rejected this theory in favor of a subsidy recapture formula. The committee suggested that:

when at the end of any calendar year the cumulative profits on the true investment exceeds 6 per cent per annum calculated from the enactment of the new subsidy program, 75 per cent of profits exceeding 6 per cent should be paid to the government until subsidy payments theretofore made to the shipbuilder have been retired.⁸⁹

Operating subsidy was to be subject to recapture "in the same manner."⁹⁰

This is an instance in which the system proposed by the committee is, in my opinion, in virtually all respects substantially preferable to the one which has evolved over the years. At the present time recapture of subsidy is calculated over a ten year period rather than annually, applies only to return in excess of ten per cent of "capital necessarily employed" rather than six per cent, and is shared 50-50 by the subsidized operator and the government rather than 75-25.⁹¹

⁸⁸ REPORT 45.

⁸⁹ *Id.* at 44.

⁹⁰ *Id.* at 45.

⁹¹ 49 Stat. 2004 (1936), 46 U.S.C. § 1176(5) (1964). Suppose a subsidized operator has \$100,000,000 invested in ships and other property. Suppose, further, that he has profits of \$18,000,000 after taxes in a given year, including a \$5,000,000 operating subsidy. He has \$8,000,000 of profits in excess of "10% of capital necessarily employed" (\$10,000,000). If recapture were figured annually, that excess would be subject to 50% recapture up to the amount of subsidy received (\$5,000,000). In this case, he would return \$4,000,000 (50% of \$8,000,000) to the government and retain the balance, leaving a total profit of \$14,000,000. With a \$9,000,000 profit, none of his subsidy would be subject to recapture. With a \$20,000,000 profit, the subsidy would be entirely recaptured. The "recapture" is of subsidy, not profits, and once the subsidy has been entirely "recaptured" there are no limitations on the shipowner's profits. But notice the differences in retained earnings in the three examples:

<i>Total Profit (Including Subsidy)</i>	<i>Subsidy</i>	<i>Subsidy Recaptured</i>	<i>Total Profit Retained</i>
\$ 9,000,000	\$5,000,000	None	\$14,000,000
\$18,000,000	\$5,000,000	\$4,000,000	\$19,000,000
\$20,000,000	\$5,000,000	\$5,000,000	\$20,000,000

The operator must more than double his profits to increase his earnings by less than 50%.

The subsidy recapture system has a substantial impact on the decisions of subsidized shipping management. They must consider consequences not only for earnings and taxes, but also for subsidy. Assuming the desirability of minimizing the impact of the subsidy system on the thinking of management, useful alternatives are available. Suppose, for example, a sliding scale for recapture produced no "free earnings," or a dramatic plateau (now 10%) where government recovered substantial portions

Subsidy for competition with unsubsidized operators. The committee suggested that "no operating subsidy should be paid to any line operating in competition with an unsubsidized American flag line rendering adequate service upon a foreign-trade route."⁹² This provision is parallel to the committee's proposal to make subsidies available to all qualified shipowners, and to prohibit paying subsidy to an operator in competition with a company in the domestic trade. It is designed to prevent unfair competition and to provide a measure of encouragement and protection for the unsubsidized operator.

This problem also remains with us today. There are four major unsubsidized operators in the American flag-liner trades. None of them is accorded any protection from subsidized competition. At least two have changed hands during the past three years.⁹³ None has ships less than twenty years of age. Each has been repeatedly refused requested subsidy support.

Miscellaneous proposals. The committee touched on a number of other subjects which will not be examined in detail. It proposed a formula for shipbuilding subsidy. It recommended prohibiting transfer of vessels to foreign registry under most conditions—"and under no circumstances . . . unless provision be made for American construction and registry of tonnage of at least equal value . . ."⁹⁴ It provided a formula for operating subsidy. And it recommended that all contracts under the 1928 law be terminated.⁹⁵

(now 50%) of the subsidy. The percentage of recapture could be related to the percentage of profit. (For example, 10% recapture of subsidy and of profits if 1-3% return on capital necessarily employed, 20% on 4-7%, 30% on 8-10%, 50% on 10-15%, 60% on 15-20%, and 75% on all over 20%.) This is one way of trying to structure a subsidy recapture system which will minimize the impact of the recapture formula on the operators' incentive to maximize profits as well as earnings retained (that is, profits, plus subsidy, less recapture). If a sliding scale is for any reason thought to be undesirable, then presumably the plateau scheme can come into play, and the heavier it is, the better. It is for these reasons that 75% recapture of all profits in excess of 6% of capital necessarily employed seems preferable to 50% recapture of all in excess of 10%.

