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THE ADMINISTRATIVE POWER OF INVESTIGATION

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THE Administrative Procedure Act to the contrary notwithstanding, administrative proceedings are not limited to rule-making, adjudication, and licensing. [1] Some administrative proceedings are investigations—proceedings designed to produce information. Investigations are useful for all administrative functions, not only for rule-making, adjudication, and licensing, but also for prosecuting, for supervising and directing, for determining general policy, for recommending legislation, and for purposes no more specific than illuminating obscure areas to find out what if anything should be done.

The story of the development of the administrative power of investigation is rather dramatic. As regulation has expanded and intensified, the administrative quest for facts and more facts has gained momentum and has seemingly become an irresistible force. This force has collided with what at first were apparently immovable constitutional principles concerning privacy, searches and seizures, self-incrimination, and freedom from bureaucratic snooping. The constitutional principles remained firm for a time but gradually weakened and crumbled. The force proved irresistible. Remnants of the constitutional principles are left standing, but only to an extent clearly consistent with permitting administrative agencies freely to secure factual materials needed to carry out the programs they administer.

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1. Subsection (g) of Section 2 of the Administrative Procedure Act, 60 STAT. 237 (1946), 5 U.S.C.A. § 1001 (g) (Supp. 1946) provides that "'Agency proceeding' means any agency process as defined in subsections (c), (d), and (e)." These three subsections deal respectively with rule-making, adjudication, and licensing. Since adjudication is defined as agency process other than rule-making, it is arguable that an investigation, not being rule making, is necessarily adjudication. But that strains too much the accepted meaning of adjudication.

Questions of substance may hinge on the definition of "agency proceeding." For instance, Section 6(a) gives the right to be represented by counsel to "any person compelled to appear in person before any agency or representative thereof" and to "every party . . . in any agency proceeding." This apparently changes the law of Bowles v. Baer, 142 F.2d 787 (C. C. A. 7th 1944), holding that witnesses subpoenaed in an administrative investigation may be denied representation by counsel. But a party or witness not compelled to appear is given the right to be represented by counsel only in an "agency proceeding," and that term apparently does not include a formal hearing in an investigation. Yet Section 6(b) refers to "a nonpublic investigatory proceeding."

The clash between official fact-gatherers and interests of privacy is probably about as old as organized government. [2] Oppressive use of writs of assistance (general search warrants) contributed substantially to the movement which became the American Revolution. [3] The first important skirmish in the modern development came in 1881, when the civil liberties fortifications built around privacy were found impenetrable even by direct exertion of the great power of Congress; the Supreme Court, in holding that the House of Representatives could not enforce a subpoena issued by a congressional committee in the course of an investigation, asserted that neither house of Congress "possesses the general power of making inquiry into the private affairs of the citizen." [4] This particular point was not captured by the attackers until 1927, when the congressional power to punish a recusant witness for contempt was at last recognized. [5] Early in the twentieth century the defenders won again when the Supreme Court narrowly interpreted a statute conferring a power of investigation upon the Interstate Commerce Commission. The Court held that the Commission could not compel testimony in order to secure information to aid in recommending legislation. The holding rested less on statutory language than on prevailing mores: ". . . the power to require testimony is limited, as it usually is in English-speaking countries, at least, to only the cases where the sacrifice of privacy is necessary,—those where the investigations concern a specific breach of the law." [6] The attackers came back with the added strength of new legislation and prevailed on this point in 1917. [7] When in 1924 the Federal Trade Commission sought information about statutory violations without showing probable cause and without framing its demand in specific terms, the attackers were se-

2. For a valuable historical account going back to biblical and Roman times, see the first chapter of LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT (1937).

3. Writs of assistance (deriving their name from their command to all officers to assist in their execution) gave continuous authority to petty officers to search at will wherever they suspected smuggled goods to be. Of a speech by James Otis in 1761 John Adams said: "I do say in the most solemn manner, that Mr. Otis's oration against *writs of assistance* breathed into this nation the breath of life." 10 WORKS OF JOHN ADAMS 276 (1856). See the second chapter of LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT (1937). For a brief historical summary, see Fraenkel, *Concerning Searches and Seizures* 34 HARV. L. REV. 361 (1921). For the development in Great Britain, see CLOKIE and ROBINSON, ROYAL COMMISSIONS OF INQUIRY (1937).

4. Kilbourn v. Thompson, 103 U.S. 168, 190 (1881).

5. McGrain v. Daugherty, 273 U.S. 135 (1927). See Landis, *Constitutional Limitations on the Congressional Power of Investigation* 40 HARV. L. REV. 153 (1926); Herwitz and Mulligan, *The Legislative Investigating Committee* 33 COL. L. REV. 1 (1933); MCGEARY, THE DEVELOPMENTS OF CONGRESSIONAL INVESTIGATIVE POWER (1940).

6. Harriman v. ICC, 211 U.S. 407, 419-20 (1908).

7. Smith v. ICC, 245 U.S. 33 (1917). The new legislation is discussed below at p. 1117.

verely denounced by Mr. Justice Holmes for a unanimous Court: "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire . . . and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime . . . It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." [8] The latest significant triumph of the defenders came in 1936, when the Supreme Court, although dealing with a mere attempt of an administrative agency to get information, talked somewhat intemperately of "odious" practices and of "intolerable abuses of the Star Chamber," and quoted with approval a nineteenth-century statement of a lower court: "A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny." [9]

The spirit behind statements of this kind became utterly exhausted by 1940 when the Supreme Court denied certiorari after a lower court had rendered a clear-cut holding that an agency may inspect books and records "regardless of whether the business is a public utility and regardless of whether there is any pre-existing probable cause for believing that there has been a violation of the law." [10] The doctrine has recently developed that records required by statute or regulation are "quasi-public" records not subject to immunities applying to private records and may therefore be inspected by administrative officers without any showing of probable cause, the privilege against self-incrimination affording no protection. [11] In 1943 the Supreme Court held that a district court must enforce a subpoena duces tecum at the instance of an administrative agency, not only in the absence of a showing that the company whose records were sought was subject to the regulatory jurisdiction of the agency but even in the absence of a showing of probable jurisdiction. [12] In 1946 the Supreme Court made clear that an administrative subpoena duces tecum will be judicially enforced if "the investigation be for a lawfully authorized purpose, within the

8. FTC v. American Tobacco Co., 264 U.S. 298, 305-6 (1924).

9. Jones v. SEC, 298 U.S. 1, 27 (1936), quoting from *In re* Pacific Railway Commission, 32 Fed. 241, 263 (C.C.N.D. Cal. 1887).

10. Fleming v. Montgomery Ward & Co., 114 F.2d 384, 390 (C. C. A. 7th 1940), *cert. denied*, 311 U.S. 690 (1940).

11. *See, e.g.*, Bowles v. Insel, 148 F.2d 91 (C. C. A. 3d 1945). This and similar cases are discussed below at pp. 1136-8.

12. Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943).

power of Congress to command"; this applies not only to adjudications and to investigations relating to law enforcement but also to "general or statistical investigations authorized by Congress."[13] And in 1947 the Supreme Court held that in absence of statutory provision or legislative history affirmatively denying the power of delegation, an administrator may delegate to regional administrators and district directors the power to sign and issue subpoenas. [14]

THE NATURE OF THE INVESTIGATING POWER

The administrative power of investigation includes detective work like that of the Federal Bureau of Investigation and such units as the Interstate Commerce Commission's Bureau of Inquiry, laboratory work exemplified by the Commerce Department's Bureau of Standards, and the collection and analysis of social science materials by such agencies as the Labor Department's Bureau of Labor Statistics, the Agriculture Department's Bureau of Agricultural Economics, and the now defunct National Resources Planning Board. Yet these are not the types of investigation here involved. The investigating power about which the many legal battles have been fought relates to compelling testimony, inspecting or ordering production of books and records, requiring the keeping of records in accordance with designated forms, and commanding that questionnaires be answered or that reports be made to administrative authorities.

Far more than law enforcement is involved. The administrative power of investigation is of course essential to law enforcement, but its most significant functions probably relate to the exercise of other administrative powers. The power of investigation is part and parcel of the prosecuting power and of the practically more important power of supervision which grows out of the prosecuting power. The Federal

13. Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 209 (1946).

14. Fleming v. Mohawk Wrecking and Lumber Co., 67 Sup. Ct. 1129 (1947). The *Mohawk* case distinguished Cudahy Packing Co. v. Holland, 315 U.S. 357 (1942) on the grounds that (1) when Congress enacted the Fair Labor Standards Act involved in the *Cudahy* case, a provision authorizing delegation of the subpoena power was eliminated by a conference committee, whereas a Senate Committee said the Price Control Act authorized the Administrator to delegate "any of the powers given to him by the bill"; (2) the Fair Labor Standards Act specifically delegated some other powers, thus negativing power to delegate the signing and issuing of subpoenas; (3) the Fair Labor Standards Act was dependent on the Federal Trade Commission Act having a history of its own; (4) the Price Control Act, unlike the Fair Labor Standards Act, granted a broad rule-making power, which the Court said "may itself be an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld"; and (5) the Price Control Act contained no provision negativing authority to delegate the subpoena power. In the *Mohawk* case, Mr. Justice Jackson was alone in expressing concern that delegation of the subpoena power should not be coupled with automatic court enforcement of subpoenas and that the Supreme Court's decisions are tending in the direction of automatic enforcement.

Reserve Board and the Federal Deposit Insurance Corporation supervise the banking of the nation largely through the power of investigation, only rarely resorting either to adjudication or to rule-making. Fraud in securities is controlled primarily by a system of compulsory disclosures. The appropriate agency usually conducts a proceeding to investigate the causes of accidents of trains, ships, and airplanes. Investigations are often conducted to determine general policies; for instance, in its 1946 annual report the Federal Communications Commission discusses a "general public hearing to determine what changes, if any, should be made in present policies on allocation of clear channels in the standard broadcast band." [15] Such general policy determination may relate to adjudication, to rule-making, to prosecuting, to supervising, or to all of those and more. [16] The flavor of what administrative investigation is becoming is well conveyed by two sentences in the 1946 annual report of the Civil Aeronautics Board: "The first postwar year of Board operations was marked by a considerable number of investigations in all phases of civil aviation. The Board was concerned with pilot fatigue as related to air safety, universal air travel on a credit basis, fire prevention in aircraft, the development of air freight, matters relating to nonscheduled air transportation, and a series of problems involving intercorporate relationships." [17] During 1945 and 1946 the Federal Power Commission conducted a large fact-finding investigation into the conservation and utilization of natural gas, including inquiry into (1) reserves, known fields, prospective discoveries and field life calculations, (2) production practices and problems, (3) extent and control of physical waste, (4) state laws governing production, waste, and conservation, (5) utilization of natural gas, "end use" such as for carbon black, boiler fuel, imports, and exports. [18] In an appendix to

15. 12 FCC ANN. REP. 10 (1946).

16. For instance, the Federal Communications Commission's investigation of network control of local stations led to regulations providing that licenses would not be issued to stations having designated provisions in their contracts with networks. This cuts across both rule-making and adjudication. A description of the investigation is presented in the opinion in National Broadcasting Co. v. United States, 319 U.S. 190, 193-6 (1943). In 1941 the Commission instituted an investigation to determine what policy or rules, if any, should be promulgated concerning the acquisition of broadcasting stations by newspapers. In its 1941 annual report, the Commission said: "Such questions . . . may be settled, as in the past, in the consideration of particular cases as they arise, or they may be the subject of a general determination of Commission policy or of new legislation." 7 FCC ANN. REP. 25 (1941). After investigating, the Commission decided not to adopt any general rule, but to submit a summary of evidence to congressional committees and to announce that the Commission will not deny a license merely because the applicant is engaged in newspaper publishing but will prevent "concentration of control in the hands of the few to the exclusion of the many who may be equally well qualified." 10 FCC ANN. REP. 7 (1944).

17. 6 CAB ANN. REP. 2 (1946).

18. 26 FPC ANN. REP. 66 (1946).

its 1944 annual report the Federal Trade Commission describes each of about 125 investigations made since 1915, some requested by Congress or by one House, some by the President, some by another agency, and some instituted by the Commission of its own motion. In its 1946 annual report the Commission describes its general investigations of international phosphate cartels, of the wholesale baking industry, and of resale price maintenance. In addition, the Federal Trade Commission made 370 wartime cost-finding inquiries in 1917-18, and 300 investigations at the instance of the War Production Board during one year of the Second World War. [19] The Interstate Commerce Commission's rate-structure investigation, made pursuant to the Hoch-Smith resolution of Congress, has been called "the most far-reaching and important one ever entered upon by the Interstate Commerce Commission or by any other human tribunal among civilized peoples." [20] The record was 155,000 pages, plus more than 11,000 exhibits.

Administrative investigations are intertwined with congressional investigations, which in recent years have become far more numerous than ever before. Congressional committees sometimes seek information to guide legislation, sometimes investigate in order to supervise administration, and sometimes intend merely to provide favorable or unfavorable publicity about some group or cause. The Truman Committee will be long remembered for its contributions to efficient prosecution of World War II, as will the Dies Committee for its publicity techniques. One of the greatest investigations of all time was that of the Temporary National Economic Committee, composed of three Senators, three Representatives, and six administrative officers representing the Securities and Exchange Commission, the Federal Trade Commission, and the Departments of the Treasury, Justice, Labor, and Commerce. Facts developed by the TNEC will provide source materials for economists in and out of government for years to come. Special agencies are often established for the sole purpose of conducting investigations. One type of such special investigating agency is exemplified by the Commission on Industrial Relations set up in 1912, and by the National Commission on Law Observance and Enforcement (Wickersham Commission) created in 1929. Congress created another type of temporary agency in 1940, the Board of Investigation and Re-

19. 30 FTC ANN. REP. 2, 3, 85–100 (1944).

