

APPENDIX M

RELIANCE UPON PRECEDENTS BY ADMINISTRATIVE AGENCIES

The following description of the agencies' practices is based upon examination of available documentary materials and upon extensive interviews with the agencies' personnel. It is a striking fact that in almost every instance the agencies' officers who were interviewed expressed the belief that they accorded to the precedents of their respective agencies as much weight as is thought to be given by the highest court of a state to its own prior decisions.

Bureau of Internal Revenue.—The Bureau of Internal Revenue is especially interesting as a manifestation of the natural urge to rely upon precedents. The interpretation of tax statutes is a function in which the tendency to apply the doctrine of stare decisis is unusually strong. The T. D.'s (Treasury Decisions) issued by the Bureau constitute for the most part amendments to the Treasury Regulations and are issued in the exercise of a semilegislative function. It is the "office rulings" of various kinds which the Bureau and the taxpayers tend to regard as precedents. The great majority of disputes between the taxpayers and the Bureau are disposed of without formal rulings and it is only the more important or novel questions which become the subject matter of rulings. The Bureau has repeatedly published its assertions that "The rules other than T. D.'s have none of the force and effect of T. D.'s and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury * * * Officers of the Bureau of Internal Revenue are especially cautioned against reaching a conclusion in any case merely on the basis of similarity to a published ruling * * *." Despite this published statement and the apparent determined effort back of it, the declaration of policy against reliance upon office rulings has had little effect, for the innate desire for consistency and for guidance in the solution of particular problems is too strong; hence, in practice the force accorded to the office rulings by Bureau officials approaches that accorded to regulations. Office rulings of various kinds tend to accumulate as precedents and at the present time the published rulings alone have reached twenty bound volumes.

In addition to the office rulings which are published officially and in various commercial tax services, there are other office rulings which are unpublished and treated as confidential. These unpublished rulings are communicated by the Bureau to its field officials with the caution that "No unpublished ruling or decision will be cited or relied upon by any official or employee of the Bureau * * * as a precedent in the disposition of other cases." This caution is in practice found to be unenforceable; the Bureau's field officials seek

guidance from the unpublished rulings as they do from those which have been published, and the fact seems to be that the unpublished rulings are given great weight even though they are not cited.

Board of Tax Appeals.—Practices of the Board of Tax Appeals in citing and following precedents are well known. Some cases culminate in memorandum opinions which are not published, but reasoned opinions accompany the decisions of most of the cases. In its opinions the Board cites not only decisions of the courts, but also its own prior adjudications. The authorities are cited, discussed, followed, distinguished, and overruled in very much the same manner that traditional judicial opinions deal with earlier decisions.

Bureau of Customs.—The Bureau of Customs has accumulated a body of office rulings which are comparable to those of the Bureau of Internal Revenue. These office rulings are issued as the result of requests either by field officials or importers. The principles contained in the rulings are applied not merely to the cases in question, but also to any other similar situation arising in the future. Only a small portion of the rulings appear in the weekly official publication. The Customs Bureau goes even further in maintaining consistency than to issue rulings which are relied upon as precedents. When a collector has determined to classify merchandise at a rate different from that which it has been the well-established practice to assess, no ruling resulting in the imposition of a higher rate may become effective until thirty days after the publication of the ruling in the Treasury Decisions. Thus a sort of stare decisis applies even where neither formal decision nor informal recorded ruling is made.

Federal Power Commission.—The Federal Power Commission has not regularly published formal opinions. For the most part orders have been issued without opinions. Recently, however, all of the opinions written between January 1, 1931, and June 30, 1939, have been collected for publication in a printed volume. During this period of 8½ years, less than 50 opinions have been prepared, although in addition there are some cases in which orders have been issued without majority opinions, but with dissenting opinions. In some cases there are references to previous decisions, though this is relatively rare. Officers of the Commission disclaim being bound by the principle of stare decisis, but declare that for practical reasons they usually follow their precedents. No express overrulings are remembered by one of the Commission's most experienced officers, but some previous cases have been distinguished.

