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Revoking the "Fishing License:" Recent Decisions Place Unwarranted Restrictions on Administrative Agencies' Power to Subpoena Personal Financial Records

Jack W. Campbell, IV

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Revoking the “Fishing License:” Recent Decisions Place Unwarranted Restrictions on Administrative Agencies’ Power to Subpoena Personal Financial Records

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I. INTRODUCTION

The backbone of an administrative agency's effectiveness is the ability to investigate rapidly the activities of entities within the agency's jurisdiction.¹ An agency's ability to carry out its investigative functions depends upon enforcement of the agency's administrative subpoenas.² Courts have not always looked favorably upon broad agency subpoena power.³ The implementation of the New Deal and the exigencies of World War II created a need for increased administrative oversight of national affairs. Courts began to recognize the usefulness of proactive administrative government.⁴ Concurrent supreme court decisions reflected this philosophical change by adopting highly deferential views of administrative subpoena enforcement.⁵

1. *Federal Maritime Commn. v. Port of Seattle*, 521 F.2d 431, 433 (9th Cir. 1975).

2. *Id.*

3. See *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-06 (1924) ("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"); *Jones v. Securities Exchange Commn.*, 298 U.S. 1, 27 (1936) ("An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact").

4. Kenneth Culp Davis and Richard J. Pierce, Jr., 1 *Administrative Law Treatise* § 4.1 at 141 (Little, Brown, 3d. ed. 1994).

5. The turning point case was *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943). The Court held that so long as an administrative subpoena is not "plainly incompetent or irrelevant to any lawful purpose" of the agency, the district courts have a duty to order production of the evidence. *Id.* at 509. See also *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216 (1946) (stating that a subpoena is enforceable so long as the agency proceeds "with [the] investigation in accordance with the mandate of Congress and . . . the records sought [are] relevant to that purpose"); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant").

This deference has governed administrative subpoena enforcement for over fifty years.

Recent decisions, however, have signaled a move away from the deferential view of administrative subpoena power.⁶ In response to the savings and loan crisis of the late 1980s⁷ Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").⁸ Administrative agencies charged with enforcing FIRREA routinely subpoena the personal financial records of directors and officers of failed savings and loan associations.⁹ Attempts to enforce these subpoenas have proven difficult. Judicial resistance to this use of the subpoena power rests on two grounds. First, courts have drawn a distinction between corporate and personal financial records. This distinction underlies the holding that fourth amendment privacy concerns require agencies to demonstrate some suspicion of wrongdoing in order to subpoena personal financial records.¹⁰ Second, courts have prohibited or curtailed use of the subpoena power to determine the cost-effectiveness of bringing an enforcement action.¹¹

Part II of this Note describes the development of broad agency subpoena power and the recent decisions restricting that power. Part III analyzes the validity of a distinction between personal and corporate financial records in the context of administrative subpoena enforcement. It also discusses the impact of such a distinction on ad-

6. See, for example, *Parks v. FDIC*, 65 F.3d 207, 214 (1st Cir. 1995) (holding that the Fourth Amendment requires an administrative agency to articulate a reasonable suspicion of wrongdoing by the target before a court will enforce a subpoena for personal financial records); *RTC v. Walde*, 18 F.3d 943, 949 (D.C. Cir. 1994) (holding that subpoenas for personal financial records issued to determine the cost-effectiveness of bringing an enforcement action are only enforceable if the agency has an "articulable suspicion" that the party is liable); *CFTC v. Collins*, 997 F.2d 1230, 1234 (7th Cir. 1993) (holding that a subpoena for a target's personal tax records is only enforceable after balancing the privacy interest in income tax returns and the needs of law enforcement).

7. See generally Martin Mayer, *The Greatest-Ever Bank Robbery: The Collapse of the Savings and Loan Industry* (C. Scribner's Sons, 1990).

8. Pub. L. No. 101-73, 103 Stat. 183 (1989), codified in scattered sections of 12 U.S.C. (1994 ed.).

9. See, for example, *Parks*, 65 F.3d at 208-09; *In re McVane*, 44 F.3d 1127, 1129 (2d Cir. 1995); *FDIC v. Wentz*, 55 F.3d 905, 907 (3d Cir. 1995); *Walde*, 18 F.3d at 944. Compare *Collins*, 997 F.2d at 1231 (invalidating a Commodity Futures Trading Commission subpoena seeking personal income tax returns to investigate the target's possible motive to violate the Commodity Exchange Act).

10. See *Parks*, 65 F.3d at 211; *Wentz*, 55 F.3d at 908-09.

11. Compare *Walde*, 18 F.3d at 949 (holding that it is permissible to use subpoena power to determine the cost-effectiveness of an enforcement action if the agency has an "articulable suspicion" of wrongdoing by the target), with *Freese v. FDIC*, 837 F. Supp. 22, 24 (D.N.H. 1993) ("A determination of whether the pursuit of a civil suit against the plaintiffs would be cost effective is not a proper purpose to issue a subpoena").

ministrative agencies' ability to carry out their regulatory missions effectively. Part IV focuses on the use of administrative subpoena power to determine the cost-effectiveness of enforcement actions. This Part particularly emphasizes the tension between restrictions on this use of the subpoena power and the judicial deference typically granted to agency discretion in setting a regulatory agenda.¹² Part V concludes that the restrictions placed on administrative agencies' power to subpoena personal financial records in recent decisions are unwarranted and threaten the effective and efficient functioning of administrative agencies.

II. THE FOURTH AMENDMENT AND LEGAL DEVELOPMENT OF ADMINISTRATIVE SUBPOENA POWER—THERE AND BACK AGAIN¹³

A. *Toward Broad Administrative Subpoena Power—"There"*

Administrative subpoena power was once viewed with a great deal of suspicion. *Boyd v. United States*¹⁴ represents the "highwater mark"¹⁵ of the Fourth Amendment's¹⁶ protection against enforcement of all subpoenas. In refusing to enforce a district court order that Boyd produce an invoice verifying payment of customs duties, the Supreme Court held that "compulsory production of . . . private books and papers . . . is the equivalent of a search and seizure . . . within the meaning of the Fourth Amendment."¹⁷ In *Federal Trade Commn. v. American Tobacco Co.*,¹⁸ the Court manifested similar suspicion of

12. See *Lincoln v. Vigil*, 113 S. Ct. 2024 (1993); *Heckler v. Chaney*, 470 U.S. 821 (1985).

13. With apologies to J.R.R. Tolkien. See J.R.R. Tolkien, *The Hobbit or There and Back Again* (Houghton Mifflin, 1966).

14. 116 U.S. 616 (1886).

15. Sean Doherty, Comment, *Commodity Futures Trading Commn. v. Collins: Is the Rationale Sound for Establishing an Exception to Subpoena Law for Tax Returns?*, 7 DePaul Bus. L. J. 365, 374 (1995).

16. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. Const., Amend. IV.

17. *Boyd*, 116 U.S. at 634-35. The erosion of the *Boyd* doctrine began soon after its announcement. In *Hale v. Henkel*, 201 U.S. 43 (1906), the Court held that "the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a *subpoena duces tecum*, the production, upon a trial in court, of documentary evidence." *Id.* at 73. Such interference would render it "utterly impossible to carry on the administration of justice." *Id.* (quoting *Summers v. Moseley*, 2 Cr. & M. 477). Professor LaFave has commented that "[t]he continuing validity of *Boyd's* Fourth Amendment holding is doubtful at best." Wayne R. LaFave, 2 *Search and Seizure: A Treatise on the Fourth Amendment* § 4.13(a) at 364 (West, 2d ed. 1987). LaFave goes on to describe *Boyd* as a "much mooted case." *Id.* (quoting *In re Addonizo*, 53 N.J. 107, 248 A.2d 531, 537 (1968)).

18. 264 U.S. 298 (1924).

administrative subpoenas. The Federal Trade Commission ("FTC") sought enforcement of a subpoena issued to obtain certain of the company's books and records in order to determine whether the company was engaged in unfair methods of competition.¹⁹ Though the FTC's investigation was well within its statutory authority, the Court held that the "spirit" of the Fourth Amendment precluded the FTC from conducting "fishing expeditions" directed at uncovering evidence of wrongdoing in private papers.²⁰ *Jones v. Securities and Exchange Commn.*²¹ soon buttressed the *American Tobacco* holding. The Court held that a subpoena issued by the Securities and Exchange Commission ("SEC") was unenforceable absent some prior evidence of wrongdoing.²² These decisions relegated administrative agencies to a reactive, rather than proactive, status.²³ While Congress was free to confer plenary authority on an agency to regulate in an area, the agency could not exercise this authority in a proactive or intelligent manner without ready access to information that only the regulatory target could supply.²⁴

The onset of World War II accelerated the philosophical shift in the Court's view of administrative government begun during the New Deal. Wartime agencies required a great deal of information from regulated parties in order to accomplish their vast missions.²⁵ Recognizing this necessity, the Court signaled a retreat from exacting scrutiny of administrative subpoenas in *Endicott Johnson Corp. v. Perkins*.²⁶ The Walsh-Healey Public Contracts Act granted the

19. Id. at 303.

20. Id. at 305-06. The "fishing expedition" language from *American Tobacco* has been quoted repeatedly in recent cases restricting administrative agencies' power to subpoena personal financial records. See, for example, *Parks*, 65 F.3d at 213; *Walde*, 13 F.3d at 949; *Freese*, 837 F. Supp. at 25.

21. 298 U.S. 1 (1936).

22. "An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact." Id. at 27.

23. This fact did not escape the notice of Justice Cardozo. Dissenting in *Jones*, he noted that "attainment of the ends of public justice" would be only partial "unless retribution for the past is added to prevention for the future." Id. at 30 (Cardozo, J., dissenting). Justice Cardozo's views would ultimately carry the day. See *Oklahoma Press*, 327 U.S. at 203. Reactive administrative oversight is not problematic if one assumes that market preferences will act to reduce wrongdoing. The Great Depression, however, caused New Dealers to conclude that proactive regulation was necessary to counteract market failures. These market failures were determined to arise from "externalities ignored by the common law and a lack of information on the part of consumers and workers." Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 438 (1987).

24. Davis and Pierce, 1 *Administrative Law Treatise* § 4.1 at 138 (cited in note 4).

25. Id.

26. 317 U.S. 501 (1943). This change in direction was foreshadowed by Judge Learned Hand in *McMann v. Securities and Exchange Commn.*, 87 F.2d 377 (2d Cir. 1937). Judge Hand rejected McMann's fourth amendment challenge to a subpoena issued by the SEC. He noted

Secretary of Labor broad investigative power by authorizing the Secretary to issue subpoenas to determine whether governmental contractors violated certain wage and hour requirements.²⁷ The Court regarded its role in the supervision of these investigations as narrow and sought to respect Congress's assignment of the Act's administration to the Secretary rather than to the judicial branch.²⁸ The Court enforced the subpoena, finding it sufficient that the subpoenaed records were not "plainly incompetent or irrelevant to any lawful purpose" delegated to the Secretary.²⁹ This highly deferential attitude toward administrative subpoena power contrasted markedly with the *American Tobacco* holding.

Endicott Johnson might have been read as a judicial response to the exigencies of the war rather than as an endorsement of broad agency investigative power. However, the Court's subsequent decisions in *Oklahoma Press Publishing Co. v. Walling*³⁰ and *United States v. Morton Salt Co.*³¹ invalidated such a contextualized reading. The *Oklahoma Press* Court rejected the subpoena target's fourth amendment challenge, holding that an administrative subpoena is not a search and seizure.³² Rather, the *Oklahoma Press* Court held that

that "[t]he suppression of truth is a grievous necessity at best, more especially when as here the inquiry concerns the public interest; it can be justified at all only when the opposed private interest is supreme." *Id.* at 378. The decision may not have been a substantial departure from *American Tobacco* and *Jones*, in that the SEC already had some evidence of illegal activity by McMann prior to issuing the subpoena. *Id.* at 379. However, Judge Hand's opinion appears to place more emphasis on the public interest in effective regulation than did either the *American Tobacco* or *Jones* Courts.

27. *Endicott Johnson*, 317 U.S. at 502-03.

28. *Id.* at 507.

29. *Id.* at 509. In addition to adopting a highly deferential approach to the relevancy of subpoenaed documents, the Court held that the issue of the subpoena target's coverage by the statute was a matter to be determined initially by the Secretary, not the courts. *Id.* at 508-09. This holding prevented subpoena targets from dragging out an investigation by forcing the courts to try the coverage issue prior to enforcing a subpoena. Though the *Endicott Johnson* holding was a marked departure from *American Tobacco*, remnants of administrative distrust remained. Justice Murphy, in dissent, expressed his fear that, absent a more interventionist role in subpoena enforcement, "intolerable oppression and injustice" by "well-meaning but overzealous officials" would result. *Id.* at 510.

30. 327 U.S. 186 (1946).

31. 338 U.S. 632 (1950).

32. 327 U.S. at 195. Elaborating on this holding, the Court stated that "[n]o officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections which in fact were made." *Id.* Compare *United States v. Dionisio*, 410 U.S. 1, 9 (1973) (holding that a subpoena to appear before a grand jury is not a seizure in the fourth amendment sense, even though the summons may be inconvenient or burdensome). The *Morton Salt* Court drew an analogy between administrative subpoenas and grand jury investigations, noting that, like a grand jury, the administrative agency "does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just

the Fourth Amendment, if applicable,³³ only guarded against abuse of the subpoena power in cases of indefiniteness, overbreadth, unlawful use, or irrelevance to the investigative purpose.³⁴ Addressing the proactive use of subpoena power to police entities within the agency's regulatory jurisdiction, the Court held that the very purpose of an administrative subpoena is to discover evidence of potentially illegal conduct, not to react to pending actions against the subpoena target.³⁵ Indeed, under *Morton Salt*, "official curiosity" is a sufficient basis on which to issue a subpoena.³⁶

*United States v. Powell*³⁷ crystallized the deferential attitude toward judicial enforcement of administrative subpoenas. Petitioner Powell sought to quash an IRS subpoena for business records related to the tax returns of Powell's company.³⁸ Powell argued that the IRS must establish probable cause for tax fraud prior to issuing the subpoena. Interestingly, Powell asserted that the Internal Revenue Code, rather than the Fourth Amendment, dictated this result.³⁹ The Court rejected this statutory interpretation, noting that accepting it might seriously impede the IRS's ability to initiate investigations.⁴⁰ The *Powell* Court recognized that Congress could limit the investigative power of the IRS with a probable cause requirement. Absent explicit statutory language, however, the courts could not infer cause limitations on the subpoena power unless the legislative history clearly attributed such an intent to Congress.⁴¹

because it wants assurance that it is not." *Morton Salt*, 338 U.S. at 642-43. For an interesting discussion of the disappearing distinction between grand jury investigations and administrative subpoena investigations in modern government, see Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 Vand. L. Rev. 573 (1994).