20. The statement is made by Commissioner Aitchison, quoted in Att'y Gen. Comm. Ad. Proc. Monograph, Interstate Commerce Commission 95 (1940). See the description of ICC general investigations in the Monograph at pp. 93–8. Some investigations are very narrow—into a single rate between two points on one commodity. A large investigation into freight forwarding was in large measure a general fishing expedition to see what might turn up; it led to both legislative and administrative action. Investigations may be conducted before drafting regulations, as in the case of hours of service of motor carriers, or to secure criticisms of proposed regulations, as in the case of motor carrier safety regulations.

search, to make inquiries into questions of transportation which the Interstate Commerce Commission had not adequately studied. More often Congress or congressional committees utilize existing agencies for conducting investigations. Whether or not instituted at the instance of Congress, administrative investigations often lead to legislation. An outstanding example was an investigation by the Securities and Exchange Commission of investment trusts; not only was a comprehensive report made to Congress, but through the investigation the terms of a compromise bill were agreed upon between representatives of the industry and the Commission, and the bill thus prepared passed both houses of Congress unanimously.[21]

STATUTORY PROVISIONS

Federal statutes setting up regulatory agencies uniformly confer broad powers of investigation, although detailed provisions vary considerably from agency to agency. Narrow judicial interpretations have given rise to strikingly large grants of power. The Interstate Commerce Commission was initially empowered "to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created," and "for the purposes of this act . . . to require, [by subpoena,] the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation." [22] The Supreme Court in 1908 emphasized the words, "for the purposes of this Act," and held that the Commission could investigate only matters that might have been made the object of a complaint, and not matters which would merely assist in recommending additional legislation. [23] Congress then amended the statute to authorize the Commission "to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act."[24] The Supreme Court in 1917 upheld the power of the Commission to investigate railroad expenditures for political purposes, saying that ". . . it is not far from true—and it may be it is entirely true, as said by the Commission—that 'there can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce.' " [25] This

21. 10 SEC ANN. REP. 157-8 (1944).
22. 24 STAT. 379, 383 (1887).
23. Harriman v. ICC, 211 U.S. 407 (1908).
24. 36 STAT. 539, 551 (1910), 49 U.S.C. § 13 (2) (1940).
25. Smith v. ICC, 245 U.S. 33, 43 (1917).

theory that carriers are "agents of the public" has ever since assisted in judicial approval of investigations by the Interstate Commerce Commission. [26]

The Interstate Commerce Act also empowers the Commission to prescribe forms of accounts and records, and provides: "The Commission shall at all times have access to all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept . . . and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission." [27]

When in 1914 Congress enacted the Federal Trade Commission Act, it had the advantage of knowing the Supreme Court's narrow construction of the Interstate Commerce Act and accordingly resorted to exceedingly broad language: "The commission shall also have power . . . to gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce," except banks and certain common carriers, and to require such corporations "to file with the commission in such form as the commission may prescribe, annual or special . . . reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations . . ." [28] The Commission is further empowered to make public the information obtained, except trade secrets and names of customers, to make annual and special reports to Congress with recommendations for legislation, to have access to documentary evidence, and to subpoena witnesses and "all such documentary evidence relating to any matter under investigation . . ." [29]

The later statutes setting up regulatory agencies have similarly conferred full powers of investigation. Thus, the Securities Exchange Act, [30] the Public Utility Holding Company Act, [31] the Natural Gas

26. See the discussion of the role of the concept of business affected with a public interest as it affects the investigating power, pp. 1136-8.

27. 41 STAT. 493 (1920), as amended, 54 STAT. 916 (1940), 49 U.S.C. § 20 (5) (1940). The Commission is empowered by § 20(1) to require annual, periodical or special reports, and to require "specific and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary . . ." § 20(7) provides for forfeiture to the United States not to exceed $500 for each day of failure or refusal to submit accounts, books, records, memoranda, correspondence, or other documents. Numerous other provisions concerning investigations run through the Act.

28. 38 STAT. 721 (1914), 15 U.S.C. § 46(a) and (b) (1940).

29. 38 STAT. 722 (1914), 15 U.S.C. § 49 (1940).

30. 48 STAT. 899 (1934), 15 U.S.C. § 78(u) (1940).

31. 49 STAT. 831 (1935), 15 U.S.C. § 79(r) (1940).

Act, [32] and the Federal Power act [33] authorize investigations for purposes of enforcement, for prescribing rules or regulations, and for obtaining information to serve as a basis for recommending legislation. The powers granted by the Civil Aeronautics Act, [34] the Communications Act, [35] the Emergency Price Control Act, [36] and the Atomic Energy Act [37] are very general but do not specifically authorize investigations for recommending legislation. All these statutes confer powers to subpoena witnesses and records in the exercise of the powers of investigation.

A good deal of significance should be attached to the reiteration of congressional will in all these statutes. Not a single important regulatory statute fails to provide broad powers of investigation supported by powers to compel production of evidence. At the time when the courts were seemingly trying to limit the power of investigation to businesses affected with a public interest, [38] or to law enforcement and quasi-judicial proceedings, [39] Congress continued to enact new legis-

32. 52 STAT. 828 (1938), 15 U.S.C. § 717(m) (1940).

33. 49 STAT. 856 (1935), 16 U.S.C. § 825(f) (1940).

34. 52 STAT. 1000 (1938), 49 U.S.C. § 487 (Supp. 1943). The Board may require annual, monthly, periodical and special reports, and "specific answers to all questions upon which the Board may deem information to be necessary." The Board prescribes forms of accounts, records, and memoranda, to which the Board has access, as well as access to lands, buildings, and equipment.

35. Under 48 STAT. 1094 (1934), 47 U.S.C. § 403 (1940), the Commission is authorized to institute an inquiry on its own motion "in any case and as to any matter or thing concerning which complaint is authorized to be made . . . or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act." Under 48 STAT. 1096 (1934), 47 U.S.C. § 409 (1940), the Commission may "require by subpena the attendance and testimony of witnesses and the production of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation."

36. 56 STAT. 30 (1942), as amended, 58 STAT. 637 (1944), 50 U.S.C. § 922(a) (Supp. 1944) authorizes the Administrator "to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act. . . ." The Administrator is also authorized to subpoena witnesses and records, and to require certain persons to furnish information, to keep records, to make reports, and to permit inspections.

37. Pub. L. No. 585, 79th Cong., 2d Sess. § 12(a) (3) (Aug. 1, 1946) provides that the Atomic Energy Commission may "make such studies and investigations, obtain such information, and hold such hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this Act, or in the Administration or enforcement of this Act, or any regulations or orders issued thereunder. For such purposes the Commission is authorized . . . by subpena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place."

38. See FTC v. American Tobacco Co., 264 U.S. 298, 305 (1924), declaring that "The mere facts of carrying on a commerce not confined within state lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company now may be." See discussion, *infra*. p. 1136.

39. See discussion, *infra*, p. 1120.

lation granting powers to investigate irrespective of these limitations. Firm legislative insistence on full powers of administrative investigation has undoubtedly been a substantial factor in the final defeat of the attempt to protect private records from exposure to governmental agencies. [40] State legislative enactments expressing the same general view have also contributed. [41]

Subpoenas in Support of Proceedings Unrelated to Adjudication or to Law Enforcement

In the simple society of the nineteenth century the occasion for compelling disclosure of private information seldom arose except in connection with litigation in court and grand jury or other proceedings looking to law enforcement. Near the end of that century a federal court could expect general acceptance of a statement that "intrusion into, and compulsory exposure of, one's private affairs and papers, without judicial process, or in the course of judicial proceedings . . . is contrary to the principles of a free government, and is abhorrent to the instincts of Englishmen and Americans." [42] In its 1908 decision in *Harriman v. ICC* the Supreme Court held through Mr. Justice Holmes that subpoenas could not be used by the Interstate Commerce Commission in investigations made for purposes of recommending legislation, since "[T]he power to require testimony is limited . . . to . . . cases . . . where the investigations concern a specific breach of the law." [43] In *FTC v. Baltimore Grain Co.*, [44] the Federal Trade Commission sought to compel production of records in a general investigation, pursuant to a Senate resolution, into the relation between prices of grain at the farm and export prices. The lower court said that the question was whether the Commission might inspect papers "whenever, in the judgment of the commission, such inspection may furnish information of value to an inquiry it is making as to some economic or commercial problem, and when it has no reason to believe that any violation of law has been committed." [45] The court went on to say that such a power would be "beyond any power which Congress can confer. . ." [46]

40. See Handler, *The Constitutionality of Investigations by the Federal Trade Commission* 28 Col. L. Rev. 708, 905, 925–8 (1928) for references to many federal statutes conferring powers of investigation upon officers and agencies.

41. As a sample of state legislation on the administrative powers of investigation, Mr. Handler presents a very impressive catalog of New York legislation. *Id.* at 928-9.

42. Mr. Justice Field, in *In re* Pacific Railway Commission, 32 Fed. 241, 251 (C.C.N.D. Cal. 1887).

43. 211 U.S. 407, 419–20 (1908).

44. 284 Fed. 886 (D. Md. 1922), *aff'd*, 267 U.S. 586 (1924).

45. 284 Fed. 886, 888 (D. Md. 1922).

46. *Id.* at 890.

The Supreme Court affirmed without opinion. [47] In 1919 the House of Representatives requested the Federal Trade Commission to investigate the cost of living, and Congress appropriated $150,000 for the investigation. A district court enjoined enforcement of an order of the Commission requiring information, and the Court of Appeals for the District of Columbia affirmed in 1923, [48] largely on the ground that the steel, iron and coal businesses under investigation were beyond the interstate commerce power, but partly on the ground of lack of any complaint charging violation of law and that the investigation "seems to be more in the nature of a news-gathering expedition, in hope of securing something of public interest for publication, or possibly subject-matter for future legislation by Congress." [49] The case was argued twice before the Supreme Court, and finally, in 1927, eight years after the investigation was authorized, the Supreme Court held that the remedy at law was adequate and that the bill should have been dismissed for want of equity. [50]

As recently as 1936, in the unusually extreme case of *Jones v. SEC*, [51] the Supreme Court held that enforcement of a subpoena should be denied even where the purpose seemed to be law enforcement. The Securities Act of 1933 gave the Commission authority to issue a subpoena "for the purpose of all investigations which, in the opinion of the Commission, are necessary and proper" for the enforcement of this act. [52] Jones filed a registration statement, which he then withdrew. The Commission refused to consent to the withdrawal and issued a subpoena duces tecum for the purpose of securing information as to possible falsity of representations in the registration statement. The Supreme Court held that the Commission could not prevent withdrawal of the registration statement, and went on to reason that "since here the only disclosed purpose for which the investigation was undertaken had ceased to be legitimate when the registrant rightfully withdrew his statement, the power of the commission to proceed with the inquiry necessarily came to an end . . . further pursuit of the inquiry, obviously, would become what Mr. Justice Holmes characterized as 'a fishing expedition . . .'—an undertaking which uniformly has met with judicial condemnation."[53]

47. 267 U.S. 586 (1924). The affirmance was on the authority of FTC v. American Tobacco Co., 264 U.S. 298 (1924).

48. FTC v. Claire Furnace Co., 285 Fed. 936 (App. D. C. 1923).

49. *Id.* at 941.

50. 274 U.S. 160 (1927). See the full discussion of the case by Handler, *The Constitutionality of Investigations by the Federal Trade Commission* 28 COL. L. REV. 708, 905 (1928).

51. 298 U.S. 1 (1936). Brandeis, Stone, and Cardozo, JJ., dissented. See the criticism of the case in LANDIS, THE ADMINISTRATIVE PROCESS 136–40 (1938).

52. 48 STAT. 85 (1933), 15 U.S.C. §77(s) (1940).

53. 298 U.S. 1, 26 (1936).