Federal Trade Commission.—The Federal Trade Commission probably relies on precedents to a greater extent than the Federal Power Commission. The Commission accompanies its formal decisions with very few argumentative opinions—perhaps not more than a dozen in as many years. The findings of fact and orders which are published do not cite previous decisions as authorities. Despite the absence of citation of previous decisions, however, the Commission itself does rely to a very great extent upon the law which it has created by its adjudications. In the interoffice memoranda previous decisions are commonly cited and relied upon as authorities. The briefs of counsel cite the Commission's decisions to a considerable extent. A widely circulated commercial publication contains a collection of the Commission's decisions, which are thus readily available to practitioners; the

Commission's staff makes a considerable use of this service. The Commission prepares indices of its own reports. They are used within the Commission, but are not available to private practitioners. It is said, however, that one may not rely with complete assurance upon the indices to disclose whether a point has previously been passed upon by the Commission.

One practice in the Federal Trade Commission with respect to precedents is especially noteworthy. Cases which the Commission has closed without further action after an investigation has been concluded, are collected and indexed. The reason for the decision not to issue a complaint is embodied in a memorandum in the file of each case, and whenever the reason is that the Commission has decided that the particular activity in question is not an unfair or deceptive act or practice, the decision is regarded within the Commission as an authoritative precedent. This body of materials is available only to the Commission and its staff and not to private practitioners or parties. Except in the relatively rare cases which are carried through formal proceedings and dismissed without the issuance of a cease and desist order, no authorities are available to the public which define what is a fair practice, since the Commission's pronouncements indicate only what is an unfair practice. It is significant that the Commission and its staff utilize materials revelatory of its past (though unannounced) action in order to decide whether or not complaints should issue and in deciding whether or not cease and desist orders should be entered.

No express overrulings have been made by the Federal Trade Commission, because of the lack of argumentative opinions in which earlier cases are cited. In fact, actual overrulings have occurred.

Department of Agriculture.—None of the various agencies at the Department of Agriculture has heretofore published formal opinions giving reasons for results reached. At the present time compilations are being made of the decisions under the Packers and Stockyards Act and under the Perishable Agricultural Commodities Act. Indices are also in process of preparation for these two administrations. Previously no agency in the Department of Agriculture has had an official index of its own earlier decisions. One officer in the Department is of the opinion, however, that precedents play an important role in the Department—perhaps even more important than if argumentative opinions had been published and indexed. There has been such continuity of personnel, it is said, that memories take the place of indices and reported opinions. Cases are frequently decided on the basis of these memories of old cases, where the main rule or principle is remembered, but where the details have become too blurred to afford a basis for distinguishing. It is said that if the decisions were reported, the details would be available to provide grounds for distinguishing, whereas the tendency under the present practice is simply to apply the rule or principle blindly without inquiring whether the details of the cases are similar. This officer believes that when, for example, the Packers and Stockyards opinions are published and indexed, there will be less reliance upon precedents than there is now. At any rate, the present fact is that counsel almost never cite old cases in their briefs and the Departmental agencies themselves seldom do so, although there are some instances in

which examiners' reports have cited previous cases. The natural conclusion would be that availability of precedents to parties, to examiners, and to administrators would give additional impetus to the reliance upon the precedent.

Federal Communications Commission.—The Federal Communications Commission is especially interesting with respect to adherence to precedents. It is believed by some that the Communications Commission goes further than other agencies of comparable importance in refusing to give weight to its own prior decisions. This view seems to be supported to some extent by the Commission's reluctance to cite in its formal opinions any of its own earlier decisions. Volume 5 of the Commission's formal reports contains a table of cases cited. This table lists 28 citations to cases, 22 of which are decisions of courts, 3 of which are Interstate Commerce Commission decisions, and 3 of which are Federal Communications Commission decisions. Two of the three Communications Commission decisions were citations to a former phase of the same case and the third citation was followed in the report by the observation: "But the facts and circumstances surrounding each particular case must govern." Particularly in the broadcast field it is generally felt that there are seldom two cases where the facts are substantially alike and that any attempted general principles will necessarily have to give way in most cases to special circumstances.