33. Professor LaFave notes that the Court's reference to the Fourth Amendment was only one of analogy; the issue framed was one of balancing the public interest against private security. LaFave, 2 *Search and Seizure* § 4.13(b) at 365 (cited in note 17).

34. *Oklahoma Press*, 327 U.S. at 208-09. The *Morton Salt* Court's holding was essentially the same. "[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *Morton Salt*, 338 U.S. at 652.

35. *Oklahoma Press*, 327 U.S. at 201.

36. *Morton Salt*, 338 U.S. at 652.

37. 379 U.S. 48 (1964).

38. *Id.* at 49.

39. *Id.* at 52-53. Specifically, Justice Powell relied on § 7605(b), which provided: No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

Id.

40. *Id.* at 53-54.

41. *Id.* at 56.

Citing the rejection of cause requirements in *Oklahoma Press* and *Morton Salt*, the *Powell* Court synthesized the administrative subpoena enforcement review into a four-part test: (1) whether the investigation will be conducted pursuant to a legitimate purpose, (2) whether the inquiry may be relevant to that purpose, (3) whether the agency already possesses the information sought, and (4) whether necessary administrative steps have been followed.⁴² Though the *Powell* test was formulated in the context of IRS subpoenas, a subsequent decision held the test generally applicable to all administrative subpoena enforcement actions.⁴³ The *Powell* test became the universal standard by which administrative subpoenas were evaluated.

Following these decisions, jurisprudence on enforcement of administrative subpoenas appeared settled. The agency bore the initial burden of proof, but needed only to make "a prima facie recital of jurisdiction and statement of the basis for enforcement."⁴⁴ This burden was extremely light. Indeed, one commentator referred to the requirement of a legitimate investigative purpose as a "virtual nullity."⁴⁵ The only judicial inquiries targeted the investigative authority of the agency and the relevance of the subpoenaed documents.⁴⁶ Courts did not undertake an individualized balancing of private and public interests. Rather, recognition of the importance of effective regulatory agencies resulted in an institutional fourth amendment balancing of private and public interests. Specifically, the courts balanced the institutional need for effective regulatory agencies against the public's collective concern for personal privacy. This institutional balancing produced the lenient tests of *Endicott Johnson*, *Oklahoma Press*, *Morton Salt*, and *Powell*. Until recently, satisfaction of these tests presented the only fourth amendment barrier to administrative subpoena enforcement.⁴⁷

42. Id. at 57-58.

43. *Securities and Exchange Commn. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 741-42 (1984). See John W. Bagby, *Administrative Investigations: Preserving a Reasonable Balance Between Agency Powers and Target Rights*, 23 Am. Bus. L. J. 319, 324 (1985).

44. Bagby, 23 Am. Bus. L. J. at 322 (cited in note 43).

45. LaFave, 2 *Search and Seizure* § 4.13(b) at 367 (cited in note 17). Professor Cooper remarked that since *American Tobacco's* restrictive holding, "the pendulum has swung far in the opposite direction." Frank E. Cooper, *Federal Agency Investigations: Requirements for the Production of Documents*, 60 Mich. L. Rev. 187, 190 n.9 (1961). See *Securities Exchange Commn. v. Knopfler*, 658 F.2d 25, 26 (2d Cir. 1981) ("[T]he opponent of a subpoena has a heavy burden if he seeks denial of enforcement on the ground that the subpoena is sought for an invalid purpose").

46. Doherty, 7 DePaul Bus. L. J. at 420 (cited in note 15).

47. See, for example, *Securities and Exchange Commn. v. Kaplan*, 397 F. Supp. 564, 569 (E.D.N.Y. 1975) (holding that the subpoena meets the requirements for enforcement if the inquiry is within the authority of the agency, the demand is not too indefinite, and the

B. *Recent Restrictions on Administrative Subpoena Power—
“Back Again”*

Recently, the Seventh Circuit took a significant step away from judicial deference to administrative subpoena power in *CFTC v. Collins*.⁴⁸ The Commodity Futures Trading Commission (“CFTC”) subpoenaed Collins’s income tax returns to investigate possible civil violations of the Commodity Exchange Act.⁴⁹ Judge Posner determined that the district court had abused its discretion in enforcing the subpoenas. This holding did not rest on fourth amendment grounds.⁵⁰ Instead, the court refused to enforce the subpoena because doing so would threaten the “self-reporting, self-assessing character of the income tax system.”⁵¹ Judge Posner contended that routinely requiring investigation targets to hand over these “highly sensitive” documents would create a disincentive to file an income tax return.⁵²

Discussion of *Endicott Johnson* and its progeny was conspicuously absent from Judge Posner’s opinion. Undoubtedly, the subpoena passed muster under the requirements of these cases.⁵³ Thus, the *Collins* decision may be viewed as a balancing of two competing public interests—the interest in effective regulatory agencies and the interest in an effective self-reporting income tax system—with the latter interest prevailing. Judge Posner did not explicitly balance these two interests, however, making it difficult to assess the merits

information is reasonably relevant). Indeed, judicial deference to administrative subpoenas led Judge Friendly to postulate that the “less rigid requirements of the due process clause” rather than the Fourth Amendment provided the only check on enforcement. *In re Horowitz*, 482 F.2d 72, 79 (2d Cir. 1973).

48. 997 F.2d 1230 (7th Cir. 1993).

49. *Id.* at 1231-32. Specifically, the CFTC believed that the presence of tax motives would serve as evidence of a violation of the Commodity Exchange Act. *Id.* at 1232.

50. *Collins* did not assert a fourth amendment challenge. *Collins*’s primary objection to the subpoena rested on fifth amendment grounds. *Id.* at 1232. Judge Posner rejected the fifth amendment challenge, holding that *Collins* had not been compelled by the government to place any incriminating information on his tax return and thus had no claim of privilege. *Id.* at 1233. For a discussion of the current confused state of the required records doctrine in fifth amendment jurisprudence, see Akhil Reed Amar and Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 869-73 (1995).

51. *Collins*, 997 F.2d at 1233.

52. *Id.* This rationale was questioned in a recent comment. See Doherty, 7 DePaul Bus. L. J. at 425-28 (cited in note 15). The commentator suggested that the taxpayer’s motivation to disclose income fully is primarily achieved by the threat of IRS penalties. *Id.* at 426.

53. The CFTC is statutorily empowered to subpoena documents deemed “relevant or material to the inquiry” regarding violations of the Commodities Exchange Act. Doherty, 7 DePaul Bus. L. J. at 424 (cited in note 15). The subpoena request was specifically limited to tax returns. The information in the return was reasonably relevant to the investigation because there appeared to be a correlation between tax benefits and motive to violate the Act. *Id.* (applying the *Morton Salt* inquiry to the subpoena request).

of the decision on these grounds. Rather, his criticism of the CFTC's "bare representation that the tax return might contain information germane to the investigation"⁵⁴ suggests a more general distrust of administrative subpoena power. Particularly, Judge Posner seemed to suggest that the CFTC's narrow regulatory mission caused it to suffer from tunnel vision. Accordingly, Judge Posner advocated a judicial oversight role in agency investigations to assure that broader policy concerns are considered.

What *Collins* merely suggested, *Freese v. FDIC*⁵⁵ made clear. In *Freese*, the Federal Deposit Insurance Corporation ("FDIC") issued subpoenas seeking personal financial records from former directors and officers of the failed New Hampshire Savings Bank.⁵⁶ The purpose of the investigation was three-fold: to determine whether any claims could be brought against the former directors and officers, whether the directors and officers had sufficient assets to justify pursuit of any such claims, and whether the FDIC should seek to freeze or attach any assets.⁵⁷ The court refused to enforce the subpoena on two grounds. First, it held that subpoenaing personal financial records in order to determine the cost-effectiveness of an enforcement action was improper.⁵⁸ Second, and more generally, the court blasted the FDIC's "hubristic" use of the subpoena power to infringe on fundamental constitutional rights.⁵⁹ Citing *American Tobacco's* fourth amendment condemnation of "fishing expeditions," the *Freese* court held that the FDIC's failure to suggest specific wrongdoing by the former directors and officers made the subpoena unenforceable on any grounds.⁶⁰

*RTC v. Walde*⁶¹ elaborated upon the "improper cost-effectiveness purpose" theme of *Freese*. The Resolution Trust Company ("RTC") issued subpoenas to former directors and officers of failed savings and loan institutions seeking personal financial records in order to investigate possible wrongdoing and to assess the cost-effectiveness of possible litigation against the directors and officers.⁶² The

54. *Collins*, 997 F.2d at 1234. Under *Morton Salt*, bare representations of relevancy are generally sufficient for enforcement of a subpoena. See *Morton Salt*, 338 U.S. at 652 (holding that mere "official curiosity" is a sufficient predicate to a subpoena request).

55. 837 F. Supp. 22 (D.N.H. 1993).

56. *Id.* at 23.

57. *Id.*

58. *Id.* at 24.

59. *Id.* at 25.

60. *Id.*

61. 18 F.3d 943 (D.C. Cir. 1994).

62. *Id.* at 944. RTC was created as part of the FIRREA. 103 Stat. at 183. The RTC may be appointed as conservator of failed savings and loan institutions. As conservator, the RTC is

Walde court held that some of the financial records were relevant to the RTC's investigation of possible wrongdoing.⁶³ Unlike the *Freese* court, the *Walde* court cited *Morton Salt* and *Powell* for the proposition that the RTC was not required to make a preliminary determination of liability in order to subpoena these relevant personal records.⁶⁴

In discussing the use of the subpoena power to determine the cost-effectiveness of enforcement action, however, the court clouded the issue of the preliminary determination of liability. Some language in the decision suggested that the RTC must have an articulable suspicion of wrongdoing before subpoenaing personal financial information for any reason.⁶⁵ Other language suggested that this level of suspicion should arise only following a subpoena of personal financial records to determine the cost-effectiveness of an enforcement action.⁶⁶ In either case, the asserted rationale for requiring an articulable suspicion for the subpoena of personal financial records involved a distinction in the privacy interests implicated in disclosure of personal, as opposed to corporate, financial records.⁶⁷ Like the *Freese* court, the *Walde* court cited *American Tobacco's* fourth amendment prohibition of "fishing expeditions"⁶⁸ as authority for limiting administrative subpoena power in the context of personal financial records. The court then enigmatically declared that it would

statutorily charged with preserving and conserving the assets of the institution. To accomplish this task, the RTC is empowered to avoid fraudulent transfers, assert claims against the directors and officers, seek court orders to attach assets, and issue subpoenas. *Walde*, 18 F.3d at 944. RTC is also directed to "minimiz[e] the amount of any loss realized in the resolution of cases." *Id.* at 948 (quoting 12 U.S.C. § 1441a(b)(3)(C)(iv)).

63. *Walde*, 18 F.3d at 947.

64. *Id.*

65. *Id.* at 949.

66. Compare two statements made in the case: "[W]e think that the RTC must have at least an articulable suspicion that a former officer or director is liable to the failed institution before a subpoena for personal financial information may issue," *id.* at 949; "We . . . hold that . . . where the RTC has no articulable suspicion to believe that the former officer or director is liable . . . the RTC may not subpoena his personal financial information for the purpose of assessing the cost-effectiveness of prospective litigation," *id.* Later D.C. Circuit cases have clarified this ambiguity by opting for the latter, less restrictive holding. See *RTC v. Frates*, 61 F.3d 962, 964-65 (D.C. Cir. 1995); *In re Sealed Case (Administrative Subpoena)*, 42 F.3d 1412, 1416 (D.C. Cir. 1994); *RTC v. Thornton*, 41 F.3d 1539, 1544 (D.C. Cir. 1994). Other circuits, however, have apparently adopted the former, more restrictive holding. See *FDIC v. Wentz*, 55 F.3d 905, 908-09 (3d Cir. 1995); *In re McVane*, 44 F.3d 1127, 1139-40 (2d Cir. 1995).

It is important to note that the RTC's argument in support of subpoena power was based entirely on statutory construction. See *Walde*, 18 F.3d at 948. RTC argued that the sum of several mandates of FIRREA indicated congressional intent that the RTC assess the cost-effectiveness of any enforcement action. *Id.* No argument was advanced that determining cost-effectiveness is an inherently legitimate investigative function. See Part IV.C for a discussion of the merits of this argument.

67. *Walde*, 18 F.3d at 948-49.

68. See notes 3 and 20 and accompanying text.

not reach *Walde's* fourth amendment challenge to the subpoena,⁶⁹ despite having done exactly that by discussing *American Tobacco*.

Although later decisions seemed to limit the effect of *Walde* on agency subpoena power,⁷⁰ the case laid the groundwork for future restrictions on administrative subpoena power in two ways. First, *Walde* drew a distinction between subpoenaing corporate and personal financial records for fourth amendment purposes.⁷¹ Second, the *Walde* court questioned the legitimacy of assessing the cost-effectiveness of an enforcement action as a proper purpose of agency subpoena power. Furthermore, the case granted a district court more authority to edit subpoenas and to eliminate document requests that the court determined were intended to assess cost-effectiveness.⁷² The court's assumption of this type of supervisory role thereby curtailed agency investigative discretion.

The distinction between personal and corporate financial records led the First Circuit to establish the most sweeping of recent restrictions on administrative subpoena power in *Parks v. FDIC*.⁷³ The First Circuit withdrew the opinion after granting a rehearing en banc.⁷⁴ Though no longer precedent, the initial *Parks* majority and dissenting opinions best contrast the competing concerns in administrative subpoena enforcement. The court held that the Fourth Amendment bars the administrative subpoena of personal financial

69. *Walde*, 18 F.3d at 949.