These various authorities show overwhelmingly that the law once was firmly established against the use of subpoenas for investigations not related to adjudication or to law enforcement. Yet in statute after statute Congress has continued to confer upon administrative agencies the powers of subpoena not only for adjudication and law enforcement but also for rule-making, for recommending further legislation, and for other purposes. The multiplication of agencies, the complexities of their regulatory tasks, the obvious necessity for securing information, and the growing recognition of public interest in regulated businesses all conspired against the judicial position. Writing in 1926, Mr. Lilienthal surveyed the authorities, weighed the pragmatic considerations, and said: "The question is still open: Can an administrative tribunal . . . compel the attendance and testimony of witnesses when the facts sought by it are not to be used in the enforcement of existing law?" [54] Another writer concluded an article in 1933 with the gloomy observation: "The review of the cases here undertaken seems to indicate that except for judicial or quasi-judicial inquiries, only Congress or its committees can conduct an investigation into the private affairs of individuals." [55]

Congress persisted. Still more statutes authorized use of subpoenas for making rules, for recommending legislation, for gathering information to be used in ways not defined in advance. The urgency of the demand for information persisted. Acceleration in growth of regulatory powers enhanced the need for factual materials and the awareness of that need. The agencies themselves persisted. Investigations unrelated to adjudication or law enforcement increased by leaps and bounds. The pressures of public opinion persisted. More and more government regulation became the accepted order of the day, investigations by agencies and by congressional committees became increasingly familiar, and aspects of economic life once considered private came to be regarded as part of the public domain. The temper of the times was changing, and the authoritative judicial pronouncements embodied

54. Lilienthal, *The Power of Governmental Agencies to Compel Testimony* 39 HARV. L. REV. 694, 713 (1926).

55. Langeluttig, *Constitutional Limitations on Administrative Power of Investigation* 28 ILL. L. REV. 508, 523 (1933).

The general subject has produced a wealth of literature. See especially Landis, *Constitutional Limitations on the Congressional Power of Investigation* 40 HARV. L. REV. 153 (1926); Handler, *The Constitutionality of Investigations by the Federal Trade Commission* 28 COL. L. REV. 708, 905 (1928); MacChesney and Murphy, *Investigatory and Enforcement Powers of the Federal Trade Commission* 8 GEO. WASH. L. REV. 581 (1940); Sherwood, *The Enforcement of Administrative Subpoenas* 44 COL. L. REV. 531 (1944); Note, *Investigatory Powers of Congress and Administrative Agencies* 26 WASH. U. L. Q. 531 (1941); Comment, *Investigatory Powers of the Securities and Exchange Commission* 44 YALE L. J. 819 (1935); Note, *Validity of Subpoenas Duces Tecum Issued by Federal Administrative Bodies,* 86 U. OF PA. L. REV. 420 (1938).

social philosophies which were on the wane. In these circumstances, effective law sometimes changes even in absence of judicial declaration or legislative enactment. Authorities permitting subpoenas for purposes other than adjudication or law enforcement, considered narrowly without reference to changed conditions, are weaker than clear-cut holdings the other way, and yet it is unthinkable that the Supreme Court today would refuse to permit the use of compulsory process to secure information for any administrative purpose which is regarded as legitimate. The older authorities, analytically stronger, have now been fully superseded by the later authorities, analytically weaker. [56]

As early as 1917 *Smith v. ICC* [57] held that new legislation permitted what the Court forbade in the *Harriman* case of 1908—general inquiry into railroad expenditures made for political purposes—on the theory that "it may be it is entirely true, as said by the Commission—that 'there can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce.' "[58] But the Commission's investigation was prompted by a complaint as well as by a resolution of the Senate.

In 1927 the old holding in *Kilbourn v. Thompson* [59] that Congress itself could not enforce a subpoena issued in the course of a legislative investigation finally gave way. *McGrain v. Daugherty* [60] renounced the former view that neither house of Congress "possesses the general power of making inquiry into the private affairs of the citizen," [61] and announced an opposite rule: "We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." [62] If Congress, or either house thereof, may delegate a general investigating power to a committee, which in turn delegates in part to the committee's staff, it becomes very difficult to maintain the position that the same power may not be delegated

56. In Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 202 (1946), the Court distinguishes cases of actual search and seizure from cases involving judicial enforcement of subpoenas and says: "The confusion is due in part to the fact that this is the very kind of situation in which the decisions have moved with variant direction, although without actual conflict when all of the facts in each case are taken into account. Notwithstanding this, emphasis and tone at times are highly contrasting, with consequent overtones of doubt and confusion for validity of the statute or its application."

The Court's observations are well supported. But much of the apparent confusion and variant direction of the decisions yields to heavy emphasis on dates of cases; with some exceptions, the later the case the broader the power of investigation. On the narrow subject of investigations unrelated to adjudication or law enforcement, the key is not confusion or variant direction so much as it is law in process of gradual change.

57. Smith v. ICC, 245 U.S. 33 (1917).

58. *Id.* at 43.

59. 103 U.S. 168 (1881).

60. 273 U.S. 135 (1927).

61. Kilbourn v. Thompson, 103 U.S. 168, 190 (1881).

62. 273 U.S. 135, 174 (1927).

to an administrative agency. The *McGrain* holding necessarily would encompass an investigating body like the Temporary National Economic Committee, composed of three Senators, three Representatives, and six administrative officials. The same principle should apply to the situation in *Hearst v. Black*, [63] where the Senate investigating committee secured the assistance of the Federal Communications Commission in enforcing a subpoena against telegraph companies.

Long-standing tradition permits the use of subpoenas in aid of grand jury proceedings. [64] The authorities are now clear that the same may be done in aid of the administrative counterpart of grand jury proceedings—law enforcement investigations preceding the issuance of formal complaints. Thus, in enforcing a subpoena duces tecum issued by the Securities and Exchange Commission in an investigation one purpose of which was to determine whether or not a recommendation of criminal prosecution should be made to the Attorney General, a court was quite content with the mere observation that the investigation was analogous to that of a grand jury. [65] Another court held that subpoenas were enforceable although the investigation was not held in public and although the witnesses were denied representation by counsel. [66] Despite the absence of a clear-cut provision in the National Labor Relations Act conferring on the Board a subpoena power in support of an investigation preceding the filing of a complaint, the exercise of such power has been upheld. [67] If disclosures may be compelled for investigations which may or may not lead to prosecutions, consistency seems to require similar compulsion for investigations for making rules or planning legislation.

Two decisions of the Supreme Court permit administrative agencies to compel disclosure of business facts, apart from adjudication or specific charge of law violation, although neither case involved the discretionary use of a subpoena. In *ICC v. Goodrich Transit Co.* [68] the Court upheld Commission orders prescribing methods of accounts and requiring a financial report. These orders were not required because of a complaint but were general regulations applicable to a class of car-

63. 87 F.2d 68 (App. D.C. 1936). After the Senate Committee requested the Commission's assistance, the agents of the Commission "took possession of the telegraph companies' offices and examined wholesale the thousands of private telegraph messages received and dispatched therefrom over a period of seven months." *Id.* at 70. The court held the "dragnet" seizure beyond the Commission's authority. The case is significant here only as an illustration of cooperation between a congressional committee and an agency.

64. *See, e.g.*, Brown v. United States, 276 U.S. 134 (1928).

65. Consolidated Mines v. SEC, 97 F.2d 704 (C.C.A. 9th 1938). *See also* Woolley v. United States, 97 F.2d 258, 262 (C.C.A. 9th 1938).

66. Bowles v. Baer, 142 F.2d 787 (C.C.A. 7th 1944).

67. NLRB v. Barrett Co., 120 F.2d 583 (C.C.A. 7th 1941), 55 HARV. L. REV. 134 (1941).

68. 224 U.S. 194 (1912).

riers. In *Electric Bond & Share Co. v. SEC* [69] the Court's language in holding that the Commission may require submission of information in the form of a registration statement went far beyond the necessities of the immediate case: "Information bearing upon activities which are within the range of congressional power may be sought not only by congressional investigation as an aid to appropriate legislation, but through the continuous supervision of an administrative body." [70] The authority of these two cases is weakened by the fact that regulations of general applicability which prescribe in advance the type of information open to administrative scrutiny may well be regarded as less dangerous than power to command a particular party to disclose information which the agency seeks for special purposes.[71]

The most reliable authority, even if only a dictum, is a statement by the Supreme Court in 1946 in *Oklahoma Press Pub. Co. v. Walling*: "It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command." [72] Recent decisions of lower courts have in various circumstances specifically upheld administrative power to compel disclosures for purposes related neither to law enforcement nor to adjudication. [73]

69. 303 U.S. 419 (1938).

70. *Id.* at 437. The Court also declared: "Congress was entitled to demand the fullest information as to organization, financial structure and all the activities which could have any bearing upon the exercise of congressional authority." *Id.* at 441.

71. In Isbrandtsen-Moller Co. v. United States, 300 U.S. 139 (1937), the Court upheld an order of the Secretary of Commerce requiring the company to file a copy or summary of its books and records on designated subjects. The order recited merely that the information was "necessary to the proper administration of the regulatory provisions" of the Shipping Act. The Court, in an opinion preoccupied with other issues, specifically rejected the contention that the Secretary could require production of records only in hearings upon complaints of violations.

72. 327 U.S. 186, 208-9 (1946). The Court went on to say: "This has been ruled most often perhaps in relation to grand jury investigations, but also frequently in respect to general or statistical investigations authorized by Congress." The Court cited authorities which analytically fall considerably short of supporting the second half of the statement. The technique seems to be the familiar one of changing the law without appearing to do so.

73. Stahlman v. Federal Communications Commission, 126 F.2d 124 (App. D.C. 1942) (subpoena enforced to guide rule-making); Federal Trade Commission v. National Biscuit Co., 18 F. Supp. 667 (S.D.N.Y. 1937) (subpoena enforced to support investigation of agricultural income pursuant to resolution of both houses of Congress); United States v. Cream Products Distributing Co., 156 F.2d 732 (C.C.A. 7th 1946) (no charge of violation required; lawfully authorized purpose within power of Congress to command is enough); Bowles v. Northwest Poultry and Dairy Products Co., 153 F.2d 32 (C.C.A. 9th 1946) (admission of the law violations charged held no defense to enforcement of subpoena, because subpoena need not relate to law enforcement); Provenzano v. Porter, 159 F.2d 47 (C.C.A. 9th 1946-7), *cert. denied*, 67 Sup. Ct. 1303 (1947) (subpoena enforceable irrespective of probability of law violation).

The highly crystallized law that subpoenas could be enforced only in connection with law enforcement or adjudication was embodied in Supreme Court holdings. In a narrow sense such holdings outweigh the opposing authorities—oblique and possibly distinguishable [74] Supreme Court decisions, a 1946 dictum of the Supreme Court, and decisions of lower courts. But the recent authorities are in agreement with the temper of the times and the earlier ones are not. No qualification is now needed for the proposition of law that lack of relation to law enforcement or adjudication is no longer a ground for refusing to enforce a subpoena issued by an administrative agency.

Searches and Seizures and Self-Incrimination

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Neither the literal language of the Amendment nor the history which led to its adoption supports the idea that the Amendment limits the use of judicially enforceable subpoenas which require testimony or the production of designated books and records. Writs of assistance during the colonial period had given continuing authority to lowly officers to search private premises at will for smuggled goods, and the adoption of the Fourth Amendment was a direct response to that experience. [75] The Amendment's prohibition of unreasonable searches and seizures might well have been limited to what the words cover—searches and seizures. But the Supreme Court's opinion in the 1886 case of *Boyd v. United States* [76] contained a dictum extending the effects of the Amendment. Referring to a 1765 judgment of Lord Camden in *Entick v. Carrington*, [77] the Court said that "it is not the breaking of his doors and the rummaging of his drawers, that constitutes the essence of the offense . . . . but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is

74. An advocate may argue: The *McGrain* case is different because that was Congress and not an agency; the *Goodrich Transit* and *Electric Bond and Share* cases are distinguishable for the two independent reasons that they involved regulations equally applicable to all and not orders framed for particular respondents, and that they involved public utilities and not ordinary businesses; the *Isbrandtsen-Moller* case is weak authority because the Court did not seem to give its attention to this issue; the *Oklahoma Press* case is only dictum; and some of the lower courts' decisions rest in part upon the idea of "quasi-public" records, which is not applicable in all cases.

75. See Lasson, The History and Development of the Fourth Amendment c. 2 (1937).

76. 116 U. S. 616 (1886).

77. 19 How. St. Tr. 1030, 1074 (1765).

within the condemnation of that judgment." [78] This idea was furthered by the 1906 decision in *Hale v. Henkel*, in which the Court said that "an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment." [79] The objection was to the breadth of the order—compelling a witness to produce all his papers in the hope of finding something relevant may be regarded as the equivalent of a search.

Except for limitations concerning breadth and relevancy, [80] the Fourth Amendment does not now restrict an administrative subpoena for records or an administrative requirement of reports. In the *Oklahoma Press* case of 1946 the Supreme Court emphasizes that objections under the Fourth Amendment to a subpoena duces tecum are answered by the simple observation that such a subpoena involves "no question of actual search and seizure. . . . "[81] Later in the same opinion the Court declares: "The primary source of misconception concerning the Fourth Amendment's function lies perhaps in the identification of cases involving so-called 'figurative' or 'constructive' search with cases of actual search and seizure."[82] The Court seems intent upon burying the *Boyd* dictum and reverting to a more natural meaning of searches and seizures. [83]

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78. 116 U.S. 616, 630 (1886).

79. 201 U.S. 43, 76 (1906).

80. The problem of the breadth of the order is discussed *infra*, pp. 1129-34.

81. Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 195 (1946).

82. *Id.* at 202. The Court also refers to "confusion obscuring the basic distinction between actual and so-called 'constructive' search." 327 U.S. at 204. Even as early as 1911 the Court held that a suitably specific and reasonable requirement that reports be furnished does not involve "the faintest semblance of an unreasonable search and seizure." Baltimore & Ohio R. R. v. ICC, 221 U.S. 612, 622 (1911).

In Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 145 (1937), the Court said with respect to an order of the Secretary of Commerce requiring the filing of a copy or summary of books and records: "The argument that the order amounts to an unreasonable search and seizure forbidden by the Fourth Amendment, is answered by the fact that it does not call for the production or inspection of any of appellant's books or papers."

83. Lower courts are picking up the refrain; *e.g.*, Porter v. Mueller, 156 F.2d 278, 280 (C. C. A. 3d 1946): "We deal here with no case of administrative agents swooping into offices and sweeping up records to be used in prosecutions. Actually no physical search and seizure occurred."

Of course, restrictions remain on actual searches and seizures. Gouled v. United States, 255 U.S. 298 (1921). But a warrant authorizing even the invasion of the privacy of a home may be based on no more than an affidavit of probable cause. Dumbra v. United States, 268 U.S. 435 (1925) (the home was also being used as an illegal winery). The Supreme Court has recently held that the scope of a search incident to an arrest may be broader for public documents (ration coupons) than for private records, Davis v. United States, 328 U.S. 582 (1946), and that one supplying goods to the government may by contract waive the protection, Zap v. United States, 328 U.S. 624 (1946). In Harris v. United States, 67 Sup. Ct. 1098 (1947) the Court, five to four, weakened substantially the protection of a home against searches and seizures.

