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FEDERAL AGENCY INVESTIGATIONS: PROCEDURAL RIGHTS OF THE SUBPOENAED WITNESS

*Frank C. Newman**

Most information that federal agencies seek they get without forcing people to testify. Sometimes, however, when investigators on their own cannot uncover the facts and an informed person refuses to cooperate, he will be summoned to appear and answer questions, under penalty of contempt for refusal.

Many questions he need not answer. Agencies may not abridge his first amendment rights, for example, or deny him benefits of the privilege against self-incrimination or the common-law privileges. Further, the Administrative Procedure Act states that "No process . . . shall be issued, made, or enforced in any manner or for any purpose except as authorized by law"; and courts may enforce a summons only "to the extent that it is found to be in accordance with law."¹ Thus the relevant statutes and regulations are to be combed for technical requirements, and subpoenaed witnesses can insist that the inquiry be within the agency's authority and that all information sought be reasonably pertinent.²

Those substantive rights of witnesses were discussed at length in the 1950's. There is a rich literature on what questions are lawful.³ But there has been no parallel discussion of witnesses'

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¹ Administrative Procedure Act § 6, 60 Stat. 240 (1946), 5 U.S.C. §§ 1005 (b), (c) (1958). Concerning the force of a threat to impose judicial penalties, see 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 3.11 (1958) [hereinafter cited as DAVIS]; GELLHORN & BYSE, ADMINISTRATIVE LAW 605-11 (4th ed. 1960); cf. *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 363 (1942).

² *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *D. G. Bland Lumber Co. v. NLRB*, 177 F.2d 555, 558 (5th Cir. 1949). "The statutes bestowing this [subpoena] power have not been uniform in providing means for and eliminations [limitations?] upon its exercise and enforcement methods and sanctions." ATT'Y GEN. COMM. ON AD. PROCEDURE REPORT 414 (1941). For tabular presentation of technical requirements, see *id.* 415-35.

³ See 1 DAVIS, §§ 3.01-3.14 ("Investigation"); 2 *id.* § 14.08 nn. 23-25 (common-law privileges); McNaughton, *The Privilege Against Self-Incrimination*, 51 J. CRIM. L., C. & P.S. 138 (1960). The McNaughton article also discusses "1st Amendment Privilege" at 145 n.37, and other privileges at 150 n.52. Cf. Judge Stanley Barnes' instructive opinion

procedural rights, and some comments that have appeared are disturbingly inaccurate.⁴ Further, the Supreme Court has now pronounced on the subject in *Hannah v. Larche*;⁵ and parts of the Justices' opinions are puzzling, as we shall see.

This article is designed to help fill a gap in the literature and to warn government attorneys, particularly, about some questionable asides in the *Hannah* case. We shall not deal with record-keeping requirements or with agency inspections, subpoenas duces tecum, and related search and seizure problems. The focus instead is on the subpoenaed witness,⁶ that is, a man who knows that force may be used against him unless pursuant to government command he appears and answers questions.⁷ We examine several rights that may protect the witness;⁸ and we shall also ask whether the agencies, to discharge their governmental duties, truly need the subpoena power.

THE RIGHT TO COUNSEL

Our Supreme Court Justices still quarrel as to the constitutional right of a witness to be represented by counsel.⁹ Fortunately,

in *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960); *Griswold, The Right To Be Let Alone*, 55 NW. U.L. REV. 216 (1960); Note, 45 CALIF. L. REV. 347 (1957).

⁴ See, e.g., Note, 54 HARV. L. REV. 1214, 1216 (1941) ("Since the results of an investigation are not conclusive against a witness, the due process clause would seem to impose no restraints on administrative inquiries."); Note, 35 NOTRE DAME LAW. 440, 441 (1960) ("[T]he privilege against self-incrimination . . . would seem to be the only protection these witnesses have . . ."); cf. TAYLOR, GRAND INQUEST 242 (1955); Liacos, *Rights of Witnesses Before Congressional Committees*, 33 B.U.L. REV. 337, 383 (1953) ("There is no judicial enforcement of minimum procedures . . ."); Note, 1 N.Y.L.F. 6 (1955).

⁵ 363 U.S. 420 (1960).

⁶ Our aim here is to identify the rights of a witness who is subject to sanctions for contumacy or whose answers, because of government-sponsored publicity, may tend to defame, degrade, or incriminate him. We do not examine rights that inhere in other threatened deprivations of his liberty or property (by adjudication, for example).

⁷ Commands that a person fill out a questionnaire or submit a report are similar to subpoenas ad testificandum; but they do not involve a personal appearance, and the procedural rights thus differ. If a witness has appeared and would be subject to penalty for refusal to answer (e.g., if he refuses to tell "the whole truth") he should be entitled to the rights of a subpoenaed witness even though he originally may have appeared voluntarily.

⁸ The rights examined here apply to all witnesses, I believe, whether the proceedings are purely investigatory or are designed to aid adjudication and rule-making. Witnesses who are also parties may have additional rights, of course, which are catalogued in chapters 6 to 16 of 1, 2 DAVIS, §§ 6.01-16.14.