70. The RTC has since been careful to characterize its subpoena requests for personal financial information as relevant to uncovering wrongdoing. Even if one of the purposes of the subpoena is to determine the cost-effectiveness of an enforcement action, the D.C. Circuit has been willing to enforce the subpoena on a permissible alternate basis. See *Frates*, 61 F.3d at 964-65; Thomas P. Vartanian, Robert H. Ledig, and Paul D. Marquardt, *RTC Counts Cash First, Investigates Liability Later*, 12 Banking Policy Rep. 1, 16 (July 19, 1993). However, at least one case suggests that the D.C. Circuit may have attempted to reinstate the articulable suspicion requirement for subpoena of personal records by recasting the issue as one of statutory interpretation rather than fourth amendment concern. *Sealed Case*, 42 F.3d at 1418 (holding that absent specific statutory authority, agencies cannot "cast about for potential wrongdoing in an individual's personal financial documents").

71. *Walde*, 18 F.3d at 948.

72. *Id.* at 949.

73. 65 F.3d 207 (1st Cir. 1995). The facts of *Parks* were essentially identical to those of *Walde*, except that the FDIC rather than the RTC acted as conservator of the failed institution. See note 62 and accompanying text. The *Parks* court criticized the *Walde* court for not adopting a blanket rule against subpoena of personal financial records for any person absent sufficient suspicion of wrongdoing. 65 F.3d at 212. The *Parks* court also criticized *Wentz*, which apparently read *Walde* as setting forth such a rule, for striking the public/private balance too far in favor of the public. *Id.* at 213. See discussion of this reading of *Walde* in note 66.

74. The First Circuit granted a rehearing en banc on November 8, 1995 and subsequently withdrew the opinion from the bound version of the Federal Reporter. Citations in this Note refer to the advance sheet, in which the opinion originally appeared. Alternatively, the case may be accessed at 1995 WL 529629. The rehearing en banc was docketed for February 2, 1996.

records unless the agency can “articulate a reasonable suspicion of wrongdoing” by the target of the investigation.⁷⁵ The *Parks* court asserted that this standard would “stop short of probable cause,”⁷⁶ but required the agency to articulate specific facts indicative of individualized suspicion.⁷⁷ The court acknowledged the strong public interest in resolving the affairs of failed banking institutions, but found that the privacy interest in personal financial records outweighed this interest, absent sufficient suspicion of wrongdoing.⁷⁸ Consistent with prior cases in other jurisdictions, the First Circuit cited *American Tobacco* to support these restrictions on the subpoena power.⁷⁹

As discussed above, recent decisions appear to reflect the pre-1940 distrust of administrative government in many respects. By revitalizing *American Tobacco*'s precedential value and drawing a distinction between corporate and personal financial records, these decisions threaten the effective investigation of individuals within an agency's regulatory jurisdiction.⁸⁰ Indeed, under *Parks*, such investigations can occur only on a reactive basis.⁸¹ Furthermore, restrictions on the use of the subpoena power to determine cost-effectiveness threaten the ability of agencies to use limited budgetary resources efficiently while carrying out their statutory mandates.

III. PERSONAL AND CORPORATE FINANCIAL RECORDS—DISTINCTION WITHOUT A DIFFERENCE?

Courts have asserted that subpoenas for personal, as opposed to corporate, financial records implicate greater privacy concerns. This distinction underlies heightened suspicion requirements for enforcement of administrative subpoenas seeking personal financial records.⁸² This Part analyzes the validity of this distinction, and

75. *Parks*, 65 F.3d at 214.

76. *Id.*

77. *Id.* at 215.

78. *Id.* at 214. Specifically, the court disapproved of the FDIC's “asser[tion] of the power to rummage through financial papers of private citizens based on nothing more than the hope that illegal conduct might be revealed.” *Id.* at 213.

79. *Id.* at 213.

80. “By handing the targets of agency investigations a potent new weapon, the majority facilitates the insertion of monkey wrenches into the administrative machinery, and creates the potential not only for delaying agency probes (thereby further eroding agency effectiveness), but also for increasing the extent of judicial intrusions into the agency sphere.” *Id.* at 218 (Selya, J., dissenting) (citations omitted).

81. See discussion in note 23 and accompanying text.

82. See notes 73-79 and accompanying text.

contends that heightened suspicion requirements for enforcement of administrative subpoenas seeking personal financial records threaten agencies' investigative effectiveness.

A. Subpoenas Are Not Searches Regardless of the Target

The *Parks* court's hostility to administrative subpoenas appears to stem from its equating an administrative subpoena for personal financial records with an actual search. Specifically, the court derides the FDIC for "assert[ing] the power to rummage through the financial papers of private citizens."⁸³ This equation leads the court to mandate a "reasonable suspicion of wrongdoing" as a prerequisite to enforcement of an administrative subpoena for personal financial records.⁸⁴ Equating an administrative subpoena with an actual search, however, is contrary to precedent and unnecessary in enforcement proceedings.

For purposes of fourth amendment analysis, administrative subpoenas are distinguishable from actual searches and seizures.⁸⁵

83. *Parks*, 65 F.3d at 213. This choice of words is particularly interesting in that the lack of ability to rummage through a person's property has traditionally been asserted as the key distinction between an administrative subpoena and an actual search. "A subpoena duces tecum, obviously, is much less intrusive than a search warrant: the police do not go rummaging through one's home, office, or desk if armed with only a subpoena." *Stanford Daily v. Zurcher*, 353 F. Supp. 124, 130 (N.D. Cal. 1972), aff'd 550 F.2d 464 (9th Cir. 1977), rev'd 436 U.S. 547 (1978). See *United States v. Poller*, 43 F.2d 911, 914 (2d Cir. 1930) (Hand, J.) ("[T]he real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him"). Thus, this choice of verb by the *Parks* court suggests that it sees little, if any, distinction between an administrative subpoena for personal financial records and an actual search.

84. *Parks*, 65 F.3d at 214. Indeed, the court stated that "the Supreme Court has often utilized a reasonableness standard which requires the government to articulate a reasonable suspicion of wrongdoing by the target of the search." *Id.* at 214. The cases cited by the *Parks* court in support of the heightened scrutiny of administrative subpoenas for personal financial records are fourth amendment challenges to actual searches, however, not subpoenas. See, for example, *New Jersey v. T.L.O.*, 469 U.S. 325, 328 (1985) (challenging a public school official's search of a student's handbag); *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 526 (1967) (challenging a housing ordinance that allowed warrantless inspections of private apartments).

85. The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside. No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections, which were in fact made.

Oklahoma Press, 327 U.S. at 195. See *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 414 (1984) ("[T]he enforceability of the administrative subpoena . . . at issue here is governed . . . by our decision in *Oklahoma Press*). Compare by analogy *Dionisio*, 410 U.S. at 9 (holding that a subpoena to appear before a grand jury is not a seizure in the fourth amendment sense, despite

The rationale for this distinction is that, unlike an actual search, an administrative subpoena is not self-executing.⁸⁶ The target of a subpoena has an opportunity to request that a court quash the subpoena prior to its enforcement.⁸⁷ At an enforcement proceeding, the subpoena target may demonstrate that the subpoena was issued for an improper purpose such as harassment, pressure to settle a collateral dispute, or bad faith.⁸⁸ The *Powell* criteria demonstrate judicial recognition of the potential for subpoena abuse and provide adequate protections for a subpoena target.⁸⁹

Until recently, courts routinely found the *Powell* test satisfied when a target challenged an administrative subpoena. The *Powell* checks are not, however, "devoid of an inhibiting effect."⁹⁰ Specifically, the *Powell* criteria create procedural hurdles that allow courts to prevent an agency from pursuing groundless subpoenas.⁹¹ In addition, by setting forth grounds to challenge a subpoena, the *Powell* criteria induce agency personnel to curb the scope of subpoenas voluntarily, as agencies have a "self-interest in avoiding judicial enforcement."⁹²

An administrative subpoena of personal financial records should not be treated as an actual search. The subpoena target retains the right to challenge enforcement of the subpoena in the courts. Requiring an administrative agency to articulate a reasonable suspicion of wrongdoing prior to enforcement of a subpoena represents an attempt by the courts to garner an unduly broad supervisory role in agency investigations. The courts assume a role

the fact that the summons may be inconvenient or burdensome). Of course, this distinction has not always been recognized. See notes 14-17 and accompanying text.

86. *Bagby*, 23 Am. Bus. L. J. at 319-20 (cited in note 43). The distinction between subpoenas and searches has also been drawn for fifth amendment purposes. The Supreme Court has held that records obtained by law enforcement officials during a legal search and seizure do not violate a defendant's fifth amendment privilege against self-incrimination. *Andresen v. Maryland*, 427 U.S. 463, 473 (1976). The rationale for the holding is that during a search, a defendant is not compelled to turn over the records. *Id.* In contrast, compliance with a grand jury subpoena for personal records may compel a defendant to disclose records containing incriminating information. Thus, the fifth amendment privilege may be asserted as a defense to compliance with a grand jury subpoena. *Id.* at 473-74.

87. *Stanford Daily*, 353 F. Supp. at 130.

88. *OTS v. Ernst & Young*, 786 F. Supp. 46, 50 (D.D.C. 1992).

89. "In line with the . . . requirement that the disclosure sought shall not be unreasonable, the district court is authorized to impose reasonable conditions and restrictions with respect to the production of the subpoenaed material if the demand is unduly burdensome." *FTC v. Texaco, Inc.*, 555 F.2d 862, 881 (D.C. Cir. 1977) (citation omitted). See Doherty, 7 DePaul Bus. L. J. at 420 (cited in note 15).

90. Marc I. Steinberg, *SEC Subpoena Enforcement Practice*, 11 J. Corp. L. 1, 5 (1985).

91. *Id.*

92. *Id.*

more akin to proactive supervision of the investigation than to reactive supervision, the latter being designed only to prevent abuse of the subpoena power. The reasonable suspicion standard articulated by the *Parks* court actually exceeds that required for enforcement of a grand jury subpoena.⁹³ Significant burdens on grand jury subpoena power have been consistently rejected as threatening the grand jury's investigative power and the public's interest in expeditious administration of the criminal laws.⁹⁴ This laissez-faire attitude toward grand jury subpoena power probably stems from courts' comfort with a supervisory role over grand jury investigations. Their reluctance to adopt a similar attitude toward administrative subpoena enforcement suggests latent hostility to delegation of a similar investigative role to agencies. Assumption of a supervisory role over agency investigations is antithetical to this delegation of investigative power.⁹⁵

Of course, congressional assignment of an investigative function to an agency does not require the courts to "rubber-stamp" the actions of an agency.⁹⁶ This Note contends, however, that the *Powell* criteria⁹⁷ strike the appropriate balance between effective agency investigative power and the need for a judicial check on over-zealous agency officials. Courts will not enforce subpoenas that are issued for an improper purpose or irrelevant to a proper agency investigative purpose. Recharacterization of administrative subpoenas seeking personal financial records as actual searches is merely a judicial attempt to revive the long-rejected *Boyd* doctrine.⁹⁸ Rejuvenation of this type of judicial oversight role in agency investigation is particularly harmful in the area of banking

93. "[An administrative agency] is more analogous to the Grand Jury, which . . . can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Morton Salt*, 338 U.S. at 642-43.

94. *United States v. R Enterprises*, 498 U.S. 292, 298-99 (1991) (quoting *Dionisio*, 410 U.S. at 17). Commentators have noted that the Fourth Amendment's limitation on grand jury subpoenas applies only to "the extent to which subpoenas can compel the production of individuals' personal, nonbusiness documents." Sara S. Beale, William C. Bryson, and Rebecca E. Swenson, 1 *Grand Jury Law and Practice* § 6.27 at 177 (Callaghan & Co., 1986). See *Fisher v. United States*, 425 U.S. 391, 401 n.7 (1976) ("Special problems of privacy which might be presented by subpoena of a personal diary are not involved here").

95. See *Endicott Johnson*, 317 U.S. at 507 ("Congress submitted the administration of the Act to the judgment of the Secretary of Labor, not to the judgment of the courts"). See also *Schwimmer v. United States*, 232 F.2d 855, 862-63 (8th Cir. 1956) ("Some exploration or fishing necessarily is inherent and entitled to exist in all documentary productions sought by a grand jury").

96. *Chapman v. Maren Elwood College*, 225 F.2d 230, 234 (9th Cir. 1955).

97. See note 42 and accompanying text.

98. See notes 14-17 and accompanying text. See also *Addonizo*, 248 A.2d at 539-40 (discussing the dangers of indiscriminately applying fourth amendment decisions in actual search cases to subpoena cases).

regulation. Agencies charged with regulating the banking industry must act proactively in order to prevent wrongdoing. Reactive regulation increases the likelihood that taxpayers will bear the costs of wrongdoing via FDIC payments to depositors.⁹⁹

B. Personal v. Corporate Financial Records

As discussed above, the *Parks* court sought to justify its reasonable suspicion standard for enforcement of administrative subpoenas for personal financial records by blurring, if not erasing, the distinction between an actual search and an administrative subpoena. The court preceded this equation of subpoenas with actual searches by drawing a fourth amendment privacy distinction between personal and corporate financial records.¹⁰⁰ Only administrative subpoenas for the former were equated with actual searches.¹⁰¹ Although other courts have not equated any type of administrative subpoena with an actual search, some courts have cited a distinction between personal and corporate records as justification for heightened scrutiny of administrative subpoenas of personal financial records.¹⁰² While some early cases suggested such a distinction,¹⁰³ subsequent developments in administrative subpoena law have practically eliminated it.¹⁰⁴ This Section contends that courts should find no privacy distinction between personal and corporate financial records for purposes of administrative subpoena enforcement.

99. See Jennifer J. Alexander, Note, *Is the Cross-Guarantee Constitutional?*, 48 Vand. L. Rev. 1742, 1751-52 (1995).

100. *Parks*, 65 F.3d at 210-11.