The Fifth Amendment prohibits compelling any person "in any criminal case to be a witness against himself." Although as an original proposition one might think that a compulsory disclosure of records is not forcing a person to be a witness against himself, yet the *Boyd* case gave impetus to using the Fifth Amendment to limit orders compelling production of records. The Court in the *Boyd* case said that with respect to production of records the Fourth and Fifth Amendments "run almost into each other." [84] Subsequent history is largely one of escaping the effects of the *Boyd* dictum. There are three principal routes of escape. (1) Statutes customarily provide that no person shall be excused from testifying or from producing documentary evidence on the ground of self-incrimination, but that no natural person shall be prosecuted for any act about which he gives evidence in obedience to a subpoena. [85] Such an immunity provision is sufficient to permit compelling the production of self-incriminating evidence. [86] (2) The doctrine is now firmly established that corporations are not privileged against furnishing self-incriminating evidence, and that representatives of corporations acting in their official capacity have no privilege against self-incrimination. [87] The Supreme Court has recently extended this doctrine to unincorporated labor unions and their officers. [88] (3) The latest circumvention of the self-incrimination restriction is through the theory that records which a statute or regulations require to be kept are "quasi-public" records having special attributes. Thus, a circuit court of appeals has recently held: "These books and documents here sought are quasi-

84. 116 U.S. 616, 630 (1885).

85. In 1893 the Interstate Commerce Act was amended by the Compulsory Testimony Act, so as to provide in effect that no person shall be excused on the ground of self-incrimination from giving evidence in obedience to a subpoena of the Commission, but that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction . . . concerning which he may . . . produce evidence . . . in obedience to its subpoena . . ." 27 STAT. 443 (1893), 49 U.S.C. § 46 (1940). The Emergency Price Control Act, like many other federal statutes, provided for application of the Compulsory Testimony Act, including the immunity provision. In United States v. Shapiro, 159 F.2d 890 (C. C. A. 2d 1947), the defendant was convicted partly on the basis of evidence he had produced in response to a subpoena issued under the Price Control Act. The defendant contended that the immunity provision of the Compulsory Testimony Act was applicable. The court rejected the contention, holding that the immunity provision does not apply to "public documents" such as records required to be kept under the Price Control Act. The court pointed out that applying the immunity provision would "destroy the value of record-keeping requirements." *Id.* at 893.

86. Brown v. Walker, 161 U.S. 591 (1896). A weaker immunity provision had previously been held insufficient in Counselman v. Hitchcock, 142 U.S. 547 (1892). Immunity from state prosecution is not essential to validity of a federal statute requiring a witness to testify despite self-incrimination. United States v. Murdock, 284 U.S. 141, 149 (1931).

87. United States v. Bausch & Lomb Co., 321 U.S. 707, 726 (1944); Essgee Co. v. United States, 262 U.S. 151 (1923); Wilson v. United States, 221 U.S. 361 (1911); Hale v. Henkel, 201 U.S. 43 (1906).

88. United States v. White, 322 U.S. 694 (1944).

public records and the constitutional privilege against self-incrimination does not extend to such records." [89]

In the *Oklahoma Press* case the Court reviewed the cases and concluded: "Without attempt to summarize or accurately distinguish all of the cases, the fair distillation, in so far as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." [90]

Thus in final analysis the protections against unreasonable searches and seizures and against compulsory self-incrimination do not now prevent or even substantially hamper administrative authorities from compelling production of reports and records, so long as subpoenas comply with requirements with respect to breadth and relevancy.

Limitations Concerning Breadth and Relevancy—"Fishing Expeditions"

Roving inquiries into private books and records are strongly condemned in the older cases. In *FTC v. American Tobacco Co.*, [91] Mr. Justice Holmes speaking for a unanimous Court lashed out against the practice of conducting "fishing expeditions into private papers on the possibility that they may disclose evidence of crime . . . . It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." Complaints had been filed with the Federal Trade Commission charging the respondents with regulating prices at which their commodities were resold, and the Commission was conducting an investigation pursuant to a Senate resolution. The Commission ordered the American Tobacco Company to produce all letters and telegrams received from or sent to all of its jobber customers during 1921, and ordered P. Lorillard Company to produce all letters, telegrams or re-

89. Hagen v. Porter, 156 F.2d 362, 367 (C. C. A. 9th 1946), *cert. denied*, 67 Sup. Ct. 85 (1946) (the court added for good measure that a statutory immunity provision was applicable); *accord*, Porter v. Mueller, 156 F.2d 278, 280 (C. C. A. 3d 1946) ("The papers in question are considered public records required by law . . . and thus the individual respondents may not rely on the privilege").

90. Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 208 (1946). See Note, *Rights of Witnesses in Administrative Investigations*, 54 HARV. L. REV. 1214 (1941).

91. 264 U.S. 298, 306 (1924).

ports from or to its salesmen, or from or to all tobacco jobbers' or wholesale grocers' associations, all contracts or arrangements with such associations, and correspondence and agreements with a list of corporations named. Although the Court denied enforcement of the subpoenas, the Court emphasized that the Commission claimed "an unlimited right of access to the respondents' papers" with reference to possible violations of the statute, and stated in the last paragraph of the opinion: "We have considered this case on the general claim of authority put forward by the Commission."[92] The narrow holding therefore was not that the subpoenas were too broad but that the claim of unlimited access to papers should be denied.[93] Indeed, other parts of the opinion make clear that subpoenas of the kind here issued might be enforced if a showing were made of the relevancy of the records to the inquiry. Not only was the Court's principal objection to the subpoenas its aversion to "a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up," but the Court declared: "The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. . . . Some evidence of the materiality of the papers demanded must be produced."[94] Thus the objection is not to breadth but to lack of a showing of materiality. This conclusion gains support from other decisions, both earlier and later.

The outstanding earlier case is *Hale v. Henkel*, holding a subpoena duces tecum "far too sweeping in its terms."[95] The subpoena required production of all understandings, contracts or correspondence between the company and six different companies, all reports made and accounts rendered by such companies, and all letters received by the company since its organization from more than a dozen different companies. The Court said that a subpoena requiring production of all the company's records "would scarcely be more universal in its operation, or more completely put a stop to the business of that company."[96] But the Court also observed: "Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers."

Brown v. United States[97] is the leading case for relaxing the restric-

92. *Id.* at 305, 307.

93. This is essentially the way the Court explains the case in Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 207 n. 40 (1946).

94. 264 U.S. 298, 306 (1924).

95. 201 U.S. 43, 76 (1906).

96. *Id.* at 77.

97. 276 U.S. 134 (1928); *accord,* Consolidated Rendering Co. v. Vermont, 207 U.S. 541 (1908); *see* Wheeler v. United States, 226 U.S. 478 (1913).

tions on broad subpoenas. The case involved a grand jury proceeding under the Sherman Act against an association of furniture manufacturers, whose agent was ordered to produce all letters and telegrams to and from its predecessor, its members, and the members of its predecessor, during a period of three and one-half years, relating to the sale of case goods, and particularly with reference to eighteen designated subjects. [98] Distinguishing the *Hale* case, the Court upheld the subpoena, declaring that it specified a reasonable period of time, and specified the subjects with reasonable particularity.

More recent case law definitely reflects a weakening of the inhibition against fishing expeditions. The Court in the *Oklahoma Press* case expresses an attitude having hardly anything in common with the *American Tobacco* opinion. The Court laid down the broad standard that the requirement of particularity "comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry." [99] More is to be learned from specific ex-

98. The particularization of the subjects of investigation undoubtedly contributed substantially to the reasons for upholding the subpoena. If the subpoena had required specified records "relating to the manufacture and sale of case goods," and had stopped there, it would have been less likely to gain judicial favor than the subpoena in the form in which it was issued. That subpoena required specified records "'relating to the manufacture and sale of case goods, and particularly with reference to—(a) general meetings of Alliance [the National Alliance of Furniture Manufacturers] (b) zone meetings of Alliance members (c) costs of manufacture (d) grading of various types of case goods (e) issuing new price lists (f) discounts allowed on price lists (g) exchanging price lists (h) maintaining prices (i) advancing prices (j) reducing prices (k) rumors of charges of price cutting (l) discounts, terms, and conditions of sale, etc. (m) curtailment of production (n) the pricing of certain articles or suits of furniture by W. H. Coye (o) cost bulletins (p) intention of W. H. Coye and A. C. Brown to attend furniture markets or expositions at Jamestown, N. Y., Grand Rapids, Mich., Chicago, Ill., and New York City, N. Y., and meetings of members held prior to and during said furniture markets or expositions (q) conditions obtaining at various furniture markets or expositions at Jamestown, N. Y., Grand Rapids, Mich., Chicago, Ill., and New York City, N. Y., (r) manufacturers maintaining a fair margin of profit between cost prices and selling prices.'" Brown v. United States, 276 U.S. 134, 138 (1928) (excerpt from the actual subpoena).

99. Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 209 (1946). Apparently no contention was made in the Supreme Court that the subpoena was too broad. It required production of "'books, papers, and documents showing the hours worked by, and wages paid to, each of your employees between October 29, 1938, and the date hereof, including all payroll ledgers, time sheets and cards, and time clock records, and all your books, papers and documents showing the distribution of papers, out of the state of Oklahoma, the dissemination of news outside of the state of Oklahoma, and the source and receipt of advertisements of nationally advertised goods.'" 147 F.2d 658, 659 (C. C. A. 10th 1945).

About as good a general statement as any is the simple one in Detweiler Bros. v. Walling, 157 F.2d 841, 843 (C. C. A. 9th 1946): "The only limitation upon the scope of

amples of subpoenas held valid or invalid. The most revealing opinions are those of circuit courts of appeals.

In *Smith v. Porter*, [100] an OPA subpoena of June 17, 1946, was upheld which required production of "the articles of partnership, bank statements and cancelled checks from January 1, 1943, copies of federal income tax returns for 1943, 1944, and 1945, general accounts, physical inventories for the years named, general ledger accounts and financial statements for those years together with copies of contracts in effect during that period, correspondence files, copies of sales invoices, bills of lading or other shipping papers, and all vouchers or purchase invoices." [101] As to materiality of all these records, the circuit court of appeals said merely: "Considering the enumerated papers as a whole they appear to us probably relevant to an investigation to be conducted under the Price Control Act." [102] No mention was made of the *Hale* or *American Tobacco* cases, and none of the flavor of those cases is discernible.

United States v. Cream Products Distributing Co. [103] involved an investigation by the War Food Administrator. The company argued that because the investigation was limited to an inquiry into use of milk solids in frozen dairy foods, compelling the production of *all* records relating to purchases and sales was improper. The court thought this argument worth no more than a one-sentence reply—to the effect that the statute authorized the Administrator to make such investigation as may be necessary or appropriate in his discretion to the enforcement or administration of the Act, and to require production of any records which may be relevant to the inquiry. The admonition of Mr. Justice Holmes in the *American Tobacco* opinion that evidence of materiality must be produced was ignored.

In *SEC v. Vacuum Can Co.*, [104] an investigation was conducted on the complaint of Pothast into the question whether Mayer had violated the statute. A subpoena required production, inter alia, of a stock certificate book and ledgers. The company offered to produce only those portions which specifically referred to Mayer, Pothast and others by name. To the company's contention that other parts of the records were not relevant to the investigation, the court replied: "The purpose of the subpoena is to discover evidence, not to prove a pending charge, but upon which to make one if the discovered evidence so justifies. . . . The investigation here was one authorized by law, and the evidence

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the Administrator's inquiry is that the records demanded be reasonably relevant to the matter in issue."

100. 158 F.2d 372 (C. C. A. 9th 1946).

101. *Id.* at 373.

102. *Id.* at 374.

103. 156 F.2d 732 (C. C. A. 7th 1946).

104. 157 F.2d 530 (C. C. A. 7th 1946), *cert. denied*, 67 Sup. Ct. 770 (1947).

sought to be produced was material and relevant to the investigation." [105] The court was not at all impressed with the idea that materiality must be shown.

In *Provenzano v. Porter*, [106] a subpoena required production of "employees' individual time-cards and payroll records, sales and general ledgers, and other records" concerning costs and selling prices. The court rejected the fishing expedition argument by saying: "The records and data called for are of the character ordinarily thought relevant and material to an investigation under the Price Control Act. . . . In the course of his administration of the act the Administrator is empowered to conduct investigations for the purpose of placing dealers in commodities and services in their proper category under the regulations; and it is plain that the records ordered produced in this instance are relevant to a lawful inquiry." [107] *Porter v. Gantner & Mattern Co.* [108] involved what the court described as "a formal requirement for inspection of portions of [the company's] books." The district court held it lacked jurisdiction to enforce an "inspection requirement." The circuit court of appeals reversed, saying that nothing of substance hinges on the difference between a "subpena" and an "inspection requirement." Cases such as these seem to involve fishing expeditions in the sense in which the old courts used that term, but modern courts are unperturbed by the evils the old courts saw in such practices. [109] The motivating question is: How could programs such as those administered by the OPA be carried out unless the agency can get at the business facts?

Recent cases refusing enforcement to subpoenas for reasons relating to breadth or relevancy are rare. An example is *Shotkin v. Nelson*. [110] The War Production Board, investigating compliance with an order concerning fluorescent lights, required an electric company to produce "all sales invoices, purchase orders, preference rating records, accounts receivable, notes receivable, bookkeeping journals and general ledgers, and all inventories taken in 1943 . . . showing the purchase, ownership and sale of electrical and light fixtures and supplies by you and by all and any of the companies . . . named, during the years 1943 and 1944."