⁹ See *Hannah v. Larche*, 363 U.S. 420, 451 n.31 (1960); *id.* at 493 (Justices Harlan and Clark concurring); *id.* at 486 (Mr. Justice Frankfurter concurring). But in the *Hannah* case there was no dispute on the right to counsel, and the Court's seeming approval of § 102(c) of the Civil Rights Act ("Witnesses at the hearings may be

that due process question has little application to federal agencies. They are nearly all subject to the Administrative Procedure Act,¹⁰ and in that act section 6 (a) states, "Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel"¹¹ There are no exceptions, and the Court of Appeals for the Fifth Circuit has reminded us that the guarantee is worth taking at face value.¹²

THE RIGHT TO A TRANSCRIPT

Just as he often needs counsel, a witness may need to know exactly what were his answers to questions he was forced to answer. Again the APA is clear (and its words suggest that the draftsmen had in mind some cases that did require attention¹³). Section 6 (b) states, "Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in

accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.") is at best weak dictum. 363 U.S. at 433; *cf. id.* at 492 (Mr. Justice Frankfurter concurring). It can be argued first, that that section does not supersede § 6 (a) of the APA; and second, that it is unconstitutionally restrictive. See Newman, *Some Facts on Fact-Finding by an Investigatory Commission*, 13 *AD. L. REV.* 120, 127 (1961). The Court overlooked similar arguments that FTC and SEC restrictions on the right to counsel are illegal. 363 U.S. at 446, 447 n.26; *cf. Backer v. Commissioner*, 275 F.2d 141, 143 (5th Cir. 1960).

¹⁰ See Newman, *What Agencies Are Exempt from the Administrative Procedure Act?*, 36 *NOTRE DAME LAW.* 320 (1961). Concerning exempt agencies, see *Niznik v. United States*, 173 F.2d 328, 336 (6th Cir. 1949) (Selective Service); *Lopez v. Madigan*, 174 F. Supp. 919, 921 (N.D. Cal. 1959) (Parole Board). The *Niznik* case, relying as it does on *United States v. Pitt*, 144 F.2d 169, 172 (3d Cir. 1944) ("[H]e at no time requested . . . counsel"), is doubtful authority. *Michel v. Louisville & N.R.R.*, 188 F.2d 224, 226 n.6 (5th Cir. 1951), is of limited relevance because the National Railroad Adjustment Board exercises no subpoena power.

We know too little about the right of a witness to have the tribunal assign counsel to him. *Cf. United States ex rel. Castro-Louzan v. Zimmerman*, 94 F. Supp. 22, 25 (E.D. Pa. 1950); Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 *FORDHAM L. REV.* 1, 72 (1959); and see *Jacobson v. NLRB*, 113 F.2d 728 (3d Cir. 1940) (no free transcript); Rackow, *The Right to Counsel—Time for Recognition Under the Due Process Clause*, 10 *W. RES. L. REV.* 216 (1959).

¹¹ 60 Stat. 240 (1946), 5 U.S.C. § 1005 (a) (1958).

¹² *Backer v. Commissioner*, 275 F.2d 141 (5th Cir. 1960) (freedom to select counsel upheld). Section 6 governs, "Except as otherwise provided in this Act . . ." 60 Stat. 240 (1946), 5 U.S.C. § 1005 (1958). With respect to the right to counsel there appear to be no such exceptions. See generally 1 *DAVIS* § 8.10; *GELLHORN & BYSE, op. cit. supra* note 1, at 594-95.

¹³ *In re SEC*, 84 F.2d 316 (2d Cir. 1936); *United States v. Mascuch*, 30 F. Supp. 976 (S.D.N.Y. 1939); *SEC v. Torr*, 15 F. Supp. 144 (S.D.N.Y. 1936); *cf. Edwards v. United States*, 312 U.S. 473, 481 (1941).

a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony."¹⁴

PUBLIC OR PRIVATE HEARING?

The sentence just quoted assumes that "nonpublic" investigatory proceedings are permissible. A witness apparently has no constitutional right to be heard in public.¹⁵ But constitutional rights may evolve from an improper denial of his request that the hearing be private.¹⁶ And many statutes and regulations require that some investigative proceedings be private, others public.¹⁷ As yet there have been few discussions of this whole problem, and its perplexities will not be explored here.¹⁸

THE RIGHT TO NOTICE

Would this subpoena be legal? "You must appear at the address shown below next Monday at 10:00 a.m. before an official who, and to answer questions which, at that time will be identified." If our witness had no other notice as to the content of questions that might be asked, his lack of preparation could even impede the government's need for information. Yet there are cases implying that that subpoena constitutionally could be enforced.¹⁹

¹⁴ 60 Stat. 240 (1946), 5 U.S.C. § 1005 (b) (1958).

¹⁵ See *Anonymous v. Baker*, 360 U.S. 287, 294 (1959); *In re Groban*, 352 U.S. 330 (1957); *Bowles v. Baer*, 142 F.2d 787, 789 (7th Cir. 1944); *Woolley v. United States*, 97 F.2d 258, 262 (9th Cir. 1938); cf. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 322 (1933).