101. *Id.*

102. *Wentz*, 55 F.3d at 908 (enforcing a subpoena but noting that privacy concerns must be considered when personal, as opposed to corporate, financial records are subpoenaed); *McVane*, 44 F.3d at 1136 ("In contrast to the limited rights of corporations, the courts have recognized certain 'rights to privacy' of individuals Among these protected rights is 'the individual interest in avoiding disclosure of personal matters'"); *Thornton*, 41 F.3d at 1544 ("[A]lthough an agency may subpoena corporate financial information solely to ascertain the cost-effectiveness of contemplated litigation, it is less free to subpoena personal financial information for the same purpose"); *Walde*, 18 F.3d at 948 ("The Supreme Court reminds us that 'corporations can claim no equality with individuals in the enjoyment of a right to privacy'").

At least one district court had drawn this distinction prior to the *Walde* decision. *Breakey v. Inspector General*, 836 F.Supp 422, 426 (E.D. Mich. 1993). In *Breakey*, the court did not elaborate on the fourth amendment ramifications of this distinction. Rather, the court determined that the subpoena met the requirements for enforcement set forth in the Right to Financial Privacy Act. *Id.* at 427.

103. See discussion in Part III.B.1.

104. See discussion in Part III.B.2. See also *Parks*, 65 F.3d. at 216 (Selya, J., dissenting) (discussing recent legal developments that blur the distinction between privacy interests in personal and corporate financial records).

1. Early Case Law Suggests a Distinction

Courts drawing a fourth amendment distinction between personal and corporate financial records have relied on scant authority. The *Parks* decision is typical.¹⁰⁵ The court established the inferior privacy rights of corporations by citing *Oklahoma Press* and *Morton Salt*.¹⁰⁶ Each decision indicated that corporations receive lesser constitutional protection of privacy.¹⁰⁷ The *Oklahoma Press* Court reasoned that corporations receive reduced privacy protection because they are creatures of state law and as such, are "subject to broad visitatorial power."¹⁰⁸ When viewed in isolation, these holdings lend some support to the proposition that a subpoena of personal financial records mandates some higher level of scrutiny. As Judge Selya suggested in his *Parks* dissent, however, these cases should be read as reflecting the Court's desire to keep this question open.¹⁰⁹

Judge Selya suggests that the *Oklahoma Press* and *Morton Salt* Courts merely intended to confine their rulings to the facts of the cases before them.¹¹⁰ The historical context of the decisions supports this view. These cases arose during the early stages of a dramatic shift in judicial attitude toward administrative government.¹¹¹ Given the evolving nature of judicial attitudes toward administrative government and *American Tobacco's* relatively recent condemnation of agency investigative power,¹¹² Judge Selya's reading of the cases as limited to their facts appears particularly appropriate.

Ironically, *American Tobacco's* strong fourth amendment condemnation of administrative subpoenas,¹¹³ considered in light of the facts of the case, may actually provide support for a *lack* of distinction between corporate and personal financial records. The FTC's subpoena was directed toward the American Tobacco Company. No natural persons were identified as investigative targets.¹¹⁴ Yet, the Court failed to distinguish between corporate and personal records in

105. See *Parks*, 65 F.3d at 210-11.

106. *Id.* at 211.

107. *Morton Salt*, 338 U.S. at 652 ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy"); *Oklahoma Press*, 327 U.S. at 205 ("[C]orporations are not entitled to all of the constitutional protections which private individuals have in these and related matters").

108. 327 U.S. at 204-05.

109. 65 F.3d at 216 (Selya, J., dissenting).

110. *Id.*

111. See notes 25-36 and accompanying text.

112. See *American Tobacco*, 264 U.S. at 305-06.

113. See *id.*

114. *Id.* at 303.

condemning all fishing expeditions into private papers. The announcement of this universal and complete condemnation in a case in which the defendant was a corporation suggests that “financial records are financial records are financial records”¹¹⁵ in the eyes of the judiciary. It is certainly difficult to see how the Court could strengthen its condemnation if the defendant happened to be a natural person. Despite this plausible reading of *American Tobacco*, courts hostile to administrative investigations prefer to use this rhetorical talisman to ward off administrative subpoenas of personal financial records.¹¹⁶

2. Subsequent Erosion of the Distinction—Does Absence of Evidence Imply Evidence of Absence?

Oklahoma Press and *Morton Salt* both suggested that the line of demarcation for fourth amendment privacy concerns in administrative subpoenas should be drawn between personal and corporate records.¹¹⁷ Subsequent case law has shown, however, that the nature of the records sought¹¹⁸ and the investigative power conferred upon an agency,¹¹⁹ rather than the identity of the investigative target, are the primary considerations in subpoena enforcement proceedings.

Perhaps the strongest support for the lack of a distinction between personal and corporate financial records for fourth amendment purposes lies in the courts’ consistent failure to draw such a distinction. *Ryan v. United States*,¹²⁰ handed down on the same day

115. *Parks*, 65 F.3d at 217 (Selya, J., dissenting).

116. See *id.* at 213; *Walde*, 18 F.3d at 949; *Freese*, 837 F. Supp. at 25.

117. *Morton Salt*, 338 U.S. at 652; *Oklahoma Press*, 327 U.S. at 205.

118. The distinction between individuals on the one hand and corporations on the other, however, does not explain the lack of protection afforded to individuals served with subpoenas for documents. In the case of private individuals, perhaps the mere relevance standard is sufficient to protect privacy interests in documents related to economic activity, but arguably purely private papers should be protected by requiring the investigatory body to meet a more stringent standard.

LaFave, 2 *Search and Seizure* § 4.13 at 383 (cited in note 17). See *United States v. Miller*, 425 U.S. 435, 442-43 (1976) (holding that the nature of the documents sought to be protected determines whether there is a “legitimate expectation of privacy” for fourth amendment purposes); *United States v. Couch*, 409 U.S. 322, 350 (1973) (Marshall, J., dissenting) (“We are not so outraged by the intrusion on privacy that accompanies the seizure of [business records] as we are by the seizure of a diary”).

119. See *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1989) (“We are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself”); *Securities and Exchange Commission v. Howatt*, 525 F.2d 226, 229 (1st Cir. 1975) (“[I]t is not the court’s role to intrude into the investigative agency’s function”); *Doherty*, 7 DePaul Bus. L. J. at 420 (cited in note 15).

120. 379 U.S. 61 (1964).

as *Powell*, provides a particularly noteworthy example of this omission. In *Ryan*, the petitioner challenged an IRS subpoena requiring him to turn over eleven years of personal financial records.¹²¹ The Court summarily affirmed the Sixth Circuit's enforcement of the subpoena for the reasons set forth in *Powell*.¹²² The failure to draw a distinction between the corporate financial records sought in *Powell* and the personal financial records sought in *Ryan* strongly indicates that the Court intended the *Powell* test¹²³ to apply equally to natural persons and corporations. Unlike the *Oklahoma Press* Court's apparent focus on the identity of the investigative target, the *Ryan* and *Powell* Courts' focus explicitly shifted to the nature of the records and the authority of the investigating agency. These cases can be reconciled, however, by characterizing the *Oklahoma Press* holding as resting on the principle that records of a business or economic nature do not merit heightened fourth amendment protection, regardless of the identity of the owner of those records. Such a reading, while not readily apparent, may be inferred from the language of *Oklahoma Press*.¹²⁴

This absence of a distinction between personal and corporate financial records is not limited to the enforcement of IRS subpoenas. Judicial enforcement of subpoenas issued by the SEC also noticeably lacks any such distinction.¹²⁵ In *SEC v. Howatt*,¹²⁶ the SEC issued subpoenas to a number of individuals seeking personal financial records pursuant to an investigation of possible securities fraud.¹²⁷ The subpoenas were issued after the SEC received a written complaint from a broker.¹²⁸ This case can be reconciled with *Parks* if one assumes that the written complaint provided the reasonable

121. *Id.* at 61.

122. *Id.* at 62. See notes 37-43 and accompanying text.

123. Specifically, the four-prong inquiry for enforcement of an administrative subpoena. See note 42 and accompanying text.

124. After discussing the distinction between private and corporate records, the Court stated that "[w]hatever limits there may be to congressional power to provide for the production of corporate or other business records, therefore, they are not to be found in view of the course of prior decisions, in any such absolute or universal immunity as petitioners seek." *Oklahoma Press*, 327 U.S. at 208 (emphasis added). While the reference to "other business records" could be read simply as an attempt by the Court to make its decision applicable to other business entities such as partnerships or sole proprietorships, the *Powell* and *Ryan* holdings seem to require this sentence to be read as making *Oklahoma Press* applicable to all business or economic records, personal or corporate.

125. See, for example, *Knopfler*, 658 F.2d at 25; *Howatt*, 525 F.2d at 226; *Ayers v. Securities and Exchange Commission*, 482 F. Supp. 747 (D. Mont. 1980); *Securities and Exchange Commission*, 397 F. Supp. 564 (E.D.N.Y. 1975).

126. 525 F.2d 226 (1st Cir. 1975).

127. *Id.* at 228.

128. *Id.*

suspicion necessary to launch an investigation into private financial records.¹²⁹ Yet, the plain language of *Howatt* makes such a reconciliation impossible. The *Howatt* court specifically held that no cause requirements would limit enforcement of the subpoenas.¹³⁰ Thus, the First Circuit appears to have overruled its *Howatt* holding in *Parks*.

Since the *Parks* court failed to overrule *Howatt* expressly, the cases could be harmonized by arguing that Congress conferred broader investigative power to the SEC than to the FDIC. Comparison of the enabling statutes of the two agencies, however, reveals essentially identical investigative powers.¹³¹ Furthermore, the *Parks* court's reliance on fourth amendment grounds to strike down the FDIC's subpoena of personal financial documents makes statutory construction distinctions impossible. Presumably, the SEC would be bound to the reasonable suspicion threshold in the enforcement of its subpoenas for personal financial records in the First Circuit.¹³²

129. See *Parks*, 65 F.3d at 214. The Third Circuit in *Wentz* reached the same conclusion as the *Howatt* court, namely that the subpoena for personal financial records was enforceable. *Wentz*, 55 F.3d at 909. The *Wentz* court, however, engaged in the same reasonable suspicion analysis as the *Parks* court. Thus, it too is analytically inconsistent with *Howatt*. See also *McVane*, 44 F.3d at 1139-40.

130. *Howatt*, 525 F.2d at 229 ("The Commission is not required by statute or the Constitution to limit its investigations to those against whom 'probable' or even 'reasonable' cause to suspect a violation has been established"). *Kaplan*, 397 F. Supp. at 564, accords with *Howatt*. In *Kaplan*, the SEC issued subpoenas for personal financial records pursuant to § 20(a) of the Securities and Exchange Act of 1933. *Id.* at 565. In enforcing the subpoenas, the court held that "it is well settled that the Fourth Amendment does not now restrict an administrative subpoena for records." *Id.* at 568.

131. The SEC has the power to "administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry." 15 U.S.C. § 78u(b) (1994 ed.). Similarly, the FDIC is empowered to "administer oaths and affirmations, to take . . . depositions, and to issue . . . subpoenas and subpoenas duces tecum." 12 U.S.C. § 1818(n) (1994 ed.). This investigative power is not affected by the FDIC's acting as a conservator or receiver of a failed financial institution. *Id.* § 1821(d)(2)(I)(i).

132. Judge Selya remarked that the "upshot [of *Parks*] is to create a singular benchmark against which certain administrative subpoenas henceforth will have to be evaluated in the First Circuit—and only the First Circuit." *Parks*, 65 F.3d at 216 (Selya, J., dissenting). Apparently, though, the same benchmark will be applied in the Second and Third Circuits, though with perhaps less bite. See *Wentz*, 55 F.3d at 908-09; *McVane*, 44 F.3d at 1139-40. Judge Selya's reference to "certain" administrative subpoenas is not exactly clear. The reference may be to any administrative subpoena issued for personal financial records or may be an attempt to distinguish *Howatt*. As mentioned above, however, the constitutional holding of *Parks* makes any statutory construction distinctions impossible.

3. Is the Current Debate Merely Judicial Déjà Vu?—*United States v. Miller*¹³³ and the Right to Financial Privacy Act¹³⁴

Consistent judicial failure to draw a fourth amendment distinction between personal and corporate financial records strongly suggests that no such distinction is constitutionally required. This section analyzes several 1970s supreme court decisions eliminating essentially all privacy protections for personal financial records held by a bank, and Congress's response to those decisions. This analysis provides further evidence that no heightened privacy interests are implicated when an agency subpoenas personal, rather than corporate, financial records.

In *California Bankers Association v. Schultz*,¹³⁵ the Supreme Court heard a challenge to the Bank Secrecy Act of 1970 ("BSA"). Congress enacted the BSA in response to concern about white collar crime¹³⁶ and the secret stashing of American currency in foreign bank accounts.¹³⁷ The BSA imposed numerous recordkeeping requirements on domestic banks, including: keeping copies of all checks over \$100.00 for five years; maintaining systems to trace large deposits for two years; and collecting signature cards, social security numbers, and names and addresses of all account holders.¹³⁸ Additionally, the BSA required domestic banks to report certain transactions to governmental law enforcement agencies.¹³⁹

The plaintiffs in *Schultz* included several individual bank customers who challenged the BSA as violative of their fourth amendment rights against unreasonable search and seizure.¹⁴⁰ The Court rejected their argument, holding that the BSA did not compel automatic reporting of any transaction.¹⁴¹ In particular, the Court noted that the BSA's legislative history and regulations promulgated pursuant to the BSA indicated that access to banking records would be adequately controlled by "existing legal process."¹⁴² Presumably,

133. 425 U.S. 435 (1976).

134. 12 U.S.C. § 3401 et seq. (1994 ed.).

135. 416 U.S. 21 (1974).

136. *Id.* at 26-27.

137. Nancy M. Kirschner, *The Right to Financial Privacy Act of 1978—The Congressional Response to United States v. Miller: A Procedural Right to Challenge Access to Financial Records*, 13 U. Mich. J. L. Ref. 10, 15 (1979).

138. *Id.* at 16.

139. Patricia A. Calore, Note, *The Right to Financial Privacy Act and the SEC*, 39 Wash. & Lee L. Rev. 1073, 1074 n.13 (1982).