105. *Id.* at 532; *accord*, McGarry v. SEC, 147 F.2d 389 (C. C. A. 10th 1945).

106. 159 F.2d 47 (C. C. A. 9th 1947), *cert. denied*, 67 Sup. Ct. 1303 (1947).

107. *Id.* at 48-9.

108. 156 F.2d 886 (C. C. A. 9th 1946).

109. For example, a subpoena has been upheld requiring certain telegraph companies to produce all telegrams sent or received by named parties concerning specified subjects, over periods of as long as eleven months. Newfield v. Ryan, 91 F.2d 700 (C. C. A. 5th 1937), *cert. denied*, 302 U.S. 729, 36 MICH. L. REV. 786 (1938). Another case enforced a subpoena of the Fair Labor Standards Administrator for records showing wages, time-clock cards, and hours scheduled during a six months period for each department in the Kansas City branch of a national mail order company. Fleming v. Montgomery Ward & Co., 114 F.2d 384 (C. C. A. 7th 1940), *cert. denied*, 311 U.S. 690 (1940).

110. 146 F.2d 402 (C. C. A. 10th 1944).

The court emphatically rejected the contention that the general form of the subpoena was too broad, saying that "subpoenas requiring the production of all documents relative to an inquiry have been consistently sustained by the courts." [111] Yet, since the investigation was into fluorescent lights and since the subpoena required records concerning all electrical fixtures whether or not they were subject to the WPB order involved, the court held the subpoena too broad.[112]

The Administrative Procedure Act provides: "No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law." [113] These words taken at face value seem to say that existing law shall continue. The Attorney General, whose agreement to the bill was important to its passage, said that this provision "states existing law." [114] The Senate committee said that this provision "is designed to preclude 'fishing expeditions' and investigations beyond the jurisdiction or authority of an agency." [115] The House committee made a similar statement, and went on to say: "Investigations may not disturb or disrupt personal privacy, or unreasonably interfere with private occupation or enterprise." [116] This legislative history probably lays some slight foundation for an argument that the Act changes the law, but such an argument seems unlikely to prevail.

Disclosure of Information Relating to Activities Beyond the Agency's Jurisdiction

Several federal decisions have held that agencies whose regulatory powers rest on the interstate commerce clause may not require production of records concerning intrastate activities. [117] For instance, when

111. *Id.* at 404, 405.

112. Perhaps some significance with reference to fishing expeditions is found in the Supreme Court's 1947 opinion in Penfield Co. v. SEC, 67 Sup. Ct. 918, 920 n.3, 922 (1947), holding that a district court should have sent to jail one who refused to obey a court order enforcing a subpoena issued by the Commission. Counsel had argued before the district court: "We have in mind that these books and records may disclose certain acts other than those charged in the indictment." Mr. Justice Douglas said for the Court: "The records might well disclose other offenses against the Securities Act of 1933 which the Commission administers." The attitude seems not much different from saying that the Commission may search through the records, relevant or irrelevant, in the hope that something may turn up. How remote—how very remote—is the eleven-year-old view of Jones v. SEC, 298 U.S. 1 (1936)!

113. 60 Stat. 238 (1946), 5 U.S.C.A. § 1005(b) (Supp. 1946).

114. Sen. Doc. No. 248, 79th Cong., 2d Sess. 227, 410 (1946). The Senate Judiciary Committee Print of June, 1945, also said that § 6(b) "states the established limitations." *Id.* at 27.

115. *Id.* at 205.

116. *Id.* at 264.

117. FTC v. Claire Furnace Co., 285 Fed. 936 (App. D. C. 1923), *rev'd on other grounds*, 274 U.S. 160 (1927); FTC v. P. Lorillard Co., 283 Fed. 999 (S.D.N.Y. 1922),

the Federal Trade Commission, pursuant to a request of the House of Representatives that an investigation be made of the cost of living, sought to compel disclosure of information concerning steel, iron, and coal businesses, the Court of Appeals for the District of Columbia held: "The powers of the Commission are limited to matters directly relevant to interstate commerce. In other words, the corporation under investigation must not only be engaged in interstate commerce but the subject under investigation must be so related to interstate commerce that its regulation may be accomplished by act of Congress." [118]

This view seems clearly unsound and is unlikely to be followed. The court confused power to obtain information with power to regulate; the scope of the one power may not properly be measured by the scope of the other. For example, no one would deny that a federal court having jurisdiction over a subject matter may use its subpoena power to compel disclosure of facts concerning activities relevant to the case but not subject to federal regulation; surely the same is true of administrative adjudication. The proper test of the power of a federal agency to obtain information is not federal regulatory power over the activities to which the information relates but is the relevancy of the information to an inquiry which the agency has power to make. If an agency is authorized to conduct an investigation for purposes of making rules or planning legislation, the agency's subpoena power, unless otherwise limited, extends to all information relevant to the investigation.

A 1912 decision of the Supreme Court, reaffirmed in 1941, enunciates this principle. The Interstate Commerce Commission prescribed uniform systems of accounts for carriers and required reports respecting their corporate organization and financial condition. One carrier operated amusement parks and objected to including in the orders details concerning wholly intrastate business. In upholding the orders, the Court carefully distinguished the power to compel disclosures from the power to regulate: "It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in their accounts, is a regulation of business not within the jurisdiction of the Commission. . . . The requiring of information concern-

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aff'd on other grounds, 264 U.S. 298 (1924); FTC v. Smith, 34 F.2d 323 (S.D.N.Y. 1929). The first case is criticized adversely in Handler, *The Constitutionality of Investigations by the Federal Trade Commission*, 28 COL. L. REV. 708, 905, 918–23 (1928), and the later cases are criticized adversely in MacChesney and Murphy, *Investigatory and Enforcement Powers of the Federal Trade Commission*, 8 GEO. WASH. L. REV. 581, 585–6, 593–4 (1940).

118. FTC v. Claire Furnace Co., 285 Fed. 936, 941 (App. D. C. 1923). The court went on to say that the investigating power extends to those intrastate affairs which are so intertwined and intermingled with interstate affairs as to be inseparable, but that in this case there was no such intermingling. See MacChesney and Murphy, *Investigatory and Enforcement Powers of the Federal Trade Commission* 8 GEO. WASH. L. REV. 581, 584–7 (1940).

ing a business is not regulation of that business." [119] In sustaining the constitutionality of the Wage-Hour Act in 1941, the Court incidentally upheld a requirement that certain records of wages and hours be kept. The Court remarked in passing that "the requirement for records even of the intrastate transaction is an appropriate means to the legitimate end." [120]

To the general observation that an agency having authority to make an investigation may compel disclosure of all information relevant to the investigation, irrespective of the scope of the agency's regulatory power, an exception must be noted to the effect that when the purpose of compelling a disclosure is not to secure information for governmental purposes but is to use the power of compelling the disclosure as a sanction for producing a desired regulatory effect, the agency's action is necessarily limited by the scope of its regulatory power. If the agency may not regulate, it may not regulate by using publicity as a sanction.

Businesses "Affected with a Public Interest"; "Quasi-Public" Records

Many of the old cases concerning the power of investigation hinged in part on the concept of business "affected with a public interest." The Supreme Court in the *Smith* case quoted with apparent approval the view of the Interstate Commerce Commission "that 'there can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce.' " [121] A few years later in the *American Tobacco* case the Court cited the *Smith* case and said: "The mere facts of carrying on a commerce not confined within state lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company now may be." [122] In the *Baltimore Grain* case the investigation was blocked because the inquiry concerned what the court called "nonpublic service corporations," [123] but *Bartlett Frazier* held that restrictions on disclosures by private businesses "cannot be applied to regulations which require reports and disclosures in respect

119. ICC v. Goodrich Transit Co., 224 U.S. 194, 211 (1912).

120. United States v. Darby, 312 U.S. 100, 125 (1941). In Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300 (1937) it was held that the Illinois Commerce Commission could require production of records and require reports from a foreign corporation which was engaged in interstate commerce and beyond the Commission's regulatory power. In Fleming v. Montgomery Ward & Co., 114 F.2d 384, 392 (C. C. A. 7th 1940), *cert. denied*, 311 U.S. 690 (1940), the court specifically rejected a contention that a subpoena for records must be limited to employees who are not exempt from the Act.

121. Smith v. ICC, 245 U.S. 33, 43 (1917).

122. FTC v. American Tobacco Co., 264 U.S. 298, 305 (1924).

123. FTC v. Baltimore Grain Co., 284 Fed. 886, 889 (D. Md. 1922), *aff'd*, 267 U.S. 586 (1925).

to a business which is affected with a public interest." [124] Other cases have drawn the same distinction. [125]

The concept of business affected with a public interest has now disappeared from federal constitutional law. [126] Every business is affected with a public interest to whatever extent Congress or a state legislature chooses to make it so. No longer does due process of law confer immunity from such regulation as legislative bodies see fit to provide. Accordingly, the cases which forbid investigations of businesses not affected with a public interest can no longer be controlling authority. Just as Congress may require railroad records to be kept open to governmental inspection under the Interstate Commerce Act, [127] Congress may now similarly require ordinary businesses to keep and to permit inspection of records concerning, say, wages and hours, [128] or any other subject relevant to an inquiry which Congress has power to authorize. Thus, under the Price Control Act, federal courts have commonly expressed the view that records required to be kept are "quasi-public records," although the businesses were selling meat, [129] dairy products, [130] lumber, [131] and fruit and produce. [132] When a producer of cotton objected to keeping records and filing reports pursuant to the cotton marketing provisions of the Agricultural Adjustment Act, a circuit court of appeals held that the records and reports "are quasi-public documents . . . open to inspection by such persons and officers as are authorized under the statute to inspect them." [133]

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124. Bartlett Frazier Co. v. Hyde, 65 F.2d 350, 351-2 (C. C. A. 7th 1933), *cert. denied*, 290 U.S. 654 (1933).

125. In Cudahy Packing Co. v. United States, 15 F.2d 133, 137 (C. C. A. 7th 1926), the court agreed that the packing business was "impressed with a public interest," but denied inspection of records because "we can perceive no very decided difference in principle between the Packers and Stockyards Act as applied to the packers and the Federal Trade Commission Act as applied to the corporations falling within its purview."

126. Of many cases that might be cited for this proposition, probably the best is Olsen v. Nebraska, 313 U.S. 236 (1941), unanimously overruling Ribnik v. McBride, 277 U.S. 350 (1928) and holding that fees charged by private employment agencies could be limited by state action. Nebbia v. New York, 291 U.S. 502, 531-9 (1934), seriously crippled the concept and the *Olsen* case obliterated it.

127. Smith v. ICC, 245 U.S. 33 (1917).

128. *See* United States v. Darby, 312 U.S. 100, 124-5 (1941).

129. Bowles v. Insel, 148 F.2d 91 (C. C. A. 3d 1945).

130. Hagen v. Porter, 156 F.2d 362 (C. C. A. 9th 1946), *cert. denied*, 67 Sup. Ct. 85 (1946); Bowles v. Beatrice Creamery Co., 146 F.2d 774 (C. C. A. 10th 1944) (poultry also involved).

131. Porter v. Mueller, 156 F.2d 278 (C. C. A. 3d 1946); Bowles v. Glick Bros. Lumber Co., 146 F.2d 566 (C. C. A. 9th 1945), *cert. denied on other grounds*, 325 U.S. 877 (1945); Bowles v. Chew, 53 F. Supp. 787 (N. D. Cal. 1944).

132. United States v. Shapiro, 159 F.2d 890 (C.C.A. 2d 1947).

133. Rodgers v. United States, 138 F.2d 992, 996 (C. C. A. 6th 1943). The origin of the idea of "quasi-public" records is probably the opinion in Wilson v. United States, 221 U.S. 361, 380 (1911), where the Court was discussing the privilege against self-incrimina-

Despite a rather large number of cases in the last two or three years, principally OPA cases, resting on the theory of "quasi-public" records, the assumption is probably unsafe that records not regarded as "quasi-public" are immune to the same kind of order for inspection or production. The theory is probably no more than a technical device invented to assist the growth of law and is not likely to be used to prevent further growth. In *Troy Laundry Co. v. Wirtz*, [134] an argument against enforcing an order of the National Wage Stabilization Board requiring production of records was founded on the proposition that no statute required the records to be kept and that therefore the doctrine of such cases as the *Oklahoma Press* case [135] did not apply. The court readily granted that the Fair Labor Standards Act involved in the latter case required wage records to be kept and that the Act administered by the Wage Stabilization Board did not. But the court rejected the contention with the simple observation that "the reasoning of the Supreme Court's decision in the *Oklahoma Press* case does not rest upon the fact that the statute required the records to be kept." [136] This observation seems entirely sound, and the *Troy Laundry* case is probably a forerunner of other cases which will hold that inspection or production of business records not classified as "quasi-public" may be required whenever inspection or production of "quasi-public" records may be required. The concept of "quasi-public" records, having served its purpose, will then disappear.

Enforcement of Subpoenas and Other Orders Requiring Information

Despite the apparent paucity of prosecutions under them, [137] statutory provisions for penal sanctions for refusal to produce evidence are very common. For instance, the Federal Trade Commission Act provides: "Any person who shall neglect or refuse to attend and testify,

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tion: "Thus, in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction. . . . The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established."

134. 155 F.2d 53 (C. C. A. 9th 1946), *cert. denied*, 67 Sup. Ct. 66 (1946).

135. Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

136. 155 F.2d at 57.

137. Down to 1937 neither the Interstate Commerce Commission nor the Federal Trade Commission had initiated a single criminal prosecution for failure to provide information, and the Securities and Exchange Commission had secured one indictment. See Note, 51 HARV. L. REV. 312, 316 (1937). Lack of prosecutions does not prove ineffectiveness of penal provisions, however.

or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment." [138] Failure to file an annual or special report as required by the Federal Trade Commission is punishable by forfeiture to the United States of $100 for each day such failure continues beyond thirty days after notice of default. [139] Similar provisions are contained in other statutes. [140]

The main reliance for enforcement of administrative orders requiring disclosure of information has been a procedure whereby the agency applies to a court for an order, violation of which is punishable as a contempt of court. In the 1893 case of *ICC v. Brimson* the Supreme Court remarked that such a body as the Interstate Commerce Commission "could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment." [141] But the Court went on to hold that a judicial proceeding to enforce a subpoena issued by the Commission satisfies the "case" or "controversy" requirement of the Constitution, and that judicial enforcement does not violate the principle of separation of powers. [142] Accordingly, since 1893 Congress

138. 38 STAT. 723 (1914), 15 U.S.C. § 50 (1940).

139. In United States v. National Biscuit Co., 25 F. Supp. 329 (S. D. N. Y. 1938), it was held that the $100 per day forfeiture applied only to reports and not to answers to questionnaires. The Federal Trade Commission sought to recover penalties aggregating $40,900 for delay in answering questionnaires. The company previously had unsuccessfully resisted a mandamus proceeding, and had finally given the Commission all the information requested, in compliance with the court's order entered in FTC v. National Biscuit Co., 18 F. Supp. 667 (S. D. N. Y. 1937).

140. *See, e.g.*, SEC, 48 STAT. 904 (1934), as amended, 15 U.S.C. §§ 78ff. (1940); ICC, 24 STAT. 386 (1887), as amended, 49 U.S.C. 20(7) (1940) (penalty of $500 per day for failure or refusal to keep records and submit for inspection or copying).

The Supreme Court has held constitutional a statute making refusal to testify before a Congressional Committee a misdemeanor. *In re* Chapman, 166 U.S. 661 (1897); *see* Sinclair v. United States, 279 U.S. 263 (1929).

Both Senate and House committees said of § 6(c) of the Administrative Procedure Act: "The subsection expressly recognizes the right of parties subject to administrative subpenas to contest their validity in the courts prior to subjection to any form of penalty for noncompliance." SEN. DOC. No. 248, 79th Cong., 2d Sess. 206, 265 (1946). But this probably means no more than that the penalty cannot be imposed without proving the validity of the subpoena. See Nathanson, *Some Comments on the Administrative Procedure Act* 41 ILL. L. REV. 368, 410-2 (1946).

141. 154 U.S. 447, 485 (1894).

142. *Id.* at 489. A federal court had previously held to the contrary in an opinion written by Mr. Justice Field. *In re* Pacific Railway Commission, 32 Fed. 241 (C.C.N.D. Cal. 1887). A part of this extreme opinion was quoted with approval by a majority of the Supreme Court as recently as 1936 in Jones v. SEC, 298 U.S. 1, 27 (1936).

has consistently refused to empower any agency to commit for contempt, customarily providing instead that agencies may apply to the appropriate district court for an order enforceable by contempt proceedings. [143]

Since the probabilities are strong that the present Supreme Court would not follow the dictum in the *Brimson* case that an agency could not constitutionally be empowered to punish for contempt, [144] it is arguable that the present system should be legislatively changed. [145] The proposition that the present system rests on constitutional interpretations which are no longer valid seems unanswerable. Furthermore, the procedure requiring agencies to apply to courts for enforcement orders is needlessly inconvenient and expensive. Yet the prospects for change seem slight, for the system is familiar, the tradition is of long standing, and inconvenience and expense result in only a small portion of the cases.

The Supreme Court's 1947 decision in *Penfield Co. v. SEC* [146] involved the power to punish for contempt one who refused to obey a court order enforcing an administrative subpoena for records. The District court imposed a flat, unconditional fine of $50.00 which was paid. The Securities and Exchange Commission contended for a remedial penalty designed to induce production of the records. In the Supreme Court it was argued that the penalty was criminal and that in absence of appeal the circuit court of appeals had no jurisdiction. The Supreme Court held that inasmuch as the relief the Commission sought was production

143. *E.g.*, the Federal Trade Commission Act typically provides: "In case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof." 38 STAT. 722 (1914), 15 U.S.C. § 49 (1940).

144. The *Brimson* case rests on the notion that the contempt power is necessarily judicial. This view has been rejected by later unanimous holdings that legislative bodies may punish for contempt. Jurney v. MacCracken, 294 U.S. 125 (1935); McGrain v. Daugherty, 273 U.S. 135 (1927). See also the impressive array of state authorities discussed *infra*, p. 1141.

145. Such an argument is advanced by Albertsworth, *Administrative Contempt Powers: A Problem in Technique*, 25 A.B.A.J. 954 (1939); *accord*, Sherwood, *The Enforcement of Administrative Subpoenas*, 44 COL. L. REV. 531 (1944). *But see* Frankfurter, J., dissenting in Penfield Co. v. SEC, 67 Sup. Ct. 918, 928 (1947): "It is beside the point to consider whether Congress was deterred by constitutional difficulties. That Congress should so consistently have withheld powers of testimonial compulsion from administrative agencies discloses a policy that speaks with impressive significance."

146. 67 Sup. Ct. 918 (1947).

of the documents, coercive sanctions were appropriate and therefore the judgment of contempt was civil and not criminal. The Court further held that the district court's refusal to grant full remedial relief was an abuse of discretion. [147]

Varying state practices concerning enforcement of subpoenas afford excellent materials for an empirical study, but the subject as dealt with by state courts is still largely shrouded in separation of powers conceptualism. [148] In view of the *Brimson* dictum that the power to punish for contempt may not be conferred on an administrative agency consistently with due process of law, perhaps a good deal of significance lies in provisions of at least four state constitutions empowering agencies to punish for contempt, [149] and in provisions enacted by at least eleven state legislatures conferring such power on administrative agencies. [150] Despite the *Brimson* case, at least five state courts have upheld the constitutionality of statutes conferring the power to commit for contempt upon administrative agencies [151] or notaries public. [152] Apparently such provisions have been invalidated in only five states. [153] In one or two states it has been held that agencies have inherent power to punish for contempt. [154]

147. Mr. Justice Rutledge wrote a concurring opinion devoted to a discussion of the bearing upon the case of the holding in United States v. United Mine Workers, 67 Sup. Ct. 677 (1947), "that civil and criminal contempt could be prosecuted in a single contempt proceeding conducted according to the rules of procedure applicable in equity causes, and that both types of relief, civil and criminal, could be imposed in such a mixed proceeding." Penfield Co. v. SEC 67 Sup. Ct. 918, 927 (1947). Mr. Justice Frankfurter, with whom Mr. Justice Jackson concurred, dissented on the ground that the district court ought not to be reversed "on the abstract assumption that papers ordered to be produced as relevant to an inquiry at the time the subpoena issued, continued relevant several months later." *Id.* at 930.

148. See the excellent summary of cases in Note, 35 COL. L. REV. 578 (1935).

149. CAL. CONST. Art. XII, § 22 (railroad commission); LA. CONST. Art. VI, § 4 (public service commission); OKLA. CONST. Art. IX, § 19 (corporation commission); VA. CONST. Art. XII, § 156(c) (corporation commission).

150. Statutes of eight states were either upheld or invalidated in the cases cited in notes 151–2 *infra*. Three statutes whose constitutionality apparently has not been passed upon are KY. REV. STAT. ANN. § 417.030 (Baldwin, 1944); TENN. CODE ANN. § 5403 (Michie, 1938); and TEX. STAT. Art. 6024 (Vernon, 1936).

151. *Cf.* Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911) (board of police commissioners); Vogel v. Corporation Comm'n, 190 Okla. 156, 121 P.2d 586 (1942), 30 GEO. L. J. 674; Southern Pac. Co. v. State, 19 Ariz. 20, 165 Pac. 303 (1917) (public service commission).

152. *Cf.* Dogge v. State, 21 Neb. 272, 31 N.W. 929 (1887); *In re* Merkle, 40 Kan. 27, 19 Pac. 401 (1888).

153. People v. Swena, 88 Colo. 337, 296 Pac. 271 (1931); Roberts v. Hackney, 109 Ky. 265, 58 S.W. 810 (1900); *In re* Sims, 54 Kan. 1, 37 Pac. 135 (1894); Langenberg v. Decker, 131 Ind. 471, 31 N.E. 190 (1892); Whitcomb's Case, 120 Mass. 118 (1876).

154. It was clearly so held in *In re* Hayes, 200 N.C. 133, 156 S.E. 791 (1931) and somewhat equivocally so held in *Ex parte* Sanford, 236 Mo. 665, 139 S.W. 376 (1911).

EXTENT OF JUDICIAL INQUIRY IN ENFORCING SUBPOENAS

The holding in the *Brimson* case [155] that a proceeding for judicial enforcement of a subpoena is a "case" or "controversy" indicates that the judicial function in such a proceeding involves more than automatic issuance of an order. A court may always consider such questions as unreasonable searches and seizures, [156] self-incrimination, [157] undue breadth of the subpoena, [158] improper inclusion of irrelevant information, [159] administrative authority to make the particular investigation, [160] power to require disclosures concerning activities outside the agency's regulatory authority, [161] the role of the concept of business "affected with a public interest," [162] and proper issuance of the particular subpoena. [163] The two troublesome questions are whether or not in law enforcement proceedings the agency must demonstrate to the court the existence of probable cause to believe that the law has been violated, and whether or not the agency must show that a defendant from whom information is sought comes within the coverage of the statute which the agency is administering.

In *Bowles v. Insel*, [164] a circuit court of appeals recently asserted, ". . . it is settled that without a showing of probable cause to believe that the law has been violated and specific description of the papers and records to be produced, a subpoena requiring the production of private papers is violative of the provision against unreasonable searches and seizures." For this proposition the court cited four decisions of the Su-

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Contra: Haas v. Jennings, 120 Ohio St. 370, 166 N.E. 357 (1929); *Ex parte* Patterson, 110 Ark. 94, 161 S.W. 173 (1913); Brown v. Davidson, 59 Iowa 461, 13 N.W. 442 (1882); Noyes v. Byxbee, 45 Conn. 382 (1877).

155. ICC v. Brimson, 154 U.S. 447 (1894).

156. Isbrandtsen-Moller Co. v. United States, 300 U.S. 139 (1937); Hale v. Henkel, 201 U.S. 43 (1906); Boyd v. United States, 116 U.S. 616 (1886).

157. United States v. White, 322 U.S. 694 (1944); United States v. Murdock, 284 U.S. 141 (1931); Brown v. Walker, 161 U.S. 591 (1896).

158. Brown v. United States, 276 U.S. 134 (1928); FTC v. American Tobacco Co., 264 U.S. 298 (1924); Hale v. Henkel, 201 U.S. 43 (1906).

159. McGarry v. SEC, 147 F.2d 389 (C.C.A. 10th 1945); Fleming v. Montgomery Ward & Co., 114 F.2d 384 (C.C.A. 7th 1940), *cert denied,* 311 U.S. 690 (1940); Newfield v. Ryan, 91 F.2d 700 (C.C.A. 5th 1937), *cert. denied,* 302 U.S. 729 (1937), 36 MICH. L. REV. 786 (1938).

160. NLRB v. Barrett Co., 120 F.2d 583 (C.C.A. 7th 1941), 55 HARV. L. REV. 134; Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938); Jones v. SEC, 298 U. S. 1 (1936); Harriman v. ICC, 211 U.S. 407 (1908).

161. ICC v. Goodrich Transit Co., 224 U.S. 195 (1912); FTC v. Claire Furnace Co., 285 Fed. 936 (App. D.C. 1923), *rev'd on other grounds,* 274 U.S. 160 (1927).

162. United States v. Darby, 312 U.S. 100, 124–5 (1941); FTC v. Baltimore Grain Co., 284 Fed. 886 (D. Md. 1922), *aff'd,* 267 U.S. 586 (1924); Bowles v. Glick Bros. Lumber Co., 146 F.2d 566 (C.C.A. 9th 1945), *cert. denied,* 325 U.S. 877 (1945).

163. Cudahy Packing Co. v. Holland, 315 U.S. 357 (1942).

164. 148 F.2d 91, 92 (C.C.A. 3d 1945).

preme Court, all of which tend to support the statement but none of which holds that a court must make a finding of probable cause before enforcing a subpoena duces tecum. The *Boyd* case contains a dictum that "any forcible and compulsory extortion of a man's own testimony or of his private papers" [165] may contravene the Fourth Amendment, which guarantees protection against unreasonable searches and seizures and provides that "no warrants shall issue but upon probable cause. . . ." As a matter of logic, if compulsory production of records is deemed to be a search and seizure, and if probable cause is required for a warrant authorizing search and seizure, then probable cause must be required for compelling the production of records. The *Hale* case [166] of 1906, again by way of dictum, corroborates the *Boyd* dictum. The general tenor of the opinion in the *American Tobacco* case [167] of 1924 is consistent with the view that a showing of probable cause must be made, but the holding is merely that the subpoena was too broad. In the *Jones* case of 1936 the Court declared: "The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made. . . . An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. . . ." [168] Yet the narrow holding in the *Jones* case is merely that where an agency's announced purpose in investigating is held unlawful the agency may not continue the investigation.