¹⁶ Cf. *Bank of America Nat'l Trust & Sav. Ass'n v. Douglas*, 105 F.2d 100, 105 (D.C. Cir. 1939); *Herold v. Herold China & Pottery Co.*, 257 Fed. 911, 917 (6th Cir. 1919); Note, 35 IND. L.J. 251 (1960); Annot., 62 A.L.R.2d 509 (1958). "[F]or many defendants undeserved publicity could in its own way become as much a source of injustice as secrecy ever has been." Rourke, *Law Enforcement Through Publicity*, 24 U. CHI. L. REV. 225, 246 (1957).

¹⁷ See, e.g., Federal Aviation Act of 1958, 72 Stat. 788, 49 U.S.C. § 1481 (1958); Investment Advisers Act of 1940, 54 Stat. 848, 15 U.S.C. § 80b-10 (b), (c) (1958) (private); Food and Drug Rules, 21 C.F.R. § 285.17 (1955) (private); Tariff Commission Rules, 19 C.F.R. § 201.11 (1961) (refers to statutes requiring public hearings); cf. *E. Griffith Hughes, Inc. v. FTC*, 63 F.2d 362 (D.C. Cir. 1933); *SEC v. Harrison*, 80 F. Supp. 226, 229 (D.D.C. 1948).

¹⁸ See I DAVIS § 8.09.

¹⁹ See the following grand jury cases: *In re Black*, 47 F.2d 542, 543 (2d Cir. 1931); *In re Meckley*, 50 F. Supp. 274, 275 (M.D. Pa. 1943); cf. *Eisler v. United States*, 170 F.2d 273, 284 (D.C. Cir. 1948). *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), states that the demand must not be "too indefinite"; and in *GELLHORN & BYSE, op. cit. supra* note 1, at 579, there is a quotation from a Solicitor General's brief indicating a concession by the government (nearly twenty years ago) that a subpoena may be resisted

1. *What Is the Practice in Federal Agencies?* So far as I know, no scholar or anyone else has ever studied a fair sampling of investigatory proceedings to find out whether subpoenaed witnesses, in fact, are denied basic information regarding the questions they will be asked. The Supreme Court made a survey of sorts in *Hannah v. Larche*, and comments on that survey seem called for. The question in *Hannah* was whether a federal court erred when it issued this injunction:

“[D]efendants . . . [members of the United States Commission on Civil Rights] are enjoined and restrained from conducting the proposed hearing in Shreveport, Louisiana, wherein plaintiff registrars, accused of depriving others of the right to vote, would be denied the right of appraisal, confrontation and cross-examination.”²⁰

The Supreme Court concluded that the lower court had erred, and vacated the injunction. The majority opinion states:

“The history of investigations conducted by the executive branch of the Government is . . . marked by a decided absence of those procedures here in issue. The best example is provided by the administrative regulatory agencies. Although these agencies normally make determinations of a quasi-judicial nature, they also frequently conduct purely fact-finding investigations. When doing the former, they are governed by the Administrative Procedure Act, . . . and the parties to the adjudication are accorded the traditional safeguards of a trial. However, when these agencies are conducting non-adjudicative, fact-finding investigations, rights such as appraisal, confrontation, and cross-examination generally do not obtain.”²¹

Mr. Justice Douglas in dissent—with Mr. Justice Black’s approval—had this to say about that statement:

“References are made to federal statutes governing numerous administrative agencies such as the Federal Trade Commission and the Securities and Exchange Commission; and the inference is that what is done in this case can be done there. This comes as a surprise to one who for some years was engaged in those administrative investigations. No effort was

on the ground that it is “unduly vague.” Cf. Perry & Simon, *The Civil Investigative Demand: New Fact-Finding Powers for the Antitrust Division*, 58 MICH. L. REV. 855, 866 (1960) (“Notice”).

²⁰ *Hannah v. Larche*, 363 U.S. 420, 429 (1960).

²¹ *Id.* at 445.

ever made, so far as I am aware, to compel a person, charged with violating a federal law, to run the gantlet of a hearing over his objection. No objection based either on the ground now advanced nor on the Fifth Amendment was, so far as I know, ever overruled. Investigations were made; and they were searching. Such evidence of law violations as was obtained was turned over to the Department of Justice. But never before, I believe, has a federal executive agency attempted, over the objections of an accused, to force him through a hearing to determine whether he has violated a federal law. If it did, the action was lawless and the courts should have granted relief."²²

What is troubling is that the majority and the Douglas statements both seem inaccurate. Mr. Justice Douglas's suggestion that no agency, over the objection of an accused, has ever forced that accused through a hearing to see if he was guilty is rebutted even by SEC cases.²³ He does fairly ask, though, whether any objection based "on the ground now advanced" (*i.e.*, denial of appraisal, confrontation, and cross-examination) has ever been overruled. An analysis of the majority's response to his question, and of the many authorities which were cited to demonstrate that "when these agencies are conducting nonadjudicative, fact-finding investigations, rights such as appraisal, confrontation, and cross-examination generally do not obtain," appears elsewhere.²⁴ The criticisms there will not be repeated here. The author's conclusion is that the Court did not present ". . . a sampling of investigatory proceedings that tells us whether subpoenaed witnesses, in fact, have been denied rights of appraisal, confrontation, and cross-examination. The references . . . do not demonstrate any history that is marked by a 'decided absence' of those rights."²⁵

²² *Id.* at 504.