Bureau of Marine Inspection and Navigation.—The Bureau of Marine Inspection and Navigation of the Department of Commerce does not publish formal opinions in any of its cases. The cases which come up from the so-called casualty boards, which involve principally questions of revocation or suspension of licenses or certificates of officers and seamen of vessels, are kept consistent by the Director and his staff through the process of constant reference to the files of old cases. Memories of staff members play a large part in this process, but there is also an office index by subject matter, which is kept current. Briefs filed by parties rarely cite precedents. The letters which are mailed to the parties announcing conclusions and to some extent stating findings of fact never cite precedents. The Director and his staff, however, consider that consistency is important and in deciding a case involving an important problem which has not been previously passed upon, they are fully conscious of the importance of case from the standpoint of establishing a new precedent.

Another principal activity of the Bureau of Marine Inspection and Navigation is on an entirely different footing: namely, the remission or mitigation of fines and forfeitures.⁸⁵ For various offenses in violation of the navigation laws statutory penalties are prescribed and in all instances when violations are brought to the attention of the enforcement officers, maximum penalties are imposed. Opportunity is then given to the alleged offender to make his application addressed to the Secretary of Commerce for remission or mitigation of the penalties. As a matter of practice only a very small percentage of the maximum amounts is actually collected. Where the statute prescribes a \$1,000 penalty and where it is found that the offender is guilty, the Bureau has discretion to recommend to the Secretary of Commerce that mitiga-

⁸⁵ Discussion of this phase of the Bureau's work may be found in this Committee's Monograph No. 10, "Bureau of Marine Inspection and Navigation, Department of Commerce," Sen. Doc. No. 186 (76th Cong., 3d sess.), pt. 10 at 24 et seq.

tion be refused or that the fine be mitigated to such an amount as \$100 or \$50, or even remitted altogether. The range of discretion is exceedingly wide; in the aggregate, maximum penalties are mitigated to some 15 or 20 percent of the amounts initially imposed. No rules have been evolved to guide the exercise of this discretion and no general principles have been enunciated. No index of previous decisions has been prepared and it is not the general practice for the Bureau to refer to the files of earlier cases. The administrators take the view that the problems are purely factual and that it is not possible to formulate principles. It has been observed, however, that conditions other than the particular circumstances surrounding the offense may affect the amount of the penalty finally fixed.

Veterans' Administration.—The Veterans' Administration achieves consistency and continuity in its adjudications through an elaborate and extensive index according to subject matter which is maintained by the staff. The opinions of the Solicitor which are rendered to the Administrator are considered persuasive but not binding. The decisions of the Administrator, whether they rest upon a Solicitor's opinion or not, are considered binding. Opinions are not compiled and published and the index is not available to veterans or their representatives. In the briefs of counsel (representatives of service organizations—usually not lawyers) citations of precedents are rare. It is said that the Veterans' Administration follows its own precedents to the same extent as a state supreme court.

The Railroad Retirement Board.—Decisions of the Railroad Retirement Board frequently rely upon opinions of the General Counsel, which are, however, rarely cited in Board's opinions. All General Counsel's opinions have been carefully indexed as to subject matter, and the General Counsel and his staff use the index a great deal. Briefs of parties and their counsel cite precedents to some extent. Parties usually are not represented by lawyers, but it is estimated that of the briefs filed by lawyers perhaps 40 percent will cite at least one precedent established by the Board. It is said to be the Board's intent to follow carefully its own prior holdings. Its ability to do so will be increased if the relevant materials are readily accessible to those—both private counsel and Board employees—who must aid the Board in its work. The present situation has been described as follows:

In the brief period of its existence, the Board has issued a large number of instructions, interpretations, rulings, and decisions, and the material is accumulating at a rapid pace. Complaint is made by those within the agency that it is often difficult to correlate the material and keep it so that it is readily accessible. A similar complaint has been made by those outside the agency. At one hearing attended, the applicant's counsel who had come from a considerable distance, expressed regret at the fact that he had been unable to find prior decisions and rulings of the Board.