140. 416 U.S. at 41.

141. *Id.* at 54.

142. *Id.* at 52.

this legal process would limit governmental access to bank records to that access obtained by enforceable subpoenas.¹⁴³ According to the *Schultz* Court, the mere maintenance of records under the BSA does not constitute a search or seizure within the meaning of the Fourth Amendment.¹⁴⁴

Justice Douglas strongly criticized this holding. In his dissent he contended that banking records reveal far more about individuals than merely their financial condition.¹⁴⁵ He also condemned the majority's failure to characterize the reporting requirements as a search or seizure.¹⁴⁶ Despite the dissents' sharp criticisms,¹⁴⁷ the majority in *Schultz* indicated that legal process would serve as a check on governmental access to personal financial records. The decision did not address the question of whether the bank customer could challenge governmental access to bank records through the legal process.¹⁴⁸

The Supreme Court resolved this question in *United States v. Miller*.¹⁴⁹ Miller was convicted of several federal offenses stemming from his operation of an illegal whiskey still.¹⁵⁰ Prior to Miller's indictment, the grand jury issued subpoenas to two banks where Miller maintained accounts.¹⁵¹ The subpoenas directed the banks to produce any records maintained for accounts in Miller's name.¹⁵² Neither the banks nor the state notified Miller of the subpoena requests.¹⁵³ The Fifth Circuit held that the government had improperly circumvented Miller's fourth amendment rights against unreasonable search and seizure.¹⁵⁴ While acknowledging that the recordkeeping requirements of the BSA were facially constitutional under *Schultz*, the court reasoned that the grand jury subpoenas issued to the banks did not

143. Kirschner, 13 U. Mich. J. L. Ref. at 16 (cited in note 137). While the Court was silent as to what legal process was controlling, Kirschner notes that floor debate prior to the BSA's enactment indicates that the House of Representatives was under the impression that access would be limited by enforceable subpoenas.

144. 416 U.S. at 54.

145. *Id.* at 85 (Douglas, J., dissenting) ("In a sense a person is defined by the checks he writes. . . . [T]he banking transactions of an individual give a fairly accurate account of his religion, ideology, opinions, and interests").

146. *Id.* at 89-90 (Douglas, J., dissenting).

147. Justices Brennan and Marshall filed separate dissents. *Id.* at 91, 93.

148. Calore, 39 Wash. & Lee L. Rev. at 1075 n.13 (cited in note 139).

149. 425 U.S. 435 (1976).

150. *Id.* at 436.

151. *Id.* at 437.

152. *Id.*

153. *Id.* at 438.

154. 500 F.2d 751, 756-58 (5th Cir. 1974).

amount to the adequate legal process required by *Shultz* for access to the records.¹⁵⁵

The Supreme Court reversed, holding that Miller had no legitimate expectation of privacy in the bank records.¹⁵⁶ Specifically, the Court found that Miller voluntarily conveyed the records to the banks, where the records would routinely be exposed to bank employees.¹⁵⁷ The Court found no fourth amendment prohibition against the government's power to subpoena information so revealed to bank employees despite Miller's likely assumption that the bank would not betray his confidence.¹⁵⁸

Swift and severe criticism followed *Miller*. Although the Court attempted to reconcile the *Miller* holding with *Katz v. United States*,¹⁵⁹ the practical impact of the decision was to revive the proprietary approach to determining when enforcement of a subpoena implicates fourth amendment privacy concerns.¹⁶⁰ Commentators harshly, and nearly uniformly, condemned *Miller*.¹⁶¹ The *Miller* Court's myopic view that maintaining a bank account constituted a choice rather than a necessary prerequisite to participation in modern economic life received particular criticism.¹⁶²

155. *Id.*

156. 425 U.S. at 442.

157. *Id.*

158. *Id.* at 443.

159. 389 U.S. 347 (1967). "[T]he premise that property interests control the right of the Government to search and seize has been discredited." Fourth amendment concerns arise when the government has "violated the privacy upon which [a person has] justifiably relied." *Id.* at 353.

160. Paul B. Razor, *Controlling Government Access to Personal Financial Records*, 25 Washburn L. J. 417, 421 (1986).

161. For example, Professor LaFare described the decision as "unfortunate" and "dead wrong." LaFare, 1 *Search and Seizure* § 2.7(c) at 509, 511 (cited in note 17). Judge Posner noted that just because a bank customer exposes his financial records to bank employees, "it does not follow that he is indifferent to having those affairs broadcast to the world." Richard A. Posner, *The Economics of Justice* 342 (Harvard U., 1981). He further stated that "[a] good sign that the Court lacks sympathy for a type of claim is its use of inconsistent reasoning to deny it." *Id.* at 343. Judge Posner's repudiation of the *Miller* case may implicitly underlie his decision in *Collins*. See notes 48-54 and accompanying text. See also Gerald G. Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy"*, 34 Vand. L. Rev. 1289, 1313-14 (1981) (calling *Miller* "misguided"); Albert W. Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. Ill. U. L. Rev. 1, 22 (1983) ("I have yet to encounter a law student with a kind word to say about the opinion"); JoAnn Guzik, *The Assumption of Risk Doctrine: Erosion of Fourth Amendment Protection Through Fictitious Consent to Search and Seizure*, 22 Santa Clara L. Rev. 1051, 1072 (1982) (describing *Miller* as an "anomaly"); Francis X. Pray, Comment, *A Bank Customer Has No Reasonable Expectation of Privacy of Bank Records: United States v. Miller*, 14 San Diego L. Rev. 414, 434 (1977) ("[T]he opinion does not represent a formidable contribution to the *raison d'être* of the possession factor in privacy law").

162. "The Court's assertion in *Miller* . . . is contrary to . . . the realities of modern-day life." LaFare, 1 *Search and Seizure* § 2.7(c) at 511 (cited in note 17). *Miller* was flatly inconsistent with *Burrows v. Superior Court*, 13 Cal. 3d 238, 529 P.2d 590 (1974), decided two years earlier

The criticisms of *Miller* are particularly relevant to cases restricting administrative subpoenas of personal financial records from directors of failed financial institutions. Acceptance of these criticisms means that, for purposes of the Fourth Amendment, modern economic reality forecloses any realistic difference between the privacy interest in personal financial records submitted to a financial institution and those maintained at home. In either case, the Fourth Amendment should provide some measure of protection from governmental access to such records. Thus, *Parks*¹⁶³ and similar cases might be viewed as reflecting lower federal courts' skepticism of the *Miller* holding. Accordingly, evaluation of the congressional response to *Miller*—the Right to Financial Privacy Act (the "Act")¹⁶⁴—is critical.

Unwilling to wait for a judicial reversal of *Miller*, Congress responded to the intense criticism of the decision by creating a statutory right to privacy in personal banking records.¹⁶⁵ Signed into law on November 10, 1978,¹⁶⁶ the Right to Financial Privacy Act provides

by the California Supreme Court. Burrows was an attorney suspected of misappropriating a client's funds. A police detective contacted several banks and obtained copies of Burrows's financial records. Burrows was not notified of the detective's request for the documents, nor were the documents procured pursuant to any warrant or other court process. *Id.* at 591. The court held that the state's procurement of the bank records violated Burrows's rights under Art. I, § 13 of the California Constitution, a provision essentially identical to the Fourth Amendment. The court recognized that maintenance of bank accounts is a necessity, not a choice, in the modern world.

For all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits and associations.

Id. at 596. In its recognition of modern economic reality, the *Burrows* decision was far more consistent with *Katz* than was *Miller*.

The *Miller* majority distinguished *Burrows* on the grounds that the bank records were procured pursuant to an oral request by the detective rather than any legal process. *Miller*, 425 U.S. at 445 n.7. As Justice Brennan pointed out, however, the majority's holding did not rest on a requirement that the subpoenas were defective. *Id.* at 448 n.2 (Brennan, J., dissenting).

163. 65 F.3d at 207.

164. 12 U.S.C. §§ 3401 et seq. (1994 ed.).

165. The title is a congressional response to the Supreme Court decision in the [sic] *United States v. Miller* which held that a customer of a financial institution has no standing under the Constitution to contest Government access to financial records. The Court did not acknowledge the sensitive nature of these records, and instead decided that since the records are the "property" of the financial institution, the customer has no constitutionally recognizable privacy interest in them.

Nevertheless, while the Supreme Court found no constitutional right of privacy in financial records, it is clear that Congress may provide protection of individual rights beyond that afforded in the Constitution.

Financial Institutions Regulatory Act of 1978, H.R. Rep. No. 95-1383, 95th Cong., 2d Sess. 34 (1978).

166. Kirschner, 13 U. Mich. J. L. Ref. at 31 (cited in note 137).

that personal financial records held by a financial institution may be accessed by use of an administrative subpoena.¹⁶⁷ Prior to issuing a subpoena to a financial institution, an agency must notify the customer and provide a description of the records sought, a statement of the general purpose of the inquiry, and an explanation of the customer's right to challenge the subpoena in court.¹⁶⁸ The customer may then apply to a United States district court to quash the subpoena on the grounds that the records are not "relevant to the legitimate law enforcement inquiry" or that the agency has not substantially complied with the requirements of the Act.¹⁶⁹ The district court may quash the subpoena if it finds that (1) the law enforcement inquiry is not legitimate, (2) the records are not relevant to a legitimate law enforcement inquiry, or (3) the agency has not substantially complied with the notice requirements of the Act.¹⁷⁰

The most striking aspect of the Act's review provision is its virtual reproduction of the *Powell* test for determining whether an administrative subpoena is valid on fourth amendment grounds.¹⁷¹ This codification of the *Powell* test is not surprising. Congress disagreed with the Supreme Court's characterization in *Miller* of the fourth amendment implications of obtaining personal financial records from banks. In attempting to equate, via statute, records held by banks with those directly held by the customer, Congress logically looked to the prevailing fourth amendment test employed in administrative subpoena enforcement proceedings.¹⁷² One difference between the Act's review standard and the *Powell* test, however, is that under the Act the party challenging the subpoena bears the burden of initiating judicial review and stating the reasons for his or her belief that the records are irrelevant to any legitimate law enforcement inquiry.¹⁷³ Under the *Powell* test, the governmental agency bears the initial burden of proof.¹⁷⁴ Some commentators have criticized this requirement as a significant weakness of the Act.¹⁷⁵

167. 12 U.S.C. § 3405. Other means of access include customer authorization, id. § 3404, search warrant, id. § 3406, judicial subpoena, id. § 3407, or "formal written requests" if no "administrative summons or subpoena authority appears available," id. § 3408.

168. Id. §§ 3405(2), 3406(b)-(c), 3407(2).

169. Id. § 3410(a).

170. Id. § 3410(c).

171. See note 42 and accompanying text.

172. See notes 37-43 and accompanying text.

173. 12 U.S.C. § 3410(a)(2).

174. See note 44 and accompanying text.

175. See, for example, Kirschner, 13 U. Mich. J. L. Ref. at 47-48 (cited in note 137). Kirschner notes that "an earlier version of the Act provided customers with the same right as if the records were in his possession." Id. at 47. In other words, the government would have

The Right to Financial Privacy Act essentially codified scholarly criticism of the *Miller* Court's failure to recognize a fourth amendment privacy interest in personal financial records held by a bank. The Act itself has its critics. Arguably, the Act's failure to place the burden on the government to prove that records sought are relevant to a legitimate law enforcement inquiry causes it to fall short of the fourth amendment protection provided for by the *Powell* test.¹⁷⁶ Even if the Act were amended to reverse the burden of proof, making it in effect a codification of *Powell*, *Parks* would still present a conundrum. The Act does not require the governmental agency to articulate a reasonable suspicion of unlawful activity in order to subpoena the personal financial records. Thus, the Act appears unconstitutional under the *Parks* holding. In other words, Congress's attempt to provide more privacy protection for personal financial records than the *Miller* Court held was constitutionally required is unconstitutional.¹⁷⁷ This logical absurdity could only be rectified if the Court overruled *Miller* and accepted a distinction between personal and corporate financial records for fourth amendment purposes, which would apparently also require the reversal of *Ryan*.¹⁷⁸

This tortuous judicial path need not be taken. The Act is far more doctrinally consistent with the *Powell/Ryan* line of cases than it is with *Parks*.¹⁷⁹ Congress attempted to provide consistency, albeit imperfect, in the protection of private financial records by legislatively reconciling the *Miller* fact pattern with the prevailing fourth amendment jurisprudence ignored by the *Miller* Court.¹⁸⁰ The Act

borne the burden of demonstrating a reasonable relationship between the records sought and the investigation. Such a requirement is consistent with *Powell*. The amendment shifting this burden to the customer was likely a compromise to appease the Departments of Justice and the Treasury, who vigorously opposed the Act. *Id.* at 26-31, 42 (discussing the legislative debates surrounding the Act's passage).

176. See note 44 and accompanying text.

177. Congress clearly has the power to provide this additional privacy protection. *Zurcher v. Stanford Daily*, 436 U.S. 547, 567 (1978) ("Of course, the Fourth Amendment does not prevent or advise against legislative . . . efforts to establish nonconstitutional protections against possible abuses").

178. See notes 120-24 and accompanying text.

179. "[T]he title seeks to strike a balance between customers' right of privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations." H.R. Rep. No. 95-1383 at 33 (cited in note 165).

180. It is true that the Right to Financial Privacy Act defines a "customer" as a "person." 12 U.S.C. § 3401(5). A "person" is defined as "an individual or a partnership of five or fewer individuals." *Id.* § 3401(4). Corporations are not within the ambit of the Act. *Pittsburgh Natl. Bank v. United States*, 771 F.2d 73, 75 (3d Cir. 1985); *Spa Flying Service, Inc. v. United States*, 724 F.2d 95, 96 (8th Cir. 1984). Kirschner notes that earlier versions of the Act extended protection to all customers—individuals, partnerships, corporations, trusts, and other legal entities. Kirschner, 13 U. Mich. J. L. Ref. at 43 (cited in note 137). This fact lends some credence to the distinction between corporate and personal records. However, rather than

properly recognizes that maintaining bank accounts is a necessity rather than a choice in modern economic life.¹⁸¹ In recognizing this reality, the Act properly gives bank customers the right to challenge an administrative subpoena for personal financial records and to have the subpoena evaluated under the *Powell* standard.¹⁸² Under this standard, the reviewing court appropriately directs its attention to the nature of the records subpoenaed, not the identity of the owner or holder of the records. Congress's selection of the *Powell* standard of review as the heightened protection due personal financial records provides further evidence that privacy interests in such records are no greater than those in corporate financial records. Courts grappling with privacy issues surrounding administrative subpoena of personal financial records should consider the Act as providing an important framework in which to consider the issue.