²³ See Loeb & Crary, 3 S.E.C. 324 (1938), discussed at 40 n.80 of ATT'Y GEN. COMM. ON AD. PROCEDURE SEC MONOGRAPH (1941); *Edwards v. United States*, 312 U.S. 473 (1941); *ICC v. Brimson*, 154 U.S. 447, 467 (1894); *Genecov v. Federal Petroleum Bd.*, 146 F.2d 596 (5th Cir. 1944); *Bowles v. Baer*, 142 F.2d 787 (7th Cir. 1944); *In re SEC*, 84 F.2d 316 (2d Cir. 1936); *SEC v. Torr*, 15 F. Supp. 144 (S.D.N.Y. 1936). Supporting Mr. Justice Douglas, see *United States v. Minker*, 350 U.S. 179 (1956); ATT'Y GEN. COMM. ON AD. PROCEDURE NLRB MONOGRAPH 5 n.20 (1941); *cf.* Ludlam, *Tax Fraud Investigations: A Plea for Constitutional Procedures*, 43 A.B.A.J. 1009, 1010 (1957) ("until it decides against criminal prosecution, it will not issue a summons to the taxpayer . . .").

²⁴ See Newman, *Due Process, Investigations, and Civil Rights*, 8 U.C.L.A.L. REV. 735 (1961).

²⁵ *Id.* at 767.

2. *What Does Due Process Require as to Notice?* In *Hannah* the Court discussed the rights of "appraisal confrontation, and cross-examination" as if they were all in one package. The Court's treatment of the facts, though, suggests that there was no rejection of a right to notice and that the word "appraisal" denotes something different from what most observers would call the right to notice (*i.e.*, notice to a witness of the kind of questions he may be asked). The voting registrars who sought relief in *Hannah* had been subpoenaed by the Civil Rights Commission, which has authority to investigate complaints that some people have improperly deprived other people of the right to vote. With respect to appraisal the Court stated,

"The specific constitutional question . . . is whether persons whose conduct is under investigation by a governmental agency of this nature are entitled, by virtue of the Due Process Clause, to know the specific charges that are being investigated, as well as the identity of the complainants. . . ."²⁶

"It should be noted that the respondents in these cases did have notice of the general nature of the inquiry. The only information withheld from them was the identity of specific complainants and the exact charges made by those complainants. Because most of the charges related to the denial of individual voting rights, it is apparent that the Commission could not have disclosed the exact charges without also revealing the names of the complainants."²⁷

There may be doubt whether those last two sentences find support in the record.²⁸ The holding, nevertheless, is that due process was not violated when the "only information withheld" was the identity of complainants and the exact charges they made. The Court thus implies that a good deal more was known by these subpoenaed witnesses than the "general nature of the inquiry." By no means did the Court approve an agency's denying to a witness notice of the kind of questions he may be asked.

Moreover, the Court's own doctrine of pertinence assumes some notice. That doctrine establishes that (1) a witness may demand from his investigators enough data to enable him to

²⁶ *Hannah v. Larche*, 363 U.S. 420, 441 (1960).

²⁷ *Id.* at 441 n.18.

²⁸ See Newman, *supra* note 24, at 739 n.5.

measure a question for its pertinence to the subject under inquiry, and (2) that subject must not be identified too vaguely.²⁹

Existing cases do not, however, assure to an agency witness the notice right that a distinguished American Bar Association committee believed should be assured in legislative investigations. They said, "The witness should receive proper notice of the subject matter to be considered in the hearing, so that he may know generally what the committee is after, what kind of examination he will be expected to face, and what evidence or pertinent information he should produce."³⁰ Should due process be construed to require less than that, if the witness can show prejudice?

THE RIGHT TO ANSWER COMPLETELY, TO EXPLAIN, TO REBUT

Not all notice comes from pre-hearing information. The test is not whether a witness has had a chance to write out or memorize his answers beforehand—so that his syntax will be admirable, say, or his replies to embarrassing questions as subtly misleading as possible. The test is whether an honest intent to answer truthfully might be perverted by surprise.

Can there be doubt that this statement, if truthful, is not contemptuous? "I'm sorry, Mr. Chairman, but I can't answer that question because I don't trust my immediate recollection; and I won't be able to tell 'the whole truth' until I have had a chance to reflect on the matter (or look at my files, talk to my associates, etc.)."³¹ That illustrates too that a witness sometimes need not comply with a command to "Answer yes or no."

In this article we do not deal with proposals to allow a defamed, degraded, or incriminated non-witness to submit statements defending his repute. When by subpoena a man has been compelled to appear, though, may government officials—while he

²⁹ See NEWMAN & SURREY, LEGISLATION 341-59 (1955); Slotnick, *The Congressional Investigating Power: Ramifications of the Watkins-Barenblatt Enigma*, 14 MIAAMI L. REV. 381, 397 (1960); Notes, 24 U. CHI. L. REV. 740, 746 (1957); 106 U. PA. L. REV. 124, 125 n.14 (1957).