The question of whether subsidy recapture should be figured over a ten year period involves issues wholly unrelated to the theory behind the subsidy (equalization of competitive cost disadvantages between American and foreign shipowners). For example, presumably once 72% of the wages of American seamen are paid by the U.S. Government, the American shipowner has been put into "parity" with his foreign competitor. If, in spite of that, he suffers losses in any given year, it is, we may assume, for reasons unrelated to the obligations undertaken by his government in the Merchant Marine Act. To give him subsidy in such years with no obligation to return it in the future would seem to be adequate—without giving him the added advantage of carrying over the loss to offset recapture obligations in future more profitable years.

⁹² REPORT 45.

⁹³ N.Y. Times, June 2, 1966, p. 61, col. 2; *id.*, May 12, 1965, p. 93, col. 7.

⁹⁴ REPORT 44.

⁹⁵ *Id.* at 45.

It is noteworthy that Senator Black and his committee, in addition to providing detailed safeguards for the operation of a subsidy system, recognized that the ultimate safeguard would have to be found in the quality of the men operating the system. They were knowledgeable about the limitations imposed upon new appointees to old-line agencies accustomed to dealing with vested interests.

The subsidy must be administered by fearless, uncompromising men, unsusceptible to the insidious influence of selfish interests. These men must bring to their difficult task intelligence, industry, candor, and courage, and minds single to the best interest of their country. They must *not* be compelled to take over the entire personnel of existing governmental agencies, shot through with the destructive propaganda of the past, but should be encouraged to avail themselves primarily of those now in government service who have resisted that propaganda and should be permitted to call others of like mind to their aid.⁹⁶

As an added safeguard the committee recommended that no person in an executive or supervisory position within the agency should have had, within three years prior to appointment, any financial interest in a company related to the shipping business, or have been previously employed by such a company. It expressly provided, in language anticipating our present conflict of interest laws and regulations, that "the acquisition of any interest in any such business or the receipt of any gratuity or valuable thing from any such source should be ground for immediate dismissal"⁹⁷

IV. CONCLUSION: AFTERMATH AND APPRAISAL

Senator Black's principal contributions to the 1936 Act and its early administration were the hearings and committee report. After the hearings came fifteen months of debate and thirty-five drafts of proposed legislation.⁹⁸ Black's role in the compromise represented by the final draft, or that of any other individual Senator, is lost in the documentary record. He stimulated the nation's conscience, creating demand for Congressional maritime reform. He proposed legislation. The United States Congress enacted a major law. This substantial achievement is in no way diminished

⁹⁶ *Id.* at 42.

⁹⁷ *Id.* at 45.

⁹⁸ See LAWRENCE, *op. cit. supra* note 7, at 47-49. Lawrence reports that Black opposed the final compromise, and that the Senate Commerce Committee (split ten to ten on the merits) reported it out in response to President Roosevelt's desire that some bill reach the floor. The Senate Appropriations Committee threatened to withhold funds for mail contract payments. The final draft, which "combined but failed to resolve differing points of view," passed the Senate by voice vote one day prior to adjournment for the 1936 presidential nominating conventions (June 19, 1936), and was rushed through the House without change.

by the eventual product of Congressional compromise. One can fairly credit Black with those features of the 1936 Act that attempted to protect against the abuses of the 1928 mail pay system, and absolve him of responsibility for those features added by others.

The U. S. Maritime Commission began work in April, 1937 under the leadership of Joseph P. Kennedy, the former Securities and Exchange Commission Chairman. By June 30, 1937, the Commission settled expiring mail pay contracts; claims of \$166,000,000 eventually resulted in payments of less than \$1,000,000. By November, 1937, it had issued its *Economic Survey of the American Merchant Marine* and Chairman Kennedy was testifying before Congress that the 1936 Act was "unworkable." One of the most notable recommendations of the 1937 Commission was the suggestion that foreign construction of ships be permitted whenever the cost differential between American and foreign shipyards exceeded the maximum permitted by the Act—then 33 1/3 per cent. As might be expected, the proposal met the same outburst of political opposition from the shipyards heaped upon similar proposals both thirty years earlier and thirty years later.⁹⁹

The Commission's new ship construction program was scarcely underway when World War II completely supplanted any commercial basis for the program. As a result of our maritime shipbuilding effort, the U.S. was left with a fleet of 4,500 ships at the war's end, and thus with little cause for orderly ship replacement programs. Since the Second World War, things have been getting progressively worse for all concerned with the American merchant marine.

Subsidies have a way of increasing. An early mail subsidy program increased in cost from \$454,000 to \$1,300,000 annually between 1891 and 1906. Under the 1928 Act, costs ran from \$7,600,000 to \$24,600,000 annually by 1936. The 1936 Act produced costs of \$3,600,000 initially, \$30,000,000 in 1949, \$106,000,000 in 1956, and \$208,000,000 in 1964 for operating subsidy alone. Average annual operating subsidy per ship (using 1957-1959 constant dollars) has risen from \$70,000 to \$655,000.¹⁰⁰

President Eisenhower observed that such high operating costs "seriously hampered . . . efforts to maintain a U.S. merchant fleet . . ." ¹⁰¹ Secretary McNamara has expressed concern that national resources are being used inefficiently "when we apply them to a field in which we have a handicap of 100 per cent in construction and

⁹⁹ *Id.* at 34-36, 70-73.