4. Weighing Public and Private Interests—A Recalibration or a Thumb on the Scales?

In addition to focusing on the nature of the records in subpoena enforcement, courts consider the scope and purpose of the investigative power conferred upon the agency.¹⁸³ The importance of the public interest advanced by the use of investigative power is fundamental to this consideration. Public interests that appear to be far less substantial than the public interest in resolving the savings and loan crisis have trumped fourth amendment challenges to disclosure of personal financial information.

*Walls v. Petersburg*¹⁸⁴ and *Barry v. New York*¹⁸⁵ are instructive on this point. In both cases, public employees challenged requirements that their financial background be disclosed as a means of monitoring possible conflicts of interest and corruption.¹⁸⁶ The courts

viewing this amendment as reflecting congressional recognition of any doctrinal distinction between corporate and personal financial records in supreme court cases, the failure to extend universal protection is better explained by the political give and take required to pass the Act. *Id.* at 42. See discussion in note 175. Even if one accepts this distinction as continuing to exist under the Act, it is at least instructive that Congress selected the *Powell* criteria as the "heightened" amount of protection due natural persons.

181. See note 162 and accompanying text.

182. See *O'Brien*, 467 U.S. at 745.

183. See note 119 and accompanying text.

184. 895 F.2d 188 (4th Cir. 1990).

185. 712 F.2d 1554 (2d Cir. 1983).

186. The plaintiff in *Walls* challenged a requirement that she fill out a background check questionnaire requiring disclosure of financial information as a condition of employment with a "Community Diversion Incentive Program" operated by the City of Petersburg's Bureau of Police. *Walls*, 895 F.2d at 190. The *Barry* plaintiffs challenged a New York City ordinance

rejected the fourth amendment challenges in each case, holding that the public interest in preventing corruption or conflict of interest at the local level outweighed personal privacy concerns associated with disclosure of the financial information.¹⁸⁷ Each court acknowledged that the public disclosure requirements were potentially "embarrassing and highly intrusive."¹⁸⁸ Each city's implementation of a mechanism designed to limit redisclosure of the financial records, however, convinced the court to require the employees to comply with the disclosure requirements.¹⁸⁹ Courts may also employ compliance orders containing disclosure limitations as a means of balancing agency investigative needs with confidentiality concerns.¹⁹⁰

Courts have permitted agencies to investigate records that are more sensitive than financial records by drafting orders that strictly limit the right of access to the records. In *St. Luke's Regional Medical Center, Inc. v. United States*,¹⁹¹ the Department of Health and Human Services ("HHS") investigated a staff physician for Medicaid fraud. In the process of the investigation, HHS subpoenaed many of the physician's medical records.¹⁹² Finding that the government's interest in exposing Medicaid fraud outweighed the physician's privacy interests in the records, the court ordered the physician to comply with the subpoena.¹⁹³ Recognizing the sensitive nature of the documents, however, the court ordered that redisclosure of the records to third parties, including state agencies, not occur without further court approval.¹⁹⁴

St. Luke's followed the holding of *United States v. Westinghouse Electric Corporation*,¹⁹⁵ in which the court ordered Westinghouse's custodian of records to comply with a National

requiring certain city employees to file annual reports disclosing financial information. *Barry*, 712 F.2d at 1556.

187. *Walls*, 895 F.2d at 194; *Barry*, 712 F.2d at 1560.

188. *Barry*, 712 F.2d at 1561. See *Walls*, 895 F.2d at 192-93.

189. The City of Petersburg kept the questionnaires in a locked file cabinet accessible by only four people. *Walls*, 895 F.2d at 194. The New York City Board of Ethics could deny an inspection request of publicly disclosed financial records if the Board determined that the requester was not acting in good faith or was seeking to obtain the information for an improper purpose. *Barry*, 712 F.2d at 1562.

190. See, for example, *EEOC v. C&P Telephone Co.*, 813 F. Supp. 874, 876 (D.D.C. 1993). The need for confidentiality is not a valid basis for refusing to comply with an administrative subpoena. "A court may, however, impose various conditions on disclosure of confidential information to an administrative agency." *Id.*

191. 717 F.Supp. 665 (N.D. Iowa 1989).

192. *Id.* at 666.

193. *Id.*

194. *Id.* at 667.

195. 638 F.2d 570 (3d Cir. 1980).

Institute for Occupational Safety and Health ("NIOSH") subpoena for employee medical records.¹⁹⁶ In determining that the government's interest in researching health and safety on the jobsite outweighed privacy concerns, the court developed a lengthy list of factors to be considered when balancing the competing interests.¹⁹⁷ Noticeably absent from the list was any consideration of whether the records are owned by a corporation or an individual. Indeed, in this case, it would be absurd to suggest that the medical records were any less sensitive merely because Westinghouse, rather than a natural person, owned them. No patient would be less concerned about public disclosure of his medical records just because his employer owned the records.¹⁹⁸ In its compliance order, however, the court required NIOSH to notify employees whose records were sought and to permit the affected employees to challenge the subpoena on personal grounds.¹⁹⁹

Parks is remarkable for its failure to consider orders limiting redisclosure of financial records by the agency. The court specifically considered the public interest in resolving the savings and loan crisis, and dismissed it as subordinate to the privacy interests in the records.²⁰⁰ Congress has placed the cost of bailing out the savings and loan industry at as much as \$500 billion.²⁰¹ Furthermore, the *Parks* court failed to consider the broader public concern with preventing bank failures. Such failures are often the result of fraud and self-dealing by insiders. Many banking laws are aimed at preventing this

196. *Id.* at 580.

197. *Id.* at 578. The factors included: the type of record requested; the information the record contains or might contain; the potential for harm in any subsequent non-consensual disclosure; the potential for injury from disclosure to the relationship in which the record was generated; the adequacy of safeguards; the degree of need for access; and any express statutory mandate, articulated public policy, or other recognizable public interest militating toward access. *Id.*

198. Further illustration of this point is found in *University of Pennsylvania*, 493 U.S. at 182. The EEOC subpoenaed confidential peer review materials in an investigation of charges of racial and sexual harassment. *Id.* at 186. The Court enforced the subpoena, noting that failing to allow such disclosure would "place a substantial litigation-producing obstacle in the way of the Commission's efforts to investigate and remedy alleged discrimination." *Id.* at 194. No mention was made of the fact that the records were owned by the University rather than an individual. As in *Westinghouse*, these records were equally sensitive regardless of the owner. Compare the criticisms of *Miller* discussed in notes 159-62 and accompanying text.

199. *Westinghouse*, 638 F.2d at 581. The similarity of this order to the requirements of the Right to Financial Privacy Act is unmistakable. See notes 168-74 and accompanying text. Interestingly, the *St. Luke's* court omitted such a restriction from its order. 717 F. Supp. at 664-65.

200. *Parks*, 65 F.3d at 214.

201. Comprehensive Crime Control Act of 1990, H.R. Rep. No. 101-681 (Part I), 101st Cong., 2d Sess., 69 (1990).

type of activity.²⁰² It is therefore difficult, if not impossible, to see how this interest is not at least as substantial as the prevention of corruption in local government and investigation of Medicaid fraud. The *Parks* court appears to have placed its thumb on the personal side of the judicial scale in weighing the respective personal and governmental interests.²⁰³ It is unclear whether this balance would have come out differently had the court considered its power to limit redisclosure as a means of respecting the privacy concerns associated with financial disclosure. If the court used this equitable power, it would not need to inject a vague articulable suspicion requirement for the subpoena of personal financial records—a standard that cases have already shown will be applied by different courts with little consistency.²⁰⁴

C. Striking the Balance With Existing Protections in Subpoena Enforcement

The unprecedented heightened suspicion requirement for enforcement of administrative subpoenas for personal financial records and the consistent failure to consider redisclosure limitations to protect privacy interests in such records suggests deep judicial distrust of agency investigative power. This Section discusses the criticisms leveled at the OTS's and the RTC's investigative techniques and how these criticisms may have impacted judicial decisions restricting administrative subpoena enforcement. While acknowledging these criticisms as valid concerns, this Section contends that existing enforcement and redisclosure limitations are sufficient to protect subpoena targets.

Parks's doctrinal inconsistency may be explained by judicial suspicion of the competency and motives of governmental inspectors charged with resolving the savings and loan crisis. The Resolution Trust Corporation ("RTC")²⁰⁵ and the Office of Thrift Supervision

202. Collective action problems limit shareholders' incentives to monitor self-dealing. The moral hazard presented by the availability of FDIC insurance for depositors encourages insiders to take undue risks in the management of financial institutions. Jonathan R. Macey and Geoffrey P. Miller, *Bank Failures, Risk Monitoring, and the Market for Bank Control*, 88 Colum. L. Rev. 1153, 1166-69; Alexander, 48 Vand. L. Rev. at 1752-54 (cited in note 99).

203. Note that in *McVane* and *Wentz*, the Second and Third Circuits, respectively, acknowledged the tremendous public interest in resolution of the savings and loan crisis as outweighing the personal interest in confidentiality of financial records. *McVane*, 44 F.3d at 1136; *Wentz*, 55 F.3d at 909.

204. Compare *Parks*, 65 F.3d at 213-14, with *Wentz*, 55 F.3d at 909.

205. See note 62 and accompanying text.

("OTS")²⁰⁶ have been bitterly criticized for the manner in which they have carried out the mandates of FIRREA.²⁰⁷ At least one commentator made the disturbing suggestion that heavy handed enforcement tactics drove an officer of a savings and loan to commit suicide.²⁰⁸ Critics have described the agencies as engaging in a "witch-hunt"²⁰⁹ aimed at persecuting innocent persons simply because they served on the board of directors of an insured institution.²¹⁰ Such sentiments may underlie the *Parks* majority's fear of what Judge Selya referred to in his dissent as "minions of an administrative agency . . . roam[ing] at will, like a herd of zebra on the veldt, through an individual's personal papers or effects."²¹¹ Such concern is perfectly reasonable, but it can be addressed under existing law.

Subpoena targets asked to turn over personal financial records may force the agency to justify the subpoena to a federal district court judge before the subpoena can be enforced. If, as the *Parks* court suggests, the real purpose of these types of subpoenas is harassment, the court may refuse to enforce them by striking the subpoena under

206. The OTS was also created as part of FIRREA. 12 U.S.C. § 1462a(a). The Director of the OTS has the power to "provide for the examination, safe and sound operation, and regulation of savings associations. Id. § 1463(a)(1).

207. See, for example, James T. Pitts, Eric W. Bloom, and Monique M. Vasilchik, *FDIC/RTC Suits Against Bank and Thrift Officers and Directors—Why Now, What's Left?*, 63 *Fordham L. Rev.* 2087 (1995); Mollie Dickenson, *The Real S&L Scandal*, *Worth* 92 (Sept. 1994). Criticism has also been levelled from the bench. See *Wachtel v. OTS*, 982 F.2d 581, 586 (D.C. Cir. 1994) (criticizing the OTS's broad interpretation of its statutory authority as "attributable not so much to creative lawyering as to excessive zeal").

208. Dickenson, *Worth* at 92 (cited in note 207). Dickenson's article details how Scott Cone, the Chief Financial Officer of Landmark Land Co., was driven to despair by the OTS's relentless investigative tactics. Mr. Cone shot himself while wearing a T-shirt emblazoned with a logo featuring the letters RTC circled and slashed through in red. *Id.* Mr. Cone was eventually cleared of all wrongdoing. *Id.* at 102.

209. *Id.* at 97.

210. Pitts, Bloom, and Vasilchik, 63 *Fordham L. Rev.* at 2088 (cited in note 207). This criticism suggests an argument in favor of *Parks*. Allowing agencies to subpoena directors' and officers' financial records is disruptive and potentially expensive for the targets. Conceivably, the disruption caused by these subpoenas could deter qualified candidates from seeking positions as directors and officers of financial institutions. This concern may be overstated, however, given the standard corporate practice of indemnifying and insuring directors and officers. See Robert C. Clark, *Corporate Law* § 15.10.3 at 673-74 (Little, Brown, 1986). Since the mid-1980s, however, director and officer ("D&O") insurers have begun including a "regulatory exclusion" in their policies. Peter D. Rosenthal, Note, *Have Bank Regulators Been Missing the Forest for the Public Policy Tree?: The Case for Contract-Based Arguments in the Litigation of the Regulatory Exclusions in Director and Officer Liability Policies*, 75 *B.U. L. Rev.* 155, 155 (1995). These exclusions, however, present in over half of D&O liability policies, deny coverage for "any action brought 'by or on behalf of' a governmental regulatory agency." *Id.* D&Os have been successful in persuading some courts to declare some regulatory exclusions unenforceable as against public policy. Since 1989, though, courts have been unsympathetic to this type of claim. *Id.* at 156-57. If the courts continue to enforce these regulatory exclusions, qualified candidates will face a disincentive to accept a D&O position. See *id.* at 183.

211. *Parks*, 65 F.3d at 217 (Selya, J., dissenting).

the *Powell* test's prohibition of using the subpoena power for an improper purpose.²¹² While a subpoena target "bears a heavy burden" in convincing the court that the subpoena has been issued for an improper purpose,²¹³ the burden can be met when a target is being harassed.²¹⁴ Refusal to enforce a subpoena on harassment grounds would provide relief for subpoena targets in extreme cases of agency abuse. Nonetheless, refusal to enforce subpoenas on these grounds should remain a rare occurrence. Otherwise, the courts will garner a supervisory role in agency investigation that is incompatible with the assignment of investigative power to agencies.²¹⁵

Even if the agency satisfies the four-prong *Powell* test²¹⁶ for enforcement of its subpoena, courts can and should routinely restrict redisclosure of the financial information in the enforcement order.²¹⁷ Such restrictions will protect the privacy interests of the subpoena target and preserve the investigative power of the agency. Ignoring this type of protection in favor of the vague, malleable articulable suspicion requirement threatens to hinder not only the investigative effectiveness of the RTC, OTS, and FDIC, but also the effectiveness of all federal agencies charged with investigating possible wrongdoing by individuals. The only way to avoid such interference is some sort of judicial determination that certain agencies, such as the IRS or SEC,

212. *Ernst & Young*, 786 F. Supp. at 50. See note 42 and accompanying text.