³⁰ REPORT ON CONGRESSIONAL INVESTIGATIONS OF THE ABA SPECIAL COMMITTEE ON INDIVIDUAL RIGHTS AS AFFECTED BY NATIONAL SECURITY, Appendix 30 (1954).

³¹ The author recalls a World War II investigation where a harried government official, brought in from the corridors of the House Office Building with no notice whatsoever, conscientiously took so long reflecting on his answers to questions about agency policy that the committeemen, bored more than they could tolerate, finally adjourned the hearing for lack of patience.

is testifying or thereafter—fairly say: “Stop! You have no right to explain your answers or rebut inferences that inhere in them”? If the explanations or rebuttals are written, must they not be received under the first amendment right “to petition the government”? And does not section 6 (a) of the APA create a supplementary right to appear in person for that purpose? It reads, “So far as the orderly conduct of public business permits, any interested person may appear . . . for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency functions.”³² The value of that section and of the right to petition too often has been overlooked.³³

CONFRONTATION AND CROSS-EXAMINATION

Every subpoenaed witness is concerned with rights as to notice, counsel, the course of reply and rebuttal, and a transcript. Those rights seem reasonably guaranteed by either a generally applicable statute (the APA) or due process. Rights of confrontation and cross-examination are radically different. For some witnesses they are impossible to grant, and they are generally guaranteed by neither statute nor due process.

The reason they cannot apply to all witnesses is that in many proceedings there is no one to confront or cross-examine. That is the case, for example, when an agency subpoenas a man to ask him about reports he has submitted. No third party need be involved. Similarly, if the subpoena has been inspired by an anonymous phone call, even though a third party is involved there is no way to confront and cross-examine him. Accordingly, our analysis can apply only when the questions put to a witness relate to a known third party or one who could be identified.

For investigations the APA says nothing about confrontation and cross-examination, and *Hannah* holds that no such rights inhere in due process. The Court spoke emphatically and seemed

³² 60 Stat. 240 (1946), 5 U.S.C. § 1005 (a) (1958).

³³ Concerning rules that require incorporation in the record, see Newman, *Some Facts on Fact-Finding by an Investigatory Commission*, 13 AD. L. REV. 120, 126 (1961). Concerning rights of non-witnesses, see Scott & King, *Rules for Congressional Committees: An Analysis of House Resolution 447*, 40 VA. L. REV. 249, 268-71 (1954); cf. *United States v. Boyer*, 150 F.2d 595 (D.C. Cir. 1945); CAL. CIV. PROC. CODE § 1019; Annot., 170 A.L.R. 161 (1947).

not to care whether the hearing was public or private; whether, if private, later publicity might injure the witness; whether the aim of the investigation was or was not to determine the need for a follow-up adjudication; or whether third parties had filed affidavits accusing the witness of misconduct or had testified in his presence or had sought anonymity or immunity from questioning.

We will not guess whether *Hannah* is likely to be modified. Even if its due process pronouncements stand, however, (1) as a precedent it governs only those cases where the congressional intent to deny confrontation and cross-examination seems clear,³⁴ and (2) the Court's discussion of "policy" hardly demonstrates that, absent such intent, denial is advisable or that rights to confront and cross-examine should be withheld when new investigatory procedures are prescribed.³⁵ Therefore it is desirable to outline some ideas as to fairness and efficiency that judges, administrators, advocates, and procedure reformers should keep in mind.

(1) Even when the questions put to a witness do relate to a known third party or one who could be identified, we need not in investigations impose rights greater than those which apply in adjudications. In other words, enthusiasm for confronting and cross-examining must be tempered by an awareness that administrative law history involves a wise rejection of many confrontation and cross-examination rules that have governed trial courts (*e.g.*, rigid doctrines of hearsay and judicial notice).³⁶

(2) Wigmore's reminder that the main aim of confrontation and cross-examination is efficiency (*i.e.*, getting at the truth) is impressive.³⁷ Yet to allow the rights in some proceedings would be too complicating, too delaying, too costly. Rule-making proceedings provide an example; and the subpoenaing of a man to testify as to practicable safety rules, say, scarcely requires for truth-determining that he be allowed to confront and cross-examine all other people who submitted data. The example calls to mind,

³⁴ See 363 U.S. at 430-39.

³⁵ See Newman, *Due Process, Investigations, and Civil Rights*, 8 U.C.L.A.L. REV. 735, 744 (1961).

³⁶ See GELLHORN & BYSE, *op. cit. supra* note 1.

³⁷ See Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381 (1959); *cf.* McCORMICK, EVIDENCE § 31 (1954).

however, Kenneth Davis's legislative-adjudicative fact dichotomy.³⁸ Truth as to adjudicative facts in an investigation may well best be assured by the testing we believe is advisable for such facts in an adjudication.