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It is to be noted that a major step has been taken * * * by the Board's issuance of a small handbook entitled "Selected Questions and Answers on Railroad Retirement Act." Containing 171 questions and answers, it is divided into chapters according to subject matter, and is indexed with extreme completeness.

Current instructions to claims personnel are shortly to be superseded by a carefully indexed manual now in the course of preparation. Rulings by the General Counsel are distributed, after mimeographing, to all members of the legal staff as well as to other interested personnel. Each item bears a number which is correlated with a detailed cumulative digest system. Rulings on coverage are distributed by mail to the affected interests including some of the brotherhoods, the Association of American Railroads, the American Short Line

Railway Association, and other interested persons who request this service. On the basis of such information the Association of American Railroads issued in February 1940 a greatly condensed summary of many of these rulings and distributed copies to its members. The Board itself recently issued its first law bulletin containing a compilation of all its rulings to date with respect to bus and trucking operations. Approximately a thousand copies were distributed to railroads through the Association of American Railroads; additional copies were supplied to labor organizations, to the Commerce Clearing House, to Prentice-Hall, and to other persons requesting copies. This publication is the first of a series contemplated by the Board; the second, now in process, will contain a compilation of rulings interpreting the statutory phrase "service in connection with the transportation of passengers or property by railroad. * * *⁸⁶

Social Security Board.—The Bureau of Old Age and Survivors' Insurance of the Social Security Board is beginning to develop a vast body of precedents which will guide its adjudications. Questions of law which arise in the course of initial adjudications are referred to the General Counsel's office for opinions. The opinions rendered by the General Counsel's office are marked "precedent opinions" whenever the question passed upon is one of general significance. These precedent opinions are accumulated and used as guides for the adjudication section in later cases. The referees who hear cases when dissatisfied claimants request hearings are not definitely bound to follow the opinions rendered by the General Counsel's office. The Appeals Council which decides cases on appeal from referee's decisions is likewise theoretically free to depart from General Counsel's opinions. The practices of the referees and of the Appeals Council in this regard, however, remain yet to be worked out, as a hearing and review of cases is now only beginning.

United States Employees' Compensation Commission.—The United States Employees' Compensation Commission stands alone in its novel practices with respect to the effect of its own precedents. In the administration of the Longshoremen's and Harbor Workers' Act and the District of Columbia Workmen's Compensation Act the deputy commissioners do not write opinions disposing of individual cases. There is no digest of the decisions of the deputy commissioners and it is considered that no principles are developed by the process of adjudication. Instead of attempting to establish a body of law by the accumulation of their own precedents, the deputy commissioners rely upon court decisions in the field of workmen's compensation. They use the American Digest System, Corpus Juris, and the Commerce Clearing House service for finding decisions on various problems that may be in point. Of course, the statutes which are interpreted by State courts may frequently be somewhat different from the Federal acts; furthermore, decisions of State courts in the field of workmen's compensation are notoriously conflicting and confused. But such guidance as the deputy commissioners have for their own formulation of problems comes from the body of law which has been built up by the courts. To some extent occasional reliance upon the central office for advice constitutes an element making for consistency. The deputy commissioners sometimes write to the office or the Chief Counsel of the Commission for guidance on specific questions of law or of inter-

⁸⁶ Committee Monograph No. 8, "Railroad Retirement Board," Sen. Doc. No. 186 (76th Cong., 3d sess.), pt. 8, at 45-46.

pretation. When the Chief Counsel passes upon a question of general interest, his opinion is sent to all deputies. These opinions of the Chief Counsel, however, are not heavily relied upon as precedents.