Despite their weaknesses, these four cases in the aggregate seem to be fairly substantial. Yet the opposing authorities are now stronger. In *Bowles v. Insel*, [169] after the court made the observation above quoted it proceeded to hold that records required by statute to be kept open to inspection are not private but are "quasi-public" and therefore may be inspected without a showing of probable cause. The concept of "quasi-public" records, as we have seen, [170] is gaining increasing acceptance. But even irrespective of the question whether or not records are regarded as "quasi-public," disclosure may now be required without a showing of probable cause. In the *Oklahoma Press* case [171] the Supreme Court ignored the distinction between records required to be kept and other records and asserted that the Fair Labor Standards Administrator must perform an investigative function which is "essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence, and is governed by the same

165. Boyd v. United States, 116 U.S. 616, 630 (1886).
166. Hale v. Henkel, 201 U.S. 43 (1906).
167. FTC v. American Tobacco Co., 264 U.S. 298 (1924).
168. Jones v. SEC, 298 U.S. 1, 26, 27 (1936).
169. 148 F.2d 91 (C.C.A. 3d, 1945).
170. See pp. 1136–8, *supra*.
171. Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

limitations." [172] The Court applied the view it had previously taken with respect to a grand jury investigation—that the inquiry must not be "limited . . . by forecasts of the probable result of the investigation." [173] The Supreme Court first announced this view as recently as 1946, but at that time the law had virtually become settled to that effect even in absence of a Supreme Court holding. The leading case is *Fleming v. Montgomery Ward & Co.*, in which a circuit court of appeals carefully discussed previous authorities and concluded: "When Congress, acting in the public interest, has the power to regulate and supervise the conduct of any particular business under the commerce clause, an administrative agency may be authorized to inspect books and records and to require disclosure of information regardless of whether the business is a public utility and regardless of whether there is any preexisting probable cause for believing that there has been a violation of the law." [174] The holding was an especially strong one because the company was specifically denied opportunity to present evidence showing lack of probable cause to believe the company had violated the Act. If the spirit of this holding was inconsistent with that of earlier decisions of the Supreme Court, the inference is that the law was changing, for other decisions of the 1940's support the *Montgomery Ward* decision. Thus, another circuit court of appeals resolved this problem with a mere remark that "the existence of probable cause for believing that the Act has been violated is not made a prerequisite to inspection." [175] It has been held that the National Labor Relations Board may secure enforcement of a subpoena duces tecum issued after a charge has been filed with the Board but before the Board has served a complaint, the purpose of the subpoena being to get information bearing on the question whether or not a complaint should be issued. [176] The grand jury analogy has been increasingly relied upon. [177] The view that production of records may be compelled without a showing of probable cause has gained further support from holdings that subpoenas duces tecum

172. *Id.* at 216.

173. *Ibid.*

174. 114 F.2d 384, 390 (C.C.A. 7th 1940), *cert. denied,* 311 U.S. 690 (1940).

175. Bowles v. Glick Bros. Lumber Co., 146 F.2d 566, 571 (C.C.A. 9th 1945), *cert. denied,* 325 U.S. 877 (1945).

176. NLRB v. Barrett Co., 120 F.2d 583 (C.C.A. 7th 1941), 55 HARV. L. REV. 134. The dissenting judge declared: "It would be a procedure, however, with which I am not familiar, for a prosecuting attorney, upon receiving a complaint, to arm himself with a subpoena directing the suspected person to appear at his office with books and records and to submit to examination all for the purpose of determining whether he should be charged with an offense." *Id.* at 588.

177. *See, e.g.,* Consolidated Mines v. SEC, 97 F.2d 704, 708 (C.C.A. 9th 1938); Woolley v. United States, 97 F.2d 258, 262 (C.C.A. 9th 1938): "The Securities and Exchange Commission, as a fact-finding body, performs a function similar to that of a grand jury . . ."

may be issued for purposes other than law enforcement or adjudication, [178] and from holdings that third parties may be required to give evidence [179] and do not even have standing to question the jurisdiction of the tribunal or the propriety of the investigation. [180]

The second important question concerning the extent of judicial inquiry in enforcing administrative subpoenas is whether or not the agency must show that a defendant from whom information is sought comes within the coverage of the statute which the agency is administering. Since a third party may be required to furnish information relevant to an inquiry which the agency is authorized to make, the question here relates only to the jurisdiction of the agency over parties in the position of defendants. The leading case is *Endicott Johnson Corp. v. Perkins*, [181] holding that a district court in enforcing a subpoena should not take evidence on the issue of coverage but that a pleading of the administrative authority alleging "reason to believe" that the defendant and the subject matter are covered by the statute is sufficient for the entry of an order enforcing the subpoena. The question arose under the Walsh-Healey Public Contracts Act, requiring those who contract to supply materials to the Government to observe certain labor standards in the performance of the contract. The corporation had contracted to supply materials and admitted an obligation to comply with the Act in certain of its plants. But the information sought through the subpoena related to other plants in which, according to an allegation of the Secretary of Labor, there was reason to believe persons were employed in the performance of the contracts with the Government. The corporation denied this allegation. The district court, on the Secretary's application for an order enforcing the subpoena, denied the Secretary's motion for an order on the pleadings and accompanying affidavits, and set the case for trial on the question whether the Act covered the particular plants. [182] The Supreme Court held not only that the district court lacked authority to decide the question of coverage but also that the district court lacked authority to control the Secretary's procedure to the extent of requiring as a condition to enforcement of the subpoena that the Secretary must first reach and announce a decision on the coverage question.

Some authority supports each of three views concerning the extent to which the enforcing court should inquire into the question of coverage: (1) the court may take evidence and decide for itself the coverage issue; (2) the court may go to the opposite extreme and refuse to con-

178. See discussion pp. 1120–6, *supra*.

179. McGarry v. SEC, 147 F.2d 389 (C.C.A. 10th 1945).

180. Blair v. United States, 250 U.S. 273 (1919).

181. 317 U.S. 501 (1943).

182. 37 F. Supp. 604 (N.D.N.Y. 1941), 40 F. Supp. 254 (N.D.N.Y. 1941). The circuit court of appeals reversed. 128 F.2d 208 (C.C.A. 2d 1942).

sider the question of coverage, inquiring no further than to ascertain whether the information sought is relevant to any lawful purpose of the administrative authority; or (3) the court may take a middle view and inquire only into the question of probable legal justification for ordering the information to be produced. The district court took the first position. The unanimous circuit court of appeals and the Supreme Court adopted the second. Two dissenting Justices advocated the third. [183] Especially significant is the Supreme Court's unanimity in rejecting the view of the district court, a view which had been adopted by a circuit court of appeals in a case involving the Fair Labor Standards Act. [184]

In the majority opinion the Supreme Court took care to point out: "The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act. . . ." [185] This statement implies that the enforcing court should inquire whether or not the information sought is plainly irrelevant to any lawful purpose which the agency might have. But the majority opinion seems very clear that the inquiry of the enforcing court should go no further. And the decision embraces more than the mere proposition that an agency necessarily has jurisdiction to secure information to assist it in determining the scope of its jurisdiction. That proposition was an essential part of the Court's reasoning, but the Court instead of stopping there went on to declare and to hold that the district court may not disable the Secretary from rendering a complete decision, that is, from securing information bearing not only on the question of jurisdiction but also on the merits. When the question of coverage is difficult or complex, the Secretary "might find

183. Mr. Justice Murphy, with whom Mr. Justice Roberts concurred, said that the district court should "inquire and satisfy itself whether there is probable legal justification for the proceeding, before it exercises its judicial authority to require a witness or a party to reveal his private affairs or be held in contempt." 317 U.S. 501, 515 (1943). Although this idea is the mainstay of the dissenting opinion, yet at one point the dissenting Justices say that the compulsory disclosure depends upon the question of coverage and that the corporation "was entitled to have this question determined by the district court before the subpoena was enforced over its objection." *Id.* at 517. This language is a virtual adoption of the view of the district court but seems inconsistent with the main tenor of the dissenting opinion.

184. General Tobacco & Grocery Co. v. Fleming, 125 F.2d 596, 599 (C.C.A. 6th 1942), holding that "it is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects." The Supreme Court granted certiorari in the *Endicott Johnson* case partly because of a probable conflict with the *General Tobacco* case. See Note, 149 A. L. R. 194 (1944).

185. 317 U.S. 501, 509 (1943).

it advisable to begin by examining the payroll, for if there were no underpayments found, the issue of coverage would be academic."

The decision thus permits the Secretary to compel disclosure of information concerning the amount of wages paid in plants which even the Secretary may upon investigation find to be beyond the Secretary's jurisdiction, or which a reviewing court may later find to be beyond the Secretary's jurisdiction, and the only way the corporation may successfully resist the order compelling the disclosure is by showing that the evidence sought is "plainly incompetent or irrelevant to any lawful purpose of the Secretary." The Court's rejection of the view of the dissenting Justices that the enforcing court "should first satisfy itself that probable cause exists for the Secretary's contention that the Act covers the plants in question"[186] emphasizes that even a showing of probable coverage is unnecessary.

After the decision of the *Endicott Johnson* case, much confusion developed on the question whether the principles there established were limited to the administration of the Walsh-Healey Act or were of general applicability. [187] The doubts were resolved by the Supreme Court in the *Oklahoma Press* decision. In the two cases there before the Court the questions were "whether any showing is required beyond the Administrator's allegations of coverage and relevance of the required materials to that question; and, if so, of what character. Stated otherwise, they are whether the court may order enforcement only upon a finding of 'probable cause,' that is, probability in fact, of coverage . . ." [188] In one of the two cases "probable cause" was clearly shown and accordingly the judgment of the court below was affirmed; in the other case it was "doubtful" whether the showing would constitute "probable cause," and therefore the Supreme Court had to determine what showing was necessary. The Court held: "Congress has made no requirement in terms of any showing of 'probable cause'; and, in view of what has already been said, any possible constitutional requirement of that sort was satisfied by the Administrator's showing in this case, including not only the allegations concerning coverage, but also that he was proceeding with his investigation in accordance with the mandate of Congress and that the records sought were relevant to that purpose." [189] The view so fully developed in the *Endicott Johnson* case is

186. *Id.* at 517.

187. Ten lower court cases are cited in the opinion in Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 192 (1946).

188. *Id.* at 214.

189. *Id.* at 215–6. The Court went on to point out that in view of the Court's holding the same day in Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) that a publisher who sends one-half of one per cent of his publication outside the state is engaged in production of goods for interstate commerce under the Fair Labor Standards Act, the showing was sufficient to show coverage itself, though that was not required. The Court

thus generally applicable, unless a specific statutory provision calls for a different result. [190]

The lone dissent of Mr. Justice Murphy in the *Oklahoma Press* case deserves special mention, because it is probably one of the most extreme pronouncements that has ever come from the Supreme Court bench: ". . . I am unable to approve the use of non-judicial subpoenas issued by administrative agents . . . Only by confining the subpoena power exclusively to the judiciary can there be any insurance against . . . corrosion of liberty." [191] One obvious difficulty with this view is that even if the subpoena power is confined exclusively to the judiciary, the result is that supboenas are issued not by judges but by clerks of court and by the assistants who work in clerks' offices. For instance, the Federal Rules of Civil Procedure provide that clerks "shall" issue on the request of a party both subpoenas for witnesses and subpoenas for records, "signed and sealed but otherwise in blank." [192] If issuance of subpoenas by anyone but a judge is dangerous to liberty, then the traditional system of the regular courts, which seemingly operates to the satisfaction of all concerned, must be radically changed.

The Administrative Procedure Act muddies a bit the waters made clear by the *Endicott Johnson* and *Oklahoma Press* cases. The words of the Act seem wholly innocuous: "Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under

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continued: "The result therefore sustains the Administrator's position that his investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence, and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be 'limited . . . by forecasts of the probable result of the investigation . . .'" See also Provenzano v. Porter, 159 F.2d 47 (C.C.A. 9th 1946), *cert. denied*, 67 Sup. Ct. 1303 (1947).

190. The decisions in the *Endicott Johnson* and *Oklahoma Press* cases make clear that the Administrator may compel production of records by a defendant who may ultimately be found to be beyond the coverage of the statute. The basic principle involved is more clearly developed in Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), holding that a court may not enjoin the National Labor Relations Board from conducting a hearing upon a complaint alleging unfair labor practices, even if the company was not subject to the Act. The place to prove that the company is beyond the Board's jurisdiction is before the Board or in the reviewing court. *See* Petroleum Exploration, Inc. v. Public Service Comm'n, 304 U.S. 209, 222 (1938), where the Court referred to "the abiding and fundamental principle . . . that the expense and annoyance of litigation is 'part of the social burden of living under government.'" *But cf.* Public Utilities Comm'n of Ohio v. United Fuel Gas Co., 317 U.S. 456 (1943).

191. 327 U.S. 186, 218–9 (1946).

192. FED. R. CIV. P., 45(a).

penalty of punishment for contempt in case of contumacious failure to comply." [193] The difficulty comes not from the words but from the legislative history of this provision. Congressman Walter, sponsoring the bill in the House, said that the effect of this provision is "to do more than merely restate the existing constitutional safeguards. . . ." [194] But the Attorney General had previously said that the provision "is intended to state the existing law with respect to the judicial enforcement of subpenas." [195] And the Attorney General by later memorandum introduced by Mr. Hobbs said: "The law as expounded in *Endicott Johnson v. Perkins* is still applicable. All that this section requires is that the court determine whether the subpena issued comes within the general power of that agency. There need be no in limine inquiries as to whether the person subpenaed is or is not covered by the act." [196] Statements by Senate and House committees seem to support the Attorney General's interpretation. [197]

Disclosure of Information to the Public

Furnishing information to an administrative agency is not the equivalent of disclosing that information to the public, and the question often arises whether or not an agency should keep confidential the facts which have been made known to it. Statutory provisions making it a misdemeanor for any officer or employee of an agency improperly to disclose information are very common. [198] For instance, the Securities Exchange Act provides: "It shall be unlawful for any member, officer, or employee of the Commission to disclose to any person other than a member, officer or employee of the Commission, or to use for personal benefit any information contained in any application, report,

193. 60 Stat. 238, 5 U.S.C.A. § 1005(c) (Supp. 1946).