(3) Facts that defame, degrade, or incriminate a subpoenaed witness merit special treatment. It is one thing if they are kept secret, or are used only by government officials who decide whether to institute the kind of an adjudicatory proceeding where rights to confront and cross-examine will be respected. It is something else if there is no subsequent proceeding and if the adverse facts are nonetheless publicized—before, during, or after the hearing to which the witness has been subpoenaed. In that case, to the extent that identifiable third parties have supplied derogatory data, does not decency require that confrontation and cross-examination generally be allowed? Similarly, though borderlines between inquiries that are based on accusations and those that are not may sometimes be dim, do not confrontation and cross-examination seem peculiarly apt when, concededly, the investigation relates to sworn accusations against the witness (the situation in *Hannah*)?

(4) Both ancient and recent history warn us about the faceless informer and the danger of using his tales as an excuse for abridging a man's right to be let alone.³⁹ The Supreme Court has now decided that in investigations, at least, the value of secret information offsets those dangers—or, more accurately, that Congress may permit accusatory data to be kept secret when Congress concludes that its utility against a subpoenaed witness offsets its risks. The fact that *Hannah* was a civil rights case, however, decided at a time when retaliations against the Negro who dared protest discrimination were regularly headlined items, may suggest that persuasive evidence of the societal need for secrecy is crucial. If the "informer system" must be protected—and there are telling arguments in its favor⁴⁰—when should it be extended to people who are not regularly employed confidential agents? In cases where informers are to testify at the same hearing as the subpoenaed witness (the situation in *Hannah*), is there any reason why they should not be cross-examinable? And is there

³⁸ 1 DAVIS §§ 7.01, 7.02.

³⁹ See Pollit, *supra* note 37.

⁴⁰ HARNEY & CROSS, *THE INFORMER IN LAW ENFORCEMENT* 81 (1960); *cf.* McCORMICK, *EVIDENCE* § 148 (1954).

justification for diluting the effectiveness of cross-examination that could better be ensured in those cases by prior identification?⁴¹

(5) Even when cross-examination might be too complicating or too delaying, could we not often allow confrontation? And should we not sponsor substitutes for the kind of cross-examining that traditionally has characterized criminal trials? (Consider, for example, the technique of submitting questions to be put by the presiding officer, so that he can evaluate them, rather than by counsel for the witness directly.) And could we not also shield efficiency by insisting that the witness demonstrate, through reference to what he believes is The Truth, his need to cross-examine? That need was not considered in *Hannah*, unfortunately, because the litigation there involved threatened rather than actual agency proceedings. The Court might wisely have postponed its sweeping pronouncements until it knew exactly how the subpoenaed registrars in fact were prejudiced.⁴²

MISCELLANEOUS RIGHTS

If the witness in an investigation believes other people's testimony would help him, may he bring them in or have them subpoenaed?⁴³ May he insist that testimony affecting him be sworn? Does he benefit from a *Jencks* rule or any discovery right

⁴¹ Cf. Newman, *supra* note 35, at 744.

⁴² *Id.* at 745, 759.

⁴³ APA § 6(c) states: "Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought." 60 Stat. 240 (1946), 5 U.S.C. § 1005(c) (1958). Section 2(b) tells us that "'Party' includes any person . . . named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding . . ." 60 Stat. 237 (1946), 5 U.S.C. § 1001(b) (1958). When individuals have been named as parties to investigations, as occasionally they are [see, e.g., FTC Rules, 16 C.F.R. § 1.40 (1960)], they can probably benefit from § 6(c) because § 6(b), by the phrase "nonpublic investigatory proceeding" indicates that an investigation is a proceeding. Professor Kenneth Davis says that to regard all investigations as "proceedings" would strain the accepted meanings of APA words too much. 1 DAVIS § 3.01 n.1; cf. *id.* § 8.10. Even if that is true, investigations are clearly proceedings when they are aimed at the formulation of an order. See APA § 2(d), 60 Stat. 237 (1946), 5 U.S.C. § 1001(d) (1958); and for an illustration, see Federal Food, Drug and Cosmetic Act § 335, 52 Stat. 1045 (1938), 21 U.S.C. § 335 (1958): "Before any violation of this Act is reported by the Secretary to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding." Cf. *United States v. Los Angeles & S.L.R.R.*, 273 U.S. 299, 309 (1927) (property valuation by ICC); 68 Stat. 938 (1954), 42 U.S.C. § 2135(b) (1958) (AEC must report violations of law to the Attorney General).

against the government?⁴⁴ May he refuse to answer questions that are uncivilized, indecent, vicious? Are investigators sometimes so motivated by personal interest or prejudice that a whole proceeding becomes illegally tainted?

Observers who read the *New York Times* or the *Washington Post & Times Herald* know that those questions are more than hypothetical. A good many editorialists and some law reformers have argued that, for legislative investigations, statutes recognizing a variety of related rights should be enacted.⁴⁵ So far as I know, for agency investigations there is yet no common or constitutional law which would make such statutes superfluous.

Sometimes, though, we credit too much the absence of precedent. The mere lack of cases on the question, say, whether witnesses ordered to appear in Washington, D. C., must pay their own travel costs hardly makes us conclude that they must. Some rules of fair dealing are so obvious that even warped investigators recognize them. (*E.g.*, witnesses who speak no English are entitled to translations; unheard questions must be repeated; reasonable recesses must be allowed.) And some scattered court rulings on such questions as venue suggest that judges can do justice even without the aid of authoritative prior pronouncements.⁴⁶

THE TRUE NEED FOR TESTIMONY

The discussion so far shows that, in investigations, procedural problems range widely. To honor a subpoenaed witness's rights requires reference to bulky statute and case law, and some wisdom and imagination besides. What might happen if, to avoid complexities, we were to restrict the number of witnesses whose cases create problems? Do government officials really need the power to compel testimony?