213. *Knopfler*, 658 F.2d at 26.

214. Examples of refusal to enforce a subpoena on harassment grounds may be found in the grand jury context. See *In re Grand Jury Matters*, 751 F.2d 13, 16 (1st Cir. 1984). A party seeking to quash a grand jury subpoena on harassment grounds also faces a difficult task. The government need only refute charges of harassment "to the extent the witness has supplied evidence to support them." Conclusory and speculative claims of harassment will not succeed. *In re Chinske*, 785 F. Supp. 130, 132 (D. Mont. 1991). In addition, conclusory affidavits issued by the government stating that the grand jury subpoena is not intended as harassment may occasionally satisfy the government's burden in refuting charges of harassment. *In re Grand Jury*, 619 F.2d 1022, 1028 (3d Cir. 1980). Presumably, this light governmental burden would suffice only when the target's claims of harassment were similarly conclusory. The courts' reluctance to quash subpoenas on harassment grounds stems from a reluctance to "unduly interfere with the independence of the grand jury and the prosecutor." *Chinske*, 785 F. Supp. at 133.

Nonetheless, subpoena targets are occasionally successful. For example, in one challenge several individuals were indicted in a state court for various drug-related offenses. In the interim, a federal grand jury began investigating the defendants for violations of federal laws. During the investigation, the grand jury subpoenaed the defendants' attorneys to testify. *Grand Jury Matters*, 751 F.2d at 15. The First Circuit held that the district court had not abused its discretion in quashing these subpoenas on harassment grounds. *Id.* at 19. One state court held that a county district attorney's grand jury subpoena of records related to an annexation dispute amounted to harassment. The annexation dispute did not involve any possible violation of laws by the subpoena target. *Gher v. District Court*, 183 Colo. 316, 516 P.2d 643, 644 (1973).

215. See notes 93-98 and accompanying text.

216. See note 42 and accompanying text.

217. See notes 190-204 and accompanying text.

are somehow less likely to harass an investigative target. What factors would go into making such a determination is anyone's guess. Furthermore, in addition to the inconsistent application of the articulable suspicion requirement in different jurisdictions,²¹⁸ one can easily envision circuit splits developing over which agencies merit less scrutiny of their subpoena enforcement actions. The most rational approach to subpoenas for personal financial records, therefore, is consistent application of the *Powell* criteria and employment of protective orders.

A license is "permission by a competent authority to do an act which, without such permission would be illegal . . . or otherwise not allowable."²¹⁹ The *Parks* decision and others like it appear to take the position that fishing into personal financial records by agencies is illegal or not allowable. These decisions seem to regard enforcement of such subpoenas under the *Powell* test as a "fishing license" under which courts act as the "competent authority" granting permission to engage into this otherwise forbidden activity. Subpoenaing personal financial records, however, is certainly not a forbidden activity. Viewing this use of the subpoena power as forbidden undermines agency investigative power and runs contrary to precedent.²²⁰ Subpoena enforcement proceedings and protective orders sufficiently balance the competing public and private concerns in agency investigations. Furthermore, these proceedings avoid requiring an agency to "hitch the horse in front of the cart"²²¹ by meeting a vague and malleable articulable suspicion requirement before proceeding with its statutory duties.

218. See note 204 and accompanying text.

219. *Black's Law Dictionary* 920 (West, 6th ed. 1990).

220. *Schwimmer*, 232 F.2d at 862-63 ("Some exploration or fishing necessarily is inherent and entitled to exist in all documentary productions sought by a grand jury"). The court in *In re Alleged Prohibited Political Activity*, 443 F. Supp. 1194 (E.D. Pa. 1977), may have summed up the law most succinctly.

[E]ven if I were to conclude that the Commission was attempting "in this case to cast twenty-two 'deposition' subpoenas in the hope that they may, when interwoven, serve as a 'fishing net' to catch a violator," it is clear from the case law interpreting the powers of similar agencies that the Commission was legally within its authority to do so since the information sought is relevant and the inquiry is within the authority of the agency.

Id. at 1199 (citations omitted).

221. *Parks*, 65 F.3d at 218 (Selya, J., dissenting).

IV. USING SUBPOENA POWER TO DETERMINE COST-EFFECTIVENESS: IMPERMISSIBLE PURPOSE OR INHERENT AGENCY POWER?

As mentioned above, there are two grounds for recent judicial resistance to use of the administrative subpoena power to obtain personal financial records. The first ground is the drawing of a privacy distinction between personal and corporate financial records. The second ground, discussed in this Part, is judicial questioning of the legitimacy of using administrative subpoenas to determine whether proceedings against the target would be cost-effective. Some decisions have held that issuing administrative subpoenas to assess the cost-effectiveness of enforcement actions is impermissible.²²² Other decisions, most notably *Walde*, have held that this use of the subpoena power is not per se impermissible although it does require that the agency demonstrate an articulable suspicion of wrongdoing before such a subpoena will be enforced.²²³ This Part contends that cost-effectiveness should always be considered a proper investigative purpose unless explicitly precluded by statute. Specifically, this Part argues that subpoenaing financial information to determine the cost-effectiveness of enforcement actions is necessary to allow an agency to set an enforcement agenda that best utilizes limited budgetary resources.

A. Statutory Construction—A Need to Consider the Big Picture

The battle over the use of administrative subpoenas to assess cost-effectiveness is largely waged on the field of statutory construction.²²⁴ Generally, the courts liberally interpret an agency's statutory authority to subpoena information pursuant to an investigation.²²⁵ This approach to statutory interpretation results from the perceived importance of the public need for agencies to possess broad investigative power.²²⁶

222. See *Freese*, 837 F. Supp. at 24-25; *Resolution Trust Corp. v. Feffer*, 793 F. Supp. 11, 14-15 (D.D.C. 1992).

223. *Frates*, 61 F.3d at 964-65; *Sealed Case*, 42 F.3d at 1416; *Thornton*, 41 F.3d at 1544; *Walde*, 18 F.3d at 949.

224. *Walde*, 18 F.3d at 948; *Federal Trade Commn. v. Turner*, 609 F.2d 743, 745 (5th Cir. 1980).

225. LaFave, 2 *Search and Seizure* § 4.13(b) at 367 (cited in note 17).

226. Cooper, 60 Mich. L. Rev. at 189 (cited in note 45). Professor Cooper suggests, however, that the broad or restrictive interpretation of an agency's investigative power often turns on the court's opinion "as to the social desirability of empowering a particular agency to obtain a certain type of information under the stated circumstances." *Id.* at 190. Be that as it may, most

In *Federal Trade Commn. v. Turner*,²²⁷ the FTC issued a subpoena to determine whether the subject of a cease and desist order had sufficient financial resources to make a civil action for consumer redress cost-effective.²²⁸ The FTC argued that its statutory grant of broad investigative and enforcement power necessarily included the ability to subpoena financial information in order to determine cost-effectiveness.²²⁹ Notwithstanding the judicial tendency to read statutes conferring investigative power broadly,²³⁰ the Fifth Circuit held that the FTC's investigative authority was limited to determining whether consumers had been wronged. The court deemed the financial condition of the investigative target irrelevant to that purpose.²³¹

In *Walde*, the RTC employed a similar statutory construction argument but gained a partial victory. The RTC pointed to three provisions of FIRREA directing the RTC to minimize losses to depositors while acting as conservator of a failed savings and loan.²³² Despite a relatively clear statutory mandate,²³³ the D.C. Circuit reluctantly acknowledged the RTC's authority to use subpoenas to determine whether an enforcement action would be cost-effective. Concerned that Congress had not really intended "so intrusive a grant of authority,"²³⁴ the court held that the RTC "must have at least an articulable suspicion that a former officer or director is liable" before

decisions in recent times have supported broad agency investigative authority. See notes 44-47 and accompanying text.

227. 609 F.2d 743 (5th Cir. 1980).

228. *Id.* at 744.

229. *Id.* Specifically, the FTC relied on various sections of the Federal Trade Commission Act. 15 U.S.C. § 41 et seq. (1994 ed.). Section 46(a) grants the FTC authority to investigate activities of those engaged in interstate commerce. Section 49 authorizes the FTC to subpoena documents relating to such investigations. Finally, Section 45 authorizes the FTC to initiate proceedings against an investigative target. See *Turner*, 609 F.2d at 744.

230. See *Turner*, 609 F.2d at 747 (Brown, J., dissenting) (discussing the evolution of broad administrative power).

231. *Id.* at 745-46.

232. The RTC is directed to "minimize[] the amount of any loss realized in the resolution of cases." 12 U.S.C. § 1441a(b)(3)(C)(iv) (1994). In addition, the RTC must "conserve the assets and property of the . . . institution." *Id.* § 1821(d)(2)(B)(iv). Finally, the RTC may issue subpoenas "for purposes of carrying out any power, authority or duty with respect to an insured depository institution." *Id.* § 1821(d)(2)(I)(i). The RTC failed to argue that yet another statutory provision supports its argument. While satisfying the obligations to an institution's depositors, the RTC must determine that "the total amount of the expenditures by the Corporation and obligations incurred by the Corporation . . . is the least costly to the deposit insurance fund of all possible methods for meeting the Corporation's obligation." *Id.* § 1823(c)(4)(A)(ii).

233. The RTC's statutory argument was certainly more persuasive than the FTC's in *Turner*. The FTC was unable to point to any language specifically directing the agency to minimize losses. *Turner*, 609 F.2d at 744.

234. *Walde*, 18 F.3d at 949.

enforcing a subpoena designed to assess the cost-effectiveness of an enforcement action.²³⁵

This holding is unsatisfactory. The heightened suspicion requirement suggests that the D.C. Circuit created a middle ground position. The choice, however, should be binary: the use of the subpoena power to assess cost-effectiveness is either permissible or impermissible. If, as the court seems to suggest, the use is impermissible, it is difficult to see how attaching a heightened suspicion requirement makes it more palatable. Again, the court seems to regard the use as generally impermissible, but subject to special permissive use upon court approval. As discussed earlier, this view of the subpoena power as a "license" is simply incorrect.²³⁶

Perhaps uncomfortable with the rather narrow statutory interpretation employed in *Walde*, the D.C. Circuit has subsequently turned the articulable suspicion requirement into a paper tiger. The court will now enforce a subpoena seeking personal financial information in order to assess cost-effectiveness, so long as the RTC states an alternative basis for the subpoena.²³⁷ For example, in *Frates*, the D.C. Circuit enforced a subpoena aimed at assessing cost-effectiveness because the RTC also claimed that the subpoena was relevant to determining potential liability and the need to avoid asset transfers by the target.²³⁸ Commentators hostile to the RTC have criticized these subsequent decisions as eliminating any check on administrative power created in *Walde*.²³⁹ One commentator noted that the RTC's attempts to connect personal financial information with wrongdoing are often tenuous.²⁴⁰ Employment of these strained connections threatens to undermine the credibility of the agency.²⁴¹

235. *Id.*

236. See notes 219-21 and accompanying text. The court's *Turner*-like holding is also somewhat mystifying given the D.C. Circuit's criticism of *Turner* in *Federal Trade Commn. v. Invention Submission Corp.*, 965 F.2d 1086 (D.C. Cir. 1992). The court characterized the *Turner* rejection of cost-effectiveness subpoenas as "mere dictum," neither explained nor justified by the court's opinion. *Id.* at 1089. The *Walde* court attempted to reconcile its decision with *Invention Submission* by resorting to the recently popular, but questionable, distinction between corporate and personal financial records. The target of the subpoena in *Invention Submission* was a corporation. *Id.* at 1087. See Part III for criticism of the distinction between corporate and personal records.

237. In *Frates*, the court held that "the RTC must demonstrate an articulable suspicion only where it subpoenas personal financial information 'for the sole purpose of determining the subpoenaed person's net worth.'" 61 F.3d at 964-65 (quoting *Walde*, 18 F.3d at 944).

238. *Id.* at 965.

239. See Pitts, Bloom, and Vesilchik, 63 *Fordham L. Rev.* at 2101 (cited in note 207) (describing *Walde* as "rife with loopholes").

240. Vartanian, Ledig, and Marquardt, 12 *Banking Policy Rep.* at 16 (cited in note 70).

241. *Id.*

Acceptance of such strained theories in subpoena enforcement actions also reflects poorly on the courts.

The reluctance to recognize this type of subpoena authority appears to stem primarily from judicial discomfort with allowing agencies to assess the cost-effectiveness of enforcement action when private civil litigants cannot do so under discovery rules.²⁴² Reference to the discovery rules governing civil actions, however, is unwarranted in administrative subpoena enforcement.²⁴³ In addition, the courts have overlooked the traditional judicial deference to an agency's setting of an enforcement agenda. This traditional deference provides a sound doctrinal basis for recognizing that the power to assess cost-effectiveness via subpoena power is inherent in any statutory grant of administrative investigative power.

B. (Mis)Guidance From the Federal Rules of Civil Procedure

Private civil litigants are not ordinarily permitted to discover a defendant's financial status since such information is rarely relevant to the merits of the action.²⁴⁴ The Federal Rules of Civil Procedure, however, do not restrict or control administrative subpoenas.²⁴⁵ Despite the clear inapplicability of the rules to administrative subpoenas, courts and commentators have continued to look to them by analogy for purposes of restricting administrative subpoena power.