¹⁰⁰ *Id.* at 205-06.

¹⁰¹ *Id.* at 229.

50 per cent in operating costs"¹⁰² The National Academy of Sciences reported in 1960 that "the subsidy system as it now stands is actually hindering U.S. maritime progress."¹⁰³ Secretary of Commerce Hodges described the maritime program as "in general . . . disappointing."¹⁰⁴ I concluded twenty-eight months as Maritime Administrator in substantial agreement, and Samuel A. Lawrence has provided a book-length treatment of the subject charging that "the industry, in short, is uneconomic in every sense."¹⁰⁵ The Northwestern Transportation Center study comes to the same conclusions,¹⁰⁶ and both the Interagency Maritime Task Force report¹⁰⁷ and dissenting views to the Maritime Advisory Committee report¹⁰⁸ express substantial concern about the programs.¹⁰⁹

Central to today's chaos is the absence of any agreement on a clearly articulated set of purposes and goals for our maritime programs. What do we gain in return for the maritime subsidies we annually invest in this industry? Why do we wish to carry a "substantial" portion of our own trade in heavily subsidized American flag ships? How can we quantify our need—in terms of numbers of ships, or jobs, or tons carried, or total dollars invested? To the extent we seek to serve military needs, how can a subsidized private commercial fleet most economically and effectively contribute to such needs?¹¹⁰

The real problem, of course, is that rational analysis of the program and our current problems has but a limited role to play. Senator Black watched this truth in action as his proposals were compromised through the drafts that eventually became the 1936 Act. Lawrence believes that a part of the explanation is to be found in "higher political echelons" which "have often allowed the

¹⁰² *Ibid.*

¹⁰³ *Id.* at 240-41.

¹⁰⁴ *Id.* at 241.

¹⁰⁵ *Id.* at 337.

¹⁰⁶ FERGUSON, LERNER, MCGEE, OI, RAPPING & SOBOTKA, *op. cit. supra* note 7.

¹⁰⁷ INTERAGENCY MARITIME TASK FORCE, *THE MERCHANT MARINE IN NATIONAL DEFENSE AND TRADE* (1965).

¹⁰⁸ UNITED STATES MARITIME ADVISORY COMMITTEE, *MARITIME POLICY AND PROGRAM OF THE UNITED STATES* (1965).

¹⁰⁹ Black was not unaware of the abuses which have created our current maritime problems. The Democratic platform of 1932 declared "illogical and unsound all efforts to overcome with subsidies the handicaps to American Shipping." LAWRENCE, *op. cit. supra* note 7, at 50 n.38. See text accompanying notes 56-61 *supra*.

¹¹⁰ My own most thorough publicly available effort to address these fundamental policy questions as Maritime Administrator is contained in a prepared statement presented to the House Merchant Marine and Fisheries Committee. See *Hearings Before the Subcommittee on Merchant Marine of the House Committee on Merchant Marine and Fisheries*, 89th Cong., 2d Sess., ser. 89-19, at 345-84 (1966). See also Johnson, *The State of Our Merchant Fleet 1967*, *NAVAL REVIEW* 122 (1966).

cost of the government's program to increase rather than risk alienating any immediately affected group"—a substitute for "hard decision and real innovation."¹¹¹ In addition, the program attracts almost no public attention. The details of governmental maritime aid, and the interrelationships between the numerous government agencies involved, are complex and difficult for outsiders to understand. Turnover among policy personnel has been high; from 1950 to 1965 there were eight Maritime Administrators, seven Secretaries of Commerce, and nine Under Secretaries of Commerce for Transportation. And the industry has created and nurtured one of Washington's most powerful subgovernments: lobbyists and friends in and out of Congress and the executive branch.

These and other reasons have brought Lawrence to the belief that "basic changes are unlikely in the immediate future."¹¹² I hope he is wrong. But I cannot disagree with his final conclusion that "the industry itself enjoys the privilege and bears the chief responsibility for choosing whether to make the adjustments necessary to move ahead or preserve the status quo."¹¹³

Justice Black has been throughout his life a man of extraordinary intelligence, ability, courage, and character. Nations are typically blessed with but few of his kind during the course of their history. The odds are slim that another may come along who will again subject the American merchant marine to the kind of searching examination provided by Senator Black in 1935. Such may, however, be the only salvation for American flag merchant shipping in the waning decades of the Twentieth Century.

¹¹¹ LAWRENCE, *op. cit. supra* note 7, at 332.

¹¹² *Id.* at 349.

¹¹³ *Id.* at 352.