Writing over thirty years ago (prior to the New Deal, even), Professor Milton Handler made these comments:

⁴⁴ See *Jencks v. United States*, 353 U.S. 657, 669 (1957); *cf.* GELLHORN & BYSE, *op. cit.* *supra* note 1, at 615 ("Is a Litigant Entitled To Compel Production of Government Documents?").

⁴⁵ REPORT ON CONGRESSIONAL INVESTIGATIONS OF THE ABA SPECIAL COMMITTEE ON INDIVIDUAL RIGHTS AS AFFECTED BY NATIONAL SECURITY is the best over-all statement.

⁴⁶ *Bank of America Nat'l Trust & Sav. Ass'n v. Douglas*, 105 F.2d 100, 107 (D.C. Cir. 1939), 28 CALIF. L. REV. 240 (1940) (venue); *In re Keegan*, 18 F. Supp. 746, 748 (S.D.N.Y. 1937) ("The court will not give assistance to a summons if abuse is plainly proved."); *cf.* *United States v. O'Connor*, 118 F. Supp. 248, 250 (D. Mass. 1953).

"How could the income tax laws be enforced if the Commissioner of Internal Revenue were denied the power to examine the books and records of taxpayers and *to compel the attendance of witnesses* and the production of papers? How could the Commissioner of Patents, the Commissioner of Pensions, Immigration inspectors, the Comptroller discharge their duties without similar or analogous powers? . . . It was not without reason that Congress invested the Secretaries of Agriculture and Commerce, all departmental officials in the investigation of claims against the government filed with them, the President or his agents under Trading with the Enemy Act, and the Director of War Risk Insurance with similar powers . . . [and] the same holds true for the Interstate Commerce, the Federal Trade, the Federal Power Commissions, the Shipping Board, and the China Registrar, which in addition to determining rights and duties, promulgating and enforcing regulation, conduct extensive investigations."⁴⁷

In the same year, however, Ernst Freund concluded that "circumstances must be very exceptional indeed in which the authority cannot make a prima facie case on the basis of information procured without resource to compulsory powers. . . ."⁴⁸ And David Lilienthal two years earlier had suggested, "Before a legislative body grants an unlimited power to compel the attendance and testimony of witnesses, it should consider carefully whether the legislative purposes cannot be effected without such a broad grant."⁴⁹

By way of further answer to Professor Handler's questions, we learned in 1941 from the Attorney General's Committee on Administrative Procedure, first, that several agencies with functions by no means unique do manage to get along without subpoena power (Post Office, Federal Deposit Insurance Corp., Federal Reserve Board, National Railroad Adjustment Board, National Maritime Board, War Department); and, second, that other agencies empowered to issue subpoenas seem not to use them (Tariff

⁴⁷ Handler, *The Constitutionality of Investigations by the FTC*, 28 COLUM. L. REV. 905, 925-27 (1928). (Emphasis added.)

⁴⁸ FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 184 (1928).

⁴⁹ Lilienthal, *The Power of Government Agencies To Compel Testimony*, 39 HARV. L. REV. 694, 722 n.104 (1926).

Commission, Railroad Retirement Board, Veterans Administration).⁵⁰

I do not imply that agencies need less power to (1) bring witnesses into quasi-judicial hearings, (2) inspect premises and documents, or (3) demand record-keeping and reports. Instead, for "pure" investigation (distinguished from the kind of inquiry that inheres in a quasi-judicial hearing), I wonder if agency investigators truly have demonstrated either a dependence on compelled testimony or a gain from such testimony that anywhere near offsets the dangers that lurk in powers to compel. Professor Davis has observed, "The litigated questions usually relate to records and written reports, seldom to oral testimony."⁵¹ And it is probable that lack of litigation relates more to disuse of the power to compel testimony than to lack of legal issues involving its use.

Agency officials sometimes act like judges, sometimes like legislators, sometimes like prosecutors and police. "[P]olice have no legal right to compel answers . . ."⁵² And as to prosecutors, judicial comments like these perhaps reflect a fundamental premise:

"I do not understand that a minor Government official can summon people at will to give testimony about their affairs and the affairs of their customers and neighbors. A United States Attorney cannot do that."⁵³

"It would have been surprising had Congress attempted to authorize the Nation's chief prosecuting officer and his subordinates to compel a citizen to appear in government private offices to answer questions in secret about that citizen's conduct, associations, and beliefs. Some countries give such power to their officials. It is to be hoped that this country never will."⁵⁴

This country *has* given like power to many officials—even to a

⁵⁰ ATT'Y GEN. COMM. ON AD. PROCEDURE REPORT 416-31 (1941); *cf.* *Hannah v. Larche*, 363 U.S. 420, 470 (1960) ("The [Food and Drug] Act makes no provision for compelling testimony.").