The administration of the United States Employees' Compensation Act by the Commission is somewhat different. Court decisions are infrequently in point and are therefore only slightly significant as precedents, and even the Commission's own decisions do not constitute a body of binding authority. A large number of the decisions of the Commission—those which are deemed significant—are indexed and the index is used to a considerable extent. Because of the fact, however, that reasoned opinions are not prepared in individual cases, recourse to the files of old cases is not always fruitful because the interpretation of the precedent decision may be extremely difficult.

Interstate Commerce Commission.—The Interstate Commerce Commission has formally declared in many opinions that it "is not bound by any rule of stare decisis."⁸⁷ These formal statements, however, are offset by others of the Commission's observations, such as, for example, the following: "When, upon a given state of facts, we reach a conclusion regarding certain rates we will adhere to that conclusion in subsequent proceedings regarding the same or similar rates unless new facts are brought to our attention, conditions are shown to have undergone a material change, or we proceeded on a misconception or misapprehension."⁸⁸ The nearly 300 volumes of reported decisions of the Interstate Commerce Commission are constantly in use by the Commission and its staff and by practitioners. The annotations to the Interstate Commerce Act fill eight large volumes and constitute an exceedingly elaborate and comprehensive index to the reported cases. An excellent study of stare decisis in the Commission is Pittman, *The Doctrine of Precedents and the Interstate Commerce Commission* (1937), 5 Geo. Wash. L. Rev. 543. There the conclusion is reached that "It is doubtful whether the Commission decides cases in a manner fundamentally different from that of the traditional courts." Further independent examination of the Commission's practices confirms this conclusion.⁸⁹

United States Maritime Commission.—The United States Maritime Commission, in practices concerning stare decisis as in other practices, followed the example of the Interstate Commerce Commission. More than 90 percent of the Commission's formal adjudications are reported in opinions which are printed and published. All the cases since the beginning of the United States Shipping Board in 1916 number less than 600 and the body of principles established is not a large one. The Commission cites and relies upon its own previous decisions wherever a precedent is available. There are some conflicting decisions, but no express overrulings. Until 1940, no index of decisions had been available, but during that year an examiner of the Commission on his own responsibility published an index, which, however, is not yet extensively used. Memories of

⁸⁷ See e. g., *American Glue Co. v. Boston & Maine Ry.*, 191 I. C. C. 37, 39.

⁸⁸ *Ibid.*

⁸⁹ It should be noted here, however, that the Pittman study was limited to a survey of the reported decisions. Much of the work of the Commission never culminates in formal opinions. In one year, for example, the Commission acted upon 8,000 applications seeking permission to establish rates or fares on less than thirty days' notice or seeking waiver of tariff-publishing rules; rarely is one of these cases formally reported. Similarly, cases involving applications for abandonments and extensions of railroad lines usually are not reported and the same is true of applications for approval of consolidations, mergers, leases, purchases, and acquisitions of control.

individuals within the Commission's staff have thus far been sufficient for finding appropriate precedents, since there has been considerable continuity of personnel in the regulatory portions of the Commission's organization. Because of the nature of the regulatory functions the Maritime Commission tends to rely to a much greater extent upon reported decisions of the Interstate Commerce Commission than upon its own previously decided cases. The annotations to the Interstate Commerce Act are constantly in use by the Commission and its staff.