The *Turner*²⁴⁶ court found that when an agency contemplates initiation of an enforcement action, it effectively becomes a civil plaintiff.²⁴⁷ As such, the prohibition of pre-trial discovery of a defendant's financial condition becomes applicable to the agency.²⁴⁸ Importantly, the FTC had not filed civil charges against the subpoena target.²⁴⁹ The *Turner* court did not specify when contemplation of an enforce-

242. See Part IV.B.

243. See *id.*

244. *Sanderson v. Winner*, 507 F.2d 477, 479-80 (10th Cir. 1974); *Ranney-Brown Distributors, Inc. v. E.T. Barwick Industries, Inc.*, 75 F.R.D. 3, 5 (S.D. Ohio 1977). An exception to this prohibition is the ability to discover financial information to aid in executing a judgment. F.R.C.P. 69. The Second Circuit has held, however, that Rule 69's limitation of discovery of financial information to enforcement of judgments does not limit a federal agency's statutory authority to issue subpoenas for such information. *United States v. Kulukundis*, 329 F.2d 197, 199 (2d Cir. 1964) (Friendly, J.) (finding that a subpoena issued by the IRS pursuant to § 7602 of the Internal Revenue Code was not limited by Rule 69).

245. *Bowles v. Bay of New York Coal & Supply Corp.*, 152 F.2d 330, 331 (2d Cir. 1945).

246. For a detailed discussion of the *Turner* fact pattern, see notes 227-31 and accompanying text.

247. *Turner*, 609 F.2d at 745.

248. *Id.*

249. *Id.* at 744.

ment action is sufficiently concrete to justify the imposition of pre-trial discovery limitations on the federal agency. The broadest reading of the case would make the federal civil discovery rules applicable to all agencies with civil enforcement power because any agency investigation would likely include contemplation of an enforcement action. Such a reading would severely hamper agency investigative power.²⁵⁰

Turner's contemplation of a gray area in which an agency is effectively, but not actually, a civil litigant²⁵¹ probably reflects judicial discomfort with the use of subpoenas to assess cost-effectiveness.²⁵² One commentator critical of these types of subpoenas noted that all civil litigants would love to assess the financial condition of the opposing party for strategic purposes, but are prohibited from doing so by the federal rules.²⁵³

The bootstrapping of pre-trial discovery limitations into administrative subpoena enforcement fails to consider the broader public interest in the missions of agencies.²⁵⁴ The regulatory mission of many, if not most, agencies is enormous.²⁵⁵ Accomplishing these missions requires efficient allocation of limited resources. Certainly, when a civil plaintiff brings an action against an insolvent defendant, some public funds are arguably wasted—namely litigation costs. If that plaintiff is injured and unable to collect a judgment, additional

250. This interpretation may explain the D.C. Circuit's criticism of the *Turner* holding in *Invention Submission*. *Invention Submission*, 965 F.2d at 1089. See note 236.

251. "[T]he Court characterizes the litigative posture of the Commission as merely akin to an individual plaintiff rather than a consumer watchdog." 609 F.2d at 746 (Brown, J., dissenting). Specific fact patterns may, of course, avoid this gray area. For example, in *Thornton*, the RTC sought to subpoena financial records from a partnership to determine the cost-effectiveness of bringing an enforcement action. 41 F.3d at 1541. The RTC had already filed suit against the partnership. *Id.* Judge Edwards, writing for the majority, held that the purpose of ascertaining the cost-effectiveness of bringing an action terminates upon filing of the action. *Id.* at 1546. In such a case, the agency is truly a litigant and should not be able to end-run around the discovery limitations of the federal rules. Of course, the practical result of such a holding is to encourage the issuance of such subpoenas prior to actually bringing the action—the issue under discussion here. This Note concludes that this proactive use of the subpoena power should be allowed. An agency's waiting until an action has already been filed before issuing a cost-effectiveness subpoena of financial records, on the other hand, smacks of harassment rather than the legitimate setting of an enforcement agenda.

252. See *Freese*, 837 F. Supp. at 24 (citing *Turner* with approval).

253. Pitts, Bloom, and Vasilchik, 63 *Fordham L. Rev.* at 2095 (cited in note 207). The Federal Rules are not entirely opposed to the strategic use of a party's financial information. Pre-trial discovery may include any insurance agreements under which the party may satisfy all or part of a judgment. F.R.C.P. 26(b)(2).

254. *Turner*, 609 F.2d at 753 (Brown, J., dissenting).

255. For example, the FDIC and RTC were vested with oversight responsibility for some 754 thrifts holding \$428.3 billion in assets designated by Congress as insolvent or troubled. Pitts, Bloom, and Vasilchik, 63 *Fordham L. Rev.* at 2092 (cited in note 207).

public costs could be incurred by way of public assistance to the plaintiff. Thus, similar public cost risks arise in preventing pre-trial discovery of a defendant's financial condition and barring administrative subpoena of similar information. The magnitude of the public cost risks, however, differs greatly. Because of the substantially greater public cost risk posed by inefficient allocation of an agency's limited resources, courts should allow agencies to subpoena personal financial records in order to assess the cost-effectiveness of administrative enforcement actions.

In conclusion, rather than analogizing these subpoenas to pre-trial discovery, courts should allow enforcement of administrative subpoenas to determine cost-effectiveness. This approach reflects the traditional judicial deference to an administrative agency's absolute discretion to set an enforcement agenda.

C. Cost-Effectiveness Subpoenas as a Necessary Tool for Setting an Enforcement Agenda

The Administrative Procedure Act precludes judicial review of action committed to agency discretion by law.²⁵⁶ This exception to judicial review is narrow and seldom recognized.²⁵⁷ Some types of administrative decisions, however, are "traditionally regarded as committed to agency discretion."²⁵⁸ Such decisions include whether to take enforcement action²⁵⁹ and how to allocate funds from a lump-sum appropriation.²⁶⁰ Both types of decisions require an agency to balance numerous non-legal factors.²⁶¹ Courts deem it "unseemly" to second-guess an agency official's judgment in balancing these factors because the agency has greater competence than the court in engaging in such

256. 5 U.S.C. § 701(a)(2) (1994 ed.).

257. *MCorp v. Clarke*, 755 F. Supp. 1402, 1410 (N.D. Tex. 1991).

258. *Lincoln v. Vigil*, 113 S. Ct. 2024, 2031 (1993).

259. *Heckler v. Chaney*, 470 U.S. 821, 831 (1984). In *Heckler*, death row inmates brought an action against the Food and Drug Administration. The inmates claimed that the use of certain drugs in lethal injections was unapproved and thus violated the Food, Drug and Cosmetic Act. *Id.* at 823.

260. *Lincoln*, 113 S. Ct. at 2031. In *Lincoln*, handicapped Indian children challenged the Indian Health Service's decision to cease funding the Indian Children's Program from a lump-sum annual appropriation. *Id.* at 2027-29.

261. The agency must decide "whether agency resources are best spent on [one action] or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Heckler*, 470 U.S. at 831. "[C]ourts have been especially inclined to regard as unreviewable those aspects of agency decisions that involve a considerable degree of expertise or experience, or that are based upon economic projections and cost analyses." *Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574, 579 (3d Cir. 1979) (emphasis added).

balancing.²⁶² Using administrative subpoenas to assess the cost-effectiveness of an enforcement action provides a means by which agencies can intelligently set enforcement agendas designed to accomplish regulatory missions efficiently.

The reason that courts do not review discretionary actions is that the nature of such decisions is not amenable to judicial scrutiny.²⁶³ The use of administrative subpoenas as a *means* of making discretionary decisions effectively does not itself qualify as a discretionary activity. An agency cannot carry out discretionary activities in an unconstitutional manner;²⁶⁴ the courts are competent to determine whether an administrative subpoena should be enforced.²⁶⁵ In making these determinations, however, courts should recognize that frequent refusal to enforce subpoenas aimed at assessing cost-effectiveness will undermine an agency's ability to set an intelligent, efficient enforcement agenda. Recent decisions placing heightened suspicion requirements on these subpoenas or dismissing their use altogether²⁶⁶ fail to address this interest.

The D.C. Circuit has even been reluctant to permit OTS's use of administrative subpoenas seeking personal financial information in order to assess an appropriate monetary penalty against a director or officer of a failed savings and loan institution, despite clear statutory authority to do so.²⁶⁷ Restriction of this use of the subpoena power compounds OTS's difficulties in minimizing the losses to depositors of these institutions.²⁶⁸ These agencies may expend tremendous resources in pursuing an investigative target only to find the target unable to return any assets to the institution or pay a civil money penalty. The agency loses, and, more importantly, the depositors of the institution lose. Agency resources for recovering illegally transferred funds have been depleted, with no resultant recovery, so

262. *Local 2855*, 602 F.2d at 579.

263. There is "no law to apply" in scrutinizing these decisions. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

264. *Davis Enterprises v. EPA*, 877 F.2d 1181, 1185 (3d Cir. 1989).

265. See discussion in Part II.A.

266. See notes 222-23 and accompanying text.

267. *Sealed Case*, 42 F.3d at 1417. This use of the subpoena power would be consistent with a civil plaintiff's discovery of a defendant's financial condition where the plaintiff seeks punitive damages. Compare *Miller v. Doctor's Gen. Hosp.*, 76 F.R.D. 136, 140 (W.D. Okla. 1977) ("Where punitive damages are claimed, it has been generally held that the Defendant's financial condition is relevant to the subject matter of the action and is thus a proper subject of pretrial discovery"). This similarity should make use of the subpoena power in such cases more acceptable, or at least familiar, to the courts. See Part IV.B (discussing courts' tendencies to analogize to pre-trial discovery limitations during administrative subpoena enforcement proceedings).

268. See note 232.

that fewer resources remain to pursue other targets who may be able to return assets to the institution and its depositors. This restrictive version of investigative authority limits the agency's ability to set an efficient enforcement agenda to picking random investigative targets until agency resources dry up, hoping that some targets will actually be able to return assets to the failed institutions. This roulette wheel approach to enforcement wastes agency and taxpayer dollars. Only by taking a peek at an agency's enforcement agenda and requiring less articulable suspicion for a particularly high priority target could judicial review avoid this roulette wheel. Yet *Heckler* prohibits this judicial review of an agency's enforcement agenda.²⁶⁹

For this reason, the traditional deference granted to an agency's setting of an enforcement agenda and allocation of funds should include a recognition that assessment of the cost-effectiveness of an enforcement action is a permissible, even desirable, use of administrative subpoena power. Enforcement proceedings reviewing these subpoenas under the *Powell* standard will sufficiently safeguard individuals from harassment and undue invasion of privacy.²⁷⁰ Fear of overzealous use of the subpoena power is overstated. Agencies facing resource constraints in carrying out regulatory missions are unlikely to waste scarce resources by issuing these subpoenas in a random fashion. Targets of these subpoenas would likely be under some suspicion of wrongdoing by the agency.

The vague requirement of setting forth an articulable suspicion of wrongdoing poses a problem, however. Given the standard's vagueness and potential for inconsistent application, a court hostile to administrative agencies²⁷¹ might consistently refuse to enforce these subpoenas. An agency might then have to resort to the unacceptable roulette wheel method of investigation. If the manner in which such subpoenas are issued indicates that the agency has engaged in harassment, the court remains free to refuse to enforce the subpoena on that ground.²⁷²

Congress clearly possesses the power to curb particular exercises of agency enforcement power. Congress may accomplish this end by setting an agency's priorities statutorily or otherwise limiting the agency's discretion in setting a regulatory agenda.²⁷³ Thus,

269. See note 259 and accompanying text.

270. See discussion in Part III.C.

271. For example, the *Parks* or *Freese* courts. See notes 55-60, 73-79, and accompanying text.

272. See note 212 and accompanying text.

273. *Heckler*, 470 U.S. at 833.

Congress may choose to deny an administrative agency the power to subpoena financial records to determine the cost-effectiveness of an enforcement action. Until such time, courts should recognize that this power reflects a permissible investigative purpose consistent with traditional deference to an agency's discretion in setting a regulatory agenda.

V. CONCLUSION

Courts struck the fourth amendment balance between competing public and private interests in administrative subpoena power long ago. Reduced to a four prong test in *Powell*,²⁷⁴ the balance tilted toward a broad subpoena power so that administrative agencies could carry out their important regulatory missions with a minimum of judicial supervision. Yet, protections still exist for the target of an administrative subpoena. Administrative agencies cannot enforce their own subpoenas. The courts remain an important check on agencies, preventing them from exceeding their statutory authority or using subpoena power for impermissible purposes such as harassment.

Nonetheless, distrust of agency investigative power remains, as evidenced by recent decisions placing additional judicial checks on the subpoena power. Most significantly, a number of decisions have reintroduced an individualized balancing test where an administrative subpoena seeks personal financial records. Vague restrictions such as requiring an agency to demonstrate an articulable suspicion of wrongdoing by the subpoena target place the courts in a supervisory role in administrative investigation. This oversight threatens to force agencies to carry out their regulatory missions in a reactive, rather than proactive, fashion.

The doctrinal underpinning for these restrictions is a perceived fourth amendment privacy distinction between an individual's interest in his or her financial information and a corporation's interest in similar materials. This distinction incorrectly focuses on the identity of the subpoena target rather than the nature of the documents. Furthermore, courts have largely ignored their ability to protect privacy by including redisclosure restrictions in subpoena enforcement orders. The *Powell* protections and judicious use of confidentiality orders adequately protect individuals from undue invasion

274. 379 U.S. at 57-58.

of privacy when their financial records are subpoenaed pursuant to an agency investigation.

A second restriction on administrative subpoena power has emerged where an agency subpoenas financial information in order to assess the cost-effectiveness of an enforcement action. This use has been held impermissible by some courts and subject to heightened scrutiny by others. Courts have reached these decisions through narrow statutory construction and analogy to pre-trial discovery limitations. Analogy to pre-trial discovery, however, is misplaced because importing the traditional pre-trial discovery prohibition on assessment of a defendant's financial condition into administrative subpoena enforcement ignores the larger public interest in efficient use of agency resources. In addition, statutory grants of investigative authority should be deemed to include the authority to subpoena financial information in order to determine cost-effectiveness. This interpretation reconciles administrative subpoena power with traditional deference to an agency's power to set an enforcement agenda. While Congress remains free to proscribe cost-effectiveness subpoenas explicitly, recognizing that this power reflects an inherently permissible investigative purpose will allow agencies to set enforcement agendas in an intelligent, efficient manner.

*Jack W. Campbell IV**

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