⁵¹ 1 DAVIS § 3.02, at 164.

⁵² McNaughton, *supra* note 3, at 151 n.56.

⁵³ *Cook v. United States*, 69 F. Supp. 445 (D. Ore. 1946).

⁵⁴ *United States v. Minker*, 350 U.S. 179, 195 (Mr. Justice Black concurring); *cf. id.* at 191: [T]his Court construed congressional enactments as designed to safeguard persons against compulsory questioning by law enforcement officers behind closed doors . . ."; *Durbin v. United States*, 221 F.2d 520, 522 (D.C. Cir. 1954).

few "chief prosecuting officers";⁵⁵ and the time may have arrived to evaluate what thus the legislatures have wrought.

What might be the fate in Congress of a bill that read like this? "All grants to any agency of the power to compel testimony other than in an adjudicatory proceeding are hereby repealed; but nothing in this Act shall affect the powers of courts, grand juries, or committees of Congress; nor shall any power to require written records and reports, to inspect, or to issue subpoenas duces tecum be affected."

First, would the glaring exemption of congressional committees be so discomfiting that Congress would choose not to face its critics' scorn? I think not. We do need reforms for congressional investigations. Yet that a few committees of Congress ask questions which many people believe are improper hardly means that agency officials should have the same power.⁵⁶ Nor need the full investigatory powers of Congress be delegated merely because agency regulations often have the effect of statutes, for data-gathering resources other than subpoenas ad testificandum are typically more available to agencies than to Congressmen. There are also many reasons for withholding from appointed rather than elected officials the use of forced testimony to promote "the stimulation of public opinion and . . . the conduct of political warfare."⁵⁷

Second, would federal agencies fight the proposed statute? They could be expected to oppose it when the Bureau of the Budget forwarded the bill for their written comments. But on the stand—as witnesses before the House and Senate Judiciary Committees, say—how many agency executives could conscientiously insist that they, as policemen and prosecutors, need powers which for centuries with remarkable consistency we have denied to ordinary police and prosecutors? How many could argue, in

⁵⁵ See 1 DAVIS § 3.04, at 179; cf. Perry & Simon, *supra* note 16.

⁵⁶ Professor Davis argues that powers delegable to a congressional committee are patently delegable to an administrative agency. 1 DAVIS § 53.04, at 175. That may be true in constitutional law, but it does not follow that such powers should be delegated as a matter of legislative policy. Cf. Langeluttig, *Constitutional Limitations on Administrative Power of Investigation*, 28 ILL. L. REV. 508, 513 (1933).

⁵⁷ Dean Edward Levi, quoted in Newman, *A Legal Look at Congress and the State Legislatures*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 81 (Paulsen ed. 1959); and see Newman, *Some Facts on Fact-Finding by an Investigatory Commission*, 13 AD. L. REV. 120, 129 (1961).

connection with their rule-making functions and their duties to recommend legislation to Congress, that to be effective they require the exposure powers, for example, of a Senator Kefauver (on organized crime), or a Senator McClellan (on the crimes of organized labor), or a Senator McCarthy (on the problems that bothered him)? How many could demonstrate that their agencies, in fact, have relied on the power proposed to be withdrawn? Remember that subpoenas duces tecum, subpoenas in adjudicatory proceedings, and miscellaneous powers to inspect and require reports would not be touched.

CONCLUSION

Concerning constitutional law, Professor Kenneth Davis has advised that the spirit behind such statements as this pronouncement of Justice Stephen Field has become "utterly exhausted":⁵⁸

"A general, roving, offensive, inquisitorial compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive to the rights of the citizen, and an intolerable tyranny."

An impressive array of Supreme Court holdings demonstrate that Professor Davis is correct, and flavor is added by quotes that show approval, for instance, of "a power of inquisition . . . which . . . can investigate merely on suspicion that the law is being violated, or even just because . . . [the agency] wants assurance that it is not."⁵⁹

The message of this article is (1) that apart from constitutional law, Justice Field's dictum merits re-examination, (2) that Congress, agencies, and the courts could help reinvigorate the spirit behind such dicta by recognizing some procedural rules that would ensure basic decencies, and (3) that some perilous precedents could easily be offset by a statute that would restrict the power to compel testimony to the kinds of proceedings where

⁵⁸ 1 DAVIS § 3.01, at 162 [quoting from *In re Pacific Railway Comm'n*, 32 F. 241, 263 (N.D. Cal. 1887)].

⁵⁹ *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950).

history has shown that the potential abuses of that power are tolerable.⁶⁰

⁶⁰ *I.e.*, agency adjudications, court and grand jury proceedings, and legislative investigations. In agency adjudications the rights identified in this article (counsel, transcript, notice, etc.) would be available to all witnesses; but our experience with court trials, where witnesses' rights seem generally to have been protected, suggests that in adjudication the subpoena power is significantly cushioned. The characterization of grand jury and legislative abuses as "tolerable" does not mean that witnesses in those proceedings should be denied the procedural rights proposed here for agency proceedings. The doubt is whether the public interest requires that agency investigators be given the power to compel testimony, but there is no such doubt as to grand juries and legislative committees.