Securities and Exchange Commission.—The Securities and Exchange Commission has made a conscious attempt to build a body of precedents which will guide future adjudications. Formal adjudication by the Commission usually culminates in reasoned opinions which are printed and published. So far no comprehensive index of the Commission's decisions has been published, but the chief of the opinion section maintains his own informal index and performs the function of correlating the Commission's decisions. The vast majority of the Commission's formal opinions cite previous decisions of the Commission and rely upon them. Opinions which limit or distinguish previous decisions closely resemble traditional judicial opinions. In only one instance has the Commission expressly overruled a precedent.⁹⁰

National Labor Relations Board.—What has just been said with reference to the Securities and Exchange Commission is equally applicable to the National Labor Relations Board. That body consistently prepares and publishes opinions which disclose the reasoning underlying its decisions. These are thereafter resorted to by the Board and its staff as authoritative precedents.

Civil Aeronautics Board.—The Civil Aeronautics Board issues reasoned opinions disposing of most of its formal adjudications. One volume of printed opinions has just been completed and an index-digest of that volume is in process of preparation. The Board is aware of its creation of precedents by specific decisions and frequently individual decisions receive much more thought and careful consideration by reason of their precedent value than they would if the relatively unimportant issues between the immediate parties were the only consideration. So far, memories have been relied upon for finding relevant precedents but the one volume of decisions is sufficiently small that memory has been quite adequate for this purpose. Briefs of counsel tend to cite precedents to a considerable extent, especially in new route cases.

Post Office Department.—Stare decisis plays little part in the adjudications conducted by the Post Office Department. Mimeographed opinions are issued in some cases, but no attempt is made to compile in systematic fashion a collection of decisions. Most adjudications culminate in mere letters to the interested parties. No index of adjudications has even been prepared. To a slight extent

⁹⁰ A student of the Commission's opinions has stated the conclusion that the Commission has, "to a great extent, lost sight of the theoretical independence of such agencies from the force of precedent, and that no abstract proposition to the effect that stare decisis is not an accepted doctrine of administrative procedure would be accurate." Note, "Stare Decisis in N. L. R. B. and S. E. C." (1939) 16 N. Y. U. L. Q. Rev. 618.

there is citation of cases which have been taken to the courts, but there is no citation of previous decisions made by the Post Office Department. The officials of the Department do not recognize that they are establishing a principle for the future when they decide a particular case, but prefer to regard each case as unique.

War Department.—The War Department publishes no reasoned opinions in connection with its disposition of matters within its jurisdiction over navigable waters. Ordinarily it does not even prepare opinions of any kind, although a memorandum in the files will frequently explain the disposition made of particular controversies. No index of previous adjudications has ever been compiled and despite the fact that some of the Department's officials assert that they are careful to maintain a high degree of consistency, the difficulty in finding the results in old cases in the files must certainly jeopardize the success of their effort in that direction, since a heavy burden is placed on official memories unaided by easily accessible records.

Interior Department.—The Interior Department has issued nearly 60 bound volumes of reported formal opinions, principally opinions of the Land Office. These opinions very closely resemble those of courts and the reliance upon precedents is probably substantially the same as that of state appellate courts in dealing with comparable subject matters. The field is one in which the elements of certainty and predictability are of great consequence. It is not surprising, therefore, that the doctrine of stare decisis is unusually strong. The Department maintains an excellent index of decisions, and each volume of reports contains its own index. In addition, there are tables of cases reported, tables of cases cited, and tables of overruled and modified cases. The cumulative table of overruled and modified cases is very impressive in the number of cases which it contains. That some 500 previous decisions have been either overruled or modified, however, does not justify the conclusion that the Land Office has been inclined to overrule or to modify with unusual freedom. An analysis of cases which are regarded by the Land Office as overruled has led to the conclusion that "it is quite obvious that the Land Office uses the term 'overrule' in a much broader sense than do the courts, and includes in overruled cases those in which the language is merely limited to the particular facts by a later decision. The explanation probably is that the Department is much more consciously "making law" by its decisions, than are the courts."⁹¹

⁹¹ McClintock, *The Administrative Determination of Public Land Controversies* (1925), 9 Minn. L. Rev. 420, 542, 638.