194. Mr. Walter said: "Where administrative subpenas are contested, the court is to inquire into the situation and issue an order of enforcement only so far as the subpena is found to be in accordance with law. . . . The effect of the subsection is thus to do more than merely restate the existing constitutional safeguards which in some cases, such as those involving public contractors—see *Endicott Johnson Corp.* v. *Perkins* (317 U.S. 501, 507, 509, 510 (1943)) have been held inapplicable. Also, the term 'in accordance with law' . . . means that the legal situation, including the necessary facts, demonstrates that the persons and subject matter to which the subpena is directed are within the jurisdiction of the agency which has issued the subpena." Sen. Doc. No. 248, 79th Cong., 2d Sess. 363 (1946). The *Oklahoma Press* case had come down three months earlier.

195. *Id.* at 227.

196. *Id.* at 415.

197. *Id.* at 206, 265. See Nathanson, *Some Comments on the Administrative Procedure Act*, 41 Ill. L. Rev. 368, 409–10 (1946).

198. *See, e.g.*, Federal Trade Commission Act, 38 Stat. 724 (1914), 15 U.S.C. § 50 (1940). In Note, 51 Harv. L. Rev. 312, 320 n. 53 (1937), it is said that "practically all statutes creating administrative commissions make it unlawful for any member or employee to disclose any information which is not published in the public interest."

or document filed with the Commission which is not made available to the public pursuant to . . . this section. . . ." [199] Statutory protection against revelation of trade secrets is customary. [200] Sometimes elaborate provisions of statutes and regulations control the precise conditions under which and the parties to whom information may be revealed. A good example is the Internal Revenue Code, permitting income tax returns to be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President; the statute itself permits inspection of returns by certain state officers and by specified congressional committees, permits inspection of corporate returns by shareholders, and provides penalties for wrongful use or disclosure of information by those who inspect returns. [201] Another provision allows publication of compensation of corporate officers and employees receiving in excess of $75,000. [202] A provision of a former revenue Act allowing publication of all income tax returns has been upheld. [203]

Some statutes allow administrative agencies in their discretion to release information to the public. Provisions of this kind are included in such statutes as the Federal Trade Commission Act, [204] the Civil Aeronautics Act, [205] the Emergency Price Control Act, [206] the Securities Exchange Act, [207] and the Public Utility Holding Company Act. [208]

199. 48 STAT. 901 (1934), 15 U.S.C. § 78x (1940).

200. The Federal Trade Commission Act, 38 STAT. 721 (1914), 15 U.S.C. § 46 (1940), gives the Commission power "to make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest." The Public Utility Holding Company Act, 49 STAT. 834 (1935), 15 U.S.C. § 79v (1940), protects against "the revealing of trade secrets or processes. . . ."

201. 53 STAT. 49, 26 U.S.C. § 55 (1940).

202. 52 STAT. 516 (1938), 26 U.S.C. § 148(f) (1940).

203. United States v. Dickey, 268 U.S. 378 (1925); Hubbard v. Mellon, 5 F.2d 764 (App. D. C. 1925). See Note, 151 A. L. R. 1049 (1944).

204. 38 STAT. 721 (1914), 15 U.S.C. § 46(f) (1940).

205. 52 STAT. 1026 (1938), 49 U.S.C. § 674 (1940), providing that whenever written objection to public disclosure is made, "the Board shall order such information withheld from public disclosure when, in its judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public."

206. 56 STAT. 30 (1942), as amended, 58 STAT. 637 (1944), 50 U.S.C. § 922(h) (1944): "The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security."

207. 48 STAT. 901 (1934), 15 U.S.C. § 78x (1940), permitting disclosure when in the judgment of Securities and Exchange Commission it is "in the public interest," but making no provision concerning a hearing on the question of disclosure.

208. 49 STAT. 834 (1935), 15 U.S.C. § 79v (1940), permitting disclosure when in judg-

The Securities and Exchange Commission has held that the latter provision does not apply to a record of evidence at a hearing, that objections to disclosure must be filed contemporaneously with the filing of information to secure the benefit of this provision, and that methods of conducting an investment company business are not trade secrets.[209] During a recent year the Securities and Exchange Commission, under the various statutes it administers, granted 123 applications for confidential treatment and denied 22.[210] The Court of Appeals for the District of Columbia has held that a Commission determination to make public disclosure is judicially reviewable,[211] but that if the evidence leaves the question of injurious effects from the disclosure "in the realm of doubt and speculation" the court will refuse to upset the Commission's judgment.[212] The court's opinion in this case, discussing the question whether disclosure of gross sales and cost of goods sold would cause a buyers' strike, seems implicitly to place the burden upon the party asserting that disclosure will be injurious, and demonstrates the extreme difficulty of sustaining that burden.[213]

Probably most of the information coming into the possession of administrative agencies is not subject to any statutory provision concerning disclosure.[214] In *Bank of America National Trust & Sav. Ass'n v. Douglas*,[215] the Securities and Exchange Commission secured in-

ment of Securities and Exchange Commission it is "in the public interest," and authorizing Commission to conduct hearing "in any such case where it finds it advisable."

209. Utilities Employees Securities Co., 3 S.E.C. 1087 (1938).

210. 12 SEC ANN. REP. 128 (1947).

211. American Sumatra Tobacco Corp. v. SEC, 93 F.2d 236 (App. D.C. 1937). The statute provided that "the Commission is authorized to hear objections in any such case where it deems it advisable." 48 STAT. 901 (1934), 15 U.S.C. § 78x (1940). Since the statute thus permitted the Commission to determine the question without a hearing, it was arguable that the Commission's determination ought not to be judicially reviewed. See Comment, *Confidential Treatment of Information Required by the Securities Exchange Act*, 47 YALE L. J. 790 (1938); Lane and Blair-Smith, *The SEC and the "Expeditious Settlement of Disputes,"* 34 ILL. L. REV. 699, 714-5 (1940).

212. American Sumatra Tobacco Corp. v. SEC, 110 F.2d 117, 121 (App. D.C. 1940). ". . . If the conclusion reached is just as likely to be correct as incorrect, it is our duty to let it stand." *Id.* at 120.

213. Indeed, thorough investigation may often reveal a complete lack of support for the view that disclosure of information relating to such items as gross sales and cost of goods sold will cause injury to a business. An investigation by the Securities and Exchange Commission revealed that such information has little to do with the motivating force which determines buying policies or price competition. Frequently such figures are not secret but are already on file in various state capitals for purposes of state taxation. See the interesting account of the SEC's investigation into this subject in LANDIS, THE ADMINISTRATIVE PROCESS 42-5 (1938).

214. See Note, *Inquisitorial Powers of Federal Administrative Agencies*, 48 YALE L. J. 1427, 1430 (1939).

215. 105 F.2d 100 (App. D.C. 1939), 132 F.2d 9 (App. D.C. 1942). The court re-

formation from bank examiners' reports to the Comptroller of the Currency and the Secretary of the Treasury. After holding that under the applicable statute and regulations the information had been properly released to the Commission, the court was confronted with the problem whether or not the Commission, in absence of controlling legislation, could make public information concerning a bank which, if true, might lead to criminal prosecutions. The court relied upon the custom of keeping reports of bank examiners confidential and held that the Commission might use the information in preparing for a hearing but should not make pretrial publication of the information. The court remarked that "certainly until findings are made, the Bank is entitled to have judgment, public and official, suspended." [216] Accepting the Commission's assurance that the information would not be introduced in evidence at a public hearing, the court held that no injunction was necessary. The case shows that at least in some circumstances a court may without statutory assistance require that information in the possession of an administrative agency be kept confidential.[217] Agencies themselves, of course, may make investigation proceedings private, excluding the public.[218]

In some circumstances a court may be wholly unsympathetic to the urge for keeping business facts confidential. Thus it has been held that a company charged with false and fraudulent advertising and unfair trade methods has no right to protection against publicity resulting from holding a public hearing.[219] Despite a contention of a water carrier that the Secretary of Commerce intended to turn records over to the public and that communication of the records to competitors would damage the carrier's business, and despite the Secretary's rejection of the carrier's offer to submit the records on condition that they be not communicated to competitors, the Supreme Court denied an injunction against enforcement of an order requiring the carrier to file information showing commodities carried, points of shipment and destination, rates charged or collected, and other such information.[220]

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quired the administrative proceeding to be transferred from Washington to San Francisco. On that aspect of the case see Note, 28 CALIF. L. REV. 240 (1940).

216. *Id.* at 105.

217. *Cf.* Hearts of Oak Assurance Co. v. Attorney-General, [1932] A.C. 392, rebuking an examiner for holding a public hearing with members of press present, thereby hurting the interests of policy holders for whose protection the legislation being administered had been enacted. In Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933), the Supreme Court upheld the Tariff Commission in keeping business facts confidential even as against another party to a hearing.

218. Bowles v. Baer, 142 F.2d 787 (C.C.A. 7th 1944); Woolley v. United States, 97 F.2d 258 (C.C.A. 9th 1938). In the *Baer* case it was held that the district court had no authority to order the hearing to be conducted in public.

219. E. Griffiths Huges, Inc. v. FTC, 63 F.2d 362 (App. D.C. 1933).

220. Isbrandtsen-Moller Co. v. United States, 300 U.S. 139 (1937).

Similarly, when the Federal Trade Commission, pursuant to a congressional resolution authorizing an investigation into the financial condition of farmers, refused to give assurance to a company that information would not be disclosed to the public or to competitors or customers, a district court nevertheless granted mandamus commanding the company to answer detailed questionnaires concerning such items as purchases, sales, prices, costs, balance sheets, income and expense statements, and salaries of officers.[221]

SUMMARY AND CONCLUSIONS

No longer do federal courts in the name of civil liberties place substantial barriers in the way of administrative agencies which seek business facts deemed necessary to the proper performance of administrative tasks. A half century of congressional insistence upon a broad administrative power of investigation has at last overpowered the judicial effort to protect business privacy. A few decades ago the judges wrote into the Constitution the idea that disclosures could be required only in connection with adjudication and law enforcement, but the Constitution now permits use of subpoenas to support investigations for any lawfully authorized purpose—for making rules, for recommending legislation, for determining policy, for trying to find out whether something ought to be done and if so what. Constitutional restrictions on searches and seizures and self-incrimination until recent times frequently prevented agencies from securing needed information, but those restrictions are now rewritten so as to affect only negligibly the issuance and enforcement of orders compelling disclosure of such records as are relevant to a legitimate investigation. Courts in recent years are freely permitting much of what courts a generation ago condemned as fishing expeditions. Agencies whose regulatory powers rest on the commerce clause are no longer prohibited from investigating intrastate activities. The old Constitution often thwarted investigations of businesses which were deemed not to be "affected with a public interest," but this concept has disappeared, and in its place is the idea that records which a statute requires to be kept are "quasi-public" and cannot be withheld from official inspection. Unlike a number of state agencies which have power to punish for contempt, all federal agencies still must rely on courts for enforcement of subpoenas, but courts now enforce administrative subpoenas without requiring a showing either of probable cause to believe the law has been violated or of probable jurisdiction of the agency. Statutes and case law provide appropriate protection against improper administrative disclosure of information to the public.

221. FTC v. National Biscuit Co., 18 F. Supp. 667 (S.D.N.Y. 1937). See Note, *Rights of Witnesses in Administrative Investigations*, 54 HARV. L. REV. 1214 (1941).

Some will see in the abrupt change of law an alarming breakdown of constitutional protection against oppressive exercise of the bureaucratic inquisitorial power. Petty officials may now enter a business establishment, demand that records and documents be made available for their inspection and enforce the demand by securing a court order requiring disclosure—even in absence of probable cause to believe the law has been violated. Is this not a revival in modern garb of the odious writs of assistance which helped ignite the fire of the American Revolution?

Others will look at the same developments and see only an inevitable concomitant of industrial revolution—delayed somewhat by backward-looking judges. Each step follows inexorably: Industrialization brings regulation. Regulation necessitates administrative processes. Agencies cannot operate without access to facts. Ideas about privacy, standing in the way of agencies which seek information indispensable to intelligent regulation, have to give way. In the same way that the gasoline engine made inevitable the development of the airplane, mass production methods and all they symbolize produced complex business arrangements which brought forth equally intricate governmental mechanisms requiring effective exercise of the administrative power of investigation. And as for civil liberties, compulsory disclosure of business facts is entirely consistent with giving full protection against the kind of unreasonable searches and seizures which were in the minds of the wise men who wrote the Fourth Amendment.[222]

On this grand issue the Constitution has changed sides. It is now, for better or worse, on the side of the democratic will.

222. Such problems as that involved in the highly controversial five-to-four decision in Harris v. United States, 67 Sup. Ct. 1098 (1947), may be determined on their merits quite independently of the solutions of such problems as we have considered. Many who would hesitate the least in upholding administrative power to secure business information would take the strongest position against the search and seizure upheld by the majority in the *Harris* case.